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Counsel for Plaintiff

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

**TATIANA GALVEZ and JAMES
KELLY on behalf of themselves and
all others similarly situated,**

Plaintiffs,

v.

**THE BOSTON BEER COMPANY,
INC.**

Defendant.

CASE NO.: '21CV1508 L BGS

CLASS ACTION

**COMPLAINT FOR DAMAGES,
EQUITABLE, DECLARATORY,
AND INJUNCTIVE RELIEF**

DEMAND FOR JURY TRIAL

1 Plaintiffs Tatiana Galvez and James Kelly (“Plaintiffs”), individually and on
2 behalf of themselves and all others similarly situated, bring this class action against
3 Defendant The Boston Beer Company Inc. (“BBC,” “Boston Beer” or “Defendant”),
4 and on the basis of personal knowledge, information and belief, and the investigation
5 of counsel, allege as follows:

6 **INTRODUCTION**

7
8 1. This is a proposed class action on behalf of a nationwide, California and
9 New York class (collectively, “Class”) of consumers seeking redress for Defendant’s
10 deceptive practices associated with the advertising, labeling and sale of its Truly Hard
11 Seltzers (“THS”).

12 2. Defendant BBC manufactures, markets, advertises, and sells a line of
13 hard seltzers under the brand name Truly Hard Seltzers (“Seltzers” or “Products”).

14 3. Hard Seltzer, also known as spiked seltzer, is one of the fastest-growing
15 alcoholic beverage categories in the U.S. It combines seltzer water, with a variety of
16 alcohols, cane sugar and either fruit or fruit flavor. “While Hard Seltzers have been
17 around for centuries, millennial consumers' demands for healthier, lower-calorie
18 alcoholic beverages have helped drive the growth of the segment.”¹ Indeed, the Hard
19 Seltzer market, which is currently valued at \$4.4 billion dollars, is expected to reach
20 \$30 billion in sales by 2025.²

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25 ¹ See e.g., <https://www.t4.ai/industry/hard-seltzer-market-share>.

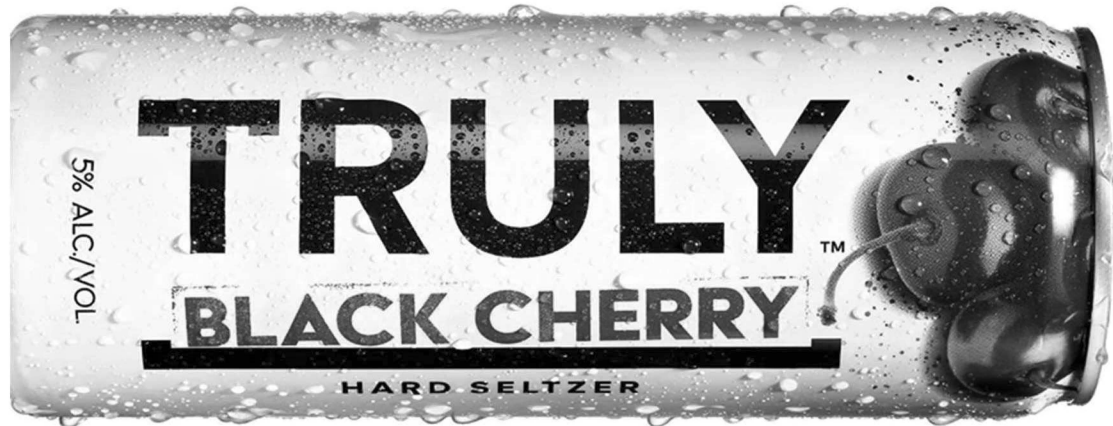
26 ² Forbes, *The Hard Seltzer Market Is Getting More Crowded*, January 12, 2021,
27 [https://www.forbes.com/sites/hudsonlindenberger/2021/01/12/the-hard-seltzer-](https://www.forbes.com/sites/hudsonlindenberger/2021/01/12/the-hard-seltzer-market-is-getting-more-crowded/?sh=1ba6398f1201)
28 [market-is-getting-more-crowded/?sh=1ba6398f1201](https://www.forbes.com/sites/hudsonlindenberger/2021/01/12/the-hard-seltzer-market-is-getting-more-crowded/?sh=1ba6398f1201).

1 4. According to recent market data, the top three brands, which collectively
2 control the majority of the hard seltzer market, are White Claw (45%), Truly Hard
3 (17.4%) and High Noon Spirits Company (10.4%).³

4 5. The hard seltzer market is highly competitive with a continual influx of
5 new market entrants vying for consumer attention and their purchasing dollars.
6 Manufactures compete on a few material differences, including most significantly, the
7 content of their beverages.

8 6. THS comes in 12 fruit flavors. Plaintiffs were frequent purchasers of
9 THS Seltzers in a variety of flavors including, but not limited to, Truly Black Cherry.
10 Other than the name of the characterizing fruit, all 12 THS Seltzers share materially
11 identical labeling, including the false and misleading portion described herein.

12 7. The following front label for Truly Black Cherry Hard Seltzer is
13 illustrative of the issue complained of herein.



24 8. The Seltzer’s principal display panel (“PDP”) boldly characterizes the
25 Product as “Black Cherry,” both in name and by a prominent vignette of four fresh
26

27 ³ PR Newswire, June 23, 2021, <https://www.prnewswire.com/news-releases/new-data-shows-white-claw-losing-on-premise-market-share-of-hard-seltzers-301318665.html>
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1 cherries. Notably, the name is also colored to match the natural color of cherries. In
2 addition, BBC chose the name “Truly,” which further emphasizes the veracity and
3 authenticity of the Product’s contents.

4 9. Despite being characterized as a “black cherry” beverage, however, the
5 Product does **not** contain its characterizing ingredient (i.e., black cherry), but rather
6 entirely derives its taste from lab synthesized ingredients described as “natural
7 flavors.” By characterizing the Product in this manner – failing to either include its
8 characterizing ingredient (black cherry) in the formulation, or alternatively, clearly
9 indicating on the Product’s principal display panel that it is a “flavored” beverage,
10 Boston Beer has falsely and misleadingly labeled its Products, deceived its consumers,
11 and violated the law.

12 10. Throughout the applicable class period, Defendant has falsely
13 represented the true nature of its hard seltzers, and as a result of this false and
14 misleading labeling, was able to sell these Products to hundreds of thousands of
15 unsuspecting consumers throughout California, New York and the United States.

16 11. Plaintiffs allege Defendant’s conduct is in breach of warranty, violates
17 California’s Business and Professions Code § 17200, *et. seq.*, California’s Business &
18 Professions Code § 17500, *et. seq.*, California Civil Code § 1750, *et seq.*, N.Y. Gen.
19 Bus U. Law § 349 *et seq.*, N.Y. Gen. Bus. Law § 350 *et seq.*, and is otherwise
20 grounds for restitution on the basis of quasi-contract/unjust enrichment.

21
22 **JURISDICTION AND VENUE**

23 12. Jurisdiction of this Court is proper under 28 U.S.C. § 1332(d)(2).
24 Diversity jurisdiction exists as Plaintiff Galvez is a resident of Chula Vista, California,
25 Plaintiff Kelly is a resident of Centereach, New York, and Defendant Boston Beer is a
26 Massachusetts corporation with its principal place of business in Boston,
27 Massachusetts. The amount in controversy exceeds \$5,000,000 for the Plaintiff and
28 members of the Class collectively, exclusive of interest and costs, by virtue of the

1 combined purchase prices paid by Plaintiffs and members of the putative Class, and
2 the profits reaped by Defendant from its transactions with Plaintiffs and the Class, as a
3 direct and proximate result of the wrongful conduct alleged herein, and by virtue of
4 the injunctive and equitable relief sought.

5 13. Venue is proper within this judicial district pursuant to 28 U.S.C. § 1391
6 because a substantial portion of the underlying transactions and events complained of
7 occurred and affected persons and entities located in this judicial district, and
8 Defendant has received substantial compensation from such transactions and business
9 activity in this judicial district.

10 **PARTIES**

11
12 14. Plaintiff Tatiana Galvez is a resident of Chula Vista, California.

13 15. Ms. Galvez purchased a variety of THS Products throughout the
14 applicable class period, including but not limited to Truly Black Cherry. The
15 purchases were made at local retail locations including but not limited to Vons and
16 Smart & Final.

17 16. Ms. Galvez believed the representations on the Products' principal
18 display panels -- that she was consuming beverages that contained the fruits depicted
19 by name and vignette on their principal display panels.

20 17. She believed that Defendant lawfully marketed and sold the Products.

21 18. Ms. Galvez relied on Defendant's labeling and was misled thereby.

22 19. Ms. Galvez would not have purchased the Products, or would have
23 purchased the Products on different terms had she known the truth about their
24 contents.

