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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NICOLE LOCKHART, BOBBI
O’SULLIVAN, and ALEXIS JADE
HUNTER, on behalf of themselves, the
general public, and those similarly situated,

Plaintiffs,

v.

BEVERAGE MARKETING USA, INC.,
HORNELL BREWING CO., INC,
ARIZONA BEVERAGE COMPANY
LLC, ARIZONA BEVERAGES USA
LLC, and ARIZONA ICED TEA LLC,

Defendants.

C.A. No.: _____

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

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INTRODUCTION

1. Plaintiffs Nicole Lockhart, Bobbi O’Sullivan, and Alexis Jade Hunter, by and through their counsel, bring this class action against Beverage Marketing USA, Inc., Hornell Brewing Co., Inc., AriZona Beverage Company LLC, AriZona Beverages USA LLC, and AriZona Iced Tea LLC (collectively, “Defendants”) on behalf of themselves, the general public, and those similarly situated for violations of California’s Consumer Legal Remedies Act (“CLRA”), California Civil Code §§ 1750 *et seq.*; False Advertising Law (“FAL”), Cal. Bus. & Prof. Code §§ 17200 *et seq.*; Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17500 *et seq.*; common law fraud, deceit and/or misrepresentation; and unjust enrichment/restitution. The following allegations are based upon information and belief, including the investigation of Plaintiffs’ counsel, unless stated otherwise

2. Defendants are among the world’s largest producers of canned and bottled beverages. Defendants’ beverages are sold throughout the United States and California in convenience stores and supermarkets such as Walmart, Kroger, Safeway, Costco, and Target.

3. Defendants’ flagship product is “Green Tea with Ginseng and Honey” (the “Product”) Defendants claim on their website that the Product is “America’s best-selling green tea.”

4. To sell the Product, Defendants represent to consumers that it contains ginseng in an amount sufficient to provide energy to those who drink it. For example, on the 23-ounce can and gallon jug containers of the Product, they represent that the drink contains “Ginseng for energy.” In addition, the Product title on the front of the containers has only six words, with “ginseng” appearing in capital letters: “Green Tea With GINSENG and HONEY.”

5. Consumers are familiar with the well-publicized benefits of consuming ginseng. Ginseng is believed to be a cure for low energy, and is purported to have other health benefits.

6. Defendants themselves credit the presence of ginseng for the success of the Product. On the primary webpage that Defendants designed for the Product, Defendants ask the

1 question “Ever wonder how it became so popular?” They answer it by saying that the Product
2 contain “100% natural green tea,” as well as “just the right amount of ginseng,” as well as
3 premium honey.¹

4 7. The Product, however, does not contain any detectible amounts of ginseng, if
5 indeed it contains any ginseng at all. Accordingly, Defendants’ representations that (i) the Product
6 has enough ginseng to provide energy; and (ii) the Product has “just the right amount of ginseng,”
7 are demonstrably false.

8 8. Defendants apparently decided to use, at best, a miniscule, scientifically
9 undetectable amount of ginseng in the Product (or, more likely, to entirely omit ginseng from the
10 Product), to increase their revenues. Over the past decade, demand for ginseng has skyrocketed
11 while supply has dwindled, causing prices to surge above \$1,000 per pound. Ginseng is so
12 coveted in the marketplace that certain species of ginseng have been harvested to the edge of
13 extinction. Defendants know that if they were to use enough ginseng in the Product to actually
14 provide energy to consumers, their revenues (and competitive advantage) would suffer.

15 9. Defendants never disclosed to consumers that the Product does not contain enough
16 ginseng to provide energy. Defendants’ misrepresentations and omissions have misled millions of
17 consumers and caused them to pay a premium for the Product.

18 **PARTIES**

19 10. Nicole Lockhart is, and at all times alleged in this Class Action Complaint was, an
20 individual and resident of Huntington Beach, California.

21 11. Bobbi O’Sullivan is, and at all times alleged in this Class Action Complaint was,
22 an individual and resident of Petaluma, California.

23 12. Alexis Jade Hunter is, and at all times alleged in this Class Action Complaint was,
24 an individual and a resident of Hawthorne, California.

25 13. Defendant Beverage Marketing USA, Inc. is a corporation existing under the laws
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28 ¹ See <https://www.drinkarizona.com/product/green-tea-with-ginseng-honey> (last accessed March 28, 2019).

1 of the State of the New York, having its principal place of business at 60 Crossways Park Drive,
2 Suite 400, Woodbury, NY 11797.

3 14. Defendant Hornell Brewing Co., Inc. is a corporation existing under the laws of
4 the State of the New York, having its principal place of business at 60 Crossways Park Drive,
5 Suite 400, Woodbury, NY 11797.

