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12 **UNITED STATES DISTRICT COURT**
13 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

14 KEVIN BRANCA, on behalf of
15 himself and all others similarly
16 situated,

17 Plaintiff,

18 v.

19 BAI BRANDS, LLC, a New Jersey
20 Limited Liability Company,

21 Defendant.

Case No: '18CV0757 BEN KSC

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

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1 Kevin Branca (“Plaintiff”), on behalf of himself and all others similarly situated, by
2 and through his undersigned counsel, hereby brings this action against Bai Brands, LLC,
3 (“Bai” or “Defendant”), and upon information and belief and investigation of counsel,
4 alleges as follows:

5 **I. JURISDICTION AND VENUE**

6 1. Plaintiff brings this proposed class action in this Court pursuant to the Class
7 Action Fairness Act of 2005 (“CAFA”), Pub. L. No. 109-2, 119 Stat. 4 (2005).

8 2. This Court has subject matter jurisdiction over this proposed class action
9 under CAFA, which provides the federal courts with original jurisdiction over any class
10 action in which any member of the plaintiff class is a citizen of a state different from any
11 defendant, and in which the matter in controversy exceeds in the aggregate the sum of \$5
12 million exclusive of interest and costs.

13 3. Minimal diversity as required by 28 U.S.C. §§ 1332(a)(1), (d)(2)(A) is
14 satisfied as the plaintiff is a citizen of California and Bai is a citizen of New Jersey.

15 4. The jurisdictional amount in controversy is satisfied. Plaintiff alleges on
16 information and belief that the total claims of the members of the proposed Class in this
17 action are in excess of \$5 million in the aggregate, exclusive of interest and costs, as
18 required by 28 U.S.C. § 1332(d)(2), (5).

19 5. This matter is not a “local controversy” pursuant to 28 U.S.C.
20 § 1332(d)(5)(B). Plaintiff alleges on information and belief that more than two-thirds of
21 all of the members of the proposed Plaintiff Class are citizens of states other than
22 California, where this action is filed, and that the proposed Class contains more than 100
23 persons.

24 6. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a)
25 because, as set forth below, Defendant conducts business in this district, and Plaintiff
26 purchased the subject Products of this action in this judicial district. Defendant conducts
27 business and engages in substantial transactions here, and many of the transactions
28

1 complained of herein occurred in this district including specifically the transactions
2 between Plaintiff and Defendant Bai.

3 7. The Court has personal jurisdiction over Defendant because the company has
4 affirmatively established and maintained contacts with the State of California at all
5 relevant times.

6 8. Bai sells the Products to California consumers in retail outlets in California.

7 9. Defendant has sufficient minimum contacts with this State and sufficiently
8 avail themselves of the markets of this State through the promotion, sales, and marketing
9 of the Products within the State to render the exercise of jurisdiction by this Court
10 reasonable.

11 10. Venue is proper in this County because Defendant conducts business here,
12 engages in substantial transactions in this County, and many of the transactions
13 complained of herein occurred in this County including specifically the transactions
14 between Plaintiff and Defendant Bai and many of the transactions between Defendant and
15 the Class.

16 **II. NATURE OF THE ACTION**

17 11. This is a national consumer class action for violations of warranty and
18 consumer protection laws, with a California consumer sub-class specifically for violation
19 of California consumer protection laws.

20 12. Defendant manufactures, distributes, advertises, markets, and sells a variety
21 of fruit-flavored beverage products, including beverage products labeled “Bai Antioxidant
22 Infusion Brasilia Blueberry,” “Bai Antioxidant Infusion Ipanema Pomegranate,” “Bai
23 Antioxidant Infusion Malawi Mango,” “Bai Bubbles Sparkling Antioxidant Infusion
24 Bolivia Black Cherry,” and “Bai Bubbles Sparkling Antioxidant Infusion Jamaica Blood
25 Orange.” A full list of flavors included in this action is included in the Table 1 that appears
26 in paragraph 58 of this Complaint. These beverage products are referred to collectively as
27 the “Products.”
28

1 13. The Products' labeling is false and misleading and the Products are therefore
2 misbranded under California law and each state's common-law consumer protection laws.

3 14. The Products are labeled as if they contain only natural ingredients and are
4 flavored only with natural ingredients when the Products in fact contain undisclosed
5 artificial flavors in violation of state and federal law.

6 15. Defendant's packaging, labeling, and advertising scheme is intended to give
7 consumers the impression that they are buying a premium, all-natural product with only
8 natural flavoring ingredients instead of a product that is artificially flavored.

9 16. Plaintiff, who was deceived by Defendant's unlawful conduct and purchased
10 the Products in California, brings this action on his own behalf and on behalf of both
11 national consumers and California consumers to remedy Defendant's unlawful acts.

12 17. On behalf of the Class and sub-class as defined herein, Plaintiff seeks an
13 order compelling Defendant to, *inter alia*: (1) cease packaging, distributing, advertising
14 and selling the Products in violation of U.S. FDA regulations and California consumer
15 protection and state common law; (2) re-label or recall all existing deceptively packaged
16 Products; (3) conduct a corrective advertising campaign to fully inform consumers; (4)
17 award Plaintiff and other Class members restitution, actual damages, and punitive
18 damages; and (5) pay all costs of suit, expenses, and attorney fees.

19 **III. PARTIES**

20 18. Defendant Bai Brands, LLC ("Bai") is a New Jersey Limited Liability
21 Company with its principal place of business at 1800 East State Street, Suite 153,
22 Hamilton, New Jersey. Bai is registered with the New Jersey Secretary of State to do
23 business under entity number 0400313967.

24 19. Defendant licenses, manufactures, packages, advertises, markets, distributes,
25 and sells the Products in California and throughout the United States.

26 20. Plaintiff Kevin Branca is a resident and citizen of San Diego County,
27 California, and purchased the Products multiple times in San Diego and southern
28 California for personal and household consumption.

1 **IV. FACTUAL ALLEGATIONS**

2 **A. Defendant Does Not Disclose That the Products are Artificially Flavored.**

3 21. Defendant’s labeling and advertising scheme is deliberately intended to give
4 consumers false the impression that the Products are composed only of natural fruits and
5 fruit juices and not artificially flavored as they actually are.

6 22. The image below is a true and accurate reproduction of the front label of one
7 of the Products, taken from Defendant’s website and advertising for the Products.¹



27 ¹<https://www.drinkbai.com/products/brasilia-blueberry>; last visited Apr. 17, 2018.

1 23. This Product label, for the “Brasilia Blueberry” beverage product for
2 example, shows a pictorial representation of ripe fresh blueberries.

3 24. Other Products, named and labeled for other natural fruits and fruit
4 combinations, show similar pictures of the ripe natural fruits the Products are purportedly
5 exclusively flavored by.

6 25. The labeled names, such as “Malawi Mango,” “Sumatra Dragonfruit,” and
7 “Bolivia Black Cherry,” along with these pictorial representations on each label, imply to
8 the consumer by operation of law that the Products consist of and are flavored only with
9 natural juices and fruit flavors.

10 26. All of the Products, however, contain a synthetic chemical flavoring
11 compound identified as “malic acid.”

12 27. This “malic acid” is a synthetic chemical that makes manufactured food
13 products taste like fresh fruit - like blueberries, mangos, or cherries, for example.