25 20. Ms. Galvez was injured in fact and lost money as a result of Defendant's
26 improper conduct.

1 21. If Ms. Galvez has occasion to believe that Defendant’s marketing and
2 labeling is truthful, non-misleading, and lawful, she would purchase THS Seltzers in
3 the future.

4 22. Plaintiff James Kelly is a resident of Centereach, New York.

5 23. Mr. Kelly purchased a variety of THS Products throughout the applicable
6 class period, including but not limited to Black Cherry. The purchases were made at
7 several stores in his surrounding area including, but not limited to Seven Eleven and
8 Stop & Shop.

9 24. Mr. Kelly believed the representations on the Products’ principal display
10 panels -- that he was consuming beverages that contained the fruits depicted by name
11 and vignette on their principal display panels.

12 25. He believed that Defendant lawfully marketed and sold the Products.

13 26. Mr. Kelly relied on Defendant’s labeling and was misled thereby.

14 27. Mr. Kelly would not have purchased the Products, or would have
15 purchased the Products on different terms had he known the truth about their contents.

16 28. Mr. Kelly was injured in fact and lost money as a result of Defendant’s
17 improper conduct.

18 29. If Mr. Kelly has occasion to believe that Defendant’s marketing and
19 labeling is truthful, non-misleading, and lawful, he would purchase THS Seltzers in
20 the future.

21 30. Defendant The Boston Beer Company, Inc., manufactures, markets and
22 sells a line of hard seltzers under the name Truly Hard Seltzer. The Seltzers are sold
23 across a variety of retail segments including supermarkets, convenience stores and
24 mass merchants. Boston Beer is a Massachusetts corporation that maintains its
25 principal place of business at One Design Center Place, Suite 850, Boston,
26 Massachusetts.

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GENERAL ALLEGATIONS

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3 31. The Boston Beer Company Inc was founded in 1984 and rose to fame on
4 the success of its Samuel Adams Boston Lager. In 1995, Boston Beer went public and
5 by 2020 posted \$1.74 billion in net revenues marking an increase of \$486.6 million, or
6 38.9%, from the comparable 52-week period in 2019. Truly Hard Seltzers, which was
7 launched in 2016,⁴ is credited for much of the company’s recent growth. As stated by
8 Dave Burwick, BBC’s President and CEO, “[t]he Truly brand overall generated triple-
9 digit volume growth in 2020 and grew its velocity and its market share sequentially
10 despite other national, regional and local hard seltzer brands entering the category. In
11 2020, Truly increased its market share in measured off-premise channels from 22
12 points to 26 points and was the only national hard seltzer, not introduced in 2020, to
13 grow share.”⁵

14 32. THS operates in a crowded beverage space among a number of well-
15 established and well-funded competitors but has excelled with the marketing of a
16 healthier choice, clean label product. Indeed, among the more than 65 hard seltzer
17 manufacturers on the market in 2020, THS was, and remains, the second-best seller.
18 "We have a culture of people who are looking for alternatives to what they're currently
19 consuming that fit more in balance with their lifestyles....It works for people who are
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24 ⁴ The THS Products include: CLASSIC (Wild Berry, Blueberry & Acai, Raspberry &
25 Lime, Black Cherry, Lime, Grapefruit, Citrus Squeeze and Lemon); TROPICAL
26 (Passion fruit, Pineapple, Watermelon & Kiwi, and Mango); TRULY EXTRA (Peach
Mango and Black Raspberry)(collectively referred to as “Class Products”).

27 ⁵ [https://www.bostonbeer.com/news-releases/news-release-details/boston-beer-](https://www.bostonbeer.com/news-releases/news-release-details/boston-beer-reports-fourth-quarter-2020-results)
28 [reports-fourth-quarter-2020-results](https://www.bostonbeer.com/news-releases/news-release-details/boston-beer-reports-fourth-quarter-2020-results)

1 looking for a balanced lifestyle, who are athletic and active or health-conscious," said
2 Casey O'Neill, a member of Truly's innovation team.⁶

3 33. Indeed, the growth and popularity of the hard seltzer market has been
4 driven by consumers who have increasingly moved towards healthier, clean label
5 beverages – a desire on which THS capitalized by falsely conveying to consumers that
6 its hard seltzers contained the ingredients emblazoned on its Product labels.⁷

7 34. Despite its legal obligation to do so, BBC chose to deceptively label its
8 Seltzers, obfuscating the material fact that they did not contain real fruit, but instead
9 derived their flavor from highly processed, lab-synthesized flavoring packets.

10 35. By way of example, despite being labeled and characterized as a black
11 cherry beverage by both name and vignette, the ingredient deck on the back of the
12 Product belies the veracity of the representation on the principal display panel, by
13 confirming that Product does not contain black cherry in any form, but instead derives
14 its flavor from a multitude of lab synthesized flavorings.

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24 ⁶ Baltimore Sun, Alcoholic seltzer finds growing market of health-conscious drinkers,
25 December 7, 2016, available at <https://www.baltimoresun.com/food-drink/bs-ae-hard-seltzer-trend-20161207-story.html>.

26 ⁷ Forbes, The Hard Seltzer Market Is Getting More Crowded, January 12, 2021,
27 available at <https://www.forbes.com/sites/hudsonlindenberger/2021/01/12/the-hard-seltzer-market-is-getting-more-crowded/?sh=50db66031201>.

Nutrition Facts	
1 serving per container	
Serving size	12 FL. OZ. (355mL)
Amount per serving	
Calories	100
	% Daily Value*
Total Fat 0g	0%
Saturated Fat 0g	0%
Trans Fat 0g	
Cholesterol 0mg	0%
Sodium 30mg	1%
Total Carbohydrate 2g	<1%
Dietary Fiber 0g	0%
Total Sugars 1g	
Includes 1g Added Sugars	<1%
Protein 0g	
Vitamin D 0mcg	0%
Calcium 0mg	0%
Iron 0mg	0%
Potassium 0mg	0%

*The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.

INGREDIENTS: FILTERED CARBONATED WATER, ALCOHOL, NATURAL FLAVORS, CANE SUGAR, CITRIC ACID, AND SODIUM CITRATE

PLEASE DRINK RESPONSIBLY.
 ©2020 HARD SELTZER BEVERAGE
 COMPANY LLC, BOSTON, MA

★ GLUTEN FREE | BEER 20732

36. Characterizing a product as black cherry, by both name and vignette, despite the fact the Product is entirely devoid of that ingredient is deceptive, misleading and in violation of state and common laws designed to protect consumers and to promote consist, honest and transparent labeling.

A. FLAVORING IN A PRODUCT IS A MATERIAL CONSIDERATION TO A REASONABLE CONSUMER

37. Over the last decade, “Natural Flavors” have become ubiquitous ingredients in food and beverage formulations. According to the Environmental Working Group, which rates more than 80,000 foods on their degree of nutrition, ingredient and processing concerns, “Natural Flavor” is the fourth most common ingredient on food labels with only salt, water and sugar mentioned more frequently.⁸

⁸ *Synthetic ingredients in Natural Flavors and Natural Flavors in Artificial Flavors*, Environmental Working Group, available at <https://www.ewg.org/foodscores/content/natural-vs-artificial-flavors/>.

1 38. The federal Food Drug & Cosmetic Act (“FDCA”) defines “natural
2 flavor” as the “essential oil, oleoresin, essence or extractive, protein hydrolysate,
3 distillate, or any product of roasting, heating or enzymolysis, which contains the
4 flavoring constituents derived from a spice, fruit or fruit juice, vegetable or vegetable
5 juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, seafood,
6 poultry, eggs, dairy products, or fermentation products thereof, whose significant
7 function in food is flavoring rather than nutritional.” 21 C.F.R. §101.22(a)(3).

8 39. In elemental terms, a natural flavor is anything that can be extracted from
9 an animal or plant source. It is called “natural” because the original source of the
10 flavor additive is not man-made.⁹ Unfortunately, despite their name, natural flavors
11 are complex, highly processed, amalgams of chemicals, carrier solvents, and
12 preservatives.¹⁰ Despite originating from a single natural source, the finalized flavor
13 can contain as many as 250 chemically identified constituents, some of which are
14 artificial and synthetic.¹¹ Moreover, these additional chemicals can make up 80 to 90
15 percent of the flavor.¹²

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17 ⁹ *Attention, Allergy Sufferers: Beware of Natural Flavors*, Food Safety News,
18 December 2, 2015, available at [https://www.foodsafetynews.com/2015/12/attention-](https://www.foodsafetynews.com/2015/12/attention-allergy-sufferers-beware-of-natural-flavors/)
19 [allergy-sufferers-beware-of-natural-flavors/](https://www.foodsafetynews.com/2015/12/attention-allergy-sufferers-beware-of-natural-flavors/).

