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Attorneys for Plaintiffs

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF VENTURA

EMMA BRENNER, JONATHON
GRINDELL, ADRIANNE HIRKA,
ADDISON HORINE, JESSICA TORRES,
CONSTANCE COFFIN, RAY GLASS,
HARVEY SITNICK, CINDY PRINCE,
KAILEE CENIS, SUZY RAMIREZ, JASON
MILLER, TODD COOK, LAURI
SINCAVAGE, PATRICK DECOLA, MISTY
STEMPLE, TRAVIS WEAVER, RAYONA
YOUNG, and MICHAEL MORELLI
individually and on behalf of all others
similarly situated,

Plaintiff,

v.

KEVITA, INC., a California company;
PEPISCO, INC., a North Carolina company.;
and DOES 1 through 10, inclusive,

Defendants.

CASE NO. 56-2017-00502340-CU-FR-VTA

[Assigned for all purposes to the Hon. Mark S.
Borrell, Department 40]

**CLASS ACTION SECOND AMENDED
COMPLAINT FOR:**

- 1. FALSE AND MISLEADING
ADVERTISING IN VIOLATION OF
BUSINESS AND PROFESSIONS
CODE §17200, et seq.**
- 2. FALSE AND MISLEADING
ADVERTISING IN VIOLATION OF
BUSINESS AND PROFESSIONS
CODE §17500, et seq.**
- 3. VIOLATION OF CALIFORNIA
CIVIL CODE § 1750. et seq.**
- 4. UNJUST ENRICHMENT**
- 5. BREACH OF EXPRESS
WARRANTY**
- 6. BREACH OF IMPLIED
WARRANTY**
- 7. VIOLATION OF CONSUMER
FRAUD LAWS**
- 8. NEGLIGENT
MISREPRESENTATION**

JURY TRIAL DEMANDED

1 Plaintiffs Emma Brenner, Jonathon Grindell, Adrienne Hirka, Addison Horine, Jessica
2 Torres, Constance Coffin, Ray Glass, Harvey Sitnick, Cindy Prince, Kailee Cenis, Suzy
3 Ramirez, Jason Miller, Todd Cook, Lauri Sincavage, Patrick Decola, Misty Stemple, Travis
4 Weaver, Jessica Torres, Rayona Young, and Michael Morelli (“Plaintiffs”) allege the following
5 based upon personal knowledge as to themselves and their own acts, and upon information and
6 belief and the investigation by Plaintiffs’ counsel which included, among other things, a review
7 of public documents, marketing materials, and announcements made by KeVita Inc. and
8 Pepsico Inc. (“Defendants” or “KeVita”) as to all other matters. Plaintiffs believe that
9 substantial additional evidentiary support exists for the allegations set forth herein and will be
10 available after a reasonable opportunity for discovery.

11 NATURE OF THE ACTION

12 1. The recent spike in popular awareness that not all bacteria is evil—and that many are
13 reportedly good and beneficial for human health—has created a fascination with live cultures
14 and fermented products. This idea has brought the centuries-old drink, Kombucha, roaring into
15 upper-middle class consciousness at upwards of \$5 per bottle.

16 2. According to the new Market Research Report "Kombucha Market Research Report
17 By Type (Bacteria, Yeast, Mold, Others), By Flavor (Herbs & Spices, Citrus, Berries, Apple,
18 Coconut & Mangoes, Flowers, Others), By Region - Global Forecasts To 2020," The global
19 kombucha market is estimated to grow from \$0.6 billion in 2015 to \$1.8 billion by 2020, at a
20 compound annual growth rate of 25.0% from 2015 to 2020.

21 3. Kombucha is generally derived from a sugar-sweetened tea (black or green) that has
22 been mixed with yeast and bacteria and then given time to ferment. The microbes are together
23 known as a SCOBY (symbiotic colony of bacteria and yeast). The result is an effervescent, tart,
24 and slightly sweet beverage. Depending on the added flavors, kombucha can taste fruity, floral,
25 spicy, or herbaceous. It has a flavor profile similar to sparkling apple cider but with a more
26 pronounced sour taste.

27 4. It is the fermentation process that truly defines the beverage and the byproduct of
28 this process that drives consumer demand. Due to the fermentation process involved in creating

1 kombucha, the resultant beverage contains a large number of healthy bacteria known as
2 probiotics. These bacteria line your digestive tract and have been touted for their purported
3 ability to increase general health and wellness and to support the immune system, as they absorb
4 nutrients and fight infection and illness.

5 5. Indeed, the KeVita website directly panders to and perpetuate such notions extolling
6 that “[p]robiotics play a crucial role in improving digestive health. They support and enhance
7 the beneficial bacteria that line the gut, and, a healthy gut improves the absorption of essential
8 nutrients in foods and supplements, contributing to your improved health!¹” KeVita
9 underscores this message by advertising, representing and warranting on the label of each of
10 their KeVita Master Brew Kombucha beverages that “...total health begins at your core” and
11 that the product is “Energizing to the Core!”

12 6. Such advertisements, representations and warranties are a part of KeVita’s integrated
13 uniform marketing campaign crafted to capitalize on health-conscious consumers’ demand for
14 probiotics and functional beverages. KeVita labels each and every one of is KeVita Master
15 Brew Kombucha beverages with the advertisement, representation and warranty that the
16 products:

- 17 • Are “Fermented”;
- 18 • Contain “Kombucha Culture”;
- 19 • Contain the highly prized “Live probiotics” for which kombucha consumers
20 purchase the beverage;
- 21 • Are “...fermented with our proprietary tea culture, which yields high levels of
22 beneficial organic acids;” and
- 23 • Are “Crafted with live probiotics.”

24 7. These representations, warranties and advertisements however are false and
25 deceptive because all of the KeVita Master Brew Kombucha beverages are pasteurized after
26 fermentation.

27 _____

28 ¹ <http://kevita.com/live-culture/#124548>

1 8. KeVita Kombucha was originally crafted as a raw fermented beverage. Indeed,
2 KeVita went to great lengths to capitalize on its original raw and unpasteurized formulation. As
3 KeVita CEO and co-founder Bill Moses boasted, “[s]everal kombucha manufacturers utilize
4 **pasteurization that kill the live cultures** in order to limit alcohol production...However, at
5 KeVita, **we’ve devised a proprietary technique that enables us to deliver a delicious, live**
6 **and active raw culture through the end of shelf-life².**”

7 9. At present, however, and throughout the relevant class period, KeVita shifted from
8 its original raw and unpasteurized formulation for a manipulated and pasteurized formulation
9 which permits Defendants to mass produce and distribute the beverages, thereby increasing the
10 profits derived therefrom. The bacteria killed during the pasteurization process includes,
11 amongst others, the very probiotics touted on the KeVita website for which consumers chose to
12 purchase and consume KeVita’s Master Brew Kombucha. Such “pasteurized kombucha” is
13 perhaps more aptly titled “kombucha-flavored tea” because the benefits of healthy bacteria have
14 been lost during that process. The pasteurization process is never disclosed to consumers who
15 would otherwise have no way of knowing, at the point of sale, such material information.

16 10. Given that pasteurization is antithetical to kombucha and the fermentation process
17 from which it is derived (and the very culture and processes from which KeVita Master Brew
18 Kombucha was originally crafted), KeVita goes to great lengths to conceal the pasteurization
19 process. Although the KeVita Master Brew Kombucha is transported in non-refrigerated trucks,
20 KeVita purchases shelf space in the refrigerated section of stores ensuring that the bottles are
21 presented to consumers in the same fashion as it was previously provided and as other natural
22 process un-pasteurized kombucha beverages. KeVita further perpetuates the idea that its
23 KeVita Master Brew Kombucha remains unpasteurized by uniformly plastering warning on
24 each beverage’s label, instructing consumers to: “keep refrigerated” as the beverage is
25 “perishable.” Such placement and representation are designed to and does, perpetuate the belief
26 KeVita has instilled into reasonable consumers such as Plaintiffs that the KeVita Master Brew

27 _____
28 ² https://www.nutraceuticalsworld.com/contents/view_online-exclusives/2012-01-30/fizzy-

1 Kombucha are produced as originally formulated and in the traditional and un-manipulated
2 manner utilized by KeVita’s competitors.

3 11. Additionally, to tap into the small batch nature of historical Kombucha beverages,
4 and to tether itself to the traditional methods of production consumers desire, KeVita advertises
5 on each label of the KeVita Master Brew Kombucha that its kombucha beverages are
6 “handcrafted.”

7 12. The use of these terms and natural imagery is designed to, and does, induce
8 consumers, such as Plaintiff and the members of the putative classes, into believing that KeVita
9 is still the raw unpasteurized product that they expect.

10 13. When purchasing the product, Plaintiffs relied on Defendants’ misrepresentations
11 and omissions and believed that the KeVita Master Brew Kombucha was fermented without
12 subsequent pasteurization and contained “beneficial organic acids yielded from the fermentation
13 and “live probiotics” which were derived from that original fermentation and not subsequently
14 added to the product after pasteurization. Plaintiffs would not have purchased KeVita Master
15 Brew Kombucha and/or would not have paid a premium for this product if they had known that
16 Defendants’ representations were false and misleading. Plaintiffs suffered an injury by
17 purchasing the KeVita Master Brew Kombucha. Plaintiffs did not receive a true kombucha
18 beverage, rather, they received a product that was pasteurized after fermentation and
19 manipulated thereafter to mimic the traditional and natural fermentation process.

20 14. Defendants’ conduct of falsely marketing, advertising, labeling, and selling KeVita
21 as fermented and “live” without disclosing (and in fact actively concealing) the pasteurization
22 constitutes unfair, unlawful, and fraudulent conduct; is likely to deceive members of the public;
23 and is unethical, oppressive, unscrupulous, and/or substantially injurious to consumers, because,
24 among other things, it misrepresents the characteristics of goods and services.

25 15. Defendants’ conduct of falsely marketing, advertising, labeling, and selling KeVita
26 as fermented and “live” without disclosing (and in fact actively concealing) the pasteurization

27
28 lifting-drinks/ (emphasis added)

1 constitutes unfair, unlawful, and fraudulent conduct; is likely to deceive members of the public;
2 and is unethical, oppressive, unscrupulous, and/or substantially injurious to consumers, because,
3 among other things, it misrepresents the characteristics of goods and services.

4 16. As such, Plaintiffs seek relief in this action individually, and on behalf of all
5 purchasers of KeVita's Master Brew Kombucha Beverages, for Defendants' violations of the
6 California Consumer Legal Remedies Act ("CLRA"), Civil Code §§ 1750, et seq., Unfair
7 Competition Law ("UCL"), Bus. & Prof. Code §§ 17200, et seq., False Advertising Law
8 ("FAL"), Bus. & Prof. Code §§ 17500, et seq., for breach of express and implied warranties,
9 negligent misrepresentation, fraud, and unjust enrichment.

10 **JURISDICTION AND VENUE**

11 17. Both jurisdiction and venue are proper in this Court. Defendants conduct, or have
12 conducted, a substantial amount of business activity in California. Defendants have sufficient
13 minimum contacts in California or otherwise intentionally avail themselves of the California
14 market through, without limitation, their advertisement, promotion, marketing, sales and/or
15 distribution of KeVita in the State of California and the County of Ventura and other business
16 activities, so as to render the exercise of jurisdiction over the Defendants by the California
17 courts consistent with traditional notions of fair play and substantial justice. Additionally,
18 Defendant KeVita Inc., is a California company headquartered in Ventura County.