6 15. Defendant AriZona Beverages USA LLC is a company existing under the laws of
7 the State of New York, having its principal place of business at 60 Crossways Park Drive, Suite
8 400, Woodbury, NY 11797.

9 16. Defendant AriZona Beverage Company LLC is a company existing under the laws
10 of the State of New York, having its principal place of business at 60 Crossways Park Drive,
11 Suite 400, Woodbury, NY 11797.

12 17. Defendant AriZona Iced Tea LLC is a company existing under the laws of the
13 State of New York, having its principal place of business at 700 Columbia Street, Brooklyn, NY
14 11231.

15 18. At all times herein mentioned, each of the Defendants was the agent, servant,
16 representative, officer, director, partner or employee of the other defendants and, in doing the
17 things herein alleged, was acting within the scope and course of his/her/its authority as such, and
18 with the permission and consent of each Defendant.

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

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

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

27 22. At all times herein mentioned, each of the Defendants aided and abetted the acts
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1 and omissions of each and all of the other Defendants in proximately causing the damages, and
2 other injuries, as herein alleged.

3 **JURISDICTION AND VENUE**

4 23. This Court has jurisdiction over the subject matter of this action pursuant to 28
5 U.S.C. § 1332(d)(2). The amount in controversy exceeds \$5,000,000, exclusive of interest and
6 costs, and this action is a class action in which at least one member of the class is a citizen of a
7 State different from the defendants.

8 24. The injuries, damages and/or harm upon which this action is based occurred or
9 arose out of activities engaged by Defendants within, affecting, and emanating from California.
10 Defendants intentionally advertised the Product in California, representing that it contained
11 “Ginseng for energy,” causing a significant portion of reasonable consumers to believe that the
12 Product contained enough ginseng to provide them with energy. Defendants distributed the
13 Product in California knowing it would be sold at retail to consumers such as Plaintiffs. Plaintiffs
14 purchased the Product in California based on Defendants’ misrepresentations.

15 25. Each Defendant regularly conducts and/or solicits business in, engages in other
16 persistent courses of conduct in, and/or derives substantial revenue from products provided to
17 persons in California.

18 26. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because a
19 substantial part of the events or omissions giving rise to the claims occurred in the State of
20 California, including within this District.

21 27. In accordance with California Civil Code Section 1780(d), Plaintiffs concurrently
22 file herewith declarations establishing that, in 2008, they purchased the Product in California.
23 (*See Exhibits A, B and C.*)

24 **SUBSTANTIVE ALLEGATIONS**

25 28. The non-alcoholic beverages market is fiercely competitive. Beverage producers
26 continually attempt to gain market share in various ways, including by touting the ingredients in
27 their products and the positive ways that those ingredients will affect the consumer.
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29. Operating under the brand name “AriZona,” Defendants are large companies that produce, market, and distribute non-alcoholic beverages for sale to consumers.

30. Defendants understand that consumers are increasingly health-conscious and interested in consuming beverages that are healthy. At the same time, with the recent explosion of the energy drink market, Defendants also understand that consumers are increasingly interested in consuming beverages that provide energy, including by natural means.

31. By deciding to advertise the Product—their flagship beverage—as containing ginseng, Defendants have been able to capitalize on both of these market trends. Defendants effectively represent to consumers that they can consume a healthy beverage, while at the same time gaining energy from the ginseng, a natural product. Defendants know, however, that their representations are false; the Product does not contain enough ginseng to provide energy to consumers, if indeed it contains any ginseng at all.

A. Defendants’ Misrepresentations

32. Defendants repeatedly represent to consumers on the Product itself that it contains ginseng. The front of the label for the gallon jug of the Product states as follows:



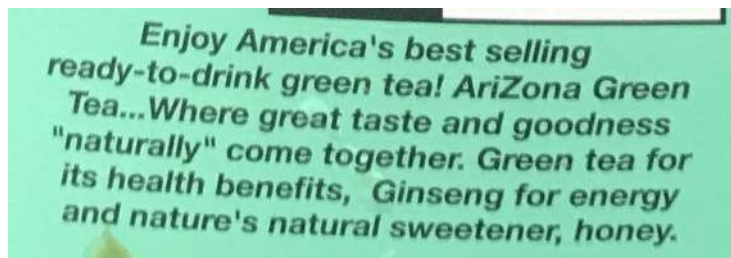
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33. Likewise, the front of the label for the 23-ounce can appears as follows:



34. As can be seen in the two photographs above, the title of the product is “Green Tea With GINSENG and HONEY,” clearly representing to consumers that the product contains ginseng.

