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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

16 JAMES KOH, on behalf of himself, and those  
17 similarly situated,

18 Plaintiff,

19 v.

20 THE COCA COLA COMPANY and ENERGY  
21 BRANDS INC. (d/b/a GLACEAU),

22 Defendant.

E-filing

MEJ

ORIGINAL  
FILED  
JAN 14 2009  
RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT,  
NORTHERN DISTRICT OF CALIFORNIA

CV 09 0182  
CASE NO. \_\_\_\_\_

CLASS ACTION COMPLAINT  
Cal. Bus. & Prof. Code §17200 *et seq.* and  
§17500 *et seq.*, Cal. Civ. Code §1750 *et*  
*seq.*, Fraud, Unjust Enrichment.

Demand for Jury Trial

28

1 Plaintiff James Koh (“Plaintiff”), individually and on behalf of all others similarly  
2 situated, brings this action against The Coca-Cola Company and Energy Brands, Inc. d/b/a  
3 Glaceau (collectively “Defendants”), demanding a trial by jury, and alleges as follows:

4 **NATURE OF THE CASE**

5 1. This is a proposed class action on behalf of California residents seeking redress for  
6 Defendants’ deceptive practices in misrepresenting the nutritional content and health benefits of  
7 Defendants’ purported “health beverage” – Glaceau VitaminWater (“VitaminWater”) – in  
8 violation of California’s consumer protection laws from January 15, 2005 to the present (the  
9 “Class Period”).

10 2. Consumers are increasingly health-conscious. Many consumers are trying to avoid  
11 soft drinks and are looking for a healthier beverage alternative.

12 3. These health concerns fueled the consumption of VitaminWater, from which  
13 Defendants profited enormously. Defendants command a premium price for VitaminWater by  
14 distinguishing it from soft drinks (including its own), and by marketing and advertising it as a  
15 health beverage. On average, Defendants charge almost twice as much for VitaminWater as for  
16 one of their other soft drinks (e.g., Coca-Cola Classic, Diet Coke, Sprite, etc.). Sales of  
17 VitaminWater are estimated at more than half a billion dollars annually, with VitaminWater  
18 significantly increasing sales each year during the Class Period.

19 4. Defendants’ advertising and marketing campaigns, as well as its labeling of  
20 VitaminWater, deceptively promote VitaminWater as a healthy alternative to soft drinks.  
21 Contrary to Defendants’ deceptive representations as alleged herein, VitaminWater is not a  
22 healthy beverage. Rather, it is sugar water – just like soft drinks – with a few added vitamins.  
23 Indeed, the amount of sugar in a bottle of VitaminWater is roughly equal to a can of soda.

24 5. Defendants’ misrepresentations about VitaminWater – from its healthful-sounding  
25 name and good-for-you health promises – bombard consumers with a message of purported  
26 health, and draw consumer attention away from the significant amount of sugar in the product.  
27 Reasonable consumers should not be forced to look beyond the misleading representations on  
28 VitaminWater labels and in other marketing, advertising and promotional materials to discover

1 the truth from the ingredients listed in small print on the back of the bottle. Instead, reasonable  
2 consumers should be able to trust that representations on the packaging and in-store advertising  
3 of VitaminWater are ultimately consistent with the ingredient list, and not the opposite as is the  
4 case with VitaminWater.

5 **JURISDICTION AND VENUE**

6 6. This Court has jurisdiction over all causes of action asserted herein pursuant to 28  
7 U.S.C. §1332(d), because the aggregate claims of the Class exceed the sum or value of  
8 \$5,000,000.00, and there is diversity of citizenship between proposed class members and  
9 Defendants.

10 7. Venue is proper in this District pursuant to 28 U.S.C. §1391(a)(1) & (2).  
11 Substantial acts in furtherance of the alleged improper conduct occurred within this District.  
12 Plaintiff resides within this District and bought Defendants' Products within this District.

13 8. Defendants are authorized to do business in California, have sufficient minimum  
14 contacts with California, and/or otherwise have intentionally availed themselves of the markets  
15 in California through the promotion, marketing, and sale of VitaminWater in California, to  
16 render the exercise of jurisdiction by this Court permissible under traditional notions of fair play  
17 and substantial justice.

18 **THE PARTIES**

19 **Plaintiff**

20 9. Plaintiff James Koh ("Plaintiff") is a resident of San Francisco, California. Plaintiff  
21 purchased VitaminWater during the Class Period. Specifically, Plaintiff purchased  
22 VitaminWater Rescue (Green Tea) and VitaminWater Revive (Fruit Punch) at their premium  
23 price approximately five times a month during the period of October 2007 to July 2008. Plaintiff  
24 purchased this VitaminWater from several 7-Eleven convenience stores located in San Francisco  
25 and from a deli convenience store located in Daly City, California. Plaintiff relied upon the  
26 written misrepresentations contained on VitaminWater bottles that VitaminWater is a healthy  
27 beverage and therefore believed he was ingesting a healthy beverage. Plaintiff relied upon the  
28 written misrepresentations that VitaminWater was a healthy beverage in reaching his decision to

1 purchase VitaminWater. Had Plaintiff known the truth that the statements he relied upon were  
2 false, he would have not purchased VitaminWater.