14 28. The Products’ labels violate California and federal statute and state common
15 law in multiple regards.

16 29. First, because each Product contains additional flavoring ingredients that
17 simulate and reinforce the characterizing flavor, the front label is required by law to
18 disclose those additional flavors rather than misleadingly suggest that the Product is
19 flavored only by natural fruit juices. Cal. Health & Saf. Code § 109875 *et seq.*, (Sherman
20 Law), incorporating 21 C.F.R. § 101.22.²

21 30. Second, the Products’ ingredient list violates federal and state law because it
22 misleadingly identifies the malic acid flavoring ingredient only as the generic “malic acid”
23 instead of using the specific, non-generic name of the ingredient. *See* 21 C.F.R.

24 _____
25 ² California’s Sherman Food, Drug, and Cosmetic Act, Cal. Health & Saf. Code § 109875
26 *et seq.*, incorporates into California law all regulations enacted pursuant to the U.S. Food
27 Drug and Cosmetic Act. An act or omission that would violate an FDCA regulation
28 necessarily therefore violates California’s Sherman Law. *Id.* at § 110100. Regulatory
citations in the text are to California’s Sherman Law and reference the corresponding
federal regulation for convenience.

1 § 101.4(a)(1).

2 31. Even more deceptive, however, is the fact that the Products, rather than being
3 flavored only with natural juices and flavors as the labels suggest, contain an undisclosed
4 artificial flavor made from petrochemicals. Defendant conceals this fact from consumers.

5 32. Defendant adds a synthetic industrial chemical called d-l-malic acid,³ in the
6 form of a racemic mixture of d- and l-isomers, to flavor the Products and make them taste
7 like fresh fruit.

8 33. This “malic acid” is not naturally-occurring but is in fact manufactured in
9 petrochemical plants from benzene or butane—components of gasoline and lighter fluid,
10 respectively—through a series of chemical reactions, some of which involve highly toxic
11 chemical precursors and byproducts.

12 34. Both the natural and unnatural forms of malic acid are considered GRAS
13 (generally recognized as safe) for use as flavorings; the d-malic acid form, however, has
14 not been extensively studied for its health effects in human beings. Both forms confer a
15 “tart, fruity” flavor to food products.⁴

16 35. Defendant uses this artificial petrochemical, d-l-malic acid, in its Products
17 but pretends otherwise, conflating the natural and the artificial flavorings and deceiving
18 consumers.

19 36. Because it contains artificial flavor, both federal and state law require the
20 Products to display both front- and back-label disclosures to inform consumers that they
21 are artificially flavored. 21 C.F.R. § 101.22.

22 37. They have neither.

23 38. California law, incorporating and identically mirroring U.S. Food, Drug, and
24 Cosmetic Act regulations by reference, requires that a food’s label accurately describe the
25 nature of the food product and its characterizing flavors. 21 C.F.R. § 102.5(a).

26 _____
27 ³ D-malic acid is also called d-hydroxybutanedioic acid or (R)-(+)-2-Hydroxysuccinic acid.

28 ⁴ <https://thechemco.com/chemical/malic-acid/>; last visited Mar. 20, 2018.

1 39. Under FDA regulations, a recognizable primary flavor identified on the front
2 label of a food product is referred to as a “characterizing flavor.” 21 C.F.R. § 101.22.

3 40. FDA regulations and California law establish that if “the label, labeling, or
4 advertising of a food makes any direct or indirect representations with respect to the
5 primary recognizable flavor(s), by word, vignette, e.g., depiction of a fruit, or other
6 means” then “such flavor shall be considered the characterizing flavor.” 21 C.F.R.
7 § 101.22(i).

8 41. “Blueberry,” “Mango,” “Cherry,” and other fruits the Products are named
9 and labeled as, are primary recognizable flavors identified on the Products’ front labels.
10 These are characterizing flavors under California and federal regulations.

11 42. If a product’s characterizing flavor is not created exclusively by the
12 characterizing flavor ingredient, the product’s front label must state that the product’s
13 flavor was simulated or reinforced with either or both of natural or artificial flavorings. If
14 any artificial flavor is present which “simulates, resembles or reinforces” the
15 characterizing flavor, the food must be prominently labeled as “Artificially Flavored.” 21
16 C.F.R. § 101.22(i) (3), (4).

17 43. A food product’s label also must include a statement of the “presence or
18 absence of any characterizing ingredient(s) or component(s) . . . when the presence or
19 absence of such ingredient(s) or component(s) in the food has a material bearing on price
20 or consumer acceptance . . . and consumers may otherwise be misled about the presence
21 or absence of the ingredient(s) or component(s) in the food.” 21 C.F.R. § 102.5(c).

22 44. Such statements must be in boldface print on the front display panel and of
23 sufficient size for an average consumer to notice. *Id.*

24 45. Under these regulations, Defendant was required to place prominently on the
25 Products’ front labels a notice sufficient to allow California and other consumers to
26 understand that the Products contained artificial flavorings.

27 46. Defendant failed to do so, deceiving consumers and violating California law,
28 federal law, and corresponding state common laws.

1 47. Accordingly, Plaintiff was unaware that the Products contained artificial
2 flavoring when he purchased them.

3 48. When purchasing the Products, Plaintiff was seeking a product of particular
4 qualities, that were flavored only with the natural ingredients claimed on the label and
5 which did not contain artificial flavoring.

6 49. Plaintiff is not alone in these purchasing preferences. As reported in Forbes
7 Magazine, 88% of consumers polled recently indicated they would pay more for foods
8 perceived as natural or healthy. “All demographics [of consumers]—from Generation Z to
9 Baby Boomers—say they would pay more” for such products, specifically including foods
10 with no artificial flavors.⁵

11 50. California’s Health & Safety Code states that “[a]ny food is misbranded if it
12 bears or contains any artificial flavoring, artificial coloring, or chemical preservative,
13 unless its labeling states that fact.” Cal. Health & Saf. Code § 110740.

14 51. California law required Defendant to include sufficient notice on the
15 Products’ labels to alert California consumers that the Products are artificially flavored.

16 52. Defendant failed to do so.

17 53. Accordingly, Defendant’s Products were misbranded and illegal to distribute
18 or sell in California. Cal. Health & Saf. Code § 110740; § 110760; § 110765.

19 54. Because the Products violated California law, they were misbranded when
20 offered for sale in California.

21 55. Plaintiff lost money as a result of Defendant’s conduct because he purchased
22 a Product that contained undisclosed artificial flavors and was illegal to sell.

23 56. John Compton, the CEO of a competing beverage manufacturer, spoke to
24 investors at the Morgan Stanley Consumer & Retail Conference, stating, “We have talked
25

26 _____
27 ⁵ *Consumers Want Healthy Foods--And Will Pay More For Them*, FORBES MAGAZINE (Feb.
28 15, 2015), <https://www.forbes.com/sites/nancygagliardi/2015/02/18/consumers-want-healthy-foods-and-will-pay-more-for-them/#4b8a6b4b75c5>; last visited Mar. 9, 2018.

1 extensively to consumers about this idea, and they come back and tell us the number one
2 motivation for purchase is products that claim to be all natural.”

3 57. Defendant’s labeling and advertising reflects consumers’ preferences— not
4 by making the Product solely with natural ingredients, but instead by concealing the fact
5 that the Products are artificially flavored.