19 18. Venue is proper in this Court because Defendant KeVita Inc. is headquartered in this
20 Ventura County and Defendants regularly conduct business in Ventura County, because
21 Plaintiff lives in Ventura County, and because the conduct alleged herein which gives rise to the
22 claims asserted occurred within Ventura County. Specifically, Plaintiff Emma Brenner
23 ("Brenner") purchased the subject product at stores in Ventura County.

24 19. Defendants have distributed, marketed, advertised, labeled, and sold KeVita which is
25 the subject of the present Complaint, in this District. Thus, under 28 U.S.C. §§1391(c)(2) and
26 (d), Defendants are deemed to reside in this District. As such, venue is proper in this judicial
27 district under 28 U.S.C. §1391(b)(1) because Defendants are deemed to reside in this District
28 and under 28 U.S.C. §1391(b)(2), because Defendants conduct business in this District and a
substantial part of the acts or omissions giving rise to the claims set forth herein occurred in this

1 District.

2 **PARTIES**

3 20. Plaintiff Brenner is a citizen of California and an individual consumer. During the
4 Class Period, Plaintiff Brenner purchased the KeVita Master Brew Kombucha at a grocery
5 stores in Agoura Hills, Westlake Village and Chico California. In the last year, Plaintiff spent
6 approximately sixty dollars (\$60) purchasing the KeVita Master Brew Kombucha for her
7 personal consumption. Additionally, at her request, Plaintiff Brenner caused her family to
8 purchase 8-10 bottles of the KeVita Master Brew Kombucha per month. On or about
9 September 12, 2017, Plaintiff Brenner received an email confirmation from KeVita Consumer
10 Relations confirming that the KeVita Master Brew Kombucha beverages were pasteurized.

11 21. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Brenner read and
12 relied upon false and misleading statements that were prepared by and/or approved by
13 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
14 packaging. For each purchase, she understood that she was paying for a fermented and live
15 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
16 fermentation process and was deceived when she received a product that was pasteurized and
17 manipulated post-fermentation.

18 22. During the Class Period, Plaintiff Jonathon Grindell (“Plaintiff Grindell”) was a
19 citizen of the States of Washington and Oregon. Plaintiff Grindell is currently a resident of
20 Washington. During the Class Period, Plaintiff Grindell purchased the KeVita Master Brew
21 Kombucha at stores in Seattle, Washington and in Oregon. Plaintiff Grindell began purchasing
22 KeVita Master Brew Kombucha approximately six to seven years ago. Plaintiff Grindell
23 typically purchased and consumed KeVita Master Brew Kombucha weekly and/or purchased
24 several bottles at a time and drank them over the course of a month.

25 23. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Grindell read and
26 relied upon false and misleading statements that were prepared by and/or approved by
27 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
28 packaging. For each purchase, he understood that he was paying for a fermented and live

1 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
2 fermentation process and was deceived when he received a product that was pasteurized and
3 manipulated post-fermentation.

4 24. Plaintiff Adrienne Hirka (“Plaintiff Hirka”) is a citizen of Texas and an
5 individual consumer. During the Class Period, Plaintiff Hirka purchased the KeVita Master
6 Brew Kombucha at stores in Houston, Texas including Randall’s. Plaintiff Hirka began drinking
7 KeVita Master Brew Kombucha approximately four years ago. Generally, Plaintiff Hirka
8 purchased 1-2 bottles of KeVita Master Brew Kombucha per week. Plaintiff Hirka recalls
9 purchasing the Blueberry Cherry, Lavender, Mojito Coconut and Strawberry Acai Coconut
10 flavor.

11 25. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Hirka read and
12 relied upon false and misleading statements that were prepared by and/or approved by
13 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
14 packaging. For each purchase, she understood that she was paying for a fermented and live
15 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
16 fermentation process and was deceived when she received a product that was pasteurized and
17 manipulated post-fermentation.

18 26. Plaintiff Addison Horine (“Plaintiff Horine”) is a citizen of Texas and an individual
19 consumer. During the Class Period, Plaintiff Horine purchased the KeVita Master Brew
20 Kombucha at stores in Odessa, Texas. For the last three years, Plaintiff Horine purchased and
21 consumed 50-60 bottles of KeVita Master Brew Kombucha per year.

22 27. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Horine read and
23 relied upon false and misleading statements that were prepared by and/or approved by
24 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
25 packaging. For each purchase, he understood that he was paying for a fermented and live
26 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
27 fermentation process and was deceived when he received a product that was pasteurized and
28 manipulated post-fermentation.

1 28. Plaintiff Jessica Torres (“Plaintiff Torres”) is a citizen of Virginia and an individual
2 consumer. During the Class Period, Plaintiff Torres purchased the KeVita Master Brew
3 Kombucha at stores in and around Arlington, Plaintiff Torres started purchasing KeVita Master
4 Brew Kombucha approximately two years ago. Plaintiff Torres generally purchases and
5 consumes KeVita Master Brew Kombucha a couple of times per month.

6 29. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Torres read and
7 relied upon false and misleading statements that were prepared by and/or approved by
8 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
9 packaging. For each purchase, she understood that she was paying for a fermented and live
10 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
11 fermentation process and was deceived when she received a product that was pasteurized and
12 manipulated post-fermentation. Plaintiff Torres recalls purchasing the Pineapple Peach flavor.

13 30. Plaintiff Constance Coffin (“Plaintiff Coffin”) is a citizen of New York and an
14 individual consumer. During the Class Period, Plaintiff Coffin purchased the KeVita Master
15 Brew Kombucha at stores such as Fairway Market in and around Brooklyn, New York. Plaintiff
16 Coffin purchases and consumes KeVita Master Brew Kombucha on a near daily basis
17 (sometimes as many as five KeVita Master Brew Kombucha products in a given day.) Plaintiff
18 Coffin recalls purchasing the Ginger flavor.

19 31. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Coffin read and
20 relied upon false and misleading statements that were prepared by and/or approved by
21 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
22 packaging. For each purchase, she understood that she was paying for a fermented and live
23 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
24 fermentation process and was deceived when she received a product that was pasteurized and
25 manipulated post-fermentation.

26 32. Plaintiff Ray Glass, (“Plaintiff Glass”) is a citizen of New Jersey and an individual
27 consumer. During the Class Period, Plaintiff Glass purchased the KeVita Master Brew
28 Kombucha at stores in and around West Orange, New Jersey.

1 33. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Glass read and
2 relied upon false and misleading statements that were prepared by and/or approved by
3 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
4 packaging. For each purchase, he understood that she was paying for a raw, fermented and live
5 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
6 fermentation process and was deceived when he received a product that was pasteurized and
7 manipulated post-fermentation.

8 34. Plaintiff Harvey Sitnick, (“Plaintiff Sitnick”) is a citizen of California and an
9 individual consumer. During the Class Period, Plaintiff Sitnick purchased the KeVita Master
10 Brew Kombucha at a grocery stores in Boca Raton, Florida. Generally, in the last four years,
11 Plaintiff Sitnick purchases and consumes 2-3 bottles of KeVita Master Brew Kombucha per
12 week. Plaintiff Sitnick believes he has purchased all the flavors but especially prefers drinking
13 the Tart Cherry and Blueberry Basil flavors.

14 35. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Sitnick read and
15 relied upon false and misleading statements that were prepared by and/or approved by
16 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
17 packaging. For each purchase, he understood that he was paying for a fermented and live
18 kombucha beverage with the “mother”, probiotics and beneficial organic acids yielded from the
19 natural fermentation process and was deceived when he received a product that was pasteurized
20 and manipulated post-fermentation.

21 36. Plaintiff Cindy Prince, (“Plaintiff Prince”) is a citizen of Hawaii and an individual
22 consumer. During the Class Period, Plaintiff Prince purchased the KeVita Master Brew
23 Kombucha at stores in and around Hilo, Hawaii. Plaintiff purchased at least one bottle of
24 KeVita Master Brew Kombucha in the last four years.

25 37. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Prince read and
26 relied upon false and misleading statements that were prepared by and/or approved by
27 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
28 packaging. For each purchase, she understood that she was paying for a fermented and live

1 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
2 fermentation process and was deceived when she received a product that was pasteurized and
3 manipulated post-fermentation.

4 38. Plaintiff Kailee Cenis (“Plaintiff Cenis”) is a citizen of Massachusetts and an
5 individual consumer. During the Class Period, Plaintiff Cenis purchased the KeVita Master
6 Brew Kombucha at stores in and around Ashby, Massachusetts. Plaintiff Cenis began drinking
7 kombucha approximately four years ago. Generally, Plaintiff Cenis purchases and consumes 3
8 bottles of KeVita Master Brew Kombucha every other week.

9 39. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Cenis read and
10 relied upon false and misleading statements that were prepared by and/or approved by
11 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
12 packaging. For each purchase, she understood that she was paying for a fermented and live
13 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
14 fermentation process and was deceived when she received a product that was pasteurized and
15 manipulated post-fermentation. Plaintiff Coffin recalls purchasing the Tart Cherry and
16 Raspberry flavors.

17 40. Plaintiff Suzy Ramirez (“Plaintiff Ramirez”) is a citizen of Arizona and an
18 individual consumer. During the Class Period, Plaintiff Ramirez purchased the KeVita Master
19 Brew Kombucha at stores in and around Phoenix, Arizona. Plaintiff Ramirez has also
20 purchased and consumed KeVita Master Brew Kombucha in the State of Minnesota. Plaintiff
21 Ramirez purchases and consumes KeVita Master Brew Kombucha regularly.

22 41. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Ramirez read and
23 relied upon false and misleading statements that were prepared by and/or approved by
24 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
25 packaging. For each purchase, she understood that she was paying for a fermented and live
26 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
27 fermentation process and was deceived when she received a product that was pasteurized and
28 manipulated post-fermentation.

1 42. Plaintiff Jason Miller (“Plaintiff Miller”) is a citizen of Michigan and an individual
2 consumer. During the Class Period, Plaintiff Cenis purchased the KeVita Master Brew
3 Kombucha at stores in and around Battle Creek, Michigan. Plaintiff Miller has purchased and
4 consumed at least 40 bottles of KeVita Master Brew Kombucha. Plaintiff Miller purchased
5 flavors such as Ginger, Raspberry Lemon, Lavender Melon, Tart Cherry and Citrus.

6 43. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Miller read and
7 relied upon false and misleading statements that were prepared by and/or approved by
8 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
9 packaging. For each purchase, he understood that he was paying for a fermented and live
10 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
11 fermentation process and was deceived when he received a product that was pasteurized and
12 manipulated post-fermentation.

13 44. Plaintiff Todd Cook (“Plaintiff Cook”) is a citizen of Connecticut and an individual
14 consumer. During the Class Period, Plaintiff Cook purchased and consumed on average one
15 bottle per day during a two-year period. Plaintiff Cook purchased KeVita Master Brew
16 Kombucha at stores in and around New Haven, Connecticut. Plaintiff Cook typically purchased
17 ginger flavor but tried many other flavors.

18 45. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Cook read and
19 relied upon false and misleading statements that were prepared by and/or approved by
20 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
21 packaging. For each purchase, he understood that he was paying for a fermented and live
22 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
23 fermentation process and was deceived when he received a product that was pasteurized and
24 manipulated post-fermentation.

25 46. Plaintiff Lauri Sincavage (“Plaintiff Sincavage”) is a citizen of Connecticut and an
26 individual consumer. During the Class Period, Plaintiff Cenis purchased the KeVita Master
27 Brew Kombucha at stores in and around Milford, Connecticut and in New York. For the past 2-
28 3 years, Plaintiff Sincavage began purchasing and consuming KeVita Master Brew Kombucha a

1 half-dozen times per month.

