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Attorneys for Plaintiff and the Putative Class

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SERGIO CHAUCA, individually and
on behalf of all others similarly
situated,

Plaintiff,

v.

ROWDY BEVERAGE, INC.,

Defendant.

Case No. '23CV0730 BEN BGS

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

1 Plaintiff Sergio Chauca (“Plaintiff”) individually and on behalf of all others
2 similarly situated, by and through his attorneys, makes the following allegations
3 pursuant to the investigation of his counsel and based upon information and belief,
4 except as to allegations specifically pertaining to himself and his counsel, which are
5 based on personal knowledge.

6 **NATURE OF THE ACTION**

7 1. This is a putative class action against Defendant Rowdy Beverage, Inc.
8 (“Defendant”).

9 2. Defendant formulates, manufactures, advertises, and sells “Rowdy
10 Power Burn” energy drink products (the “Products”).¹

11 3. Defendant markets its Products in a systematically misleading manner
12 by misrepresenting that their Products do not contain preservatives. Because
13 Defendant’s sales are driven by health-conscious consumers seeking products that
14 are free from preservatives, Defendant prominently displays on the front label of the
15 Products that they contain “NO PRESERVATIVES.”

16 4. Notwithstanding this promise to consumers, however, Defendant’s
17 Products contain “citric acid” and/or “ascorbic acid” – two ingredients the FDA
18 recognizes as preservatives in food products. As such, Defendant has engaged in
19 widespread false and deceptive conduct by misrepresenting the true nature of its
20 Products.

21 5. Plaintiff brings this action on behalf of a nationwide class of consumers
22 who purchased Defendant’s Products. Plaintiff also brings this action on behalf of a
23 class of consumers who purchased Defendant’s Products in New York.

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25 _____
26 ¹ The Products encompass all of Defendant’s canned and bottled sparkling juices that
27 contain “citric acid” and/or “ascorbic acid,” including: (1) Mango Dragonfruit; (citric
28 acid and ascorbic acid) (2) Pineapple Passionfruit (citric acid and ascorbic acid); (3)
Pink Lemonade (citric acid and ascorbic acid); (4) Watermelon (citric acid and
ascorbic acid).

THE PARTIES

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2 6. Plaintiff Sergio Chauca is a citizen of New York, residing in Bronx,
3 New York. Plaintiff purchased Defendant’s Products for his personal use within the
4 applicable statute of limitations, with his most recent purchase taking place on or
5 about December of 2022. Plaintiff Chauca made these purchases from grocery stores
6 located in New York, New York. Prior to making his purchases, Plaintiff saw that
7 the Products were labeled and marketed as containing “No Preservatives.” Plaintiff
8 relied on Defendant’s representations when he decided to purchase the Products over
9 comparable and less expensive energy drinks. Plaintiff saw those representations
10 prior to and at the time of his purchases and understood them as a representation and
11 warranty that the Products did not contain any preservatives. Plaintiff relied on these
12 representations and warranties in deciding to purchase the Products. Accordingly,
13 those representations and warranties were part of the basis of his bargains, in that he
14 would not have purchased the Products on the same terms had he known that those
15 representations were not true. In making his purchases, Plaintiff paid a substantial
16 price premium due to the false and misleading “No Preservatives” claims. Plaintiff,
17 however, did not receive the benefit of his bargains because the Products were not,
18 in fact, preservative-free because they contained citric acid and ascorbic acid – two
19 ingredients recognized by the FDA as preservatives.

20 7. Defendant Rowdy Beverage, Inc, is a Delaware corporation with its
21 corporate headquarters and principal place of business located at 10531 4S
22 Commons Drive, San Diego, CA 92127.

23 8. Plaintiff reserves the right to amend this Complaint to add different or
24 additional defendants, including without limitation any officer, director, employee,
25 supplier, or distributor of Defendant who has knowingly and willfully aided, abetted,
26 and/or conspired in the false and deceptive conduct alleged herein.

JURISDICTION AND VENUE

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2 9. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §
3 1332(d)(2)(A), as amended by the Class Action Fairness Act of 2005 (“CAFA”),
4 because this case is a class action where the aggregate claims for all members of the
5 proposed class are in excess of \$5,000,000.00, exclusive of interests and costs, there
6 are over 100 members of the putative class, and Plaintiff, as well as most members
7 of the proposed class, is a citizen of a state different from Defendant.

8 10. This Court has general jurisdiction over Defendant because Defendant
9 maintains its principal place of business within this District.

10 11. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this
11 action because Defendant resides in this District.