20 ¹⁰ *What are Natural Flavors?*, Food Revolution Network, available at
21 <https://foodrevolution.org/blog/natural-flavors/>.

22 ¹¹ *Is There Really Anything Natural About Natural Flavors?*, Suffolk University
23 Journal of Health and Biomedical Law, April 4, 2019 available at
24 [https://sites.suffolk.edu/jhbl/2019/04/04/is-there-really-anything-natural-about-](https://sites.suffolk.edu/jhbl/2019/04/04/is-there-really-anything-natural-about-natural-flavors/)
[natural-flavors/](https://sites.suffolk.edu/jhbl/2019/04/04/is-there-really-anything-natural-about-natural-flavors/).

25 ¹² *Synthetic ingredients in Natural Flavors and Natural Flavors in Artificial flavors*,
26 EWG, available at [https://www.ewg.org/foodscores/content/natural-vs-artificial-](https://www.ewg.org/foodscores/content/natural-vs-artificial-flavors/#:~:text=Federal%20Food%20and%20Drug%20Administration,juice%2C%20vegetable%20or%20vegetable%20juice%2C)
27 [flavors/#:~:text=Federal%20Food%20and%20Drug%20Administration,juice%2C%20](https://www.ewg.org/foodscores/content/natural-vs-artificial-flavors/#:~:text=Federal%20Food%20and%20Drug%20Administration,juice%2C%20vegetable%20or%20vegetable%20juice%2C)
28 [vegetable%20or%20vegetable%20juice%2C](https://www.ewg.org/foodscores/content/natural-vs-artificial-flavors/#:~:text=Federal%20Food%20and%20Drug%20Administration,juice%2C%20vegetable%20or%20vegetable%20juice%2C). (These flavor mixtures often include
amyl acetate, amyl butyrate, amyl valerate, ethyl butyrate, various aliphatic acid ester,
ethyl acetate, ethyl valerate, ethyl isovalerate, ethyl pelargonate, vanillin, lemon

1 40. In addition to incorporating synthetic solvents and carrier systems, the
2 base ingredient often times has no relation to the characterizing flavor of the product
3 at all.¹³

4 41. Natural flavors are added to foods and beverages for a variety of reasons
5 including to replace flavors that were eliminated in processing and pasteurizing, or to
6 help food taste fresh even when it is not. In Products where the characterizing
7 ingredient was never intended to be in the formulation, and is therefore wholly absent,
8 flavors not only provide a taste and smell profile, but are specifically designed to
9 entice and addict the consumer to the product.¹⁴

10 42. “How a food tastes is largely determined by the volatile chemicals in the
11 food. Chemicals that give food a specific smell are extremely important because smell
12 makes up 80 to 90 percent of the sense of taste.”¹⁵ “A great deal of scientific
13

14 essential oil, citral, citronellal, rose absolute, geraniol, orange essential oil, geranium
15 essential oil, aldehyde C₁₀, ethyl heptanoate, acetaldehyde, aldehydes C₁₄ and C₁₆,
16 styralyl acetate, dimethyl benzyl carbinyl acetate, benzyl formate, phenyl ethyl
17 isobutyrate, cinnamyl isovalerate, anise essential oil, esters of colophony and
18 benzaldehyde and may contain terpenyl isovalerate, isopropyl isovalerate, citronellyl
19 isovalerate, geranyl isovalerate, benzyl isovalerate, cinnamyl formate, isopropyl
20 valerate, butyl valerate, methyl allyl butyrate and potentially the synthetic ingredients
21 cyclohexyl acetate, allyl butyrate, allyl cyclohexylvalerate, allyl isovalerate and
22 cyclohexyl butyrate).

21 ¹³ *Id.*; *What's inside natural flavors?*, Food Business News, December 3, 2020,
22 available at [https://www.foodbusinessnews.net/articles/17385-whats-inside-natural-
23 flavors](https://www.foodbusinessnews.net/articles/17385-whats-inside-natural-flavors).

24 ¹⁴ *What does 'natural flavors' really mean?*, Washington Post, July 25, 2017,
25 available at [https://www.washingtonpost.com/lifestyle/wellness/what-does-natural-
26 flavors-really-mean/2017/07/24/eccdc47e-67f7-11e7-a1d7-9a32c91c6f40_story.html](https://www.washingtonpost.com/lifestyle/wellness/what-does-natural-flavors-really-mean/2017/07/24/eccdc47e-67f7-11e7-a1d7-9a32c91c6f40_story.html).

27 ¹⁵ *Synthetic ingredients in Natural Flavors and Natural Flavors in Artificial Flavors*,
28 Environmental Working Group, available at
<https://www.ewg.org/foodscores/content/natural-vs-artificial-flavors/>.

1 engineering and design time goes into crafting flavors for processed foods. This
2 specialized work is done by just 500 professional flavorists who are responsible for
3 the majority of flavors in nearly all food processed in the U.S.”¹⁶

4 43. As made plain in a 60 Minutes expose on food flavorists, one of their
5 primary goals is to create flavors that make foods and beverages addictive.¹⁷

6 44. Unfortunately for the consuming public, manufacturers are not required
7 to list the sub-ingredients that constitute these flavors – a fact which results in the
8 ability of manufacturers to obfuscate dozens of chemicals from disclosure.¹⁸

9 45. “On an ingredient label, “natural flavor” can be a sort of black box,
10 enclosing dozens of components, including flavor chemicals, flavor modifiers, and
11 solvents, none of which have to be individually disclosed. Many companies will use
12 additives like propylene glycol when they can disguise them under the benign-
13 sounding catchall “natural flavors”—even if they would reject them as individually
14 listed ingredients.”¹⁹

15 46. This has resulted in a growing distrust of natural flavors by the
16 consuming public.²⁰ A 2018 report from Label Insight and the Food Marketing
17 Institute found 93% of consumers find it important for brands and manufacturers “to
18
19

20 ¹⁶ *Id.*

21 ¹⁷ *The Flavorists, Tweaking Tastes and Creating Cravings*, CBS News, November 27,
22 2011, available at <https://www.youtube.com/watch?v=a7Wh3uq1yTc>.

23 ¹⁸ *What are Natural Flavors? The Truth About This “Natural” Ingredient*, Public
24 Good, April 2, 2020, available at <https://blog.publicgoods.com/what-are-natural-flavors/>.

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26 ¹⁹ *Clean label’s dirty little secret*, The Counter, February 1, 2018, available at
27 <https://thecounter.org/clean-label-dirty-little-secret/>.

28 ²⁰ *Id.* at fn. 18.

1 provide detailed information about what is in food and how it's made" and "[t]hree
2 quarters of shoppers in 2018 would switch brands for transparency."²¹

3 47. Indeed, the most significant trend driving change in the food and
4 beverage industry right now is transparency. Consumers want to know and understand
5 what ingredients are going into their products, which is why so many products are
6 simplifying and shortening ingredient lists.²² "Clean labels with high ethical values
7 are more important than ever, particularly to a growing segment of consumers with
8 special dietary needs, which means, lab-created artificial and natural flavors are not in
9 demand; consumers want real ingredients from nature."²³ Moreover, today, brands are
10 also questioning whether natural flavors, preservatives and sweetener are really
11 clean.²⁴

12 48. In response, a number of food and drink manufacturers have become
13 more "honest and real about what's going into their food as consumers demand
14 transparency and clean labeling."²⁵ Some Boston Beer competitors, such as Spindrift
15 Seltzer, realized the fallacy of natural flavors and modified their formulation to
16

17 ²¹ *The State of Transparency - 2016 vs 2018*, Label Insight, September 18, 2018,
18 available at <https://blog.labelinsight.com/the-state-of-transparency-2016-vs-2018>.

19 ²² *Top Trends Driving Change In The Food Industry*, Forbes, February 16, 2019,
20 available at <https://www.forbes.com/sites/juliabolayanju/2019/02/16/top-trends-driving-change-in-the-food-industry/?sh=302c9e636063>.

21 ²³ *Id.*

22
23 ²⁴ *See, Clean Label 2.0: Natural Flavors and preservatives, pesticide residues, and*
24 *Non-GMO in the spotlight*, Food Navigator USA, April 26, 2017, available at
25 <https://www.foodnavigator-usa.com/Article/2017/04/27/Clean-label-2.0-From-natural-flavors-to-synbio-and-pesticide-residues>.

26 ²⁵ *The "Natural Flavors" Ingredient Is a Total Lie*, The Daily Meal, June 26, 2017,
27 available at <https://www.thedailymeal.com/healthy-eating/natural-flavors-ingredient-total-lie>.
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1 include real ingredients (i.e., fruit). Prior to making the change, Spindrift CEO Bill
2 Creelman had tried to get to the bottom of what natural flavors were being used in his
3 company’s drinks. “When I asked our supplier, no one would tell me, he said. It was
4 time to make a change.”²⁶ Today, Spiked Spindrift is among several hard seltzer
5 manufacturers offering a below 100 calorie, 4% alcoholic beverage flavored with real
6 fruit.²⁷

7 49. Ultimately, hard seltzer manufacturers have a choice on how to flavor
8 their beverages. While some will choose real ingredients in their product formulations,
9 others will choose a variety of lab synthesized flavorings. They all, however, will
10 compete for consumers on the basis of those choices.

