

1 Plaintiff David Green (“Plaintiff”), by and through his undersigned counsel,
2 alleges the following based upon his own personal knowledge and the investigation of
3 his counsel. Plaintiff believes that substantial evidentiary support will exist for the
4 allegations set forth herein after a reasonable opportunity for discovery.

5 **NATURE OF THE ACTION**

6 1. This is a proposed class action against Dr Pepper Snapple Group, Inc.
7 (“Defendant”) for misleading consumers about the nutritional qualities, health
8 qualities, and ingredients of its soft drinks, namely, 7UP Cherry Antioxidant, Diet
9 7UP Cherry Antioxidant, 7UP Mixed Berry Antioxidant, Diet 7UP Mixed Berry
10 Antioxidant, 7UP Pomegranate Antioxidant, and Diet 7UP Pomegranate Antioxidant,
11 as well as other soft drink products sold under the “7UP” brand name that Defendant
12 marketed, labeled, and/or advertised as including antioxidants (collectively, the
13 “Product” or “Products”).

14 2. During the period September 6, 2006, to the present (the “Class Period”),
15 Defendant engaged in a widespread marketing and advertising campaign to mislead
16 consumers about the nutritional qualities, health qualities, and ingredients of the
17 Products. Specifically, Defendant conveyed the message that the Products were
18 healthful, natural, and antioxidant-rich beverages that derived their antioxidant content
19 from real cherries or real berries.

20 3. By misleading consumers about the nutritional qualities, healthfulness,
21 and ingredients of the Products as detailed herein, Defendant was able to distinguish
22 the Products from similar soft drinks and, thereby, command a premium price for the
23 Products. Defendant was motivated to mislead consumers for no other reason than to
24 take away market share from competing products and increase its own sales and
25 profits.

26 4. Defendant conveyed its misleading message through a widespread
27 marketing and advertising campaign on the packaging of the Products and on various
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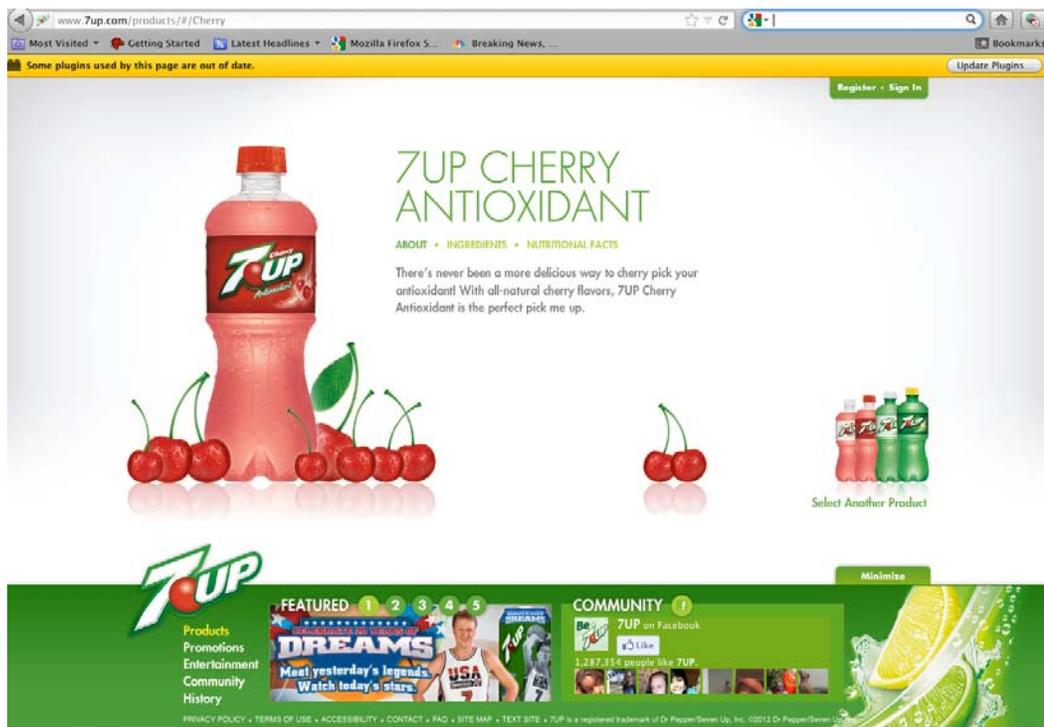
1 websites, including Defendant’s 7UP brand website, <http://www.7up.com> (the “7UP
2 Website”).

3 5. For example, Defendant asserts that the Products contain antioxidants,
4 including by using the representation “Antioxidant” in the Product names and on the
5 Product packaging.