3 **Defendants**

4 10. The Coca-Cola Company (“Coca-Cola”) is a Georgia corporation headquartered in  
5 Atlanta, Georgia. Coca-Cola describes itself as the largest manufacturer, distributor and  
6 marketer of nonalcoholic beverage concentrates and syrups in the world. During 2007, Coca-  
7 Cola expanded its still beverage offerings by acquiring Energy Brands Inc., also known as  
8 Glaceau, the maker of enhanced water brands including VitaminWater.

9 11. Defendant Energy Brands, Inc. (d/b/a as Glaceau) is a wholly owned subsidiary of  
10 Coca-Cola. Defendant Energy Brands, Inc. is headquartered in Whitestone, New York.

11 **GENERAL ALLEGATIONS**

12 **Defendants Know That Consumers Desire Healthier Alternatives to Soft Drinks**

13 12. Riding on the success of bottled water, the beverage industry contrived a new way to  
14 boost sales: “water beverages” enhanced with vitamins, fruit, herbs, antioxidants and more. As  
15 sales in this category rose 30% in 2007, Defendants profited handsomely by their sale of  
16 VitaminWater to consumers.

17 13. Defendants recognize the importance of marketing and labeling VitaminWater as a  
18 healthy alternative to sugary soft drinks. In its Form 10-K Annual Report filed with the United  
19 States Securities and Exchange Commission for the year 2007, Coca-Cola acknowledged that  
20 “obesity and other health concerns may reduce demand for some of [its] products” and are risk  
21 factors to its profits. Coca-Cola further stated that “some researchers, health advocates and  
22 dietary guidelines are encouraging consumers to reduce consumption of certain types of  
23 beverages, especially sugar-sweetened beverages. Increasing public awareness about these  
24 issues ... could affect our profitability.”

25 14. Not surprisingly, VitaminWater does not name Coca-Cola anywhere on its  
26 packaging or labeling; rather these purportedly healthy drinks are sold without any reference to  
27 the soft drink manufacturer that produces them.

28

**Defendants’ Marketing, Advertising and Labeling Claims That VitaminWater Provides Health Benefits To Consumers**

15. Defendants deceive consumers into believing that VitaminWater provides remarkable health benefits by marketing, advertising and labeling the VitaminWater flavors with names including: “defense,” “rescue,” “energy,” “power-c,” “balance,” “focus,” “revive,” “endurance,” “essential,” “b-relaxed,” “formula 50,” “vital-t,” “charge + -,” and “multi-v.”

16. Defendants’ VitaminWater labels proclaim that VitaminWater is a “Nutrient-Enhanced Water Beverage” and that “vitamins + water = all you need.”

17. In addition, the VitaminWater labels make additional claims touting the purported health benefits of drinking VitaminWater. For example, the labels of VitaminWater’s “defense” flavor claims as follows: “[I]f you’ve had to use sick days because you’ve actually been sick then you’re seriously missing out, my friends. [S]ee, the trick is to stay healthy and use sick to days to just um, not go in. [A]nd this combination of zinc and fortifying vitamins can help out with that and keep you healthy as a horse. [S]o drink up.”

18. In addition, the Vitamin Water labels make the following claims about the purported health benefits of drinking other flavors of VitaminWater:

- Rescue “is specially formulated to support optimal metabolic function with antioxidants that may reduce the risk of chronic diseases, and vitamins necessary for the generation and utilization of energy from food.”
- Focus “is specially formulated to provide vitamin [A] (a nutrient known to be required for visual function), antioxidants and other nutrients [that] scientific evidence suggests may reduce the risk of age-related eye disease.”
- Balance “is specially formulated with bioactive components that contribute to an active lifestyle by promoting healthy, pain-free functioning of joints, structural integrity of joints and bones, and optimal generation and utilization of energy from food.”

- 1 • Defense “is specially formulated with nutrients required for optimal functioning
- 2 of the immune system, and the generation and utilization of energy from food to
- 3 support immune and other metabolic activities.”
- 4 • B-Relaxed “is specially formulated with [B] vitamins and theanine. The [B]
- 5 vitamins are there to replace those lost during times of stress (physical or mental).
- 6 Theanine is an amino acid found naturally in tea leaves and has been shown to
- 7 promote feelings of relaxation. This combination can help bring about a healthy
- 8 state of physical and mental being.”
- 9 • Power-C “is specially formulated with nutrients that enable the body to exert
- 10 physical power by contributing to structural integrity of the musculoskeletal
- 11 system, and by supporting optimal generation and utilization of energy from
- 12 food.”

