

1 **Todd M. Friedman (216752)**
 2 **Adrian R. Bacon (280332)**
 3 **Law Offices of Todd M. Friedman, P.C.**
 4 **21550 Oxnard Street, suite 780**
 5 **Woodland Hills, CA 91367**
 6 **Phone: 323-306-4234**
 7 **Fax: 866-633-0228**
 8 **tfriedman@toddfllaw.com**
 9 **abacon@toddfllaw.com**
 10 **Attorneys for Plaintiff**

11 *Attorneys for Plaintiff, RICHARD WINTERS, and all others similarly situated*

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

14 RICHARD WINTERS and JAKE
15 GRUBER, individually, and on
16 behalf of other members of the
17 general public similarly situated,

18 Plaintiffs,

19 vs.

20 TWO TOWNS CIDERHOUSE INC.,

21 Defendant.

22 Case No. 20-cv-0468-BAS-BGS

23 **SECOND AMENDED**
24 **CLASS ACTION COMPLAINT**

- 25 (1) Violation of Unfair Competition Law (Cal. Business & Professions Code §§ 17500 *et seq.*) and
- 26 (2) Violation of Unfair Competition Law (Cal. Business & Professions Code §§ 17200 *et seq.*)
- 27 (3) Violation of the Consumer Legal Remedies Act (Cal. Civ. Code §§ 1750 *et seq.*)
- 28 (4) Violation of the Illinois Consumer Fraud Act (815 ILCS 505/1 *et seq.*)

Jury Trial Demanded

Plaintiff RICHARD WINTERS (“Plaintiff”), individually and on behalf of all other members of the public similarly situated, allege as follows:

PRELIMINARY STATEMENTS

1
2 1. This is an action for damages, injunctive relief, and any other available
3 legal or equitable remedies, for violations of Unfair Competition Law Cal. Business
4 & Professions Code §§ 17500 *et seq.*, the Unfair Competition Law Cal. Business &
5 Professions Code §§ 17200 *et seq.*, the Consumer Legal Remedies Act Cal. Civ.
6 Code §§ 1750 *et seq.*, and the Illinois Consumer Fraud Act 815 ILCS 505/1 *et seq.*,
7 resulting from the illegal actions of Defendant, in intentionally labeling its drink
8 products with false and misleading claims that they contain no artificial flavors,
9 when Defendant’s products contain artificial Malic Acid. Malic Acid is a common
10 food additive associated with tart and sour flavors. Plaintiffs allege as follows upon
11 personal knowledge as to themselves and their own acts and experiences, and, as to
12 all other matters, upon information and belief, including investigation conducted by
13 their attorneys.

JURISDICTION AND VENUE

14
15 2. This Court has jurisdiction pursuant to 28 U.S.C. §1332(d), because the
16 matter in controversy exceeds the sum or value of \$5,000,000 exclusive of interest
17 or costs and is a class action in which the members of the class are citizens of a State
18 different from the Defendant.

19 3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because
20 a substantial part of the events giving rise to this claim occurred in this District, and
21 Defendant does business, *inter alia*, in the Southern District of California.

PARTIES

22
23 4. Plaintiff Winters is an individual who was at all relevant times residing
24 in Mesa, Arizona.

25 5. Plaintiff Gruber is an individual who was at all relevant times residing
26 in Carol Stream, Illinois.

27 6. On information and belief, Defendant is an Oregon corporation whose
28

1 principal place of business is located in Corvallis, Oregon.

2 7. At all times relevant hereto, Defendant was engaged in the
3 manufacturing, marketing, and sale of cider products.

4 **FACTS COMMON TO ALL COUNTS**

5 8. Defendant manufactures, advertises, markets, sells, and distributes
6 apple cider products throughout California and the United States under the brand
7 name 2 Towns Cider.

8 9. During the Class Period the following list of products (the “Products”)
9 were advertised as containing no artificial flavors when they in fact contained
10 artificial Malic Acid:

- 11 a. Bright Cider;
- 12 b. Easy Squeezy;
- 13 c. Pacific Pineapple;
- 14 d. Made Marion;
- 15 e. Ginja Ninja;
- 16 f. Outcider;

17 10. During the Class Period Plaintiffs purchased many of the Products.

18 11. Plaintiff Winters most recent purchase was on November 18, 2019.

19 12. Plaintiff Grubers most recent purchase was on June 9, 2020.

20 13. All of the Products contain artificial DL-Malic Acid; therefore, the
21 apple flavors of Defendant’s products are at least partially artificial, but Defendant
22 intentionally advertises and labels the Products as containing “Nothing Artificial:
23 NO concentrates or refined sugars; NO essences or artificial flavors; NO velcorin or
24 sorbate.”

25 14. Persons, like Plaintiffs herein, have an interest in purchasing products
26 that do not contain false and misleading claims with regards to the inclusion of
27 artificial ingredients in those products.

1 15. By making false and misleading claims about the ingredients contained
2 in their products Defendant impaired Plaintiffs' ability to choose the type and quality
3 of products he chose to buy.

4 16. Therefore, Plaintiffs have been deprived of their legally-protected
5 interest to obtain true and accurate information about their consumer products as
6 required by California, Illinois, and Federal law.

7 17. As a result, Plaintiffs have been misled into purchasing products they
8 would not have otherwise purchased.

9 18. A flavor is a substance the function of which is to impart taste. See 21
10 C.F.R. § 101.22(a)(1),(a)(3).