35. Defendants also repeatedly represent to consumers that the amount of ginseng in the Product is enough to provide energy to those who drink it. The back of the label for the gallon jug of the Product appears as follows:



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36. Similarly, the back of the label for the 23-ounce can of the Product appears as follows:



37. As can be seen in the two photographs above, the containers for the Product prominently state that the Product contains “Ginseng for energy.”

38. The representation that the Product contains “Ginseng for energy” was uniformly communicated to Plaintiffs and every other person who purchased the Product during the proposed class period

39. Defendants’ website also represents to consumers that the Product contains a substantial amount of ginseng. On the primary webpage that Defendants designed for the Product, Defendants ask the question “Ever wonder how it became so popular?” They answer it by saying that the Product contains “100% natural green tea,” as well as “just the right amount of ginseng,” as well as premium honey.

40. The Product, however, does not contain any detectible amounts of ginseng, if indeed it contains any ginseng at all.

41. Plaintiffs’ counsel retained two respected food laboratories to conduct three tests of the Product for ginsenosides—the main chemical constituent of ginseng. Although various samples of the Product were tested using incredibly sensitive equipment,² none of the three tests

² A ginsenoside would have been detected if it equaled or exceeded 0.624 mcg/g—equivalent to 0.624 parts per million.

1 were able to detect *any* amount of ginsenosides in the Product. Thus, the testing confirmed that
2 the Product contains either no ginseng at all, or, at best, an amount of ginseng that is so miniscule
3 that it cannot be detected even by scientific tests and could not provide energy to a consumer.

4 42. The laboratories also tested several competing products made by other beverage
5 producers. Like the Product, those competing products were advertised as containing ginseng.
6 The labs confirmed that products made by competing brands, such as Republic of Tea and
7 Starbucks, do contain ginseng.

8 43. Defendants' representations misled reasonable consumers into believing that the
9 Product contains sufficient ginseng to provide energy to those who consume it.

10 **B. Consumer Demand for Ginseng**

11 44. For thousands of years, ginseng has been used in Chinese medicine to treat
12 numerous ailments. Ginseng is believed to boost both physical and mental energy.³ In one study,
13 for example, ginseng was shown to have antifatigue effects in patients with idiopathic chronic
14 fatigue.⁴ It is believed that main chemical constituents of ginseng, ginsenosides, is responsible for
15 ginseng's positive effects.⁵

16 45. The ginseng plant is slow-growing and takes years to mature. In recent years, the
17 demand for ginseng among has skyrocketed while supply has dwindled, causing prices to surge
18 above \$1,000 per pound.⁶ The plant is so coveted that certain species of ginseng have been
19 harvested to the edge of extinction.⁷

20 46. Defendants decided to use a miniscule, scientifically undetectable amount of
21 ginseng in the Product (or to entirely omit ginseng from the Product), to increase their revenues.
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24 ³ See, e.g., <https://www.medicalnewstoday.com/articles/262982.php> (last accessed March 29, 2019)

25 ⁴ See Kim HG et al., Antifatigue effects of Panax ginseng C.A. Meyer: a randomized, double-
26 blind, placebo-controlled trial, PLoS One (April 17, 2013).

27 ⁵ See, e.g., <https://www.medicalnewstoday.com/articles/262982.php>; Kim HG et al.

28 ⁶ See, e.g., <https://www.nationalgeographic.com.au/people/as-demand-for-ginseng-soars-poachers-threaten-its-survival.aspx> (last accessed March 29, 2019).

⁷ See *id.*

1 Defendants knew that if they were to use enough ginseng in the Product to actually provide
2 energy to consumers, their revenues would suffer.

3 47. Defendants' advertising and labeling of the Product as containing "Ginseng for
4 energy" is false, misleading, and intended to induce consumers to purchase the Product, at a
5 premium price, while ultimately failing to meet consumer expectations.

6 48. Defendants engaged in the practices complained of herein to further their private
7 interests of: (i) increasing sales of the Product, while decreasing the sales of competing
8 beverages; and/or (ii) commanding a higher price for the Product because consumers will pay
9 more for beverages containing ginseng in sufficient quantities to provide energy.

10 **C. Plaintiffs' Experiences**

11 49. Plaintiff Lockhart has purchased the Product many times within California over
12 the past three years. For example, she purchased the gallon jug in July 2018 at Ralph's grocery
13 store in Fountain Valley, California. She has purchased both the gallon jug and the 23-ounce can
14 of the Product. Before purchasing the Product, she read and relied on Defendants' representation
15 that the Product contains "Ginseng for energy." Ms. Lockhart believed this meant that the Product
16 contained ginseng and that consuming it would provide the energy associated with ginseng
17 consumption. At the time of each purchase, Ms. Lockhart did not know that the Product did not
18 contain an amount of ginseng capable of providing any energy, if it contained any at all.