11 50. Recognizing that these choices (i.e., the difference between products with
12 real ingredients versus those that are flavored) are material to the reasonable
13 consumer, the law imposes strict rules regarding the labeling of products that have
14 been flavored. These laws ensure consistent labeling among competitive products and
15 are designed to clearly convey the nature of the product, minimize consumer
16 confusion, and enable informed purchasing decisions.

17 **B. THE FEDERAL FOOD DRUG & COSMETIC ACT**

18
19 51. The Federal Food, Drug & Cosmetic Act (“FDCA”) broadly regulates
20 the sale of food and beverages to the consuming public. 21 U.S.C §301. It was
21 promulgated in significant part to prevent consumer deception and was principally
22
23

24 ²⁶ *Id.*

25 ²⁷ See,
26 [https://www.spindriftspiked.com/pages/spiked?gelid=CjwKCAjw3_KIBhA2EiwAaA_AlijJKKtX--](https://www.spindriftspiked.com/pages/spiked?gelid=CjwKCAjw3_KIBhA2EiwAaA_AlijJKKtX--965zTy3DsSifexSwNrTRcsc6MvLV6RczFeyDzBbH3ZiWhoCKp8QAvD_BwE)
27 [965zTy3DsSifexSwNrTRcsc6MvLV6RczFeyDzBbH3ZiWhoCKp8QAvD_BwE](https://www.spindriftspiked.com/pages/spiked?gelid=CjwKCAjw3_KIBhA2EiwAaA_AlijJKKtX--965zTy3DsSifexSwNrTRcsc6MvLV6RczFeyDzBbH3ZiWhoCKp8QAvD_BwE).
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1 implemented through the creation of a uniform system of labeling on which
2 consumers could rely to make informed purchasing decisions.

3 52. By extensively regulating the labeling of foods and beverages, the FDCA
4 and its implementing regulations have identified the words and statements that must
5 or may be included on labeling and have specified how prominently and
6 conspicuously those words and statements must appear. These provisions ensure that
7 statements are presented on labels in such a way as to likely be read and understood
8 by the ordinary person. 21 U.S.C. §343(f). The FDCA consists of hundreds of sections
9 and subsections, the following of which bear direct relevance to the case at bar.

10 53. The FDCA prohibits the misbranding of any food. 21 U.S.C. §331(b).²⁸
11 Generally, a food is misbranded if, among other things, its labeling is false or
12 misleading. 21 U.S.C. §343.²⁹ In addition to this general mandate, the FDCA
13 contains specific rules which manufacturers must follow to ensure their products are
14 properly labeled and understood by the reasonable consumer. Among them, 21 C.F.R.
15 §101.22, which provides:

16
17 (i) If the label, labeling, or advertising of a food makes any direct
18 or indirect representations with respect to the primary recognizable
19 flavor(s), by word, vignette, e.g., depiction of a fruit, or other
20 means, or if for any other reason the manufacturer or distributor of
21 a food wishes to designate the type of flavor in the food other than
22 through the statement of ingredients, such flavor shall be
23 considered the characterizing flavor and shall be declared in the
24 following way:

23 ²⁸ The term food broadly means “articles used for food or drink for man...” 21 U.S.C
24 §321(f) and incorporates beverages such as the Products which are the subject of this
25 litigation.

26 ²⁹ California’s Sherman Food, Drug and Cosmetic Law (“Sherman Law”), which
27 adopts the FDCA in its entirety, identically provides that, “[a]ny food is misbranded if
28 its labeling is false or misleading in any particular.” California Health & Safety Code,
Article 6, §110660.

1 (1) If the food contains no artificial flavor which simulates,
2 resembles or reinforces the characterizing flavor, the name of
3 the food on the principal display panel or panels of the label
4 shall be accompanied by the common or usual name of the
5 characterizing flavor, e.g., "vanilla", in letters not less than one-
6 half the height of the letters used in the name of the food, except
7 that:

8 (i) If the food is one that is commonly expected to contain a
9 characterizing food ingredient, e.g., strawberries in
10 "strawberry shortcake", and the food contains natural flavor
11 derived from such ingredient and an amount of
12 characterizing ingredient insufficient to independently
13 characterize the food, or the food contains no such
14 ingredient, the name of the characterizing flavor may be
15 immediately preceded by the word "natural" and shall be
16 immediately followed by the word "flavored" in letters not
17 less than one-half the height of the letters in the name of the
18 characterizing flavor, e.g., "natural strawberry flavored
19 shortcake," or "strawberry flavored shortcake."

20 (ii) If none of the natural flavor used in the food is derived
21 from the product whose flavor is simulated, the food in
22 which the flavor is used shall be labeled either with the
23 flavor of the product from which the flavor is derived or as
24 "artificially flavored."

25 (iii) If the food contains both a characterizing flavor from the
26 product whose flavor is simulated and other natural flavor
27 which simulates, resembles or reinforces the characterizing
28 flavor, the food shall be labeled in accordance with the
introductory text and paragraph (i) (1)(i) of this section and
the name of the food shall be immediately followed by the
words "with other natural flavor" in letters not less than one-
half the height of the letters used in the name of the
characterizing flavor.

1 54. Class Products each bear a label which by word and/or word and vignette
2 characterizes the Beverage’s primary recognizable flavor as one derived from a single
3 or combination of fruits. Despite conveying to the reasonable consumer that the
4 beverage contains the ingredient (i.e., fruit) from which its primary characterizing
5 flavor is derived, in truth, the Beverages are entirely devoid of such ingredients.
6 Instead, the primary recognizable flavor is derived from a lab synthesized flavoring
7 packet consisting of potentially hundreds of undisclosed sub-ingredients.

8 55. By law, if a product does not contain its characterizing ingredient, that
9 fact must be stated on the principal display panel in order to properly inform
10 consumers that this is a “flavored” product. To the extent that the “Natural Flavor” in
11 Class Products originate from their characterizing ingredient (e.g., the natural flavor is
12 derived from a black cherry), the front label must indicate that it is “Black Cherry
13 Flavored.” However, to the extent that the “Natural Flavor” is derived from a natural
14 ingredient other than a Product’s charactering ingredient, (i.e., something other than a
15 black cherry), the front label must indicate that the product is “Artificially Flavored.”
16 Finally, if the Product contains more than one ‘natural flavor,’ as is the case here,
17 then it must additionally indicate on the principal display panel that is has also been
18 flavored “With Other Natural Flavors.”

19 56. Under any scenario, Boston Beer has failed to indicate that its Products
20 are flavored – a failure that is in violation of the law and operates as deceit upon
21 consumers.

22 57. In January 1973, the FDA Commissioner published a proposal to revise
23 the requirements contained §1.12 of the FDCA (now §101.22) with respect to the
24 labeling of flavor contained in food. The FDA solicited public commentary, which it
25 subsequently summarized and responded to. Federal Register Vol. 38, No. 231,
26 December 3, 1973. Among other things, the FDA made clear that the purpose of these
27 regulations was to provide labeling uniformity among marketplace participants in
28 order to prevent consumer confusion and deception.

1 58. Setting forth the general standards applicable to the flavoring regulations,
2 the FDA recognized that although “[i]t is not possible to set out all the circumstances
3 under which a flavor representation is or is not implied, [a]ny use of a vignette
4 showing a fruit or vegetable clearly constitutes such a representation.... [Moreover,]
5 use of a specific fruit flavor in the food name, such as "black cherry soda," does
6 constitute such a representation and requires compliance with §1.12(i).” 38 Fed. Reg.
7 at 33285.

8 59. Some stakeholders argued that flavor designations should not be required
9 on the front-of-package, but rather be limited to the statement of ingredients. While
10 the Commissioner agreed that in instances where the manufacturer makes no direct or
11 indirect representation with respect to the flavor of a product other than in the
12 ingredients statement, no designation was necessary on the principal display panel.
13 However, where flavor representations are made on the principal display panel ***“it is
14 necessary to establish a uniform system of flavor designation to dispel any
15 confusion or misrepresentation.”*** 38 Fed. Reg. at 33286. ***“The difference between a
16 product that contains a characterizing food ingredient and a product that contains
17 no such ingredient [] is not at all subtle, and is very important to the value of the
18 product and thus to the consuming public.”*** *Id.* at 33285 (emphasis added).