2 47. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Sincavage read
3 and relied upon false and misleading statements that were prepared by and/or approved by
4 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
5 packaging. For each purchase, she understood that she was paying for a fermented and live
6 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
7 fermentation process and was deceived when she received a product that was pasteurized and
8 manipulated post-fermentation.

9 48. Plaintiff Patrick DeCola (“Plaintiff DeCola”) is a citizen of Massachusetts and an
10 individual consumer. During the Class Period, Plaintiff DeCola s purchased the KeVita Master
11 Brew Kombucha at stores such as Target and Market Basket in and around Somersworth, New
12 Hampshire. Plaintiff DeCola began purchasing and consuming KeVita Master Brew Kombucha
13 in approximately 2015 or 2016. Plaintiff DeCola has purchased KeVita Master Brew
14 Kombucha dozens of times during the Class Period including the following flavors: Ginger,
15 Tart Cherry, and Raspberry Lemon.

16 49. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff DeCola read and
17 relied upon false and misleading statements that were prepared by and/or approved by
18 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
19 packaging. For each purchase, he understood that he was paying for a fermented and live
20 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
21 fermentation process and was deceived when he received a product that was pasteurized and
22 manipulated post-fermentation.

23 50. Plaintiff Misty Stemple (“Plaintiff Stemple”) is a citizen of Ohio and an individual
24 consumer. During the Class Period, Plaintiff Stemple purchased the KeVita Master Brew
25 Kombucha at a health food store in Cuyahoga Falls, Ohio. Plaintiff Stemple first purchased
26 KeVita approximately two years ago. Generally, Plaintiff Stemple purchased and consumed one
27 to three bottles of KeVita Master Brew Kombucha each week.

28 51. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Stemple read and

1 relied upon false and misleading statements that were prepared by and/or approved by
2 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
3 packaging. For each purchase, she understood that she was paying for a fermented and live
4 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
5 fermentation process and was deceived when she received a product that was pasteurized and
6 manipulated post-fermentation.

7 52. Plaintiff Travis Weaver (“Plaintiff Weaver”) is a citizen of Utah and an individual
8 consumer. During the Class Period, Plaintiff Weaver purchased the KeVita Master Brew
9 Kombucha at stores such as Whole Foods and Sprouts in and around Blanding, Utah. During
10 the Class Period, Plaintiff Weaver would purchase and consumer several bottles of KeVita
11 Master Brew Kombucha 1-2 times per month.

12 53. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Weaver read and
13 relied upon false and misleading statements that were prepared by and/or approved by
14 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
15 packaging. For each purchase, he understood that he was paying for a fermented and live
16 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
17 fermentation process and was deceived when he received a product that was pasteurized and
18 manipulated post-fermentation.

19 54. Plaintiff Rayona Young (“Plaintiff Young”) is a citizen of Maryland and an
20 individual consumer. During the Class Period, Plaintiff Young purchased the KeVita Master
21 Brew Kombucha at stores in and around Edgewood, Maryland. Plaintiff Young began drinking
22 kombucha in or about 2015. Generally, Plaintiff Young purchases and consumes 2 bottles of
23 KeVita Master Brew Kombucha per week.

24 55. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Young read and
25 relied upon false and misleading statements that were prepared by and/or approved by
26 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
27 packaging. For each purchase, she understood that she was paying for a fermented and live
28 kombucha beverage with probiotics and beneficial organic acids yielded from the natural

1 fermentation process and was deceived when she received a product that was pasteurized and
2 manipulated post-fermentation.

3 56. Plaintiff Michael Morelli ("Plaintiff Morelli") is a citizen of Colorado and an
4 individual consumer. During the Class Period, Plaintiff Morelli purchased the KeVita Master
5 Brew Kombucha at stores such as Costco in and around Colorado Springs, Colorado. Plaintiff
6 Morelli has also purchased KeVita Master Brew Kombucha beverages in the States of
7 California, Florida and Illinois. Plaintiff Morelli regularly purchases and consumes KeVita
8 Master Brew Kombucha (approximately 10-15 bottles of KeVita Master Brew Kombucha per
9 week).

10 57. Prior to purchasing the KeVita Master Brew Kombucha, Plaintiff Morelli read and
11 relied upon false and misleading statements that were prepared by and/or approved by
12 Defendants and their agents and disseminated through the KeVita Master Brew Kombucha
13 packaging. For each purchase, he understood that he was paying for a fermented and live
14 kombucha beverage with probiotics and beneficial organic acids yielded from the natural
15 fermentation process and was deceived when he received a product that was pasteurized and
16 manipulated post-fermentation.

17 58. Defendant KeVita Inc. is a California Company headquartered in Oxnard,
18 California. During the Class Period, KeVita Inc. was acquired by PepsiCo Inc., in or around
19 November of 2016.

20 59. Defendant PepsiCo Inc. is an American multinational multi-national food, snack,
21 and beverage corporation headquartered in Purchase, New York.

22 60. The use of the term "defendants" or "Defendants" in any of the allegations in this
23 Complaint, unless specifically alleged otherwise, is intended to include and charge, both jointly
24 and severally, not only the Defendants identified in this Complaint, but also all Defendants
25 designated as DOES 1 through 10, inclusive, as though the term "Defendants" was followed in
26 each and every instance throughout this Complaint with the phrase "and each of them jointly
27 and severally, including all named Defendants and Defendants included herein and sued under
28 the fictitious names of DOES 1 through 10, inclusive."

1 61. Plaintiffs are informed and believe, and thereon allege, that Defendants, at all times
2 herein mentioned, were the partners, joint venturers, subsidiaries, successors in interest,
3 managing agent, merged entities, agents, alter egos, part of a jointly owned, managed, and/or
4 operated business enterprise, and/or employees of each other Defendant and in doing the acts,
5 omissions, and things alleged herein were acting as such and within the scope of their authority
6 as such agents and employees and with the permission and consent of all other Defendants.
7 Plaintiffs are informed and believe, and thereon allege, that Defendants have, and always herein
8 mentioned had, a joint economic and business interest, goal and purpose in the products that are
9 the subject of this lawsuit.

10 **ALLEGATIONS OF FACT**

11 **A. HISTORY OF KOMBUCHA**

12 62. The word “kombucha” is of uncertain etymology. The American Heritage
13 Dictionary suggests that it is probably from Japanese, “tea made from kombu (the Japanese
14 word for kelp perhaps being used by English speakers to designate fermented tea due to
15 confusion or because the thick gelatinous film produced by the kombucha culture was thought
16 to resemble seaweed).” Other sources report that the name “kombucha” is derived from Dr.
17 Kombu, a Korean physician who brought the fermented tea to Japan.

18 63. The origins of the beverage kombucha are likewise a bit murky, much like the
19 beverage itself. It is popularly believed that Kombucha originated in Northeast China
20 (historically referred to as Manchuria) around 220 B.C.³ Since inception Kombucha has been
21 prized for its healing properties⁴.

22 64. According to a Russian fable, the first kombucha culture originated from an ant. As
23 the story goes, a monk with healing powers was summoned to help an ailing emperor. The
24 monk promised to treat the emperor’s sickness with an ant, dropping a single insect into the
25 emperor’s tea and advising him to wait for the “jellyfish” to grow and transform the tea into a
26 healing potion. As the story goes, the emperor followed the monks’ advice and was healed.

27 _____
28 ³ <https://www.forbes.com/sites/christinatroitino/2017/02/01/kombucha-101-demystifying-the-past-present-and-future-of-the-fermented-tea-drink/#1ece08fa4ae2>

1 65. An alternative theory of origin was put forth by Bachinskaya, the Russian scientist
2 who first studied kombucha at the turn of the century. Bachinskaya also based her origin theory
3 on an insect (this time deriving from her observations related to fruit flies.) When acetobacter
4 bacteria that lives on the flies' legs are transferred to liquid they quickly begin multiplying and
5 converting the sugars to acetic acid, with the end result of turning batch of wine or beer to
6 vinegar (or tea to kombucha) simply by landing on it.

7 66. Regardless of how the culture originated, kombucha was eventually brought to
8 Europe because of trade route expansions in the early 20th century, most notably appearing in
9 Russia (as "Kambucha") and Germany (as "Kombuchaschwamm"). Despite a dip in
10 international popularity during WWII due to the shortage of tea and sugar supplies, kombucha
11 regained popularity following a 1960s study in Switzerland comparing its health benefits to
12 those of yogurt⁵. The beverage enjoyed a resurgence of popularity in the United States in the
13 1990's.

14 **B. RISE IN CONTEMPORARY CONSUMER INTEREST IN KOMBUCHA**

15 67. In the last decade, United States consumers have developed an insatiable thirst for
16 kombucha beverages. Such demand has catapulted the fringe kombucha market into a
17 multimillion dollar industry. In fact, according to research firm Euromonitor International, it is
18 projected that the industry that could reach \$656.7 million in U.S. sales by 2019⁶.

19 68. Kombucha has the fastest-growing segment of the "functional beverage" market in
20 the U.S.—a category vaguely defined by one industry publication as "drinks with added
21 functionality, such as ingredients and associated health benefits and functional positioning."⁷

22 69. "It fits right into that health and wellness trend," said Duane Stanford, editor of
23 Beverage Digest, a trade publication for the U.S. nonalcoholic beverage industry. "People are
24 looking for healthier beverages, they're looking at ingredients and because there's a segment of
25 consumers that are really interested in that, kombucha just kind of becomes one of those niche

26 ⁴ <https://www.forbes.com/sites/christinatroitino/2017/02/01/kombucha-101-demystifying-the-past-present-and-future-of-the-fermented-tea-drink/#1ece08fa4ae2>

27 ⁵ <https://www.forbes.com/sites/christinatroitino/2017/02/01/kombucha-101-demystifying-the-past-present-and-future-of-the-fermented-tea-drink/#43be7c914ae2>

28 ⁶ <http://www.latimes.com/business/la-fi-kombucha-makers-20160102-story.html>

⁷ <https://www.theatlantic.com/health/archive/2016/12/the-promises-of-kombucha/509786/>

1 products that is able to get a following."

2 **C. KOMBUCHA INGREDIENTS AND MANUFACTURING**

3 70. Kombucha is the symbiosis of a number of bacteria and special yeast cultures. In
4 simple terms, kombucha starts out as a sugary tea, which is then fermented with the help of a
5 SCOBY.

6 71. "SCOBY" is an acronym for "symbiotic culture of bacteria and yeast." It is a
7 zooglear mat—that is, a mass of bacteria and yeast tied together with cellulose nanofibers. The
8 most visible aspect of the SCOBY, also called the “mother,” is an off-white or brownish mat
9 that looks like a slimy Frisbee or a calamari steak.



17 72. The SCOBY mat floats on top of a fermenting batch of kombucha. The growth of
18 the mat regulates the liquid's access to oxygen.

19 73. The primary bacteria in a SCOBY is *komatagaeibacter xylinum* (aka
20 *Acetobacterxylinum*), although there could be other strains. In addition to building the SCOBY,
21 the bacteria are responsible for converting the ethanol produced by the yeast into healthy acids.

22 74. In a mutually beneficial cycle, the ethanol produced by the yeast in the SCOBY
23 becomes food for the bacteria which converts the ethanol to acetic acid.