19 50. As a result of Defendants' misrepresentations and omissions, the Product has no,
20 or, at a minimum, a much lower, value to Ms. Lockhart. Had Ms. Lockhart known that the
21 product does not contain enough ginseng to provide energy (or that the product does not contain
22 any ginseng at all), she would not have purchased it or, at a minimum, would have paid less for it.
23 Accordingly, Ms. Lockhart was injured by paying more money for the Product than she would
24 have paid were it not for Defendants' misrepresentations.

25 51. Plaintiff O'Sullivan purchased the Product within California within the past three
26 years. For example, she purchased the gallon jug of the Product in July 2018 at Safeway near her
27 home in Petaluma, California. Before purchasing the product, she read and relied on Defendants'
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1 representation that the Product contains “Ginseng for energy.” Ms. O’Sullivan believed this
2 meant that the Product contained ginseng and that consuming it would provide the energy
3 associated with ginseng consumption. At the time of each purchase, Ms. O’Sullivan did not know
4 that the Product did not contain an amount of ginseng capable of providing any energy, if it
5 contained any at all.

6 52. As a result of Defendants’ misrepresentations and omissions, the Product has no,
7 or, at, a minimum, a much lower, value to Ms. O’Sullivan. Had Ms. O’Sullivan known that the
8 product does not contain enough ginseng to provide energy (or that the product does not contain
9 any ginseng at all), she would not have purchased it or, at a minimum, would have paid less for it.
10 Accordingly, Ms. O’Sullivan was injured by paying more money for the Product than she would
11 have paid were it not for Defendants’ misrepresentations.

12 53. Plaintiff Hunter purchased the Product within California within the past three
13 years. For example, she purchased the gallon jug of the Product in July 2018 at Ralph’s grocery
14 store in Hawthorne, California. Before purchasing the product, she read and relied on Defendants’
15 representation that the Product contains “Ginseng for energy.” Ms. Hunter believed this meant
16 that the Product contained ginseng and that consuming it would provide the energy associated
17 with ginseng consumption. At the time of each purchase, Ms. Hunter did not know that the
18 Product did not contain an amount of ginseng capable of providing any energy, if it contained any
19 at all.

20 54. As a result of Defendants’ misrepresentations and omissions, the Product has no,
21 or, at, a minimum, a much lower, value to Ms. Hunter. Had Ms. Hunter known that the product
22 does not contain enough ginseng to provide energy (or that the product does not contain any
23 ginseng at all), she would not have purchased it or, at a minimum, would have paid less for it.
24 Accordingly, Ms. Hunter was injured by paying more money for the Product than she would have
25 paid were it not for Defendants’ misrepresentations.

26 55. Plaintiffs continue to desire to purchase teas with quantities of ginseng sufficient
27 to provide energy, including brands marketed and sold by Defendants. If Defendants’ Product
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1 were reformulated to include a level ginseng sufficient to provide energy, Plaintiffs would likely
2 purchase Defendants' products again in the future. Plaintiffs regularly visit stores where
3 Defendants' beverages are sold. Because Plaintiffs do not know the formula for Defendants'
4 Product and cannot test whether or not the beverages are made using ginseng before purchasing,
5 Plaintiffs will be unable to rely on Defendants' labels when shopping for beverages in the future
6 absent an injunction that prohibits Defendants from labeling their beverages with the phrase
7 "Ginseng for energy" unless the Product is actually made using a level of ginseng sufficient to
8 produce an effect. Further, because green tea contains caffeine, it would be particularly difficult
9 for Plaintiffs to determine, after consuming a future formula of the beverage, whether any
10 resulting feeling of energy is attributable solely to caffeine or to instead to ginseng that may be in
11 the formula. Likewise, because of changes in the market, Plaintiffs do not know at any given
12 time, which brands are owned by Defendants and whether their representations about ginseng are
13 truthful. Thus, Plaintiffs are likely to be repeatedly presented with false or misleading information
14 when shopping for green tea and other soft drinks, making it difficult to make informed
15 purchasing decisions. Should Defendants begin to market and sell a new brand of soft drink,
16 Plaintiffs could be at risk for buying another one of Defendants' products in reliance on the same
17 or similar misrepresentation.

18 CLASS ALLEGATIONS

19 56. Plaintiffs bring this action against Defendants, on behalf of themselves and all
20 others similarly situated, as a class action pursuant to Rule 23 of the Federal Rules of Civil
21 Procedure. Plaintiffs seek to represent the following groups of similarly situated persons, defined
22 as follows:

23 All persons who, between April 1, 2015 and the present, purchased
24 the gallon jug or 23-ounce can of Arizona Green Tea with Ginseng
25 and Honey in California (the "Class").