19 60. The Commissioner also confirmed that when an otherwise “natural flavor
20 [] is not derived from the product whose flavor is simulated...., the product is properly
21 labeled as artificially flavored.” *Id.* at 33285-6.

22 61. In 1993 the FDA once again considered amendments to certain
23 regulations of the FDCA. The FDA published the proposed amendments for public
24 comment and provided a similar commentary process as in 1973. While considering
25 the applicability of §101.22 in light of more specific regulations such as §102.3, the
26 FDA reconfirmed the function and importance of §101.22.

27 “Both §§ 101.22 and 102.33 are intended to ensure that the label communicates
28 essential information to consumers. These provisions are intended to provide

1 manufacturers with flexibility for labeling products while providing consumers
 2 with information that they need to determine the nature of the product. The
 3 agency concludes that both kinds of label information discussed here are
 4 essential to adequately describe the nature of the product. One type of
 5 information informs the consumer when flavoring substances have been added
 6 to the product. The other type describes other aspects of the basic nature of the
 7 product.” 58 FR 2897, *2919. **Ultimately, “....a consumer who wants the**
 8 **food because of its particular.... flavor is entitled to examine a label that**
 9 **reveals facts material in light of the representations made....”** 58 Fed. Reg.
 10 2897 *2898 (emphasis added).

11 C. PRODUCT LABELS MATTER TO CONSUMERS

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 13 62. Front-of-Package marketing is the most important part of a product label
 14 as consumers attempt to make quick, yet informed purchasing decisions.³⁰ Indeed, a
 15 survey conducted by the FDA determined that 67% of respondents used Front-of-
 16 Package labels when making purchasing decisions.³¹ This is confirmed by numerous
 17 studies which similarly found that consumers often rely on Front-of-Package claims to
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21 ³⁰ See, e.g. Mark Becker, et al, *Front of Pack Labels Enhance Attention to Nutrition*
 22 *Information in Novel and Commercial Brands*, Food Policy Volume 56, October
 23 2015, Pages 76-86. Available at <https://doi.org/10.1016/j.foodpol.2015.08.001> (“Our
 24 results provide clear evidence that FOP labels are more effective at attracting attention
 25 than the traditional NFP [Nutrition Facts Panel], and that this advantage is attributable
 26 to both the location”).

27 ³¹ Hawley, K. L., Roberto, C. A., Bragg, M. A., Liu, P. J., Schwartz, M. B., &
 28 Brownell, K. D. (2013). *The Science On Front-Of-Package Food Labels*. Public
 Health Nutrition, 16(3), 430–439. Available at
<http://doi.org/10.1017/S1368980012000754>.

1 inform their purchasing decisions, and that Front-of-Package claims can have a
2 “strong impact on their food purchases.”³²

3 63. While manufacturers are generally free to add claims to the Front-of-
4 Package consistent with their obligations under the law, “[e]merging evidence
5 indicates that many labels are misleading in conveying properties of food products and
6 bear a wide array of confusing messages.”³³ This makes compliance with FDCA
7 labeling requirements even more critical in order to provide consumers with
8 recognizable standards and to prevent deception.

9 64. Not only has Defendant violated the clear letter of the FDCA, but it has
10 separately acted to deceive and mislead consumers into purchasing products with
11 qualities and attributes that they simply did not have in violation of the laws alleged
12 herein.

13
14 **D. COMPETITOR PRODUCTS**

15 65. Boston Beer is fully aware of its labeling obligations under state and
16 federal laws as well as its overarching duty to honestly inform consumers about the
17 products it is selling.

18 66. It is axiomatic that “the marketing industry is based on the premise
19 that labels matter—that consumers will choose one product over another similar
20 product based on its label and various tangible and intangible qualities they may come
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23 ³² *Healthy Through Presence or Absence, Nature or Science? A Framework for*
24 *Understanding Front-of-Package Food Claims*, Journal of Public Policy & Marketing
25 2019, Vol. 38(2) 172-191 available at
<https://journals.sagepub.com/doi/pdf/10.1177/0743915618824332>.

26 ³³ Jennifer L. Pomeranz, *Front-of-Package Food and Beverage Labeling New*
27 *Directions for Research and Regulation*, Am J Prev Med 2011;40(3):382–385
28 available at <https://pubmed.ncbi.nlm.nih.gov/21335274/>.

1 to associate with a particular source.”³⁴ The FDCA was promulgated in part to prevent
2 consumer deception by creating a uniform system of labeling on which consumers can
3 rely in comparing similar products and thereafter make informed purchasing
4 decisions. This is especially important with respect to the use of flavorings which have
5 rapidly become ubiquitous in food and drink formulations. It is critical, therefore, that
6 manufacturers label their products consistently as prescribed law.

7 67. A review of some of Truly’s competitors illustrates this clearly. For
8 example, White Claw (Fig. 1), as the best-selling hard seltzer on the market is THS’
9 biggest competitor. Like THS, they sell a black cherry hard seltzer stated on its
10 principal display panel without qualification. Unlike THS, however, White Claw
11 actually contains cherry juice, which is why the label can simply state “black cherry.”
12 The same is true for Vizzy Hard Seltzer (Fig. 2.) and Spindrift Spiked Seltzer (Fig.3.),
13 both of which offer fruit flavored beverages and contain their characterizing
14 ingredients.

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26 ³⁴ *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 328; *FTC v. Proctor & Gamble*
27 *Co.* (1967) 386 U.S. 568, 572 (noting the central role of advertising and sales
28 promotion in generating market share where the competing products are functionally
identical).

Fig.1



Ingredients

Purified carbonated water, alcohol, natural flavors, cane sugar, citric acid, natural cherry juice concentrate, sodium citrate.³⁵

Fig 2.



Ingredients

Sparkling Water, Cane Sugar, Natural Flavors, Cherry Juice Concentrate, Citric Acid, Sodium Citrate, and Dried Acerola Cherry Juice.³⁶

³⁵ <https://www.whiteclaw.com/flavors/black-cherry>

³⁶ <https://www.instacart.com/products/22036128-vizzy-hint-of-black-cherry-lime-hard-seltzer-12-0-fl-oz>

1 Fig 3.



Ingredients

CARBONATED WATER, ALCOHOL FROM FERMENTED CANE SUGAR, PINEAPPLE JUICE, CITRIC ACID.³⁷

13 68. In contrast, Bon Viv (Fig. 4.) offers fruit flavored hard seltzers which,
14 like Truly, do not contain their characterizing ingredients. Unlike Truly, however, Bon
15 Viv attempts to indicate on its principal display panel that the product is flavored.

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28 ³⁷ <https://www.spindrifftspiked.com/products/pineapple>

1 Fig 4.



Ingredients

Purified Water, Cold-fermented Corn Syrup, Natural Flavors, Sodium Citrate, Malted Rice³⁸

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13 69. By failing to properly label its products, Boston Beer has misled and
14 deceived consumers.

15 70. As a result of Defendant’s unlawful and deceptive conduct, Plaintiffs and
16 members of the Class have been harmed.

17
18 **ECONOMIC INJURY**

19 71. Plaintiffs sought to buy products that were lawfully labeled, marketed
20 and sold.

21 72. Plaintiffs saw and relied on Defendant’s misleading labeling of its
22 Products.

23 73. Plaintiffs believed that the Products purchased contained real fruit.

24 74. Plaintiffs believed that the Products were lawfully marketed and sold.

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28 ³⁸ <https://www.instacart.com/products/17706627-bon-viv-hard-seltzer-black-cherry-can-16-fl-oz>

1 75. In reliance on the claims made by Defendant regarding the qualities of its
2 Products, Plaintiffs paid a price premium.

3 76. As a result of their reliance on Defendant's misrepresentations, Plaintiffs
4 received Products that lacked the promised ingredients which they reasonably
5 believed they contained.

6 77. Plaintiffs received Products that were unlawfully marketed and sold.

7 78. Plaintiffs lost money and thereby suffered injury as they would not have
8 purchased these Seltzers and/or paid as much for them absent the misrepresentation.

9 79. Defendant knows that the inclusion of characterizing ingredients are
10 material to a consumer's purchasing decision.

11 80. Plaintiffs altered their positions to their detriment and suffered damages
12 in an amount equal to the amounts they paid for the Seltzers they purchased, and/or in
13 additional amounts attributable to the deception.

14 81. By engaging in the false and deceptive conduct alleged herein Defendant
15 reaped, and continues to reap financial benefits in the form of sales and profits from
16 its Products.

17 82. Plaintiffs, however, would be willing to purchase THS again in the future
18 should they be able to rely on Defendant's marketing as truthful and non-deceptive.
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CLASS ACTION ALLEGATIONS

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2 83. Plaintiffs bring this action on behalf of themselves and on behalf of
3 classes of all others similarly situated consumers defined as follows:

- 4 a. **National:** All persons in the United States who purchased Class
5 Products in the United States during the Class Period.
- 6 b. **California:** All persons in California who purchased the Class
7 Products in California during the Class Period.
- 8 c. **New York:** All persons in New York who purchased the Class
9 Products in New York during the Class Period.
- 10 d. **Class Period** is the maximum time allowable as determined by the
11 statute of limitation periods accompanying each cause of action.