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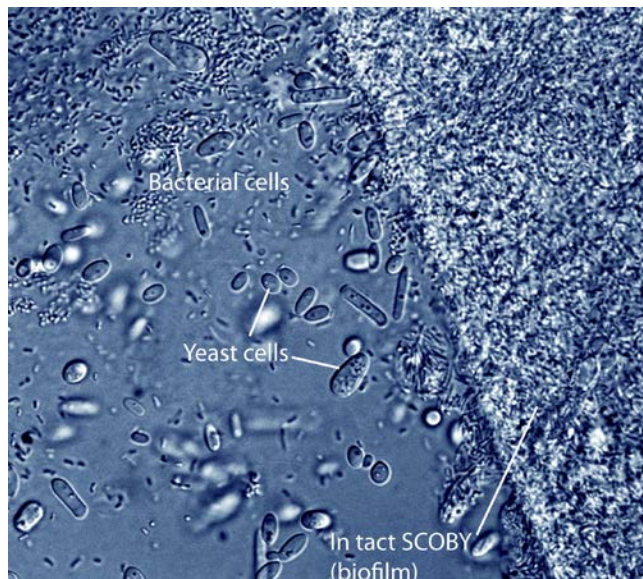
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75. At room temperature, the yeast and bacteria feed on the sugar in the tea and ferment it. It's a similar process to making wine, and a small amount of alcohol is produced in the fermentation process. Vinegar and carbonation are also produced, which give kombucha its distinct sour flavor and effervescence.

D. THE PURPORTED BENEFITS OF KOMBUCHA

76. According to the Mayo Clinic, “[l]imited evidence suggests kombucha tea may offer benefits similar to probiotic supplements, including promoting a healthy immune system and preventing constipation. At present, however, valid medical studies of kombucha tea’s role in human health are very limited — and there are risks to consider.⁸”

77. “The probiotic content [of kombucha] is certainly a component to appreciate,” says Caroline Cederquist, MD, founder of BistroMD. “[Prebiotics] and probiotics consistently demonstrate improvements in digestive health with evidence supporting its use in treating diarrhea and irritable bowel syndrome and fighting against intestinal infections.⁹”

78. Probiotics are bacteria that line your digestive tract and support your body’s ability to absorb nutrients and fight infection. There are actually 10 times more probiotics in your gut than cells in your body and since 80 percent of your immune system is located in your gut, and

⁸ <http://www.mayoclinic.org/healthy-lifestyle/consumer-health/expert-answers/kombucha-tea/faq-20058126>

1 the digestive system is the second largest part of your neurological system, it's no surprise that
2 the gut is considered the "second brain."

3 79. Kombucha's potential digestive benefits are particularly important in modern
4 American society. According to the National Institute of Diabetes and Digestive and Kidney
5 Diseases, "upward of 60 million to 70 million Americans are affected by digestive diseases. In
6 addition, digestive disease and disorders cost the U.S. over \$100 billion per year."

7 80. Hippocrates is attributed with the saying "all disease begins in the gut." Thousands
8 of years later, health-conscious consumers are guzzling Kombucha in the belief that so doing
9 will increase gastrointestinal health and overall well-being. Kombucha has become the "apple-
10 a-day" of the millennial generation.

11 **E. HISTORY OF KEVITA MASTER BREW KOMBUCHA**

12 81. Crafted since 2009, the KeVita's Master Brew Kombucha beverages have grown
13 from a kitchen in Ojai, California to placement in over 20,000 retail locations across North
14 America.

15 82. Chakra Earthsong Levy, KeVita's chief formulator and co-founder, explained that
16 while the inspiration behind the creation of the beverages was to create a healthy alternative to
17 soda, the journey from concept to finished product took a long and winding route. "KeVita
18 emerged quite naturally actually. After decades of culturing sauerkraut, seed and nut cheeses,
19 traditional kefir and yogurt, I created what I fondly call 'my best ferment,'" Ms. Levy said. "A
20 year in development, Lemon Ginger was the first flavor, followed by Living Greens and Green
21 Tea. Living Greens is such a powerful blend of superfoods with just the right amount of green
22 tea."¹⁰

22 ///

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25 ///

27 ⁹ <https://www.wellandgood.com/good-food/how-to-read-a-kombucha-label/>

28 ¹⁰ https://www.nutraceuticalsworld.com/contents/view_online-exclusives/2012-01-30/fizzy-lifting-drinks/

1 83. Kevita’s Master Brew Kombucha beverages (the “Product”) is currently offered in
2 eleven flavors:

3 84.



4 grapefruit



mango habanero



5 roots beer



6 dragonfruit lemongrass



7 blueberry basil



8 citrus



9 tart cherry



10 ginger



11 raspberry lemon



12 pineapple peach



13 lavender melon

14
15 85. Regardless of flavor, the Product is similarly situated in that each: (a) is the same
16 basic product, kombucha; (b) contains many of the same basic ingredients; (c) are subject to the
17 same manufacturing processes and procedures including, *inter alia*, pasteurization; and (d)
18 contain on their labels, verbatim advertisements, representations and warranties which are at
19 issue in this litigation.



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F. ALTHOUGH NOT ORIGINALLY PART OF THE MANUFACTURING PROCESS KEVITA PASTEURIZES THEIR KOMBUCHA PRODUCT

86. Pasteurization is a process that kills microbes (mainly bacteria) in food and drink, such as milk, juice, canned food, and others.

87. Pasteurization generally involves briefly heating a liquid to kill harmful bacteria such as salmonella. Pasteurization is, however, an indiscriminate process that kills off not only undesirable elements but also the yeast and bacteria that are essential to the fermentation process including the very probiotics for which consumers purchase the products. Indeed, pasteurization of a living product such as Kombucha is antithetical to the fermentation process.

88. KeVita was not always manufactured with pasteurization. Originally and until as recently as 2011, KeVita was cold-processed, non-pasteurized and kept chilled during

1 manufacturing, bottling and transportation. It was never heated during production "in order to
2 maintain the integrity of KeVita's certified organic living cultures."¹¹

3 89. The importance of providing a live, raw and unpasteurized kombucha product was
4 not lost on the founders of KeVita. Co-founder Bill Moses boasted “[s]everal kombucha
5 manufacturers utilize pasteurization that kill the live cultures in order to limit alcohol
6 production...However, at KeVita, we’ve devised a proprietary technique that enables us to
7 deliver a delicious, live and active raw culture through the end of shelf-life.”¹²

8 90. Ensuring the product was “authentic, live and beneficial” to customers and not
9 subject to pasteurization was echoed by Chakra Earthsong, KeVita’s chief formulator and co-
10 founder who is quoted as saying, “KeVita’s promise to our customers is to provide an authentic
11 product with the highest quality organic ingredients available...We’ve dedicated significant
12 resources to ensure that KeVita’s cultures remain alive to afford optimal benefits to our loyal
13 consumers.¹³” As Ms. Earthson-Levy noted in the perjorative, “[n]aturally cultured or
14 fermented drinks cannot be shipped warm then chilled, unless they have been pasteurized.”¹⁴

15 **G. KEVITA’S DECEPTIVE ADVERTISING**

16 91. American consumers are health conscious and look for wholesome, natural foods to
17 keep a healthy diet. Product package labels are vehicles that convey food quality and nutrition
18 information to consumers that they can and do use to make purchasing decisions.

19 92. Defendants realize that consumers are increasingly aware of the relationship between
20 health and diet and, thus, understand the importance and value of descriptors and labels that
21 convey to consumers certain “buzzwords” when considering whether to buy foods.

22 93. Throughout the Class Period, Defendants engaged in, and Plaintiff and members of
23 the Classes were exposed to, a long-term advertising campaign in which Defendants utilized
24 various forms of media including, but not limited to, website, social media advertising, and print
25 advertising on the KeVita label. Throughout the Class Period, Defendants have failed concealed

26 _____
27 ¹¹ https://www.nutraceuticalsworld.com/contents/view_online-exclusives/2012-01-30/fizzy-lifting-drinks/
28 ¹² https://www.nutraceuticalsworld.com/contents/view_online-exclusives/2012-01-30/fizzy-lifting-drinks/
¹³ https://www.nutraceuticalsworld.com/contents/view_online-exclusives/2012-01-30/fizzy-lifting-drinks/
¹⁴ https://www.nutraceuticalsworld.com/contents/view_online-exclusives/2012-01-30/fizzy-lifting-drinks/

1 the facts of the products' pasteurization. Moreover, Defendants have consistently made certain
2 representations in its labeling, advertising, and marketing that are false and misleading. To
3 accomplish this, Defendants use an integrated, nationwide messaging campaign to consistently
4 convey the deceptive and misleading message that KeVita is fermented and "live" without
5 disclosing (and in fact actively concealing) the pasteurization. This message, at a minimum, is
6 conveyed at the point of purchase on the KeVita packaging and labeling. Thus, all consumers
7 are exposed to the same message whether viewed on the internet or on the label.

8 94. During the Class Period, Plaintiffs were introduced to the Product through its
9 labeling and advertising.

10 95. A reasonable consumer understands kombucha to be fermented from a SCOBY
11 culture and only minimally processed.

12 96. Defendants' labeling of the Product underscore and perpetuated consumer beliefs.
13 Specifically, Defendants state on the Product's packaging and labeling:

- 14 • Fermented
- 15 • "Live Probiotic"
- 16 • "Crafted with live probiotics"
- 17 • "fermented with our proprietary tea culture which yields high levels of beneficial
18 organic acids"
- 19 • "Perishable"
- 20 • "Keep refrigerated"

21 97. These statements and pictures mislead the consumer into believing that the Product
22 is fermented from kombucha culture and contained probiotics and beneficial organic acids
23 derived directly therefrom without pasteurization or post- pasteurization manipulation.

24 98. Plaintiff and the Classes reasonably understood the Product's packaging to mean that
25 the Product was fermented from kombucha culture and contained probiotics and beneficial
26 organic acids derived directly therefrom without adulteration through pasteurization.

27 99. Consumers lack the meaningful ability to test or independently ascertain the
28 truthfulness of food and beverage labeling claims especially at the point of sale. Consumers

1 would not know the true nature of the ingredients or the details of the manufacturing process
2 merely by reading the ingredient label; their discovery requires investigation beyond the grocery
3 store and knowledge of food chemistry as well as internal manufacturing habits beyond that of
4 the average consumer. Thus, reasonable consumers must, and do, rely on food companies such
5 as Defendants to honestly report the nature of a beverage's qualities and ingredients, and
6 beverage companies such as Defendants intend and know that consumers rely upon food
7 labeling statements in making their purchasing decisions. Such reliance by consumers is also
8 eminently reasonable, since food companies are prohibited from making false or misleading
9 statements on their products under federal law.

10 100. Defendants unscrupulously capitalize on consumers' heightened demand for
11 natural products by deceptively labeling, advertising, and marketing KeVita.

12 **TOLLING OF THE STATUTE OF LIMITATIONS,**

13 **FRAUDULENT CONCEALMENT, EQUITABLE TOLLING,**

14 **AND CONTINUING VIOLATIONS**

15 101. Plaintiffs did not discover and could not have discovered through the exercise of
16 reasonable diligence, the existence of the claims sued upon herein until immediately prior to
17 commencing this civil action.

18 102. Any applicable statutes of limitation have been tolled by Defendants' affirmative
19 acts of fraudulent concealment and continuing misrepresentations, as the facts alleged above
20 reveal.

21 103. Because of the self-concealing nature of Defendants' actions and their
22 affirmative acts of concealment, Plaintiffs and the Classes assert the tolling of any applicable
23 statutes of limitations affecting the claims raised herein.

24 104. Defendants continue to engage in the deceptive practice, and consequently,
25 unwary consumers are injured on a daily basis by Defendants' unlawful conduct. Therefore,
26 Plaintiff and the Classes submit that each instance that Defendants engaged in the conduct
27 complained of herein and each instance that a member of any Class purchased KeVita's Product
28 constitutes part of a continuing violation and operates to toll the statutes of limitation in this

1 action.

