**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF KINGS**

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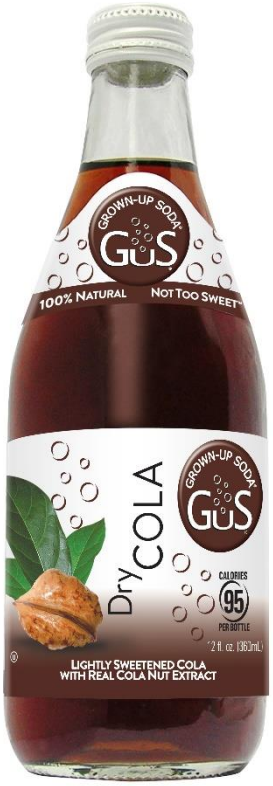
| PETER TOUSSAINT, individually on behalf of himself and all others similarly situated, | : | Case No. |
| Plaintiff, | : | |
| -against- | : | |
| UTMOST BRANDS, INC., | : | **CLASS ACTION COMPLAINT** |
| Defendant. | : | **JURY TRIAL DEMANDED** |

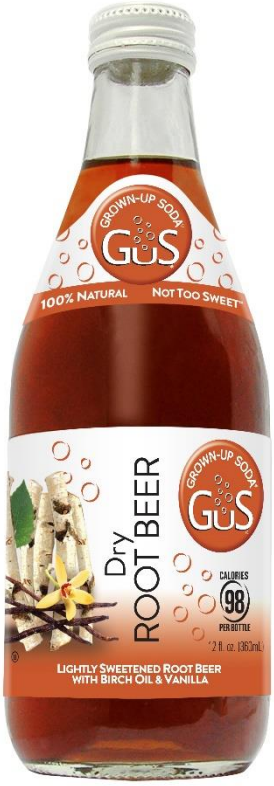
Plaintiff, individually and on behalf of all others similarly situated, by his attorneys, alleges the following upon information and belief, except for those allegations pertaining to Plaintiff, which are based on personal knowledge:

## NATURE OF ACTION

1. Plaintiff Peter Toussaint ("Plaintiff") brings this action against UTMOST BRANDS, INC. ("Utmost Brands" or "Defendant"), on behalf of himself and a class consisting of all consumers in the State of New York who purchased any of the following Utmost Brands' "Grown Up Soda" products (the products) at any time during the applicable statute of limitations period up to and including the present (the "Class Period");
    a. "100% NATURAL DRY COLA" **(Exhibit ("Ex.") A)**
    b. "100% NATURAL DRY VALENCIA ORANGE" **(Ex. B)**
    c. "100% NATURAL DRY ROOT BEER" **(Ex. C)**
    d. "100% NATURAL DRY MEYER LEMON" (**Ex. D**)
    e. "100% NATURAL STAR RUBY GRAPEFRUIT" **(Ex. E)**

2. Utmost Brands is a beverage company that owns the "GUS GROWN-UP SODA" and "GROWN-UP SODA" trademarks and brands.
3. In an effort to appeal to health conscious consumers interested in purchasing products that do not contain artificial or synthetic ingredients, Defendant markets the products as "100% NATURAL."
4. As depicted below, the products prominently display the claim, representation, and warranty that they are "100% NATURAL." **(*See* Exs. A-E).**




GROWN-UP SODA
GUS
100% NATURAL
NOT TOO SWEET
Dry Meyer
LEMON
CALORIES
90
PER BOTTLE
LIGHTLY SWEETENED LEMON
SODA WITH REAL JUICE


GROWN-UP SODA
GUS
100% NATURAL
NOT TOO SWEET
Dry Valencia
ORANGE
CALORIES
95
PER BOTTLE
LIGHTLY SWEETENED ORANGE
SODA WITH REAL JUICE


GROWN-UP SODA
GUS
100% NATURAL
NOT TOO SWEET
Star Ruby
GRAPEFRUIT
CALORIES
90
PER BOTTLE
LIGHTLY SWEETENED GRAPEFRUIT
SODA WITH REAL JUICE