6 6. Defendant also prominently displays pictures of cherries or berries on the
7 Product packaging. Each individual can or bottle of the Product displays images of
8 real fruit directly below the word “Antioxidant,” as does the outer packaging of
9 Product multi-can or multi-bottle containers. See graphic insert;
10 <http://www.7up.com/products/#/Cherry> (last visited Aug. 27, 2012);
11 <http://www.7up.com/products/#/MixedBerry> (last visited Apr. 27, 2012).



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2 7. Further, on the 7UP Website, Defendant displays 7UP Cherry
3 Antioxidant surrounded by images of real cherries, along with the statements “There’s
4 never been a more delicious way to cherry pick your antioxidant! With all-natural
5 cherry flavors, 7UP Cherry Antioxidant is the perfect pick me up.” See graphic insert;
6 <http://www.7up.com/products/#/Cherry> (last visited Aug. 27, 2012). Further, in the
7 recent past, the 7UP Website displayed animated images of falling cherries each time
8 a visitor highlighted an image of the 7UP Cherry Antioxidant soft drink. See *id.* (last
9 visited Apr. 27, 2012).



23 8. On the 7UP Website, Defendant also displays Diet 7UP Cherry
24 Antioxidant surrounded by images of real cherries, along with the statements “Diet
25 7UP Cherry Antioxidant has the same great taste without the calories of the original.
26 A delicious way to cherry pick your antioxidant!” See [http://www.7up.com/
27 products/#/Cherry](http://www.7up.com/products/#/Cherry) (last visited Aug. 27, 2012).

1 9. The representation “Antioxidant,” which is part of the name of each of
2 the Products, is central to the marketing of the Products and is displayed prominently
3 on their packaging. The images of real cherries and real berries are also central to the
4 marketing of the Products, and these images are displayed prominently on the Product
5 packaging and are often juxtaposed with the representation “antioxidant”.

6 10. Contrary to Defendant’s claims and representations, the Products do not
7 contain any real cherries, real berries, or even extracts from those fruits. Nor do the
8 Products derive their antioxidant content from real, antioxidant-rich cherries; real,
9 antioxidant-rich raspberries, blackberries, and cranberries; or real, antioxidant-rich
10 pomegranates. Unbeknownst to the average consumer, the Products contain only one
11 antioxidant—vitamin E.

12 11. Further, as explained in detail below, the minimal amount of added
13 vitamin E in the Products is insufficient to provide consumers with the health benefits
14 that Defendant’s representations lead them to believe the Products are able to confer.
15 Defendant’s representations are especially misleading in light of other ingredients in
16 the Products that are dangerous to consumers’ health, such as high fructose corn syrup
17 in the non-“Diet” Products and the artificial sweeteners acesulfame potassium and
18 aspartame in the “Diet” Products.

19 12. Accordingly, Defendant’s labeling and naming of the Products as
20 “antioxidant”; Defendant’s inclusion of images of real cherries, real berries, or real
21 pomegranates on the Product packaging and in the Product marketing and advertising,
22 often juxtaposed with the term “antioxidant”; and the other representations detailed
23 herein are false, misleading, and designed to deceive consumers into purchasing
24 Defendant’s Products. Plaintiff brings this action to stop Defendant’s misleading
25 practices.

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1 only antioxidant in the Products, vitamin E, was only present in a minimal amount
2 that was insufficient to provide Plaintiff Green with any health benefits; Plaintiff
3 Green would not have purchased the Products.

4 16. Defendant Dr Pepper Snapple Group, Inc. is a Delaware corporation with
5 its principal place of business in Plano, Texas. Dr Pepper Snapple Group, Inc.
6 markets and distributes 7UP Cherry Antioxidant, Diet 7UP Cherry Antioxidant, 7UP
7 Mixed Berry Antioxidant, Diet 7UP Mixed Berry Antioxidant, 7UP Pomegranate
8 Antioxidant, Diet 7UP Pomegranate Antioxidant, and other similar products
9 throughout California and the nation.

10 **SUBSTANTIVE ALLEGATIONS**

11 17. The images of real cherries and real berries on the Product packaging and
12 in the Product marketing and advertising suggest to the average consumer that the
13 Products contain real cherries or real berries, including real raspberries, real
14 blackberries, real cranberries, and real pomegranates, or that the Products contain
15 extracts from these fruits.

16 18. Defendant's juxtaposition of the representation "Antioxidant" with
17 images of real cherries or real berries suggests to the average consumer that any
18 antioxidant content in the Products is derived from real cherries or real berries.

