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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MOKHTAR NASERI,
on behalf of himself and others similarly situated,

Plaintiff,

v.

THE COCA-COLA COMPANY
and COCA-COLA REFRESHMENTS USA, INC.,

Defendants.

Case No.:

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff MOKHTAR NASERI ("Plaintiff" or "Plaintiff NASERI"), individually and on behalf of all other persons similarly situated, by his undersigned attorneys, pursuant to this Class Action Complaint against the Defendants, THE COCA-COLA COMPANY and COCA-COLA REFRESHMENTS USA, INC. (collectively, "Defendants" or "Coca-Cola") alleges the following:

NATURE OF THE ACTION

1. This is a consumer protection action seeking redress for, and the termination of, Coca-Cola's unfair and deceptive practice of advertising and marketing its Gold Peak Tea products as having "No Preservatives" when they contain citric acid, phosphoric acid, and ascorbic acid, all well-known preservatives commonly used in commercial food and drink products.

2. Defendants sold Plaintiff and Class members the following beverages with deceptive and misleading "No Preservatives" representations on the front labels:

a. Gold Peak Diet Tea (citric acid and phosphoric acid)
b. Gold Peak Lemon Tea (citric acid)
c. Gold Peak Unsweetened Tea (phosphoric acid)
d. Gold Peak Sweet Tea (phosphoric acid)
e. Gold Peak Green Tea (citric acid and ascorbic acid)

Collectively, "the Products" and individually, a "Product." The Products are sold in various sizes, including 18.5 FL OZ, 59 FL OZ, 64 FL OZ, 89 FL OZ and the 16.9 FL OZ six-pack. Images of the Products, their labels, and their ingredients lists are in **EXHIBIT A**.

3. Defendants engaged in deceptive labeling practices by expressly representing on their Product labels and website that the Products have "No Preservatives." By deceptively marketing the Products as having "No Preservatives," Defendants wrongfully capitalized on, and reaped enormous profits from, consumers' strong preference for drink products made free of preservatives.

4. Defendants marketed the Products in a way that is deceptive to consumers under consumer protection laws of New York.

5. Plaintiff brings this proposed consumer class action on behalf of himself and all other persons who, from the applicable limitations period up to and including the present (the "Class Period"), purchased the Products in New York for consumption and not resale.

JURISDICTION AND VENUE

6. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332, because this is a class action, as defined by 28 U.S.C § 1332(d)(1)(B), in which a member of the putative class is a citizen of a different state than Defendants, and the amount in controversy exceeds the sum or value of $5,000,000, excluding interest and costs. *See* 28 U.S.C. § 1332(d)(2). Alternatively, the Court has jurisdiction over all claims alleged herein pursuant to 28 U.S.C § 1332

because the matter in controversy exceeds the sum or value of $75,000 and is between citizens of different states.

7. Furthermore, this court has personal jurisdiction over Defendants because their Products are advertised, marketed, distributed, and sold throughout New York State. Defendants engaged in the wrongdoing alleged in this Complaint throughout the United States, including in New York State. Defendants are authorized to do business in New York State, and Defendants have sufficient minimum contacts with New York and/or otherwise have intentionally availed themselves of the markets in New York State, rendering the exercise of jurisdiction by the Court permissible under traditional notions of fair play and substantial justice. Moreover, Defendants are engaged in substantial and not isolated activity within New York State.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(a) and (b), because a substantial part of the events giving rise to Plaintiff's claims occurred in this District and Defendants are subject to personal jurisdiction in this District.

PARTIES

Plaintiff

9. Plaintiff MICHAEL NASERI is, and at all times relevant hereto has been, a citizen of the State of New York and a resident of Queens County. On June 13, 2017, Plaintiff NASERI purchased a six-pack of 16.9 OZ bottles of Gold Peak Diet Tea for personal consumption at the Target store in Flushing, Queens for the price $3.99. As the result of Defendants' deceptive conduct as alleged herein, Plaintiff NASERI was injured when he paid money for a beverage that did not deliver the qualities it promised. He paid the above sum on the assumption that he was purchasing a preservative-free beverage and would not have been willing to pay this sum had he known it was preservative-laden. Defendants promised Plaintiff NASERI a preservative-free beverage but delivered something else of significantly less value, thereby depriving him of the

benefit of his bargain and injuring him in an amount up to the purchase price. Damages can be calculated through expert testimony at trial. Further, should Plaintiff NASERI encounter the Products in the future, he could not rely on the truthfulness of the packaging, absent corrective changes to the packaging and advertising of the Products.

Defendants

10. Defendant THE COCA-COLA COMPANY is a corporation organized under the laws of Delaware with its headquarters at One Coca-Cola Plaza, N.W., Atlanta, GA 30313, USA and an address for service of process at c/o CT Corporation System, 111 Eighth Avenue, New York, NY 10011.

11. Defendant COCA-COLA REFRESHMENTS USA, INC. is a subsidiary of THE COCA-COLA COMPANY. It is organized under the laws of Delaware with its headquarters at One Coca-Cola Plaza, N.W., Atlanta, GA 30313, USA and has an address for service of process at Corporations Service Company, 80 State Street, Albany, NY 12207-2543.

12. Defendants develop, market and sell food and beverage products under the "Coca-Cola" brand name throughout the United States. Defendants also manufacture, market, advertise and sell their extensive Gold Peak Tea drink Products across the United States. The Products are available at numerous retail and online outlets such as Target, Duane Reade, CVS, Rite Aid and Amazon.com.

13. The advertising for the Products, relied upon by Plaintiff, was prepared and/or approved by Defendants and their agents, and was disseminated by Defendants and their agents through advertising containing the misrepresentations alleged herein. The advertising for the Products was designed to encourage consumers to purchase the Products and reasonably misled

the reasonable consumer, i.e. Plaintiff and the Class, into purchasing the Products. Defendants own, manufacture and distribute the Products, and created and/or authorized the unlawful, fraudulent, unfair, misleading and/or deceptive labeling and advertising for the Products.

FACTUAL ALLEGATIONS

Defendants Market Their Products As Free of Added Preservatives Even Though They Contain Citric Acid, Phosphoric Acid, And Ascorbic Acid

14. The front labels of the Products represent that they are free of preservatives. But all of the Products contain one or more of the preservatives citric acid, phosphoric acid, and ascorbic acid.

15. By representing that the Products have "No Preservatives," Defendants sought to capitalize on consumers' preference for less processed foods and drinks with fewer additives and the association between such products and a wholesome way of life. Consumers are willing to pay more for less processed products with no additives because of this association as well as the perceived higher quality, health and safety benefits associated with preservative-free foods.

16. The marketing research firm Mintel reports that more and more Americans are concerned to avoid food containing preservatives:

> Foods bearing "free-from" claims are increasingly relevant to Americans, as they perceive the products as closely tied to health. New research from Mintel reveals that **84 percent of American free-from consumers buy free-from foods because they are seeking out more natural or less processed foods**. In fact, 43 percent of consumers agree that free-from foods are healthier than foods without a free-from claim, while another three in five believe the fewer ingredients a product has, the healthier it is (59 percent).
>
> Among the top claims free-from consumers deem most important are trans-fat-free (78 percent) and preservative-free (71 percent).[1]

[1] http://www.mintel.com/press-centre/food-and-drink/84-of-americans-buy-free-from-foods-because-they-believe-them-to-be-more-natural-or-less-processed (last accessed 07/05/2017)

17. And alternet.org reports research showing that most Americans are prepared to pay a premium price for such healthier options:

> Not only are consumers increasingly seeking out wholesome foods, they are willing to pay a premium for them. According to Nielsen's 2015 Global Health & Wellness Survey that polled over 30,000 people online, 88 percent of Americans are willing to pay more for healthier foods. Global sales of healthy food products are estimated to reach $1 trillion by 2017, according to Euromonitor.
>
> When it comes to what consumers will be seeking out more of over the coming year, it may amount to single word. "Just think of the word no," Seifer said. "No preservatives, no additives, no growth hormones."[2]

18. Given these trends, Defendants had a natural interest in misrepresenting their Products as free of preservatives despite the presence of citric acid, phosphoric acid, and ascorbic acid, as this misrepresentation provided a clear marketing advantage over competitors that do not engage in such deceptive conduct.

Citric Acid, Phosphoric Acid, and Ascorbic Acid Are Preservatives

19. Citric acid, phosphoric acid, and ascorbic acid are preservatives as the term is defined by the FDA in 21 C.F.R. § 101.22(a)(5): "The term *chemical preservative* means any chemical that, when added to food, tends to prevent or retard deterioration thereof, but does not include common salt, sugars, vinegars, spices, or oils extracted from spices, substances added to food by direct exposure thereof to wood smoke, or chemicals applied for their insecticidal or herbicidal properties."

20. The MacMillan Dictionary defines "tends" as "to usually do a particular thing," as in "He tends to exaggerate" or "The gym tends to get very busy at around six o'clock."[3] The scientific evidence and FDA statements cited below establishes that citric, phosphoric, and

[2] http://www.alternet.org/food/8-food-trends-watch-2016 (last accessed 07/05/2017)
[3] http://www.macmillandictionary.com/us/dictionary/american/tend (last accessed 07/05/2017)

ascorbic acids all tend to prevent or retard the deterioration of food. And this remains the case regardless of the subjective purposes for which these substances were added to the Products. Citric, phosphoric and ascorbic acids do not fall into any of the regulatory exemptions from the definition of a preservative.

Citric Acid Is A Preservative

21. Citric acid is a preservative. The FDA expressly classifies citric acid as a preservative. Citric acid is identified as a preservative in its Overview of Food Ingredients, Additives, and Colors, on the FDA's website:

Types of Ingredients	What They Do	Examples of Uses	Names Found on Product Labels
Preservatives	Prevent food spoilage from bacteria, molds, fungi, or yeast (antimicrobials); slow or prevent changes in color, flavor, or texture and delay rancidity (antioxidants); maintain freshness	Fruit sauces and jellies, beverages, baked goods, cured meats, oils and margarines, cereals, dressings, snack foods, fruits and vegetables	Ascorbic acid, citric acid, sodium benzoate, calcium propionate, sodium erythorbate, sodium nitrite, calcium sorbate, potassium sorbate, BHA, BHT, EDTA, tocopherols (Vitamin E)

http://www.fda.gov/Food/IngredientsPackagingLabeling/FoodAdditivesIngredients/ucm094211.htm. (last accessed 07/05/2017)

22. The FDA's classification of citric acid as a preservative is further confirmed by its Warning Letter, dated October 6, 2010, to the manufacturer of the Chiquita brand "Pineapple Bites with Coconut" and "Pineapple Bites":

> "The 'Pineapple Bites' and 'Pineapple Bites with Coconut' products are further misbranded within the meaning of section 403(k) of the Act [21 U.S.C. 343(k)] in that they contain the chemical preservative ascorbic acid and citric acid but their

> labels fail to declare these preservatives with a description of their functions. 21 CFR 101.22."

See **EXHIBIT B**, FDA Warning Letter dated October 6, 2010 (emphasis added).

23. Citric acid's status as a preservative is also acknowledged by insiders in the preservative manufacturing and distribution industries. FBC Industries, Inc. a manufacturer and supplier of FCC grade Citric Acid additives, acidulants, buffering agents and preservatives for the food and beverage industry describes citric acid's function: "Citric acid is the most commonly used acidulant in the industry. As a food additive or food grade product, citric acid is used as a flavoring and preservative. The buffering properties of citrates are used to control pH and flavor."[4]

Phosphoric Acid Is A Preservative

24. Phosphoric acid is a preservative.

25. The American Beverage Association states of phosphoric acid "[t]his flavoring agent in soft drinks is a preservative that provides tartness."[5]

26. The *Encyclopedia of Food and Color Additives* explains the uses of phosphoric acid: "Use as a flavor enhancer, flavoring agent, pH control agent, sequestrant, stabilizer and thickener, and synergist." The *Encyclopedia* explains that phosphoric acid is "used as an acidulant, PH control agent, buffering agent, flavor enhancer, flavoring agent, sequestrant, stabilizer and thickener, and synergist. It works effectively to reduce the pH in many food products allowing antimicrobial agents to be more effective."[6]

27. Scholarly sources confirm that consumer concerns about a preservative like phosphate is well justified:

> the amount of total phosphate ingestion can be significantly augmented by the consumption of processed food and drinks, as phosphate metabolites are used as additives in these

[4] http://www.fbcindustries.com/Citric_Acid.aspx (last accessed 07/05/2017)
[5] http://www.ameribev.org/education-resources/beverage-dictionary/ (last accessed 07/05/2017)
[6] Burdock, G. A. (1997). *Encyclopedia of Food and Color Additives*. Boca Raton, Fla.: CRC Press.

> commercially processed food and drinks. In recent years, the amount of phosphate intake increased worldwide, especially in countries with a high consumption of processed food. Increased use of phosphate as a preservative has significantly increased in a wide range of drinks and food, complicating the patients' ability to minimize phosphate intake. Recent experimental studies have convincingly demonstrated the risk of increase serum phosphate levels in the development of premature ageing to reno-vascular diseases.[7]

28. Additional confirmation of phosphoric acid's potential dangers is located in **Exhibit C**, the Declaration of Dr. Marc Meyers ¶¶ 37-38, discussed below.

Ascrobic Acid Is A Preservative

29. Ascorbic acid is a preservative. The FDA expressly recognizes ascorbic acid as a preservative. *See* ¶ 21 above. Ascorbic acid is also listed as a preservative in 21 C.F.R. § 182.3013 and cited as a preservative in in the FDA warning letter to Chiquita above. *See* ¶ 22, **Exhibit B**.

30. The online magazine livestrong.com explains how ascorbic acid functions as a preservative:

> Preservatives are divided into three categories: Antimicrobials, antioxidants and ascorbic acid. Antimicrobials prevent bacterial, mold and yeast development. Antioxidants preserve fats, keeping them from going rancid. Ascorbic acid, more commonly known as vitamin C, falls in the third group as a preservative that stops foods from continuing to ripen, an aging process that leads to decay.
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> **About Ascorbic Acid**
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> Ascorbic acid is a water-soluble vitamin with antioxidant properties. Inside your body, the nutrient preserves cell integrity by neutralizing free radicals, which are toxic molecules that can damage healthy cells and cause disease.
>
> **Preserving Properties**
>
> Ascorbic acid neutralizes oxygen when it comes into contact with it. Oxygen allows foods to continue to ripen, an aging process similar to the one people go through that ends in death. Oxygen is also vital for many microorganisms to thrive, some of which cause decay. Ascorbic acid slows or neutralizes these events. The substance blocks cured meat's propensity to form carcinogens called nitrosamines, for example. In the process, the vitamin also preserves the flesh's red color. In addition, ascorbic acid preserves flavor.