12 84. Plaintiffs bring this Class pursuant to Federal Rule of Civil Procedure
13 23(a), and 23(b)(1), 23(b)(2), 23(b)(3) and 23(c)(4).

14 85. Excluded from the Class are: (i) Defendant and its employees, principals,
15 affiliated entities, legal representatives, successors and assigns; and (ii) the judges to
16 whom this action is assigned.

17 86. Upon information and belief, there are tens of thousands of members of
18 the Class. Therefore, individual joinder of all members of the Class would be
19 impracticable.

20 87. There is a well-defined community of interest in the questions of law and
21 fact affecting the parties represented in this action.

22 88. Common questions of law or fact exist as to all members of the Class.
23 These questions predominate over the questions affecting only individual Class
24 members. These common legal or factual questions include but are not limited to:

- 25 a. Whether Defendant marketed, packaged, or sold the Class
26 Products to Plaintiff and those similarly situated using false,
27 misleading, or deceptive statements or representations;
- 28 b. Whether Defendant omitted or misrepresented material facts

1 in connection with the sales of its Products;

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

4 d. Whether Defendant has been unjustly enriched as a result of
5 its unlawful business practices;

6 e. Whether Defendant's actions violate the Unfair Competition
7 Law, Cal. Bus. & Prof. Code §§17200, *et seq.* (the "UCL");

8 f. Whether Defendant's actions violate the False Advertising
9 Law, Cal. Bus. & Prof. Code §§17500, *et seq.* (the "FAL");

10 g. Whether Defendant's actions violate the Consumers Legal
11 Remedies Act, Cal. Civ. Code §§1750, *et seq.* (the "CLRA");

12 h. Whether Defendant's actions violate N.Y. Gen. Bus. Law §
13 349 *et seq.*;

14 i. Whether Defendant's actions violate N.Y. Gen. Bus. Law §
15 350 *et seq.*;

16 j. Whether Defendant should be enjoined from continuing the
17 above-described practices;

18 k. Whether Plaintiffs and members of the Class are entitled to
19 declaratory relief; and

20 l. Whether Defendant should be required to make restitution,
21 disgorge profits, reimburse losses, and pay damages as a
22 result of the above-described practices.

23 89. Plaintiffs' claims are typical of the claims of the Class, in that Plaintiffs
24 were consumers who purchased Defendant's Products. Plaintiffs are no different in
25 any relevant respect from any other Class member who purchased the Products, and
26 the relief sought is common to the Class.

27 90. Plaintiffs are adequate representatives of the Class because their interests
28 do not conflict with the interests of the members of the Class they seek to represent,

1 and they have retained counsel competent and experienced in conducting complex
2 class action litigation. Plaintiffs and their counsel will adequately protect the interests
3 of the Class.

4 91. A class action is superior to other available means for the fair and
5 efficient adjudication of this dispute. The damages suffered by each individual Class
6 member likely will be relatively small, especially given the relatively small cost of the
7 Products at issue and the burden and expense of individual prosecution of the complex
8 litigation necessitated by Defendant's conduct. Thus, it would be virtually impossible
9 for members of the Class individually to effectively redress the wrongs done to them.
10 Moreover, even if members of the Class could afford individual actions, it would still
11 not be preferable to class-wide litigation. Individualized actions present the potential
12 for inconsistent or contradictory judgments. By contrast, a class action presents far
13 fewer management difficulties and provides the benefits of single adjudication,
14 economies of scale, and comprehensive supervision by a single court.

15 92. In the alternative, the Class may be certified because Defendant has acted
16 or refused to act on grounds generally applicable to the Class, thereby making
17 appropriate preliminary and final equitable relief with respect to each Class.

18 93. The requirements for maintaining a class action pursuant to Rule 23(b)(2)
19 are also met, as Defendant has acted or refused to act on grounds generally applicable
20 to the Class, thereby making appropriate final injunctive relief or corresponding
21 declaratory relief with respect to the Class as a whole.

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FIRST CAUSE OF ACTION
(Breach of Express Warranty)

94. Plaintiffs incorporate each and every allegation contained in the paragraphs above as if restated herein.

95. Plaintiffs' express warranty claims are based on violations of N.Y. CLS UCC § 2-313 and § 2-607 and Cal. Com. Code §2313. Defendant was afforded reasonable notice of this claim in advance of the filing of this complaint.

96. Defendant made express warranties to Plaintiffs and members of the Class that the Products they purchased contained fruit characterized by name and vignette on the Products' principal display panel.

97. The express warranties made to Plaintiffs and members of the Class appear on every Product label. This warranty regarding the nature of the Product marketed by Defendant specifically relates to the goods being purchased and became the basis of the bargain.

98. Plaintiffs and the Class purchased the Products in the belief that they conformed to the express warranties that were made on the Products' labels.

99. Defendant breached the express warranties made to Plaintiffs and members of the Class by failing to supply goods that conformed to the warranties it made. As a result, Plaintiffs and members of the Class suffered injury and deserve to be compensated for the damages they suffered.

100. Plaintiffs and the members of the Class paid money for the Products. However, Plaintiffs and the members of the Class did not obtain the full value of the advertised Products. If Plaintiffs and other members of the Class had known of the true nature of the Products, they would not have purchased them or paid less for them. Accordingly, Plaintiffs and members of the Class have suffered injury in fact and lost money or property as a result of Defendant's wrongful conduct.

1 101. Plaintiffs and the Class are therefore entitled to recover damages, punitive
2 damages, equitable relief such as restitution and disgorgement of profits, and
3 declaratory and injunctive relief.

4
5 **SECOND CAUSE OF ACTION**
6 **(“Unlawful” Business Practices in Violation of**
7 **The Unfair Competition Law (“UCL”), Bus. & Prof. Code §§17200, *et seq.*)**
8 **By Plaintiff Galvez on Behalf of the California Subclass**

9 102. Plaintiff Galvez incorporates each and every allegation contained in the
10 paragraphs above as if restated herein.

11 103. The UCL defines unfair business competition to include any “unlawful,
12 unfair or fraudulent” act or practice, as well as any “unfair, deceptive, untrue or
13 misleading” advertising. Cal. Bus. Prof. Code §17200.

14 104. A business act or practice is “unlawful” if it violates any established state
15 or federal law.

16 105. Defendant’s acts, omissions, misrepresentations, practices, and/or non-
17 disclosures concerning the Products alleged herein, constitute “unlawful” business
18 acts and practices in that they violate the Federal Food, Drug, and Cosmetic Act, 21
19 U.S.C. §§301, *et seq.* and its implementing regulations, including, at least, the
20 following sections:

- 21 a. 21 U.S.C. §343(a), which deems food misbranded when its
22 labeling contains a statement that is false or misleading in any
23 particular;
24 b. 21 C.F.R. §102.5(a)-(d), which prohibits the naming of foods so as
25 to create an erroneous impression about the presence or absence of
26 ingredient(s) or component(s) therein;

1 c. 21 CFR §101.22 pertaining to the labeling requirements when
2 products do not contain their characterizing ingredients but instead
3 are flavored;

4 d. 21 U.S.C. §§331 and 333, which prohibits the introduction of
5 misbranded foods into interstate commerce.

6 106. California's Sherman Food, Drug, and Cosmetic Law (“Sherman Law”),
7 Cal. Health & Safety Code §109875 *et seq.*, broadly prohibits the misbranding of food.
8 Cal. Health & Safety Code §110765; *See, also* Cal. Health & Safety Code §110660
9 (“Any food is misbranded if its labeling is false or misleading in any particular.”). The
10 Sherman Law incorporates all food labeling regulations and any amendments to those
11 regulations adopted pursuant to the Food, Drug, and Cosmetic Act of 1938 as the food
12 labeling regulations of California. Cal. Health & Safety Code §§110100(a), 110665,
13 110670.

14 107. As described in detail above, by failing to label the Products in a manner
15 that accurately represents its contents, Defendant generally violates 21 U.S.C.
16 §343(a)(1) (“a food shall be deemed to be misbranded if its labeling is false or
17 misleading in any particular”) as incorporated by California’s Sherman Law.
18 Independently, by mislabeling the Products, Defendant violates Cal. Health & Safety
19 Code § 110660 (“any food is misbranded if its labeling is false or misleading in any
20 particular.”)

21 108. Defendant violated and continues to violate the Sherman Law, Article 6,
22 Section 110660 and hence has also violated and continues to violate the “unlawful”
23 prong of the UCL through the false labeling of its Product.