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27 57. Plaintiffs and members of the proposed class have been economically damaged by
28 their purchase of the Product because the advertising for the Product was and is untrue and/or

1 misleading under California law; therefore, the Product is worth less than what Plaintiffs and
2 members of the Class paid for them and/or Plaintiffs and members of the Class did not receive
3 what they reasonably intended to receive.

4 58. As a direct and proximate result of Defendants' unfair and wrongful conduct, as
5 set forth herein, Plaintiffs and the class members: (1) were misled into purchasing the Product; (2)
6 received a product that failed to meet their reasonable expectations and Defendants' promises; (3)
7 paid a premium sum of money for a product that was not as represented and, thus, were deprived
8 of the benefit of the bargain because the purchased product had less value than what was
9 represented by Defendants; and (4) ingested a substance that was other than what was represented
10 by Defendants and that Plaintiffs and class members did not expect.

11 59. This action is properly brought and may be maintained as a class action because it
12 satisfies all of the prerequisites of Rule 23.

13 60. Numerosity: Plaintiffs do not know the exact size of the class, but it far exceeds
14 1000 persons.

15 61. Typicality: Plaintiffs are typical of the class because they were subject to the
16 fraudulent scheme of Defendants as every other class member. They purchased the Product based
17 on Defendants' false representation that it contains "Ginseng for energy." Like all other class
18 members, they paid a premium as a result of that misrepresentation and suffered economic injury
19 as a result. Thus, Plaintiffs and the class members sustained the same injuries and damages
20 arising out of Defendants' conduct in violation of the law. The injuries and damages of each class
21 member were caused directly by Defendants' wrongful conduct in violation of law as alleged.

22 62. Adequacy: Plaintiffs will fairly and adequately protect the interests of all class
23 members because it is in their best interests to prosecute the claims alleged herein to obtain full
24 compensation due to them for the unfair and illegal conduct of which they complain. Plaintiffs
25 have no interests that are in conflict with, or antagonistic to, the interests of class members.
26 Plaintiffs have retained highly competent and experienced class action attorneys to represent their
27 interests and those of the class. By prevailing on their claims, Plaintiffs will establish Defendants'
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1 liability to all class members. Plaintiffs and their counsel have the necessary financial resources to
2 adequately and vigorously litigate this class action, and Plaintiffs and counsel are aware of their
3 fiduciary responsibilities to the class members and are determined to diligently discharge those
4 duties by vigorously seeking the maximum possible recovery for class members.

5 63. Commonality and Predominance: This action involves common questions the
6 common answers of which will drive the resolution of this case for all class members because
7 each class member’s claim derives from the deceptive, unlawful and/or unfair statements and
8 omissions that led consumers to believe that the Product contains ginseng. The Product contained
9 the representation “Ginseng for energy” throughout the class period. The Product’s formula
10 likewise remained unchanged. Thus, all of the central issues in this case will be resolved via
11 common proof for all class members, establishing that common issues predominate over any
12 individual issues. The questions of law and fact common to the Class are:

- 13 a) whether the Product contains ginseng and, if so in what quantity;
14 b) whether Defendants unfairly, unlawfully and/or deceptively misrepresented
15 that the Product contains sufficient “Ginseng for energy”;
16 c) whether the use of the phrase “Ginseng for energy” on the display panel of
17 the Product violated Federal and/or California state law;
18 d) whether the advertising of the product as having “Ginseng for energy”
19 causes the Product to command a premium in the market as compared with
20 similar products that do not make such a claim;
21 e) whether Defendants’ advertising and marketing regarding the Product sold
22 to the class members was likely to deceive the class members and/or was
23 unfair;
24 f) whether the “Ginseng for energy” claim on Product packaging and
25 advertising is material to a reasonable consumer’s decision to purchase the
26 Product;
27 g) whether Defendants engaged in the alleged conduct knowingly, recklessly,
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- or negligently;
- h) the amount of profits and revenues earned by Defendants as a result of their conduct;
- i) whether class members are entitled to restitution, injunctive and other equitable relief and, if so, what is the nature (and amount) of such relief; and
- j) whether class members are entitled to payment of actual, incidental, consequential, exemplary and/or statutory damages plus interest thereon, and if so, what is the nature of such relief.

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

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

PLAINTIFFS' FIRST CAUSE OF ACTION
(Violation of the Consumers Legal Remedies Act (the "CLRA"), California Civil Code § 1750, et seq.)

66. Plaintiffs reallege and incorporate the paragraphs of this Class Action Complaint as if set forth herein.

1 67. Defendants' actions, representations and conduct have violated, and continue to
2 violate the CLRA, because they extend to transactions that are intended to result, or which have
3 resulted, in the sale of goods to consumers.