6 58. Table 1, below, lists the Products included in this Action.

7 **Table 1: The Products**

8 Bai Antioxidant Infusion Brasilia 9 Blueberry	Bai Bubbles Sparkling Antioxidant Infusion Gimbi Pink Grapefruit
10 Bai Antioxidant Infusion Burundi 11 Blueberry Lemonade	Bai Bubbles Sparkling Antioxidant Infusion Bogota Blackberry Lime
12 Bai Antioxidant Infusion Costa Rica 13 Clementine	Bai Bubbles Sparkling Antioxidant Infusion Peru Pineapple
14 Bai Antioxidant Infusion Ipanema 15 Pomegranate	Bai Bubbles Sparkling Antioxidant Infusion Lambari Watermelon Lime
16 Bai Antioxidant Infusion Kula 17 Watermelon	Bai Bubbles Sparkling Antioxidant Infusion Waikiki Coconut Lime
18 Bai Antioxidant Infusion Malawi Mango	Bai Antioxidant Cocofusion Madagascar Coconut Mango
20 Bai Antioxidant Infusion Sao Paulo 21 Strawberry Lemonade	Bai Antioxidant Supertea Narino Peach Tea
22 Bai Antioxidant Infusion Sumatra 23 Dragonfruit	Bai Antioxidant Supertea Paraguay Passionfruit Tea
24 Bai Bubbles Sparkling Antioxidant 25 Infusion Bolivia Black Cherry	Bai Antioxidant Supertea Rio Raspberry Tea
26 Bai Bubbles Sparkling Antioxidant 27 Infusion Jamaica Blood Orange	Bai Antioxidant Supertea Socorro Sweet Tea

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1 **B. Defendant's Competitors Label Their Products Lawfully.**

2 59. Defendant not only deceives consumers but also gains an unfair commercial
3 advantage in the marketplace by labeling the Products deceptively.

4 60. Manufacturers of competing beverage products label their products lawfully
5 and accurately label their artificially flavored fruit juice beverages as "Artificially
6 Flavored."

7 61. Other competing major manufacturers, offering products whose labels
8 suggest just as Defendant's do that their products are naturally flavored, truly are flavored
9 only with natural ingredients.

10 62. Defendant, however, unlawfully conceals their use of an artificial flavoring,
11 deceiving consumers, illegally cutting costs and increasing profits, and competing unfairly
12 and unlawfully in the marketplace, hurting their competitors as well as consumers.

13 63. Defendant's conduct injures competing manufacturers that do not engage in
14 the same illegal behavior. These manufacturers compete for market share and limited shelf
15 space, as well as for consumers' buying preferences and dollars. Defendant's competitors
16 do so lawfully. Defendant does not.

17 **C. Plaintiff's Purchases of the Products**

18 64. Plaintiff Kevin Branca purchased the Products in California during the Class
19 Period defined herein.

20 65. Plaintiff purchased the Products multiple times since 2012, most recently at
21 the Costco Wholesale store located at 951 Palomar Airport Road, Carlsbad, California.

22 66. Plaintiff's most recent purchase was on or about July 2016.

23 67. Plaintiff purchased the Products at the marked retail prices. A single 18-fluid
24 ounce plastic bottle retails at about \$1.99. Plaintiff's most recent purchase of the Product
25 was a variety pack for a marked retail price of \$19.99, which contained fifteen (15) 18-
26 fluid ounce plastic bottles including the "Brasilia Blueberry," "Kula Watermelon,"
27 "Ipanema Pomegranate," and "Costa Rica Clementine" flavored Products.
28

1 68. Plaintiff first discovered Defendant's unlawful acts described herein in April
2 2018, when he learned the Products' characterizing flavors were deceptively created or
3 reinforced using artificial flavoring even though Defendant failed to disclose that fact on
4 the Products' label.

5 69. Plaintiff was deceived by and relied upon the Products' deceptive labeling,
6 and specifically the omission of the legally-required notice that it contained artificial
7 flavorings. Plaintiff purchased the Products believing they were naturally flavored, based
8 on the Products' deceptive labeling and failure to disclose that it was artificially flavored.

9 70. Plaintiff, as a reasonable consumer, is not required to subject consumer food
10 products to laboratory analysis, to scrutinize the back of the label to discover that the
11 product's front label is false and misleading, or to search the label for information that
12 federal regulations require be displayed prominently on the front – and, in fact, under state
13 law is entitled to rely on statements that Defendant deliberately places on the Products'
14 labeling. Defendant, but not Plaintiff, knew or should have known that this labeling was
15 in violation of federal regulations and state law.

16 71. Because Plaintiff reasonably assumed the Products to be free of artificial
17 flavoring, based on the Products' label, when it was not, he did not receive the benefit of
18 his purchases. Instead of receiving the benefit of products free of artificial flavoring, he
19 received Products that were unlawfully labeled to deceive the consumer into believing that
20 it is exclusively naturally flavored and contains no artificial flavoring, in violation of
21 federal and state labeling regulations.

22 72. Plaintiff would not have purchased the Products in the absence of Defendant's
23 misrepresentations and omissions. Had Defendant not violated California law, Plaintiff
24 would not have been injured.

25 73. The Products were worth less than what Plaintiff paid for them and Class
26 members would not have paid as much as they have for the Products absent Defendant's
27 false and misleading statements and omissions.

1 74. Plaintiff lost money as a result of Defendant's unlawful behavior. Plaintiff
2 altered his position to his detriment and suffered loss in an amount equal to the amount he
3 paid for the Products.

4 75. Plaintiff intends to, seeks to, and will purchase the Products again when he
5 can do so with the assurance that Products' label, which indicate that the Products are
6 naturally flavored, are lawful and consistent with the Products' ingredients.

7 **V. DELAYED DISCOVERY**

8 76. Plaintiff did not discover that Defendant's labeling of the Products was false
9 and misleading until April 2018, when he learned the Products contained undisclosed
10 artificial flavoring.

11 77. Plaintiff and the Class members are reasonably diligent consumers who
12 exercised reasonable diligence in their purchase and consumption of the Products.
13 Nevertheless, they would not have been able to discover Defendant's deceptive practices
14 and lacked the means to discover them given that, like nearly all consumers, they rely on
15 and are entitled to rely on the manufacturer's obligation to label its products in compliance
16 with federal regulations and state law. Furthermore, Defendant's labeling practices and
17 non-disclosures—in particular, failing to identify the artificial flavor in the ingredient list,
18 or to disclose that the Products contained artificial flavoring, or to accurately identify the
19 kind of malic acid that Defendant put in the Products—impeded Plaintiff's and Class
20 members' abilities to discover the deceptive and unlawful labeling of the Products
21 throughout the Class Period.

22 78. Because Defendant actively concealed their illegal conduct, preventing
23 Plaintiff and the Class from discovering their violations of state law, Plaintiff and the Class
24 are entitled to delayed discovery and an extended Class Period tolling the applicable statute
25 of limitations.

26 **VI. CLASS ACTION ALLEGATIONS**

27 79. Plaintiff brings this action on behalf of himself and all others similarly
28 situated (the "Class") pursuant to Federal Rule of Civil Procedure 23.