11 19. Taste is the combination of sensations arising from specialized receptor
12 cells located in the mouth. Gary Reineccius, Flavor Chemistry and Technology 2nd
13 edition, § 1.2 (2005). Taste can be defined as sensations of sweet, sour, salty, bitter,
14 and umami; however, limiting taste to five categories suggests that taste is simple,
15 which is not true. *Id.* For example, the taste of sour contains the sourness of vinegar
16 (Acetic Acid), sour milk (Lactic Acid), lemons (Citric Acid), apples (Malic Acid),
17 and wines (Tartaric Acid). *Id.* Each of those acids is responsible for unique sensory
18 characteristics of sourness. *Id.*

19 20. Fruit flavors are the sum of the interaction between sugars, acids, lipids,
20 and a blend of volatile compounds. Hui, et. al., Handbook of Fruit and Vegetable
21 Flavors, Ch. 36 p. 693 (2010). The content of sugars, mainly glucose and fructose,
22 and its ratio to the content of acids, such as citric and malic acid, determine the
23 sweetness of fruits. *Id.*

24 21. Malic Acid (C₄H₆O₅) is the common name for 1-hydroxy-1, 2-
25 ethanedicarboxylic acid. Malic Acid has two isomers, or different arrangements of
26 atoms in the molecule, L-Malic Acid, and D-Malic Acid. 21 C.F.R. § 184.1069. L-
27 Malic Acid *occurs naturally* in various fruits. *Id.* (Emphasis added). D-Malic Acid
28

1 *does not occur naturally. Id* (emphasis added). D-Malic Acid is most commonly
2 found in a Racemic Mixture, DL-Malic Acid, which is commercially made from
3 petroleum products.

4 22. An isomer is a molecule sharing the same atomic make up as another
5 but differing in structural arrangements. Dan Chong and Johnathan Mooney,
6 *Chirality and Stereoisomers*, (2019).¹ Stereoisomers contain different types of
7 isomers each with distinct characteristics that separate each other as different
8 chemical entities with different chemical properties. *Id.* Stereoisomers differ from
9 each other by spatial arrangement, meaning different atomic particles and molecules
10 are situated differently in any three-dimensional direction by even one degree. *Id.*
11 Enantiomers are a type of stereoisomer that are mirror-images and cannot be
12 superimposed. *Id.* It can be helpful to think of enantiomers as right-hand and left-
13 hand versions of the same molecular formula. D-Malic Acid and L-Malic Acid are
14 enantiomers.

15 23. The following are skeletal formulas of the enantiomers D-Malic Acid
16 and L-Malic Acid:

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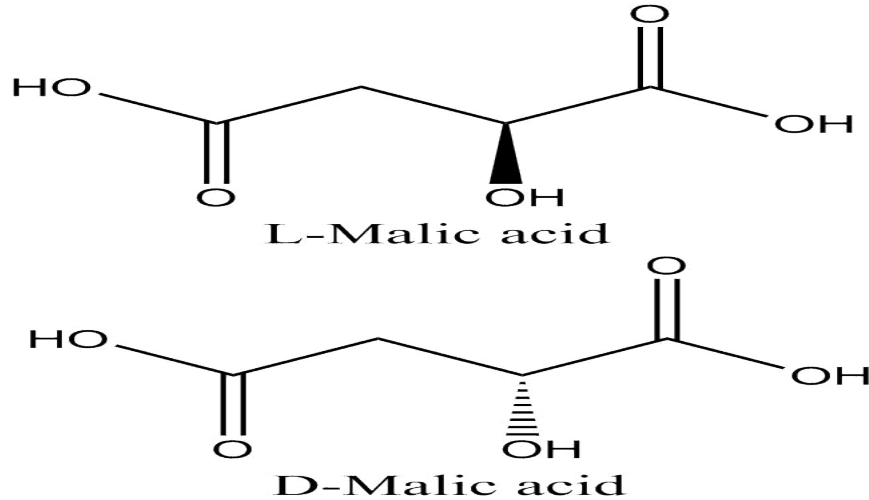
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[https://chem.libretexts.org/Bookshelves/Organic_Chemistry/Supplemental_Modules_\(Organic_Chemistry\)/Chirality/Chirality_and_Stereoisomers](https://chem.libretexts.org/Bookshelves/Organic_Chemistry/Supplemental_Modules_(Organic_Chemistry)/Chirality/Chirality_and_Stereoisomers).



24. Sweetness and tartness are important contributors to the states and flavor perception of fruit juices. Hui, et. al., Handbook of Fruit and Vegetable Flavors, Ch. 24 p. 455 (2010). Organic acids such as Malic Acid in apples and pears, and Tartaric and Malic Acid in grapes, contribute to the tartness of the juices. *Id.* The **sugar to acid ratio** have a **great impact** on the perceived sweetness and tartness of fruit juices, as well as the flavor perception and balance, and overall consumer acceptability. *Id.* (emphasis added).

25. Malic Acid is a key organic acid in the flavors of many fruits as is evidence by its high concentration in those fruits. The following are charts depicting the concentration of Malic Acid in the characterizing fruit flavors of Defendant's products:

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² The only structural difference between D-Malic Acid and L-Malic Acid is that one Hydroxide (OH⁻) is attached to each different enantiomer at a different angle. The solid cone and the dashed-line cone represent the stereochemical differences. Straight lines represent bonds on the same plane as the paper, solid cones represent bonds pointed towards the observer, and dashed-line cones represent bonds pointed away from the observer.

Table 8.7. Concentrations of malic acid (MA; mg g⁻¹ FW) in the flesh of some ripe temperate fruits and some leaves and roots. For leaves and roots, nitrate and ammonium refer to the form of nitrogen on which the plants were grown.