5. Contrary to Defendant's claim, representation, and warranty, the products are not "100% Natural" because they contain synthetic ingredients.
6. Specifically, the products contain the synthetic ingredients caramel color, ascorbic acid and beta carotene. **(*See* Exs. F)**.
7. Defendant uses the "100% NATURAL" claim to fool consumers into believing that the products do not contain synthetic ingredients. In so doing, Defendant has materially misled and deceived consumers, and it has violated consumer protection laws.
8. United States regulatory organizations have clearly delineated between natural ingredients and synthetic ingredients. They have not, however, adopted a formal definition of the term "natural."
9. The FDA declared in 2012: "From a food science perspective, it is difficult to define a food product that is 'natural' because the food has probably been processed and is no longer the product of the earth. That said, the FDA has not developed a definition for use of the term natural or its derivatives. ***However, the agency has not objected to the use of the term if the food does not contain added color, artificial flavors, or synthetic substances."*** (emphasis added). **(Ex. G)**. This declaration reiterated and reaffirmed the policy that the FDA had previously articulated in 1993. 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993).
10. On January 6, 2014, the FDA issued a letter to Judges Yvonne G. Rogers and Jeffrey S. White of the United States District Court, Northern District of California and to Judge Kevin McNulty of the District of New Jersey. In essence, the FDA declined the courts' invitation to comment on whether food containing substances derived from genetically modified seeds could be labeled "natural." Notably, the FDA declared: "The agency has,

however, stated that its policy regarding the use of the term 'natural' on food labeling means that '*nothing artificial or synthetic* (including color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in food." **(Ex. H (emphasis added))**.

11. Defendant claims that its products are "100% NATURAL." These claims—which Defendant has made uniformly to consumers throughout New York during the class period—are false and misleading.

12. Contrary to Defendant's representations that the products are "100% NATURAL," they each contain synthetic ingredients, which place the products outside what a reasonable consumer expects of products that purport to be "100% Natural."

**Ascorbic Acid**

13. Ascorbic acid is a chemically modified form of vitamin C used in foods as a chemical preservative. **(21 C.F.R. § 182.3013)** It is recognized as a synthetic by federal regulation. **(7 C.F.R. 205.605(b))** Unlike natural vitamin C, synthetic ascorbic acid is generally produced from corn or wheat starch being converted to glucose, then to sorbitol and then to ascorbic acid through a series of chemical processes and steps.

14. The products containing the synthetic ingredient, ascorbic acid, include Defendant's 100% Natural Dry Valencia Orange and 100% Natural Dry Meyer Lemon.

**Caramel Color**

15. 21 C.F.R. § 73.85 dictates that caramel coloring is a "color additive."

16. 21 C.F.R. § 101.22 dictates that the term "color additive" is synonymous with "artificial color" or "artificial coloring."

17. The products containing the synthetic ingredient, caramel color, include 100% Natural Dry Cola and 100% Natural Dry Root Beer.
18. Accordingly, the products are artificially colored, and are not, therefore, "100% Natural."
19. Defendant's conduct is particularly egregious given the peer-reviewed studies demonstrating a link between 4-MEI contained in certain classes of caramel coloring and increased incidence of tumors in those who consume it.
20. 4-MEI forms during the manufacturing of certain types of caramel coloring (known as Class III and Class IV caramel coloring) that are used to color cola-type beverages and other foods. In 2007, the National Toxicology Program (NTP) issued a report in which it concluded that 4-MEI caused lung cancer in male and female mice and may have been associated with development of leukemia in female rats. (**Exhibit I**).

**Beta Carotene**

21. Beta-carotene has the molecular formula C40H56. It is synthesized by saponification of vitamin A acetate. The resulting alcohol is either reacted to form vitamin A Wittig reagent (a chemical reaction of an aldehyde or ketone with a triphenyl phosphonium yield to give an alkene and triphenylphosphine oxide) or oxidized to vitamin A aldehyde (through a Grignard Reaction, an organometallic chemical reaction in which alkyl- or aryl-magnesium halides add to a carbonyl group in an aldehyde or ketone). **(21 CFR 184.1245 (a))**
22. The products containing the synthetic ingredient, beta carotene, include 100% Natural Star Ruby Grapefruit, 100% Natural Dry Valencia Orange, and 100% Natural Dry Meyer Lemon.

