

CLARKSON LAW FIRM, P.C.

Ryan J. Clarkson (SBN 5786967)
rclarkson@clarksonlawfirm.com
Timothy K. Giordano (SBN 4091260)
tgiordano@clarksonlawfirm.com
Bahar Sodaify (*pro hac vice*)
bsodaify@clarksonlawfirm.com
Zachary T. Chrzan (*pro hac vice*)
zchrzan@clarksonlawfirm.com
555 Madison Ave., 5th Fl.
New York, NY 10022
Tel: (213) 788-4050
Fax: (213) 788-4070

Counsel for Plaintiffs

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

AMIT HEZI, JOSEPH NINA, and DANIEL
PRESCOD, and individually and on behalf of all
others similarly situated,

Plaintiffs,

vs.

CELSIUS HOLDINGS, INC.,

Defendant.

Case No. 1:21-cv-09892-VM

FIRST AMENDED COMPLAINT

DEMAND FOR JURY TRIAL

Plaintiffs Amit Hezi, Joseph Nina, and Daniel Prescod, (“Plaintiffs”), each individually and each on behalf of all others similarly situated, bring this first amended complaint against Celsius Holdings, Inc. (“Defendant” and/or “Celsius”) and alleges as follows:

SUMMARY OF THE ACTION

1. This is a class action lawsuit brought on behalf of all purchasers of Celsius beverages (the “Product(s)”), sold online and at retail outlets, in grocery stores, and through other channels throughout the United States. Plaintiffs seek damages, restitution, and injunctive relief on behalf of a Nationwide Class and, as necessary, New York and California Consumer Subclasses, of consumers who purchased the Product which was falsely labeled and advertised as explained herein.

2. The Product comes in a number of varieties and flavors, including, but not limited to original Celsius beverages (at times labeled “Celsius Live Fit”), Celsius Heat, Celsius BCAA+Energy, and Celsius with Stevia), as well as Celsius On-The-Go and Flo Fusion powdered drinks.



7. By falsely labeling the Product as having “No Preservatives” and no artificial flavors Defendant has profited from consumers’ preference for food products that are healthier or made free of preservatives and artificial flavors.

PARTIES

8. Plaintiff Amit Hezi (“Plaintiff Hezi”) is, and at all times relevant hereto was, a citizen of New York. Plaintiff Hezi purchased the Product for about \$2 at CVS stores in Manhattan, New York since the Fall of 2020. In making his purchase, Plaintiff Hezi relied upon the claims made on the front label of the Product, including the “No Preservative” claim, which was prepared and approved by Defendant and its agents and disseminated statewide and nationwide, as well as designed to encourage consumers to purchase the Product. If Plaintiff Hezi had known that the Product actually contained a preservative, he would not have purchased the Product.

9. Plaintiff Joseph Nina (“Plaintiff Nina”) is, and at all times relevant hereto was, a citizen of New York. Plaintiff Nina purchased the Product for about \$2 at Rite Aid stores in Manhattan, New York since the Spring of 2021. In making his purchase, Plaintiff Nina relied upon the claims made on the front label of the Product, including the “No Preservative” claim, which was prepared and approved by Defendant and its agents and disseminated statewide and nationwide, as well as designed to encourage consumers to purchase the Product. If Plaintiff Nina had known that the Product actually contained preservatives, he would not have purchased the Product.

10. Plaintiff Daniel Prescod (“Plaintiff Prescod”) is, and at all times relevant hereto was, a citizen of California. Plaintiff Prescod paid approximately \$9.00 for a four-pack of the

Product that he purchased at a retail store in Los Angeles, California in 2018. In making his purchase, Plaintiff Prescod relied upon the claims made on the front label of the Product, including the “No Preservative” claim, which was prepared and approved by Defendant and its agents and disseminated statewide and nationwide, as well as designed to encourage consumers to purchase the Product. If Plaintiff Prescod had known that the Product actually contained preservatives, he would not have purchased the Product.

11. Plaintiffs believed and expected the Product did not contain preservatives and contained only natural flavoring ingredients and did not contain artificial flavoring ingredients because that is what the representations and omissions said and implied.

12. Celsius Holdings, Inc. is a corporation headquartered in Boca Raton, Florida and maintains its principal business office at 2424 North Federal Hwy, Suite 208, Boca Raton, FL 33431. Celsius directly and through its agents, has substantial contacts with and receives substantial benefits and income from and through the States of New York, California, and Nationwide. Celsius is the one of the owners, manufacturers, and distributors of the Products, and is one of the companies that created and/or authorized the false, misleading, and deceptive packaging for the Products.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. section 1332(d) in that (1) this is a class action involving more than 100 class members; (2) Plaintiff Hezi is a citizen of New York and Defendant is a citizen of the State of Florida; and (3) the amount in controversy is in excess of \$5,000,000, exclusive of interests and costs. Plaintiffs have standing to bring this action pursuant to the New York General Business Law

Section 349, *et seq.*; New York General Business Code Section 350, *et seq.*; California Consumers Legal Remedies Act, Civil Code Section 1750, *et seq.*; California False Advertising Law, Business & Professions Code Section 17500, *et seq.*; California Unfair Competition Law, Business & Professions Code Section 17200, *et seq.*; and the common law.

14. Venue is proper in this Court because Plaintiff Hezi and many Class Members reside in the Southern District of New York, and throughout the State of New York. A substantial part of the events or omissions giving rise to the class' claims occurred in this District. Defendant is subject to personal jurisdiction in New York based upon sufficient minimum contacts which exist between it and New York or otherwise did intentionally avail itself of the markets within New York, through its sale of the Products to New York consumers.