19 19. Unfortunately for consumers, the Products do not contain any real
20 cherries, real berries, or even extracts from those fruits. Nor do the Products derive
21 their antioxidant content from real, antioxidant-rich cherries; real, antioxidant-rich
22 raspberries, blackberries, or cranberries; or real, antioxidant-rich pomegranates.
23 Instead, Defendant bases its antioxidant representations solely on its fortification of
24 the Products with a trace amount of a form of vitamin E called d-alpha tocopheryl
25 acetate—the only antioxidant in the Products.

26 20. Moreover, the Products do not provide the health benefits that reasonable
27 consumers associate with antioxidants.

1 21. Defendant’s addition of vitamin E to the Products provides only 15% of
2 the Food and Drug Administration’s (“FDA”) Recommended Daily Intake (“RDI”) of
3 vitamin E per 12 ounce can. Current scientific research, however, does not indicate
4 that vitamin E provides significant health benefits at this level.

5 22. For example, studies have found that vitamin E doses greater than 400
6 international units every other day are required to provide humans with health
7 benefits. *See* H.D. Sesso et al., *Vitamin E and C in the Prevention of Cardiovascular*
8 *Disease in Men*, 300 JAMA 2123, 2123 (2002) (finding that vitamin E doses greater
9 than 400 international units every other day are required to suppress elevated systemic
10 oxidative stress in humans); *see also* L. Jackson Roberts II et al., *The Relationship*
11 *Between Dose of Vitamin E and Suppression of Oxidative Stress in Humans*, 43 FREE
12 RADIC. BIOL. MED. 1388, 1391-1392 (2007). By comparison, the RDI established by
13 the FDA for vitamin E is 30 international units. *See* 21 C.F.R. § 101.9(c)(8)(iv). At
14 10% RDI per serving, the Products contain less than 3 international units per
15 serving—only 0.75% of the amount of vitamin E that scientific research establishes is
16 required to provide humans with health benefits.

17 23. Moreover, consumers seeking simply to meet the RDI for vitamin E are
18 also unlikely to experience health benefits from 7UP Antioxidant Products. The
19 National Institutes of Health confirms that vitamin E deficiency is rare, and the
20 average American likely exceeds the RDI for vitamin E. National Institutes of Health,
21 Office of Dietary Supplements, *Dietary Supplement Fact Sheet: Vitamin E*, available
22 at <http://ods.od.nih.gov/factsheets/VitaminE-HealthProfessional/> (accessed Oct. 11,
23 2011).

24 24. Further, scientific research suggests that isolated antioxidants, such as the
25 vitamin E added to Defendant’s Products, do not provide the same health benefits as a

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1 diet rich in fruits and vegetables.¹ Clinical trials indicate that individual antioxidants,
2 taken alone, do not appear to have consistent preventative effects. *See, e.g.,* Rui Hai
3 Liu, *Health Benefits of Fruits and Vegetables are from Additive and Synergistic*
4 *Combinations of Phytochemicals*, 78 Am. J. Clinical Nutrition 517S, at 518S (2003);
5 *see also* National Institutes of Health, Office of Dietary Supplements, *Dietary*
6 *Supplement Fact Sheet: Vitamin E*, available at [http://ods.od.nih.gov/factsheets/
7 VitaminE-HealthProfessional/](http://ods.od.nih.gov/factsheets/VitaminE-HealthProfessional/) (accessed Oct. 11, 2011) (advising consumers to obtain
8 antioxidants such as vitamin E through healthful foods such as almonds, peanut butter,
9 broccoli, and spinach, rather than through supplements or fortified foods).

10 25. In this regard, the United States Department of Agriculture notes that
11 [a] fundamental premise of the Dietary Guidelines [for Americans] is that
12 nutrients should come primarily from foods. Foods in nutrient-dense,
13 mostly intact forms contain not only the essential vitamins and minerals
14 that are often contained in nutrient supplements, but also dietary fiber and

15 ¹ Numerous studies establish that consuming whole fruits and vegetables benefits
16 health and suggest that consumption of individual vitamins does not provide the same
17 benefits. *See e.g.,* Penny M. Kris-Etherton et al., *Bioactive Compounds in Foods:
18 Their Role in the Prevention of Cardiovascular Disease and Cancer*, 113 Am. J. Med.
19 71S, 71S–88S (2002) (“Numerous epidemiologic studies indicate that an increase in
20 the consumption of fruits and vegetables is associated with a decrease in the incidence
21 of cardiovascular disease (CVD), [coronary heart disease], and stroke.”); Y. Kelly et
22 al., *Nutrition and Respiratory Health in Adults: Findings from the Health Survey for
23 Scotland*, 21 European Respiratory J. 664, 664–671 (2003) (“[T]he active agent(s), or
24 the most beneficial combinations of dietary components are contained within whole
25 foods. It may be that improving the diet, by increasing the consumption of fresh fruit,
26 vegetables and fish, rather than consumption of vitamin supplements, will be
27 beneficial in helping to protect against airway disease.”); Manuela Blasa et al., *Fruit
28 and Vegetable Antioxidants in Health*, in *Bioactive Foods Promoting Health: Fruits
and Vegetables* 37, 37–58 (Ronald Ross Watson & Victor R. Preedy eds., 2010)
 (“The synergy among phytochemicals is one of the reasons that nutritional guidelines
insist on varying the foods in one’s diet, particularly fruits and vegetables.”).