**Factual Background**

23. American consumers are health conscious and look for wholesome, natural foods to maintain a healthy diet. American consumers are increasingly seeking "100% Natural" ingredients in the foods they purchase. Although this segment of the health food market was once a niche market, natural foods are increasingly becoming part of the mainstream food landscape. According to *Natural Foods Merchandiser*, a leading information provider for the natural foods industry, the industry enjoyed over $89 billion in total revenue in 2013, which was over a 10% increase from 2012.[1]

24. Consumers desire "100% Natural" ingredients in food products for myriad reasons, including wanting to live a healthier lifestyle, perceived benefits in avoiding disease and other chronic conditions, and to avoid chemical and synthetic additives in their food. As a result, consumers are willing to pay a higher price for "100% Natural" food and beverages.

25. As set forth in an article in *The Economist*, "natural" products are a fast growing market. According to *The Economist*, the chief selling point of the natural foods industry is that no man-made chemicals are used in the production process.[2]

26. In order to capture and tap into this growing market for the perceived healthier, chemical free benefits of "natural" foods, Defendant labels its products as being "100% NATURAL."

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[1] *Natural Food Merchandiser 2014 Market Overview Data Charts and Graphics*, NEWHOPE360 http://newhope360.com/nfm-market-overview/nfm-2014-market-overview-data-charts-and-graphics?page=1 (last accessed Mar. 27, 2015 at 6:04 PM), and graph attached hereto as Exhibit J.

[2] *Chemical Blessings What Rousseau Got Wrong*, THE ECONOMIST, Feb. 4, 2008, available at http://www.economist.com/node/10633398, and attached hereto as Exhibit K.

27. A reasonable consumer's understanding of the term "natural" comports with that of federal regulators and common meaning. That is, the reasonable consumer understands the term "natural" to mean that none of the ingredients are synthetic or artificial.
28. When the term "natural" is broadened to "100% NATURAL," the consumer understands that representation to mean that none of the ingredients are synthetic or artificial.
29. Consumers lack the meaningful ability to test or independently ascertain or verify the truthfulness of food labeling claims such as "100% NATURAL," especially at the point of sale. Consumers would not know the true nature of the ingredients merely by reading the ingredients label. Discovering that the ingredients are unnatural and synthetic requires a scientific investigation beyond the grocery store and knowledge of food chemistry beyond that of the average consumer. That is why, even though ascorbic acid, caramel color, and beta carotene are identified on the back of the packaging in the products' ingredients lists, the reasonable consumer would not understand – nor is he expected to understand - that ascorbic acid, caramel color, and beta carotene are synthetic ingredients.
30. Moreover, the reasonable consumer is not expected or required to scour the ingredient list on the back of the product in order to confirm or debunk Defendant's prominent front-of-the-product claim, representation, and warranty.
31. Defendant did not disclose that ascorbic acid, caramel color, and beta carotene are synthetic ingredients. A reasonable consumer understands Defendant's "100% NATURAL" claim to mean that the products are made exclusively with all natural ingredients.

32. Food companies such as Defendant intend and know that consumers make food purchasing decisions based upon food labeling. Basing food purchasing decisions on food labeling is eminently reasonable given that food companies are prohibited from making false or misleading statements on their products.

33. Defendant knew that it made the "100% NATURAL" representation on its products' packaging. Defendant also knew this claim was false and misleading because it knew the products contained synthetic ingredients. Indeed, ascorbic acid, caramel color, and beta carotene are all recognized as synthetic ingredients by federal regulations.

34. By labeling the products "100% NATURAL," Defendant represented that the products carry benefits important to consumers – benefits that consumers are willing to pay a premium for over comparable products that are not labeled as "100% NATURAL."

35. Had Plaintiff and Class Members known that the product was misbranded and contained false and misleading representations, Plaintiff and Class Members would not have purchased the products at an unwarranted premium over and above alternative products that were not misbranded and not violative of consumer protection laws.

36. Defendant falsely advertises and misrepresents to its consumers, including Plaintiff and Class Members, that its products are "100% NATURAL."

37. The material misrepresentations and mislabeling induced Defendant's consumers, including Plaintiff and Class Members, to purchase the products at a premium price. To their detriment, Plaintiff and Class Members relied on Defendant's false and misleading misrepresentations and mislabeling.