Fruits	MA level	Reference
Apple	4.8–14.7	Fuleki <i>et al.</i> 1994
Blackberry	0.5–6.0	Wrolstad <i>et al.</i> 1980
Blueberry (highbush)	0.47–0.50	Markakis <i>et al.</i> 1963
Blueberry (lowbush)	5.0	Kalt and McDonald 1996
Cherry (sweet)	5.0–8.5	Girard and Kopp 1998
Cherry (sweet)	8.5–10	Kelebek and Selli 2011
Cherry (sweet)	6.3–14	Ballistreri <i>et al.</i> 2013
Citrus (orange)	0.6–2.0	Ting and Attaway 1971
Citrus (tangerine)	1.8–2.1	Ting and Attaway 1971
Citrus (grapefruit)	0.4–0.6	Ting and Attaway 1971
Citrus (lemon)	1.7–2.6	Ting and Attaway 1971
Citrus (lime)	2.0	Ting and Attaway 1971
Currant (black)	0.7–1.7	Rodriguez <i>et al.</i> 1992
Currant (red)	0.5–2.1	Rodriguez <i>et al.</i> 1992
Currant (red)	0.3–0.5	Nour <i>et al.</i> 2011
Currant (white)	0.4	Rodriguez <i>et al.</i> 1992
Peach	8.0	Byrne <i>et al.</i> 1991
Peach	2.0–7.0	Dirlwanger <i>et al.</i> 1999
Pear	1.6–2.0	Drake and Eisele 1999
Plum (damson)	7.0	García-Mariño <i>et al.</i> 2008
Plum (European)	20.0	Lombardi-Boccia <i>et al.</i> 2004
Plum (Japanese)	7.6–15.9	Robertson <i>et al.</i> 1992
Plum (Japanese)	8.0–10.0	Singh <i>et al.</i> 2009
Raspberry	0.14–1.7	Rodriguez <i>et al.</i> 1992
Strawberry	1.5–2.8	Moing <i>et al.</i> 2001
Leaves		
Tobacco (nitrate)	11.0	Pucher and Vickery 1949
Tobacco (ammonium)	0.8	Pucher and Vickery 1949
Barley (nitrate)	4.3	Kandlbinder <i>et al.</i> 1997
Barley (ammonium)	0.3	Kandlbinder <i>et al.</i> 1997
Roots		
Barley (nitrate)	<0.13	Kandlbinder <i>et al.</i> 1997
Barley (ammonium)	<0.13	Kandlbinder <i>et al.</i> 1997

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³ Robert Walker and Franco Famiani, *Horticultural Reviews, Organic Acids in Fruits*, (Vol. 45, Ch. 8 2018).

Table I. Acids Naturally Present in Fruits

Fruit	Predominant Acid	Secondary Acids
Apple	Malic Acid (95%*)	Tartaric Acid, Fumaric Acid
Apricot	Malic Acid (70%*)	Citric Acid, Tartaric Acid
Cherry	Malic Acid (94%*)	Tartaric Acid
Grape	Malic Acid (60%*)	Tartaric Acid
Grapefruit	Citric Acid	Malic Acid
Guava	Citric Acid	Malic Acid
Lime, Lemon	Citric Acid	Malic Acid
Mango	Citric Acid	Malic Acid, Tartaric Acid
Orange	Citric Acid	Malic Acid
Peach	Malic Acid (73%*)	Citric Acid
Pear	Malic Acid (77%*)	Citric Acid
Pineapple	Citric Acid	Malic Acid
Raspberry	Citric Acid	Malic Acid, Tartaric Acid
Strawberry	Citric Acid	Malic Acid, Tartaric Acid
Tamarind	Tartaric Acid	Citric Acid, Malic Acid
Watermelon	Malic Acid (99%*)	Fumaric Acid

*% of the total acid in the fruit

For more information: Bartek Ingredients Inc. • 421 Seaman St. • Stoney Creek, Ontario L8E 3J4 • Canada
Tel: (905) 662-3292 • (905) 662-1127 • Order desk: 1-800-263-4165 • Fax: (905) 662-8849
www.bartek.on.ca • sales@bartek.on.ca

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26. Adding DL-Malic Acid to a fruit juice solution containing L-Malic Acid would change the concentration of Malic Acid in the solution and the ratio of total Malic Acid to sugars in that solution.

27. Natural sugars—like glucose, fructose, and sucrose—combined with artificial DL-Malic Acid in a ratio engineered to resemble the natural chemical combination of sugar and L-Malic Acid found in the characterizing fruits of Defendant's products does not equal the natural flavor of those characterizing fruits. Likewise, a natural chemical combination of sugar and L-Malic Acid altered by adding artificial DL-Malic Acid is no longer the original chemical combination of sugar and L-Malic Acid and therefore no longer the natural flavor.

28. Irrespective of the purpose Defendant claims DL-Malic Acid was

⁴ Daniel Sortwell and Anne Woo, *Improving the Flavor of Fruit Products with Acidulants*, p. 1 (1996), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.548.4424&rep=rep1&type=pdf>

1 added to its products, DL-Malic Acid has the same effect on the fruit flavors.
2 Defendant does not have the ability to command DL-Malic Acid to only perform
3 certain functions, and Defendant should not be allowed to decide which Malic Acid
4 constitutes flavor and which Malic Acid constitutes only a flavor enhancer or Ph
5 balancer.

6 29. Defendant includes DL-Malic Acid to help make its products taste more
7 like apple.

8 30. Defendant had the option to add naturally extracted L-Malic Acid to
9 its products, or to add a naturally manufactured acid such as Citric Acid to its
10 products, but it instead intentionally used artificial DL-Malic Acid because it was
11 likely cheaper.

12 31. Wine and Cider beverages containing less than 7% alcohol by volume
13 are subject to the labeling requirements of the Federal Food, Drug, and Cosmetic
14 Act (“FFDCA”), labeling requirements. CPG Sec. 510.450.

15 32. The Sherman Food, Drug, and Cosmetic Act (“SFDCA”) incorporates
16 all food additive regulations of the Federal Food, Drug, and Cosmetic Act. Cal.
17 Health & Safety Code § 110100.