2 105. Defendants are estopped from relying on any statute of limitations defense
3 because of their unfair or deceptive conduct.

4 106. Defendants' conduct was and is, by its nature, self-concealing. Still, Defendants,
5 through a series of affirmative acts or omissions, suppressed the dissemination of truthful
6 information regarding their illegal conduct, and actively have foreclosed Plaintiffs and the
7 Classes from learning of their illegal, unfair, and/or deceptive acts. These affirmative acts
8 included concealing that the Product is pasteurized.

9 107. By reason of the foregoing, the claims of Plaintiffs and the Classes are timely
10 under any applicable statute of limitations, pursuant to the discovery rule, the equitable tolling
11 doctrine, and fraudulent concealment.

12 **CLASS ACTION ALLEGATIONS**

13 108. Plaintiffs bring this action individually and on behalf of all other persons
14 similarly situated. The Classes which Plaintiffs seek to represent comprise:

15 **California Class**

16 All persons in California who purchased the Product from October 4,
17 2017 until the date of judgment in this action for personal or household
18 use, and not for resale or distribution purposes. Specifically excluded
19 from this Class are Defendants, the officers, directors, or employees of
20 Defendants, any entity in which Defendants have a controlling interest,
21 and any affiliate, legal representative, heir, or assign of Defendants. Also
22 excluded are those who assert claims for personal injury as well as any
23 federal, state, or local governmental entities, any judicial officer presiding
24 over this action and the members of his/her immediate family and judicial
25 staff, and any juror assigned to this action.

26 **National Class**

27 All persons in the United States who purchased the Product from October
28 4, 2017, until the date of judgment in this action for personal or
household use, and not for resale or distribution purposes. Specifically
excluded from this Class are Defendants, the officers, directors, or
employees of Defendants, any entity in which Defendants have a
controlling interest; and any affiliate, legal representative, heir, or assign
of Defendants. Also excluded are those who assert claims for personal
injury as well as any federal, state, or local governmental entities, any
judicial officer presiding over this action and the members of his/her

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immediate family and judicial staff, and any juror assigned to this action.

Consumer Protection Class

All persons who reside in states in the United States with similar consumer protection laws, breach of express warranty laws and breach of implied warranty law, who purchased the Product from October 4, 2017 until the date of judgment in this action, for personal or household use, and not for resale or distribution purposes. Specifically excluded from this Class are Defendants, the officers, directors, or employees of Defendants, any entity in which Defendants have a controlling interest, and any affiliate, legal representative, heir, or assign of Defendants. Also excluded are those who assert claims for personal injury as well as any federal, state, or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

109. The Classes are sufficiently numerous, as each includes thousands of persons who have purchased the Product. Thus, joinder of such persons in a single action or bringing all members of the Classes before the Court is impracticable for purposes of California Civil Code Section 382. The question is one of a general or common interest of many persons and it is impractical to bring them all before the Court. The disposition of the claims of the members of the Classes in this class action will substantially benefit both the parties and the Court.

110. There are questions of law and fact common to each Class for purposes of California Civil Code Section 382, including whether a pasteurized beverage product is properly labeled as “kombucha”; and whether Defendants’ labels and packaging include uniform misrepresentations and omissions that misled Plaintiffs and the other members of the Classes to believe the Product was fermented and unpasteurized. The members of each Class were and are similarly affected by having purchased the Product for its intended and foreseeable purpose as promoted, marketed, advertised, packaged, and labeled by Defendants as set forth in detail herein, and the relief sought herein is for the benefit of Plaintiffs and other members of the Classes. Thus, there is a well-defined community of interest in the questions of law and fact involved in this action and affecting the parties.

111. Plaintiffs asserts claims that are typical of the claims of each respective Class for purposes of California Civil Code Section 382. Plaintiffs and all members of each respective

1 Class have been subjected to the same wrongful conduct because they have purchased that
2 Product, which is not natural as represented. Plaintiffs paid a premium for the Product, on the
3 belief it was natural, over similar alternatives that did not make such representations. Plaintiffs
4 and the members of each Class have thus all overpaid for the Product.

5 112. Plaintiffs will fairly and adequately represent and protect the interests of the
6 other members of each respective Class for purposes of California Civil Code Section 382.
7 Plaintiffs have no interests antagonistic to those of other members of each respective Class.
8 Plaintiffs are committed to the vigorous prosecution of this action and has retained counsel
9 experienced in litigation of this nature to represent her. Plaintiffs anticipates no difficulty in the
10 management of this litigation as a class action.

11 113. Class certification is appropriate under California Civil Code Section 382
12 because Defendants have acted on grounds that apply generally to each Class, so that final
13 injunctive relief or corresponding declaratory relief is appropriate respecting each Class as a
14 whole. Defendants utilize an integrated, nationwide messaging campaign that includes uniform
15 misrepresentations that misled Plaintiffs and the other members of each Class.

16 114. Class certification is appropriate under California Civil Code Section 382
17 because common questions of law and fact substantially predominate over any questions that
18 may affect only individual members of each Class. Among these common questions of law and
19 fact are:

- 20 a. whether Defendants misrepresented or omitted material facts in connection with
21 the promotion, marketing, advertising, packaging, labeling, and sale of the
22 Product;
- 23 b. whether Defendants' labeling of the Product is likely to deceive the members of
24 each Class;
- 25 c. whether Defendants' conduct is unethical, oppressive, unscrupulous, and/or
26 substantially injurious to consumers;
- 27 d. whether Defendants represented that the Product has characteristics, benefits,
28 uses, or qualities that it does not have;

- 1 e. whether Defendants’ acts and practices in connection with the promotion,
- 2 marketing, advertising, packaging, labeling, distribution, and sale of the Product
- 3 violated the laws alleged herein;
- 4 f. whether Plaintiffs and members of the Classes are entitled to injunctive and other
- 5 equitable relief; and
- 6 g. whether Defendants were unjustly enriched by their conduct.

7 115. Defendants engaged in a common course of conduct giving rise to the legal
8 rights sought to be enforced by the members of each respective Class. Similar or identical
9 statutory and common law violations and deceptive business practices are involved. Individual
10 questions, if any, pale by comparison to the numerous common questions that predominate.

11 116. The injuries sustained by Plaintiffs and the members of each Class flow, in each
12 instance, from a common nucleus of operative facts – Defendants’ misconduct.

13 117. Plaintiffs and the members of each Class have been damaged by Defendants’
14 misconduct. The members of each Class have paid for a product that would not have been
15 purchased in the absence of Defendants’ deceptive scheme, or, alternatively, would have been
16 purchased at a lesser price.

17 118. Proceeding as a class action provides substantial benefits to both the parties and
18 the Court because this is the most efficient method for the fair and efficient adjudication of the
19 controversy. Members of each Class have suffered and will suffer irreparable harm and
20 damages as a result of Defendants’ wrongful conduct. Because of the nature of the individual
21 claims of the members of each Class, few, if any, could or would otherwise afford to seek legal
22 redress against Defendants for the wrongs complained of herein, and a representative class
23 action is therefore the appropriate, superior method of proceeding and essential to the interests
24 of justice insofar as the resolution of claims of the members of each Class is concerned. Absent
25 a representative class action, members of each Class would continue to suffer losses for which
26 they would have no remedy, and Defendants would unjustly retain the proceeds of its ill-gotten
27 gains. Even if separate actions could be brought by individual members of each Class, the
28 resulting multiplicity of lawsuits would cause undue hardship, burden, and expense for the

1 Court and the litigants, as well as create a risk of inconsistent rulings, which might be
2 dispositive of the interests of the other members of each Class who are not parties to the
3 adjudications and/or may substantially impede their ability to protect their interests.

4 **FIRST CAUSE OF ACTION**

5 **FALSE AND MISLEADING ADVERTISING IN VIOLATION OF BUSINESS &**
6 **PROFESSIONS CODE § 17200, et seq.**

7 **(By Plaintiffs, the California Class and National Class against all Defendants and**
8 **Does 1-10)**

9 119. Plaintiffs repeat and reallege the allegations set forth above and incorporates the
10 same as if set forth herein at length.

11 120. This cause of action is brought pursuant to *Business and Professions Code* §
12 17200, et seq.

13 121. In the advertising of the Product, Defendants makes false and misleading
14 statements and material omissions. Specifically, as set forth above, Defendants labels their
15 product: (1) as “kombucha”; (2) derived from a “Kombucha Culture”; (3) “...fermented with
16 our proprietary tea culture, which yields high levels of beneficial organic acids”; (4) [c]rafted
17 with live probiotics;” and (4) as containing “probiotics”.

18 122. In fact, the Product is pasteurized after fermentation which kills most if not all
19 the cultures, acids and probiotics which are touted on the label.

20 123. Defendants are aware that the claims that they make about the Product are false,
21 misleading and unsubstantiated.

22 124. As alleged in the preceding paragraphs, the misrepresentations and omissions by
23 Defendants of the material facts detailed above constitute an unfair and fraudulent business
24 practice within the meaning of California *Business & Professions Code* § 17200.

25 125. In addition, Defendants’ use of various forms of advertising media to advertise,
26 call attention to or give publicity to the sale of goods or merchandise which are not as
27 represented in any manner constitute unfair competition, unfair, deceptive, untrue or misleading
28 advertising, and an unlawful business practice within the meaning of *Business & Professions*

1 Code §§ 17531 and 17200, which advertisements have deceived and are likely to deceive the
2 consuming public, in violation of *Business & Professions Code* § 17500.

3 126. There were reasonably available alternatives to further Defendants’ legitimate
4 business interests, other than the conduct described herein.

5 127. All of the conduct alleged herein occurs and continues to occur in Defendants’
6 business. Defendants’ wrongful conduct is part of a pattern or generalized course of conduct
7 repeated on thousands of occasions daily.

8 128. Pursuant to *Business & Professions Code* §§ 17203 and 17535, Plaintiffs and the
9 members of the Classes seek an order of this Court enjoining Defendants from continuing to
10 engage, use, or employ their practice of advertising the sale and use of the Product. Likewise,
11 Plaintiffs and the members of the Classes seek an order requiring Defendants to disclose such
12 misrepresentations, and additionally request an order awarding Plaintiffs restitution of the
13 money wrongfully acquired by Defendants by means of responsibility attached to Defendants’
14 failure to disclose the existence and significance of said misrepresentations.

15 **SECOND CAUSE OF ACTION**

16 **FALSE AND MISLEADING ADVERTISING IN VIOLATION OF BUSINESS &**
17 **PROFESSIONS CODE § 17500, et seq.**

18 **(By Plaintiffs, the California Class and National Class against all Defendants and**
19 **Does 1-10)**

20 129. Plaintiffs repeats and realleges the allegations set forth in the preceding
21 paragraphs and incorporates the same as if set forth herein at length.

22 130. This cause of action is brought pursuant to *Business and Professions Code* §
23 17500, et seq. (the “FAL”). The FAL prohibits the dissemination of any advertisement which is
24 untrue or misleading, and which is known, or which by exercise of reasonable care should be
25 known, to be untrue or misleading. Cal. Bus. & Prof. Code §17500.

26 131. In its advertising of Product, Defendants make false and misleading statements.
27 Specifically, as set forth above, Defendants labels their product: (1) as “kombucha”; (2) derived
28 from a “Kombucha Culture”; (3) “...fermented with our proprietary tea culture, which yields

1 high levels of beneficial organic acids”; (4) [c]rafted with live probiotics;” and (4) as containing
2 “probiotics.”

3 132. In fact, the Product is pasteurized after fermentation which kills most if not all
4 of the cultures, acids and probiotics which are touted on the label Defendants are aware that
5 the claims that they make about Product are false, misleading and unsubstantiated.