15. Defendant and other out-of-state participants can be brought before this Court pursuant to the provisions of.

FACTUAL ALLEGATIONS

16. Defendant advertises and labels that the Product contains “No Preservatives,” and no artificial flavors, thereby misleading reasonable consumers to believe that the Product is free of preservatives and artificial flavors. However, the Product contains a well-known and well-documented preservative and artificial flavor, citric acid.

17. A chemical preservative is defined by the Food and Drug Administration (“FDA”) as “any chemical that, when added to food, tends to prevent or retard deterioration thereof, but does not include common salt, sugars, vinegars, spices, or oils extracted from spices, substances added to food by direct exposure thereof to wood smoke, or chemicals applied for their insecticidal or herbicidal properties.” 21 C.F.R. §101.22(a)(5).

18. An artificial flavor is defined by the FDA as “any substance the function of which is to impart flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy products, or fermentation products thereof.” 21 C.F.R. § 101.22(a)(1).

19. The FDA classifies and identifies citric acid as a preservative in its Overview of Food Ingredients, Additives, and Colors, on the FDA’s website and provides examples of uses of preservatives like citric acid, including, in beverages.¹

20. Citric acid’s classification as a preservative is further confirmed by a Warning Letter sent by the FDA to the manufacturer of Chiquita brand “Pineapple Bites with Coconut” and “Pineapple Bites,” in which the FDA proclaimed the “Pineapple Bites” and “Pineapple Bites with Coconut” products are further misbranded within the meaning of Section 403(k) of the Act [21 U.S.C. 343(k)] in that they contain the chemical preservative ascorbic acid and *citric acid* but their labels fail to declare these preservatives with a description of their functions. 21 CFR 101.22.”²

21. Citric acid acts as a preservative in the Product regardless of the subjective purpose or intent for why Defendant added citric acid to the Product, including, as a flavoring agent.

¹ See FDA website, <https://www.fda.gov/Food/IngredientsPackagingLabeling/FoodAdditivesIngredients/ucm094211.htm>.

² See *Letter to Chiquita Brands Int’l, Inc. and Fresh Express, Inc.*, Archived FDA Warning Letters (2005-2012), <https://web.archive.org/web/20211128074142/https://www.fdalabelcompliance.com/letters/ucm228663>.

22. Even if citric acid can be used as a flavoring agent in the Product, a greater amount of citric acid is needed to act as a flavoring agent than to preserve the Product because citric acid acts as a preservative *even if* very low levels are contained in the Product.³

23. The quantity of citric acid therefore needed to affect the flavor of the Product is more than sufficient to function as a preservative. Accordingly, Defendant's purported intent to use citric acid for flavoring has no bearing on the actual function of citric acid as a preservative.

24. Citric acid in beverages functions as a preservative by serving as an acidulant and as an indirect antioxidant, by infiltrating and then weakening or killing microorganisms through direct antimicrobial effect lowering their pH-level and thereby combatting microorganisms, and through sequestration. Citric acid serves these functions regardless of whether they are also being used as flavorants.⁴

25. Citric acid still acts as a preservative even if it was intended to be used for another purpose. Food and beverage manufacturers, like Defendant, seek to provide consumers with products that are palatable within a given shelf life. To help ensure this, manufacturers impose many hurdles to degradation when formulating a product. Therefore, if an ingredient has a preservative effect, like citric acid, it is considered a preservative because it acts as a hurdle to food degradation regardless of whether it was added to the Product for other reasons.⁵

³ See Doores, S., 1993. Organic acids. In: Davidson, P.M., Branen, A.L. (Eds.), *Antimicrobials in Foods*. Marcel Dekker, Inc., New York, pp. 95-136.

<http://base.dnsgb.com.ua/files/book/Agriculture/Foods/Antimicrobials-in-Food.pdf>.

⁴ See Deman, John M. "Acids as food additives serve a dual purpose, as acidulants and as preservatives." *Principles of food chemistry*. AVI Publishing Co., Inc., 1999, p. 438.

⁵ See Biesta-Peters, E., et al. Comparing Nonsynergistic Gamma Models with Interaction Models To Predict Growth Of Emetic Bacillus Cereus When Using Combinations Of Ph And Individual

26. By representing the Product has “No Preservatives,” Defendant seeks to capitalize on consumers’ preference for less processed products with no preservatives. Indeed, “foods bearing ‘free-from’ claims are increasingly relevant to Americans, as they perceive the products as closely tied to health...84 percent of American free-from consumers buy free-from foods because they are seeking out more natural or less processed foods. In fact, 43 percent of consumers agree that free-from foods are healthier than foods without a free-from claim, while another three in five believe the fewer ingredients a product has, the healthier it is (59 percent). Among the top claims free-from consumers deem most important are trans-fat-free (78 percent) and preservative-free (71 percent).”⁶

27. Consumers are also willing to pay more for the Product with “no preservatives” because of the perceived higher quality, health and safety benefits associated with preservative-free foods. According to Nielsen’s 2015 Global Health & Wellness Survey that polled over 30,000 people online, 80 percent of Americans are willing to pay more for healthier foods.⁷ This, coupled with the fact that global sales of healthy food products reached \$1 trillion in 2017, according to

Undissociated Acids As Growth-Limiting Factors. *Applied and Environmental Microbiology*, American Society for Microbiology, (2010), <https://aem.asm.org/content/aem/76/17/5791.full.pdf>.