18 33. Under the Federal Food, Drug, and Cosmetic Act (“FFDCA”), artificial
19 flavor is defined as “any substance, the function of which is to impart flavor, which
20 is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible
21 yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs,
22 dairy products, or fermentation products thereof.” 21 C.F.R § 101.22(a)(1).

23 34. DL-Malic Acid is not derived from a spice, fruit or fruit juice, vegetable
24 or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material,
25 meat, fish, poultry, eggs, dairy products, or fermentation products thereof.

26 35. A combination of sugar and DL-Malic Acid in a ratio resembling a fruit
27 flavor cannot be derived from a spice, fruit or fruit juice, vegetable or vegetable
28

1 juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish,
2 poultry, eggs, dairy products, or fermentation products thereof.

3 36. Likewise, a combination of sugar, natural L-Malic Acid, and artificial
4 DL-Malic Acid combined in a way to resemble the natural ratio of sugar and L-
5 Malic Acid found in the characterizing fruits of Defendant's products cannot be
6 derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast,
7 herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy
8 products, or fermentation products thereof.

9 37. A combination of sugars and artificial DL-Malic Acid engineered to
10 resemble the natural ratio of sugars and natural L-Malic Acid that make up the
11 natural flavor of the characterizing fruit of Defendants' products is not a natural
12 flavor. Put more simply, the natural flavor of the fruits in controversy is heavily
13 dependent on a specific ratio of sugar and L-Malic Acid, while Defendants flavors
14 depend upon a ratio of sugar and DL-Malic Acid.

15 38. Under the FFDCA, a flavor enhancer is a substance "added to
16 supplement, enhance, or modify the original taste and or aroma of a food without
17 imparting a characteristic taste or aroma of its own." 21 C.F.R. § 170.3(o)(11).

18 39. Under the FFDCA, PH balancers are "substances added to change or
19 maintain active acidity or basicity, including buffers, acids, alkalis, and neutralizing
20 agents." 21 C.F.R. § 170.3(o)(23).

21 40. DL-Malic Acid under other circumstances could function as a flavor
22 enhancer or PH balancer, such as when Malic Acid is not a core component of the
23 natural flavor of the food. For example, Malic Acid added to vinegar (Asctic Acid)
24 dishes like barbecue pork, coleslaw, or pickled eggs would most likely not
25 fundamentally alter the underlying vinegar flavors.

26 41. Under the circumstances in this case, artificial DL-Malic Acid
27 fundamentally alters the original combination of sugar and natural L-Malic Acid
28

1 core to apple flavors, so that the flavor of the Products are no longer a natural
2 combination of sugar and L-Malic Acid but instead are an artificial combination of
3 sugar and DL-Malic Acid.

4 42. Under the FFDCA, a primary flavor identified on the front of a food
5 product label is referred to as a “characterizing flavor.” 21 C.F.R. § 101.22.

6 43. The FFDCA further defines a “characterizing flavor” as flavors
7 identified by “... labeling, or advertising of a food [making] any direct or indirect
8 representations with respect to the primary recognizable flavor, by word, vignette,
9 e.g., depiction of a fruit or other means.” 21 C.F.R. § 101.22(i).

10 44. If the food products contain any artificial flavor that simulates,
11 resembles or reinforces the characterizing flavor, the name of the characterizing
12 flavor “shall be accompanied by the word(s) ‘artificial’ or ‘artificially flavored’...
13 e.g., ‘artificial vanilla’, ‘artificially flavored strawberry’, or ‘grape artificially
14 flavored.’ 21 C.F.R. § 101.22(i)(2).

15 45. Under the SFDC A, a food is misbranded if its labeling is false or
16 misleading in any particular, including if it contains any artificial flavoring, coloring,
17 or chemical preservative, unless it bears labeling stating that fact. Cal. Health &
18 Safety Code § 110660; Cal. Health & Safety Code § 110740.

19 46. The following are examples of the Products’ labeling that explicitly
20 violate FFDCA and SFDC A regulations:

21 ///

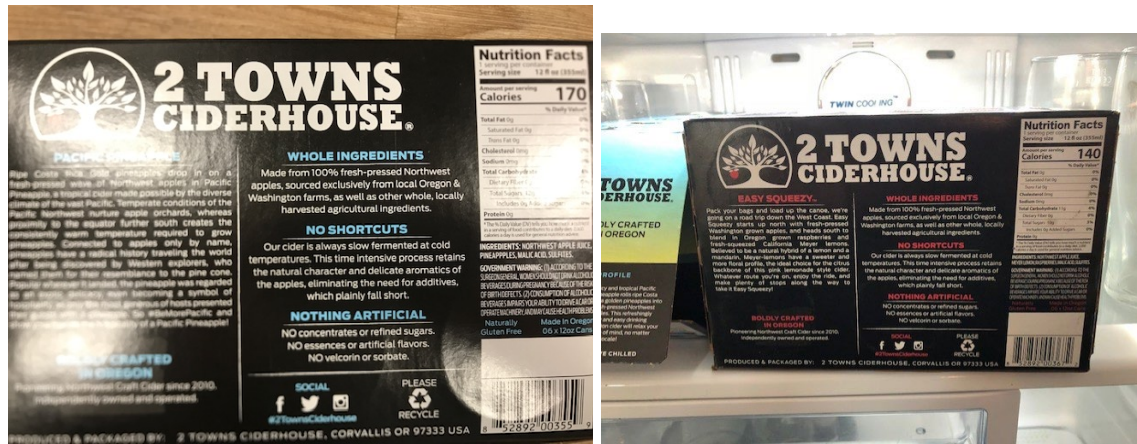
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47. The Products’ apple flavors containing DL-Malic Acid resemble the natural characterizing apple flavors Defendant claims are in its products.

48. Plaintiffs purchased Defendant’s products because Defendant’s packaging claims that their products do not contain artificial flavors.