FACTUAL ALLEGATIONS

12
13 ***Overview of Defendant’s False Preservative Claims***

14 12. Defendant advertises and displays on the front labels of the Products
15 that they contain “No Preservatives,” thereby misleading reasonable consumers into
16 believing that the Products are free from preservatives. However, the Products
17 contain well-known and well-documented preservatives: citric acid and/or ascorbic
18 acid. Defendant’s most recent labeling of the Products, along with their ingredient
19 panels, are depicted on the following page:

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1 13. The FDA defines a chemical preservative as “any chemical that, when
2 added to food, tends to prevent or retard deterioration thereof, but does not include
3 common salt, sugars, vinegars, spices, or oils extracted from spices, substances
4 added to food by direct exposure thereof to wood smoke, or chemicals applied for
5 their insecticidal or herbicidal properties.” 21 C.F.R. §101.22(a)(5).

6 14. The FDA also classifies and identifies citric acid and ascorbic acid as
7 preservatives in its Overview of Food Ingredients, Additives, and Colors, on the
8 FDA’s website and provides examples of how citric acid and ascorbic acid are used
9 as preservatives in beverages.²

10 15. The FDA’s view of this matter is further bolstered by a Warning Letter
11 that it sent to Chiquita Brands International, Inc., indicating that Chiquita’s
12 “Pineapple Bites” products were misbranded within the meaning of section 403(k)
13 of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 343(k), because “they contain the
14 chemical preservatives ascorbic acid and citric acid but their labels fail to declare
15 these preservatives with a description of their functions.”³

16 16. Citric acid functions in beverages as a preservative by serving as an
17 acidulant and as an indirect antioxidant. Citric acid infiltrates and weakens or kills
18 microorganisms through direct antimicrobial effect, lowering a juice product’s pH
19 level, thereby combatting and sequestering microorganisms. Citric acid serves these
20 functions regardless of whether it is being added as a flavoring agent.⁴

21 _____
22 ² <https://www.fda.gov/food/food-ingredients-packaging/overview-food-ingredients-additives-colors> (last accessed November 30, 2022)

23 ³ FDA, *Warning Letter to Chiquita Brands International, Inc. and Fresh Express*
24 *Incorporated*
25 (Oct. 6, 2010), available at
26 <https://wayback.archiveit.org/7993/20170112194314/http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2010/ucm228663.htm> (last accessed November 30, 2022)

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

1 17. Industry participants also recognize that citric acid functions as a
2 preservative. For example, one food additives supplier states: “Citric acid is the most
3 commonly used acidulant in the industry. As a food additive or food grade product,
4 citric acid is used as a flavoring and preservative. The buffering properties of citrates
5 are used to control pH and flavor.”⁵

6 18. Based on the foregoing, Defendant’s use of citric acid in its Products
7 renders their “No Preservatives” representation false and misleading. This is true
8 even if Defendant’s subjective intention was to add citric acid to impart taste/tartness
9 to the Products—a statement that some manufacturers have recently added to their
10 labeling as a pretext, but is entirely missing on the Product’s labeling. This
11 conclusion is buttressed by the fact that citric acid can function as a preservative
12 even when it is used only in trace amounts.⁶

13 19. To make matters worse, Defendant also includes ascorbic acid as an
14 ingredient in its Products.⁷ Ascorbic acid is a chemically modified form of vitamin
15 C, which, pursuant to FDA regulations, is commonly used in foods as a preservative.
16 21 C.F.R. § 182.3013.

17 20. Ascorbic acid, like citric acid, functions as an antioxidant that helps
18 prevent microbial growth and oxidation in food products, thereby preserving their
19 color and freshness. Although Defendant identifies ascorbic acid as a source of
20 vitamin C, they do so within the ingredient list of the Products rather than their
21 nutritional facts panel—thus falling outside the ambit of FDA regulations. 21 C.F.R.
22 § 101.9(c)(8)(v).

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24 ⁵ FBC Industries, Inc., *Citrates*, <https://fbcindustries.com/citrates/> (last accessed
November 30, 2022).

25 ⁶ See Doores, S., 1993. *Organic acids*. In: Davidson, P.M., et al. (Eds.),
26 *Antimicrobials in Food* CRC Press, pp. 95-136.
27 <http://base.dnsgb.com.ua/files/book/Agriculture/Foods/Antimicrobials-in-Food.pdf>
(last accessed November 30, 2022).

28 ⁷ Except its Sparkling Blackberry Lemonade flavor.

1 21. Tellingly, Defendant’s Products are primarily composed of teas and
2 other extracts that are prone to spoliation.

3 22. Furthermore, ascorbic acid, like citric acid, can have preservative
4 effects even when used in low amounts.⁸ Based on the foregoing, Defendant’s use of
5 ascorbic acid—especially in combination with citric acid—supports the conclusion
6 that the Products indeed contain preservatives.