⁶ See, *Free-From Food Trends - US - May 2015*, Mintel: World’s Leading Market Intelligence Agency <http://www.mintel.com/press-centre/food-and-drink/84-of-americans-buy-free-from-foods-because-they-believe-them-to-be-more-natural-or-less-processed>.

⁷ See, *We Are What We Eat: Healthy Eating Trends Around the World*, Nielson (Jan. 2015) <https://web.archive.org/web/20150421053626/https://www.nielsen.com/content/dam/nielsen/global/eu/nielseninsights/pdfs/Nielsen%20Global%20Health%20and%20Wellness%20Report%20-%20January%202015.pdf>.

Euromonitor, means consumers are eager and willing to pay more for food advertised and labeled as having “No Preservatives” like the Product.⁸

28. Defendant’s practice of capitalizing on consumers’ preferences for healthier products is false and deceptive. This deception continues today, as consumers continue to purchase the Product under the mistaken belief that it is preservative-free with no artificial flavors based on Defendant’s false, deceptive, and misleading labeling and advertising of the Product as having “No Preservatives” and no artificial flavors.

29. Plaintiffs and other consumers of the Product made their purchase decisions in reliance upon Defendant’s advertised claims that that Product contains “No Preservatives” or no artificial flavors.

30. Plaintiffs and the Class reasonably and detrimentally relied upon the Product’s label representations by Defendant that the Product contains “No Preservatives” or no artificial flavors. Plaintiffs and the Class would not have purchased the Product had they known that the Product contains preservatives and/or artificial flavors.

31. Defendant’s conduct threatens consumers by using intentionally deceptive and misleading labels. Defendant’s conduct also threatens other companies, large and small, who “play by the rules.” Defendant’s conduct stifles competition and has a negative impact on the marketplace, and reduces consumer choice.

⁸ See, *Health and Wellness the Trillion Dollar Industry in 2017: Key Research Highlights*, Euromonitor International, <https://web.archive.org/web/20220831234425/https://www.euromonitor.com/article/health-and-wellness-the-trillion-dollar-industry-in-2017-key-research-highlights>.

32. There is no practical reason for false labeling and advertising of the Product, other than to mislead consumers as to the presence of preservatives in the Product while simultaneously providing Defendant with a financial windfall.

33. Plaintiffs make the allegations herein upon personal knowledge as to themselves and their own acts and experiences, and as to all other matters, upon information and belief, including investigation conducted by their attorneys.

CLASS ALLEGATIONS

34. Plaintiffs bring this action each on their own behalf and each on behalf of all other persons similarly situated. Plaintiffs seek to represent a class consisting of “All persons in the United States who, from January 1, 2015 through the present, purchased in the United States, for personal or household consumption and not for resale or distribution, one of the Products (“Nationwide Class”).

35. Plaintiffs also seek to represent subclasses defined as: All persons who purchased the Products in California for personal or household consumption and not for resale or distribution during the period January 1, 2015 through the present (“California Consumer Subclass”), and all persons who purchased the Products in New York for personal or household consumption and not for resale or distribution during the period January 1, 2015 through the present (“New York Consumer Subclass”).

36. Excluded from the Class are: (1) any judge and/or magistrate judge to whom this action is assigned; (2) any member of those judges’ immediate families; (3) Defendant; (4) any of Defendant’s subsidiaries, parents, affiliates, and officers, directors, employees, legal

representatives, heirs, successors, or assigns; (5) counsel for the Parties; and (6) any persons who timely opt-out of the Settlement Class.

37. The Class is so numerous that their individual joinder herein is impracticable. On information and belief, the Class numbers in the millions or more throughout the States of New York and California, and Nationwide during the time period January 1, 2015 through the present (the “Class Period”).

38. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. The questions of law and fact common to the Class predominate over questions which may affect individual Class members. Common questions of law and fact include, but are not limited to, the following:

- a. Whether Defendant’s conduct violates New York General Business Law Section 349, *et seq.*;
- b. Whether Defendant’s conduct violates New York General Business Code Section 350, *et seq.*;
- c. Whether Defendant’s conduct constitutes an unfair method of competition, or unfair or deceptive act or practice, in violation of Civil Code section 1750, *et seq.*;
- d. Whether Defendant used deceptive representations in connection with the sale of the Product in violation of Civil Code section 1750, *et seq.*;
- e. Whether Defendant represented the Product has characteristics or quantities that it does not have in violation of Civil Code section 1750, *et seq.*;
- f. Whether Defendant advertised the Product with intent not to sell it as advertised in violation of Civil Code section 1750, *et seq.*;

g. Whether Defendant's labeling and advertising of the Products is untrue or misleading in violation of Business and Professions Code section 17500, *et seq.*;

h. Whether Defendant knew or by the exercise of reasonable care should have known its labeling and advertising was and is untrue or misleading in violation of Business and Professions Code section 17500, *et seq.*;

i. Whether Defendant's conduct is an unfair business practice within the meaning of Business and Professions Code section 17200, *et seq.*;

j. Whether Defendant's conduct is a fraudulent business practice within the meaning of Business and Professions Code section 17200, *et seq.*;

k. Whether Defendant's conduct is an unlawful business practice within the meaning of Business and Professions Code section 17200, *et seq.*;

l. Whether Defendant's conduct constitutes breach of express warranty;

m. Whether Defendant's conduct constitutes breach of implied warranty;

n. Whether Defendant engaged in intentional misrepresentation of the Products;

o. Whether Defendant engaged in negligent misrepresentation of the Products;

p. Whether Defendant engaged in fraudulent behavior;

q. Whether Defendant was unjustly enriched by its unlawful conduct;

r. Whether Plaintiffs and the Class have sustained damages as a result of Defendant's unlawful conduct; and

s. The proper measure of damages sustained by Plaintiffs and the Class .