1 other naturally occurring substances that may have positive health
2 effects.

3 United States Department of Agriculture, *Dietary Guidelines for Americans, 2010*,
4 Ch. 5 p. 49 (Jan. 31, 2011), available at [http://www.cnpp.usda.gov/DGAs2010-](http://www.cnpp.usda.gov/DGAs2010-PolicyDocument.htm)
5 [PolicyDocument.htm](http://www.cnpp.usda.gov/DGAs2010-PolicyDocument.htm) (click on “Chapter 5: Building Healthy Eating Patterns”).

6 26. Not only do the Products fail to provide the health benefits suggested by
7 the representations and images on the packaging and in the Product marketing, the
8 Products include ingredients that are harmful or potentially harmful to human health.

9 27. The non-“Diet” Products are in fact nothing more than slightly fortified
10 sugar water. One serving of 7UP Cherry Antioxidant, for example, contains 38 grams
11 of sugars and 140 calories. The non-“Diet” Products also include high fructose corn
12 syrup, an artificial ingredient that scientific research has established is dangerous to
13 human health. See, e.g., G.A. Bray, S.J. Nielsen, & B.M. Popkin, *Consumption of*
14 *high-fructose corn syrup in beverages may play a role in the epidemic of obesity*,
15 79(4) *Am. J. of Clinical Nutrition* 537, 537–43 (2004).

16 28. While the “Diet” Products do not contain added sugars or high fructose
17 corn syrup, they do contain the artificial sweeteners acesulfame potassium and
18 aspartame, both of which are synthetic. There is some scientific evidence that
19 artificial sweeteners such as these are carcinogenic to animals² and that they increase

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21 ² See Myra L. Karstadt, *Testing Needed for Acesulfame Potassium, an Artificial*
22 *Sweetener* 114 *Environ. Health Perspectives* A516 (Sept. 2006); Morando Soffritti,
23 *Acesulfame Potassium: Soffritti Responds*, 114 *Environ. Health Perspectives* A516
24 (Sept. 2006); Morando Soffritti et al., *Life-Span Exposure to Low Doses of Aspartame*
25 *Beginning During Prenatal Life Increases Cancer Effects in Rats*, 115 *Environ.*
26 *Health Perspectives* 1293 (2007), available at [http://ehp03.niehs.nih.gov/article/](http://ehp03.niehs.nih.gov/article/info:doi/10.1289/ehp.10271)
27 [info:doi/10.1289/ehp.10271](http://ehp03.niehs.nih.gov/article/info:doi/10.1289/ehp.10271); Morando Soffritti et al., *First Experimental*
28 *Demonstration of the Multipotential Carcinogenic Effects of Aspartame Administered*
in the Feed to Sprague-Dawley Rats, 114 *Environ. Health Perspectives* 379 (2006).

1 the risk of preterm birth in humans.³

2 29. The Products also include an ingredient called Red 40, which may also
3 impose health risks. See Shuji Tsuda, et al., *DNA damage induced by red food dyes*
4 *orally administered to pregnant and male mice*, 61(1) *Toxicological Sci.* 92, 92–99
5 (2001), available at <http://www.ncbi.nlm.nih.gov/pubmed/11294979?dopt=Abstract>;
6 Charles V. Vorhees, et al., *Developmental toxicity and psychotoxicity of FD and C red*
7 *dye No 40 (allura red AC) in rats*, 28(3) *Toxicology* 207, 207–17 (Oct. 1983),
8 available at <http://www.ncbi.nlm.nih.gov/pubmed/6636206?dopt=Abstract>; L.
9 Koutsogeorgopoulou, et al., *Immunological aspects of the common food colorants,*
10 *amaranth and tartrazine*, 40(1) *Veterinary & Hum. Toxicology* 1, 1–4 (Feb. 1998),
11 available at <http://www.ncbi.nlm.nih.gov/pubmed/9467198?dopt=Abstract>.