4 68. Plaintiffs and class members are "consumers" as that term is defined by the CLRA
5 in California Civil Code § 1761(d).

6 69. The Products that Plaintiffs (and other similarly situated class members) purchased
7 from Defendants were "goods" within the meaning of California Civil Code § 1761(a).

8 70. Defendants' acts and practices, set forth in this Class Action Complaint, led
9 Plaintiffs and similarly situated consumers to falsely believe that the Product contained sufficient
10 ginseng to provide energy to those who drink it. In truth, the Product does not contain any
11 detectible amounts of ginseng (if indeed they contain any ginseng at all), so Defendants' claim
12 that consumers can obtain energy from ginseng in the Product is false.

13 71. By engaging in the actions, representations and conduct set forth in this Class
14 Action Complaint, Defendants have violated, and continue to violate, § 1770(a)(5), § 1770(a)(7),
15 § 1770(a)(8), and § 1770(a)(9) of the CLRA. In violation of California Civil Code §1770(a)(5),
16 Defendants' acts and practices constitute improper representations that the goods they sell have
17 sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities, which they do not
18 have. In violation of California Civil Code §1770(a)(7), Defendants' acts and practices constitute
19 improper representations that the goods they sell are of a particular standard, quality, or grade,
20 when they are of another. In violation of California Civil Code §1770(a)(8), Defendants
21 disparaged and continue to disparage the goods, services, or business of another by false or
22 misleading representation of fact. In violation of California Civil Code §1770(a)(8), Defendants
23 falsely or deceptively market and advertise that, unlike other green teas, their Product contains
24 sufficient ginseng to provide energy to those who consume it. Finally, in violation of California
25 Civil Code §1770(a)(9), Defendants advertise and continue to advertise goods or services with
26 intent not to sell them as advertised.

27 72. Plaintiffs request that this Court enjoin Defendants from continuing to employ the
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1 unlawful methods, acts and practices alleged herein pursuant to California Civil Code
2 § 1780(a)(2). If Defendants are not restrained from engaging in these types of practices in the
3 future, Plaintiffs and the other members of the Class will continue to suffer harm.

4 73. On October 22, 2018 and October 26, 2018, Plaintiffs provided Defendants with
5 notice and demand that they correct, repair, replace or otherwise rectify the unlawful, unfair, false
6 and/or deceptive practices complained of herein. (*See* Exhibit D.) The October 22 notice was sent
7 via certified mail, return receipt requested, to AriZona Beverage Company LLC and AriZona
8 Beverages USA LLC, c/o National Registered Agents, Inc., 111 Eighth Avenue, New York, NY
9 10011. The October 26 notice was sent to (i) AriZona Beverages USA LLC, c/o Martin
10 Cunningham, 60 Crossways Park Drive West, Woodbury, NY 11797; and (ii) Hornell Brewing
11 Co., Inc., c/o National Registered Agents, Inc., 111 Eighth Avenue, New York, NY 1001. (*See*
12 *id.*)⁸ Despite receiving the aforementioned notices and demands, Defendants did not respond in
13 any way. Defendants also failed to take any action in response to the notice and demand, as they
14 did not identify similarly situated customers, notify them of their right to correction, repair,
15 replacement or other remedy, and/or to provide that remedy. Accordingly, Plaintiffs seek,
16 pursuant to California Civil Code § 1780(a)(3), on behalf of themselves and those similarly
17 situated class members, compensatory damages, punitive damages and restitution of any ill-gotten
18 gains due to Defendants' acts and practices.

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

21
22 **PLAINTIFFS' SECOND CAUSE OF ACTION**

23 **(False Advertising, Business and Professions Code § 17500, *et seq.* ("FAL"))**

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

26 76. Beginning at an exact date unknown to Plaintiffs, but within three (3) years
27 preceding the filing of the Class Action Complaint, Defendants made untrue, false, deceptive

28 ⁸ Hornell is the parent corporation of the AriZona limited liability companies.

1 and/or misleading statements in connection with the advertising and marketing of the Product.

2 77. Defendants made representations and statements (by omission and commission)
3 that led reasonable consumers to believe that the Product that they were purchasing contained
4 sufficient ginseng to provide energy to those who drink it.

5 78. In truth, the Product does not contain any detectible amounts of ginseng (if indeed
6 it contains any ginseng at all), so Defendants' claim that consumers can obtain energy from
7 ginseng in the Product is false.

8 79. Plaintiffs and those similarly situated relied to their detriment on Defendants'
9 false, misleading and deceptive advertising and marketing practices, including each of the
10 misrepresentations and omissions set forth in Section A of the Substantive Allegations above.
11 Had Plaintiffs and those similarly situated been adequately informed and not intentionally
12 deceived by Defendants, they would have acted differently by, without limitation, refraining from
13 purchasing the Product or paying less for it.