13 19. The central message of all of these claims is that drinking VitaminWater is good for

14 one’s health. However, as set forth below, this message is deceptive and misleading.

15 **VitaminWater is Not a Healthier Alternative to Soft Drinks**

16 20. VitaminWater, the supposed “Nutrient Enhanced Water Beverage,” does not deliver

17 its promised benefits of health. In fact, VitaminWater may actually harm consumers’ health.

18 21. VitaminWater is loaded with sugar. In fact, each 20 ounce bottle contains

19 approximately 33 grams of sugar. By comparison, a can of Coca-Cola Classic contains 39 grams

20 of sugar.

21 22. Diets high in added sugars – from such foods as sugar-sweetened beverages like

22 VitaminWater – squeeze healthier foods out of the diet, thereby displacing foods that provide

23 nutrients that reduce the risk of osteoporosis, cancer, heart disease, stroke, and other health

24 problems.<sup>1</sup>

25

26 \_\_\_\_\_

27 <sup>1</sup> See S. Bowman, *Diets of Individuals Based on Energy Intakes from Added Sugars*, 12 FAMILY

28 ECON. NUTRITION REV. 31-8 (1999); G. Mrdjenovi & D.A. Levitsky, *Nutritional and Energetic*

*Consequences of Sweetened Drink Consumption in 6- to 13-year-old Children*, 142 J.

PEDIATRICS 604-10 (2003).

1 23. Diets rich in added sugars contribute to obesity, the prevalence of which has risen  
 2 dramatically in the last three decades in both youths and adults.<sup>2</sup> Obesity, in turn, increases the  
 3 risk of diabetes, heart disease, high blood pressure, and other health problems.<sup>3</sup> In people who  
 4 are “insulin resistant,” high intakes of added sugars increase levels of blood triglycerides, which  
 5 are associated with a higher risk of heart disease and diabetes.<sup>4</sup> In addition, frequent  
 6 consumption of foods rich in added sugars increases the risk of osteoporosis.<sup>5</sup>

7 24. A scientific review of 30 publications (15 cross-sectional, ten prospective, and five  
 8 experimental) found that consumption of sugar-sweetened beverages (like VitaminWater) may  
 9 be a key contributor to the epidemic of overweight and obesity, by virtue of these beverages'  
 10 high added sugar content, low satiety, and incomplete compensation for total energy. The  
 11 weight of epidemiologic and experimental evidence indicates that a greater consumption of  
 12 sugar-sweetened beverages, like VitaminWater, is associated with weight gain and obesity.<sup>6</sup>

13 25. As a result of its unlawful, unfair and fraudulent advertising and marketing practices,  
 14 Defendants have made millions at the expense of the public health and trust, and continue to  
 15 make millions through these unfair, unlawful and fraudulent advertising and marketing practices.  
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17 <sup>2</sup> See D.S. Ludwig, K.E. Peterson & S.L. Gortmaker, *Relationship between Consumption of*  
 18 *Sugar-sweetened Drinks and Childhood Obesity*, 357 LANCET 505-8 (2001); C.S. Berkey, H.R.  
 19 Rockett, A.E. Field, et al., *Sugar-added Beverages and Adolescent Weight Change*, 12 OBESITY  
 20 RES. 778-88 (2004); C.M Apovian, *Sugar-sweetened Soft Drinks, Obesity, and Type 2 Diabetes*,  
 21 292 J. AM. MED. ASS'N 927-34 (2004); Ctr. for Disease Control and Prevention, Nat'l Ctr. for  
 22 Health Statistics, *Prevalence of Overweight among Children and Adolescents: United States,*  
 23 *1999-2002, available at [www.cdc.gov/nchs/products/pubs/pubd/hestats/overwght99.htm](http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overwght99.htm)*; Ctr.  
 24 for Disease Control and Prevention, Nat'l Ctr. for Health Statistics, *Prevalence of Overweight*  
 25 *and Obesity among Adults: United States, 1999-2002, available at*  
 26 *[www.cdc.gov/nchs/products/pubs/pubd/hestats/obese/obse99.htm](http://www.cdc.gov/nchs/products/pubs/pubd/hestats/obese/obse99.htm)*.

23 <sup>3</sup> U.S. Surgeon General, U.S. Dep't of Health and Human Serv., *The Surgeon General's Call to*  
 24 *Action to Prevent and Decrease Overweight and Obesity* (2001). *available at*  
 25 *[www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf](http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf)*.