39. Plaintiffs' claims are typical of the claims of the Class, and Plaintiffs will fairly and adequately represent and protect the interests of the Class. Plaintiffs have retained competent and experienced counsel in class action and other complex litigation.

40. Plaintiffs and the Class have suffered injury in fact and have lost money as a result of Defendant's false representations. Plaintiffs and the Class each purchased the Product under the false belief that the Product was free of preservatives or artificial flavors. Plaintiffs and the Class relied upon Defendant's packaging and would not have purchased the Product if they had known that the Product contained preservatives and artificial flavors.

41. A class action is superior to other available methods for fair and efficient adjudication of this controversy. The expense and burden of individual litigation would make it impracticable or impossible for the Class to prosecute their claims individually.

42. The trial and litigation of Plaintiffs' claims are manageable. Individual litigation of the legal and factual issues raised by Defendant's conduct would increase delay and expense to all parties and the court system. The class action device presents far fewer management difficulties and provides the benefits of a single, uniform adjudication, economies of scale, and comprehensive supervision by a single court.

43. Defendant has acted on grounds generally applicable to the entire Class, thereby making final injunctive relief and/or corresponding declaratory relief appropriate with respect to the Class as a whole. The prosecution of separate actions by individual Class members would create the risk of inconsistent or varying adjudications with respect to individual Class members that would establish incompatible standards of conduct for Defendant.

44. Absent a class action, Defendant will likely retain the benefits of their wrongdoing. Because of the small size of the individual Class members' claims, few, if any, Class members could afford to seek legal redress for the wrongs complained of herein. Absent a representative action, the Class will continue to suffer losses and Defendant will be allowed to continue these violations of law and to retain the proceeds of its ill-gotten gains.

COUNT ONE

**Violation of New York General Business Law,
New York General Business Law § 349, *et seq.***

And Similar Statutes in Other States

(on behalf of Plaintiffs Hezi and Nina and the New York Consumer Subclass)

45. Plaintiffs repeat and reallege all allegations of the previous paragraphs, and incorporates the same as if set forth herein at length.

46. Plaintiffs bring this cause of action pursuant to Section 349, *et seq.*, New York General Business Law ("GBL"), on their own behalf and on behalf of all other persons similarly situated of the proposed New York Consumer Subclass against Defendant.

47. New York's General Business Code section 349, *et seq.*, declares unlawful "[d]eceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any services in this state."

48. The conduct of Defendant alleged herein constitutes recurring "unlawful" deceptive acts and practices in violation of GBL § 349, and as such, Plaintiffs and the Class seek monetary damages and the entry of preliminary and permanent injunctive relief against

Defendant, enjoining them from inaccurately describing, labeling, marketing, and promoting the Product.

49. There is no adequate remedy at law.

50. Defendant misleadingly, inaccurately, and deceptively advertise and market its Product to consumers.

51. Defendant's improper consumer-oriented conduct—including labeling and advertising the Product as containing "No Preservatives," or no artificial flavors, when in fact it contains the well documented preservative and artificial flavor, citric acid—is misleading in a material way in that it, inter alia, induced Plaintiffs and the Class to purchase and pay a premium for the Product and to use the Product when they otherwise would not have. Defendant made its untrue and/or misleading statements and representations willfully, wantonly, and with reckless disregard for the truth.

52. Plaintiffs and the Class have been injured inasmuch as they paid a premium for Products that—contrary to Defendant's representations—were not preservative-free and artificial flavor-free. Accordingly, Plaintiffs and the Class received less than what they bargained and/or paid for.

53. Defendant's advertising and Product packaging and labeling induced Plaintiff and the Class Members to buy Defendant's Product and to pay a premium price for them.

54. Defendant's deceptive and misleading practices constitute a deceptive act and practice in the conduct of business in violation of New York General Business Law §349(a) and Plaintiffs and the Class have been damaged thereby.

55. As a result of Defendant's recurring, "unlawful" deceptive acts and practices, Plaintiffs and the Class are entitled to monetary and compensatory damages, injunctive relief, restitution and disgorgement of all moneys obtained by means of Defendant's unlawful conduct, interest, and attorneys' fees and costs. Plaintiff and the Class seek actual damages of \$50 for Defendant's violation of this Section. Plaintiff and the Class seek actual damages of \$1,000 for Defendant's willful violation of this Section.

COUNT TWO

Violation of New York General Business Law,

New York General Business Law § 350, *et seq.*

And Similar Statutes in Other States

(on behalf of Plaintiff Hezi and Nina and the New York Consumer Subclass)

56. Plaintiffs repeat and reallege all allegations of the previous paragraphs, and incorporates the same as if set forth herein at length.

57. Gen. Bus. Law § 350 provides, in part, as follows: False advertising in the conduct of any business, trade, or commerce or in the furnishing of any service in this state is hereby declared unlawful.

58. N.Y. Gen. Bus. Law § 350a(1) provides, in part, as follows: The term 'false advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity if such advertising is misleading in a material respect. In determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in

the light of such representations with respect to the commodity or employment to which the advertising relates under the conditions proscribed in said advertisement, or under such conditions as are customary or usual.

59. Defendant's labeling and advertising contain untrue and materially misleading statements concerning the Products inasmuch as they misrepresent that the Product contains "No Preservatives," or no artificial flavors when in reality, it contains the preservative and artificial flavor, citric acid.