7 23. In any event, even if the Products’ citric acid and/or ascorbic acids do
8 not, in fact, function as a preservative in the Products, they nonetheless qualify as
9 preservatives given that they have the capacity or tendency to do so. *See* 21 C.F.R.
10 §101.22(a)(5) (defining preservatives as “any chemical that, when added to food,
11 *tends* to prevent or retard deterioration,”) (emphasis added); *see also* Merriam-
12 Webster’s Dictionary (defining “preservative” as “something that preserves or has
13 the power of preserving.”)⁹; Oxford English Dictionary (defining “preservative” as
14 “[t]ending to preserve or capable of preserving”) (emphasis added).¹⁰

15 ***Defendant Capitalizes on Consumer’s Demand for Preservative-Free Foods***

16 24. By representing the Products have “No Preservatives,” Defendant seeks
17 to capitalize on consumers’ preference for less processed products with no
18 preservatives. Indeed, “foods bearing ‘free-from’ claims are increasingly relevant to
19 Americans, as they perceive the products as closely tied to health ...84 percent of
20 American consumers buy free-from foods because they are seeking out more natural
21 or less processed foods. In fact, 43 percent of consumers agree that free-from foods
22 are healthier than foods without a free-from claim, while another three in five

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24 ⁸ *Id.*

25 ⁹ *Preservative*, Merriam-Webster Dictionary, [https://www.merriam-
webster.com/dictionary/preservative?utm_campaign=sd&utm_medium=serp&utm_s
26 ource=jsonld](https://www.merriam-webster.com/dictionary/preservative?utm_campaign=sd&utm_medium=serp&utm_source=jsonld) (last accessed November 30, 2022).

27 ¹⁰ *Preservative*, American Heritage Dictionary,
28 <https://ahdictionary.com/word/search.html?q=preservative> (last accessed November
30, 2022).

1 believe the fewer ingredients a product has, the healthier it is (59 percent). Among
2 the top claims free-from consumers deem most important are trans-fat-free (78
3 percent) and preservative-free (71 percent).”¹¹

4 25. According to another study, when consumers were asked to choose a
5 product that was the closest to their understanding of what “natural” means on
6 product labels, they often chose products with “No Preservatives” labels.¹²

7 26. The global sale of healthy food products is estimated to be \$4 trillion
8 dollars and is forecasted to reach \$7 trillion by 2025.¹³ Based on the foregoing,
9 consumers are willing to purchase and pay a premium for healthy non-preservative
10 food items like the Products.

11 27. Had Defendant not made the false, misleading, and deceptive
12 misrepresentations and omissions alleged herein, Plaintiff and the proposed class
13 members (1) would not have purchased Products; (2) would not have paid as much
14 as they did for those purchases; or (3) would have purchased less expensive energy
15 drink that do not claim to contain “No Preservatives.”

16 28. Although Defendant is in the best position to know what content it
17 placed on its website and in marketing materials during the relevant timeframe, and
18 the knowledge that Defendant had regarding the false and defective nature of the
19 Products as well as its failure to disclose the existence of those defects and
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22 ¹¹ See, *Free-From Food Trends - US - May 2015*, MINTEL
23 <https://www.mintel.com/press-%20centre/food-and-drink/84-of-americans-buy-free-from-foods-because-they-believe-them-to-be-more-natural-or-less-processed>
24 (last accessed November 30, 2022).

25 ¹² Sajida Rahman, et al., *Assessing consumers’ understanding of the term “Natural” on food labeling*, *Journal of Food Science*, Vol. 85, No. 6, 1891-1896. (2020).

26 ¹³ Global Wellness Institute, *The Global Wellness Economy Stands at \$4.4 Trillion Amidst the Disruptions of COVID-19; Is Forecast to Reach \$7 Trillion by 2025*,
27 <https://www.hospitalitynet.org/news/4108643.html> (last accessed November 30,
28 2022).

1 misrepresentations to consumers, to the extent necessary, Plaintiff satisfies the
2 requirements of Rule 9(b) by alleging the following facts with particularity:

3 29. **WHO:** Defendant, Rowdy, made material misrepresentations and/or
4 omissions of fact in its labeling and marketing of the Products by representing that
5 they contain “No Preservatives.”

6 30. **WHAT:** Defendant’s conduct here was and continues to be fraudulent
7 because it has the effect of deceiving consumers into believing that the Products
8 contain “No Preservatives.” Defendant misrepresented to Plaintiff and the proposed
9 class members that the Products contain “No Preservatives” when in fact they
10 contain two ingredients – citric acid and ascorbic acid – that preserve or have the
11 tendency to preserve.

12 31. **WHEN:** Defendant made material misrepresentations and/or omissions
13 during the putative Class periods, including prior to and at the time Plaintiff and the
14 proposed class members purchased the Products, despite its knowledge that the
15 Products do not conform to their purported qualities.