[7] Shutto, Y., Shimada, M., Kitajima, M., Yamabe, H., & Razzaque, M. S. (2011). Lack of Awareness among Future Medical Professionals about the Risk of Consuming Hidden Phosphate-Containing Processed Food and Drinks. *PLoS ONE, 6*(12), e29105. http://doi.org/10.1371/journal.pone.0029105 (last accessed 07/05/2017)

Food-Preservation Mechanism

Canned vegetables, bottled juices, jams and other preserved fruit are processed foods manufacturers protect with ascorbic acid. The vitamin's acidity makes it hard for the enzyme phenolase to act. Phenolase accelerates oxidation, a chemical process in which oxygen level rises, resulting in decay. This is also the process that ascorbic acid combats.[8]

Citric Acid, Phosphoric Acid, And Ascorbic Acid Function As Preservatives In the Products

31. As noted above in ¶¶ 19, 20, a preservative as defined by the FDA is a substance that "tends" to prevent or retard the deterioration of foods. Thus, it is not necessary that a substance function as a preservative in every single instance for it to qualify as a preservative according to the FDA's definition, so long as this is its general tendency.

32. However, citric, phosphoric, and ascorbic acid do as a matter of fact function as preservatives in the Products.

33. This is confirmed by the Declaration of Dr. Marc Meyers, a food scientist with a Ph.D., nearly thirty years, of experience in the field, and published work. Meyers Decl. ¶¶ 3-6.

34. Confirming the general preservative properties of citric, phosphoric, and ascorbic acids, *see* Meyers Decl. ¶¶ 21-30, Dr. Meyers observes that "[c]itric, phosophoric, ans ascorbic acid will act as preservatives even at levels lower than their taste threshholds. With a higher quantity of these acids, these effects will be more pronounced, but they still occur when low levels of acid are present." Meyers. Decl. ¶ 26.

35. Thus, Defendants cannot argue that they include these acids in the Products merely to impart added taste, because the quantities required to impart taste are more than enough to function as preservatives. Even if imparting taste is Defendants' primary motivation for including

[8] http://www.livestrong.com/article/496950-is-ascorbic-acid-a-preservative/ (last accessed 07/05/2017)

these acids in the Products, Defendants' motivation does not influence their chemical functioning. *See* Meyers Dec. ¶ 36.

36. In addition, Dr. Meyers also makes the following points about these preservatives' specific functioning in the Products. These are:

(a) All three preservatives are acidulants that function to lower the pH-level of the Products, which is necessary to protect beverages against microorganisms. Meyers Decl. ¶ 32.

(b) Citric acid and ascorbic acid have additional antimicrobial qualities over and above their pH-lowering effect. Meyers Decl. ¶ 33.

(c) All three preservatives have antioxidant effects in the Gold Peak products. Meyers Decl. ¶¶ 32, 34.

(d) The fact that Defendant may also employ other means of preserving the Product, like a hermetic seal, does not change the fact that citric, phosphoric, and ascorbic acids are functioning as preservatives. Meyers Decl. ¶ 36

Defendants' "No Preservatives" Misrepresentation Violated Federal And State Laws

37. New York and federal law place similar requirements on food companies that are designed to ensure that the claims they make about their products to consumers are truthful and accurate. Both New York and federal laws were violated by Defendants' deceptive "No Preservatives" misrepresentations.

38. Defendants' deceptive misrepresentations violate the FDCA, which provides that "[a] food shall be deemed misbranded. If its labeling is false or misleading in any particular." 21 U.S.C. § 343 (a)(1).

39. Defendants' deceptive misrepresentations violate N.Y. Agm. Law § 201, which likewise deems that "[f]ood shall be deemed to be misbranded: 1. If its labeling is false or misleading in any particular."

40. Independently of these, Defendants' deceptive misrepresentations also violate NY GBL § 349, which declares unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce.

41. Defendants' deceptive misrepresentations also violated NY GBL § 350, which makes unlawful "[f]alse advertising in the conduct of any business, trade or commerce."

Plaintiff's Claims Are Not Preempted By The FDCA

42. Plaintiff's claims are not preempted by the FDCA because the definition of "preservative" as used herein is identical with that of the FDA (see above). Moreover, FDA regulations specifically note that claims like "contains no preservatives" are non-nutritive claims that that are not governed by 21 C.F.R. § 101.13. *See* 21 C.F.R. § 101.65(b)(2). Since the FDA has not issued specific standards governing when "no preservative" claims are either true or false, such representations fall outside the ambit of FDA regulations. Accordingly, Plaintiff's claim cannot possibly be preempted. *See Bimont v. Unilever U.S., Inc.*, No. 14-CV-7749 (JPO), 2015 U.S. Dist. LEXIS 119908, at *6 (S.D.N.Y. Sep. 9, 2015) ("preemption does not preclude a state-law claim if the state requirement is outside the scope of the relevant federal requirements").

Defendants' Misrepresentations Were Material To A Reasonable Consumer And Relied Upon By Plaintiff And The Class

43. Plaintiff and Class members reasonably relied on Defendants' representation that the Products were free of preservatives.

44. Defendants' "No Preservatives" misrepresentation would deceive a reasonable consumer.

45. At the point of sale, Plaintiff and Class members did not know, and had no reason to know, that the Products were misbranded as set forth herein, and would not have bought the Products had they known the truth about them. "Misleading" is judged in reference to "the ignorant, the unthinking and the credulous who, when making a purchase, do not stop to analyze." *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 75 (9th Cir. 1951).

46. A representation that a product has "No Preservatives" is material to a reasonable consumer when deciding to purchase it. Plaintiff did, and a reasonable consumer would, attach importance to whether Defendants' Products have "No Preservatives" because it is common knowledge that consumers prefer to avoid foods with potentially unhealthy additives (see consumer behavior research above). Moreover, Defendants would not have included the representation on the front label of the Products if it was not going to influence consumer behavior.

47. Defendants' knew that its "No Preservatives" representations were false and intended that they be relied upon by Plaintiff and the Class. Upon information and belief, Defendants employ food scientists who are familiar with the basic properties of citric, phosphoric, and ascorbic acids.

Plaintiff and the Class Were Injured As The Result Of Defendants' Deceptive Practices

48. Plaintiff and the Class were injured when Defendants denied them the full benefit of their bargain. They paid money for Products that were represented to them as preservative-free, and then received Products that were preservative-laden, which had significantly less value. Plaintiff and the Class were thus deprived of the benefit of their bargain. They would not have purchased the Products, or would only have been willing to pay less for them, had they known the

truth. Thus, they were injured in an amount up to the purchase price, the difference between the actual value of the Products and the value of the Products as misrepresented to them by Defendants, to be determined by expert testimony at trial. Defendants' very inclusion of "No Preservatives" on the Products' front labels is an acknowledgment that this increased the Products' perceived value.

49. *See Orlander v. Staples, Inc.*, 802 F.3d 289, 302 (2d Cir. 2015) ("the issue of 'price premium' was relevant because it showed that plaintiffs paid more than they would have for the good but for the deceptive practices of the defendant-sellers"); *Kacocha v. Nestle Purina Petcare Co.*, No. 15-CV-5489 (KMK), 2016 U.S. Dist. LEXIS 107097, at *51-52 (S.D.N.Y. Aug. 11, 2016) ("[I]n his Complaint, Plaintiff seeks monetary damages on the grounds that he 'would not have paid the premium price he paid' to buy the Products had he 'known the truth.'…Case law makes clear that this is sufficient at the motion-to-dismiss phase for a § 349 claim to survive."); *Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 288-89 (S.D.N.Y. 2014) (Plaintiffs claim that, but for Defendants' "unfair and deceptive practices," they—and the putative class—would not have purchased, or paid a price premium for, Smart Balance. Compl. ¶¶ 7, 81. Indeed, Plaintiffs claim that they paid price premiums specifically 'based on Defendants' misrepresentations,' and allege that they deserve damages in the amount of either the purchase prices, or the price premiums, that they paid for Smart Balance. Id. ¶ 81. Accordingly, the Court finds that Plaintiffs have adequately alleged injury under GBL § 349…")

CLASS ACTION ALLEGATIONS

50. Plaintiff NASERI seeks to represent the following class:

> All individuals who made retail purchases of the Products in New York during the applicable limitations period for personal consumption and not resale, and/or such subClass as the Court may deem appropriate. ("the Class")

51. The proposed Class excludes current and former officers and directors of Defendants, members of the immediate families of the officers and directors of Defendants, Defendants' legal representatives, heirs, successors, assigns, and any entity in which they have or have had a controlling interest, and the judicial officer to whom this lawsuit is assigned.

52. Plaintiff reserves the right to revise the Class definition based on facts learned in the course of litigating this matter.

53. This action is proper for class treatment under Rules 23(b)(1)(B) and 23(b)(3) of the Federal Rules of Civil Procedure. While the exact number and identities of other Class members are unknown to Plaintiff at this time, Plaintiff is informed and believes that there are thousands of Class members. Thus, the Class is so numerous that individual joinder of all Class members is impracticable.

54. Common questions of law and fact arise from Defendants' conduct described herein. Such questions are common to all Class members and predominate over any questions affecting only individual Class members. These include:

a. whether labeling "No Preservatives" on Products containing citric acid, phosphoric acid, and ascorbic acid was false and misleading;

b. whether Defendants deprived Plaintiff and the Class of the benefit of their bargain because the Products purchased were different from, and had less value than, what Defendants warranted;

c. whether Defendants must disgorge any and all profits it has made as a result of its misconduct; and

d. whether Defendants should be barred from marketing the Products as having "No Preservatives."

55. Plaintiff's claims are typical of those of the Class members because Plaintiff and the other Class members sustained damages arising out of the same wrongful conduct, as detailed herein. Plaintiff and other Class members purchased Defendants' Products and sustained similar injuries arising out of Defendants' conduct in violation of New York State law. Defendants' unlawful, unfair and fraudulent actions concern the same business practices described herein irrespective of where they occurred or were experienced. The injuries of the Class were caused directly by Defendants' unfair and deceptive practices. In addition, the factual underpinning of Defendants' misconduct is common to all Class members and represents a common thread of misconduct resulting in injury to all members of the Class. Plaintiff's claims arise from the same practices and course of conduct that give rise to the claims of the members of the Class and are based on the same legal theories.

56. Plaintiff will fairly and adequately represent and pursue the interests of the Class and has retained competent counsel experienced in prosecuting class actions. Plaintiff understands the nature of his claims herein, has no disqualifying conditions, and will vigorously represent the interests of the Class. Neither Plaintiff nor Plaintiff's counsel have any interests that conflict with or are antagonistic to the interests of the Class. Plaintiff has retained highly competent and experienced class action attorneys to represent his interests and those of the Class. Plaintiff and Plaintiff's counsel have the necessary financial resources to adequately and vigorously litigate this class action, and Plaintiff and counsel are aware of their fiduciary responsibilities to the Class and will diligently discharge those duties by vigorously seeking the maximum possible recovery for the Class.

57. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The damages suffered by any individual class member are too

small to make it economically feasible for an individual class member to prosecute a separate action, and it is desirable for judicial efficiency to concentrate the litigation of the claims in this forum. Furthermore, the adjudication of this controversy through a class action will avoid the potentially inconsistent and conflicting adjudications of the claims asserted herein. There will be no difficulty in the management of this action as a class action.

58. The prerequisites to maintaining a class action for injunctive relief or equitable relief pursuant to Rule 23(b)(2) are met, as Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole.

59. The prerequisites to maintaining a class action for injunctive relief or equitable relief pursuant to Rule 23(b)(3) are met, as questions of law or fact common to the Class predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

60. The prosecution of separate actions by members of the Class would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendants. Additionally, individual actions may be dispositive of the interest of all members of the Class, although certain Class members are not parties to such actions.

61. Defendants' conduct is generally applicable to the Class as a whole and Plaintiff seeks, *inter alia*, equitable remedies with respect to the Class as a whole. As such, Defendants' systematic policies and practices make declaratory relief with respect to the Class as a whole appropriate.

CAUSES OF ACTION

COUNT I

INJUNCTION FOR VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 349 (DECEPTIVE AND UNFAIR TRADE PRACTICES ACT)

62. Plaintiff NASERI realleges and incorporates herein by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

63. Plaintiff NASERI brings this claim on behalf of himself and the other members of the Class for an injunction for violations of New York's Deceptive Acts or Practices Law ("NY GBL § 349").

64. NY GBL § 349 provides that "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are . . . unlawful."

65. Under the NY GBL § 349, it is not necessary to prove justifiable reliance. ("To the extent that the Appellate Division order imposed a reliance requirement on General Business Law [§] 349 … claims, it was error. Justifiable reliance by the plaintiff is not an element of the statutory claim." *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941 (N.Y. App. Div. 2012) (internal citations omitted)).

66. Any person who has been injured by reason of any violation of the NY GBL § 349 may bring an action in their own name to enjoin such unlawful act or practice, an action to recover their actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the Defendants willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

67. The practices employed by Defendants, whereby they advertised, promoted, and marketed their Products as containing "No Preservatives" were unfair, deceptive, and misleading and are in violation of the NY GBL § 349.

68. The foregoing deceptive acts and practices were directed at customers.

69. Defendants should be enjoined from marketing their products as containing "No Preservatives" pursuant to NY GBL § 349.

70. Plaintiff NASERI, on behalf of himself and all others similarly situated, respectfully demands a judgment enjoining Defendants' conduct, awarding costs of this proceeding and attorneys' fees, as provided by NY GBL § 349, and such other relief as this Court deems just and proper.

COUNT II

DAMAGES FOR VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 349 (DECEPTIVE AND UNFAIR TRADE PRACTICES ACT)

71. Plaintiff NASERI realleges and incorporates herein by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

72. Plaintiff NASERI brings this claim individually and on behalf of the other members of the Class for violations of NY GBL § 349.

73. Defendants' business act and practices and/or omissions alleged herein constitute deceptive acts or practices under NY GBL § 349, which were enacted to protect the consuming public from those who engage in unconscionable, deceptive or unfair acts or practices in the conduct of any business, trade or commerce.

74. The practices of Defendants described throughout this Complaint, were specifically directed to consumers and violate the NY GBL § 349 for, *inter alia*, the following reasons:

a. Defendants knowingly and falsely represented and advertised that the Products have "No Preservatives" with an intent to cause Plaintiff and members of the Class to believe that they do not contain preservatives;

b. Defendants caused Plaintiff and the Class to suffer a probability of confusion and a misunderstanding of legal rights, obligations and/or remedies by and through their conduct;

c. Defendants made material representations and statements of fact to Plaintiff and the Class that resulted in Plaintiff and the Class reasonably believing the represented or suggested state of affairs to be other than what they actually were.

75. The practices employed by Defendants, whereby Defendants advertised, promoted, and marketed their Products as having "No Preservatives" were unfair, deceptive, and misleading and are in violation of NY GBL § 349.

76. Under the circumstances, Defendants' conduct in employing these unfair and deceptive trade practices were malicious, willful, wanton and outrageous such as to shock the conscience of the community and warrant the imposition of punitive damages.

77. Defendants' actions impact the public interest because Plaintiff and members of the Class were injured in exactly the same way as thousands of others purchasing the Products as a result of and Defendants' generalized course of deception.

78. The foregoing deceptive acts and practices were directed at consumers.

79. The foregoing deceptive acts and practices proximately caused Plaintiff and other members of the Class to suffer actual damages in the form of, *inter alia*, monies spent to purchase the Products. Plaintiff and other members of the Class are entitled to recover compensatory

damages, statutory damages, punitive damages, attorneys' fees and costs, and any other relief the Court deems appropriate. Damages can be calculated through expert testimony at trial.

COUNT III

DAMAGES FOR VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 350 (FALSE ADVERTISING LAW)

80. Plaintiff NASERI realleges and incorporates by reference the allegations contained in all preceding paragraphs and further alleges as follows:

81. Plaintiff NASERI brings this claim individually, as well as on behalf of members of the class, for violations of NY GBL § 350.