25 <sup>4</sup> M.J. Stampfer, R.M Krauss, J. Ma, et al., *A Prospective Study of Triglyceride Level, Low-*  
 26 *density Lipoprotein Particle Diameter, and Risk of Myocardial Infarction*, 276 J. AM. MED.  
 27 ASS'N 882-8 (1996).

26 <sup>5</sup> S.J. Whiting, A. Healey & S. Psiuk, *Relationship between Carbonated and Other Low Nutrient*  
 27 *Dense Beverages and Bone Mineral Content of Adolescents*, 32 NUTRITION RES. 1107-15 (2001).

28 <sup>6</sup> Vasanti S. Malik, Matthias B. Schulze & Frank B. Hu, *Intake of Sugar-sweetened Beverages*  
 and *Weight Gain*, Vol. 84, No. 2 AM. J. OF CLINICAL NUTRITION, 274-288 (Aug. 2006).

**CLASS ACTION ALLEGATIONS**

1  
2 26. Plaintiff brings this action as a class action pursuant to Rule 23 of the Federal Rules  
3 of Civil Procedure. The class that Plaintiff seeks to represent are composed of and defined as  
4 follows:

5 **All Californians who purchased VitaminWater at any time from January 15,**  
6 **2005 to present. Excluded from the Class are officers and directors of**  
7 **Defendants, members of the immediate families of the officers and directors**  
8 **of Defendants, and their legal representatives, heirs, successors or assigns**  
9 **and any entity in which they have or have had a controlling interest.**

10 27. For purposes of this Complaint, the phrase “Class Members” shall refer collectively  
11 to all members of this Class, including the named Plaintiff.

12 28. This action has been brought and may properly be maintained as a class action  
13 against Defendants pursuant to the provisions of Federal Rule of Civil Procedure 23 because  
14 there is a well-defined community of interest in the litigation and the proposed Class is easily  
15 ascertainable.

16 29. Numerosity: Plaintiff does not know the exact size of the Class, but, based upon  
17 Defendants’ sales of VitaminWater, it is estimated that the Class is composed of more than  
18 10,000 persons. Furthermore, even if subclasses need to be created for these consumers, it is  
19 estimated that each subclass would have thousands of members. The persons in the Class are so  
20 numerous that the joinder of all such persons is impracticable and the disposition of their claims  
21 in a class action rather than in individual actions will benefit the parties and the courts.

22 30. Common Questions Predominate: This action involves common questions of law  
23 and fact to the potential Class because each Class Member’s claim derives from the same  
24 allegedly fraudulent, false, misleading, deceptive and/or unfair action. The common questions  
25 of law and fact involved predominate over questions that affect only Plaintiff or individual Class  
26 Members. Thus, proof of a common or single set of facts will establish the right of each member  
27 of the Class to recover. Among the questions of law and fact common to the Class are:  
28



- 1 • Whether Defendants marketed, advertised, labeled and/or sold  
2 VitaminWater to Plaintiff, and those similarly situated, using false,  
3 misleading and/or deceptive statements or representations;
- 4 • Whether Defendants omitted and/or misrepresented material facts in  
5 connection with the marketing, advertising, labeling and/or sale of  
6 VitaminWater;
- 7 • Whether Defendants participated in and pursued the common course of  
8 conduct complained of herein;
- 9 • Whether Defendants' marketing, advertising, labeling and/or selling of  
10 VitaminWater constitutes an unfair, unlawful or fraudulent practice; and  
11 • Whether, and to what extent, injunctive relief should be imposed on  
12 Defendants to prevent such conduct in the future.

13 31. Typicality: Plaintiff's claims are typical of the Class because he bought  
14 VitaminWater during the Class Period. Defendants' allegedly unlawful, unfair and/or fraudulent  
15 actions, concern the same business practices described herein irrespective of where they  
16 occurred or were received. Thus, Plaintiff and Class Members sustained the same injuries and  
17 damages arising out of Defendants' conduct in violation of California law. The injuries and  
18 damages of each Class Member were caused directly by Defendants' wrongful conduct in  
19 violation of law as alleged herein.

20 32. Adequacy: Plaintiff will fairly and adequately protect the interests of all Class  
21 Members because it is in his best interest to prosecute the claims alleged herein to obtain full  
22 compensation due to him for the illegal conduct of which he complains. Plaintiff also has no  
23 interests that conflict with or are antagonistic to the interests of Class Members. Plaintiff has  
24 retained highly competent and experienced class action attorneys to represent his interests and  
25 that of the Class. No conflict of interest exists between Plaintiff and Class Members because all  
26 questions of law and fact regarding liability of Defendants are common to Class Members and  
27 predominate over any individual issues that may exist, such that by prevailing on their own  
28 claim, Plaintiff necessarily will establish Defendants' liability to all Class Members. Plaintiff

1 and his counsel have the necessary financial resources to adequately and vigorously litigate this  
2 class action, and Plaintiff and counsel are aware of their fiduciary responsibilities to the Class  
3 Members and are determined to diligently discharge those duties by vigorously seeking the  
4 maximum possible recovery for Class Members.