38. Defendant's statements are false and its practices are deceptive and misleading because, *inter alia*, the products contain synthetic ingredients. The products are not, therefore, "100% NATURAL."

**THE PARTIES**

39. Plaintiff, PETER TOUSSAINT, is a citizen of the State of New York in the County of Kings. Mr. Toussaint was willing to pay a premium and has paid a premium for foods that are purportedly "100% Natural."

40. Based on the "100% NATURAL" label on Defendant's products, in June 2015, Mr. Toussaint was induced into making his purchases at premium prices. However, the "100% NATURAL" products he purchased contained synthetic ingredients.

41. Had Mr. Toussaint known that Defendant's "100% NATURAL" products were not 100% natural, he would not have purchased the products at a premium price over and above alternative products. Mr. Toussaint did not receive the "100% NATURAL" products he bargained for and has lost money as a result in the form of paying a premium for Defendant's products because they were purportedly "100% NATURAL."

42. The members of the proposed class ("Class Members") consist of men and women throughout the state of New York who purchased the products during the class period.

43. Defendant Utmost Brands, Inc. is a New York corporation that manufactures, sells, markets, distributes, advertises, and promotes the products throughout New York.

## JURISDICTION AND VENUE

44. Jurisdiction is proper pursuant to New York Civil Practice Law and Rules ("CPLR") §§ 301 & 302, and venue is proper pursuant to CPLR § 503.

45. This Court has personal jurisdiction over the Defendant because Defendant is a New York corporation, conducts and transacts business in the State of New York, contracts to supply goods within the State of New York, and supplies goods within the State of New York.

46. Venue is proper because Plaintiff and numerous class members reside in Kings County, in the State of New York, and Defendant has, at all relevant times, been conducting business throughout Kings County in the State of New York.

## CLASS ALLEGATIONS

47. Plaintiff brings this class action pursuant to Article 9 of the CPLR on behalf of himself and those similarly situated. As detailed at length in this Complaint, Defendant orchestrated deceptive marketing and labeling practices. Defendant's customers were uniformly impacted by and exposed to this misconduct. Accordingly, this Complaint is uniquely situated for class-wide resolution, including injunctive relief.

48. The Class is defined as all consumers in the State of New York who purchased the products at any time during the period within the applicable statute of limitations.

49. The Class is properly brought and should be maintained as a class action under Article 9, satisfying the class action prerequisites of numerosity, commonality, typicality, and adequacy because:

50. Numerosity: Class Members are so numerous that joinder of all members is

impracticable. Plaintiff believes that there are thousands of consumers who are Class Members as described above who have been damaged by, *inter alia*, Defendant's deceptive and misleading practices.

51. Common Questions of Fact and Law: The questions of law and fact common to the Class Members which predominate over any questions which may affect individual Class Members include, but are not limited to:

    a) Whether Defendant is responsible for the conduct alleged herein which was uniformly directed at all consumers who purchased its products;

    b) Whether Defendant's misconduct set forth in this Complaint demonstrates whether Defendant has engaged in unfair, fraudulent, deceptive, or unlawful business practices with respect to the advertising, marketing, and sale of its products;

    c) Whether Defendant's false and misleading statements concerning its products and its concealment of material facts regarding the products were likely to deceive reasonable consumers;

    d) Whether Plaintiff and the Class are entitled to injunctive relief; and

    e) Whether Plaintiff and the Class are entitled to money damages.

52. Typicality: Plaintiff is a member of the Class. Plaintiff's claims are typical of the claims of each Class Member, in that, every member of the Class was susceptible to the same deceptive, misleading conduct and purchased Defendant's products. Plaintiff is entitled to relief under the same causes of action as the other Class Members.

53. Adequacy: Plaintiff is an adequate Class representative because his interests do not conflict with the interests of the Class Members he seeks to represent; his claims are

common to all members of the Class and he has a strong interest in vindicating his rights; he has retained counsel competent and experienced in complex class action litigation and they intend to vigorously prosecute this action. Plaintiff has no interests which conflict with those of the Class. The Class Members' interests will be fairly and adequately protected by Plaintiff and his counsel. Defendant has acted in a manner generally applicable to the Class, making relief appropriate with respect to Plaintiff and the Class Members. The prosecution of separate actions by individual Class Members would create a risk of inconsistent and varying adjudications.