16 32. **WHERE:** Defendant’s marketing message was uniform and pervasive,
17 carried through material misrepresentations and/or omissions on the labeling of the
18 Products’ packaging, website, and through marketing materials.

19 33. **HOW:** Defendant made material misrepresentations and/or failed to
20 disclose material facts regarding the Products’ inclusion of preservatives, namely
21 that the Products contain “No Preservatives” when in fact they do.

22 34. **WHY:** Defendant made the material misrepresentations and/or
23 omissions detailed herein for the express purpose of inducing Plaintiff, the proposed
24 class members, and all reasonable consumers to purchase and/or pay for the
25 Products, the effect of which was that Defendant profited by selling the Products to
26 tens of thousands of consumers.

1 individual Class members. Common legal and factual questions include, but are not
2 limited to: (a) the true nature and presence of preservatives in the Products; (b)
3 whether the marketing, advertising, packaging, labeling, and other promotional
4 materials for the Products are misleading; (c) whether Defendant's conduct alleged
5 herein violated the consumer protection statutes of the Class; (d) whether
6 Defendant's conduct alleged herein constitutes unjust enrichment; (e) whether
7 Defendant's conduct constitutes negligent omission; (f) whether Plaintiff and the
8 Class members of the Classes have suffered damages as a result of Defendant's
9 actions and the amount thereof; (g) whether Plaintiff and the Class Members are
10 entitled to statutory damage; and (h) whether Plaintiff and the Class Members are
11 entitled to attorney's fees and costs.

12 42. **Typicality.** The claims of Plaintiff Chauca are typical of the claims of
13 the Class in that Plaintiff and the Class were exposed to Defendant's false and
14 misleading marketing, purchased Defendant's Products, and suffered a loss as a
15 result of those purchases.

16 43. **Adequacy.** Plaintiff will fairly and adequately protect Class Members'
17 interests. Plaintiff has no interests antagonistic to Class Members' interests, and
18 Plaintiff has retained counsel that have considerable experience and success in
19 prosecuting complex class-actions and consumer-protection cases.

20 44. **Superiority.** A class action is superior to all other available methods for
21 the fair and efficient adjudication of this controversy for, *inter alia*, the following
22 reasons: prosecutions of individual actions are economically impractical for
23 members of the Class; the Class is readily definable; prosecution as a class action
24 avoids repetitious litigation and duplicative litigation costs, conserves judicial
25 resources, and ensures uniformity of decisions; and prosecution as a class action
26 permits claims to be handled in an orderly and expeditious manner.

1 45. Defendant has acted or failed to act on grounds generally applicable to
2 the Class, thereby making appropriate final injunctive relief with respect to the Class
3 as a whole.

4 46. Without a class action, Defendant will continue a course of action that
5 will result in further damages to Plaintiff and members of the Class and will likely
6 retain the benefits of its wrongdoing.

7 47. Based on the foregoing allegations, Plaintiff's claims for relief include
8 those set forth below.

9 **COUNT I**
10 **Violations of New York G.B.L. § 349**
11 **(On Behalf of Plaintiff and the New York Subclass)**

12 48. Plaintiff re-alleges and incorporates by reference every allegation set
13 forth in the preceding paragraphs as though alleged in this Count.

14 49. Plaintiff brings this claim individually and on behalf of the members of
15 the New York Subclass against Defendant.

16 50. New York's General Business Law § 349 prohibits deceptive acts or
17 practices in the conduct of any business, trade, or commerce.

18 51. In its sale of Products throughout the state of New York, at all relevant
19 times herein, Defendant conducted business and trade within the meaning and
20 intendment of New York's General Business Law § 349.

21 52. Plaintiff and the New York Subclass Members are consumers who
22 purchased Defendant's Products for their personal use.

23 53. By the acts and conduct alleged herein, Defendant engaged in
24 deceptive, unfair, and misleading acts and practices by conspicuously representing
25 on the packaging of the Products that they contain "No Preservatives." Despite that
26 representation, however, the Products contain well-documented preservatives: citric
27 acid and ascorbic acid.

28 54. The foregoing deceptive acts and practices were directed at consumers.

1 55. Defendant’s deceptive acts and practices are misleading in a material
2 way because they violate consumers’ reasonable expectations. Defendant knew
3 consumers would purchase the Products and/or pay more for them under the false—
4 but reasonable—belief that the Products contained “No Preservatives” when they
5 did. By advertising prominently that the Products contained “No Preservatives”,
6 Defendant proves that information about their preservative content is material to
7 consumers. If such information were not material, Defendant would not feature it
8 prominently on the front label of every Product’s package. As a result of its
9 deceptive acts and practices, Defendant has sold thousands, if not millions, of
10 Products to unsuspecting consumers across New York. If Defendant had advertised
11 its Products truthfully and in a non-misleading fashion, Plaintiff and other New York
12 Subclass Members would not have purchased them or would not have paid as much
13 as they did for them.