6 133. As alleged in the preceding paragraphs, the misrepresentations by Defendants of
7 the material facts detailed above constitute an unfair and fraudulent business practice within the
8 meaning of California *Business & Professions Code* § 17500.

9 134. In addition, Defendants’ use of various forms of advertising media to advertise,
10 call attention to or give publicity to the sale of goods or merchandise which are not as
11 represented in any manner constitutes unfair competition, unfair, deceptive, untrue or
12 misleading advertising, and an unlawful business practice within the meaning of *Business &*
13 *Professions Code* §§ 17531 and 17200, which advertisements have deceived and are likely to
14 deceive the consuming public, in violation of *Business & Professions Code* § 17500.

15 135. Pursuant to *Business & Professions Code* §§ 17203 and 17535, Plaintiffs and the
16 members of the Classes seek an order of this Court enjoining Defendants from continuing to
17 engage, use, or employ their practice of advertising the sale and use of the Product. Likewise,
18 Plaintiffs and the members of the Classes seek an order requiring Defendants to disclose such
19 misrepresentations, and additionally request an order awarding Plaintiffs restitution of the
20 money wrongfully acquired by Defendants by means of responsibility attached to Defendants’
21 failure to disclose the existence and significance of said misrepresentations.

22 **THIRD CAUSE OF ACTION**

23 **VIOLATION OF CALIFORNIA CIVIL CODE § 1750, et seq.**

24 **(By Plaintiffs, the California Class and National Class against all Defendants and**
25 **Does 1-10)**

26 136. Plaintiffs repeats and realleges all the allegations of the previous paragraphs and
27 incorporates the same as if set forth herein at length.

28 137. This cause of action is brought pursuant to *Civil Code* § 1750, et seq., the

1 Consumers Legal Remedies Act.

2 138. Plaintiffs, as well as each member of the Consumer Class, constitutes a
3 “consumer” within the meaning of *Civil Code* § 1761(d).

4 139. Defendants’ sales of the Product constitute “transactions” within the meaning of
5 *Civil Code* § 1761(e).

6 140. The Product purchased by Plaintiffs and the Consumer Class constitute “goods”
7 under *Civil Code* § 1761(a).

8 141. The Consumer Class consists of thousands of persons, the joinder of whom is
9 impracticable.

10 142. There are questions of law and fact common to the classes, which questions are
11 substantially similar and predominate over questions affecting the individual members,
12 including but not limited to:

13 (a) Whether Defendants represented that the Product has characteristics, benefits, uses or
14 quantities which it does not have;

15 (b) Whether the existence, extent and significance of the major misrepresentations,
16 concealments and omissions regarding the purported benefits, characteristics and efficacy of the
17 Product violate the Act; and

18 (c) Whether Defendants knew of the existence of these misrepresentations,
19 concealments and omissions.

20 143. The policies, acts, and practices heretofore described were intended to result in
21 the sale of Health-Ade Kombucha to the consuming public and violated and continue to violate:

22 (1) Section 1770(a)(5) of the Act which prohibits, *inter alia*, “[r]epresenting that goods or
23 services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities
24 which they do not have;” (2) Section 1770(a)(7) of the Act, which prohibits, “[r]epresenting that
25 goods or services are of a particular standard, quality, grade, or that goods are of a particular
26 style or model , if they are of another;” (3) Section 1770(a)(9), which prohibits, “[a]dvertising
27 goods or services with intent not to sell them as advertised” and section 1770(a)(14) which bars
28 KeVita from “representing that a transaction confers or involves rights, remedies, or obligations

1 which it does not have or involve.”

2 144. Defendants fraudulently deceived Plaintiffs and the Classes by representing that
3 Product has certain characteristics, benefits, uses and qualities which it does not have. In doing
4 so, Defendants intentionally misrepresented and concealed material facts from Plaintiffs and the
5 Classes, specifically and not limited to that Product is natural. Said misrepresentations and
6 concealment were done with the intention of deceiving Plaintiffs and the Classes and depriving
7 them of their legal rights and money.

8 145. Defendants knew that Product was, not truly derived from a kombucha culture,
9 and did not qualify as “kombucha” as represented in Defendants’ advertisements and on
10 Defendants’ packaging because the product was subject to pasteurization.

11 146. Defendants’ actions as described hereinabove were done with conscious
12 disregard of Plaintiffs’ rights and Defendants were wanton and malicious in their concealment
13 of the same.

14 147. Pursuant to § 1780(a) of the Act, Plaintiffs seeks injunctive relief in the form of
15 an order enjoining the above-described wrongful acts and practices of Defendants including, but
16 not limited to, an order enjoining Defendants from distributing such false advertising and
17 misrepresentations. Plaintiffs shall be irreparably harmed if such an order is not granted.

18 148. On September 26, 2017, Plaintiff Brenner gave written notice to Defendants via
19 certified mail, of the methods, acts, and/or practices declared unlawful by Section 1770 of the
20 particular alleged violations of Section 1770.

21 149. The notice was confirmed received by Defendants by November 21, 2017.

22 150. More than thirty (30) days have passed since receipt of the notice and all
23 consumers similarly situated have not been identified nor have reasonable efforts to identify
24 such consumers been made.

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1 **FOURTH CAUSE OF ACTION**

2 **UNJUST ENRICHMENT**

3 **(By Plaintiffs, California Class and National Class**

4 **Against all Defendants and Does 1-10)**

5 151. Plaintiffs repeat and reallege the allegations set forth in the preceding
6 paragraphs and incorporates the same as if set forth herein at length.

7 152. Plaintiffs brings this claim individually, as well as on behalf of members of the
8 nationwide Class and California Class pursuant California law. Although there are numerous
9 permutations of the elements of the unjust enrichment cause of action in the various states, there
10 are few real differences. In all states, the focus of an unjust enrichment claim is whether the
11 defendant was unjustly enriched. At the core of each state's law are two fundamental elements
12 – the Defendant received a benefit from the Plaintiffs and it would be inequitable for the
13 defendant to retain that benefit without compensating the Plaintiffs. The focus of the inquiry is
14 the same in each state. Since there is no material conflict relating to the elements of unjust
15 enrichment between the different jurisdictions from which class members will be drawn,
16 California law applies to the claims of the Class.

17 153. In the alternative, Plaintiffs brings this claim individually as well as on behalf of
18 the California Class.

19 154. At all times relevant hereto, Defendants deceptively labeled, marketed,
20 advertised, and sold Product to Plaintiffs and the Classes.

21 155. Plaintiffs and members of the Classes conferred upon Defendants non-gratuitous
22 payments for Product that they would not have due to Defendants' deceptive labeling,
23 advertising, and marketing. Defendants accepted or retained the non-gratuitous benefits
24 conferred by Plaintiffs and members of the Classes, with full knowledge and awareness that, as
25 a result of Defendants' deception, Plaintiffs and members of the Class were not receiving a
26 product of the quality, nature, fitness, or value that had been represented by Defendants and
27 reasonable consumers would have expected.

28 156. Defendants have been unjustly enriched in retaining the revenues derived from

1 purchases of Product by Plaintiffs and members of the Classes, which retention under these
2 circumstances is unjust and inequitable because Defendants misrepresented that Product is: (1)
3 “kombucha”; (2) derived from a “Kombucha Culture”; (3) “...fermented with our proprietary
4 tea culture, which yields high levels of beneficial organic acids”; (4) [c]rafted with live
5 probiotics;” and (4) as containing “probiotics”, when in fact it is subject to pasteurization,
6 which caused injuries to Plaintiffs and members of the Classes because they paid a price
7 premium due to the mislabeling of Product.

8 157. Retaining the non-gratuitous benefits conferred upon Defendants by Plaintiffs
9 and members of the Classes under these circumstances made Defendants’ retention of the non-
10 gratuitous benefits unjust and inequitable. Thus, Defendants must pay restitution to Plaintiffs
11 and members of the Classes for their unjust enrichment, as ordered by the Court.

12 **FIFTH CAUSE OF ACTION**

13 **BREACH OF EXPRESS WARRANTY**

14 **(By Plaintiffs, on behalf of themselves, the California Class and**
15 **Consumer Protection Class Against all Defendants and Does 1-10)**

16 158. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs
17 and incorporates the same as if set forth herein at length.

18 159. Plaintiffs bring this Count individually under the laws of the state where she
19 purchased Product and on behalf of the California Class and Consumer Protection Class (in
20 states having similar laws regarding express warranties).

21 160. Defendants’ representations, as described herein, are affirmations by Defendants
22 that Product is: (1) as “kombucha”; (2) derived from a “Kombucha Culture”; (3) “...fermented
23 with our proprietary tea culture, which yields high levels of beneficial organic acids”; (4)
24 [c]rafted with live probiotics;” and (4) as containing “probiotics”. Defendants’ representations
25 regarding Product are made to Plaintiffs and the other members of the Classes at the point of
26 purchase and are part of the description of the goods. Those promises constituted express
27 warranties and became part of the basis of the bargain, between Defendants on the one hand,
28 and Plaintiffs and the Classes on the other.

1 161. In addition, or in the alternative, Defendants made each of their above-described
2 representations to induce Plaintiffs and the Classes to rely on such representations, and they
3 each did so rely on Defendants’ representations as a material factor in their decisions to
4 purchase Product. Plaintiffs and other members of the Classes would not have purchased
5 Product but for these representations and warranties.

6 162. The Product did not, in fact, meet the representations Defendants made about
7 Product, as described herein.

8 163. At all times relevant to this action, Defendants falsely represented that Product
9 was (1) as “kombucha”; (2) derived from a “Kombucha Culture”; (3) “...fermented with our
10 proprietary tea culture, which yields high levels of beneficial organic acids”; (4) [c]rafted with
11 live probiotics;” and (4) as containing “probiotics”, when in fact it is pasteurized, a process
12 which undermines each of the subject claims.

13 164. At all times relevant to this action, Defendants made false representations in
14 breach of the express warranties and in violation of state express warranty laws, including:

- 15 a. Alaska St. §45.02.313;
- 16 b. Ariz. Rev. Stat. Ann. §47-2313;
- 17 c. Ark. Code Ann. §4-2-313;
- 18 d. Cal. Com. Code §2313;
- 19 e. Colo. Rev. Stat. §4-2-313;
- 20 f. Conn. Gen. Stat. Ann. §42a-2-313;
- 21 g. D.C. Code §28:2-313;
- 22 h. Fla. Stat. §672.313;
- 23 i. Haw. Rev. Stat. §490:2-313;
- 24 j. 810 Ill. Comp. Stat. 5/2-313;
- 25 k. Ind. Code §26-1-2-313;
- 26 l. Kan. Stat. Ann. §84-2-313;
- 27 m. La. Civ. Code. Ann. art. 2520;
- 28 n. Maine Rev. Stat. Ann. 11 §2-313;

- 1 o. Mass. Gen. Laws Ann. 106 §2-313;
- 2 p. Minn. Stat. Ann. §336.2-313;
- 3 q. Miss. Code Ann. §75-2-313;
- 4 r. Mo. Rev. Stat. §400.2-313;
- 5 s. Mont. Code Ann. §30-2-313;
- 6 t. Neb. Rev. Stat. §2-313;
- 7 u. Nev. Rev. Stat. §104.2313;
- 8 v. N.H. Rev. Stat. Ann. §382-A:2-313;
- 9 w. N.J. Stat. Ann. §12A:2-313;
- 10 x. N.M. Stat. Ann. §55-2-313;
- 11 y. N.Y. U.C.C. Law §2-313;
- 12 z. N.C. Gen. Stat. Ann. §25-2-313;
- 13 aa. Okla. Stat. Ann. tit. 12A, §2-313;
- 14 bb. Or. Rev. Stat. §72.3130;
- 15 cc. Pa. Stat. Ann. tit. 13, §2313;
- 16 dd. R.I. Gen. Laws §6A-2-313;
- 17 ee. S.C. Code Ann. §36-2-313;
- 18 ff. S.D. Codified Laws. §57A-2-313;
- 19 gg. Tenn. Code Ann. §47-2-313;
- 20 hh. Tex. Bus. & Com. Code Ann. §2.313;
- 21 ii. Utah Code Ann. §70A-2-313;
- 22 jj. Vt. Stat. Ann. tit. 9A§2-313;
- 23 kk. Wash. Rev. Code §62A.2-313;
- 24 ll. W. Va. Code §46-2-313;
- 25 mm. Wyo. Stat. Ann. §34.1-2-313;

26 165. The above statutes do not require privity of contract in order to recover for
27 breach of express warranty.