12 30. In summary, Defendant’s representations, including the representation
13 “Antioxidant” juxtaposed with images of real cherries or real berries, mislead
14 reasonable consumers into believing that the Products contain real cherries or real
15 berries, and/or believing that the antioxidant content of the Products is derived from
16 real cherries or real berries, or extracts from these fruits, even though the Products do
17 not contain real cherries or real berries, or extracts from those fruits, and the only
18 antioxidant in the Products—vitamin E—is only present in the Products due to
19 fortification by Defendant. Defendant thus misleads reasonable consumers into
20 believing that the Products provide antioxidant-related health benefits that are the
21 same as or similar to the antioxidant-related health benefits provided by fruits and
22 vegetables naturally rich in many nutrients and phytonutrients, only one of which is
23 vitamin E. The minimal amount of vitamin E in the Products and the fact that vitamin

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25 ³ Thorhallur I. Halldorsson et al., *Intake of Artificially Sweetened Soft Drinks and Risk*
26 *of Preterm Delivery: A Prospective Cohort Study in 59,334 Danish Pregnant Women*,
27 *92 Am. J. Clin. Nutr.* 626 (2010).
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1 E exists in the Products in isolation as an additive mean that the Products will not
2 provide consumers with the health benefits that Defendant's representations lead them
3 to expect, and, even worse, the high sugar content, high fructose corn syrup,
4 aspartame, acesulfame potassium, and/or Red 40 found in the Products are actually
5 dangerous to consumers' health. Defendant's use of the term "Antioxidant" and the
6 other representations and images detailed herein in the marketing, labeling, and
7 advertising of the Products is thus nothing more than a marketing gimmick intended to
8 deceive consumers into purchasing the Products. Accordingly, Defendant's
9 representations concerning the nutritional qualities, health qualities, and ingredients of
10 the Products are misleading, deceptive, and unlawful.

11 31. Moreover, Defendant's fortification of the Products with chemical
12 additives is in direct violation of the FDA's Fortification Policy. 21 C.F.R. § 104.20
13 (the "Fortification Policy"). The Fortification Policy states specifically that the FDA
14 "does not encourage indiscriminate addition of nutrients to foods, *nor does it consider*
15 *it appropriate to fortify ... snack foods such as ... carbonated beverages.*" See 21
16 C.F.R. § 104.20(a) (emphasis added). Because Defendant fortifies the Products,
17 which are all carbonated beverages, with vitamin E, Defendant has engaged in actions
18 that the FDA does not consider appropriate, as the Fortification Policy explicitly
19 states.

20 32. According to the FDA, the Fortification Policy has the full force and
21 effect of law. See Food and Drug Administration, *Guidance for Industry: Food*
22 *Labeling; Nutrient Content Claims; Definition for "High Potency" and Definition for*
23 *"Antioxidant" for Use in Nutrient Content Claims for Dietary Supplements and*
24 *Conventional Foods; Small Entity Compliance Guide*, 3 (May 1, 2011), available at
25 [http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocu](http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm063064.htm)
26 [ments/FoodLabelingNutrition/ucm063064.htm](http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm063064.htm); see also Letter from Food and Drug
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1 Administration, to Miles V. McEvoy, Deputy Administrator, National Organic
2 Program (Apr. 14, 2011), at 4, *available at*
3 <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5090415> (stating
4 that since “the provisions of the fortification policy have been incorporated into two
5 labeling regulations which have the force and effect of law . . . FDA may issue a
6 warning letter and take enforcement action if a manufacturer markets a food bearing
7 one of these nutrient content claims and the food contains a nutrient addition that is
8 inconsistent with the fortification policy.”).

9 33. The federal Courts have also recognized that the Fortification Policy has
10 legally binding effect. For example, the United States District Court for the Eastern
11 District of New York explained in 2010 that “[t]he FDA Fortification Policy is itself
12 non-binding but . . . is incorporated by reference into binding FDA regulations. As the
13 FDA has explained:

14 While it is true that the fortification policy is only a guideline, in the
15 context of new § 101.54(e)(1)(ii), FDA has subjected the use of § 104.20
16 (21 C.F.R. 104.20) to notice and comment rulemaking. Interested
17 persons were given notice that FDA intends to use that provision as more
18 than a guideline. Such persons had an opportunity to object... No
19 comments did. Therefore, the fact that part 104 (21 CFR part 104) is
20 generally intended to be used as a guideline has no significance here.

21 *Ackerman v. Coca-Cola Co.*, Case No. CV–09–0395 (JG)(RML), 2010 WL 2925955,
22 at *9, n. 16 (E.D.N.Y. July 21, 2010) (citing 58 Fed. Reg. 2302, 2362).