1 80. The Nationwide Class is defined as follows:

2 All U.S. citizens who purchased the Products in the United
3 States on or after January 1, 2012 until the date class notice
4 is disseminated, excluding Defendant and Defendant's
5 officers, directors, employees, agents, and affiliates, and
6 the Court and its staff.

7 81. The California Sub-Class is defined as follows:

8 All California citizens who purchased the Products in
9 California on or after January 1, 2012 until the date class
10 notice is disseminated, excluding Defendant and
11 Defendant's officers, directors, employees, agents, and
12 affiliates, and the Court and its staff.

13 82. During the Class Period, the Products unlawfully contained the undisclosed
14 artificial flavors d-malic acid or d-l-malic acid and were otherwise improperly labeled as
15 alleged herein. Defendant failed to label the Products as required by law.

16 83. The proposed Class meets all criteria for a class action, including numerosity,
17 typicality, superiority, and adequacy of representation.

18 84. The proposed Class satisfies numerosity. The Products are offered for sale at
19 over a thousand supermarkets in California; the Class numbers at minimum in the tens of
20 thousands. Individual joinder of the Class members in this action is impractical.
21 Addressing the Class members' claims through this class action will benefit Class
22 members, the parties, and the courts.

23 85. The proposed Class satisfies typicality. Plaintiff's claims are typical of and
24 are not antagonistic to the claims of other Class members. Plaintiff and the Class members
25 all purchased the Products, were deceived by the false and deceptive labeling, and lost
26 money as a result, purchasing a product that was illegal to sell in California.

27 86. The proposed Class satisfies superiority. A class action is superior to any
28 other means for adjudication of the Class members' claims because each class member's

1 claim is modest, based on the Products' retail purchase price which is generally under
2 \$5.00. It would be impractical for individual Class members to bring individual lawsuits
3 to vindicate their claims.

4 87. Because Defendant's misrepresentations were made on the label of the
5 Products themselves, all Class members including Plaintiff were exposed to and continue
6 to be exposed to the omissions and affirmative misrepresentations. If this action is not
7 brought as a class action, Defendant can continue to deceive consumers and violate
8 California law with impunity.

9 88. The proposed Class representatives satisfy adequacy of representation.
10 Plaintiff is an adequate representative of the Class as he seeks relief for the Class, his
11 interests do not conflict with the interests of the Class members, and he has no interest
12 antagonistic to those of other Class members. Plaintiff has retained counsel who are
13 competent in the prosecution of consumer fraud and class action litigation.

14 89. There is a well-defined community of interest in questions of law and fact
15 common to the Class, and these predominate over any individual questions affecting
16 individual Class members in this action.

17 90. Questions of law and fact common to Plaintiff and the Class include:

- 18 a. Whether Defendant failed to disclose the presence of the
19 artificial flavoring ingredient d-l-malic acid in the Products;
- 20 b. Whether Defendant's labeling omissions and representations
21 constituted false advertising under California law;
- 22 c. Whether Defendant's conduct constituted a violation of
23 California's Unfair Competition Law;
- 24 d. Whether Defendant's conduct constituted a violation of
25 California's Consumer Legal Remedies Act;
- 26 e. Whether Defendant's conduct constitutes a breach of express
27 warranties, or implied warranties under California's Commercial
28 Code;

- 1 f. Whether Defendant's conduct constitutes a breach of express
- 2 warranties or implied warranties under state common law;
- 3 g. Whether Defendant's conduct violates U.S. Food and Drug
- 4 Administration labeling regulations;
- 5 h. Whether Defendant's conduct violates state common law
- 6 consumer protection law for U.S. states other than California;
- 7 i. Whether the statute of limitations should be tolled on behalf of
- 8 the Class;
- 9 j. Whether the Class is entitled to restitution, rescission, actual
- 10 damages, punitive damages, attorney fees and costs of suit, and
- 11 injunctive relief; and
- 12 k. Whether members of the Class are entitled to any such further
- 13 relief as the Court deems appropriate.

14 91. Plaintiff will fairly and adequately protect the interests of the Class, has no
15 interests that are incompatible with the interests of the Class, and has retained counsel
16 competent and experienced in class litigation.

17 92. Defendant has acted on grounds applicable to the entire Class, making final
18 injunctive relief or declaratory relief appropriate for the Class as a whole.

19 93. Class treatment is therefore appropriate under CAFA and Rule 23. Plaintiff
20 will, if notice is required, confer with Defendant and seek to present the Court with a
21 stipulation and proposed order on the details of a class notice plan.

22 **VII. CAUSES OF ACTION**

23 **First Cause of Action: Violation of the CLRA**

24 94. Plaintiff realleges and incorporates by reference the allegations made
25 elsewhere in the Complaint as if set forth in full herein.

26 95. The California Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et*
27 *seq.*, prohibits any unfair, deceptive and unlawful practices, and unconscionable
28 commercial practices in connection with the sale of any goods or services to consumers.

1 96. Plaintiff and the Class are “consumers” as defined by Cal. Civ. Code
2 § 1761(d). The Products are a “good” as defined by Cal. Civ. Code § 1761.

3 97. Defendant’s failure to label the Products in accord with federal and state
4 labeling regulations, omitting the required information that the Products contain artificial
5 flavoring, was an unfair, deceptive, unlawful and unconscionable commercial practice.

6 98. Defendant’s conduct violates the Consumer Legal Remedies Act.

7 99. As a result of Defendant’s violations, Plaintiff and the Class suffered
8 ascertainable losses in the form of the purchase price they paid for the unlawfully labeled
9 and marketed products, which they would not have paid had the Products been labeled
10 correctly, and in the form of the reduced value of the Products in relation to the Products
11 as advertised.

12 100. On or about April 12, 2018, prior to filing this action, Plaintiff sent a CLRA
13 notice letter to Defendant which complies with California Civil Code § 1782(a). Plaintiff
14 sent Defendant, individually and on behalf of the proposed Class, a letter via Certified
15 Mail, advising Defendant that they are in violation of the CLRA and demanding that they
16 cease and desist from such violations and make full restitution by refunding the monies
17 received therefrom. A copy of Plaintiff’s April 12, 2018 CLRA letter is attached hereto
18 as Exhibit 1.

19 101. Wherefore, Plaintiff seeks injunctive relief for Defendant’s violations of the
20 CLRA. If Defendant fails to take the corrective action detailed in Plaintiff’s CLRA letter
21 within thirty days of the date of the letter, then Plaintiff will seek leave to amend his
22 complaint to add a claim for damages under the CLRA.

23 **Second Cause of Action: Violation of the UCL, Unlawful Prong**

24 102. Plaintiff realleges and incorporates by reference each and every allegation
25 contained elsewhere in this Complaint, as if fully set forth herein.

26 103. Section 17200 of the California Business & Professions Code (“Unfair
27 Competition Law” or “UCL”) prohibits any “unlawful,” “unfair” and “fraudulent”
28 business practice. Section 17200 specifically prohibits any “unlawful . . . business act or

1 practice.”

2 104. The UCL borrows violations of other laws and statutes and considers those
3 violations also to constitute violations of California law.

4 105. Defendant’s practices as described herein were at all times during the Class
5 Period and continue to be unlawful under, *inter alia*, FDA regulations and California’s
6 Sherman Law.