82. Defendants have been and/or is engaged in the "conduct of … business, trade or commerce" within the meaning of N.Y. Gen. Bus. Law § 350.

83. New York Gen. Bus. Law § 350 makes unlawful "[f]alse advertising in the conduct of any business, trade or commerce." False advertising includes "advertising, including labeling, of a commodity … if such advertising is misleading in a material respect," taking into account "the extent to which the advertising fails to reveal facts material in light of … representations [made] with respect to the commodity …" N.Y. Gen. Bus. Law § 350-a(1).

84. Defendants caused to be disseminated throughout New York, through advertising, marketing and other publications, statements that were untrue or misleading.

85. Defendants' affirmative misrepresentations that the Products contain "No Preservatives" were material and substantially uniform in content, presentation, and impact upon consumers at large. Consumers purchasing the Products were, and continue to be, exposed to Defendants' material misrepresentations.

86. Defendants have violated N.Y. Gen. Bus. Law § 350 because their "No Preservatives" misrepresentations were material and likely to deceive a reasonable consumer.

87. Plaintiff NASERI and members of the Class have suffered an injury, including the loss of money or property, as a result of Defendants' false and misleading advertising.

88. Pursuant to N.Y. Gen. Bus. Law § 350-e, Plaintiff NASERI and members of the Class seek monetary damages (including actual damages and minimum, punitive, or treble and/or statutory damages pursuant to GBL § 350-a(1)), injunctive relief, restitution and disgorgement of all monies obtained by means of Defendants' unlawful conduct, interest, and attorneys' fees and costs.

COUNT IV

COMMON LAW FRAUD

89. Plaintiff NASERI realleges and incorporates herein by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

90. Defendants intentionally made materially false and misleading representations regarding the composition of the Products.

91. Plaintiff and members of the Class reasonably relied on Defendants' false and misleading representations. They did not know, and had no reason to know, that the Products contained preservatives, and they would not have purchased the Products had they known.

92. Defendants knew and intended that Plaintiff and the Class would rely on its misrepresentations.

93. Plaintiff and members of the Class have been injured as a result of Defendants' fraudulent conduct.

94. Defendants are liable to Plaintiff and members of the Class for damages sustained as a result of Defendants' fraud.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all other similarly situated, seeks judgment against Defendants, as follows:

a. An Order that this action be maintained as a class action and appointing Plaintiff as representative of the Class;

b. An Order appointing the undersigned attorney as class counsel in this action;

c. Restitution and disgorgement of all amounts obtained by Defendants as a result of their misconduct, together with interest thereon from the date of payment, to the victims of such violations;

d. All recoverable compensatory and other damages sustained by Plaintiff and the Class;

e. Actual and/or statutory damages for injuries suffered by Plaintiff and the Class and in the maximum amount permitted by applicable law;

f. An order (i) requiring Defendants to immediately cease their wrongful conduct as set forth in this Complaint; (ii) ordering Defendants to engage in a corrective advertising campaign; and (iv) requiring Defendants to reimburse Plaintiff and all members of the Class the amounts paid for the Products;

g. Statutory pre-judgment and post-judgment interest on any amounts;

h. Payment of reasonable attorneys' fees and costs; and

i. Such other relief as the Court may deem just and proper.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff, on behalf of themselves and all others similarly situated, demand a trial by jury on all questions of fact raised by the Complaint.

Dated: July 6, 2017

Respectfully submitted,

By: */s/ C.K. Lee*
C.K. Lee, Esq.

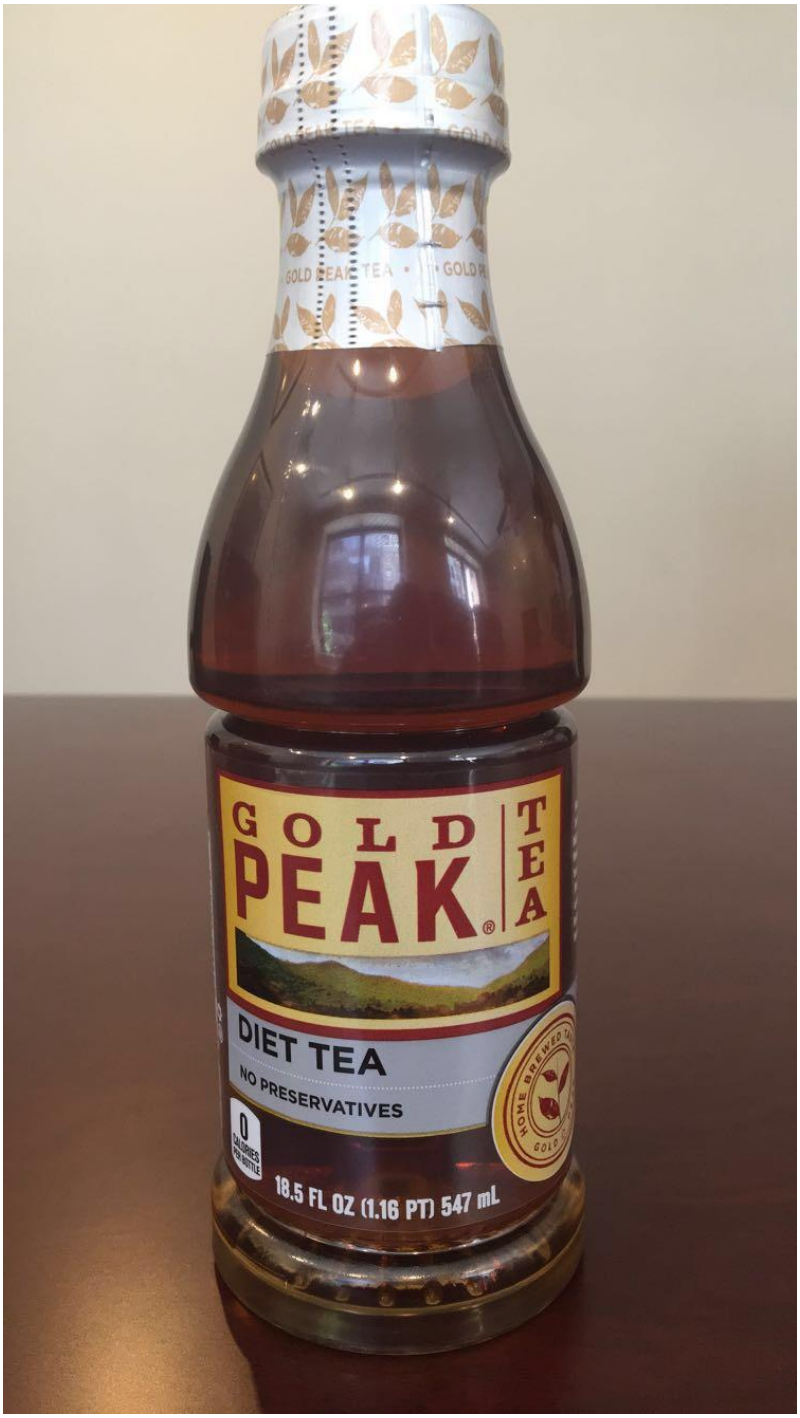
LEE LITIGATION GROUP, PLLC
C.K. Lee (CL4086)
Anne Seeling (AS3976)
30 East 39th Street, Second Floor
New York, NY 10016
Tel.: 212-465-1188
Fax: 212-465-1181
Attorneys for Plaintiff and the Class

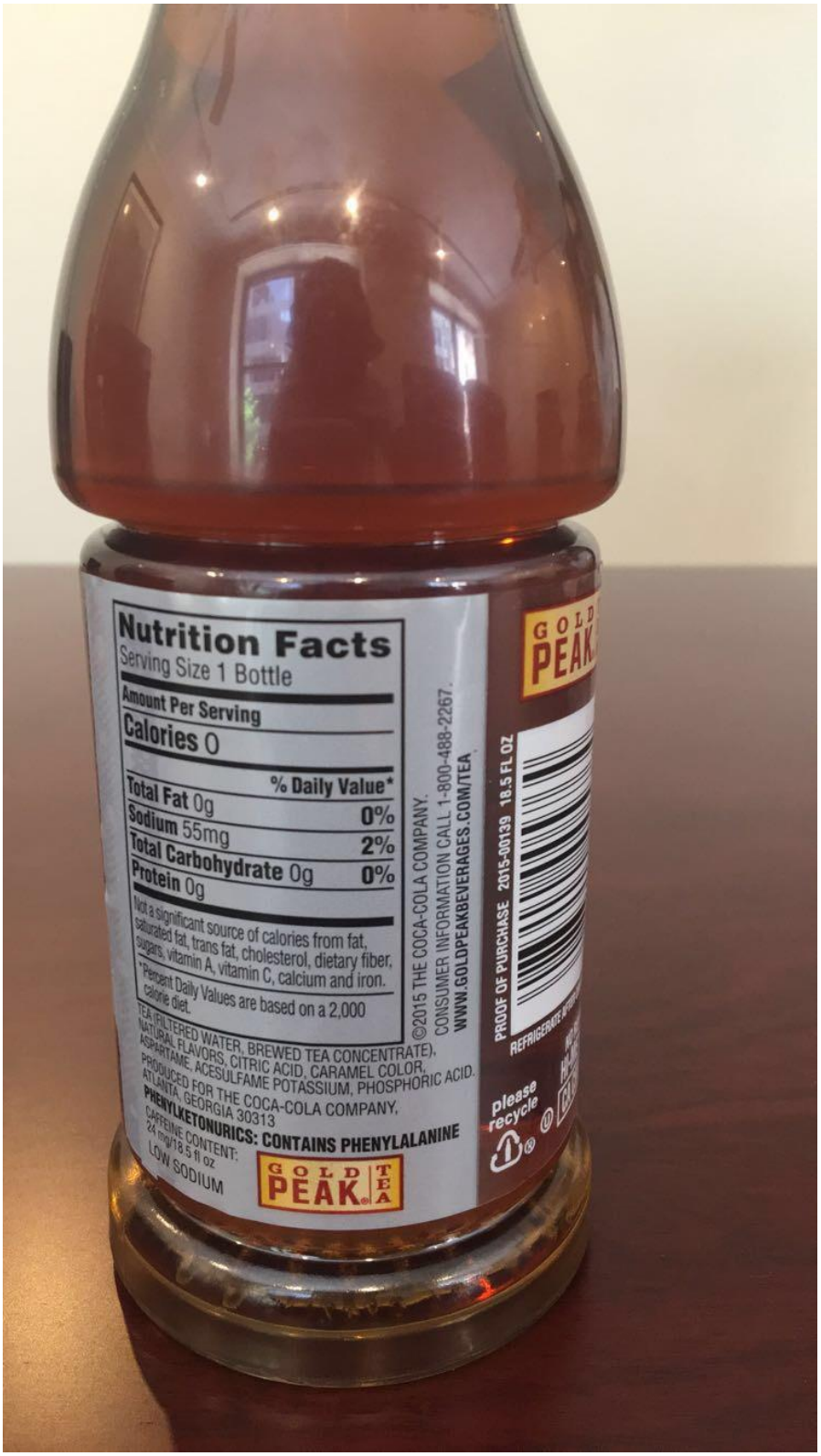
EXHIBIT A

Table of Contents

Gold Peak Diet Tea

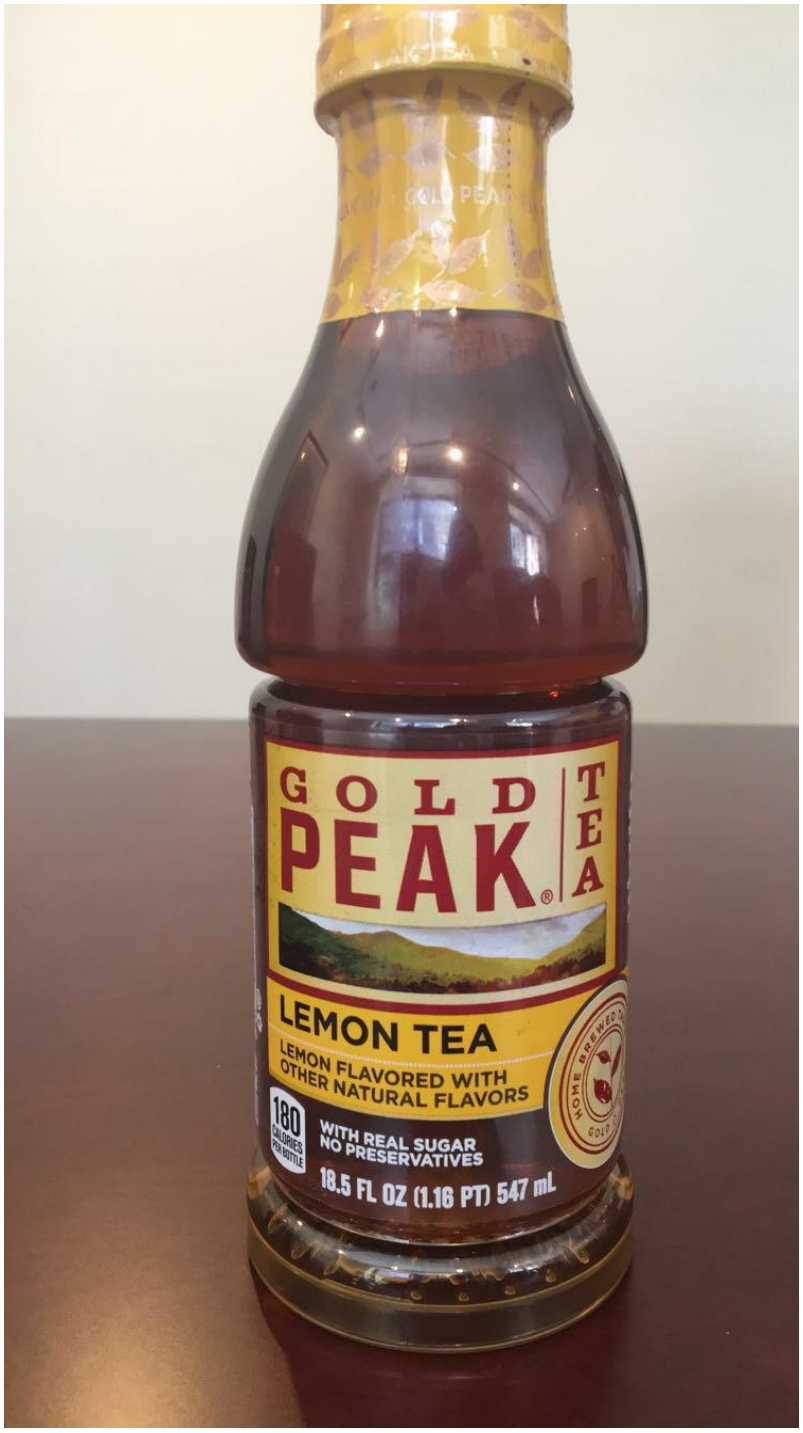
(Citric Acid and Phosphoric Acid)