23 34. The FDA has issued several warning letters to companies, including
24 Defendant and The Coca-Cola Company, for similar violations of its Fortification
25 Policy. *See, e.g.*, Letter from Food and Drug Administration to Larry D. Young,
26 President and CEO, Dr Pepper Snapple Group (Aug. 30, 2010), *available at*
27 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm224571.htm>;
28 Letter from Food and Drug Administration to Muhtar Kent, President and Chief

1 Executive Officer, The Coca-Cola Company (Dec. 10, 2008), *available at*
2 [http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2008/ucm1048050.ht](http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2008/ucm1048050.htm)
3 [m](http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2008/ucm1048050.htm); *see generally Diet Coke Plus Proves to Be a Minus With the FDA*, 16 No. 12 FDA
4 Advertising and Promotion Manual Newsletter 11 (2009).

5 35. Accordingly, Defendant's fortification of the Products, which are all
6 carbonated beverages, with vitamin E violates the FDA Fortification Policy, which
7 has the full force and effect of law and which the FDA routinely enforces.

8 **CLASS ALLEGATIONS**

9 36. Plaintiff brings this action as a class action pursuant to Rule 23 of the
10 Federal Rules of Civil Procedure on behalf of all persons in the United States who
11 purchased Defendant's Products (as defined herein) during the Class Period (the
12 "Class"). Excluded from the Class are officers and directors of Defendant, members
13 of the immediate families of the officers and directors of Defendant, Defendant's legal
14 representatives, heirs, successors or assigns, and any entity in which they have or have
15 had a controlling interest.

16 37. At this time, Plaintiff does not know the exact number of Class members,
17 but, given the nature of the claims and the number of retail stores selling Defendant's
18 Products nationally, Plaintiff believes that the Class members are so numerous that
19 joinder of all members of the Class is impracticable.

20 38. There is a well-defined community of interest in the questions of law and
21 fact involved in this case. Questions of law and fact common to the members of the
22 Class which predominate over questions which may affect individual Class members
23 include:

- 24 a. Whether Defendant labeled, marketed, advertised, and/or sold the
25 Products to Plaintiff and those similarly situated using false,
26 misleading, and/or deceptive statements or representations,
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1 including statements or representations concerning the nutritional
2 qualities, health qualities, and ingredients of the Products;

3 b. Whether Defendant omitted and/or misrepresented material facts in
4 connection with the sales of the Products;

5 c. Whether Defendant participated in and pursued the common
6 course of conduct complained of herein; and

7 d. Whether Defendant's labeling, marketing, advertising, and/or
8 selling of the Products as healthful and nutritious constitutes an
9 unfair or deceptive consumer sales practice.

10 39. Plaintiff's claims are typical of those of the Class because Plaintiff, like
11 all members of the Class, purchased Defendant's Products in a typical consumer
12 setting and sustained damages from Defendant's wrongful conduct.

13 40. Plaintiff will adequately protect the interests of the Class and has retained
14 counsel who are experienced in litigating complex class actions. Plaintiff has no
15 interests that conflict with those of the Class.

16 41. A class action is superior to other available methods for the fair and
17 efficient adjudication of this controversy.

18 42. The prerequisites to maintaining a class action for injunctive or equitable
19 relief pursuant to Federal Rule of Civil Procedure 23(b)(2) are met, as Defendant has
20 acted or refused to act on grounds generally applicable to the Class, thereby making
21 appropriate final injunctive or equitable relief with respect to the Class as a whole.

22 43. The prosecution of separate actions by members of the Class would
23 create a risk of establishing inconsistent rulings and/or incompatible standards of
24 conduct for Defendant. For example, one court might enjoin Defendant from
25 performing the challenged acts, whereas another might not. Additionally, individual
26 actions could be dispositive of the interests of the Class even though certain Class
27 members might not be parties to such actions.

1 58. Such acts of Defendant, as described above, and each of them
2 constitute unlawful business acts and practices.

3 59. In this regard, Defendant’s marketing, advertising, packaging, labeling,
4 distributing, and selling of its Products violates California’s Sherman Food, Drug and
5 Cosmetics Law, California Health & Safety Code § 109875, *et seq.* (the “Sherman
6 Law”).

7 60. In relevant part, the Sherman Law declares that food is misbranded if
8 its labeling is false or misleading in any particular way and further provides that it is
9 unlawful for any person to misbrand any food. Cal. Health & Safety Code §§ 110660,
10 110765.

11 61. The Sherman Law defines a “person” as “any individual, firm,
12 partnership, trust, corporation, limited liability company, company, estate, public or
13 private institution, association, organization, group, city, county, city and county,
14 political subdivision of this state, other governmental agency within the state, and any
15 representative, agent, or agency of any of the foregoing.” Cal. Health & Safety Code
16 § 109995. Defendant is a corporation and, therefore, a “person” within the meaning
17 of the Sherman Law.