28

1 166. As a proximate result of this breach of warranty by Defendants, Plaintiffs and
2 other members of the Classes have been damaged in an amount to be determined at trial
3 because: (a) they paid a price premium due to the deceptive labeling of Product; and (b) Product
4 did not have the composition, attributes, characteristics, nutritional value, health qualities, or
5 value promised.

6 167. Wherefore, Plaintiffs and the Classes demand judgment against Defendants for
7 compensatory damages, plus interest, costs, and such additional relief as the Court may deem
8 appropriate or to which Plaintiffs and the Classes may be entitled.

9 **SIXTH CAUSE OF ACTION**

10 **BREACH OF IMPLIED WARRANTY**

11 **(By Plaintiffs, on Behalf of Themselves, the California Class, the California Class and**
12 **Consumer Protection Class Against Defendants and Does 1-10)**

13 168. Plaintiffs repeats and realleges the allegations set forth in the preceding
14 paragraphs, and incorporates the same as if set forth herein at length.

15 169. Plaintiffs brings this Count individually under the laws of the state where she
16 purchased Product and on behalf of the California Class and Consumer Protection Class (in
17 states having similar laws regarding implied warranties).

18 170. The Uniform Commercial Code §2-314 provides that unless excluded or
19 modified, a warranty that the goods shall be merchantable is implied in a contract for their sale
20 if the seller is a merchant with respect to goods of that kind. This implied warranty of
21 merchantability acts as a guarantee by the seller that his goods are fit for the ordinary purposes
22 for which they are to be used.

23 171. The Uniform Commercial Code §2-314 provides that “[g]oods to be
24 merchantable must be at least such as.... Conform to the promises or affirmations of fact made
25 on the container or label if any.” Cal.Com.Code § 2314(2)(f).

26 172. Defendants developed, manufactured, advertised, marketed, sold, and/or
27 distributed the Product and represented that the Product was (1) as “kombucha”; (2) derived
28 from a “Kombucha Culture”; (3) “...fermented with our proprietary tea culture, which yields

1 high levels of beneficial organic acids”; (4) [c]rafted with live probiotics;” and (4) as containing
2 “probiotics”.

3 173. Defendants failed to disclose and in fact actively concealed that the Product is
4 was pasteurized and was not “kombucha”, as promised.

5 174. At all times, the following states listed below, including the District of
6 Columbia, have codified and adopted the provisions of the Uniform Commercial Code
7 governing the implied warranty of merchantability:

- 8 a. Ala. Code §7-2-314;
- 9 b. Alaska Stat. §45.02.314;
- 10 c. Ariz. Rev. Stat. Ann. §47-2314;
- 11 d. Ark. Code Ann. §4-2-314;
- 12 e. Cal. Com. Code §2314;
- 13 f. Colo. Rev. Stat. §4-2-314;
- 14 g. Conn. Gen. Stat. Ann. §42a-2-314;
- 15 h. Del. Code Ann. tit. 6 §2-314;
- 16 i. D.C. Code §28:2-314;
- 17 j. Fla. Stat. §672.314;
- 18 k. Ga. Code Ann. §11-2-314;
- 19 l. Haw. Rev. Stat. §490:2-314;
- 20 m. Idaho Code §28-2-314;
- 21 n. 810 Ill. Comp. Stat. Ann. 5/2-314;
- 22 o. Ind. Code Ann. §26-1-2-314;
- 23 p. Iowa Code Ann. §554.2314;
- 24 q. Kan. Stat. Ann. §84-2-314;
- 25 r. Ky. Rev. Stat. Ann. §355.2-314;
- 26 s. La. Civ. Code Ann. art. §2520;
- 27 t. Me. Rev. Stat. Ann. 11 §2-314;
- 28 u. Md. Code Ann. Com. Law §2-314;

- 1 v. Mass. Gen. Laws Ch. 106 §2-314;
- 2 w. Mich. Comp. Laws Ann. §440.2314;
- 3 x. Minn. Stat. Ann. §336.2-314;
- 4 y. Miss. Code Ann. §75-2-314;
- 5 z. Mo. Rev. Stat. §400.2-314;
- 6 aa. Mont. Code Ann. §30-2-314;
- 7 bb. Nev. Rev. Stat. §104.2314;
- 8 cc. N.H. Rev. Stat. Ann. §382-A:2-314;
- 9 dd. N.J. Stat. Ann. §12A:2-314;
- 10 ee. N.M. Stat. Ann. §55-2-314;
- 11 ff. N.Y. U.C.C. Law §2-314;
- 12 gg. N.C. Gen. Stat. Ann. §25-2-314;
- 13 hh. N.D. Cent. Code §41-02-314;
- 14 ii. Ohio Rev. Code Ann. §1302.27;
- 15 jj. Okla. Stat. Ann. tit. 12A §2-314;
- 16 kk. Or. Rev. Stat. §72.3140;
- 17 ll. Pa. Stat. Ann. tit. 13 §2314;
- 18 mm. R.I. Gen. Laws §6A-2-314;
- 19 nn. S.C. Code Ann. §36-2-314;
- 20 oo. S.D. Codified Laws §57A-2-314;
- 21 pp. Tenn. Code Ann. §47-2-314;
- 22 qq. Tex. Bus. & Com. Code Ann. §2-314;
- 23 rr. Utah Code Ann. §70A-2-314;
- 24 ss. Va. Code Ann. §8.2-314;
- 25 tt. Vt. Stat. Ann. tit. 9A §2-314;
- 26 uu. W. Va. Code §46-2-314;
- 27 vv. Wash. Rev. Code §62A 2-314;
- 28 ww. Wis. Stat. Ann. §402.314; and

1 xx. Wyo. Stat. Ann. §34.1-2-314.

2 175. As developer, manufacturer, producer, advertiser, marketer, seller and/or
3 distributor of sweetening products, Defendants are “merchants” within the meaning of the
4 various states’ commercial codes governing the implied warranty of merchantability.

5 176. Further, Defendants are merchants with respect to the Product. Defendants
6 developed, manufactured, produced, advertised, marketed, sold, and/or distributed the Product
7 and represented to Plaintiffs and the Classes that they developed the Product as a natural
8 sweetener primarily made from the monk fruit plant as described herein. Further, Defendants,
9 by selling the Product to Plaintiffs and the Classes, have held themselves out as retailers of the
10 Product that could be used as a natural sweetener primarily made from the monk fruit plant and,
11 in fact, have derived a substantial amount of revenues from the sale of the Product.

12 177. The Product can be classified as “goods,” as defined in the various states’
13 commercial codes governing the implied warranty of merchantability.

14 178. As a merchant of the Product, Defendants knew that purchasers relied upon them
15 to develop, manufacture, produce, sell, and distribute a kombucha beverage, as promised.

16 179. Defendants developed, manufactured, produced, sold, and distributed the Product
17 to consumers such as Plaintiffs and the Classes. They knew that the Product would be used as a
18 kombucha beverage, as promised.

19 180. Defendants specifically represented in their labeling of the Product that it is a
20 fermented kombucha beverage, as described herein.

21 181. At the time that Defendants developed, manufactured, sold, and/or distributed
22 the Product, Defendants knew the purpose for which the Product was intended and impliedly
23 warranted that the Product was of merchantable quality and was fit for its ordinary purpose – a
24 kombucha beverage with naturally fermented probiotics.

25 182. Defendants breached their implied warranties in connection with the sale of the
26 Product to Plaintiffs and members of the Classes. The Product was not fit for its ordinary
27 purposes and intended use as a kombucha beverage, because the Product is pasteurized.

28 183. Defendants had actual knowledge that the Product was not true kombucha and

1 did not contain probiotics which were derived entirely from the kombucha fermentation process
2 as promised and thus was not fit for its ordinary purpose and Plaintiffs therefore was not
3 required to notify Defendants of their breach. If notice is required, Plaintiffs and the Classes
4 adequately have provided Defendants of such notice through the filing of this lawsuit.

5 184. Defendants contracted with retailers so that the retailers could sell its Product to
6 consumers. Defendants intended that consumers would be the end users of the Product and that
7 consumers would be the beneficiaries of its contracts with retailers to sell the Product to
8 consumers.

9 185. As a direct and proximate result of Defendants' breach of implied warranties,
10 Plaintiffs and other members of the Classes have been injured. Plaintiffs and the other members
11 of the Classes would not have purchased the Product but for Defendants' representations and
12 warranties. Defendants misrepresented the character of the Product, which caused injuries to
13 Plaintiffs and the other members of the Classes because either they paid a price premium due to
14 the deceptive labeling or they purchased products that were not of a character and fitness as
15 promised and therefore had no value to Plaintiffs and the other members of the Classes.

16 **SEVENTH CAUSE OF ACTION**

17 **VIOLATIONS OF CONSUMER FRAUD LAWS**

18 **(By Plaintiffs, on Behalf of Themselves, the California Class, and Consumer Protection**

19 **Class against all Defendants and Does 1-100)**

20 186. Plaintiffs repeats and realleges the allegations set forth in the preceding
21 paragraphs and incorporates the same as if set forth herein at length.

22 187. Plaintiffs brings this Count individually under the laws of the state where she
23 purchased Product and on behalf of all other persons who purchased Product in states having
24 similar laws regarding consumer fraud and deceptive trade practices.

25 188. Plaintiffs and each of the other members of the Classes are consumers,
26 purchasers, or other persons entitled to the protection of the consumer protection laws of the
27 state in which they purchased the Product.

28 189. The consumer protection laws of the State in which Plaintiffs and the other

1 members of the Classes purchased the Product declare that unfair or deceptive acts or practices,
2 in the conduct of trade or commerce, are unlawful.

3 190. Forty states and the District of Columbia have enacted statutes designed to
4 protect consumers against unfair, deceptive, fraudulent, and unconscionable trade and business
5 practices and false advertising and that allow consumers to bring private and/or class actions.