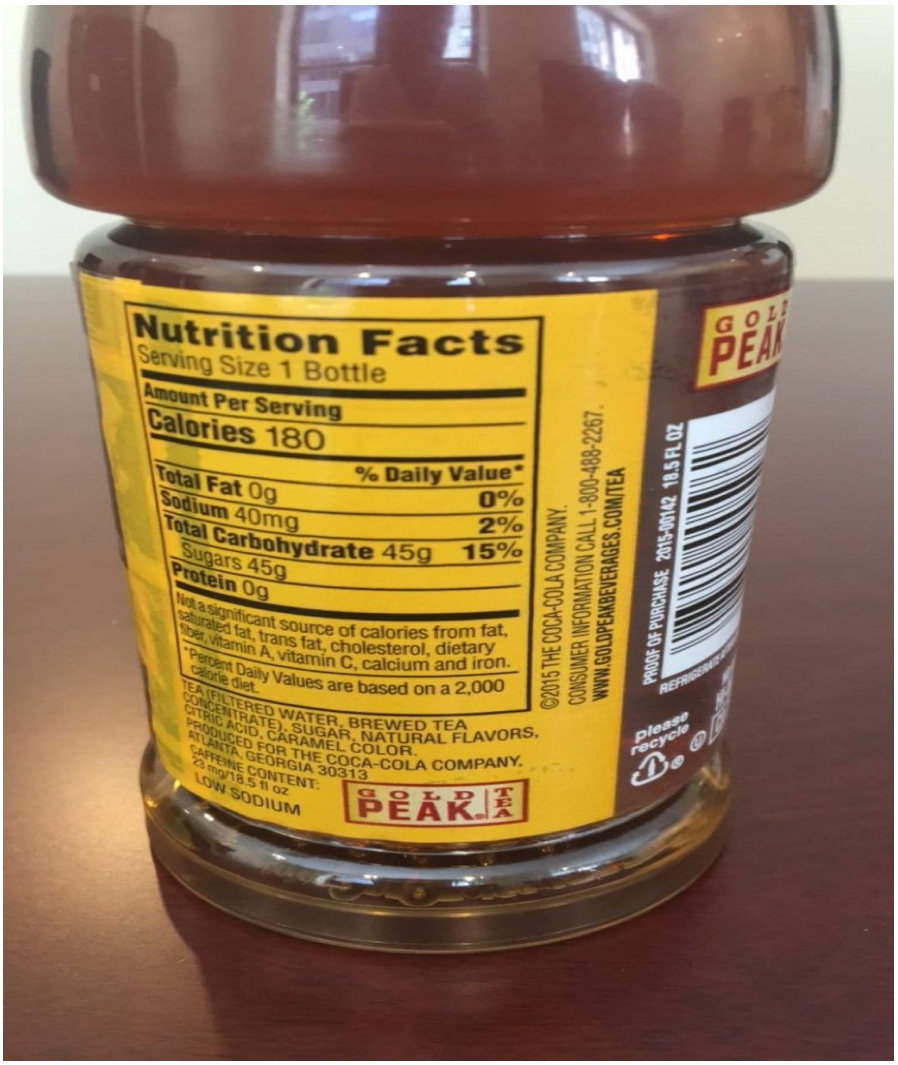



Nutrition Facts
Serving Size 1 Bottle
Amount Per Serving
Calories 0
% Daily Value*
Total Fat 0g 0%
Sodium 55mg 2%
Total Carbohydrate 0g 0%
Protein 0g
Not a significant source of calories from fat, saturated fat, trans fat, cholesterol, dietary fiber, sugars, vitamin A, vitamin C, calcium and iron.
*Percent Daily Values are based on a 2,000 calorie diet.
TEA (FILTERED WATER, BREWED TEA CONCENTRATE), NATURAL FLAVORS, CITRIC ACID, CARAMEL COLOR, ASPARTAME, ACESULFAME POTASSIUM, PHOSPHORIC ACID.
PRODUCED FOR THE COCA-COLA COMPANY, ATLANTA, GEORGIA 30313
PHENYLKETONURICS: CONTAINS PHENYLALANINE
CAFFEINE CONTENT: 24 mg/18.5 fl oz
LOW SODIUM
GOLD PEAK TEA
©2015 THE COCA-COLA COMPANY.
CONSUMER INFORMATION CALL 1-800-488-2267.
WWW.GOLDPEAKBEVERAGES.COM/TEA
PROOF OF PURCHASE 2015-00139 18.5 FL OZ
please recycle

Gold Peak Lemon Tea

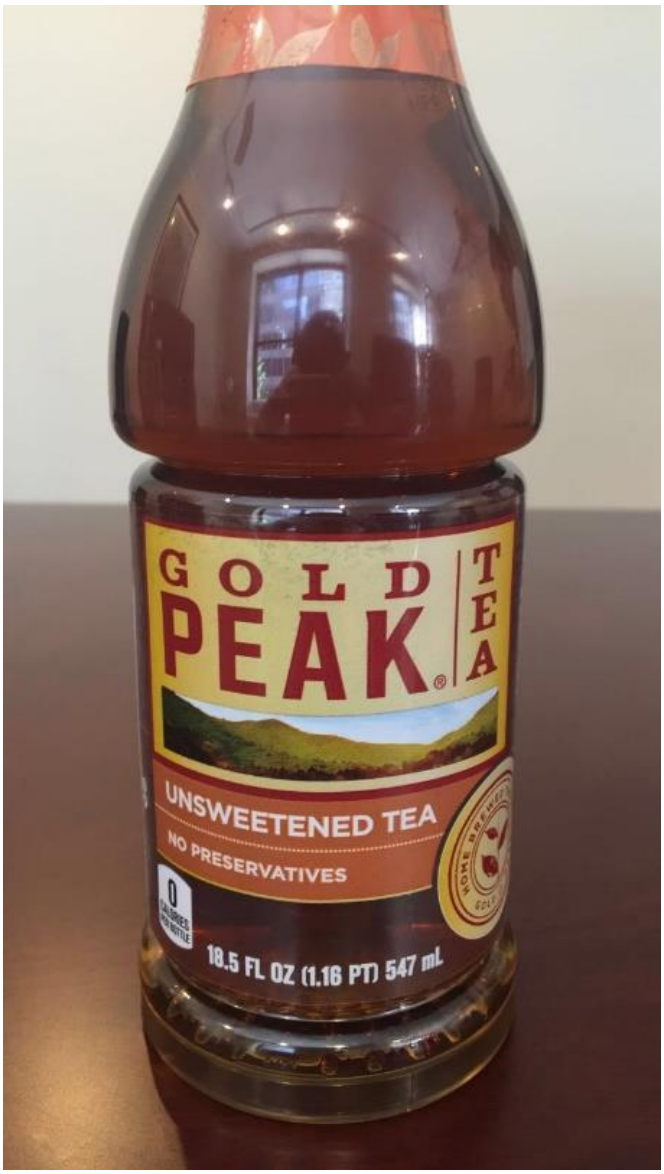
(Citric Acid)

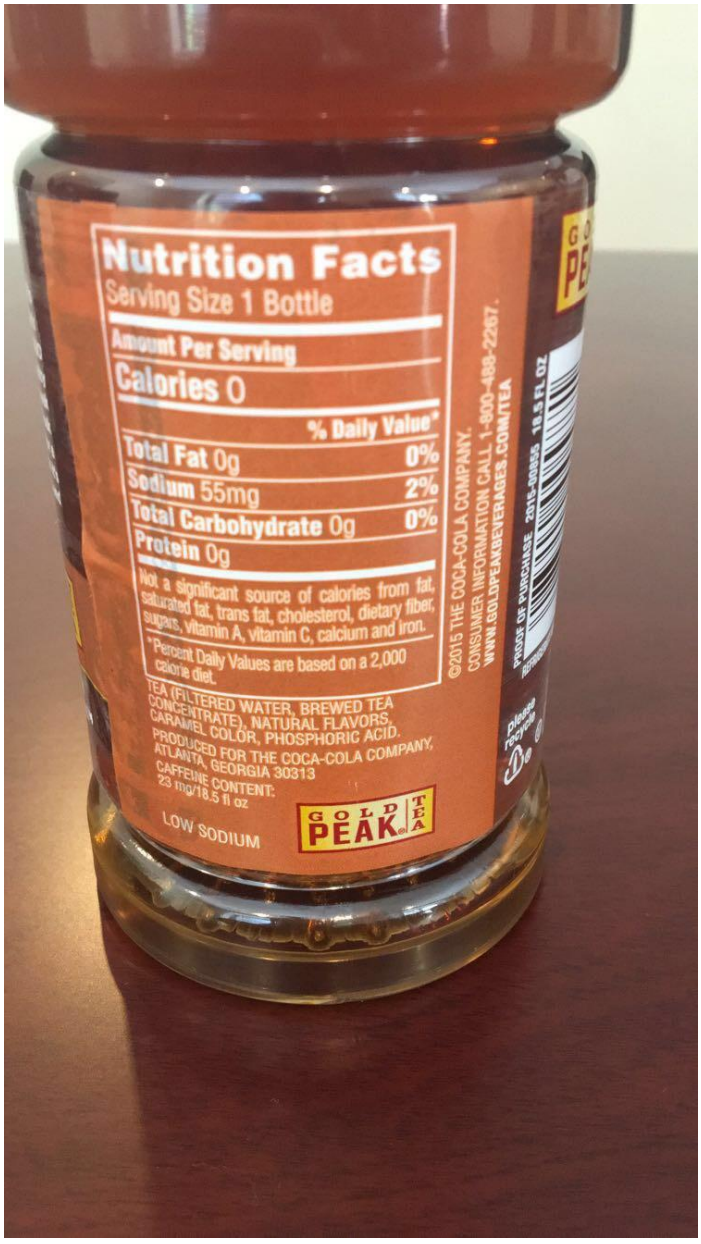



Nutrition Facts
Serving Size 1 Bottle
Amount Per Serving
Calories 180
% Daily Value*
Total Fat 0g 0%
Sodium 40mg 2%
Total Carbohydrate 45g 15%
Sugars 45g
Protein 0g
Not a significant source of calories from fat, saturated fat, trans fat, cholesterol, dietary fiber, vitamin A, vitamin C, calcium and iron.
*Percent Daily Values are based on a 2,000 calorie diet.
TEA (FILTERED WATER, BREWED TEA CONCENTRATE), SUGAR, NATURAL FLAVORS, CITRIC ACID, CARAMEL COLOR.
PRODUCED FOR THE COCA-COLA COMPANY, ATLANTA, GEORGIA 30313
CAFFEINE CONTENT: 23 mg/18.5 fl oz
LOW SODIUM
GOLD PEAK TEA
©2015 THE COCA-COLA COMPANY.
CONSUMER INFORMATION CALL 1-800-488-2267.
WWW.GOLDPEAKBEVERAGES.COM/TEA
PROOF OF PURCHASE 2015-00142 18.5 FL OZ
please recycle

Gold Peak Unsweetened Tea

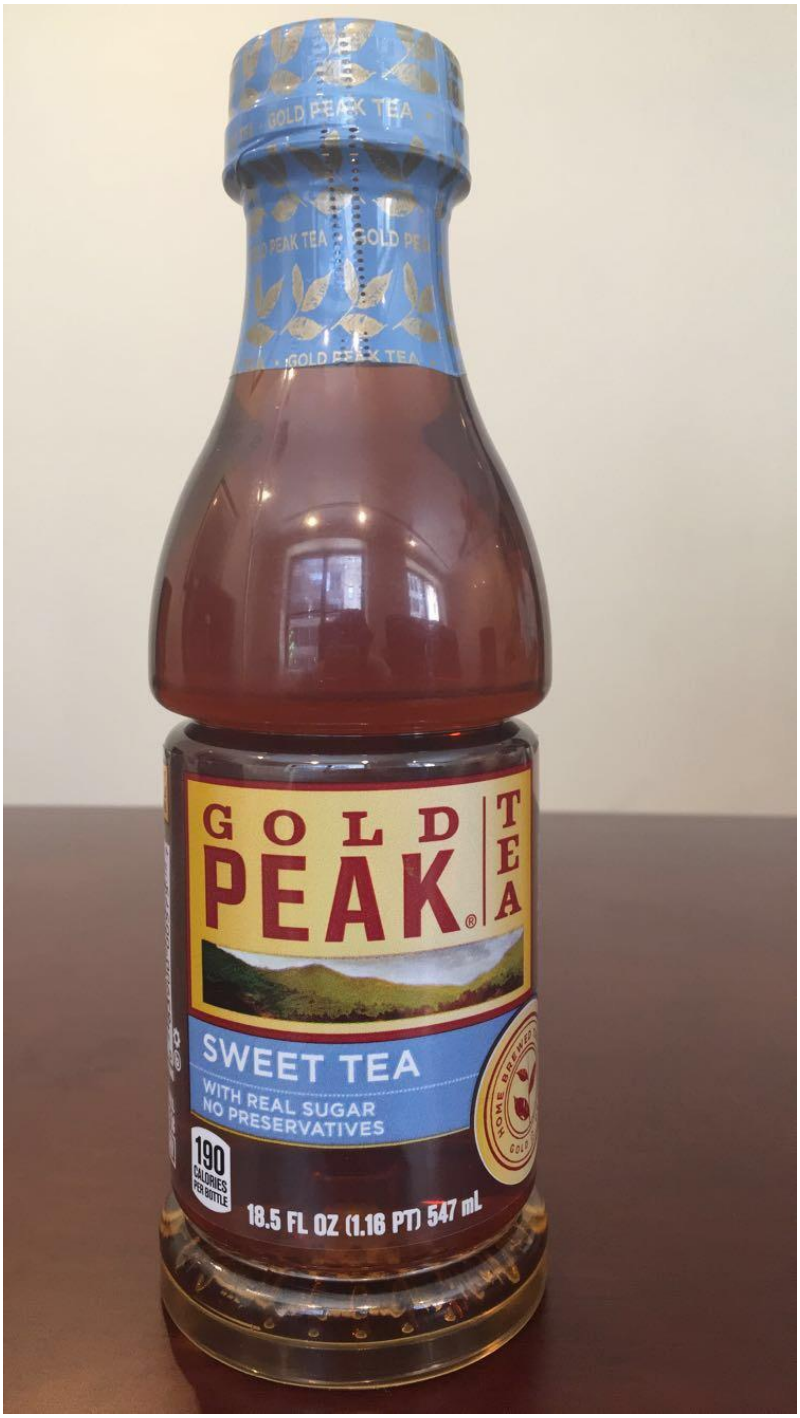
(Phosphoric Acid)