7 106. Among other violations, Defendant’s conduct in unlawfully packaging and
8 distributing the Products in commerce in California violated U.S. FDA packaging and
9 labeling regulations.

10 107. The Products’ labels fail to disclose that they contain synthetic artificial
11 flavoring in violation of 21 C.F.R. § 101.22 and California’s Sherman Law.

12 108. The Products contain d-l-malic acid.

13 109. The d-l-malic acid is a flavoring material that creates, simulates, and
14 reinforces the Products’ characterizing fruit flavors.

15 110. The d-l-malic acid in the Products is not derived from a natural material as
16 defined in 21 C.F.R. § 101.22 and is therefore by law artificial flavors.

17 111. Defendant fails to inform consumers of the presence of the artificial flavor in
18 the Products, on either the front or back-label as required by law.

19 112. Defendant’s practices are therefore unlawful as defined in Section 17200 of
20 the California Civil Code.

21 **Third Cause of Action: Violation of the UCL, Unfair Prong**

22 113. Plaintiff realleges and incorporates by reference each and every allegation
23 contained elsewhere in this Complaint as if fully set forth herein.

24 114. Section 17200 of the California Business & Professions Code (“Unfair
25 Competition Law” or “UCL”) prohibits any “unfair . . .business act or practice.”
26 Defendant’s practices violate the Unfair Competition Law “unfair” prong as well.

27 115. The Defendant’s practices as described herein are “unfair” within the
28 meaning of the California Unfair Competition Law because the conduct is unethical and

1 injurious to California residents and the utility of the conduct to Defendant does not
2 outweigh the gravity of the harm to consumers.

3 116. While Defendant's decision to label the Products deceptively and in violation
4 of California law may have some utility to Defendant in that it allows Defendant to sell
5 the Products to consumers who otherwise would not purchase an artificially-flavored food
6 product at the retail price or at all if it were labeled correctly, and to realize higher profit
7 margins than if they formulated or labeled the Products lawfully, this utility is small and
8 far outweighed by the gravity of the harm Defendant inflicts upon California consumers.

9 117. Defendant's conduct also injures competing food product manufacturers,
10 distributors, and sellers that do not engage in the same unlawful, unfair, and unethical
11 behavior.

12 118. Moreover, Defendant's practices violate public policy expressed by specific
13 constitutional, statutory, or regulatory provisions, including the Sherman Law, the False
14 Advertising Law, and the FDA regulations cited herein.

15 119. Plaintiff's and California Sub-Class members' purchases of the Products all
16 took place in California.

17 120. Defendant labeled the Products in violation of federal regulations and
18 California law requiring truth in labeling.

19 121. Defendant consciously failed to disclose material facts to Plaintiff and the
20 Class in Defendant's advertising and marketing of the Products.

21 122. Defendant's conduct is unconscionable because, among other reasons, it
22 violates 21 C.F.R. § 101.22(c), which requires all foods containing artificial flavoring to
23 include:

24 A statement of artificial flavoring . . . [which] shall be placed on the food or
25 on its container or wrapper, or on any two or all three of these, as may be
26 necessary to render such a statement likely to be read by the ordinary person
27 under customary conditions of purchase and use of such food.

28

1 123. Defendant’s conduct is “unconscionable” because it violates, *inter alia*, 21
2 C.F.R. § 101.22(c), which requires all food products for which artificial flavoring provides
3 a characterizing flavor to disclose this fact prominently on the product’s front label.

4 124. Defendant intended that Plaintiff and the Class rely on Defendant’s acts of
5 omission so that Plaintiff and the other Class members would purchase the Products.

6 125. Had Defendant disclosed all material information regarding the Products in
7 its advertising and marketing, Plaintiff and the Class would not have purchased the
8 Product or would have paid less for the Products.

9 126. Plaintiff suffered injury in fact and lost money or property as a result of
10 Defendant’s deceptive advertising: they were denied the benefit of the bargain when they
11 decided to purchase the Products based on Defendant’s violation of the applicable laws
12 and regulations, or to purchase the Products in favor of competitors’ products, which are
13 less expensive, contain no artificial flavoring, or are lawfully labeled.

14 127. Plaintiff suffered an ascertainable loss of money. The acts, omissions and
15 practices of Defendant detailed herein proximately caused Plaintiff and other members of
16 the Class to suffer an ascertainable loss in the form of, *inter alia*, monies spent to purchase
17 the Products they otherwise would not have, and they are entitled to recover such damages,
18 together with appropriate penalties, including restitution, damages, attorneys’ fees and
19 costs of suit.

20 128. Section 1720 also prohibits any “unfair, deceptive, untrue or misleading
21 advertising.” For the reasons set forth above, Defendant engaged in unfair, deceptive,
22 untrue and misleading advertising in violation of California Business & Professions Code
23 § 17200.

24 129. Pursuant to California Business & Professions Code § 17203, Plaintiff seeks
25 an order requiring Defendant to immediately cease such acts of unlawful, unfair, and
26 fraudulent business practices and requiring Defendant to return the full amount of money
27 improperly collected to all those who purchased the Products.

28 ///

1 **Fourth Cause of Action: Violation of False Advertising Law**

2 130. Plaintiff realleges and incorporates by reference each and every allegation
3 contained elsewhere in this Complaint as if fully set forth herein.

4 131. Defendant made and distributed, in California and in interstate commerce,
5 Products that unlawfully fail to disclose artificial flavoring on its packaging as required
6 by federal food labeling regulations.

7 132. The Products’ labeling and advertising in California falsely describe it as if
8 it were only naturally flavored.

9 133. Under California’s False Advertising Law, Business and Professions Code
10 § 17500 *et seq.*,

11 “It is unlawful for any person, firm, corporation or association, or any employee
12 thereof with intent directly or indirectly to dispose of real or personal property . . .
13 to make or disseminate or cause to be made or disseminated before the public in
14 this state, or to make or disseminate or cause to be made or disseminated from this
15 state before the public in any state, in any newspaper or other publication, or any
16 advertising device . . . any statement, concerning that real or personal property . . .
17 which is untrue or misleading, and which is known, or which by the exercise of
18 reasonable care should be known, to be untrue or misleading. . . .” Cal. Bus. & Prof.
19 Code § 17500.

20 134. Defendant’s labeling and advertising statements, communicating to
21 consumers that the Products contained natural flavors and concealing the fact that it
22 contained a synthetic artificial flavor, were untrue and misleading, and Defendant at a
23 minimum by the exercise of reasonable care should have known those actions were false
24 or misleading. Defendant’s conduct violated California’s False Advertising Law.

25 **Fifth Cause of Action: Breach of Express Warranty**

26 135. Plaintiff realleges and incorporates by reference the allegations found
27 elsewhere in the Complaint as if set forth in full herein.

28 136. The Products’ label warrants that the Products have “Natural Flavors.”

1 137. The Products' front label also misleadingly advertises by operation of law
2 that the Products are flavored only with the listed fruits.

3 138. These promises became part of the basis of the bargain between the parties
4 and thus constituted an express warranty, which Defendant breached; the Products are
5 artificially flavored.

6 139. Defendant sold the goods to Plaintiff and other consumers who bought the
7 goods from Defendant.

8 140. As a result, Plaintiff and other consumers did not receive goods as warranted
9 by Defendant.