54. The Class is properly brought and should be maintained as a class action under Article 9 because a class action is superior. Pursuant to Article 9, common issues of law and fact predominate over any other questions affecting only individual members of the class. The Class issues fully predominate over any individual issue because no inquiry into individual conduct is necessary, just a narrow focus on Defendant's deceptive and misleading product marketing and labeling practices. In addition, this Class is superior to other methods for fair and efficient adjudication of this controversy because, *inter alia*:

55. Superiority: A class action is superior to the other available methods for the fair and efficient adjudication of this controversy because:

    a) The joinder of thousands of individual Class Members is impracticable, cumbersome, unduly burdensome, and a waste of judicial and/or litigation resources;

    b) The individual claims of the Class Members may be relatively modest compared with the expense of litigating the claim, thereby making it

impracticable, unduly burdensome, and expensive—if not totally impossible—to justify individual actions;

c) When Defendant's liability has been adjudicated, all Class Members' claims can be determined by the Court and administered efficiently in a manner far less burdensome and expensive than if it were attempted through filing, discovery, and trial of all individual cases;

d) This class action will promote orderly, efficient, expeditious, and appropriate adjudication and administration of class claims;

e) Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action;

f) This class action will assure uniformity of decisions among Class Members; and

g) The Class is readily definable and prosecution of this action as a class action will eliminate the possibility of repetitious litigation.

**FIRST CAUSE OF ACTION**
**VIOLATION OF NEW YORK GBL §349**
**(On Behalf of Plaintiff and All Class Members)**

56. Plaintiff repeats and realleges each and every allegation contained in all the foregoing paragraphs as if fully set forth herein.

57. New York General Business Law Section 349 ("GBL § 349") declares unlawful "[d]eceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in this state…"

58. GBL § 349(h) directs that "any person who has been injured by reason of any violation of [GBL § 349] may bring an action in his own name to enjoin such unlawful act or practice…"

59. Defendant's conduct alleged herein constitutes recurring, "unlawful" deceptive acts and practices in violation of GBL § 349, and as such, Plaintiff and the Class Members seek actual monetary damages and the entry of preliminary and permanent injunctive relief against Defendant, enjoining it from inaccurately describing, labeling, marketing, and promoting its products.

60. There is no adequate remedy at law.

61. Defendant misleadingly, inaccurately, and deceptively presents its products.

62. Defendant's improper consumer-oriented conduct—including labeling and advertising that its products are "100% NATURAL"—is misleading in a material way in that it, *inter alia*, induced Plaintiff and Class Members to purchase and pay a premium for Defendant's product.

63. Plaintiff and the Class Members have been injured inasmuch as they paid a premium for products that were – contrary to Defendant's representations – not "100% NATURAL." Accordingly, Plaintiff and the Class Members received less than what they bargained and/or paid for.

64. Defendant's advertising and product labeling induced the Plaintiff and Class Members to buy Defendant's products.

65. Defendant's deceptive and misleading practices constitute a deceptive act and practice in the conduct of its business in violation of New York General Business Law § 349(a) and Plaintiff and the Class have been damaged thereby.

66. As a result of Defendant's recurring, "unlawful" deceptive acts and practices, Plaintiff and Class Members are entitled to actual monetary damages, injunctive relief, restitution and disgorgement of all monies obtained by means of the Defendant's unlawful conduct, interest, and attorneys' fees and costs.

67. Plaintiff and Class Members seek actual damages under GBL § 349, and expressly waive any right to recover minimum, punitive, treble and/or statutory damages pursuant to GBL § 349.

**SECOND CAUSE OF ACTION**
**VIOLATION OF NEW YORK GBL §350**
**(On Behalf of Plaintiff and All Class Members)**

68. Plaintiff repeats and realleges each and every allegation contained in all the foregoing paragraphs as if fully set forth herein.

69. N.Y. Gen. Bus. Law § 350, provides, in part, as follows:

> False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.

70. N.Y. Gen. Bus. Law § 350-a(1) provides , in part, as follows:

> The term 'false advertising' means advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity if such advertising is misleading in a material respect. In determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity or

employment to which the advertising relates under the conditions proscribed in said advertisement, or under such conditions as are customary or usual…

71. Defendant's labeling and advertisements contain untrue and materially misleading statements concerning Defendant's products inasmuch as they misrepresent that the products are "100% NATURAL."