14 56. As a direct and proximate result of Defendant's false, misleading, and
15 deceptive representations and/or omissions, Plaintiff and other Members of the New
16 York Subclass were injured in that they: (1) paid money for Products that were not
17 what Defendant represented; (2) were deprived of the benefit of the bargain because
18 the Products they purchased were different than Defendant advertised; and (3) were
19 deprived of the benefit of the bargain because the Products they purchased had less
20 value than if Defendant's representations about the Products’ preservative content
21 were truthful.

22 57. Plaintiff and the New York Subclass Members seek to recover their
23 actual damages or fifty dollars per violation, whichever is greater, three times actual
24 damages, and reasonable attorneys’ fees and costs.

COUNT II
Violations of New York G.B.L. §350
(On Behalf of Plaintiff and the New York Subclass)

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3 58. Plaintiff re-alleges and incorporates by reference every allegation set
4 forth in the preceding paragraphs as though alleged in this Count.

5 59. Plaintiff brings this claim individually and on behalf of the members of
6 the proposed New York Subclass against Defendant.

7 60. Defendant violated New York General Business Law § 350 by
8 representing on the packaging of the Products that they contain “No Preservatives.”
9 Despite that representation, however, the Products contain well-documented
10 preservatives: citric acid and ascorbic acid.

11 61. Plaintiff has standing to pursue this claim because he has suffered an
12 injury-in-fact and has lost money or property as a result of Defendant's deceptive
13 acts and practices. Specifically, Plaintiff purchased the Products for his own
14 personal use. In doing so, Plaintiff relied upon Defendant's false, misleading, and
15 deceptive representations that the Products contained “No Preservatives.” Plaintiff
16 spent money in the transaction that he otherwise would not have spent had he known
17 the truth about Defendant's advertising claims.

18 62. The foregoing advertising was directed at consumers and was likely to
19 mislead a reasonable consumer acting reasonably under the circumstances.

20 63. Defendant's deceptive acts and practices are misleading in a material
21 way because, as alleged above and herein, they violate consumers' reasonable
22 expectations. If Defendant had advertised its Products truthfully and in a non-
23 misleading fashion, Plaintiff and other New York Subclass Members would not have
24 purchased the Products or would not have paid as much as they did for them.

25 64. As a direct and proximate result of Defendant's false, misleading, and
26 deceptive representations and/or omissions, Plaintiff and other Members of the New
27 York Subclass were injured in that they: (1) paid money for Products that were not
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1 what Defendant represented; (2) were deprived of the benefit of the bargain because
2 the Products they purchased were different than Defendant advertised; and (3) were
3 deprived of the benefit of the bargain because the Products they purchased had less
4 value than if Defendant's representations about the Products' preservative content
5 were truthful.

6 65. As a result of Defendant's false advertising, Plaintiff and the New York
7 Subclass members suffered an economic injury because they would not have
8 purchased (or paid a premium for) the Products had they known the truth that the
9 Products in fact contained preservatives.

10 66. Plaintiff and the New York Subclass Members seek to recover their
11 actual damages or five hundred (500) dollars per violation, whichever is greater,
12 three times actual damages, and reasonable attorneys' fees and costs.

13 **COUNT III**
14 **Violations of State Consumer Protection Statues¹⁴**
15 **(On Behalf of Plaintiff and the Nationwide Class)**

16 67. Plaintiff re-alleges and incorporates by reference every allegation set
17 forth in the preceding paragraphs as though alleged in this Count.