14 80. Defendants' acts and omissions are likely to deceive the general public.

15 81. Defendants engaged in these false, misleading and deceptive advertising and
16 marketing practices to increase their profits. Accordingly, Defendants engaged in false
17 advertising, as defined and prohibited by section 17500, et seq. of the California Business and
18 Professions Code.

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

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

26 84. Plaintiffs seek, on behalf of themselves and those similarly situated, full restitution
27 of monies, as necessary and according to proof, to restore any and all monies acquired by
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1 Defendants from Plaintiffs, the general public, or those similarly situated by means of the false,
2 misleading and deceptive advertising and marketing practices complained of herein, plus interest
3 thereon.

4 85. Plaintiffs seek, on behalf of themselves and those similarly situated, a declaration
5 that the above-described practices constitute false, misleading and deceptive advertising.

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

17
18 **PLAINTIFFS' THIRD CAUSE OF ACTION**

19 **(Unlawful, unfair, and fraudulent trade practices violation of Business and Professions**
20 **Code § 17200, et seq.)**

21 87. Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action
22 Complaint as if set forth herein.

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

27 89. In particular, Defendants have engaged, and continue to engage, in unlawful
28 practices by, without limitation, violating the following state and federal laws: (i) the CLRA as

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

9 90. In particular, Defendants have engaged, and continue to engage, in unfair and
10 fraudulent practices by misrepresenting that the Product contains “Ginseng for energy.”

11 91. In truth, the Product does not contain any detectible amounts of ginseng (if indeed
12 it contains any ginseng at all), so Defendants' claim that consumers can obtain energy from
13 ginseng in the Product is false.

14 92. Plaintiffs and those similarly situated relied to their detriment on Defendants'
15 unlawful, unfair, and fraudulent business practices. Had Plaintiffs and those similarly situated
16 been adequately informed and not deceived by Defendants, they would have acted differently by
17 not purchasing the product or, at a minimum, paying less for it.

18 93. Defendants' acts and omissions are likely to deceive the general public.

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

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

25 96. As a direct and proximate result of such actions, Plaintiffs and the other class
26 members have suffered and continue to suffer injury in fact and have lost money and/or property
27 as a result of such deceptive and/or unlawful trade practices and unfair competition in an amount
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1 which will be proven at trial, but which is in excess of the jurisdictional minimum of this Court.
2 Among other things, Plaintiffs and the class members lost the amount of money they paid for the
3 Product.

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

7 98. Plaintiffs seek, on behalf of themselves and those similarly situated, full restitution
8 of monies, as necessary and according to proof, to restore any and all monies acquired by
9 Defendants from Plaintiffs, the general public, or those similarly situated by means of the
10 deceptive and/or unlawful trade practices complained of herein, plus interest thereon.

11 99. Plaintiffs seek, on behalf of those similarly situated, a declaration that the above-
12 described trade practices are fraudulent, unfair, and/or unlawful.

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

24 **PLAINTIFF'S FOURTH CAUSE OF ACTION**

25 **(Common Law Fraud, Deceit and/or Misrepresentation)**

26 101. Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action
27 Complaint as if set forth herein.
28

1 102. Throughout the last four years, Defendants fraudulently and deceptively informed
2 Plaintiffs and the proposed class that the Product contains sufficient ginseng to provide energy to
3 those who drink it.

4 103. Defendants failed to inform Plaintiffs and class members that the Product does not
5 contain any detectable amounts of ginseng (if indeed it contains any ginseng at all), so
6 Defendants' claim that consumers can obtain energy from ginseng in the Product is false.

7 104. These misrepresentations and omissions were known exclusively to, and actively
8 concealed by, Defendants, not reasonably known or knowable to Plaintiffs or class members, and
9 material at the time they were made. Defendants knew the composition of the Product and knew
10 that the soft drinks contained no detectable amounts of ginseng or ginsenosides. Defendants
11 intended to deceive consumers through its product label into believing that the Product contained
12 "Ginseng for energy" when they knew it did not contain sufficient ginseng to impart any energy,
13 as the misrepresentation was made prominently on the Product itself and reinforced through
14 Defendants' advertising.

15 105. Defendants' misrepresentations and omissions concerned material facts that were
16 essential to the analysis undertaken by Plaintiffs and class members as to whether to purchase the
17 Product. Defendants breached their duty to Plaintiffs and to the proposed class by misleading
18 them. Defendants also gained financially from, and as a result of, their breach.