6 These statutes are found at:

7 nn. Alabama Deceptive Trade Practices Act, Ala. Code §8-19-1 *et seq.*;

8 oo. Alaska Unfair Trade Practices and Consumer Protection Act, Alaska Code
9 §45.50.471 *et seq.*;

10 pp. Arkansas Deceptive Trade Practices Act, Ark. Code Ann. §4-88-101 *et seq.*;

11 qq. California Consumer Legal Remedies Act, Cal. Civ. Code §1750 *et seq.*, and
12 California's Unfair Competition Law, Cal. Bus. & Prof. Code §17200 *et seq.*;

13 rr. Colorado Consumer Protection Act, Colo. Rev. Stat. §6-1-101 *et seq.*;

14 ss. Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §42-110a *et seq.*;

15 tt. Delaware Deceptive Trade Practices Act, Del. Code tit. 6§2511 *et seq.*;

16 uu. District of Columbia Consumer Protection Procedures Act, D.C. Code §28 3901
17 *et seq.*;

18 vv. Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. §501.201 *et*
19 *seq.*;

20 ww. Georgia Fair Business Practices Act, Ga. Code Ann. §10-1-390 *et seq.*;

21 xx. California Unfair and Deceptive Practices Act, California Revised Statues §480-
22 1 *et seq.*, and California Uniform Deceptive Trade Practices Act, Haw. Rev. Stat.
23 §481A-1 *et seq.*;

24 yy. Idaho Consumer Protection Act, Idaho Code Ann. §48-601 *et seq.*;

25 zz. Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp.
26 Stat. Ann. 505/1 *et seq.*;

27 aaa. Kansas Consumer Protection Act, Kan. Stat. Ann §50 626 *et seq.*;

28

- 1 bbb. Kentucky Consumer Protection Act, Ky. Rev. Stat. Ann. §367.110 *et seq.*, and
- 2 the Kentucky Unfair Trade Practices Act, Ky. Rev. Stat. Ann §365.020 *et seq.*;
- 3 ccc. Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat.
- 4 Ann. §51:1401 *et seq.*;
- 5 ddd. Maine Unfair Trade Practices Act, Me. Rev. Stat. tit. 5 §205A *et seq.*, and
- 6 Maine Uniform Deceptive Trade Practices Act, Me. Rev. Stat. Ann. tit. 10,
- 7 §1211 *et seq.*,
- 8 eee. Massachusetts Unfair and Deceptive Practices Act, Mass. Gen. Laws ch. 93A;
- 9 fff. Michigan Consumer Protection Act, Mich. Comp. Laws §445.901 *et seq.*;
- 10 ggg. Minnesota Prevention of Consumer Fraud Act, Minn. Stat. Ann. §325F.68 *et*
- 11 *seq.*, and Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat.
- 12 §325D.43 *et seq.*;
- 13 hhh. Mississippi Consumer Protection Act, Miss. Code Ann. §§75-24-1 *et seq.*;
- 14 iii. Missouri Merchandising Practices Act, Mo. Rev. Stat. §407.010 *et seq.*;
- 15 jjj. Montana Unfair Trade Practices and Consumer Protection Act, Mont. Code Ann.
- 16 §30-14-101 *et seq.*;
- 17 kkk. Nebraska Consumer Protection Act, Neb. Rev. Stat. §59-1601 *et seq.*, and the
- 18 Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §87-301 *et*
- 19 *seq.*;
- 20 lll. Nevada Trade Regulation and Practices Act, Nev. Rev. Stat. §598.0903 *et seq.*;
- 21 mmm. New Hampshire Consumer Protection Act, N.H. Rev. Stat. §358-A:1 *et seq.*;
- 22 nnn. New Jersey Consumer Fraud Act, N.J. Stat. Ann. §56:8 1 *et seq.*;
- 23 ooo. New Mexico Unfair Practices Act, N.M. Stat. Ann. §57 12 1 *et seq.*;
- 24 ppp. New York Deceptive Acts and Practices Act, N.Y. Gen. Bus. Law §349 *et seq.*;
- 25
- 26 qqq. North Dakota Consumer Fraud Act, N.D. Cent. Code §51 15 01 *et seq.*;
- 27 rrr. Ohio Consumer Sales Practices Act, Ohio Rev. Code Ann. §1345.02 and
- 28 1345.03; Ohio Admin. Code §109:4-3-02, 109:4-3-03, and 109:4-3-10;

- 1 sss. Oklahoma Consumer Protection Act, Okla. Stat. tit. 15 §751 *et seq.*;
- 2 ttt. Oregon Unfair Trade Practices Act, Ore. Rev. Stat §646.608(e) & (g);
- 3 uuu. Rhode Island Unfair Trade Practices and Consumer Protection Act, R.I. Gen.
- 4 Laws §6-13.1-1 *et seq.*;
- 5 vvv. South Carolina Unfair Trade Practices Act, S.C. Code Ann. §39-5-10 *et seq.*;
- 6 www. South Dakota’s Deceptive Trade Practices and Consumer Protection Law,
- 7 S.D. Codified Laws §§37 24 1 *et seq.*;
- 8 xxx. Tennessee Consumer Protection Act, Tenn. Code Ann. §47-18-101 *et seq.*;
- 9 yyy. Vermont Consumer Fraud Act, Vt. Stat. Ann. tit. 9, §2451 *et seq.*;
- 10 zzz. Washington Consumer Fraud Act, Wash. Rev. Code §19.86.010 *et seq.*;
- 11 aaaa. West Virginia Consumer Credit and Protection Act, West Virginia Code §46A-
- 12 6-101 *et seq.*; and
- 13 bbbb. Wisconsin Deceptive Trade Practices Act, Wis. Stat. §100.18 *et seq.*

14 191. The Product constitutes a product to which these consumer protection laws
15 apply.

16 192. In the conduct of trade or commerce regarding its production, marketing, and
17 sale of the Product, Defendants engaged in one or more unfair or deceptive acts or practices
18 including, but not limited to, uniformly representing to Plaintiffs and each member of the
19 Classes by means of their packaging and labeling of the Product that it is a kombucha beverage
20 that was unadulterated with pasteurization, as described herein.

21 193. Defendants’ representations and omissions were false, untrue, misleading,
22 deceptive, and/or likely to deceive.

23 194. Defendants knew, or should have known, that their representations and
24 omissions were false, untrue, misleading, deceptive, and/or likely to deceive.

25 195. Defendants used or employed such deceptive and unlawful acts or practices with
26 the intent that Plaintiffs and members of the Classes rely thereon.

27 196. Plaintiffs and the other members of the Classes did so rely.

28 197. Plaintiffs and the other members of the Classes purchased the Product produced

1 by Defendants which misrepresented the characteristics and nature of the Product.

2 198. Plaintiffs and the other members of the Classes would not have purchased the
3 Product but for Defendants' deceptive and unlawful acts.

4 199. As a result of Defendants' conduct, Plaintiffs and the other members of the
5 Classes sustained damages in amounts to be proven at trial.

6 200. Defendants' conduct showed complete indifference to, or conscious disregard
7 for, the rights and safety of others such that an award of punitive and/or statutory damages is
8 appropriate under the consumer protection laws of those states that permit such damages to be
9 sought and recovered.

10 **EIGHTH CAUSE OF ACTION**

11 **NEGLIGENT MISREPRESENTATION**

12 **(By Plaintiffs, on Behalf of Herself, and the California Class against all Defendants and**
13 **Does 1-10)**

14 201. Plaintiffs repeats and realleges the allegations set forth in the preceding
15 paragraphs, and incorporates the same as if set forth herein at length.

16 202. In making representations of fact to Plaintiffs and the California Class members
17 about Health-Ade Kombucha, Defendants failed to fulfill their duty to disclose the material
18 facts alleged above. Such failure to disclose on the part of Defendants amounts to negligent
19 misrepresentation.

20 203. Plaintiffs and the other members of the California Class reasonably relied upon
21 such representations and omissions to their detriment.

22 204. Plaintiffs and the other members of the California Class, as a direct ad proximate
23 cause of Defendants' negligent misrepresentations, reasonably relied upon such
24 misrepresentations to their detriment. By reason thereof, Plaintiffs and the other Class members
25 have suffered damages in an amount to be proven at trial.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment and relief against Defendants as follows (cause of action number three is excluded from the below to the extent the remedy includes monetary damages):

A. That the Court certify the nationwide Class and the California Class under California Civil Code Section 382 and appoint Plaintiffs as Class Representative and their attorneys as Class Counsel to represent the members of the Classes;

B. That the Court declare that Defendants’ conduct violates the statutes referenced herein;

C. That the Court preliminarily and permanently enjoin Defendants from conducting their business through the unlawful, unfair, or fraudulent business acts or practices, untrue, and misleading labeling and marketing and other violations of law described in this Complaint;

D. That the Court Order Defendants to conduct a corrective advertising and information campaign advising consumers that the Product does not have the characteristics, uses, benefits, and quality Defendants have claimed;

E. That the Court Order Defendants to implement whatever measures are necessary to remedy the unlawful, unfair, or fraudulent business acts or practices, untrue and misleading advertising, and other violations of law described in this Complaint;

F. That the Court Order Defendants to notify each and every individual and/or business who purchased the Product of the pendency of the claims in this action in order to give such individuals and businesses an opportunity to obtain restitution from Defendants;

G. That the Court Order Defendants to pay restitution to restore to all affected persons all funds acquired by means of any act or practice declared by this Court to be an unlawful, unfair, or a fraudulent business act or practice, untrue or misleading labeling, advertising, and marketing, plus pre- and post-judgment interest thereon;

H. That the Court Order Defendants to disgorge all monies wrongfully obtained and all revenues and profits derived by Defendants as a result of its acts or practices as alleged in

1 this Complaint;

- 2 I. That the Court award damages to Plaintiffs and the Classes;
- 3 J. The common fund doctrine, and/or any other appropriate legal theory; and
- 4 K. that the Court grant such other and further relief as may be just and proper.
- 5

6 DATED: June 11, 2018

BRADLEY/GROMBACHER, LLP

7
8 By: 

9 Marcus J. Bradley, Esq.
10 Kiley Lynn Grombacher, Esq.
11 Taylor L. Emerson, Esq.
12 Attorneys for Plaintiffs

13 **JURY DEMAND**

14 Plaintiffs demands a trial by jury on all causes of action so triable.

15 DATED: June 11, 2018

BRADLEY/GROMBACHER, LLP

16
17 By: 

18 Marcus J. Bradley, Esq.
19 Kiley Lynn Grombacher, Esq.
20 Taylor L. Emerson, Esq.
21 Attorneys for Plaintiffs

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1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA)
3 COUNTY OF VENTURA))

4 I am employed in the County of Ventura, State of California. I am over the age of 18 and
5 not a party to the within action. My business address is 2815 Townsgate Rd., Suite 130,
Westlake Village, CA 91361.

6 On **June 12, 2018**, I served the attached document described **STIPULATION**
7 **GRANTING PLAINTIFF LEAVE TO FILE SECOND AMENDED COMPLAINT;**
8 **[PROPOSED] ORDER** on all interested parties in said action:


9 **SEE ATTACHED SERVICE LIST**

10
11 (VIA US MAIL) I caused such envelope(s) to be deposited in the mail at
12 Westlake Village, California with postage thereon fully prepaid. I am
13 "readily familiar" with the firm's practice of collection and processing
14 correspondence for mailing. It is deposited with the U.S. Postal Service
15 on that same day in the ordinary course of business. I am aware that on
motion of party served, service is presumed invalid if postal cancellation
date or postage meter date is more than one day after date of deposit for
mailing in affidavit.

16 BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on an agreement of the
17 parties to accept service by e-mail, I caused a copy of the document(s) to be sent from e-
18 mail address _____ to the e-mail addresses listed on the Service List. I did
19 not receive, within a reasonable time after the transmission, any electronic message or
other indication that the transmission was unsuccessful.

20 (FEDERAL) I declare under penalty of perjury under the laws of the United States of
21 America that the foregoing is true and correct and that I am employed in the office of a
22 member of the bar of this Court at whose direction the service was made.

23 Executed on **June 12, 2018**, at Westlake Village, California.

24 
25 Tina Amoke

EMMA BRENNER, ET AL. V. KEVITA, INC., ET AL.
VCSC Case No. 56-2017-0052340-CU-FR-VTA

Service List

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