24 109. Defendant’s identical conduct that violates the Sherman Law, also violates
25 FDCA §403(a)(1), 21 U.S.C. §343(a)(1), which declares food misbranded under federal
26 law if its “labeling is false and misleading in any particular.” This identical conduct
27 serves as the sole factual basis of each cause of action brought by this Complaint, and
28

1 Plaintiff does not seek to enforce any of the state law claims to impose any standard of
2 conduct that exceeds that which would violate FDCA.

3 110. By committing the unlawful acts and practices alleged above, Defendant
4 has engaged, and continues to be engaged, in unlawful business practices within the
5 meaning of California Business and Professions Code §§17200, *et seq.*

6 111. Through its unlawful acts and practices, Defendant has obtained, and
7 continues to unfairly obtain, money from members of the Class. As such, Plaintiff
8 requests that this Court cause Defendant to restore this money to Plaintiff and all
9 members of the Class, to disgorge the profits Defendant made on these transactions,
10 and to enjoin Defendant from continuing to violate the Unfair Competition Law or
11 violating it in the same fashion in the future. Otherwise, the Class may be irreparably
12 harmed and denied an effective and complete remedy if such an order is not granted.

13
14 **THIRD CAUSE OF ACTION**
15 **(“Unfair” Business Practices in Violation of**
16 **The Unfair Competition Law (“UCL”), Bus. & Prof. Code §§ 17200, *et seq.*)**
17 **By Plaintiff Galvez on Behalf of the California Subclass**

18 112. Plaintiff Galvez incorporates each and every allegation contained in the
19 paragraphs above as if restated herein.

20 113. The UCL defines unfair business competition to include any “unlawful,
21 unfair or fraudulent” act or practice, as well as any “unfair, deceptive, untrue or
22 misleading” advertising. Cal. Bus. Prof. Code §17200.

23 114. A business act or practice is “unfair” under the Unfair Competition Law if
24 the reasons, justifications and motives of the alleged wrongdoer are outweighed by the
25 gravity of the harm to the alleged victims.

26 115. Defendant has violated, and continues to violate, the “unfair” prong of the
27 UCL through its misleading description of the Products. The gravity of the harm to
28 members of the Class resulting from such unfair acts and practices outweighs any

1 conceivable reasons, justifications, or motives of Defendant for engaging in such
2 deceptive acts and practices. By committing the acts and practices alleged above,
3 Defendant engaged, and continues to engage, in unfair business practices within the
4 meaning of California Business and Professions Code §§17200, *et seq.*

5 116. Through its unfair acts and practices, Defendant obtained, and continues
6 to unfairly obtain, money from members of the Class. As such, Plaintiff has been injured
7 and requests that this Court cause Defendant to restore this money to Plaintiff and the
8 members of the Class, to disgorge the profits Defendant made on its Products, and to
9 enjoin Defendant from continuing to violate the Unfair Competition Law or violating it
10 in the same fashion in the future. Otherwise, the Class may be irreparably harmed and
11 denied an effective and complete remedy if such an Order is not granted.

12
13 **FOURTH CAUSE OF ACTION**
14 **(“Fraudulent” Business Practices in Violation of**
15 **The Unfair Competition Law (“UCL”), Bus. & Prof. Code §§ 17200, *et seq.*)**
16 **By Plaintiff Galvez on Behalf of the California Subclass**

17 117. Plaintiff Galvez incorporates each and every allegation contained in the
18 paragraphs above as if restated herein.

19 118. The UCL defines unfair business competition to include any “unlawful,
20 unfair or fraudulent” act or practice, as well as any “unfair, deceptive, untrue or
21 misleading” advertising. Cal. Bus. & Prof. Code §17200.

22 119. A business act or practice is “fraudulent” under the Unfair Competition
23 Law if it actually deceives or is likely to deceive members of the consuming public.

24 120. Defendant’s acts and practices of mislabeling its Products in a manner to
25 suggest they principally contained their characterizing ingredients.

26 121. As a result of the conduct described above, Defendant has been, and will
27 continue to be, unjustly enriched at the expense of Plaintiff and members of the
28

1 proposed Class. Specifically, Defendant has been unjustly enriched by the profits they
2 have obtained from Plaintiff and the Class from the purchases of their Products.

3 122. Through its fraudulent acts and practices, Defendant has improperly
4 obtained, and continues to improperly obtain, money from members of the Class. As
5 such, Plaintiff requests that this Court cause Defendant to restore this money to Plaintiff
6 and the Class, to disgorge the profits Defendant has made, and to enjoin Defendant from
7 continuing to violate the Unfair Competition Law or violating it in the same fashion in
8 the future. Otherwise, the Class may be irreparably harmed and denied an effective and
9 complete remedy if such an Order is not granted.

10
11 **FIFTH CAUSE OF ACTION**
12 **(False Advertising in Violation of**
13 **California Business & Professions Code §§ 17500, *et seq.*)**
14 **By Plaintiff Galvez on Behalf of the California Subclass**

15 123. Plaintiff Galvez incorporates each and every allegation contained in the
16 paragraphs above as if restated herein.

17 124. Defendant uses advertising and packaging to sell its Products. Defendant
18 disseminates advertising regarding its Products which by its very nature is deceptive,
19 untrue, or misleading within the meaning of California Business & Professions Code
20 §§17500, *et seq.* because those advertising statements contained on the labels are
21 misleading and likely to deceive, and continue to deceive, members of the putative Class
22 and the general public.

23 125. In making and disseminating the statements alleged herein, Defendant
24 knew or should have known that the statements were untrue or misleading, and acted in
25 violation of California Business & Professions Code §§17500, *et seq.*

26 126. The misrepresentations and non-disclosures by Defendant of the material
27 facts detailed above constitute false and misleading advertising and therefore constitute
28 a violation of California Business & Professions Code §§17500, *et seq.*

1 127. Through its deceptive acts and practices, Defendant has improperly and
2 illegally obtained money from Plaintiff and the members of the Class. As such, Plaintiff
3 requests that this Court cause Defendant to restore this money to Plaintiff and the
4 members of the Class, and to enjoin Defendant from continuing to violate California
5 Business & Professions Code §§17500, *et seq.*, as discussed above. Otherwise, Plaintiff
6 and those similarly situated will continue to be harmed by Defendant’s false and/or
7 misleading advertising.

8 128. Pursuant to California Business & Professions Code §17535, Plaintiff
9 seeks an Order of this Court ordering Defendant to fully disclose the true nature of its
10 misrepresentations. Plaintiff additionally requests an Order: (1) requiring Defendant to
11 disgorge its ill-gotten gains, (2) award full restitution of all monies wrongfully acquired
12 by Defendant and (3), interest and attorneys’ fees. Plaintiff and the Class may be
13 irreparably harmed and denied an effective and complete remedy if such an Order is not
14 granted.

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16 **SIXTH CAUSE OF ACTION**
17 **(Violation of the Consumers Legal Remedies Act,**
18 **California Civil Code §§ 1750, *et seq.*)**
19 **By Plaintiff Galvez on Behalf of the California Subclass**

20 129. Plaintiff Galvez incorporates each and every allegation contained in the
21 paragraphs above as if restated herein.

22 130. This cause of action is brought pursuant to the Consumers Legal Remedies
23 Act, California Civil Code §§1750, *et seq.* (the “CLRA”).

24 131. Plaintiff and each member of the proposed Class are “consumers” within
25 the meaning of Civil Code §1761(d).

26 132. The purchases of the Products by consumers constitute “transactions”
27 within the meaning of Civil Code §1761(e) and the Products constitute “goods” within
28 the meaning of Civil Code §1761(a).

1 133. Defendant has violated, and continues to violate, the CLRA in at least the
2 following respects:

- 3 a. §1770(5) pertaining to misrepresentations regarding the
4 characteristics of goods sold—specifying that misleading
5 representations regarding ingredients violate the CLRA;
6 b. §1770(7) pertaining to misrepresentations regarding the standard,
7 quality, or grade of goods sold; and
8 c. § 1770(9) pertaining to goods advertised with the intent not to
9 provide what is advertised.

10 134. Defendant knew, or should have known, that the labeling of their Products
11 violated consumer protection laws, and that these statements would be relied upon by
12 Plaintiff and the members of the Class.

13 135. The representations were made to Plaintiff and all members of the Class.
14 Plaintiff relied on the accuracy of the representations on Defendant’s labels which
15 formed a material basis for his decision to purchase the Products. Moreover, based on
16 the very materiality of Defendant’s misrepresentations uniformly made on or omitted
17 from their Product labels, reliance may be presumed or inferred for all members of the
18 Class.

19 136. Defendant carried out the scheme set forth in this Complaint willfully,
20 wantonly, and with reckless disregard for the interests of Plaintiff and the Class, and as
21 a result, Plaintiff and the Class have suffered an ascertainable loss of money or property.