49. Plaintiffs would not have been able to understand that the Products contained artificial flavoring without an advanced understanding of organic chemistry and without performing chemical analysis on the Products.

50. Furthermore, due to Defendant’s intentional, deceitful practice of falsely labeling the Products as containing no artificial flavors, Plaintiffs could not have known that the Products contained artificial flavors.

51. Plaintiffs were unaware that the Products contained artificial DL-Malic Acid when he purchased them.

52. Plaintiffs and the Class were deceived into paying money for products they did not want because the Products were labeled as containing “Nothing Artificial: NO concentrates or refined sugars; NO essences or artificial flavors; NO velcorin or sorbate.”

53. Worse than the lost money, Plaintiffs and the Class were deprived of their protected interest to choose the foods and ingredients they ingest.

54. Plaintiffs and the Class members, are not, and should not be, required to chemically test the food products they purchase to know the true contents of those

1 products.

2 55. Defendant, and not Plaintiffs or the Class, knew or should have known
3 that the Products’ express labeling stating “no artificial flavors” was false, deceptive,
4 and misleading, and that Plaintiffs and the Class members would not be able to tell
5 the Products’ contained artificial DL-Malic Acid unless Defendant expressly told
6 them, as required by law.

7 56. Defendant employs professional chemists or brewers to create the
8 chemical flavor formulas of Defendant’s products. Therefore, Defendant through its
9 employees knew or should have known that DL-Malic Acid is not naturally
10 occurring, and that by adding DL-Malic Acid to its products the natural flavoring
11 would be fundamentally changed.

12 57. Defendant intentionally labeled its products as containing “Nothing
13 Artificial: NO concentrates or refined sugars; NO essences or artificial flavors; NO
14 velcorin or sorbate” to capitalize on consumers growing interest in high quality
15 products. Defendant also advertises on its website that its products do not contain
16 “Artificial ‘apple’ and other flavorings, sugar and Carmel color added to attempt to
17 restore the look & flavor of a hard cider.”⁵

18 58. On information and belief, Defendant through its employees did know
19 that DL-Malic Acid was not naturally occurring and would fundamentally alter any
20 natural combination of sugar and L-Malic Acid in its products, but chose to include
21 DL-Malic Acid because it was cheaper for Defendant than using natural L-Malic
22 Acid and because it did not believe its customers were well educated enough to know
23 the difference.

24 59. As a result of Defendant’s acts and omissions outlined above, Plaintiffs
25 have suffered concrete and particularized injuries and harm, which include, but are

26
27 ⁵ <https://2townsciderhouse.com/ourmission/quality/>

1 not limited to, the following:

- 2 a. Lost money;
- 3 b. Wasting Plaintiff's time; and
- 4 c. Stress, aggravation, frustration, loss of trust, loss of serenity, and
5 loss of confidence in product labeling.

6 **CLASS ALLEGATIONS**

7 60. Plaintiffs bring this action on behalf of themselves and all others
8 similarly situated, as members of the proposed class (the "Class"), defined as
9 follows:

10 All persons within the United States who purchased the following 2 Towns
11 Products as consumers within four years prior to the filing of the original
12 Complaint until the date of Preliminary Approval: Bright Cider; Easy
13 Squeezy; Pacific Pineapple; Made Marion; Ginja Ninja; Outcider, Bad
14 Apple, Cherried Away, Cot in the Act, Sun's Out Saison, Nice & Naughty,
15 Rhubarbarian, Pearadise, Prickly Pearadise, Serious Scrump, and Imperial
16 Hop & Stalk.⁶

17
18 61. Defendants, their employees and agents are excluded from the Class.
19 Plaintiff does not know the number of members in the Class, but believes the
20 members number in the thousands, if not more. Thus, this matter should be certified
21 as a Class Action to assist in the expeditious litigation of the matter.

22 62. The Class is so numerous that the individual joinder of all of their
23 members is impractical. While the exact number and identities of their members are
24 unknown to Plaintiff at this time and can only be ascertained through appropriate
25

26 ⁶ The Class Period is from March 12, 2016 through the date that the Court grants
27 preliminary approval of the Settlement.
28

1 discovery, Plaintiff is informed and believes and thereon alleges that the Class
2 includes thousands, if not millions of members. Plaintiff alleges that the class
3 members may be ascertained by the records maintained by Defendant.

4 63. This suit is properly maintainable as a class action pursuant to Fed. R.
5 Civ. P. 23(a) because the Class are so numerous that joinder of their members is
6 impractical and the disposition of their claims in the Class Action will provide
7 substantial benefits both to the parties and the Court.

8 64. There are questions of law and fact common to the Class affecting the
9 parties to be represented. The questions of law and fact common to the Class
10 predominate over questions which may affect individual class members and include,
11 but are not necessarily limited to, the following:

- 12 a. Whether the Defendant intentionally, negligently, or recklessly
13 disseminated false and misleading information by including the
14 statement “Nothing Artificial: NO concentrates or refined
15 sugars; NO essences or artificial flavors; NO velcorin or sorbate”
16 on the Products’ packaging;
- 17 b. Whether the Class members were informed of the artificial
18 nature of the ingredients in the Products;
- 19 c. Whether the Products contain artificial flavoring;
- 20 d. Whether Defendant’s conduct was unfair and deceptive;
- 21 e. Whether Defendant unjustly enriched itself as a result of the
22 unlawful conduct alleged above;
- 23 f. Whether the statement “Nothing Artificial: NO concentrates or
24 refined sugars; NO essences or artificial flavors; NO velcorin or
25 sorbate” is misleading or false;
- 26 g. Whether there should be a tolling of the statute of limitations;
27 and

1 70. Plaintiffs' claims and injuries are identical to the claims and injuries of
2 all Class members, because all claims and injuries of all class members are based on
3 the same false labeling, same addition of DL-Malic Acid to apple flavored products,
4 and same legal theory. All allegations arise from the identical, false, affirmative
5 written statements made by Defendants when they claimed the Products contained
6 "Nothing Artificial: NO concentrates or refined sugars; NO essences or artificial
7 flavors; NO velcorin or sorbate," when in reality the Products contained a
8 combination of sugars and artificial DL-Malic Acid engineered to resemble the
9 natural ratio of sugars and natural L-Malic Acid of the apple flavors in controversy.