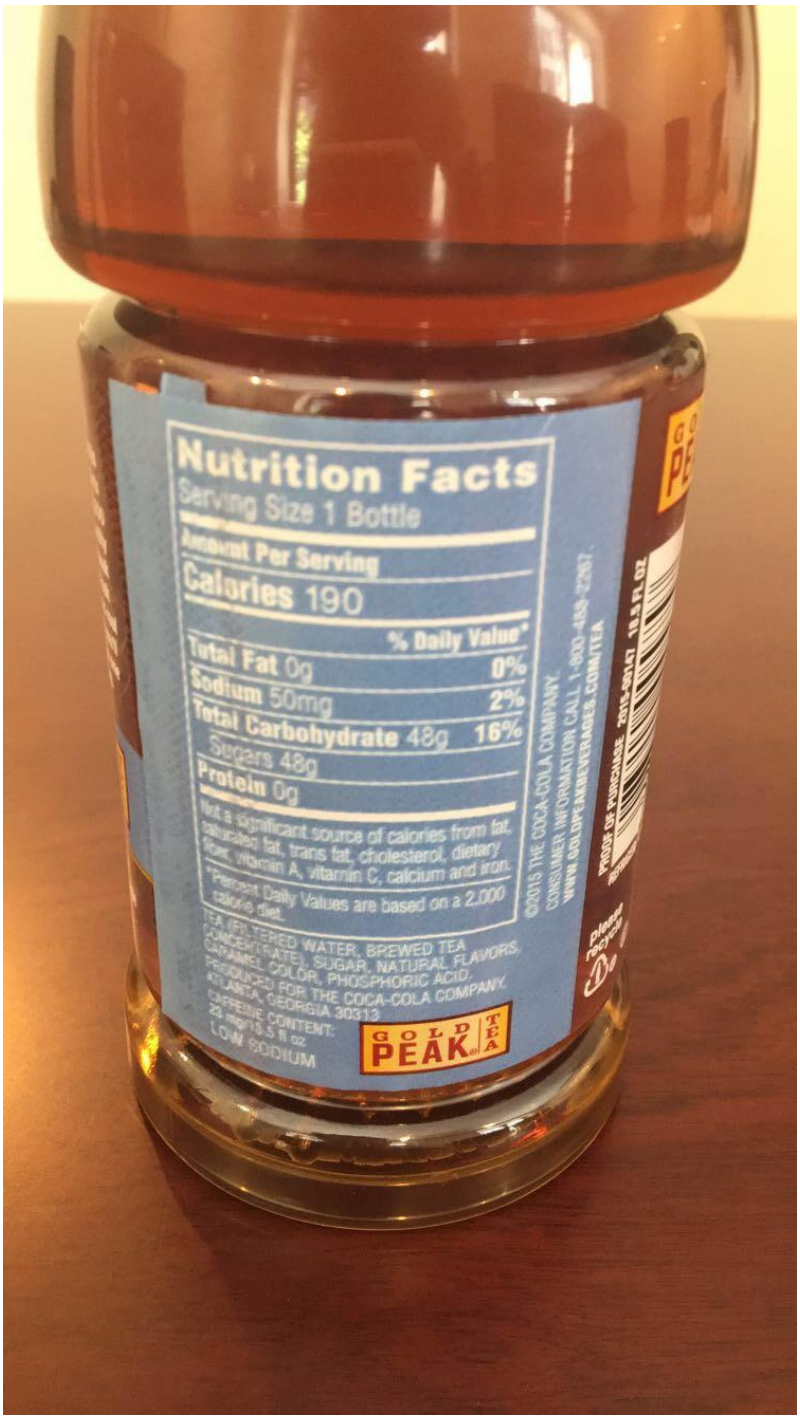



Nutrition Facts
Serving Size 1 Bottle
Amount Per Serving
Calories 0
% Daily Value*
Total Fat 0g 0%
Sodium 55mg 2%
Total Carbohydrate 0g 0%
Protein 0g
Not a significant source of calories from fat, saturated fat, trans fat, cholesterol, dietary fiber, sugars, vitamin A, vitamin C, calcium and iron.
*Percent Daily Values are based on a 2,000 calorie diet.
TEA (FILTERED WATER, BREWED TEA CONCENTRATE), NATURAL FLAVORS, CARAMEL COLOR, PHOSPHORIC ACID.
PRODUCED FOR THE COCA-COLA COMPANY, ATLANTA, GEORGIA 30313
CAFFEINE CONTENT: 23 mg/18.5 fl oz
LOW SODIUM
GOLD PEAK TEA
©2015 THE COCA-COLA COMPANY.
CONSUMER INFORMATION CALL 1-800-488-2267.
WWW.GOLDPEAKBEVERAGES.COM/TEA
PROOF OF PURCHASE 2015-00955 18.5 FL OZ
Please recycle

Gold Peak Sweet Tea

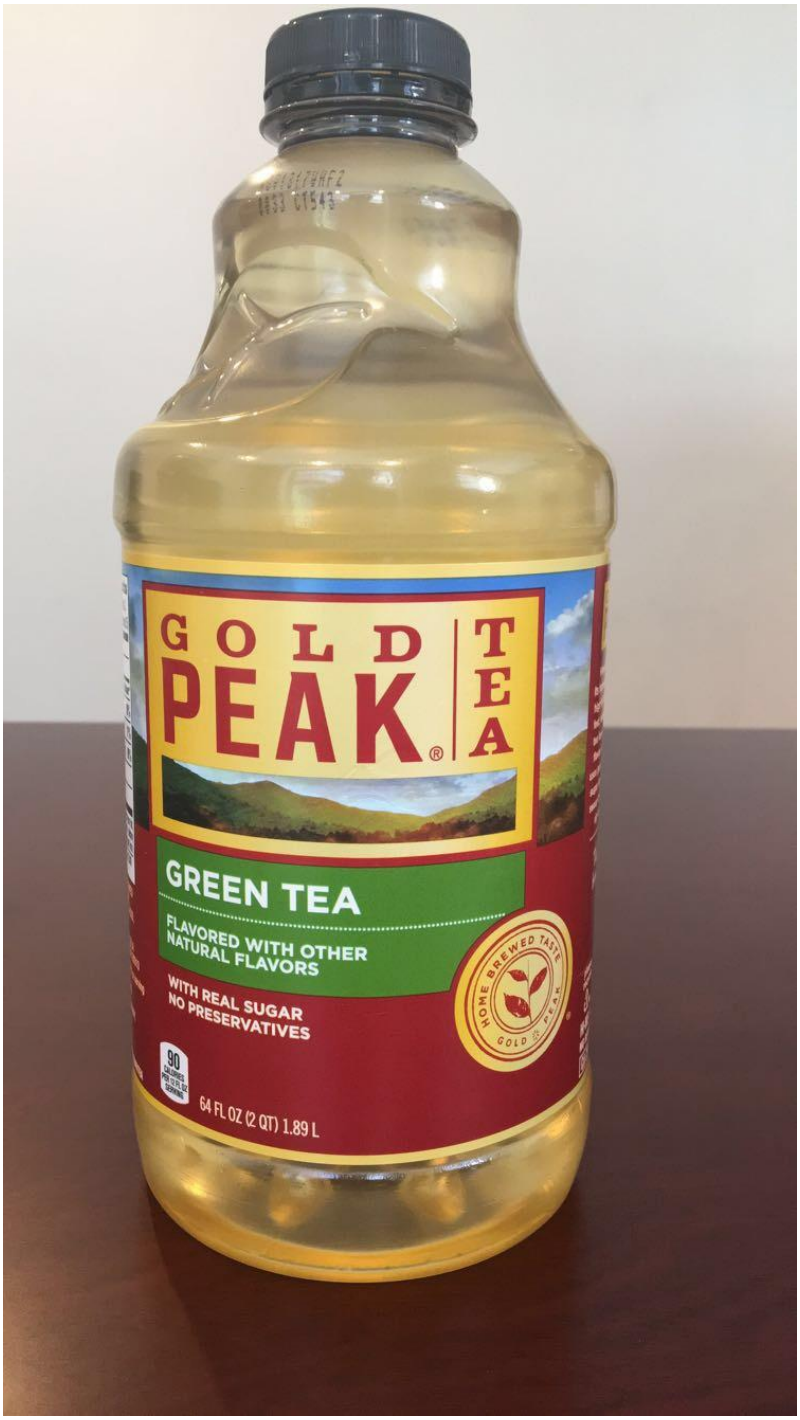
(Phosphoric Acid)




Nutrition Facts
Serving Size 1 Bottle
Amount Per Serving
Calories 190
% Daily Value*
Total Fat 0g 0%
Sodium 50mg 2%
Total Carbohydrate 48g 16%
Sugars 48g
Protein 0g
Not a significant source of calories from fat, saturated fat, trans fat, cholesterol, dietary fiber, vitamin A, vitamin C, calcium and iron.
*Percent Daily Values are based on a 2,000 calorie diet.
TEA (FILTERED WATER, BREWED TEA CONCENTRATE), SUGAR, NATURAL FLAVORS, CARAMEL COLOR, PHOSPHORIC ACID.
PRODUCED FOR THE COCA-COLA COMPANY, ATLANTA, GEORGIA 30313
CAFFEINE CONTENT: 29 mg/15.5 fl oz
LOW SODIUM
GOLD PEAK TEA
©2015 THE COCA-COLA COMPANY
CONSUMER INFORMATION CALL 1-800-438-2267
WWW.GOLDPEAKBEVERAGES.COM/TEA

Gold Peak Green Tea

(Citric Acid and Ascorbic Acid)



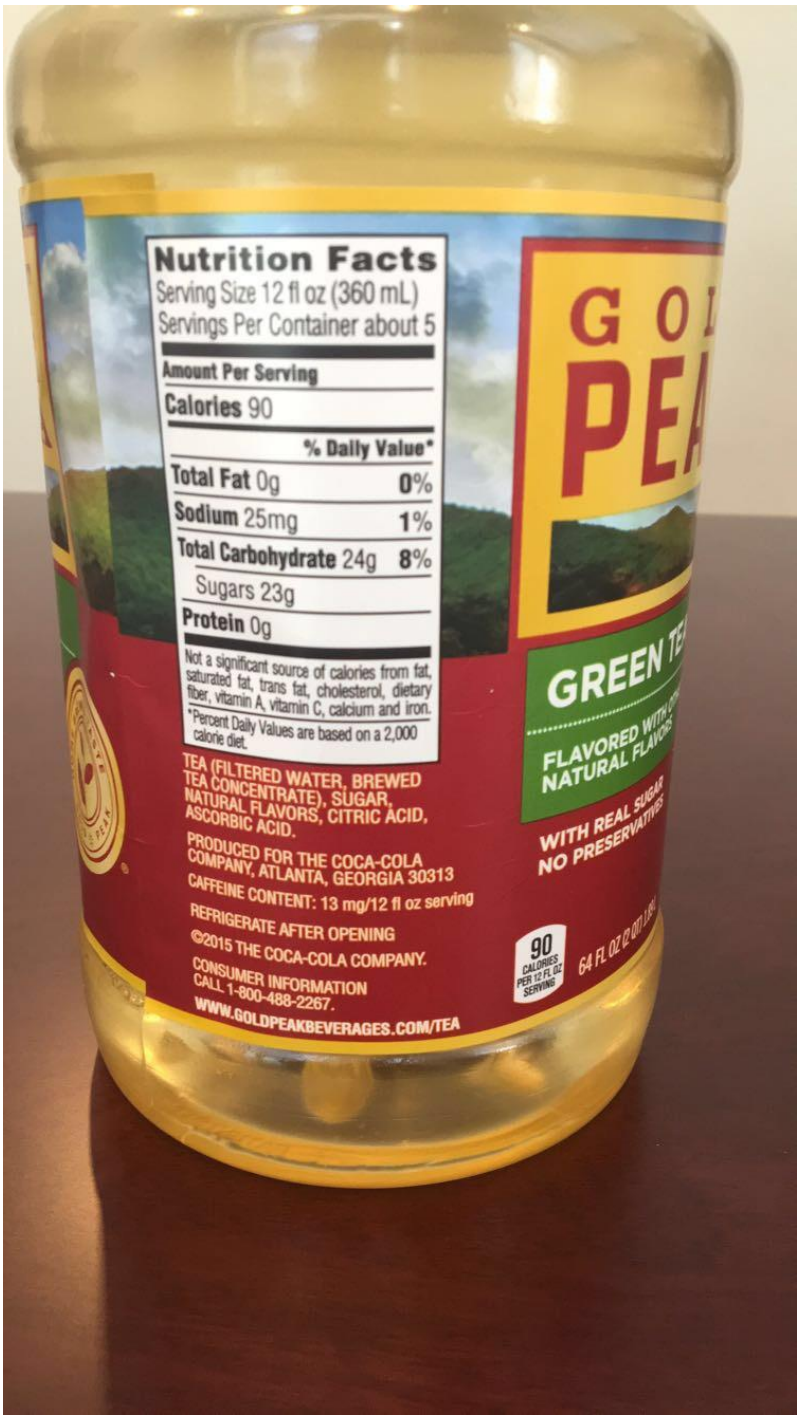

Nutrition Facts
Serving Size 12 fl oz (360 mL)
Servings Per Container about 5
Amount Per Serving
Calories 90
% Daily Value*
Total Fat 0g 0%
Sodium 25mg 1%
Total Carbohydrate 24g 8%
Sugars 23g
Protein 0g
Not a significant source of calories from fat, saturated fat, trans fat, cholesterol, dietary fiber, vitamin A, vitamin C, calcium and iron.
*Percent Daily Values are based on a 2,000 calorie diet.
TEA (FILTERED WATER, BREWED TEA CONCENTRATE), SUGAR, NATURAL FLAVORS, CITRIC ACID, ASCORBIC ACID.
PRODUCED FOR THE COCA-COLA COMPANY, ATLANTA, GEORGIA 30313
CAFFEINE CONTENT: 13 mg/12 fl oz serving
REFRIGERATE AFTER OPENING
©2015 THE COCA-COLA COMPANY.
CONSUMER INFORMATION
CALL 1-800-488-2267.
WWW.GOLDPEAKBEVERAGES.COM/TEA
GREEN TE
FLAVORED WITH
NATURAL FLAVORS
WITH REAL SUGAR
NO PRESERVATIVES
90
CALORIES PER 12 FL OZ SERVING

EXHIBIT B

Inspections, Compliance, Enforcement, and Criminal Investigations

Fresh Express Incorporated 10/6/10

Department of Health and Human Services

Public Health Service
Food and Drug Administration
San Francisco District
1431 Harbor Bay Parkway
Alameda. CA 94502-7070
Telephone: 510/337-6700

WARNING LETTER

Via UPS

October 6, 2010

Fernando Aguirre, President and CEO
Chiquita Brands International, Inc. and Fresh Express, Incorporated
250 East Fifth Street
Cincinnati, OR 45202

Dear Mr. Aguirre:

Starting on May 21, 2010 and ending on June 10, 2010, the Food and Drug Administration (FDA) inspected your food manufacturing facility located at 900 E. Blanco Road, Salinas, California. During this inspection, FDA investigators collected labels for your products and reviewed their labeling at http://www.chiquita.com[1]. Based on our review, we have concluded that your Chiquita brand "Pineapple Bites with Coconut" and "Pineapple Bites" products are misbranded in violation of the Federal Food, Drug, and Cosmetic Act (the Act) and the applicable regulations in Title 21, Code of Federal Regulations, Part 101 (21 CFR 101). You can find the Act and FDA regulations through links at FDA's Internet home page at http://www.fda.gov[2].

Specifically, your "Pineapple Bites with Coconut" product is misbranded within the meaning of Section 403(a) of the Act [21 U.S.C. § 343(a)] in that its statement of identity, "Pineapple Bites with Coconut", is false and misleading. The ingredient statement for this product states that it is made with coconut; however, our investigation determined that this product is made with a coconut flavor spray. The characterizing flavor of your Pineapple with Coconut product must be identified in accordance with 21 CFR 101.22(i)(1)(iii) (for example. "coconut flavor").