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

16 34. The prerequisites to maintaining a class action for injunctive or equitable relief  
17 pursuant to Fed. R. Civ. P. 23(b)(2) are met as Defendants have acted or refused to act on  
18 grounds generally applicable to the Class, thereby making appropriate final injunctive or  
19 equitable relief with respect to the Class as a whole.

20 35. Plaintiff is unaware of any difficulties that are likely to be encountered in the  
21 management of this action that would preclude its maintenance as a class action.

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**CAUSES OF ACTION**

**FIRST CAUSE OF ACTION**

**(Business and Professions Code § 17200, *et seq.* –  
Unlawful Business Acts and Practices)**

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

37. Such acts of Defendants, as described above, and each of them, constitute unlawful business acts and practices.

38. In this regard, Defendants’ manufacturing, marketing, advertising, packaging, labeling, distributing and selling of VitaminWater violates California’s Sherman Food, Drug and Cosmetics Law, Cal. Health & Saf. Code, §109875, *et seq.* (the “Sherman Law”).

39. In relevant part, the Sherman Act declares that food is misbranded if its labeling is false or misleading in any particular way and further provides that it is unlawful for any person to misbrand any food. Cal. Health & Saf. Code, §§ 110660, 110765.

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

41. The business practices alleged above are unlawful under the Consumers Legal Remedy Act, Cal. Civ. Code §1750, *et seq.* (“CLRA”), which forbids deceptive advertising.

42. The business practices alleged above are unlawful under §17200, *et seq.* by virtue of violating §17500, *et seq.*, which forbids untrue advertising and misleading advertising.

43. As a result of the business practices described above, Plaintiff and the Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct on the part of Defendants and such other orders and judgments which may be

1 necessary to disgorge Defendants’ ill-gotten gains and to restore to any person in interest any  
2 money paid for VitaminWater as a result of the wrongful conduct of Defendants.

3 44. The above-described unlawful business acts and practices of Defendants, and each  
4 of them, present a threat and reasonable likelihood of deception to Plaintiff and members of the  
5 Class in that Defendants have systematically perpetrated and continue to perpetrate such acts or  
6 practices upon members of the Class by means of their misleading manufacturing, marketing,  
7 advertising, packaging, labeling, distributing and selling of VitaminWater.

8 45. THEREFORE, Plaintiff prays for relief as set forth below.

9  
10 **SECOND CAUSE OF ACTION**

11 **(Business and Professions Code § 17200, *et seq.* –**  
12 **Unfair Business Acts and Practices)**

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

15 47. Such acts of Defendants, as described above, and each of them, constitute unfair  
16 business acts and practices.

17 48. Plaintiff, and other members of the Class who purchased Defendants’ VitaminWater,  
18 suffered a substantial injury by virtue of buying VitaminWater they would not have purchased  
19 absent Defendants’ unfair marketing, advertising, packaging and labeling or by paying an excessive  
20 premium price for the unfairly marketed, advertised, packaged and labeled VitaminWater.

21 49. There is no benefit to consumers or competition by deceptively marketing, advertising,  
22 packaging and labeling water beverages. Indeed, the harm to consumers and competition is  
23 substantial.

24 50. Plaintiff and other members of the Class who purchased Defendants’ VitaminWater  
25 had no way of reasonably knowing that VitaminWater they bought was not as marketed,  
26 advertised, packaged and labeled. Thus, they could not have reasonably avoided the injury each  
27 of them suffered.

28

1           51. The gravity of the consequences of Defendants’ conduct as described above  
2 outweighs any justification, motive or reason therefore, particularly considering the available  
3 legal alternatives which exist in the marketplace, and is immoral, unethical, unscrupulous,  
4 offends established public policy or is substantially injurious to Plaintiff and other members of  
5 the Class.

6           52. As a result of the business acts and practices described above, Plaintiff and the  
7 Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining  
8 such future conduct on the part of Defendants, and such other orders and judgments which may  
9 be necessary to disgorge Defendants’ ill-gotten gains and to restore to any person in interest any  
10 money paid for VitaminWater as a result of the wrongful conduct of Defendants.

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

12  
13                                   **THIRD CAUSE OF ACTION**

14                           **(Business and Professions Code § 17200, *et seq.* –**  
15                           **Fraudulent Business Acts and Practices)**

16           54. Plaintiff repeats each and every allegation contained in the paragraphs above and  
17 incorporates such allegations by reference herein.