60. Plaintiffs and the Class have been injured inasmuch as they relied upon the labeling, packaging, and advertising and paid a premium for the Product which—contrary to Defendant's representations—were not preservative-free or free of artificial flavors. Accordingly, Plaintiffs and the Class received less than what they bargained and/or paid for.

61. Defendant's Product advertising, packaging, and labeling induced Plaintiffs and the Class to buy Defendant's Product.

COUNT THREE

Violation of California Consumers Legal Remedies Act,

California Civil Code Section 1750, *et seq.*

And Similar Statutes in Other States

(on behalf of Plaintiff Prescod and the California Consumer Subclass)

62. Plaintiffs repeat and reallege all allegations of the previous paragraphs, and incorporates the same as if set forth herein at length.

63. Plaintiffs bring this cause of action pursuant to Civil Code Section 1750, *et seq.*, the Consumers Legal Remedies Act ("CLRA"), on their own behalf and on behalf of all other

persons similarly situated of the proposed California Consumer Subclass against Defendant.

64. The Class consists of millions of persons or more, the joinder of whom is impracticable.

65. There are questions of law and fact common to the class, which questions are substantially similar and predominate over questions affecting the individual members, including but not limited to: (a) Whether Defendant represented that the Product has characteristics, benefits, uses, or quantities which it does not have; (b) Whether the existence, extent, and significance of the major misrepresentations regarding the purported benefits, characteristics, and efficacy of the Product violate the Act; and (c) Whether Defendant knew of the existence of these misrepresentations.

66. The policies, acts, and practices heretofore described were intended to result in the sale of the Product to the consuming public, and violated and continue to violate section 1770(a)(5) of the Act by representing that the Products have characteristics, benefits, uses, or quantities which they do not have.

67. The CLRA prohibits certain “unfair methods of competition and unfair or deceptive acts or practices” in connection with a sale of goods.

68. The practices described herein, specifically Defendant’s packaging, advertising, and sale of the Product, were intended to result and did result in the sale of the Product to the consuming public and violated and continue to violate the CLRA by (1) using deceptive representations in connection with the Product; and (2) advertising and packaging the Product with intent not to sell them as advertised.

69. Defendant fraudulently deceived Plaintiffs and the Class by misrepresenting the

Product as having characteristics which they do not have, e.g., advertising and labeling the Product has “no preservatives” and no artificial flavors when it actually contains citric acid, a well-known preservative and an artificial flavor in the Product. In doing so, Defendant intentionally misrepresented and concealed material facts from Plaintiffs and the Class. Said misrepresentations and concealment were done with the intention of deceiving Plaintiffs and the Class and depriving them of their legal rights and money.

70. Defendant knew or should have known, through the exercise of reasonable care, that labeling and advertising of the Product as containing “no preservatives” or no artificial flavors was misleading.

71. Defendant’s actions as described herein was done with conscious disregard of Plaintiffs’ rights, and Defendant was wanton and malicious in its concealment of the same.

72. Defendant’s labeling and advertising of the Product was a material factor in Plaintiffs’ and the Class’s decisions to purchase the Product. Based on Defendant’s labeling and advertising of the Product, Plaintiffs and the Class reasonably believed that they were purchasing a Product that was free of preservatives and artificial flavors. Had they known the truth of the matter, Plaintiffs and the Class would not have purchased the Product.

73. Plaintiffs and the Class has suffered injury in fact and has lost money as a result of Defendant’s unfair, unlawful, and fraudulent conduct. Specifically, Plaintiffs and the Class paid for a Product that was different from what they were reasonably expecting to receive when they decided to make their purchases. Plaintiffs and the Class would not have purchased the Product had they known that the Product contained preservatives or artificial flavors.

74. By letter dated February 6, 2019, Plaintiff Prescod advised Defendant of its false and misleading claims pursuant to California Civil Code Section 1782(a).

75. Pursuant to section 1780(a) of the Act, Plaintiffs seek injunctive relief in the form of an order enjoining the above-described wrongful acts and practices of Defendant, including, but not limited to, an order:

- A. Enjoining Defendant from continuing to make the statements set forth above;
- B. Enjoining Defendant from continuing to offer for sale any unit of the Product that contains any false and or misleading statements and claims in its advertising or on its packaging and/or its label, including, without limitation, those statements and claims set forth above;
- C. Enjoining Defendant from continuing to use the packaging and label that it presently uses for the Products; and
- D. Enjoining Defendant from distributing such false advertising and misrepresentations.

76. Plaintiffs shall be irreparably harmed if such an order is not granted.

COUNT FOUR

**Violation of California False Advertising Law,
Business & Professions Code Section 17500, et seq.**

And Similar Statutes in Other States

(on behalf of Plaintiff Prescod and the California Consumer Subclass)

77. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, and incorporates the same as if set forth herein at length.

78. Plaintiffs bring this cause of action pursuant to Business and Professions Code Section 17500, *et seq.*, on their own behalf and on behalf of the members of the proposed California Consumer Subclass against Defendant.

79. California's False Advertising Law, California Business and Professions Code section 17500, *et seq.*, makes it "unlawful for any person to make or disseminate or cause to be made or disseminated before the public in this state, in any advertising device or in any other manner or means whatever, including over the Internet, any statement, concerning personal property or services, professional or otherwise, or performance or disposition thereof, which is untrue or misleading and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading."

80. Defendant knowingly disseminated misleading claims regarding the absence of preservatives in the Product as a means to mislead the public about what is in the Product.

81. Defendant controlled the labeling, packaging, production and advertising of the Product. It knew or should have known, through the exercise of reasonable care that its representation that there were no preservatives or no artificial flavors in the Product was untrue, deceptive, and misleading.