Your "Pineapple Bites" and "Pineapple Bites with Coconut" products are misbranded within the meaning of Section 403(r)(1)(A) of the Act [21 U.S.C. § 343(r)(1)(A)] because their labeling bears nutrient content claims but the products do not meet the requirements for the claims.
Specifically, their labeling includes the claim "Plus ... Antioxidants." However, this claim does not include the names of the nutrients that are the subject of the claim or, alternatively, link the term "antioxidants" by a symbol (e.g., an asterisk) that refers to the same symbol that appears elsewhere on the same panel of the product label, followed by the name or names of the nutrients with recognized antioxidant activity. 21 CFR 101.54(g)(4). Your use of this antioxidant claim therefore misbrands your products under section 403(r)(2)(A)(i) of the Act [21 U.S.C. § 343(r)(2)(A)(i)].

Your "Pineapple Bites" and "Pineapple Bites with Coconut" products also bear the claim "Plus Phytonutrients." "Phytonutrients" are not nutrients for which a recommended daily intake (RDI) or daily recommended value (DRV) has been established. Therefore, nutrient content claims regarding "phytonutrients" are not authorized and further misbrand your products under section 403(r)(2)(A)(i) of the Act [21 U.S.C. § 343(r)(2)(A)(i)]. To the extent phytonutrients are intended to be the basis for an antioxidant nutrient content claim, that use would violate FDA regulations for the same reason and because phytonutrients are not recognized as having antioxidant activity. 21 CFR 101.54(g)(1) and (2).

Both your "Pineapple Bites" and "Pineapple Bites with Coconut" products also bear the statement "Only 40 Calories." This statement implies that the products are "low calorie" foods. A "low calorie" claim may be made if a food with a reference amount customarily consumed (RACC) greater than 30 grams (g) or greater than 2 tablespoons does not provide more than 40 calories per RACC. 21 CFR 101.60(b)(2)(i)(A). The RACC established for pineapple is 140 g. See 21 CFR 101.12(b) (Table 2, Fruits and Fruit Juices, All other fruits fresh, canned, or frozen).
The nutrition information for both products states that there are 40 calories per 1 piece (80 g) of product; this equals about 70 calories per RACC. Therefore, under 21 CFR 101.13(i)(2), the products are required t carry a disclaimer adjacent to the claim, e.g., "Only 40 calories per serving, not a low calorie food". Because your products fail to bear the required disclaimer, they are misbranded within the meaning of section 403(r)(1)(A) of the Act.

The "Pineapple Bites" and "Pineapple Bites with Coconut" products are further misbranded within the meaning of section 403(k) of the Act [21 U.S.C. 343(k)] in that they contain the chemical preservatives ascorbic acid and citric acid but their labels fail to declare these preservatives with a description of their functions. 21 CFR 101.22. Further, the ingredients ascorbic acid and citric acid must be declared by their common or usual names. 21 CFR 101.4(a).

This letter is not intended to be an all-inclusive review of your firm's products and processes. It is your responsibility to ensure that your firm and your products comply with the Act and FDA, regulations. You should take prompt action to correct the violations. Failure to promptly correct these violations may resul in regulatory action without further notice. For instance, we may take further action to seize your product or enjoin your firm from operating.

We also note that, FDA (through its contractor) obtained two samples of Fresh Express Hearts of Romaine the testing of which yielded human pathogens. One sample was found to contain *Salmonella Anatum*; another sample was found to contain *E. coli 0157:H7*. We acknowledge that you issued letters to your customers in an effort to recall affected products. However, FDA recommends that you review your firm's criteria for receipt of raw product, your procedures for ensuring that wash, flume and processing water dc not contaminate your products and any other conditions and practices that may relate to the cause of the contamination.

We further acknowledge your June 25, 2010 response to the Good Manufacturing Practices violations cited in the FDA Form 483 regarding this inspection. In your response, you committed to:

- Retrain employees to replace or sanitize their gloves after contacting unsanitized surfaces;
- Include the dryer hoist controls and the equipment control panels that involve direct employee contact in your daily wash and sanitation procedures;
- Create a new storage system for aprons, gloves, and sleeve guards for times during manufacturing when they are not in use; and
- Modify your cutting surface inspection and replacement program so that cutting surfaces will be changed after every **(b)(4)** of use.

However, you did not provide documentation to demonstrate that these corrections have been made. You also did not address the observation that your technician improperly read the free chlorine indicator tests in the flume water. Please provide this information and documentation in your response to this Warning Letter.

In addition to the labeling issues identified above, we note that the available labeling space is at least 6" in height; therefore, the size of the nutrition information declared on these packages is not appropriate and does not meet the formatting requirements under 21 CFR 101.9(d), including hairline and footnote requirements. We note that since some of the nutrients are at insignificant levels, a shortened version of the Nutrition Facts panel may be used, e.g., the statement "Not a significant source of dietary fiber", at the bottom of the table of nutrient values as allowed under 21 CFR 101.9(c).

Please notify this office in writing within fifteen (15) working days from the date you receive this letter of

the specific steps you have taken to correct the noted violations, including an explanation of how you plan to prevent these violations, or similar violations, from occurring again. Please include documentation of the corrective actions you have taken. If your planned corrections will occur over time, please include a timetable for implementation of those corrections. If corrective action cannot be completed within 15 working days, state the reason for the delay and the time within which the corrections will be completed.

Your response should be sent to:

Darlene B. Almogela
Director of Compliance
United States Food and Drug Administration
1431 Harbor Bay Parkway
Alameda, CA 94502

If you have any questions about the content of this letter please contact Sergio Chavez, Compliance Officer, at 510-337-6886.

/s/

Barbara Cassens
District Director

Page Last Updated: 10/08/2010
Note: If you need help accessing information in different file formats, see Instructions for Downloading Viewers and Players.

Links on this page:

1. http://www.chiquita.com/
2. http://www.fda.gov

EXHIBIT C

Declaration of Dr. Marc Meyers

I, Dr. Marc Meyers, hereby state and declare as follows:

1. I make this declaration pursuant to 28 U.S.C. § 1756. Unless otherwise noted, the statements made herein are of my own first-hand knowledge and, if called upon to testify thereof, I could and would do so competently.

2. I have been asked to evaluate the function of citric acid, phosphoric acid, and ascorbic acid in the five Gold Peak Tea products listed in **Exhibit A** of the Complaint.

Expert Qualifications

3. I have been a food scientist for close to 30 years. Food science is the study of food and food ingredient properties and their interactions to develop a safe way of preserving, processing, storing, distributing and packing food products. Applications include all Food and Beverages such as baked goods, soft drinks, confectionery products, meats, dairy, formulated foods and other sweet, savory and beverage applications. Food scientists working in the private sector generally work for food companies in research and development departments that create or modify the company's food products.

4. I have a Doctor of Philosophy degree in Food Science/Food Packaging from Rutgers University (1987), a Masters in Philosophy degree in Food Science from Rutgers University (1985), a Masters of Science degree in Food Science/Food Packaging from Rutgers University (1984) and a Bachelors of Science degree in Food Science from Pennsylvania State University (1981). I am also a Certified Food Scientist as accredited by the Institute of Food Technologists and the International Food Science Certification Commission (Certification #342).

5. During my education, I focused on developing new testing methods for starch enzyme activity and flavor interactions in food packaging, and specifically studies of food additives and ingredients when stored in packaging at normal and accelerated aging.

6. I have over 20 years of industrial experience in assisting food, pharmaceutical and dietary supplement companies in developing new technologies and products for their traditional food products, wellness ingredients and supplements. I have worked for many multinational companies at the Vice President, Director or Senior Manager levels, including Wm. Wrigley Jr. Company, M&M/Mars, Inc., Duncan Hines brand (owned by Pinnacle), Natrol, Inc. (supplements), Dow Chemical (hydrocolloids), Rhodia (now Dannisco/DuPont) (texturants and hydrocolloids), Balchem Corp (encapsulation), and Firmenich, Inc. (flavor encapsulation technology). I have initiated, improved or helped launch many products, such as Wrigley's edible film strips; M&M/Mars' heart-healthy aseptic cocoa drinks; Smart Balance/Earth Balance soy milk products; Natrol's Omega Solutions Cardio, Ostea, and Low Glycemic Carb Intercept; Pinnacle Foods' Duncan Hines Oven Ready Frozen Brownie Batter, and Pinnacle's Duncan Hines Whipped Frosting.

7. Specifically, from 1987 to 1990, I worked for Dow Chemical Company in Midland, MI as Senior Development Chemist in Technical Service, developing food applications for METHOCEL food gums (hydrocolloids) and techniques for determining barrier properties of flour-based frying batters.

8. Specifically, I worked in the field of hydrocolloids, at Dow Chemical Company in Midland, MI from 1987 to 1990, and at Rhodia from 1999-2000. I also developed edilble films with hydrocolloids at Wm. Wrigley Jr. Company in Chicago, Illinois from 1990 to 1995. Hydrocolloids are substances that gel with water and help to provide stability and texture to foods,

which can be derived from both natural and synthetic sources. They are used in food as thickening agents, whipping agents, emulsifiers, coatings and stabilizers. At Dow, I was a Senior Development Chemist in Technical Service, responsible for developing food applications for METHOCEL food gums and techniques for determining barrier properties of flour-based frying batters. At Wrigley, I worked as Senior Exploratory Food Chemist, inventing new ingredients and ingredient systems (flavors, sweeteners, etc.) for chewing gum, and later as Senior Product Development Chemist, developing new chewing gum products that impart dental benefits to existing and new products.

9. At Rhodia, I also coordinated and communicated efforts of research teams at various research and development ("R&D") centers in North America, Europe, Latin America, and Asia Pacific in developing food texture application projects for the top 20 international food companies. While still with Rhodia, I also served as the Director of Food Technology for North America from 1999 to 2000. In this position, I directed R&D for six food technology labs at two locations in the United States. I also managed 25 scientists and support staff with a $3.2 million R&D budget and held the administrative responsibility of hiring of Ph.D. level managers, advanced application scientists, and technical staff.

10. I worked for Mars, Inc./Masterfoods USA (formerly M&M/Mars) from 2001 to 2003, in Vernon, California, where I held the position of New Technology Manger for Pet Care and Wellness ingredients. I focused on innovation and development of new pet food technologies to meet consumer insights for companion pets. My daily work required intimate knowledge of how consumers perceive products and understand the messages conveyed through product labeling and marketing.

11. From 2003 to 2004, I gained director-level experience as Vice President for Technology and Product Development of Natrol, Inc., located in Chatsworth, California. I served a key technical advisor to the CEO, and was also a member of the Senior Executive Management Team that reported to the CEO. I was responsible for developing and executing R&D strategy for new product development, clinical research, and technical services for traditional formats of vitamins, minerals, and supplements.

12. I held the position of Global Product Design Team Manager for Firmenich, Inc. from 2005 to 2006, in Princeton, New Jersey. In that position, I was the American group leader for a group of 5 scientists and flavorists functioning as the global flavor R&D design team that developed applications, new technology, and encapsulated flavor systems for sweet good products.

13. I served as the Director of Product Development for Pinnacle Foods Corporation in Cherry Hill, New Jersey from 2006 to 2007. There, I was the group leader for the Duncan Hines® brand, Log Cabin®, and Mrs. Butterworth's® brand syrups. This job entailed developing new products and technical services for the most profitable brands within the organization and interfacing with the marketing department from concept development through commercialization, ensuring the timely and successful launch of products. I also coordinated development and innovation activities at co-packers and suppliers. As such, I have seen the interactions between company departments in launching a product many times over.

14. From 2009 through the present, I have been an Adjunct Professor of Food Science and Nutrition at Montclair State University, teaching Food and Nutrition courses and labs. In addition, I teach a course at Rutgers University on Nutraceuticals and Functional Foods, and at Drexel University teaching Food Chemistry and a course on Functional Food Science. I have also

been an adjunct faculty member at Hunter College-CUNY in New York City and Mercer County College in New Jersey.

15. Since 2008 I have been, and I currently am, the Managing Principal Research and Development Consultant of Meyers Consulting, LLC., of Richboro, Pennsylvania ("Meyers Consulting"). In this professional role, I have consulted with or have current consulting agreements with top multinational food, pharma, and dietary supplement companies, such as Johnson & Johnson/McNeil Nutritionals, ConAgra Foods, Kraft Foods Global, Smart Balance/Earth Balance (GFA Brands), DSM, Martek Biosciences, Senomyx, Microbia Precision Engineering, and other new technology and start-up biotech companies in the development and commercialization of new ingredients. I routinely work with web-based organizations such as yourencore.com, ninesigma.com and innocentive.com as part of their Open Innovation communities to assist small domestic to major multi-national Consumer Packaged Goods ("CPG") companies. My services include developing new technologies in the areas of encapsulation and hydrocolloid applications, and providing Open Innovation New Product Development ("NPD"). I also provide expert witness services in the areas of patent infringement, food, dietary supplements, and flavor industry. From June, 2015 to February 2017, I also worked for Mondelez International while continuing to consult. I was responsible for their global encapsulation R&D for food applications.

16. Given the range of professional organization I have been involved with as a participant and a Board Member, I have been exposed to a variety of viewpoints throughout the industry and have maintained connections with industry leaders in chemistry generally as well as the narrow field of food science. To start, I have been a member of the Institute of Food Technologists ("IFT") since 1978 and a Professional Member since 1988. At the IFT, I served as

Secretary of the Chicago chapter from 1991 through 1994, Chair of the Chicago IFT Technical Programs from 1992 through 1993, Secretary of the New York IFT from 1998 through 2001 and Chair of the New York IFT Technical Program during Supplier's Night in 2010. The IFT is an international organization that is recognized for its membership of Food Scientists and had meetings and educational conferences where food ingredients are discussed.

17. I was previously a member of the American Association of Cereal Chemists (AAC), Controlled Release Society (CRS) and American Association of Candy Technologists (AACT). These associations were specific to the food industry and provided opportunities for me to observe how many companies use the technology, ingredients and processes I have used in my career. Moreover, I have been a member of the American Chemical Society (ACS) and Advisory Board Member position at Bioactives World Forum Scientific allow me to remain abreast of the most recent developments in food chemistry and food safety, such as new ingredients and applications coming to the market and how they compare to current ingredients. Additionally, at BioactivesWorld, I am the co-organizer of an annual short-course on microencapsulation in flavors and bioactives as well as hydrocolloids, which covers many different uses of these technologies in food applications. (http://www.bioactivesworld.com/microencapsulation.html).

18. I have authored numerous papers, articles and studies. For instance, I was first author on the following works: "Flavor Release and Application in Chewing Gum and Confections" in Microencapsulation in the Food Industry: A Practical Implementation Guide, Chapter 34, pp.443-453, Academic Press/Elsevier San Diego, CA (2014); "Functionality of Hydrocolloids in Batter Coating Systems" in Batter and Breadings in Food Processing 2nd Edition, Chapter 7, pp.117-138, American Association of Cereal Chemists, St. Paul, MN (2011); "Functionality of Hydrocolloids in Batter Coating Systems" in Batter and Breadings in Food

Processing, Chapter 7, pp.117-141, American Association of Cereal Chemists, St. Paul, MN (1990); Book Review of Gums and Stabilizers for the Food Industry 4 in Food Technology, 43(12):130-131 (1989); "Characterization of Radioactive Starch Degradation by Rhizopus Glucoamylase" in Journal of Food Biochemistry, 9(3):231-247 (1985). Thus, my work has been recognized in the industry since the 1980s. I am currently working on another chapter on Food Microencapsulation to be published in 2016.