18 ¹⁴ While discovery may alter the following, Plaintiff asserts that the states with
19 similar consumer fraud laws under the facts of this case include but are not limited
20 to: Alaska Stat. § 45.50.471, et seq.; Ariz. Rev. Stat. §§ 44-1521, et seq.; Ark. Code
21 § 4-88-101, et seq.; Cal. Bus. & Prof. Code § 17200, et seq.; Cal. Civ. Code § 1750,
22 et seq.; Colo. Rev. Stat. Ann. § 6-1-101, et seq.; Colo. Rev. Stat. Ann. § 6-1-101, et
23 seq.; Conn. Gen Stat. Ann. § 42- 110, et seq.; 6 Del. Code § 2513, et seq.; D.C. Code
24 § 28-3901, et seq.; Fla. Stat. Ann. § 501.201, et seq.; Ga. Code Ann. § 10-1-390, et
25 seq.; Haw. Rev. Stat. § 480-2, et seq.; Idaho Code Ann. § 48-601, et seq.; 815 ILCS
26 501/1, et seq.; Ind. Code § 24-5-0.5-2, et seq.; Kan. Stat. Ann. § 50-623, et seq.; Ky.
27 Rev. Stat. Ann. § 367.110, et seq.; LSA-R.S. 51:1401, et seq.; Me. Rev. Stat. Ann.
28 Tit. 5, § 207, et seq.; Md. Code Ann. Com. Law, § 13-301, et seq.; Mass. Gen Laws
Ann. Ch. 93A, et seq.; Mich. Comp. Laws Ann. § 445.901, et seq.; Minn. Stat. §
325F, et seq.; Mo. Rev. Stat. § 407, et seq.; Neb. Rev. St. §§ 59-1601, et seq.; Nev.
Rev. Stat. § 41.600, et seq.; N.H. Rev. Stat. § 358-A:1, et seq.; N.J. Stat. Ann. § 56:8,
et seq.; N.M. Stat. Ann. § 57-12-1, et seq.; N.Y. Gen. Bus. Law § 349, et seq.; N.C.
Gen Stat. § 75-1.1, et seq.; N.D. Cent. Code § 51-15, et seq.; Ohio Rev. Code Ann. §
1345.01, et seq.; Okla. Stat. tit. 15 § 751, et seq.; Or. Rev. Stat. § 646.605, et seq.; 73
P.S. § 201-1, et seq.; R.I. Gen. Laws § 6-13.1- 5.2(B), et seq.; S.C. Code Ann. §§ 39-

1 68. Plaintiff brings this claim individually and on behalf of the members of
2 the proposed Class against Defendant.

3 69. The Consumer Protection Statutes of the Nationwide Class Members
4 prohibit the use of deceptive, unfair, and misleading business practices in the
5 conduct of trade or commerce.

6 70. By the acts and conduct alleged herein, Defendant engaged in
7 deceptive, unfair, and misleading acts and practices by conspicuously representing
8 on the packaging of the Products that they contain “No Preservatives.” Despite that
9 representation, however, the Products contain well-documented preservatives: citric
10 acid and/or ascorbic acid.

11 71. The foregoing deceptive acts and practices were directed at consumers.

12 72. The foregoing deceptive acts and practices are misleading in a material
13 way because they fundamentally misrepresent the nature and value of the Products.

14 73. As a result of Defendant’s deceptive practices, Plaintiff and the Class
15 Members suffered an economic injury because they would not have purchased (or
16 paid a premium for) the Products had they known the truth that the Products in fact
17 contained preservatives.

18 74. Plaintiff and the New York Subclass Members seek to recover their
19 actual damages or fifty dollars, whichever is greater, three times actual damages, and
20 reasonable attorneys’ fees and costs.

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26 5- 10, et seq.; S.D. Codified Laws § 37-24-1, et seq.; Tenn. Code Ann. § 47-18-101,
27 et seq.; Tex. Code Ann., Bus. & Con. § 17.41, et seq.; Utah Code. Ann. § 13-11-175,
28 et seq.; 9 V.S.A. § 2451, et seq.; Va. Code Ann. § 59.1-199, et seq.; Wash. Rev.
Code § 19.86.010, et seq.; W. Va. Code § 46A, et seq.; Wis. Stat. § 100.18, et seq.;
and Wyo. Stat. Ann. § 40-12-101, et seq.

COUNT IV
Breach of Express Warranty¹⁵
(On Behalf of Plaintiff and the Nationwide Class)

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3 75. Plaintiff re-alleges and incorporates by reference every allegation set
4 forth in the preceding paragraphs as though alleged in this Count.

5 76. Plaintiff brings this claim individually and on behalf of the members of
6 the proposed Classes against Defendant.

7 77. On the Products’ labeling and marketing Defendant expressly
8 warranted that the Products contain “No Preservatives.”

9 78. Those statements became the basis of the bargain for Plaintiff and the
10 Class members because they are factual statements that a reasonable consumer
11 would consider material when purchasing a healthy energy drink.

12 79. Defendant breached these express warranties because the Products
13 contain two well-known preservatives: citric acid and ascorbic acid.