10 71. Defendants have acted or refused to act in respect generally applicable
11 to the Class thereby making appropriate final and injunctive relief with regard to the
12 members of the Class as a whole.

13 72. The size and definition of the Class can be identified through records
14 held by retailers carrying and reselling the Products, and by Defendant's own
15 records.

16 **FIRST CAUSE OF ACTION**
17 **Violation of the California False Advertising Act**
18 **(Cal. Bus. & Prof. Code §§ 17500 *et seq.*)**

19 72. Plaintiffs incorporates by reference each allegation set forth above.

20 73. Pursuant to California Business and Professions Code section 17500,
21 *et seq.*, it is unlawful to engage in advertising "which is untrue or misleading, and
22 which is known, or which by the exercise of reasonable care should be known, to
23 be untrue or misleading...or...to so make or disseminate or cause to be so made or
24 disseminated any such statement as part of a plan or scheme with the intent not to
25 sell that personal property or those services, professional or otherwise, so
26 advertised at the price stated therein, or as so advertised."

27 74. California Business and Professions Code section 17500, *et seq.*'s
28

1 prohibition against false advertising extends to the use of false or misleading
2 written statements.

3 75. Defendant misled consumers by making misrepresentations and
4 untrue statements about the Products, namely, Defendant sold the Products
5 advertised to have “Nothing Artificial: NO concentrates or refined sugars; NO
6 essences or artificial flavors; NO velcorin or sorbate” fully knowing the Products
7 contained D-Malic Acid, and made false representations to Plaintiff and other
8 putative Class members in order to solicit these transactions.

9 76. Specifically, Defendant wrote on the packages of these Products that
10 they contained “Nothing Artificial: NO concentrates or refined sugars; NO
11 essences or artificial flavors; NO velcorin or sorbate.”

12 77. Defendant knew that their representations and omissions were untrue
13 and misleading, and deliberately made the aforementioned representations and
14 omissions in order to deceive reasonable consumers like Plaintiff Winters and other
15 Class members.

16 78. As a direct and proximate result of Defendant’s misleading and false
17 advertising, Plaintiff Winters and the other Class members have suffered injury in
18 fact and have lost money or property. Plaintiff Winters reasonably relied upon
19 Defendant’s representations regarding the Products, namely that they contained
20 “No Artificial Flavors”. In reasonable reliance on Defendant’s false
21 advertisements, Plaintiff Winters and other Class members purchased the Products.
22 In turn Plaintiff Winters and other Class ended up with cider products that turned
23 out to actually be different than advertised, and therefore Plaintiff Winters and
24 other Class members have suffered injury in fact.

25 79. Plaintiff Winters alleges that these false and misleading written
26 representations made by Defendant constitute a “scheme with the intent not to sell
27 that personal property or those services, professional or otherwise, so advertised at
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1 the price stated therein, or as so advertised.”

2 80. Defendant advertised to Plaintiff Winters and other putative class
3 members, through written representations and omissions made by Defendant and
4 its employees, that the Products would contain “Nothing Artificial: NO
5 concentrates or refined sugars; NO essences or artificial flavors; NO velcorin or
6 sorbate.”

7 81. Defendant knew that the Products did in fact contain D-Malic Acid.

8 82. Thus, Defendant knowingly sold the Products to Plaintiff Winters and
9 other putative Class members that contained artificial flavors contrary to the
10 Products’ packaging.

11 83. The misleading and false advertising described herein presents a
12 continuing threat to Plaintiff Winters and the Class members in that Defendant
13 persists and continues to engage in these practices and will not cease doing so
14 unless and until forced to do so by this Court. Defendant’s conduct will continue
15 to cause irreparable injury to consumers unless enjoined or restrained. Plaintiff
16 Winters is entitled to preliminary and permanent injunctive relief ordering
17 Defendant to cease their false advertising, as well as disgorgement and restitution
18 to Plaintiff Winters and all Class members of Defendant’s revenues associated with
19 their false advertising, or such portion of those revenues as the Court may find
20 equitable.

21 **SECOND CAUSE OF ACTION**
22 **Violation of Unfair Business Practices Act**
23 **(Cal. Bus. & Prof. Code §§ 17200 *et seq.*)**

24 84. Plaintiffs incorporates by reference each allegation set forth above.

25 85. Actions for relief under the unfair competition law may be based on
26 any business act or practice that is within the broad definition of the UCL. Such
27 violations of the UCL occur as a result of unlawful, unfair or fraudulent business
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1 acts and practices. A plaintiff is required to provide evidence of a causal
2 connection between a defendant's business practices and the alleged harm--that is,
3 evidence that the defendant's conduct caused or was likely to cause substantial
4 injury. It is insufficient for a plaintiff to show merely that the defendant's conduct
5 created a risk of harm. Furthermore, the "act or practice" aspect of the statutory
6 definition of unfair competition covers any single act of misconduct, as well as
7 ongoing misconduct.

8 UNFAIR

9 86. California Business & Professions Code § 17200 prohibits any “unfair
10 ... business act or practice.” Defendant’s acts, omissions, misrepresentations, and
11 practices as alleged herein also constitute “unfair” business acts and practices
12 within the meaning of the UCL in that its conduct is substantially injurious to
13 consumers, offends public policy, and is immoral, unethical, oppressive, and
14 unscrupulous as the gravity of the conduct outweighs any alleged benefits
15 attributable to such conduct. There were reasonably available alternatives to
16 further Defendant’s legitimate business interests, other than the conduct described
17 herein. Plaintiffs reserve the right to allege further conduct which constitutes other
18 unfair business acts or practices. Such conduct is ongoing and continues to this
19 date.