10 141. Within a reasonable amount of time after Plaintiff discovered that the
11 Products contained synthetic ingredients, Plaintiff notified the Defendant of such breach.

12 142. As a proximate result of this breach of warranty by Defendant, Plaintiff and
13 other consumers have been damaged in an amount to be determined at trial.

14 **Sixth Cause of Action: Breach of Implied Warranty**

15 143. Plaintiff realleges and incorporates the allegations elsewhere in the
16 Complaint as if set forth in full herein.

17 144. Defendant's label representations also created implied warranties that the
18 Products were suitable for a particular purpose, specifically as a naturally flavored food
19 product. Defendant breached this warranty as well.

20 145. The Products' front label misleadingly implies that they are flavored with the
21 natural ingredients comprising the characterizing flavors.

22 146. As alleged in detail above, at the time of purchase Defendant had reason to
23 know that Plaintiff, as well as all members of the Class, intended to use the Products as a
24 naturally flavored food product.

25 147. This became part of the basis of the bargain between the parties.

26 148. Based on that implied warranty, Defendant sold the goods to Plaintiff and
27 other Class members who bought the goods from Defendant.

1 149. At the time of purchase, Defendant knew or had reason to know that Plaintiff
2 and the Class members were relying on Defendant's skill and judgment to select or furnish
3 a product that was suitable for this particular purpose, and Plaintiff justifiably relied on
4 Defendant's skill and judgment.

5 150. The Products were not suitable for this purpose.

6 151. Plaintiff purchased the Products believing it had the qualities Plaintiff sought,
7 based on the deceptive advertising and labeling, but the Products were actually
8 unsatisfactory to Plaintiff for the reasons described herein.

9 152. The Products were not merchantable in California, as it was not of the same
10 quality as other products in the natural food category generally acceptable in the trade.

11 153. The Products would not pass without objection in the trade when packaged
12 with its existing label, because the Products were misbranded and illegal to sell in
13 California. Cal. Comm. Code § 2314(2)(a).

14 154. The Products also were not acceptable commercially and breached its implied
15 warranty because it was not adequately packaged and labeled as required. Cal. Comm.
16 Code § 2314(2)(e).

17 155. The Products also were not acceptable commercially and breached its implied
18 warranty because it did not conform to the promises or affirmations of fact made on the
19 container or label, Cal. Comm. Code § 2314(2)(f), and other grounds as set forth in
20 Commercial Code section 2314(2).

21 156. By offering the Products for sale and distributing the Products in California
22 and across the United States, Defendant also warranted that the Products were not
23 misbranded and was legal to purchase in California and across the United States. Because
24 the Products were misbranded in several regards and was therefore illegal to sell or offer
25 for sale in California, Defendant breached this warranty as well.

26 157. As a result of this breach, Plaintiff and other consumers did not receive goods
27 as impliedly warranted by Defendant.
28

1 158. Within a reasonable amount of time after the Plaintiff discovered that the
2 Products contained synthetic ingredients, Plaintiff notified the Defendant of such breach.

3 159. As a proximate result of this breach of warranty, Plaintiff and other
4 consumers have been damaged in an amount to be determined at trial.

5 160. As a result, Plaintiff, the Class, and the general public are entitled to
6 injunctive and equitable relief, restitution, and an order for the disgorgement of the funds
7 by which Defendant was unjustly enriched.

8 **Seventh Cause of Action: Negligent Misrepresentation**

9 161. Plaintiff realleges and incorporates the allegations elsewhere in the
10 Complaint as if set forth in full herein.

11 162. Defendant's label representations negligently misrepresented the Products as
12 if they were exclusively naturally flavored.

13 163. Defendant was negligent in labeling the Products as if it were exclusively
14 naturally flavored and in failing to identify the Products as artificially flavored.

15 164. Defendant represented the Products to Plaintiff and the Class as solely
16 naturally flavored as if this were true.

17 165. Defendant's representations were not true.

18 166. The Products were not exclusively naturally flavored but were instead
19 artificially flavored as described herein.

20 167. Defendant had no reasonable basis for believing that the Products were
21 naturally flavored at the time or any time relevant to this action.

22 168. Defendant intended for Plaintiff and the Class to rely on this representation.

23 169. Plaintiff and the Class reasonably relied on this representation.

24 170. Plaintiff and the Class were harmed thereby as alleged herein.

25 171. Plaintiff and the Class's reliance was a substantial factor in that harm.

26 172. As a result, Plaintiff and the Class are entitled to injunctive and equitable
27 relief, restitution, and an order for the disgorgement of the funds by which Defendant was
28 unjustly enriched.

1 **Eighth Cause of Action: Fraud By Omission**

2 173. Plaintiff realleges and incorporates the allegations elsewhere in the
3 Complaint as if set forth in full herein.

4 174. Defendant actively concealed material facts, in whole or in part, with the
5 intent to induce Plaintiff and members of the Class to purchase the Products. Specifically,
6 Defendant actively concealed the truth about the Products by not disclosing the existence
7 of artificial flavoring ingredients on the front label of the Products as is required by
8 California and federal law.

9 175. Plaintiff and the Class were unaware of these omitted material facts and
10 would not have purchased the Products, or would have paid less for the Products, if they
11 had known of the concealed facts.

12 176. Plaintiff and the Class suffered injuries that were proximately caused by
13 Defendant's active concealments and omissions of material facts.

14 177. Defendant's fraudulent concealments and omissions were a substantial factor
15 in causing the harm suffered by Plaintiff and the Class members as they would not have
16 purchased the Products at all if all material facts were properly disclosed.

17 **VIII. PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiff, on behalf of himself, all others similarly situated in
19 California, and the general public, prays for judgment against Defendant as follows:

- 20 A. An order confirming that this action is properly maintainable as a class action
21 as defined above, appointing Plaintiff and his undersigned counsel to
22 represent the Class, and requiring Defendant to bear the cost of class notice;
- 23 B. An order declaring that the conduct complained of herein violates the CLRA;
- 24 C. An order declaring that the conduct complained of herein violates the UCL;
- 25 D. An order declaring that the conduct complained of herein violates the FAL;
- 26 E. An order declaring that the conduct complained of herein breached express
27 warranties, implied warranties, or both;
- 28 F. An order requiring Defendant to disgorge any benefits received from Plaintiff

- 1 and any unjust enrichment realized as a result of the improper and misleading
2 labeling, advertising, and marketing of the Products;
- 3 G. An order requiring Defendant to pay restitution and damages to Plaintiff and
4 Class members so that they may be restored any money which was acquired
5 by means of any unfair, deceptive, unconscionable or negligent acts;
- 6 H. An award of punitive damages in an amount to be proven at trial;
- 7 I. An order enjoining Defendant's deceptive and unfair practices;
- 8 J. An order requiring Defendant to conduct corrective advertising;
- 9 K. An award of pre-judgment and post-judgment interest;
- 10 L. An award of attorney fees and costs; and
- 11 M. Such other and further relief as this Court may deem just, equitable, or proper.

12 **IX. JURY DEMAND**

13 Plaintiff demands a trial by jury on all claims for damages. Plaintiff does not seek a
14 jury trial for claims sounding in equity.