72. Plaintiff and the Class Members have been injured inasmuch as they relied upon the labeling and advertising and paid a premium for products that, were contrary to Defendant's representations, not "100% NATURAL." Accordingly, Plaintiff and the Class Members received less than what they bargained and/or paid for.

73. Defendant's advertising and product labeling induced the Plaintiff and Class Members to buy Defendant's products.

74. Defendant knew, or by exercising reasonable care should have known, that its statements and representations as described in this Complaint were untrue and/or misleading.

75. Defendant's conduct constitutes multiple, separate violations of N.Y. Gen. Bus. Law § 350.

76. Defendant made the material misrepresentations described in this Complaint in Defendant's advertising and on its products' labels.

77. Defendant's material misrepresentations were substantially uniform in content, presentation, and impact upon consumers at large. Moreover, all consumers purchasing the products were and continue to be exposed to Defendant's material misrepresentations.

78. As a result of the Defendant's false or misleading advertising, Plaintiff and Class Members are entitled to monetary damages, injunctive relief, restitution and disgorgement of all monies obtained by means of Defendants' unlawful conduct, interest,

and attorneys' fees and costs.

79. Plaintiff and Class Members seek actual damages under GBL § 350, and expressly waive any right to recover minimum, punitive, or treble and/or statutory damages pursuant to GBL § 350.

**THIRD CAUSE OF ACTION**
**VIOLATION OF NEW YORK GBL LAW § 350-a(1) BY OMISSION**
**(On Behalf of Plaintiff and All Class Members)**

80. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

81. N.Y. Gen. Bus. Law § 350-a(1) expressly covers material omissions:

> In determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity or employment to which the advertising relates under the conditions proscribed in said advertisement, or under such conditions as are customary or usual…

82. Defendant's product labeling and advertising contains misleading and/or unfair material omissions concerning Defendant's products, including: that the products are not "100% NATURAL," and that the products contain synthetic ingredients.

83. Plaintiff and the Class Members have been injured inasmuch as they relied upon the labels and advertising and paid a premium for products that, contrary to Defendant's labels and advertising, are not "100% NATURAL."

84. Defendant knew, or in the exercise of reasonable care should have known, that the statements and representations made about the products as described in this Complaint omitted material facts.

85. Defendant's dissemination of advertising and labeling containing material omissions of fact constitutes multiple, separate violations of N.Y. Gen. Bus. Law § 350.

86. Defendant's material misrepresentations by way of omissions, as described in this Complaint, were substantially uniform in content, presentation, and impact upon consumers at large. Moreover, all consumers purchasing the products were and continue to be exposed to Defendant's material misrepresentations by way of omissions.

87. Defendant's advertising and product labeling induced the Plaintiff and Class Members to buy the products.

88. Plaintiff and Class Members relied on Defendant's advertising, which was deceptive, false, and contained material omissions.

89. As a result of Defendants' false and misleading advertising and labeling, the Plaintiff and Class Members are entitled to monetary damages, injunctive relief, restitution and disgorgement of all monies obtained by means of Defendants' unlawful conduct, interest, and attorneys' fees and costs.

90. Plaintiff and Class Members seek actual damages under GBL § 350-a(1), and expressly waive any right to recover minimum, punitive, or treble and/or statutory damages pursuant to GBL § 350-a(1).

**FOURTH CAUSE OF ACTION**
**BREACH OF EXPRESS WARRANTY**
**(On Behalf of Plaintiff and All Class Members)**

91. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

92. Defendant provided the Plaintiff and Class Members an express warranty in the form of written affirmations of fact promising and representing that its products are "100% NATURAL."

93. The above affirmations of fact were not couched as "belief" or "opinion," and were not "generalized statements of quality not capable of proof or disproof."

94. These affirmations of fact became part of the basis for the bargain and were material to the transaction for the Plaintiff's and Class Members' transactions.

95. Plaintiff and Class Members reasonably relied upon the Defendant's affirmations of fact and justifiably acted in ignorance of the material facts omitted or concealed when they decided to buy Defendant's product.