18           55. Such acts of Defendants as described above, and each of them, constitute fraudulent  
19 business practices under California Business and Professions Code sections § 17200, *et seq.*

20           56. As more fully described above, Defendants’ misleading marketing, advertising,  
21 packaging and labeling of VitaminWater is likely to deceive reasonable California consumers.  
22 Indeed, Plaintiff and other members of the Class were unquestionably deceived regarding the  
23 characteristics of Defendants’ VitaminWater, as Defendants’ marketing, advertising, packaging  
24 and labeling of VitaminWater misrepresent and/or omit the true contents of VitaminWater. Said  
25 acts are fraudulent business acts and practices.

26           57. This fraud and deception caused Plaintiff and members of the Class to purchase  
27 more of VitaminWater than they would have or pay more than they would have for  
28 VitaminWater had they known the true ingredients.

1           58. As a result of the business acts and practices described above, Plaintiff and the  
2 Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining  
3 such future conduct on the part of Defendants, and such other orders and judgments which may  
4 be necessary to disgorge Defendants’ ill-gotten gains and to restore to any person in interest any  
5 money paid for VitaminWater as a result of the wrongful conduct of Defendants.

6           59. THEREFORE, Plaintiff prays for relief as set forth below.

7  
8                                   **FOURTH CAUSE OF ACTION**  
9                                   **(Business and Professions Code § 17500, *et seq.* –**  
10                                   **Misleading and Deceptive Advertising)**

11           60. Plaintiff repeats each and every allegation contained in the paragraphs above and  
12 incorporates such allegations by reference herein.

13           61. Plaintiff asserts this cause of action for violations of California Business and  
14 Professions Code §17500, *et seq.* for misleading and deceptive advertising against Defendants.

15           62. At all material times, Defendants engaged in a scheme of offering their  
16 VitaminWater for sale to Plaintiff and other members of the Class by way of, *inter alia*,  
17 commercial marketing and advertising, the World Wide Web (Internet), product packaging and  
18 labeling, and other promotional materials. These materials misrepresented and/or omitted the  
19 true contents of VitaminWater. Said advertisements and inducements were made within the  
20 State of California and come within the definition of advertising as contained in Business and  
21 Professions Code §17500, *et seq.* in that such promotional materials were intended as  
22 inducements to purchase VitaminWater and are statements disseminated by Defendants to  
23 Plaintiff and the Class and were intended to reach members of the Class. Defendants knew, or in  
24 the exercise of reasonable care should have known, that these statements were misleading and  
25 deceptive.

26           63. In furtherance of said plan and scheme, Defendants have prepared and distributed  
27 within the State of California via commercial marketing and advertising, the World Wide Web  
28 (Internet), product packaging and labeling, and other promotional materials, statements that

1 misleadingly and deceptively represent the ingredients contained in VitaminWater. Consumers,  
2 including Plaintiff, necessarily and reasonably relied on these materials concerning  
3 VitaminWater. Consumers, including Plaintiff and the Class, were among the intended targets  
4 of such representations.

5 64. The above acts of Defendants, in disseminating said misleading and deceptive  
6 statements throughout the State of California to consumers, including Plaintiff and members of  
7 the Class, were and are likely to deceive reasonable consumers, including Plaintiff and other  
8 members of the Class, by obfuscating the true ingredients of VitaminWater, all in violation of  
9 the "misleading prong" of California Business and Professions Code § 17500.

10 65. As a result of the above violations of the "misleading prong" of Business and  
11 Professions Code § 17500, *et seq.*, Defendants have been unjustly enriched at the expense of  
12 Plaintiff and the other members of the Class. Plaintiff and the Class, pursuant to Business and  
13 Professions Code § 17535, are entitled to an order of this Court enjoining such future conduct on  
14 the part of Defendants, and such other orders and judgments which may be necessary to disgorge  
15 Defendants' ill-gotten gains and restore to any person in interest any money paid for  
16 VitaminWater as a result of the wrongful conduct of Defendants.

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

18  
19 **FIFTH CAUSE OF ACTION**

20 **(Business and Professions Code § 17500, *et seq.* - Untrue Advertising)**

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

23 68. Plaintiff asserts this cause of action for violations of California Business and  
24 Professions Code § 17500, *et seq.*, for untrue advertising against Defendants.

25 69. At all material times, Defendants have engaged in a scheme of offering  
26 VitaminWater for sale to Plaintiff and other members of the Class by way of, *inter alia*,  
27 commercial marketing and advertising, the World Wide Web (Internet), product packaging and  
28 labeling, and other promotional materials. These materials misrepresented and/or omitted the

1 true contents of VitaminWater. Said advertisements and inducements were made within the  
2 State of California and come within the definition of advertising as contained in Business and  
3 Professions Code §17500, *et seq.* in that such promotional materials were intended as  
4 inducements to purchase VitaminWater and are statements disseminated by Defendants to  
5 Plaintiff and the Class and were intended to reach members of the Class. Defendants knew, or in  
6 the exercise of reasonable care should have known, that these statements were untrue.