20 87. In order to satisfy the “unfair” prong of the UCL, a consumer must
21 show that the injury: (1) is substantial; (2) is not outweighed by any countervailing
22 benefits to consumers or competition; and, (3) is not one that consumers themselves
23 could reasonably have avoided.

24 88. Here, Defendant’s conduct has caused and continues to cause
25 substantial injury to Plaintiff and members of the Class. Plaintiff Winters and
26 members of the Class have suffered injury in fact due to Defendant’s decision to
27 sell them misbranded cider products (the Products). Thus, Defendant’s conduct has
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1 caused substantial injury to Plaintiff Winters and the members of the Class.

2 89. Moreover, Defendant's conduct as alleged herein solely benefits
3 Defendant while providing no benefit of any kind to any consumer. Such deception
4 utilized by Defendant convinced Plaintiff Winters and members of the Class that
5 the Class Products contained "No Artificial Flavors", in order to induce them to
6 spend money on said Class Products. In fact, knowing that Class Products, by their
7 objective terms contained artificial flavors, unfairly profited from their sale, in that
8 Defendant knew that the expected benefit that Plaintiff Winters would receive from
9 this feature is nonexistent, when this is typically never the case in situations
10 involving flavors said to be contained with a product. Thus, the injury suffered by
11 Plaintiff and the members of the Class is not outweighed by any countervailing
12 benefits to consumers.

13 90. Finally, the injury suffered by Plaintiff Winters and members of the
14 Class is not an injury that these consumers could reasonably have avoided. After
15 Defendant, falsely represented that the Products would contain "No Artificial
16 Flavors", Plaintiff Winters, Class Members suffered injury in fact due to
17 Defendant's sale of the Products to them. Defendant failed to take reasonable steps
18 to inform Plaintiff Winters and Class and California members that the the Products
19 contained artificial flavors, including intentionally misbranding the Products by
20 labeling them as containing "Nothing Artificial: NO concentrates or refined sugars;
21 NO essences or artificial flavors; NO velcorin or sorbate." As such, Defendant
22 took advantage of Defendant's position of perceived power in order to deceive
23 Plaintiff Winters and Class and California members to purchase drink products
24 containing artificial flavors. Therefore, the injury suffered by Plaintiff Winters and
25 Class members is not an injury which these consumers could reasonably have
26 avoided.

27 91. Thus, Defendant's conduct has violated the "unfair" prong of
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1 California Business & Professions Code § 17200.

2 **FRAUDULENT**

3 92. California Business & Professions Code § 17200 prohibits any
4 “fraudulent ... business act or practice.” In order to prevail under the “fraudulent”
5 prong of the UCL, a consumer must allege that the fraudulent business practice
6 was likely to deceive members of the public.

7 93. The test for “fraud” as contemplated by California Business and
8 Professions Code § 17200 is whether the public is likely to be deceived. Unlike
9 common law fraud, a § 17200 violation can be established even if no one was
10 actually deceived, relied upon the fraudulent practice, or sustained any damage.

11 94. Here, not only were Plaintiff Winters and the Class members likely to
12 be deceived, but these consumers were actually deceived by Defendant. Such
13 deception is evidenced by the fact that Plaintiff Winters agreed to purchase the
14 Products under the basic assumption that they contained “No Artificial Flavors”
15 even though the Products contained DL-Malic Acid. Plaintiff Winters’ reliance
16 upon Defendant’s deceptive statements is reasonable due to the unequal bargaining
17 powers of Defendant and Plaintiff Winters. For the same reason, it is likely that
18 Defendant’s fraudulent business practice would deceive other members of the
19 public.

20 95. As explained above, Defendant deceived Plaintiff Winters and other
21 Class Members by representing the Class Products as containing “No Artificial
22 Flavors” when the Products contained DL-Malic Acid.

23 96. Thus, Defendant’s conduct has violated the “fraudulent” prong of
24 California Business & Professions Code § 17200.

25 **UNLAWFUL**

26 97. California Business and Professions Code Section 17200, et seq.
27 prohibits “any unlawful...business act or practice.”
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1 98. As explained above, Defendant deceived Plaintiff and other Class
2 Members by representing the Class Products as containing “Nothing Artificial: NO
3 concentrates or refined sugars; NO essences or artificial flavors; NO velcorin or
4 sorbate” when the Products contained DL-Malic Acid.

5 99. Defendant used false advertising, marketing, and misrepresentations
6 to induce Plaintiff Winters and the Class Members to purchase the Products, in
7 violation of California Business and Professions Code Section 17500, *et seq.* Had
8 Defendant not falsely advertised, marketed or misrepresented the Class Products,
9 Plaintiff Winters and the Class Members would not have purchased the Products.
10 Defendant’s conduct therefore caused and continues to cause economic harm to
11 Plaintiff Winters and the Class Members.

12 100. These representations by Defendant are therefore an “unlawful”
13 business practice or act under Business and Professions Code Section 17200 *et seq.*

14 101. Defendant has thus engaged in unlawful, unfair, and fraudulent
15 business acts entitling Plaintiff Winters and the Class Members to judgment and
16 equitable relief against Defendant, as set forth in the Prayer for Relief.
17 Additionally, pursuant to Business and Professions Code section 17203, Plaintiff
18 Winters and the Class Members seek an order requiring Defendant to immediately
19 cease such acts of unlawful, unfair, and fraudulent business practices and requiring
20 Defendant to correct its actions.