15
16 DATED: April 19, 2018

Respectfully Submitted,

17 /s/ Ronald A. Marron

18 Ronald A. Marron

19 **LAW OFFICES OF RONALD A. MARRON**

20 Ronald A. Marron

21 *ron@consumersadvocates.com*

22 Michael T. Houchin

mike@consumersadvocates.com

23 651 Arroyo Drive

San Diego, CA 92103

24 Telephone: (619) 696-9006

25 Fax: (619) 564-6665

26 ***Counsel for Plaintiff and the
27 Proposed Class***
28

The JS 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 by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p>I. (a) PLAINTIFFS Kevin Branca</p> <p>(b) County of Residence of First Listed Plaintiff <u>San Diego</u> <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i></p> <p>(c) Attorneys (Firm Name, Address, and Telephone Number) Ronald A. Marron Law Offices of Ronald A. Marron 651 Arroyo Drive, San Diego, CA 92103 (619) 696-9006</p>	<p>DEFENDANTS Bai Brands, LLC</p> <p>County of Residence of First Listed Defendant <u>Mercer</u> <i>(IN U.S. PLAINTIFF CASES ONLY)</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
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'18CV0757 BEN KSC

<p>II. BASIS OF JURISDICTION <i>(Place an "X" in One Box Only)</i></p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 3 Federal Question <i>(U.S. Government Not a Party)</i></p> <p><input checked="" type="checkbox"/> 4 Diversity <i>(Indicate Citizenship of Parties in Item III)</i></p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES <i>(Place an "X" in One Box for Plaintiff and One Box for Defendant)</i></p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	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
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IV. NATURE OF SUIT *(Place an "X" in One Box Only)* Click here for: [Nature of Suit Code Descriptions.](#)

<p>CONTRACT</p> <p><input type="checkbox"/> 110 Insurance</p> <p><input type="checkbox"/> 120 Marine</p> <p><input type="checkbox"/> 130 Miller Act</p> <p><input type="checkbox"/> 140 Negotiable Instrument</p> <p><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment</p> <p><input type="checkbox"/> 151 Medicare Act</p> <p><input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans)</p> <p><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits</p> <p><input type="checkbox"/> 160 Stockholders' Suits</p> <p><input type="checkbox"/> 190 Other Contract</p> <p><input type="checkbox"/> 195 Contract Product Liability</p> <p><input type="checkbox"/> 196 Franchise</p>	<p>TORTS</p> <p>PERSONAL INJURY</p> <p><input type="checkbox"/> 310 Airplane</p> <p><input type="checkbox"/> 315 Airplane Product Liability</p> <p><input type="checkbox"/> 320 Assault, Libel & Slander</p> <p><input type="checkbox"/> 330 Federal Employers' Liability</p> <p><input type="checkbox"/> 340 Marine</p> <p><input type="checkbox"/> 345 Marine Product Liability</p> <p><input type="checkbox"/> 350 Motor Vehicle</p> <p><input type="checkbox"/> 355 Motor Vehicle Product Liability</p> <p><input type="checkbox"/> 360 Other Personal Injury</p> <p><input type="checkbox"/> 362 Personal Injury - Medical Malpractice</p> <p>PERSONAL INJURY</p> <p><input type="checkbox"/> 365 Personal Injury - Product Liability</p> <p><input type="checkbox"/> 367 Health Care/ Pharmaceutical Personal Injury Product Liability</p> <p><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability</p> <p>PERSONAL PROPERTY</p> <p><input checked="" type="checkbox"/> 370 Other Fraud</p> <p><input type="checkbox"/> 371 Truth in Lending</p> <p><input type="checkbox"/> 380 Other Personal Property Damage</p> <p><input type="checkbox"/> 385 Property Damage Product Liability</p>	<p>FORFEITURE/PENALTY</p> <p><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881</p> <p><input type="checkbox"/> 690 Other</p> <p>LABOR</p> <p><input type="checkbox"/> 710 Fair Labor Standards Act</p> <p><input type="checkbox"/> 720 Labor/Management Relations</p> <p><input type="checkbox"/> 740 Railway Labor Act</p> <p><input type="checkbox"/> 751 Family and Medical Leave Act</p> <p><input type="checkbox"/> 790 Other Labor Litigation</p> <p><input type="checkbox"/> 791 Employee Retirement Income Security Act</p> <p>IMMIGRATION</p> <p><input type="checkbox"/> 462 Naturalization Application</p> <p><input type="checkbox"/> 465 Other Immigration Actions</p>	<p>BANKRUPTCY</p> <p><input type="checkbox"/> 422 Appeal 28 USC 158</p> <p><input type="checkbox"/> 423 Withdrawal 28 USC 157</p> <p>PROPERTY RIGHTS</p> <p><input type="checkbox"/> 820 Copyrights</p> <p><input type="checkbox"/> 830 Patent</p> <p><input type="checkbox"/> 835 Patent - Abbreviated New Drug Application</p> <p><input type="checkbox"/> 840 Trademark</p> <p>SOCIAL SECURITY</p> <p><input type="checkbox"/> 861 HIA (1395ff)</p> <p><input type="checkbox"/> 862 Black Lung (923)</p> <p><input type="checkbox"/> 863 DIWC/DIWW (405(g))</p> <p><input type="checkbox"/> 864 SSID Title XVI</p> <p><input type="checkbox"/> 865 RSI (405(g))</p> <p>FEDERAL TAX SUITS</p> <p><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)</p> <p><input type="checkbox"/> 871 IRS—Third Party 26 USC 7609</p>	<p>OTHER STATUTES</p> <p><input type="checkbox"/> 375 False Claims Act</p> <p><input type="checkbox"/> 376 Qui Tam (31 USC 3729(a))</p> <p><input type="checkbox"/> 400 State Reapportionment</p> <p><input type="checkbox"/> 410 Antitrust</p> <p><input type="checkbox"/> 430 Banks and Banking</p> <p><input type="checkbox"/> 450 Commerce</p> <p><input type="checkbox"/> 460 Deportation</p> <p><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations</p> <p><input type="checkbox"/> 480 Consumer Credit</p> <p><input type="checkbox"/> 490 Cable/Sat TV</p> <p><input type="checkbox"/> 850 Securities/Commodities/ Exchange</p> <p><input type="checkbox"/> 890 Other Statutory Actions</p> <p><input type="checkbox"/> 891 Agricultural Acts</p> <p><input type="checkbox"/> 893 Environmental Matters</p> <p><input type="checkbox"/> 895 Freedom of Information Act</p> <p><input type="checkbox"/> 896 Arbitration</p> <p><input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision</p> <p><input type="checkbox"/> 950 Constitutionality of State Statutes</p>
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V. ORIGIN *(Place an "X" in One Box Only)*

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District *(specify)* 6 Multidistrict Litigation - Transfer 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity):*
28 U.S.C. Sec. 1332(d)

Brief description of cause:

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$** 5,000,000.00 CHECK YES only if demanded in complaint: **JURY DEMAND:** Yes No

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

DATE 04/19/2018 SIGNATURE OF ATTORNEY OF RECORD /s/ Ronald A Marron

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

EXHIBIT 1

LAW OFFICES OF
RONALD A. MARRON

A PROFESSIONAL LAW CORPORATION

651 Arroyo Drive
San Diego, California 92103

Tel: 619.696.9006
Fax: 619.564.6665

April 12, 2018

Via: Certified Mail, receipt acknowledgment with signature requested

TO:

Philip Lain Hancock, CEO
Bai Brands, LLC
1800 E. State Street, Suite 153
Hamilton, NJ 08609

Bai Brands, LLC
c/o The Corporation Trust Company
820 Bear Tavern Road
West Trenton, NJ 08628

Re: CLRA Demand Letter, Notice of Anticipated Litigation and Duty to Preserve Evidence

Dear Mr. Hancock,

In your role as Chief Executive Officer and on behalf of Bai Brands, LLC (“Bai”), please take note that this letter constitutes the required 30-day notice before claims for damages may be filed under the California Consumer Legal Remedies Act, California Civ. Code § 1750 *et seq.* (“CLRA”).