82. The general public bases its purchasing decisions on front label claims of a beverage product. Consumers generally do not look at the back at the ingredients list to correct or clarify the claims on the front label or for any other reason. Instead, the general public chooses a product because the product's front label leads them to believe, in this case, that they are receiving a beverage product free from preservatives and artificial flavors. And even if consumers

looked at the back of the Product, they do not have the specialized knowledge to know that citric acid is a preservative and artificial flavor.

83. Defendant's action of displaying the untrue claim that the Product has "no preservatives" on the front label and that the Product has no artificial flavors is likely to deceive the general public.

84. Defendant's actions in violation of Section 17500 were false and misleading such that the general public is and was likely to be deceived.

85. Plaintiffs and the Class have suffered injury in fact and have lost money as a result of Defendant's false representations. Plaintiffs and the Class purchased the Product in reliance upon the claims by Defendant that the Product contains "no preservatives" or no artificial flavors as represented by Defendant's labeling and advertising. Plaintiffs would not have purchased the Product if they had known that the claims and advertising as described herein were false and misleading.

86. As alleged in the preceding paragraphs, the misrepresentations by Defendant of the material facts detailed above constitutes an unfair, unlawful, and fraudulent business practice within the meaning of California Business & Professions Code section 17500.

87. In addition, Defendant's use of various forms of advertising media to advertise, call attention to, or give publicity to the sale of goods or merchandise which are not as represented in any manner constitutes unfair competition, unfair, deceptive, untrue or misleading advertising, and an unlawful business practice within the meaning of Business & Professions Code sections 17200 and 17531, which advertisements have deceived and are likely to deceive the consuming public, in violation of Business & Professions Code section 17500.

88. Pursuant to Business & Professions Code sections 17203 and 17535, Plaintiffs and the members of the Class seek an order of this Court enjoining Defendant from continuing to engage, use, or employ its practice of advertising the sale and use of the Products. Likewise, Plaintiffs and the members of the Class seek an order requiring Defendant to disclose such misrepresentations, and additionally request an order awarding Plaintiffs and the Class restitution of the money wrongfully acquired by Defendant by means of responsibility attached to Defendant's failure to disclose the existence and significance of said misrepresentations.

COUNT FIVE

**Violation of California Unfair Competition Law,
Business & Professions Code Section 17200, *et seq.***

And Similar Statutes in Other States

(on behalf of Plaintiff Prescod and the California Consumer Subclass)

89. Plaintiffs repeat and reallege the allegations set forth above, and incorporate the same as if set forth herein at length.

90. Plaintiffs bring this cause of action pursuant to Business and Professions Code Section 17200, *et seq.*, on their own behalf and on behalf of the members of the proposed California Consumer Subclass against Defendant.

91. In the advertising of the Product, Defendant makes false and misleading statements regarding the ingredients of the Product, as alleged in the preceding paragraphs.

92. Defendant's advertising claims about the Product, as alleged in the preceding paragraphs, are false, deceptive, misleading and unreasonable.

93. Defendant is aware that the claims that it makes about the Product is false,

deceptive, misleading and unreasonable.

94. As alleged in the preceding paragraphs, the misrepresentations by Defendant of the material facts detailed above constitutes an unfair and fraudulent business practice within the meaning of California Business & Professions Code section 17200.

95. In addition, Defendant's use of various forms of advertising media to advertise, call attention to, or give publicity to the sale of goods or merchandise that are not as represented in any manner constitutes unfair competition, unfair, deceptive, untrue or misleading advertising, and an unlawful business practice within the meaning of Business & Professions Code sections 17200 and 17531, which advertisements have deceived and are likely to deceive the consuming public, in violation of Business & Professions Code section 17500.

96. There were reasonably available alternatives to further Defendant's legitimate business interests, other than the conduct described herein.

97. All of the conduct alleged herein occurs and continues to occur in Defendant's business. Defendant's wrongful conduct is part of a pattern or generalized course of conduct repeated on thousands of occasions daily.

98. Pursuant to Business & Professions Code sections 17203 and 17535, Plaintiffs and the members of the Class seek an order of this Court enjoining Defendant from continuing to engage, use, or employ its practice of advertising the sale and use of the Products. Likewise, Plaintiffs and the members of the Class seek an order requiring Defendant to disclose such misrepresentations, and additionally request an order awarding Plaintiffs and the Class restitution of the money wrongfully acquired by Defendant by means of Defendant's failure to disclose the existence and significance of said misrepresentations.

99. Plaintiffs and the Class have suffered injury in fact and have lost money as a result of Defendant's false representations.

100. Plaintiffs and the Class would not have purchased the Product if they had known that the claims and advertising as described herein were false.

COUNT SIX

Common Law Fraud

(on behalf of Plaintiffs Hezi, Nina, and Prescod, and the Class)

101. Plaintiffs repeat and reallege all the allegations contained in the preceding paragraphs and incorporate the same as if set forth herein at length.

102. Plaintiffs bring this cause of action individually and on behalf of the members of the Class against Defendant.

103. Defendant has willfully, falsely, and knowingly labeled and advertised the Products as containing "No Preservatives" and no artificial flavors. However, the Products contain citric acid, an FDA classified preservative and an artificial flavor. Therefore, Defendant has made misrepresentations as to the Products.

104. Defendant's misrepresentations are and were material (i.e., the type of misrepresentations to which a reasonable person would attach importance and would be induced to act thereon in making purchase decisions), because they relate to the quality of Products the consumer is receiving.