7 70. In furtherance of said plan and scheme, Defendants have prepared and distributed  
8 within the State of California via commercial marketing and advertising, the World Wide Web  
9 (Internet), product packaging and labeling, and other promotional materials, statements that  
10 falsely advertise the ingredients contained in VitaminWater. Consumers, including Plaintiff and  
11 the Class, are among the intended targets of such representations and would reasonably be  
12 deceived by such promotional materials.

13 71. The above acts of Defendants in disseminating said untrue advertising throughout  
14 the State of California deceived Plaintiff and the other members of the Class by obfuscating the  
15 nature and quality of VitaminWater, all in violation of the "untrue prong" of California Business  
16 and Professions Code §17500.

17 72. As a result of the above violations of the "untrue prong" of Business and Professions  
18 Code § 17500, *et seq.*, Defendants have been unjustly enriched at the expense of Plaintiff and the  
19 other members of the Class. Plaintiff and the Class, pursuant to Business and Professions Code §  
20 17535, are entitled to an order of this Court enjoining such future conduct on the part of  
21 Defendants, and such other orders and judgments which may be necessary to disgorge  
22 Defendants' ill-gotten gains and restore to any person in interest any money paid for  
23 VitaminWater as a result of the wrongful conduct of Defendants.

24 73. THEREFORE, Plaintiff prays for relief as set forth below.

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**SIXTH CAUSE OF ACTION**

**(Consumers Legal Remedies Act - Cal. Civ. Code §1750, *et seq.*)**

74. Plaintiff realleges and incorporates by reference the paragraphs stated above in this Class Action Complaint as set forth herein.

75. This cause of action is brought pursuant to the California Consumers Legal Remedies Act, Cal. Civ. Code §1750, *et seq.* (the “CLRA”). This cause of action does not seek monetary damages at this point, but is limited solely to injunctive relief. Plaintiff will amend this Class Action Complaint to seek damages in accordance with the CLRA after providing Defendants with notice pursuant to Cal. Civ. Code § 1782.

76. Defendants’ actions, representations and conduct has violated, and continues to violate the CLRA, because they extend to transactions that are intended to result, or which have resulted, in the sale of lease of goods or services to consumers.

77. Plaintiff and other Class Members are “consumers” as that term is defined by the CLRA in Cal. Civ. Code §1761(d).

78. The VitaminWater that Plaintiff and other members of the Class purchased from Defendants were “goods” within the meaning of Cal. Civ. Code §1761(a).

79. By engaging in the actions, misrepresentations and misconduct set forth in this Class Action Complaint, Defendants have violated, and continue to violate, §1770(a)(7) of the CLRA. Specifically, in violation of Cal. Civ. Code § 1770(a)(7), Defendants’ acts and practices constitute unfair methods of competition and unfair or fraudulent acts or practices in that they misrepresent the particular standard, quality or grade of the goods.

80. By engaging in the actions, misrepresentations and misconduct set forth in this Class Action Complaint, Defendants have violated, and continue to violate, §1770(a)(16) of the CLRA. Specifically, in violation of Cal. Civ. Code §1770(a)(16), Defendants’ acts and practices constitute unfair methods of competition and unfair or fraudulent acts or practices in that they represent that a subject of a transaction has been supplied in accordance with a previous representation when they have not.

1 81. Plaintiff requests that this Court enjoin Defendants from continuing to employ the  
2 unlawful methods, acts and practices alleged herein pursuant to Cal. Civ. Code §1780(a)(2). If  
3 Defendants are not restrained from engaging in these types of practices in the future, Plaintiff  
4 and other members of the Class will continue to suffer harm.

5 82. THEREFORE, Plaintiff prays for relief as set forth below.

6  
7 **SEVENTH CAUSE OF ACTION**

8 **(Fraud, Deceit and/or Misrepresentation)**

9 83. Plaintiff realleges and incorporates by reference the above paragraphs of this Class  
10 Action Complaint as if set forth herein.

11 84. Defendants, through their labeling, advertising and marketing of VitaminWater,  
12 make uniform representations and offers regarding the quality of VitaminWater as described  
13 above. Defendants engaged in, and continue to engage in, such fraudulent, misrepresentative,  
14 false and/or deceptive acts with full knowledge that such acts were, and are, in fact,  
15 misrepresentative, false or deceptive.

16 85. The aforementioned fraud, misrepresentations, deceptive, and/or false acts and  
17 omissions concern material facts that are essential to the analysis undertaken by Plaintiff, and  
18 those similarly situated, in deciding whether to purchase Defendants' beverage VitaminWater.