This letter concerns the following products, (collectively the “Bai Products”):

- Bai Antioxidant Infusion Brasilia Blueberry;
- Bai Antioxidant Infusion Burundi Blueberry Lemonade;
- Bai Antioxidant Infusion Costa Rica Clementine;
- Bai Antioxidant Infusion Ipanema Pomegranate;
- Bai Antioxidant Infusion Kula Watermelon;
- Bai Antioxidant Infusion Malawi Mango;
- Bai Antioxidant Infusion Sao Paulo Strawberry Lemonade;
- Bai Antioxidant Infusion Sumatra Dragonfruit;
- Bai Bubbles Sparkling Antioxidant Infusion Bolivia Black Cherry;
- Bai Bubbles Sparkling Antioxidant Infusion Jamaica Blood Orange;
- Bai Bubbles Sparkling Antioxidant Infusion Gimbi Pink Grapefruit;

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- Bai Bubbles Sparkling Antioxidant Infusion Bogota Blackberry Lime;
- Bai Bubbles Sparkling Antioxidant Infusion Peru Pineapple;
- Bai Bubbles Sparkling Antioxidant Infusion Lambari Watermelon Lime;
- Bai Bubbles Sparkling Antioxidant Infusion Waikiki Coconut Lime;
- Bai Antioxidant Cocofusion Madagascar Coconut Mango;
- Bai Antioxidant Supertea Narino Peach Tea;
- Bai Antioxidant Supertea Paraguay Passionfruit Tea;
- Bai Antioxidant Supertea Rio Raspberry Tea; and
- Bai Antioxidant Supertea Socorro Sweet Tea

Our client, Mr. Kevin Branca, purchased various Bai Products for personal and household use in July 2016. The Product's front label for the "Bai Antioxidant Infusion Brasilia Blueberry" flavor, for example, identifies it as "Brasilia Blueberry" and the Product's back label lists its ingredients as:

Filtered water, Bai® Proprietary Sweetener Blend™ (erythritol, stevia extract), juice concentrates (blueberry, blackberry, strawberry), natural flavors, coffeefruit extract, malic acid, fruit and vegetable juice (for color), white tea extract, ascorbic acid, sodium citrate.

Under Federal and state law, the flavors listed on the front-of-package label – for example, the "Brasilia Blueberry" flavor identified in the product name – are primary recognizable flavors and therefore by law designated as characterizing flavors for the Products. *See* 21 C.F.R. § 101.22.

Any flavoring material that creates, simulates, or reinforces any characterizing flavor of a product, that is not made from the corresponding natural constituent (for example, any "blueberry" flavoring ingredient that is not made from actual blueberries), must be identified in the product labeling, including on the front-of-package label, as an added either natural or artificial flavor. *See* 21 C.F.R. § 101.22 (a), (c).

The malic acid ingredient identified in the Products' ingredient list creates, simulates, or reinforces the Products' characterizing flavors. Laboratory testing disclosed that the malic acid in the Product is not derived from any natural flavoring material but is in fact an artificial chemical synthesized from petroleum. This malic acid is therefore an artificial flavor under U.S. food regulations and California law. Bai's failure to disclose this artificial flavor on the Products' labels as required is a violation of California law and likely other states' consumer protection laws as well. *See, e.g.,* California Health and Safety Code § 114089.

Mr. Branca therefore informs you by this letter-notice that the Products are in violation of California's consumer protection laws, including the CLRA. Furthermore, the Products are misbranded and deceptively marketed, and are unlawful to sell in California with its current label. Mr. Branca further notifies you that, should you fail to timely act to correct these violations, he intends to bring a consumer class action on behalf of himself, and all other similarly situated U.S. residents who purchased the Products one or more times within the proposed Class period.

In addition to the requirements of the CLRA, California's Unfair Competition Law prohibits unlawful, deceptive, and so-called "unfair" business practices. The use of "unfair" in the statute "is

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intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud.” *Smith v. State Farm Mut. Auto Ins. Co.*, 93 Cal. App. 4th 700, 718 (2001). Courts have construed “unfair” practices as those that, among other things, violate public policy as declared by specific statutory or regulatory provisions such as FDA regulations. Mr. Branca believes that Bai’s use of undisclosed artificial flavors is in violation of FDA labeling regulations, and labeling and marketing of these Products so as to imply that they are solely naturally-flavored also constitutes an unfair business practice under California law.

This letter additionally serves to notify you that the Bai Products’ packaging claims created express and implied warranties under state law. The Bai Products’ labels claim that the Products are only made with natural flavors. Those warranties formed part of the benefit of the bargain and when the Products were not as warranted by you, our client suffered economic loss.

On behalf of himself, all others similarly situated, and the general public, our client therefore hereby demands that you remedy the above-described violations within 30 days of your receipt of this letter. This letter requests that you take prompt and specific corrective action to bring the Products into compliance with California law, including:

1. Either re-formulating the Products to replace the artificial flavor with a natural flavor, or revising the Products’ labeling so that the labels disclose the included artificial flavoring and do not imply that the Products are flavored only with natural flavoring ingredients;
2. Recalling or in the alternative issuing mandatory corrected labels and instructions for all currently unsold misbranded stock;
3. Conducting a corrective advertising campaign to inform consumers of the improper product labeling; and,
4. Initiating a process to refund excess monies paid by California consumers who purchased the Products from January 1, 2012 to the present, where such Products contained artificial flavoring but were not adequately labeled.

If you decline to promptly initiate these or equivalent adequate corrective actions, our client, on behalf of himself, all others similarly situated, and the general public, will bring legal claims for actual and punitive damages under the CLRA and any other applicable consumer laws and regulations to compel these steps, as well as seeking any other legally-appropriate restitution or damages, attorneys’ fees, costs, incentive awards, and the costs of class notice and administration.

By this letter-notice I also remind you of your legal duty to preserve all records relevant to such potential litigation. *See, e.g., National Ass’n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556-57 (N.D. Cal. 2006). We anticipate at a minimum that all e-mails, letters, reports, notes, minutes of meetings, voice mails, internal corporate instant messages, and laboratory and other records that relate to the formulation, labeling, advertising, marketing, and sales of the listed Bai Products will be sought in the forthcoming discovery process. You therefore must inform any employees, contractors, and third-party

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agents such as flavor suppliers and product consultants involved with these products to preserve all such relevant information.

If you would like any additional information about this Notice or the violations alleged herein, please feel free to have your attorney contact me.

Very truly yours,

/s/ Ronald A. Marron

Ronald A. Marron