105. Defendant knew or recklessly disregarded the fact that the Products contained a preservative.

106. Defendant intended and intends that Plaintiffs and other consumers rely on these

representations, as evidenced by Defendant intentionally labeling and advertising the Products as containing “No Preservatives” and no artificial flavor despite including the preservative citric acid.

107. Plaintiffs and members of the Class have reasonably and justifiably relied on Defendant’s misrepresentations when purchasing the Products and had the correct facts been known, would not have purchased the Products or would not have purchased them at the prices at which they were offered.

108. Therefore, as a direct and proximate result of Defendant’s fraud, Plaintiffs and members of the Class have suffered economic losses and other general and specific damages, including but not limited to the amounts paid for the Products, and any interest that would have accrued on those monies, all in an amount to be proven at trial.

COUNT SEVEN

Intentional Misrepresentation

(on behalf of Plaintiffs Hezi, Nina, and Prescod, and the Class)

109. Plaintiffs repeat and reallege all the allegations contained in the preceding paragraphs and incorporate the same as if set forth herein at length.

110. Plaintiffs bring this cause of action individually and on behalf of the members of the Class against Defendant.

111. Defendant has labeled and advertised the Products as containing “No Preservatives” and no artificial flavor. However, the Products contain citric acid, an FDA classified preservative and an artificial flavor. Therefore, Defendant has made misrepresentations as to the Products.

112. Defendant's misrepresentations regarding the Products are material to a reasonable consumer because they relate to the quantity of product received by consumers. A reasonable consumer would attach importance to such representations and would be induced to act thereon in making purchase decisions.

113. At all relevant times when such misrepresentations were made, Defendant knew that the representations were misleading, or has acted recklessly in making the representations, without regard to the truth.

114. Defendant intended and intends that Plaintiffs and other consumers rely on the "No Preservatives" and no artificial flavor Product label, as evidenced by Defendant's intentionally manufacturing, marketing, and selling the Product with the front label claim "No Preservatives," and the representation that there are no artificial flavors in the Product.

115. Plaintiffs and members of the Class have reasonably and justifiably relied on Defendant's intentional misrepresentations when purchasing the Products, and had the correct facts been known, would not have purchased the Products or would not have purchased them at the prices at which they were offered.

116. Therefore, as a direct and proximate result of Defendant's intentional misrepresentations, Plaintiffs and members of the Class have suffered economic losses and other general and specific damages, including but not limited to the amounts paid for the Products, and any interest that would have accrued on those monies, all in an amount to be proven at trial.

COUNT EIGHT

Negligent Misrepresentation

(on behalf of Plaintiffs Hezi, Nina, and Prescod, and the Class)

117. Plaintiffs repeat and reallege all the allegations contained in the preceding paragraphs and incorporate the same as if set forth herein at length.

118. Plaintiffs bring this cause of action individually and on behalf of the members of the Class against Defendant.

119. Defendant has labeled and advertised the Products as containing “No Preservatives” and no artificial flavors. However, the Products contain citric acid, an FDA classified preservative and an artificial flavor. Therefore, Defendant has made misrepresentations as to the Products.

120. Defendant’s misrepresentations regarding the Products are material to a reasonable consumer because they relate to the quality of product received by the consumer. A reasonable consumer would attach importance to such representations and would be induced to act thereon in making purchase decisions.

121. At all relevant times when such misrepresentations were made, Defendant knew or has been negligent in not knowing that that the Products are not preservative-free and artificial flavor-free and instead contain the preservative citric acid. Defendant had no reasonable grounds for believing its misrepresentation is not false and misleading.

122. Defendant intended and intends that Plaintiffs and other consumers rely on the “No Preservatives” and artificial flavor representation, as evidenced by Defendant including a “No Preservatives” label claim and no artificial flavors claim on the Product’s packaging.

123. Plaintiffs and members of the Class have reasonably and justifiably relied on Defendant’s negligent misrepresentations when purchasing the Products, and had the correct facts been known, would not have purchased the Products or would not have purchased them at

the prices at which they were offered.

124. Therefore, as a direct and proximate result of Defendant's negligent misrepresentations, Plaintiffs and members of the Class have suffered economic losses and other general and specific damages, including but not limited to the amounts paid for the Products, and any interest that would have accrued on those monies, all in an amount to be proven at trial.

COUNT NINE

Unjust Enrichment

(on behalf of Plaintiffs Hezi and Nina, and the Class)

125. Plaintiffs repeat and reallege the allegations set forth above, and incorporates the same as if set forth herein at length.

126. An unjust enrichment claim is a standalone cause of action. *Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C.* (2015) 61 Cal.4th 988, 1000.

127. By means of Defendant's wrongful conduct alleged herein, Defendant knowingly sold the Product to Plaintiffs and members of the Class in a manner that was unfair, unconscionable, and oppressive.

128. Defendant knowingly received and retained wrongful benefits and funds from Plaintiffs and members of the Class. In so doing, Defendant acted with conscious disregard for the rights of Plaintiffs and members of the Class.

129. As a result of Defendant's wrongful conduct as alleged herein, Defendant has been unjustly enriched at the expense of, and to the detriment of, Plaintiffs and members of the Class.

130. Defendant's unjust enrichment is traceable to, and resulted directly and proximately from, the conduct alleged herein.

131. Under the common law doctrine of unjust enrichment, it is inequitable for Defendant to be permitted to retain the benefits it received, without justification, from selling the Products to Plaintiffs and members of the Class in an unfair, unconscionable, and oppressive manner. Defendant's retention of such funds under such circumstances making it inequitable to do so constitutes unjust enrichment.