19. I also have presented papers at technical seminars. For example, in the area of encapsulation technology, I have presented at numerous society meetings including the Controlled Release Society (CRS), IFT, AACC, ACS and Food Ingredients Europe (FIE). I have also presented at an international conference on encapsulation of flavors for confectionery applications in Sion, Switzerland and at the Bioencapsulation Industrial Symposium in San Antonio, TX (http://impascience.eu/bioencapsulation/2011_San_Antonio/) as part of the European Bioencapsulation Group industrial workshop. I was invited to speak at these events based on the quality of my work and contributions to my field.

20. Lastly, I have been awarded 36 patents (19 U.S. patents and 17 foreign patents) in encapsulation technology, edible films, flavor technology, hydrocolloids and novel confectionery applications. A select list of these patents and a more detailed account of my professional accomplishments and expertise are set forth in my current CV, a copy of which is attached to this report.

Citric, Phosphoric, and Ascorbic Acid and their Function in Gold Peak Products

21. Citric, phosphoric, and ascorbic acid are all antioxidants, sequestrants, and preservatives, among their many other properties.[1,2] These include several mechanisms by which they preserve food and beverages and change their taste.

22. Citric and phosphoric acid are both acidity regulators, acidulants, and flavor enhancers used in food and food ingredients.

23. Citric and ascorbic acid are both direct antimicrobials.

24. Citric, phosphoric, and ascorbic acid are often used for the effects they have in finished beverage products. Citric acid is also often used for its effects in finished food products.

25. Some effects of citric, phosphoric, and ascorbic acid, such as imparting changes to taste, only take place if there is a sufficient quantity of acid in the product. If the level of acid is too low, the acid will not change the taste or flavor of the product.

26. Citric, phosphoric, and ascorbic acid will act as preservatives even at levels lower than their taste thresholds. With a higher quantity of these acids, these effects will be more pronounced, but they still occur when low levels of acid are present. Such effects include: delaying

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[1] The Food additives data book Lists citric acid as an acidulant with the following uses in food:

- Emulsifiers/Stabilisers/Chelating agents/Nutritive additives/**Antioxidants/pH control agents/Preservatives**/Flavour enhancers and modifiers/Solvents/Flour and baking additives/Anti-caking agents/Firming agents/ Glazing and coating agents.

Phosphoric acid is listed as an acidulant with the following uses:

- Emulsifiers/stabilisers/ Chelating agents/Nutritive additives/**Antioxidants/pH control agents/Preservatives**/Flavour enhancers and modifiers/Flour and baking additives/Anti-caking agents/Firming agents.

Ascorbic acid is listed as an antioxidant with the following uses:

- Antioxidant/Sequestrant/Reducing agent.

Both citric and phosphoric acid are also listed separately as sequestrants. Smith, Jim, and Lily Hong-Shum. *Food additives data book.* John Wiley & Sons, 2011. pp. 14, 36, 60, 880, 898. https://cetiquimica2.files.wordpress.com

[2] "Acids as food additives serve a dual purpose, as acidulants and as preservatives." DeMan, John M. *Principles of food chemistry.* AVI Publishing Co., Inc., 1999, p. 438.

spoilage from bacteria, mold, fungi, and yeast; delaying changes in color, flavor, texture; and delaying browning and rancidity.[3] With a sufficient amount of citric, phosphoric, and/or ascorbic acid, these effects can be prevented over the shelf-life of the food product.

27. Among other mechanisms, citric, phosphoric, and ascorbic acid preserve food by acting as antimicrobial agents.[4,5] They do this in several ways. One mechanism by which these acids kill microbes is by reducing the pH of products they are added to. Microorganisms contaminating food generally multiply more slowly or not at all at lower pH levels (higher acidity).[6,7]

28. Citric and ascorbic acid are "weak acids," meaning that a substantial amount of the acid in any acidic solution does not dissociate (i.e., much of the citric and ascorbic acid does not act as an acid in a solution to further reduce pH). To the extent that citric and ascorbic acid do not dissociate while in food or beverages, they are able to more easily penetrate the cell walls of microorganisms. This weakens those organisms directly.[8,9,10]

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[3] Doores, S., 1993. Organic acids. In: Davidson, P.M., Branen, A.L. (Eds.), *Antimicrobials in Foods*. Marcel Dekker, Inc., New York, pp. 95–136.
http://base.dnsgb.com.ua/files/book/Agriculture/Foods/Antimicrobials-in-Food.pdf

[4] Juvonen, Riikka, et al. Microbiological spoilage and safety risks in non-beer beverages. *VTT Research Notes 2599* (2011), p. 73.
http://www.vtt.fi/inf/pdf/tiedotteet/2011/T2599.pdf

[5] Lin, C. D., and T. C. Chen. Relative antifungal efficacies of phosphoric acid and other compounds on fungi isolated from poultry feed. *Animal feed science and technology* 54.1-4 (1995): 217-226.

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

[7] Nazer, A. I., et al. Combinations of food antimicrobials at low levels to inhibit the growth of Salmonella sv. Typhimurium: a synergistic effect?. *Food Microbiology* 22.5 (2005): 391-398.

[8] Lambert, R. J., and M. Stratford. Weak-acid preservatives: modelling microbial inhibition and response. *Journal of applied microbiology* 86.1 (1999): 157-164.
http://onlinelibrary.wiley.com/doi/10.1046/j.1365-2672.1999.00646.x/epdf

[9] Querol, Amparo, and Graham H. Fleet. *Yeasts in food and beverages*. (2006), pp. 131-32.

[10] Spray, D. C., and M. V. L. Bennett. Physiology and pharmacology of gap junctions. *Annual review of physiology* 47.1 (1985): 281-303.

29. Citric, phosphoric, and ascorbic acid are all sequestrants, meaning that they remove some elements and compounds from their environment. The removal of these compounds slows degradation of food and beverages. These acids sequester metal ions (i.e., act as chelators),[11,12,13] effectively acting as antioxidants. Phosphoric acid sequesters calcium particularly strongly.[14] Sequestration prevents food deterioration chemical reactions and also retards microbial growth.[15,16]

30. Ascorbic acid scavenges free radicals and is therefore a direct antioxidant.[17,18] In their capacities as antioxidants, citric, phosphoric, and ascorbic acid all have a preservative effect in food and beverages.

31. Of the five Gold Peak Tea products listed in **Exhibit A** of the Complaint, one contained citric acid, two contained phosphoric acid, one contained both citric and phosphoric acid, and one contained both citric and ascorbic acid. These are:

1. Gold Peak® "Diet Tea," containing citric and phosphoric acid

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[11] *Id.*, p. 359.
[12] Downing, Donald L. A complete course in canning and related processes: processing procedures for canned food products. Elsevier, 2013, p. 450.
[13] MARTELL, ARTHUR E. "Chelates of ascorbic acid." 1982. 153-178.
[14] J.T.Baker® Chemicals, Material Safety Data Sheet Number: S4757, Effective Date: 09/03/09, *Sodium Phosphate Dibasic* Dodecahydrate.
https://www.elac.edu/academics/departments/chemistry/chemistrydocuments/docs/S/sodium%20phosphate%20dibasic%20dodecahydrate.pdf
[15] DeMan, John M. *Principles of food chemistry*. AVI Publishing Co., Inc., 1999, p. 438.
http://drasalehi.iauq.ac.ir/assets/subdomains/drasalehi/file/Principles_of_Food_Chemistry__3rd_Edition_%5B1%5D_pdf_tsid_20070508-081642-18ebeaf.pdf.
[16] Igoe, Robert S. *Dictionary of food ingredients*. Springer Science & Business Media, 2001, p. 167.
[17] Cort, Winifred M. Antioxidant properties of ascorbic acid in foods. *Ascorbic Acid: Chemistry, Metabolism, and Uses*, 1982. 533-550.
[18] Free radical scavenging is a direct antioxidant method. Scientific literature variously labels sequestration of metal ions as a direct antioxidant method (grouped together with free radical scavenging and contrasted with catalytic and/or metabolic antioxidant mechanisms) or an indirect antioxidant method (if contrasted with free radical scavenging).

2. Gold Peak® "Lemon Tea," containing citric acid.

3. Gold Peak® "Unsweetened Tea," containing phosphoric acid.

4. Gold Peak® "Sweet Tea," containing phosphoric acid.

5. Gold Peak® "Green Tea," containing citric and ascorbic acid.

32. As shown in Gold Peak Diet Tea and Gold Peak Green Tea, there is often use of citric acid in combination with other acids like ascorbic acid, phosphoric acid, lactic acid, sodium diacetate, vinegar (acetic acid), malic acid and disodium phosphate to help with the flavor profile (tanginess) as well as controlling growth of microorganisms. Specific to citric, phosphoric, and ascorbic acid, they serve multiple purposes as acidifiers, as flavoring agents, and as antioxidants. The citric acid's tang and fruitiness mimics the effect of lemon within the Gold Peak Lemon Tea—but also, **the pH-lowering ability of citric, phosphoric, and ascorbic acid make them function as acidulants and therefore as preservatives**. Beverages, particularly uncarbonated ones, need low pH to fight microorganisms. The non-lemon flavored teas require the same effect without the same fruitiness from pure citric acid, and consequently they all use either a) only phosphoric acid, b) some citric acid and some phosphoric acid, or c) some citric acid and some ascorbic acid. The citric, phosphoric, and ascorbic acid have pH-reducing preservative effects in addition to any flavor or other effects. Likewise, they all have antioxidant effects in the Gold Peak products.

33. **Citric acid in the Gold Peak products infiltrates and weakens or kills organisms** within the Gold Peak Lemon Tea, Gold Peak Diet Tea, and Gold Peak Green Tea. The citric acid still provides all of these functions, regardless of whether it is mainly being used as a flavorant or for any other purpose—it still functions as a preservative by direct antimicrobial effect, lowers pH, and acts as a sequestrant and indirect antioxidant. Likewise, ascorbic acid in the Gold Peak Green Tea products infiltrates and weakens or kills organisms, and the ascorbic acid also acts

as a direct antioxidant to preserve the product from microbial and chemical degradation. All of these effects occur in addition to the antimicrobial effects from reduced pH. All of these effects occur at lower amounts of acid than would be required for any flavoring effects.

34. Sequestration of metal ions by citric, phosphoric, and ascorbic acid indirectly prevents oxidation of the Gold Peak products and impedes microbial growth.

Multi-Barrier "Hurdle" Systems of Food Preservation

35. Food scientists consider the cumulative effect of all risks to the integrity of food. The best practice when designing production systems is to impose many "hurdles" to degradation.[19,20] For example, a food manufacturing process might simultaneously use a safeguard against contamination by microbial spores (such as using a hermetic seal) as well as a mechanism to reduce the fecundity of any spores already within the food (such as using an acid to reduce pH). When more than one method or ingredient has a preservative effect, each is a "preservative" because it acts as an obstacle to food degradation.[21,22]

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[19] Leistner, L. Hurdle technology applied to meat products of the shelf stable product and intermediate moisture food types. *Properties of water in foods*. Springer Netherlands, 1985. 309-329.

[20] Leistner, Lothar. Basic aspects of food preservation by hurdle technology. *International journal of food microbiology* 55.1 (2000): 181-186.

[21] Bae, Y- M., and S- Y. Lee. "Combined effects of organic acids and salt depending on type of acids and pathogens in laboratory media and acidified pickle." *Journal of applied microbiology 119.2* (2015): 455-464, p. 455-56.

[22] Biesta-Peters, Elisabeth G., et al. Comparing nonsynergistic gamma models with interaction models to predict growth of emetic Bacillus cereus when using combinations of pH and individual undissociated acids as growth-limiting factors. *Applied and environmental microbiology* 76.17 (2010): 5791-5801. https://www.researchgate.net/profile/Marcel_Zwietering/publication/45271734_Comparing_Nonsynergistic_Gamma_Models_with_Interaction_Models_To_Predict_Growth_of_Emetic_Bacillus_cereus_when_Using_Combinations_of_pH_and_Individual_Undissociated_Acids_as_Growth-Limiting_Factors/links/02e7e51e3d02ef2a1f000000/Comparing-Nonsynergistic-Gamma-Models-with-Interaction-Models-To-Predict-Growth-of-Emetic-Bacillus-cereus-when-Using-Combinations-of-pH-and-Individual-Undissociated-Acids-as-Growth-Limiting-Factors.pdf

36. In the case of the Gold Peak Tea products, citric, phosphoric, and ascorbic acids must be considered preservatives under food design standards even if flavor was a consideration when they were included because they have the effect of protecting the products from spoilage and staleness, and the potential hurdles attendant to the use of those ingredients is always a consideration in food design and manufacturing. Likewise, the acids must be considered preservatives against microorganisms even if the seal on the products is designed to keep out microorganisms or if other factors also work to retard spoilage.

Excess Phosphoric Acid is a Health Risk

37. Food manufacturers take care to limit the amount of phosphoric acid in products because an excess amount poses a public health risk. The mechanism for the danger is sequestration in the human body of calcium and magnesium by phosphoric acid. Particular care is taken when food or beverages contain phosphoric acid without providing any calcium or magnesium because such products diminish those minerals without replacing them.[23]

38. Excessive phosphorous consumption can cause several diseases and medical conditions.[24] Americans generally eat more than the recommended amount of phosphorous.[25]

[23] Takeda, Eiji, et al. Increasing dietary phosphorus intake from food additives: potential for negative impact on bone health. *Advances in Nutrition: An International Review Journal* 5.1 (2014): 92-97.
http://advances.nutrition.org/content/5/1/92.full

[24] Calvo M. S., Tucker K. L. Is phosphorus intake that exceeds dietary requirements a risk factor in bone health? *Annals of the New York Academy of Sciences.* 2013; 1301(1):29–35. doi: 10.1111/nyas.12300.

[25] Moshfegh, Alanna J., et al. Phosphorous Intake of Americans What We Eat In America, *USDA Agricultural Research Service Food Research Group*, NHANES 2011-2012.
https://www.ars.usda.gov/ARSUserFiles/80400530/pdf/DBrief/15_Phosphorus_intake_1112.pdf

Excessive phosphorous consumption has also been shown to be associated with death even in healthy people,[26] as well as stomach upset even at normal doses.[27]

Conclusion

39. In summary, it is clear that citric acid, phosphoric acid, and acorbic acid act as preservatives in the five referenced Gold Peak products and act as pH-reducers, antioxidants, and antimicrobial agents beyond just being used for tanginess and flavor effects.

40. Additional reference information I reviewed to support this conclusion can be found in the following online sources:

http://legalnewsline.com/stories/511063295-nestle-usa-to-vigorously-defend-itself-against-baseless-deceptive-marketing-allegations

- According to the FDA website, citric acid is listed in the category of preservatives used to "prevent food spoilage from bacteria, molds, fungi or yeast" and slows and "prevents changes in color, flavor, or texture".

http://onlinelibrary.wiley.com/doi/10.1111/j.1541-4337.2006.00009.x/full

- There are several mechanisms by which citric acid preserves food and beverages, some of which apply to almost any. Most food and beverages are acidic, and one way that citric acid preserves food is by making them more acidic. Even if a food is alkaline (i.e., has a pH above 7.0, which denotes very low acidity), citric acid may still act as a preservative and can

[26] Chang, A., Lazo, M., Appel, L., Gutierrez, O. & Grams, M. High dietary phosphorus intake is associated with all-cause mortality: results from NHANES III. *Am. J. Clin. Nutr.* 2014; 99, 320–327. doi: 10.3945/ajcn.113.073148.