22 137. Plaintiff and the members of the Class request that this Court enjoin
23 Defendant from continuing to engage in the unlawful and deceptive methods, acts and
24 practices alleged above, pursuant to California Civil Code §1780(a)(2). Unless
25 Defendant is permanently enjoined from continuing to engage in such violations of the
26 CLRA, future consumers of Defendant’s Products will be damaged by their acts and
27 practices in the same way as have Plaintiff and the members of the proposed Class.
28

1 138. Plaintiff served a CLRA demand pursuant to Civil Code §1782, via U.S.
2 Certified Mail Return Receipt notifying Defendant of the conduct described herein and
3 that such conduct was in violation of particular provisions of Civil Code §1770. The
4 demand was received by Defendant on March 9, 2021. More than thirty days have since
5 elapsed without Defendant providing the requested relief thereby enabling Plaintiff to
6 properly seek damages as provided under Civil Code §1780.

7 139. Pursuant to Civil Code § 1780(a), Plaintiff and members of the class seek
8 compensatory damages, punitive damages, restitution, disgorgement of profits, and an
9 order enjoining Defendant from deceptively marketing the Products.

10 **SEVENTH CAUSE OF ACTION**

11 **(Violation of New York’s Consumer Protection from Deceptive Acts and**
12 **Practices Law N.Y. GEN. BUS. LAW § 349 *et seq.*)**
13 **By Plaintiff Kelly on behalf of the New York Subclass**

14 140. Plaintiff Kelly incorporates each and every allegation contained in the
15 paragraphs above as if restated herein. Plaintiff Kelly brings this claim on behalf of
16 the New York Subclass for violation of section 349 of New York’s Consumer
17 Protection from Deceptive Acts and Practices Law, N.Y. GEN. BUS. LAW § 349 *et*
18 *seq.*

19 141. Section 349 prohibits “[d]eceptive acts or practices in the conduct of any
20 business, trade or commerce or in the furnishing of any service in [the State of New
21 York].” N.Y. Gen. Bus. Law § 349(a).

22 142. Boston Beer’s labeling and marketing of the Beverages, as alleged
23 herein, constitute “deceptive” acts and practices, as such conduct misled Plaintiff
24 Kelly and the New York Subclass as to the characteristics and value of the Products.

25 143. Subsection (h) of Section 349 grants private plaintiffs a right of action for
26 violation of New York’s Consumer Protection from Deceptive Acts and Practices
27 Law, as follows:
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2 In addition to the right of action granted to the attorney general
3 pursuant to this section, any person who has been injured by
4 reason of any violation of this section may bring an action in his
5 own name to enjoin such unlawful act or practice, an action to
6 recover his actual damages or fifty dollars, whichever is greater,
7 or both such actions. The court may, in its discretion, increase
8 the award of damages to an amount not to exceed three times the
9 actual damages up to one thousand dollars, if the court finds the
10 defendant willfully or knowingly violated this section. The court
11 may award reasonable attorney's fees to a prevailing plaintiff.

12 N.Y. Gen. Bus. Law § 349(h).

13 144. In accordance with subsection (h) of Section 349, Plaintiff Kelly seeks an
14 order enjoining Boston Beer from continuing the unlawful deceptive acts and
15 practices set out above. Absent a Court order enjoining the unlawful deceptive acts
16 and practices, Boston Beer will continue its deceptive and misleading marketing
17 campaign and, in doing so, irreparably harm each of the New York Subclass members.
18 As a consequence of Boston Beer's deceptive acts and practices, Plaintiff Kelly and
19 other members of the New York Subclass suffered an ascertainable loss of monies. By
20 reason of the foregoing, Plaintiff Kelly and other members of the New York Subclass
21 also seek actual damages or statutory damages of \$50 per violation, whichever is
22 greater, as well as punitive damages. N.Y. GEN. BUS. LAW § 349(h).

23 **EIGHTH CAUSE OF ACTION**

24 **(Violation of New York's Consumer Protection from Deceptive Acts and
25 Practices Law, N.Y. GEN. BUS. LAW § 350 *et seq.*)
26 By Plaintiff Kelly on Behalf of the New York Subclass**

27 145. Plaintiff Kelly incorporates each and every allegation contained in the
28 paragraphs above as if restated herein. Plaintiff Kelly brings this claim on behalf of
the New York Subclass for violation of section 350 of New York's Consumer
Protection from Deceptive Acts and Practices Law, N.Y. Gen. Bus. Law § 350.

1 146. Section 350 prohibits “[f]alse advertising in the conduct of any business,
2 trade or commerce or in the furnishing of any service in [the State of New York].”
3 N.Y. Gen. Bus. Law § 350.

4 147. New York General Business Law Section 350-a defines “false
5 advertising” as “advertising, including labeling, of a commodity, or of the kind,
6 character, terms or conditions of any employment opportunity if such advertising is
7 misleading in a material respect.” N.Y. Gen. Bus. Law § 350-a.1. The section also
8 provides that advertising can be false by omission, as it further defines “false
9 advertising” to include “advertising [that] fails to reveal facts material in the light of
10 such representations with respect to the commodity . . . to which the advertising
11 relates.” *Id.*

12 148. Boston Beer’s labeling, marketing, and advertising of its Seltzers, as
13 alleged herein, are “misleading in a material respect” and, thus, constitute “false
14 advertising,” as they falsely represent the Products as consisting of characteristics and
15 lawfulness that they do not possess.

16 149. Plaintiff Kelly seeks an order enjoining Boston Beer from continuing this
17 false advertising. Absent enjoining this false advertising, Boston Beer will continue to
18 mislead Plaintiff Kelly and the other members of the New York Subclass as to the
19 characteristics of their Products, and in doing so, irreparably harm each of the New
20 York Subclass members.

21 150. As a direct and proximate result of Boston Beer’s violation of New York
22 General Business Law §350, Plaintiff Kelly and the other members of the New York
23 Subclass have also suffered an ascertainable loss of monies. By reason of the
24 foregoing, Plaintiff Kelly and other members of the New York Subclass also seek
25 actual damages or statutory damages of \$500 per violation, whichever is greater, as
26 well as punitive damages. N.Y. GEN. BUS. LAW § 350-e.

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NINTH CAUSE OF ACTION

**(Restitution Based On Quasi-Contract/Unjust Enrichment)
By Plaintiffs on Behalf of the Nationwide Class**

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3 151. Plaintiffs incorporate each and every allegation contained in the
4 paragraphs above as if restated herein.

5 152. Defendant’s conduct in enticing Plaintiffs and the Class to purchase is
6 Products with false and misleading packaging is unlawful because the statements
7 contained on the Defendant’s Product labels are untrue.

8 153. Defendant took monies from Plaintiffs and the Class for these Products
9 and have been unjustly enriched at the expense of Plaintiffs and the Class as result of
10 their unlawful conduct alleged herein, thereby creating a quasi-contractual obligation
11 on Defendant to restore these ill-gotten gains to Plaintiffs and the Class.

12 154. It is against equity and good conscience to permit Defendant to retain the
13 ill-gotten benefits received from Plaintiffs and Class members.

14 155. As a direct and proximate result of Defendant’s unjust enrichment,
15 Plaintiffs and the Class are entitled to restitution or restitutionary disgorgement in an
16 amount to be proved at trial.

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PRAYER FOR RELIEF

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2 THEREFORE, Plaintiffs, on behalf of themselves and on behalf of the other
3 members of the Class and for the Counts so applicable on behalf of the general public
4 request an award and relief as follows:

5 A. An order certifying that this action is properly brought and may be
6 maintained as a class action, that Plaintiffs be appointed Class Representatives, and
7 Plaintiffs’ counsel be appointed Lead Counsel for the Class.

8 B. Restitution in such amount that Plaintiff and all members of the Class
9 paid to purchase Defendant’s Product or restitutionary disgorgement of the profits
10 Defendant obtained from those transactions, for Causes of Action for which they are
11 available.

12 C. Compensatory damages for Causes of Action for which they are
13 available.

14 D. Other statutory penalties for Causes of Action for which they are
15 available.

16 E. Punitive Damages for Causes of Action for which they are available.

17 F. A declaration and Order enjoining Defendant from marketing and
18 labeling its Product deceptively, in violation of laws and regulations as specified in
19 this Complaint.

20 G. An Order awarding Plaintiff their costs of suit, including reasonable
21 attorneys’ fees and pre and post judgment interest.

22 H. An Order requiring an accounting for, and imposition of, a constructive
23 trust upon all monies received by Defendant as a result of the unfair, misleading,
24 fraudulent and unlawful conduct alleged herein.

25 I. Such other and further relief as may be deemed necessary or appropriate.
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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury on all causes of action or issues so triable.

DATED: August 25, 2021

Respectfully submitted,



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