96. Defendant was given opportunities to cure its default but refused to do so.

97. Contrary to Defendant's affirmations of fact, Defendant breached the express warranty because the products are not "100% NATURAL."

98. As a result of the foregoing, Plaintiff and the Class Members have been damaged in the premium amount paid to purchase the products, together with interest thereon from the date of purchase.

**FIFTH CAUSE OF ACTION**
**BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY**
**(On Behalf of Plaintiff and All Class Members)**

99. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

100. Defendant is in the business of manufacturing, producing, distributing, and selling the products.

101. Under the Uniform Commercial Code's implied warranty of merchantability, Defendant warranted to the Plaintiff and the Class Members that the product is "100% NATURAL."

102. Defendant breached the implied warranty of merchantability in that the products' ingredients deviate from the labels and product descriptions, and reasonable consumers expecting products that conform to their labels would not accept the products if they knew that they are not "100% NATURAL," and, in fact, contain synthetic ingredients associated with health hazards and adverse health effects.

103. Defendant breached the implied warranty of merchantability in that Defendant's products do not conform to the promises or affirmations of fact made on the products' containers or labels or literature. Any reasonable consumer would not accept the products if they knew that the products are not "100% NATURAL" and, in fact, contain synthetic ingredients associated with health hazards and adverse health effects.

104. Within a reasonable time after the Plaintiff discovered that the products are not "100% NATURAL," Plaintiff notified Defendant of such breach.

105. The inability of the product to meet the label description was wholly due to the Defendant's fault and without Plaintiff's fault or neglect, and was solely due to the Defendant's manufacture and distribution of the products to the public.

106. As a result of the foregoing, Plaintiff and the Class Members have been damaged in the amount paid for the Defendant's product, together with interest thereon from the date of purchase.

**SIXTH CAUSE OF ACTION**
**COMMON LAW UNJUST ENRICHMENT**
**(On Behalf of Plaintiff and All Class Members)**

107. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

108. Plaintiff, on behalf of himself and consumers in New York, brings a common law claim for unjust enrichment.

109. In addition to the violations set forth above, Defendant has violated, *inter alia*, NY General Business Law § 392-b by: a) putting upon an article of merchandise, bottle, wrapper, package, label or other thing, containing or covering such an article, or with which such an article is intended to be sold, or is sold, a false description or other indication of or respecting the kind of such article or any part thereof; and b) selling or offering for sale an article, which to their knowledge is falsely described or indicated upon any such package, or vessel containing the same, or label thereupon, in any of the particulars specified.

110. Defendant's unlawful conduct as described in this Complaint allowed Defendant to knowingly realize substantial revenues from selling its products at the expense, and to the detriment and/or impoverishment, of the Plaintiff and Class Members, and to the

Defendant's benefit and enrichment. Defendant has thereby violated fundamental principles of justice, equity, and good conscience.

111. Plaintiff and Class Members conferred significant financial benefits and paid substantial compensation to Defendant for products that were not as Defendant represented.

112. Under common law principles of unjust enrichment, it is inequitable for Defendant to retain the benefits conferred by Plaintiff's and Class Members' overpayments.

113. Plaintiff and Class Members seek disgorgement of all profits resulting from such overpayments and establishment of a constructive trust from which Plaintiff and Class Members may seek restitution.

**JURY DEMAND**

Plaintiff demands a trial by jury on all issues.

**WHEREFORE**, Plaintiff, on behalf of himself and the Class, prays for judgment as follows:

(a) Declaring this action to be a proper class action and certifying Plaintiff as the representative of the Class under Article 9 of the CPLR;

(b) Entering preliminary and permanent injunctive relief against Defendant, directing Defendant to correct its practices and to comply with the law;

(c) Awarding actual monetary damages pursuant to GBL § 349 and GBL § 350, excluding any right to recover minimum, punitive, treble, and/or statutory damages pursuant thereto;

(d) Awarding Plaintiff and Class Members their costs and expenses incurred in this action, including reasonable allowance of fees for Plaintiff's attorneys and experts, and reimbursement of Plaintiff's expenses; and

(e) Granting such other and further relief as the Court may deem just and proper.

Dated: June 18, 2015

**THE SULTZER LAW GROUP, P.C.**

Joseph Lipari /s/
By: _____

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