19 86. Plaintiff, and those similarly situated, would have acted differently had they not been  
20 misled – i.e. they would not have paid money for the Product in the first place.

21 87. Defendants have a duty to correct the misinformation they disseminate through their  
22 advertising of VitaminWater. By not informing Plaintiff, and those similarly situated,  
23 Defendants breached this duty. Defendants also gained financially from, and as a result of this  
24 breach.

25 88. By and through such fraud, deceit, misrepresentations and/or omissions, Defendants  
26 intended to induce Plaintiff, and those similarly situated, to alter their position to their detriment.

27 89. Plaintiff and those similarly situated, justifiably and reasonably relied on  
28 Defendants' misrepresentations, and, as such, were damaged by Defendants.

1           90. As a direct and proximate result of Defendants' fraud, deceit and/or  
2 misrepresentations, Plaintiff, and those similarly situated, have suffered damages in an amount  
3 equal to the amount they paid for Defendants' VitaminWater. The exact amount of this  
4 difference will be proven at trial.

5           91. Defendants acted with intent to defraud, or with reckless or negligent disregard of  
6 the rights of, Plaintiff, and those similarly situated.

7           92. Plaintiff, and those similarly situated, are entitled to punitive damages.

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

10                                   **EIGHTH CAUSE OF ACTION**

11                                   **(Unjust Enrichment)**

12           94. Plaintiff realleges and incorporates by reference the above paragraphs of this Class  
13 Action Complaint as if set forth herein.

14           95. As a result of Defendants' deceptive, fraudulent and misleading labeling,  
15 advertising, marketing and sales of VitaminWater, Defendants were enriched, at the expense of  
16 Plaintiff, and all others similarly situated, through the payment of the purchase price for  
17 Defendants' beverage VitaminWater.

18           96. Under the circumstances, it would be against equity and good conscience to permit  
19 Defendants to retain the ill-gotten benefits that it received from Plaintiff, and all others similarly  
20 situated, in light of the fact that the VitaminWater purchased by Plaintiff, and all others similarly  
21 situated, was not what Defendants purported it to be. Thus, it would be unjust or inequitable for  
22 Defendants to retain the benefit without restitution to Plaintiff, and all others similarly situated,  
23 for the monies paid to Defendants for such VitaminWater.

24           97. THEREFORE, Plaintiff prays for relief as set forth below.  
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**PRAYER FOR RELIEF**

THEREFORE, Plaintiff prays for judgment as follows:

- Certification of the Class, certifying Plaintiff as representative of the Class, and designating his counsel as counsel for the Class;
- A declaration that Defendants have committed the violations alleged herein;
- For restitution and disgorgement pursuant to, without limitation, the California Business & Professions Code §§ 17200, *et seq.* and 17500, *et seq.*;
- For declaratory and injunctive relief pursuant to, without limitation, the California Business & Professions Code §§ 17200, *et seq.* and 17500, *et seq.*;
- For declaratory and injunctive relief only pursuant to California Civil Code § 1780, as Plaintiff through this Complaint at this point expressly does not seek any monetary type of relief pursuant to the CLRA;
- An award of compensatory damages, the amount of which is to be determined at trial;
- For punitive damages;
- For interest at the legal rate on the foregoing sums;
- For costs of suit incurred; and
- For such further relief as this Court may deem just and proper.

**JURY TRIAL DEMANDED**

Plaintiff hereby demands a trial by jury.

Dated: January 13, 2009

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- and -

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10 Attorneys for Plaintiff

11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA

13 JAMES KOH, on behalf of himself, and  
14 those similarly situated,

15 Plaintiff,

16 v.

17 THE COCOA COLA COMPANY and  
18 ENERGY BRANDS INC. (d/b/a  
19 GLACEAU)

20 Defendants.

ORIGINAL  
FILED

JAN 14 2009

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT,  
NORTHERN DISTRICT OF CALIFORNIA

E-filing

MEJ

CV 09 0182

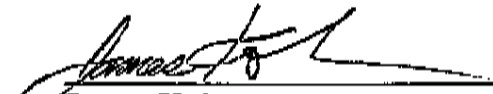
DECLARATION OF  
JAMES KOH PURSUANT TO  
CALIFORNIA CODE 1780(c)

1 I, James Koh, declare as follows:

2 1. I submit this declaration pursuant to section 1780(c) of the California  
3 Code of Civil Procedure. I have personal knowledge of the matters set forth herein  
4 and if called as a witness could and would competently testify thereto.

5 2. San Francisco County, California – the county in which this Court is  
6 located - is a proper location for this action because each of the named defendants  
7 do business within this county in that they sell VitaminWater within this county. I  
8 declare under penalty of perjury under the laws of the United States that the  
9 foregoing is true and correct.

10 Executed on January 12, 2009

  
James Koh