132. The financial benefits derived by Defendant rightfully belong to Plaintiffs and members of the Class. Defendant should be compelled to return in a common fund for the benefit of Plaintiffs and members of the Class all wrongful or inequitable proceeds received by Defendant.

133. Plaintiffs and members of the Class have no adequate remedy at law.

COUNT TEN

Breach of Express Warranty

(on behalf of Plaintiffs Hezi, Nina, and Prescod, and the Class)

134. Plaintiffs repeat and reallege all the allegations of the previous paragraphs and incorporates the same as if set forth herein at length.

135. Defendant expressly warranted on each and every Product that it contains "no preservatives" and no artificial flavors. Defendant's claims constitute an affirmation of fact, promise, and/or description of the goods, the Product, that became part of the basis of the bargain and created an express warranty that the Product would conform to the stated promise. Plaintiffs placed importance on Defendant's claims.

136. All conditions precedent to Defendant's liability under this contract have been performed by Plaintiffs and the Class.

137. Defendant breached the terms of this contract, including the express warranties, with Plaintiffs and the Class by not providing Products that conform to the advertisement.

138. Defendant's express warranty that the Product had "no preservatives" and no artificial flavors was breached because the Product contained citric acid, a well-known preservative and an artificial flavor.

139. Defendant therefore breached the terms of its express warranty with Plaintiffs and the Class by not providing Products that conform to the advertising claim that the Product has "no preservatives" and no artificial flavors.

140. As a result of Defendant's breach of express warranty, Plaintiffs and the Class have been damaged in the amount to be determined at trial.

COUNT ELEVEN

Breach of Implied Warranty

(on behalf of Plaintiffs Hezi, Nina, and Prescod, and the Class)

141. Plaintiffs repeat and reallege the allegations set forth above, and incorporates the same as if set forth herein at length.

142. Unless excluded or modified, a warranty that a good shall be merchantable is implied in a contract for their sale, if the seller is a merchant with respect to goods of that kind.

143. Defendant is a merchant with respect to the Products, as they manufacture, distribute, and sell the Products nationwide.

144. In order to be merchantable, goods must conform to the promises or affirmations of fact made by or on the container or labeling.

145. Defendant breached the implied warranty of merchantability to Plaintiffs and the Class in its representations that the Products contained “No Preservatives” and no artificial flavors, but then included the preservative and artificial flavor citric acid in the Products.

146. As a result of Defendant’s conduct, Plaintiffs and the Class did not receive merchantable goods as impliedly warranted by Defendant.

147. Defendant did not exclude or modify the Products’ implied warranty of merchantability.

148. As a proximate result of Defendant’s breach of its implied warranty, Plaintiffs and members of the Class incurred damages. Plaintiffs and members of the Class were damaged as a result of Defendant’s failure to comply with its obligations under the implied warranty, since Plaintiffs and members of the Class paid for a Product that did not have the promised quality and nature, did not receive the product that they bargained for, paid a premium for the Product when they could have instead purchased other less expensive alternative products, and lost the opportunity to purchase other similar products.

149. Plaintiffs and the Class are therefore entitled to recover all available remedies for breach.

COUNT TWELVE

Common Law Fraud

(on behalf of Plaintiffs Hezi, Nina, and Prescod, and the Class)

150. Plaintiffs repeat and reallege all the allegations contained in the preceding paragraphs and incorporate the same as if set forth herein at length.

151. Plaintiffs bring this cause of action individually and on behalf of the members of

the Class against Defendant.

152. Defendant has willfully, falsely, and knowingly labeled and advertised the Products as containing no preservatives and no artificial flavors. However, the Products contain citric acid, a preservative and an artificial flavor. Therefore, Defendant has made misrepresentations as to the Products.

153. Defendant's misrepresentations are and were material (i.e., the type of misrepresentations to which a reasonable person would attach importance and would be induced to act thereon in making purchase decisions), because they relate to the quality of Products the consumer is receiving.

154. Defendant knew or recklessly disregarded the fact that the Products contained a preservative and an artificial flavor.

155. Defendant intended and intends that Plaintiffs and other consumers rely on these representations, as evidenced by Defendant intentionally labeling and advertising the Products as containing "No Preservatives" and no artificial flavors despite including citric acid.

156. Plaintiffs and members of the Class have reasonably and justifiably relied on Defendant's misrepresentations when purchasing the Products and had the correct facts been known, would not have purchased the Products or would not have purchased them at the prices at which they were offered.

157. Therefore, as a direct and proximate result of Defendant's fraud, Plaintiffs and members of the Class have suffered economic losses and other general and specific damages, including but not limited to the amounts paid for the Products, and any interest that would have accrued on those monies, all in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, prays for judgment and relief on all Causes of Action as follows:

- A. An order certifying that the action may be maintained as a Class Action;
- B. An order enjoining Celsius from pursuing the policies, acts, and practices complained of herein and requiring Celsius to pay restitution to Plaintiffs and all members of the Class in an amount to be determined at trial;
- C. Actual damages;
- D. Punitive damages;
- E. For pre-judgement interest from the date of filing this suit;
- F. Reasonable attorney fees;
- G. Costs of this suit; and
- H. Such other and further relief as the Court may deem necessary or appropriate.

JURY TRIAL DEMANDED

Plaintiffs reiterate their jury demand on all triable issues.

DATED: November 21, 2022

CLARKSON LAW FIRM, P.C.

/s/ Ryan J. Clarkson

Ryan J. Clarkson, Esq.
Timothy K. Giordano, Esq.
Bahar Sodaify, Esq.
Zachary T. Chrzan, Esq.

Counsel for Plaintiffs