19 106. Plaintiffs and those similarly situated relied to their detriment on Defendants'
20 misrepresentations and fraudulent omissions. Had Plaintiffs and those similarly situated been
21 adequately informed and not intentionally deceived by Defendants, they would have acted
22 differently by not purchasing the Product or, at a minimum, paying less for it.

23 107. By and through such fraud, deceit, misrepresentations and/or omissions,
24 Defendants intended to induce Plaintiffs and those similarly situated to alter their position to their
25 detriment. Specifically, Defendants fraudulently and deceptively induced Plaintiffs and those
26 similarly situated to, without limitation, purchase the Product.

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108. Plaintiffs and those similarly situated justifiably and reasonably relied on Defendants’ misrepresentations and omissions, and, accordingly, were damaged by Defendants.

109. As a direct and proximate result of Defendants’ misrepresentations and/or omissions, Plaintiffs and those similarly situated have suffered damages, including, without limitation, the amount they paid for the Product.

110. Defendants’ conduct as described herein was wilful and malicious and was designed to maximize Defendants’ profits even though Defendants knew that it would cause loss and harm to Plaintiffs and those similarly situated.

PLAINTIFF’S FIFTH CAUSE OF ACTION

(Negligent Misrepresentation)

111. Plaintiffs reallege and incorporate the above paragraphs of this Class Action Complaint as if fully set forth herein.

112. Defendants negligently and falsely represented to Plaintiffs and those similarly situated that the Product contains “Ginseng for energy” which reasonably led consumers to believe that they the Product contained sufficient ginseng to provide energy to those who drink it.

113. Defendants expected, knew or should have known, at all relevant times, that reasonable consumers would rely on the statement “Ginseng for energy” and on the absence of adequate disclosures to the contrary and that the information provided to and withheld from Plaintiffs and class members would guide or influence them in their purchasing decisions and would result in an inflated price for the Product.

114. In truth, the Product does not contain any detectible amounts of ginseng (if indeed it contains any ginseng at all), so Defendants’ claim that consumers can obtain energy from ginseng in the Product is false.

115. Whether or not the Product contains ginseng in sufficient quantities to provide the energy associated with ginseng consumption was material to the decision of Plaintiffs and those similarly situated to purchase the Product. Had Plaintiffs and those similarly situated known that the Product does not contain ginseng sufficient quantities of ginseng to provide energy, they

1 would have acted differently by, without limitation, not purchasing (or paying less for) the
2 Product.

3 116. Plaintiffs and those similarly situated were unaware of the falsity of Defendants’
4 representations, and justifiably relied on them in purchasing the Product.

5 117. Due to their justifiable reliance on Defendants’ misrepresentations, Plaintiffs and
6 those similarly situated suffered pecuniary loss.

7 **PLAINTIFF’S SIXTH CAUSE OF ACTION**

8 **(Unjust Enrichment)**

9 118. Plaintiffs reallege and incorporate the above paragraphs of this Class Action
10 Complaint as if fully set forth herein.

11 119. As a result of Defendants’ unlawful and deceptive actions with respect to the
12 “Ginseng for energy” representation described above, Defendants were enriched at the expense of
13 Plaintiffs and those similarly situated through their payment of monies to obtain the Product.

14 120. The Product does not contain any detectible amounts of ginseng (if indeed it
15 contains any ginseng at all).

16 121. Under the circumstances, it would be contrary to equity and good conscience to
17 permit Defendants to retain the ill-gotten benefits they received from Plaintiffs and those
18 similarly situated.

19 122. By reason of the foregoing, Plaintiffs and those similarly situated were damaged in
20 the amount they paid to obtain the Product.

21 **REQUEST FOR RELIEF**

22 WHEREFORE, Plaintiffs, on behalf of themselves and those similarly situated,
23 respectfully requests that the Court enter judgment against Defendants as follows:

- 24 A. Certification of the proposed Class, including appointment of Plaintiffs’ counsel as
25 class counsel;
26 B. An order temporarily and permanently enjoining Defendants from continuing the
27 unlawful, deceptive, fraudulent, and unfair business practices alleged in this
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Complaint;

- C. An award of compensatory damages in an amount to be determined at trial;
- D. An award of punitive damages in an amount to be determined at trial;
- E. An award of statutory damages in an amount to be determined at trial;
- F. An award of restitution in an amount to be determined at trial;
- G. An order requiring Defendants to pay both pre- and post-judgment interest on any amounts awarded;
- H. For reasonable attorneys' fees and the costs of suit incurred;
- I. For such further relief as this Court may deem just and proper;

JURY TRIAL DEMANDED

Plaintiffs hereby demand a trial by jury as to all issues.

Dated: April 2, 2019

GUTRIDE SAFIER LLP

/s/ Todd Kennedy/
Todd Kennedy (California Bar No. 250267)