14 80. On January 31, 2023, prior to the filing of this Complaint, Plaintiff’s
15 counsel sent Defendant a warranty notice letter that complied in all respects with
16 U.C.C. 2-607. The letter provided notice of breach of express and implied
17 warranties. The letter was sent via certified mail, return receipt requested, advising
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19 ¹⁵ Code of Ala. § 7-2-313; Alaska Stat. § 45.02.313; A.R.S. § 47-2313; A.C.A. § 4-2-
20 313; Cal. Comm. Code § 2313; Colo. Rev. Stat. § 4-2-313; Conn. Gen. Stat. § 42a-2-
21 313; 6 Del. C. § 2-313; D.C. Code § 28:2-313; Fla. Stat. § 672.313; O.C.G.A. § 11-
22 2-313; H.R.S. § 490:2-313; Idaho Code § 28-2-313; 810 I.L.C.S. 5/2-313; Ind. Code
23 § 26-1-2-313; Iowa Code § 554.2313; K.S.A. § 84-2-313; K.R.S. § 355.2-313; 11
24 M.R.S. § 2-313; Md. Commercial Law Code Ann. § 2-313; 106 Mass. Gen. Laws
25 Ann. § 2-313; M.C.L.S. § 440.2313; Minn. Stat. § 336.2-313; Miss. Code Ann. § 75-
26 2-313; R.S. Mo. § 400.2-313; Mont. Code Anno. § 30-2-313; Neb. Rev. Stat. § 2-
27 313; Nev. Rev. Stat. Ann. § 104.2313; R.S.A. 382-A:2-313; N.J. Stat. Ann. § 12A:2-
28 313; N.M. Stat. Ann. § 55-2-313; N.Y. U.C.C. Law § 2-313; N.C. Gen. Stat. § 25-2-
313; N.D. Cent. Code § 41-02-30; II. O.R.C. Ann. § 1302.26; 12A Okl. St. § 2-313;
Or. Rev. Stat. § 72-3130; 13 Pa. Rev. Stat. § 72-3130; R.I. Gen. Laws § 6A-2-313;
S.C. Code Ann. § 36-2-313; S.D. Codified Laws, § 57A-2-313; Tenn. Code Ann. §
47-2-313; Tex. Bus. + Com. Code § 2.313; Utah Code Ann. § 70A-2-313; 9A V.S.A.
§ 2-313; Va. Code Ann. § 59.1-504.2; Wash. Rev. Code Ann. § 6A.2-313; W. Va.
Code § 46-2-313; Wis. Stat. § 402.313; and Wyo. Stat. § 34.1-2-313

1 Defendant that it was in violation of the U.C.C. 2-607 and state consumer protection
2 laws and demanding that it cease and desist from such violations and make full
3 restitution by refunding the monies received therefrom. The letter stated that it was
4 sent on behalf of Plaintiff and all other similarly situated purchasers.

5 81. As a direct and proximate result of Defendant’s breach of its written
6 warranties, Plaintiff and the Class Members have been damaged in an amount to be
7 proven at trial.

8 **COUNV V**
9 **Unjust Enrichment / Restitution**

10 82. Plaintiff re-alleges and incorporates by reference every allegation set
11 forth in the preceding paragraphs as though alleged in this Count.

12 83. Plaintiff brings this claim individually and on behalf of the members of
13 the proposed Class against Defendant under the laws of the State of California.

14 84. To the extent required by law, this cause of action is alleged in the
15 alternative to legal claims, as permitted under Fed. R. Civ. P. 8.

16 85. Plaintiff and the Class conferred benefits on Defendant by purchasing
17 the Products.

18 86. Defendant has been unjustly enriched in retaining the revenues derived
19 from Plaintiff and class members’ purchases of the Products. Retention of those
20 moneys under these circumstances is unjust and inequitable because Defendant
21 misrepresented that the Products contain “No Preservatives” despite their use of two
22 ingredients – citric acid and ascorbic acid –classified by the FDA as preservatives.
23 These misrepresentations caused injuries to Plaintiff and Class members because
24 they would not have purchased the Products at all, or on the same terms, if the true
25 facts were known.

26 87. Plaintiff and the Class members are, therefore, entitled to restitution in
27 the form of disgorgement of the revenues derived from Defendant’s sale of the
28 Products.

1 88. As a direct and proximate result of Defendant's actions, Plaintiff and
2 class members have suffered in an amount to be proven at trial.

3 89. Here, equitable relief is appropriate because Plaintiff may lack an
4 adequate remedy at law if, for instance, damages resulting from his purchase of the
5 Products is determined to be an amount less than the premium price of the Product.

6 90. Without compensation for the full premium price of the Products,
7 Plaintiff and the Class Members would be left without the parity in purchasing
8 power to which they are entitled.

9 91. Injunctive relief is also appropriate, and indeed necessary, to require
10 Defendant to provide full and accurate disclosures regarding the Products so that
11 Plaintiff and the Class Members can reasonably rely on Defendant's packaging as
12 well as those of Defendant's competitors who may then have an incentive to follow
13 Defendant's deceptive practices, further misleading consumers.

14 92. Restitution may also be more certain, prompt, and efficient than other
15 legal remedies requested herein. The return of the full premium price will ensure that
16 Plaintiff is in the same place he would have been in had Defendant's wrongful
17 conduct not occurred, *i.e.*, in the position to make an informed decision about the
18 purchase of the Products absent misrepresentations.