18 62. The business practices alleged above are unlawful under the
19 California Consumers Legal Remedy Act, California Civil Code § 1750, *et seq.*
20 (“CLRA”), which forbids deceptive advertising.

21 63. The business practices alleged above are unlawful under California
22 Business and Professions Code § 17200, *et seq.* by virtue of violating § 17500, *et seq.*,
23 which forbids untrue advertising and misleading advertising.

24 64. As a result of the business practices described above, Plaintiff and the
25 Class members, pursuant to California Business and Professions Code § 17203, are
26 entitled to an order enjoining such future conduct on the part of Defendant and such
27 other orders and judgments which may be necessary to disgorge Defendant’s ill-gotten
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1 gains and to restore to any person in interest any money paid for its Products as a
2 result of the wrongful conduct of Defendant.

3 65. The above-described unlawful business acts and practices of
4 Defendant present a threat and reasonable likelihood of deception to Plaintiff and
5 members of the Class in that Defendant has systematically perpetrated and continues
6 to perpetrate such acts or practices upon members of the Class by means of its
7 misleading marketing, advertising, packaging, labeling, distributing, and selling of its
8 Products.

9 66. THEREFORE, Plaintiff prays for relief as set forth below.

10 **THIRD CAUSE OF ACTION**

11 **(Violation of California Business and Professions Code § 17200, *et seq.*)**
12 **(Fraudulent Business Acts and Practices)**

13 67. Plaintiff repeats each and every allegation contained in the paragraphs
14 above and incorporates such allegations by reference herein.

15 68. Such acts of Defendant as described above constitute fraudulent
16 business practices under California Business and Professions Code § 17200, *et seq.*

17 69. As more fully described above, Defendant's misleading
18 marketing, advertising, packaging, and labeling of its Products is likely to deceive
19 reasonable California consumers. Indeed, Plaintiff and other members of the Class
20 were unquestionably deceived regarding the characteristics of Defendant's Products,
21 as Defendant's marketing, advertising, packaging, and labeling of its Products
22 misrepresents and/or omits the true nutritional qualities, health qualities, and
23 ingredients of the Products. Defendant's portrayal of its Products as being made with
24 real cherries or real berries (or extracts from these real fruits) and being healthful and
25 rich in antioxidants is misleading and deceptive because, among other things more
26 fully described herein, the Products contain only minimal amounts of a single, isolated
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1 antioxidant that is present in the Products due to fortification by Defendant and
2 contain no real fruit.

3 70. This fraud and deception caused Plaintiff and members of the Class
4 to purchase more of Defendant's Products than they would have or to pay more than
5 they would have for Defendant's Products had they known that, as described more
6 fully herein, the representations and images on Defendant's Products conveying that
7 they are made from real cherries or real berries (or extracts from these real fruits), that
8 they are "Antioxidant" and provide the health benefits associated with real,
9 antioxidant rich cherries or berries, and that they are healthful are false and/or
10 misleading.

11 71. As a result of the business acts and practices described above, Plaintiff
12 and the Class, pursuant to California Business and Professions Code § 17203, are
13 entitled to an order enjoining such future conduct on the part of Defendant and such
14 other orders and judgments which may be necessary to disgorge Defendant's ill-gotten
15 gains and to restore to any person in interest any money paid for Defendant's Products
16 as a result of the wrongful conduct of Defendant.

17 72. THEREFORE, Plaintiff prays for relief as set forth below.

18 **FOURTH CAUSE OF ACTION**

19 **(Violation of California Business and Professions Code, § 17500, *et seq.*)**
20 **(Misleading and Deceptive Advertising)**

21 73. Plaintiff repeats each and every allegation contained in the paragraphs
22 above and incorporates such allegations by reference herein.

23 74. Plaintiff asserts this cause of action for violations of California Business
24 and Professions Code § 17500, *et seq.* for misleading and deceptive advertising
25 against Defendant.

26 75. At all material times, Defendant engaged in a scheme of offering its
27 Products for sale to Plaintiff and other members of the Class by way of, *inter alia*,

1 commercial marketing and advertising, the World Wide Web (Internet), product
2 packaging and labeling, and other promotional materials. Defendant's portrayal of its
3 Products as being made from real cherries or real berries and as being healthful and
4 rich in antioxidants is misleading and deceptive because, among other things more
5 fully described herein, the Products contain only minimal amounts of a single, isolated
6 antioxidant that is present in the Products due to fortification by Defendant and
7 contain no real fruit. Said advertisements were made within the State of California
8 and come within the definition of advertising as contained in Business and Professions
9 Code § 17500, *et seq.* in that such promotional materials were intended as
10 inducements to purchase Defendant's Products, are representations disseminated by
11 Defendant to Plaintiff and the Class members, and were intended to reach members of
12 the Class. Defendant knew, or in the exercise of reasonable care should have known,
13 that these statements were misleading and deceptive.