21 **THIRD CAUSE OF ACTION**
22 **Violations of Consumer Legal Remedies Act**
23 **Cal. Civ. Code § 1750, *et seq.***

24 102. Plaintiffs incorporates by reference each allegation set forth above.

25 103. Defendant’s actions as detailed above constitute a violation of the
26 Consumer Legal Remedies Act, Cal. Civ. Code §1770, to the extent that Defendant
27 violated the following provisions of the CLRA:
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- 1 a. Representing that goods or services have sponsorship, approval,
2 characteristics, ingredients, uses, benefits, or quantities which
3 they do not have or that a person has a sponsorship, approval,
4 status, affiliation, or connection which he or she does not have;
5 Cal. Civ. Code § 1770(5);
- 6 b. Representing that goods or services are of a particular standard,
7 quality, or grade, or that goods are of a particular style or model,
8 if they are of another; Cal. Civ. Code § 1770(7);
- 9 c. Advertising goods or services with intent not to sell them as
10 advertised; Cal. Civ. Code §1770(9);
- 11 d. Representing that a transaction confers or involves rights,
12 remedies, or obligations which it does not have or involve, or
13 which are prohibited by law; Cal. Civ. Code §1770(14); and
- 14 e. Representing that the subject of a transaction has been supplied
15 in accordance with a previous representation when it has not;
16 Cal. Civ. Code §1770(16);

17 104. On or about April 9, 2020, through his Counsel of record, using
18 certified mail with a return receipt requested, Plaintiff Winters served Defendant
19 with notice of its violations of the CLRA, and asked that Defendant correct, repair,
20 replace, or otherwise rectify the goods and services alleged to be in violation of the
21 CLRA; this correspondence advised Defendant that it must take such action within
22 thirty (30) calendar days, and pointed Defendant to the provisions of the CLRA
23 that Plaintiff believes to have been violated by Defendant. Defendant has not
24 replied to this notice letter with a letter dated May 9, 2020, and thus refused to
25 adequately correct, repair, replace, or otherwise rectify the issues raised therein.

26 **FOURTH CAUSE OF ACTION**
27 **Violations of Illinois Consumer Fraud and Deceptive Business Practices Act**

815 ILCS 505/1, et seq.

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2 105. Plaintiffs incorporate by reference each allegation set forth above.

3 106. Plaintiff Gruber is a “person” as defined in 815 ILCS 505/1(c), as he is a
4 natural person.

5 107. Defendant is a “person” as defined in 815 ILCS 505/1(c), as it is a
6 company and a business entity and/or association.

7
8 108. 815 ILCS 505/2 states:

9 Unfair methods of competition and unfair or deceptive
10 acts or practices, including but not limited to the use or
11 employment of any deception fraud, false pretense, false
12 promise, misrepresentation or the concealment,
13 suppression or omission of any material fact, with intent
14 that others rely upon the concealment, suppression or
15 omission of such material fact, or the use or employment
16 of any practice described in Section 2 of the “Uniform
17 Deceptive Trade Practices Act”, approved August 5, 1965,
in the conduct of any trade or commerce are hereby
declared unlawful whether any person has in fact been
misled, deceived or damaged thereby.

18 109. Through its representation that the Products contain no artificial flavors,
19 Defendant made false promises, misrepresentations, concealments, suppressions and
20 omissions of material facts, with the intent that Plaintiff Gruber and the Class
21 Members relied upon said false promises, misrepresentations, concealments,
22 suppressions and omissions of material facts.

23 110. 815 ILCS 505/10a states:

24 (a) Any person who suffers actual damage as a result of a
25 violation of this Act committed by any other person may
26 bring an action against such person. The court, in its
27 discretion may award actual economic damages or any
28 other relief which the court deems proper...

1 (c) [T]he Court may grant injunctive relief where
2 appropriate and may award, in addition to the relief
3 provided in this Section, reasonable attorney's fees and
4 costs to the prevailing party.

5 111. In taking the actions and omissions set forth above, and making the false
6 promises, misrepresentations, concealments, suppressions and omissions of material
7 facts set forth above, Defendant violated the Illinois Consumer Fraud and Deceptive
8 Business Practices Act, including, but not limited to 815 ILCS 505/2.

9 112. By reason thereof, Plaintiff Gruber and the Class Members are entitled
10 to a judgment against Defendant, declaring that Defendant's conduct violated 815
11 ILCS 505/2, enjoining Defendant from engaging in similar conduct in the future,
12 and awarding actual damages, punitive damages, injunctive relief, costs and
13 attorneys' fees.

14 MISCELLANEOUS

15 113. Plaintiffs and the Class Members allege that they have fully complied
16 with all contractual and other legal obligations and fully complied with all
17 conditions precedent to bringing this action or all such obligations or conditions
18 are excused.

19 REQUEST FOR JURY TRIAL

20 114. Plaintiffs request a trial by jury as to all claims so triable.

21 PRAYER FOR RELIEF

22 115. Plaintiffs, on behalf of themselves and the Class, request the following
23 relief:

- 24 a. An order certifying the Class and appointing Plaintiffs as
25 Representatives of the Class.
- 26 b. An order certifying the undersigned counsel as Class;
- 27 c. An order requiring TWO TOWNS CIDER HOUSE, INC., at its
28 own cost, to notify all Class Members of the unlawful and

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PROOF OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause. On June 13, 2020, I served a true copy of the FIRST AMENDED COMPLAINT on all counsel of record via the ECF Filing System:
Executed on June 13, 2020, at Woodland Hills, CA

I hereby certify that I am a member of the Bar of the United States District Court, Southern District of California.

I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

I hereby certify under the penalty of perjury that the foregoing is true and correct.

By: /s/ Todd M. Friedman
TODD M. FRIEDMAN, ESQ.
ATTORNEY FOR PLAINTIFF