[27] EFSA. Opinion of the scientific panel on dietetic products, nutrition and allergies on a request from the Commission related to the tolerable upper intake level of phosphorus. *The EFSA Journal*. 2005;233:1–19.
http://www.efsa.europa.eu/sites/default/files/scientific_output/files/main_documents/233.pdf

still affect the delay of browning and rancidity, even in lower or trace amounts.

http://www.ameribev.org/education-resources/trade-publications/

- **Ascorbic Acid** An ingredient in soft drinks that functions as an antioxidant preservative, flavoring agent or vitamin enhancer.

  ...

- **Phosphoric Acid** This flavoring agent in soft drinks is a preservative that provides tartness.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed on June 21, 2017 in Richboro, PA.

Dr. Marc A. Meyers

6/21/17

MARC A. MEYERS, Ph.D.
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EDUCATION

Ph.D.	Rutgers University, Food Science/Food Packaging, 1987
M.Phil.	Rutgers University, Food Science. 1985
M.S.	Rutgers University, Food Science/Food Biotechnology, 1984
B.S.	Pennsylvania State University, Food Science, 1981
	Teaching Assistant, Food Science and Technology, 1981-1987

ACADEMIC EXPERIENCE

2009-current **Adjunct Professor of Food Science**, Nutrition and Food Science
Montclair State University, Upper Montclair, New Jersey

2010-current **Adjunct Food Science Instructor**, Food Science
Rutgers University, New Brunswick, New Jersey. Similar roles at
Drexel University , Philadelphia, PA, Hunter College-CUNY, New York, NY and
Mercer County College, West Windsor, NJ

PROFESSIONAL EXPERIENCE

2008-Present **Meyers Consulting, LLC,** Richboro, PA (www.Meyers-Consulting.com)
Managing Principal R&D Consultant. Consulting with top multinational food/pharma/dietary supplement companies in developing new technologies, encapsulation, hydrocolloids and Open Innovation NPD. Focus areas include: new product development for wellness ingredients/supplements, sweet goods, flavors, baked goods, confectionery and chewing gum businesses.

2015-2017 **Mondelez International**, East Hanover, New Jersey
Global Encapsulation Team Leader. Responsible for development of encapsulation technology globally. Ingredient development for Biscuit, Gum & Candy, Chocolate and Beverage applications. Developing encapsulation technologies internally and with industrial and academic partners. Provide global leadership, strategic planning and execution of projects to meet commercial needs.

2006-2007 **Pinnacle Foods Corporation,** Cherry Hill, New Jersey
Director – Product Development. Group leader for Duncan Hines ® brand (cakes, brownies and frostings), Log Cabin ® and Mrs. Butterworth's® brand syrups. Led group of 4 developers in development of new products and technical services for most profitable brands within organization. Coordinated development and innovated activities at co-packers and suppliers.
Interfaced with Marketing from concept development through commercialization, ensuring timely and successful launch of products.

2005-2006 **Firmenich, Inc.**, Princeton, New Jersey. Global Product Design Team Manager. North American group leader for global flavor R&D design team. Developed applications, new technology and encapsulated flavor systems for sweet good products. Responsible for a group of 5 scientists and flavorists.

2003-2004 **Natrol, Inc.,** Chatsworth, California. Vice President, Technology and Product Development. Member of Senior Executive Management Team reporting to CEO. Key technical advisor to CEO. Responsible for development and execution of R&D strategy for New Product Development, Clinical Research and Technical Services for traditional formats of Vitamin/Mineral/Supplements.

2001-2003 **Mars, Inc. /Masterfoods USA (formerly M&M/Mars),** Vernon, California. New Technology Manager (Pet Care and Wellness ingredients) Initial activities in Pet Care products area focused on innovation and development of new pet food technologies to meet consumer insights for companion pets.

1998-2001 **Rhodia Food Ingredients (formerly Rhone-Poulenc),** Cranbury, New Jersey. Global Director, Innovation & Development - Texture (98 -01). Developed programs in new technologies and new ingredients for texturing applications worldwide. Coordinated and communicated efforts of research teams at various R&D Centers in North America, Europe, Latin America and Asia Pacific, developing food texture application projects for Top 20 International food companies.

Director of Food Technology, North America (99 -00). Directed R&D function for six food technology labs at two U.S. locations. Managed 25 scientists and support staff with $3.2 million R&D budget. Administrative responsibility and hiring of Ph.D. level managers, advanced application scientists and technical staff.

1995-1998 **Balchem Corporation**, Slate Hill, New York. Commercial Research Director. Directed group of research scientists and technicians in developing encapsulation prototypes, commercial products and product improvements primarily for bakery, meat, confectionery and animal feed industries.

1990-1995 **Wm. Wrigley Jr. Company**, Chicago, Illinois. Senior Product Development Chemist (1993–1995). Developed new chewing gum products that impart dental benefits to current and new products.

Senior Exploratory Food Chemist (1990–1993). Invented new ingredients and ingredient systems (flavors, sweeteners, etc.) for chewing gum.

1987-1990 **Dow Chemical Company**, Midland, MI. Senior Development Chemist Technical Service and Development of food applications for METHOCEL food gums (hydrocolloids). Developed techniques for determining barrier properties of flour-based frying batters.

SELECTED PUBLICATIONS

Meyers, M.A. and Grazela, A (2011). "Functionality of Hydrocolloids in Batter Coating Systems". In Batter and Breadings in Food Processing. 2nd Edition. Chapter 7, pp.117 - 138. American Association of Cereal Chemists, St. Paul, MN.

Meyers, M.A. (1990). "Functionality of Hydrocolloids in Batter Coating Systems". In Batter and Breadings in Food Processing. Chapter 7, pp.117 - 141. American Association of Cereal Chemists, St. Paul, MN.

Meyers, M.A (1989). Book Review of Gums and Stabilizers for the Food Industry 4. In Food Technology. 43(12):130 - 131.

Halek, G.W. and Meyers, M.A. (1989). "Comparative Sorption of Citrus Flavor Compounds by Low Density Polyethylene". Packaging Technology and Science. 2:141 - 146.

Meyers, M.A. and Wasserman, B.P. (1985). "Characterization of Radioactive Starch Degradation by *Rhizopus* Glucoamylase". Journal of Food Biochemistry. 9(3):231 - 247.

SELECTED PAPERS PRESENTED

Meyers, M.A. (2011). Microencapsulation for Omega-3 Oils – DOs and DONTs. Omega-3 Platform 2011- 9th Practical Short Course on Functional Oils: Market, Regulations, Science, Sensory and Technical Issues for Food and Dietary Supplement Applications, Paris, France December 2, 2011(to be presented). Also presented at 8th Practical Short-Course in Newport Beach, CA on August 18, 2011.

Meyers, M.A.(2011).Application of Flavor Encapsulation in Chewing Gum. 3rd Annual Industrial Workshop on Microencapsulation of Flavors and Bioactives for Functional Food Applications. Minneapolis, MN September 15, 2011. Also presented in 2009 and 2010 and Sept., 2012 (also Short-Course Organizer).

Meyers, M.A. (2011). Case Study I: Longer-Lasting Flavor Release in Chewing Gum. Institute

Of Food Technologists (IFT) Pre-Annual Meeting Short-Course on Microencapsulation in Food Applications, New Orleans, LA. June 11, 2011.

Meyers, M.A. (2011). Application of Flavor Encapsulation in Chewing Gum". New York IFT Supplier's DayTechnical Seminar on Improving Food Using Encapsulation Technology, Somerset, NJ. May 11, 2011.

Meyers, M.A. (2011). Improving Food Using Encapsulated Ingredients". Bioencapsulation Research Group 14th Industrial Symposium on Microencapsulation, San Antonio, TX. March 8, 2011.

Meyers, M.A.(2008). Application of Microencapsulated Flavors in Chewing Gum". Bioencapsulation Research Group Industrial Workshop on Microencapsulation of Flavors, Sion, Switzerland. January 16, 2008.

SELECTED AWARDED PATENTS

Reed, M.A., Richey, L.C., Hook, J.S., Yatka, R.J., Tyrpin, H.T., Broderick, K.B. and Meyers, M.A. 1997. Polyol coated chewing gum having improved shelf life and method of making. U.S. Patent Number 5,665,406.

Reed, M.A., Gudas,V.V., Mazurek, P.M., Chapdelaine, A.H., Yatka, R.J., Richey, L.C. and Meyers, M.A. 1997. Syrups containing sorbitol, a plasticizing agent and an anticrystallization agent and their use in chewing gum and other products. U.S. Patent Number 5,651,936.

Yatka, R.J., Richey, L.C., Meyers, M.A. and Witkewitz, D.L. 1997. Chewing gum containing maltitol. U.S. Patent Number 5,637,334.

Yatka, R.J., Richey, L.C., Meyers, M.A. and Barkalow, D.G. 1997. Chewing gums containing natural carbohydrate gum hydrolyzate. U.S. Patent Number 5,612,070.

Tyrpin, H.T., Broderick, K.B., Meyers, M.A. and Yatka, R.J. 1997. Chewing gum pellet coated with a hard coating containing erythritol. U.S. Patent Number 5,603,970.

Yatka, R.J., Richey, L.C. and Meyers. M.A. 1996. Chewing gum products using polydextrose. U.S. Patent Number 5,525,360.

Meyers, M.A., Patel, M.M., Russell, M.P. and Record, D.W. 1996. Chewing gum containing low levels of maltodextrin. U.S. Patent Number 5,518,739.

Grey, R.T., Patel, M.M. Dubina, E. and Meyers, M.A.. 1995. Chewing gum containing a lecithin/glycerol triacetate blend. U.S. Patent Number 5,474,787.

Yatka, R.J., Richey, L.C., Meyers, M.A., Broderick, K.J. and Record. D.W. 1995. Chewing gum and other comestibles containing indigestible dextrin. U.S. Patent Number 5,458,892.

Meyers, M.A., Campbell, A.A. and Muhammad, J.R. 1995. Chewing gum products using calcium sulfate. U.S. Patent Number 5,441,749.

Meyers, M.A. 1995. Chewing gum including agent containing edible film. U.S. Patent Number 5,433,960.

Yatka, R.J., Richey, L.C. and Meyers, M.A. 1995. Chewing gum products using oligofructose. U.S. Patent Number 5,431,929.

Yatka, R.J., Richey, L.C. and Meyers, M.A. 1995. Chewing gum products using fructooligosaccharides. U.S. Patent Number 5,425,961.

Meyers, M.A. 1995. Use of edible film to prolong chewing gum shelf life. U.S. Patent Number 5,409,715.

Meyers, M.A. 1994. Use of edible film to improve the packaging of chewing gum. U.S. Patent Number 5,376,388.

Meyers, M.A. 1994. Use of edible film to prolong chewing gum shelf life. U.S. Patent Number 5,286,502.

Meyers, M.A. and Record, D.W. 1993. Chewing gum and other comestibles containing purified indigestible dextrin. U.S. Patent Number 5,236,719.

Patel, M.M., Broderick, K.B., Meyers, Schnell, P.G., Song, J.H., Yatka, R.J. and Zibell, S.E. 1993. Strongly mint-flavored chewing gums with reduced bitterness and harshness. U.S. Patent Number 5,192,563.

Yatka, R.J., Broderick, K.B., Song, J.H., Zibell, S.E., Meyers, M.A. and Campbell, A.A. 1992. Polyvinyl acetate encapsulation of codried sucralose for use in chewing gum. U.S. Patent Number 5,139,798.

Meyers, M.A. and Conklin, J.R. 1990. A Method of Inhibition of Oil Absorption in Coated Fried Foods Using Hydroxypropyl Methylcellulose. U.S. Patent Number 4,900,573.

MEMBERSHIPS IN PROFESSIONAL SOCIETIES

1978-Present Institute of Food Technologists:

2010 Chair of New York IFT Technical Program during Supplier's Night1998-2001 Secretary, NYIFT

1992-1993 Chair of Chicago IFT Technical Programs

1991-1994 Secretary, Chicago IFT

1988-Present Professional Member

2008 –Present American Chemical Society (ACS)

Prior memberships with American Association of Cereal Chemists (AAC), Controlled Release Society (CRS) and American Association of Candy Technologists (AACT).

ADDITIONAL PROFESSIONAL ACTIVITIES

2009-Present Bioactives World Forum Scientific Advisory Board Member. Also short-course organizer for a number of technical programs (www.bioactivesworld.com).

List of Prior Expert Witness Cases

I have been an expert witness for about 4.5 years and have worked on approximately 13 different cases for both the defendant and the plaintiff; as well as class-action lawsuits.

I was prepared to be deposed once but the parties settled before my deposition date. Most of my expert witness work has been reviewing patents and formulations for IP and patent infringement cases, developing Declaration Statements for the Food, Dietary Supplement and Flavor industries; and Class Action Law Suits. To keep the specifics confidential, I am only providing which cases available in the public domain:

1. Kristin Wells, etc. vs. Abbott Laboratories, Inc, et al. LASC Case # BC389753

2. UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA NICOLE FORLENZA and SHAIDEN MONROE, individually and on behalf of all others similarly situated, Plaintiffs, vs. DYNAKOR PHARMACAL, LLC, a Utah limited liability company; THE CARTERREED COMPANY, LLC, an entity of unknown origin; PC MGMT, INC., an entity of unknown origin; BASIC RESEARCH, LLC, a Utah limited liability Case No. CV09-3730 MMM (SSx)

3. U.S. District Court District of New Jersey (Newark) CIVIL DOCKET FOR CASE #: 2:09-cv-00177-JLL-CCC EVERETT LABORATORIES, INC. v. BRECKENRIDGE PHARMACEUTICAL, INC.

4. EVERETT LABORATORIES,INC. Defendant: RIVER'S EDGE PHARMACEUTICALS, LLC. Case Number: 2:2009cv03458 Filed: July 14, 2009 Court: New Jersey District Court

5. *Scheuerman, et al. v. Nestlé Healthcare Nutrition et al.*, No. 2:10-CV-3684 (FSH) (PS) (the "Scheuerman Action"), and *Maria Johnson, et al. v. Nestlé Healthcare Nutrition, Inc.*, No. 2:10-CV-5628 (FSH) (PS)
   1.

6. SOMA LABS, INC., v. [MANAVKUMAR G. SHAH, VITACARE, PHARMA, LLC f/k/a VITACARE LABS, LLC). SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION: MIDDLESEX COUNTY DOCKET NO. C-114-13. I was deposed by opposing counsel and went to a bench trial for this case.

7. DALMATIA IMPORT GROUP, INC. v. FOODMATCH, INC. et al. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, CASE No. 2:16-cv-02767-EGS. I was deposed by opposing counsel and went to a jury trial for this case.

Law firms previously retained by:

A. 2 cases with WCCE
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B. 5-6 cases with Call, Jensen & Ferrell—Scott Ferrell (new email address: sferrell@trialnewport.com)
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C. 2-3 cases with Sheppard Mullin:

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