14 76. In furtherance of said plan and scheme, Defendant has prepared
15 and distributed within the State of California – via commercial marketing and
16 advertising, the World Wide Web (Internet), product packaging and labeling, and
17 other promotional materials – representations that misleadingly and deceptively
18 represent the Products as being made from real cherries or real berries, and as being
19 healthful and nutritious. Consumers, including Plaintiff, necessarily and reasonably
20 relied on these materials concerning Defendant's Products. Consumers, including
21 Plaintiff and the Class members, were among the intended targets of
22 such representations.

23 77. The above acts of Defendant, in disseminating said misleading and
24 deceptive representations throughout the State of California to consumers, including
25 Plaintiff and members of the Class, were and are likely to deceive reasonable
26 consumers, including Plaintiff and other members of the Class, by obfuscating the real
27 health qualities, nutritional qualities, and ingredients of the Products as more fully
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1 detailed herein, in violation of the “misleading prong” of California Business and
2 Professions Code § 17500.

3 78. As a result of the above violations of the “misleading prong” of
4 California Business and Professions Code § 17500, *et seq.*, Defendant has been
5 unjustly enriched at the expense of Plaintiff and the other members of the Class.
6 Plaintiff and the Class members, pursuant to California Business and Professions
7 Code § 17535, are entitled to an order of this Court enjoining such future conduct on
8 the part of Defendant, and such other orders and judgments which may be necessary
9 to disgorge Defendant’s ill-gotten gains and restore to any person in interest any
10 money paid for its Products as a result of the wrongful conduct of Defendant.

11 79. THEREFORE, Plaintiff prays for relief as set forth below.

12 **FIFTH CAUSE OF ACTION**

13 **(Unjust Enrichment)**

14 80. Plaintiff realleges and incorporates the above paragraphs of this class
15 action Complaint as if set forth herein.

16 81. As a result of Defendant’s deceptive, fraudulent, and misleading
17 labeling, advertising, marketing, and sales of its Products, Defendant was enriched, at
18 the expense of Plaintiff, and all others similarly situated, through the payment of the
19 purchase price for Defendant’s Products.

20 82. Under the circumstances, it would be against equity and good conscience
21 to permit Defendant to retain the ill-gotten benefits that it received from Plaintiff the
22 members of the Class in light of the fact that the Products purchased by Plaintiff and
23 the members of the Class were not what Defendant purported them to be. Thus, it
24 would be unjust or inequitable for Defendant to retain the benefit without restitution to
25 Plaintiff and the members of the Class for the monies paid to Defendant for such
26 Products.

27 83. THEREFORE, Plaintiff prays for relief as set forth below.

1 **PRAYER FOR RELIEF**

2 **WHEREFORE**, Plaintiff and the Class members seek relief against Defendant
3 as follows:

4 A. For an order certifying the proposed Class herein under Federal Rule of
5 Civil Procedure 23(a), (b)(2), and (b)(3); appointing Plaintiff as representatives of the
6 class; and appointing his undersigned counsel as class counsel;

7 B. For a declaration that Defendant is financially responsible for notifying
8 Class members of the pendency of this suit;

9 C. For an award of restitution pursuant to California Business &
10 Professional Code §§ 17203, 17535;

11 D. For an award of disgorgement pursuant to California Business &
12 Professional Code §§ 17203, 17535;

13 E. For an order enjoining Defendant's unlawful and deceptive acts and
14 practices pursuant to California Business & Professional Code §§ 17203, 17535.

15 F. For injunctive relief, damages, and restitution pursuant to California Civil
16 Code § 1780;

17 G. Monetary damages, including, but not limited to any compensatory,
18 incidental, or consequential damages in an amount to be determined at trial, together
19 with prejudgment interest at the maximum rate allowable by law with respect to the
20 common law claims alleged;

21 H. Statutory damages in the maximum amount provided by law;

22 I. Punitive damages in accordance with proof and in an amount consistent
23 with applicable precedent;

24 J. For an order awarding Plaintiff and the Class members the reasonable
25 costs and expenses of suit, including their attorneys' fees; and

26 K. For any further relief that the Court may deem appropriate.
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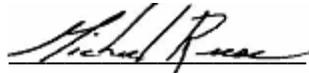
JURY TRIAL DEMANDED

Plaintiff and the members of the Class hereby demand a trial by jury.

Dated: November 8, 2012

Respectfully submitted,

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By: 

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