19 **COUNT VI**
20 **Negligent Misrepresentation**

21 93. Plaintiff hereby re-alleges and incorporates by reference the allegations
22 contained in all preceding paragraphs of this complaint.

23 94. Plaintiff brings this claim individually and on behalf of the members of
24 the proposed Class against Defendant under the laws of the State of California.

25 95. As discussed above, Defendant misrepresented that the Products
26 contain "No Preservatives" despite having two ingredients – citric acid and ascorbic
27 acid – that are classified by the FDA as preservatives.
28

1 96. At the time Defendant made these representations, Defendant knew or
2 should have known that these representations were false or made them without
3 knowledge of their truth or veracity.

4 97. At an absolute minimum, Defendant negligently misrepresented and/or
5 negligently omitted material facts about the Products and their advertising.

6 98. The negligent misrepresentations and omissions made by Defendant,
7 upon which Plaintiff and Class Members reasonably and justifiably relied, were
8 intended to induce and actually induced Plaintiff and Class Members to purchase the
9 Products.

10 99. Plaintiff and Class Members would not have purchased the Products at
11 all, or on the same terms, if the true facts had been known.

12 100. The negligent actions of Defendant caused damage to Plaintiff and
13 Class members, who are entitled to damages and other legal and equitable relief as a
14 result.

15 **COUNT VII**
16 **Fraud**

17 101. Plaintiff hereby re-alleges and incorporates by reference the allegations
18 contained in all preceding paragraphs of this complaint.

19 102. Plaintiff brings this claim individually and on behalf of the members of
20 the proposed Class against Defendant.

21 103. As discussed above, Defendant misrepresented that the Products
22 contain “No Preservatives” despite having two ingredients – citric acid and ascorbic
23 acid – that are classified by the FDA as preservatives. These misrepresentations and
24 omissions were made by Defendant with knowledge of their falsehood.

25 104. The misrepresentations and omissions made by Defendant, upon which
26 Plaintiff and Class members reasonably and justifiably relied, were intended to
27 induce and actually induced Plaintiff and Class Members to purchase the Products.

28

1 105. The fraudulent actions of Defendant caused damage to Plaintiff and the
2 members of the Class, who are entitled to damages and other legal and equitable
3 relief as a result.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiff Chauca, individually and on behalf of all others
6 similarly situated, seeks judgment against Defendant, as follows:

- 7 a. For an order certifying the Class and naming Plaintiff as a
8 representative of the Class and Plaintiff’s attorneys as Class Counsel to
9 represent the Classes;
10 b. For an order declaring Defendant’s conduct violates the statutes
11 referenced herein;
12 c. For an order finding in favor of Plaintiff and the Classes on all counts
13 asserted herein;
14 d. For actual, compensatory, statutory, and/or punitive damages in
15 amounts to be determined by the Court and/or jury;
16 e. For prejudgment interest on all amounts awarded;
17 f. For an order of restitution and all other forms of equitable monetary
18 relief;
19 g. For injunctive relief as pleaded or as the Court may deem proper; and
20 h. For an order awarding Plaintiff and the Classes their reasonable
21 attorneys’ fees, expenses, and costs of suit.

22 **JURY DEMAND**

23 Plaintiff demands a trial by jury on all causes of action and issues so triable.

24 Dated: April 20, 2023

25 Respectfully submitted,

26 **BURSOR & FISHER, P.A.**

27 By: /s/ Frederick J. Klorczyk III

28 Frederick J. Klorczyk III (SBN 320783)
888 Seventh Avenue
New York, NY 10019

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E-Mail: adrian@gr-firm.com

Attorneys for Plaintiff and the Putative Class

CIVIL COVER SHEET

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

I. (a) PLAINTIFFS

SERGIO CHAUCA, individually and on behalf of all others similarly situated,

(b) County of Residence of First Listed Plaintiff Bronx County, NY (EXCEPT IN U.S. PLAINTIFF CASES)

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

Frederick J. Klorczyk III, Bursor & Fisher, P.A. 888 7th Avenue, New York, NY 10019, (646) 837-7150

DEFENDANTS

ROWDY BEVERAGE, INC.

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

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

Attorneys (If Known)

'23CV0730 BEN BGS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and incorporation status. Includes options for Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, and Foreign Nation.

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

Click here for: Nature of Suit Code Descriptions.

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Each category contains a list of specific legal claims with checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

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

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. § 1332. Brief description of cause: Mislabeled energy drink product contains known preservatives despite a "NO PRESERVATIVES" label

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ 5,000,000+ CHECK YES only if demanded in complaint: JURY DEMAND: [X] Yes [] No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 04/20/2023 SIGNATURE OF ATTORNEY OF RECORD /s/ Frederick J. Klorczyk III

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE