

1 Howard W. Rubinstein (Fla. SBN: 0104108)
2 howardr@pdq.net
3 LAW OFFICES OF HOWARD W. RUBINSTEIN
4 P.O. Box 4839
5 Aspen, Colorado 81612
6 (832) 715-2788 · (561) 688-0630 (f)
7 (To apply as counsel pro hac vice)

8 Harold M. Hewell (Cal. SBN: 171210)
9 hmhewell@hewell-lawfirm.com
10 HEWELL LAW FIRM
11 105 West F Street, Second Floor
12 San Diego, California 92101
13 (619) 235-6854 · (888) 298-0177 (f)

14 Attorneys for Plaintiff

NOV 22 2010
2:10 NOV 22 AM 11:15
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
LOS ANGELES
FILED

BY FAX

15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA

17 LUCINDA SERRANO, as an
18 individual, and on behalf of all
19 others similarly situated,

20 Plaintiff,

21 vs.

22 PHUSION PROJECTS, LLC, a
23 Delaware limited liability company
24 dba Drink Four Brewing Co., and
25 DOES 1 through 20, inclusive,

26 Defendant.

27 : Civil No. **CV10 8964 DSF (RZx)**
28 : **COMPLAINT FOR**
: **EQUITABLE RELIEF AND**
: **DAMAGES**
: **Class Action**
: **Jury Trial Requested**

ILS
21
W-5

1 Plaintiff, Lucinda Serrano, by and through counsel, files this Complaint
2 individually and on behalf of all others similarly situated, and alleges against
3 Defendant, Phusion Projects LLC dba Drink Four Brewing Company, as
4 follows:

5 I. VENUE AND JURISDICTION

6 1. This Court has jurisdiction over the subject matter presented by
7 this Complaint because it is a class action arising under the Class Action
8 Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005), which
9 explicitly provides for the original jurisdiction of the Federal Courts of any
10 class action in which any member of the plaintiff class is a citizen of a state
11 different from any Defendant, and in which the matter in controversy exceeds
12 in the aggregate the sum of \$5,000,000.00, exclusive of interest and costs.

13 2. As set forth below, Plaintiff is a citizen of California, and
14 Defendant can be considered a citizen of either Delaware or Illinois.
15 Therefore, diversity of citizenship exists under CAFA, as required by 28
16 U.S.C. § 1332(d)(2)(A).

17 3. Plaintiff alleges that the total claims of the individual members of
18 the Plaintiff Class in this action are in excess of \$5,000,000.00 in the
19 aggregate, exclusive of interest and costs, as required by 28 U.S.C. §
20 1332(d)(2), (5).

21 4. Furthermore, Plaintiff alleges on information and belief that more
22 than two-thirds of all of the members of the proposed Plaintiff Class in the
23 aggregate are citizens of a state other than California, where this action is
24 originally being filed, and that the total number of members of the proposed
25 Plaintiff Class is greater than 100, pursuant to 28 U.S.C. § 1332(d)(5)(B).

26 5. This Court has authority to exercise personal jurisdiction over
27 Defendant because Defendant, directly and through agents, has substantial
28 contacts with and receives benefits and income from and through the State of

1 California.

2 6. Venue in this Judicial District is proper pursuant to 28 U.S.C.
3 §1391(a) because, as set forth below, Defendant conducts business in this
4 Judicial District, and Plaintiff purchased the subject product of this action in
5 this Judicial District.

6 7. The “Declaration of Harold M. Hewell, Pursuant to Civil Code
7 §1780(c) of the Consumer Legal Remedies Act, Civil Code §§1750 et seq.”
8 regarding venue under the California Consumer Legal Remedies Act
9 (“CLRA”) is submitted herewith and is incorporated herein by reference.

10 **II. PARTIES**

11 8. Plaintiff is an individual who at all times relevant herein was over
12 the age of 18 and a citizen of California who resides in the County of San
13 Bernardino. He respectfully requests a jury trial on all claims so triable.

14 9. Phusion Projects LLC is a Delaware limited liability company
15 that does business as Drink Four Brewing Company (“Phusion,” or
16 “Defendant”). Phusion lists with the California Secretary of State a principal
17 place of business located at 1658 Milwaukee Avenue, #424, Chicago, Illinois
18 60647, and an agent for service of process by the name of Sarah Stephany,
19 whose address is listed as 8834 Morro Road, Atascadero California 93422.

20 10. Phusion is the manufacturer, distributor, marketer, promoter,
21 and seller of the subject product of this Complaint, “Four Loko” energy
22 drink/alcoholic beverage, and conducts business in this jurisdiction and in
23 this Judicial District by advertising and through its agents that deliver and sell
24 Four Loko to consumers.

25 **III. GENERAL ALLEGATIONS**

26 11. All allegations herein are based on information and belief and/or
27 are likely to have evidentiary support after reasonable opportunity for further
28 investigation and discovery.

1 12. Plaintiff alleges that, at all times relevant herein, Phusion and its
2 subsidiaries, affiliates, and other related entities, as well as their respective
3 employees, were the agents, servants and employees of Phusion, and at all
4 times relevant herein, each was acting within the purpose and scope of that
5 agency and employment.

6 13. Plaintiff further alleges on information and belief that at all times
7 relevant herein, the distributors and retailers who delivered and sold Four
8 Loko, as well as their respective employees, also were Phusion's agents,
9 servants and employees, and at all times herein, each was acting within the
10 purpose and scope of that agency and employment.

11 14. The true names and capacities of Defendants named herein as
12 Does 1 through 20, inclusive, are unknown to Plaintiff who therefore sues
13 said Defendants, and each of them, by such fictitious names. Plaintiff will
14 amend this Complaint to show their true names and capacities when the same
15 has been ascertained. Plaintiff is informed and believes and based thereon
16 alleges that Defendants named herein and each of said fictitiously named
17 Defendants are negligently or otherwise legally responsible in some manner
18 for the occurrences herein alleged and that Plaintiff's injuries and damages as
19 hereinafter alleged were proximately caused by said negligence or other acts.

20 15. Whenever reference in this Complaint is made to any act by
21 Phusion or its subsidiaries, affiliates, distributors, retailers and other related
22 entities, such allegation shall be deemed to mean that the principals, officers,
23 directors, employees, agents, and/or representatives of Phusion committed,
24 knew of, performed, authorized, ratified and/or directed that act or
25 transaction on behalf of Phusion while actively engaged in the scope of their
26 duties.

27 **IV. FACTUAL ALLEGATIONS**

28 16. Phusion manufactures, markets, advertises and sells a variety of

1 flavored alcoholic beverages throughout the United States. Among those is a
2 beverage known as Four Loko.

3 17. The Product, which contains 6 to 12 percent alcohol by volume
4 depending on state regulations,¹ comes in flavors such as fruit punch, orange
5 blend, grape, watermelon, blue raspberry, kiwi strawberry, lemonade,
6 cranberry lemonade, and lemon lime. Standard beer usually contains 4 to 5
7 percent alcohol by volume.²

8 18. In addition to the high alcohol content, Four Loko contained 135
9 milligrams of caffeine in each 23.5-ounce can. According to the Mayo Clinic,
10 an 8-ounce cup of coffee contains 100 to 200 milligrams and a 12-ounce Coke
11 has 35 milligrams.³

12 19. One 23.5-ounce can of Four Loko, often called “blackout in a
13 can” by those who are familiar with it, is comparable to four or five beers.⁴

15
16 ¹ “Serious Concerns Over Alcoholic Beverages with Added Caffeine,”
17 Consumer Update, FDA Consumer Health Information, Food and Drug
18 Administration, November 2010, [http://www.fda.gov/downloads/
19 ForConsumers/ConsumerUpdates/UCM234132.pdf](http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM234132.pdf), retrieved November
20 21, 2010. A true and correct copy of that Consumer Update is attached
21 hereto as Exhibit A and incorporated by reference.

22 ² Id.

23 ³ Katie Zezima, “A Mix Attractive to Students and Partygoers,” *New York*
24 *Times*, October 26, 2010 ([http://www.nytimes.com/2010/10/27/us/
25 27drinkbox.html](http://www.nytimes.com/2010/10/27/us/27drinkbox.html)), retrieved on November 21, 2010.

26 ⁴ Martinne Geller, “Regulators warn on ‘blackout in a can’ drinks,” *Reuters*,
27 November 17, 2010 ([http://www.reuters.com/article/
28 idUSTRE6AG4V120101117?pageNumber=1](http://www.reuters.com/article/idUSTRE6AG4V120101117?pageNumber=1)), retrieved November 21,
2010.

1 20. The Product also contained guarana and taurine. Guarana
2 contains very high concentrations of caffeine and has been used as a stimulant
3 and appetite suppressant. It has not been evaluated by the U.S. Food and
4 Drug Administration (“FDA”) for safety, effectiveness, or purity, and persons
5 with heart problems, high blood pressure, kidney disease, an overactive
6 thyroid (hyperthyroidism) or an anxiety or nervous disorder have been
7 discouraged from ingesting guarana.⁵ Taurine, an amino acid that supports
8 neurological development and helps regulate the level of water and mineral
9 salts in the blood, also is believed to have antioxidant properties. The effects
10 of heavy or long-term taurine use are largely unknown.⁶

11 21. On November 16, 2010, Phusion announced that it would
12 reformulate its products to remove caffeine, guarana and taurine, and in the
13 future would produce only non-caffeinated versions of Four Loko.⁷ In the
14 press release announcing the reformulation, Phusion’s three co-founders and
15 current managing partners, Chris Hunter, Jeff Wright and Jaisen Freeman,
16 stated: “We are taking this step after trying – unsuccessfully – to navigate a
17 difficult and politically-charged regulatory environment at both the state and
18

19 ⁵ “Guarana,” Drugs.com, <http://www.drugs.com/mtm/guarana.html>,
20 retrieved on November 21, 2010.

21 ⁶ Katherine Zeratsky, R.D., L.D., “Taurine in energy drinks: What is it?”
22 MayoClinic.com, <http://www.mayoclinic.com/health/taurine/AN01856>,
23 retrieved November 21, 2010.

24 ⁷ “Phusion Projects to Remove Caffeine, Guarana and Taurine from
25 Products,” press release by Phusion Projects LLC, November 16, 2010,
26 http://www.phusionprojects.com/media_reformulation.html, retrieved
27 November 21, 2010. A true and correct copy of that press release is attached
28 hereto as Exhibit B and incorporated by reference.

1 federal levels.”⁸

2 22. Indeed, the day after Phusion announced the reformulation, the
3 FDA sent the company a warning letter stating that: “FDA is aware that,
4 based on the publicly available literature, a number of qualified experts have
5 concerns about the safety of caffeinated alcoholic beverages. Moreover, the
6 agency is not aware of data or other information to establish the safety of the
7 relevant conditions of use for your product.”⁹

8 23. In that Warning Letter, the FDA cited studies reflecting its
9 concerns about beverages containing an alcohol/caffeine mix:

10 Based upon the publicly available literature, FDA has the
11 following specific concerns about the safety of caffeine when used
12 in the presence of alcohol.² [Footnote in original.]

- 13 • Reports in the scientific literature have described behavioral
14 effects that may occur in young adults when energy drinks are
15 consumed along with alcoholic beverages (O’Brien et al.,
16 2008; Thombs et al., 2010; Miller, 2008).
- 17 • Studies suggest that the combined ingestion of caffeine and
18 alcohol may lead to hazardous and life-threatening situations
19 because caffeine counteracts some, but not all, of alcohol’s

20 ⁸ Id.

21
22 ⁹ “Warning Letter,” dated November 17, 2010, from Joann M. Givens, Acting
23 Director, Office of Compliance, Center for Food Safety and Applied
24 Nutrition, Food and Drug Administration, to Jaisen Freeman, Chris Hunter
25 and Jeff Wright, Phusion Projects, LLC (dba Drink Four Brewing Company),
26 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm234023.htm>,
27 retrieved November 21, 2010 (“Warning Letter”). A true and
28 correct copy of that Warning Letter is attached hereto as Exhibit C and
incorporated by reference.

1 adverse effects. In one study, a mixture of an energy drink and
2 alcohol reduced subjects' subjective perception of intoxication
3 but did not improve diminished motor coordination or slower
4 visual reaction times using objective measures (Ferreira et al.,
5 2006). In a dual-task model, subjects co-administered caffeine
6 and alcohol reported reduced perception of intoxication but
7 no reduction of alcohol-induced impairment of task accuracy
(Marczinski and Fillmore, 2006).

8 • Because caffeine alters the perception of alcohol intoxication,
9 the consumption of pre-mixed products containing added
10 caffeine and alcohol may result in higher amounts of alcohol
11 consumed per drinking occasion, a situation that is particularly
12 dangerous for naïve drinkers (Oteri et al., 2007).

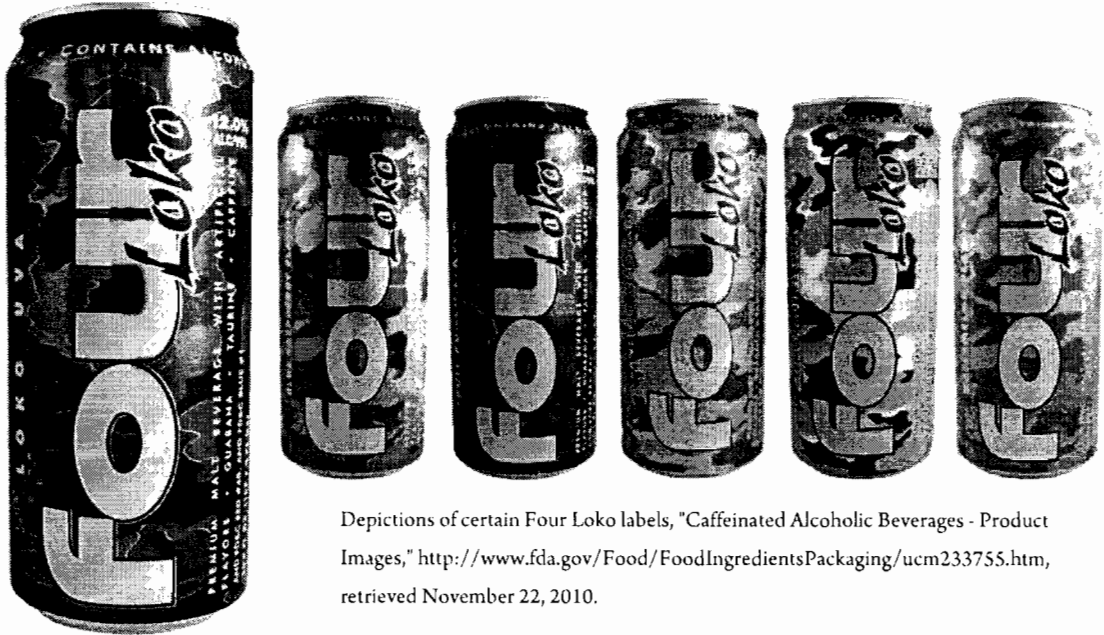
13 ² As used in the discussion below, the term “energy drink”
14 identifies beverages that contain a significant amount of calories
15 and caffeine as well as other ingredients, such as taurine, herbal
16 extracts, or vitamins (Heckman et al., 2010).

17
18 24. The FDA’s Warning Letter gave Phusion 15 days to address the
19 issues raised in the letter or face possible enforcement action, which could
20 range from “seizure of illegal products and injunctions and prosecutions
21 against manufacturers and distributors of those products.”¹⁰

22 25. Phusion and manufacturers of similar products have been under
23 scrutiny by the FDA for at least the past year. In November 2009, at the
24 request of 18 state attorneys general, the agency contacted Phusion and other
25 manufacturers of caffeinated alcoholic beverages to provide information on
26 the safety of adding caffeine to their products. In July 2010, U.S. Senator

27
28 ¹⁰ Id.

1 Charles E. Schumer of New York asked the Federal Trade Commission to
2 investigate whether the drinks, which are sold in colorful packaging fruit
3 flavors, were “explicitly designed to attract under-age drinkers.”¹¹
4



Depictions of certain Four Loko labels, "Caffeinated Alcoholic Beverages - Product Images," <http://www.fda.gov/Food/FoodIngredientsPackaging/ucm233755.htm>, retrieved November 22, 2010.

16 26. Schumer had expressed concern that the vibrant packaging
17 increased the probability that the caffeinated alcoholic beverages would be
18 attract younger consumers, and that parents and business owners stocking the
19 products might be misled by the packaging. He also noted that Four Loko is
20

21
22 ¹¹ Abby Goodnough, “F.D.A. Issues Warning Over Alcoholic Energy Drinks,”
23 *New York Times*, November 17, 2010 (<http://www.nytimes.com/2010/11/18/us/18drinks.html>),
24 retrieved November 22, 2010; “FDA
25 Warning Letters issued to four makers of caffeinated alcoholic beverages,”
26 FDA News Release, November 17, 2010, <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm234109.htm>,
27 retrieved November 22, 2010. A true and correct copy of that press release is attached hereto as
28 Exhibit D and incorporated herein by reference.

1 “stocked next to other energy drinks, creating further confusion.”¹²

2 27. The FDA’s action followed several incidents involving Four
3 Loko that attracted significant media attention. Student at Ramapo College in
4 Mahwah, New Jersey and Central Washington University in Ellensburg,
5 Washington, ended up in emergency rooms after drinking Four Loko, some
6 with high levels of alcohol poisoning. Four Loko also has been blamed for
7 several deaths in recent months.¹³

8 28. “FDA does not find support for the claim that the addition of
9 caffeine to these alcoholic beverages is ‘generally recognized as safe,’ which is
10 the legal standard,” said Dr. Joshua M. Sharfstein, Principal Deputy
11 Commissioner, FDA. “To the contrary, there is evidence that the
12 combinations of caffeine and alcohol in these products pose a public health
13 concern.”¹⁴

14 29. As a result of the deceptive marketing of Four Loko as set forth
15 above, Defendant has been able to charge a price premium for Four Loko
16 over similar alcoholic beverages that do not contain caffeine.

17 30. Plaintiff purchased Four Loko Fruit Punch on November 6, 2010
18

19 _____
20 ¹² “Schumer: FDA To Effectively Ban Caffeinated Alcoholic Drinks; FTC
21 Will Notify Manufacturers That They May Be Engaged In Illegal Marketing
22 Of Unsafe Beverages,” press release from the Office of U.S Senator Charles E.
23 Schumer, November 16, 2010, [http://schumer.senate.gov/new_website/
24 record.cfm?id=328578](http://schumer.senate.gov/new_website/record.cfm?id=328578), retrieved November 22, 2010. A true and correct
25 copy of that press release is attached hereto as Exhibit E and incorporated by
26 reference.

26 ¹³ See Note 9, “F.D.A. Issues Warning Over Alcoholic Energy Drinks.”

27 ¹⁴ See Note 9, “FDA Warning Letters issued to four makers of caffeinated
28 alcoholic beverages.”

1 from San Bernardino, California, for a purchase price of \$2.49 plus tax and
2 “CRV” (California redemption value), and then purchased Four Loko
3 Lemon-Lime on November 11, 2010 from a 7-11 in Venice, California.
4 Nothing in the advertising, labeling, packaging, marketing, promotion and
5 selling of Four Loko gave her any warning of the particular dangers of
6 drinking a caffeinated beverage with high alcoholic content, set forth in detail
7 above.

8 31. Given the foregoing, Plaintiff contends she was misled by
9 Defendant into purchasing and paying for a dangerous product that was not
10 what it was represented to be.

11 32. As a direct result, she has suffered actual damages in that she has
12 been deprived of the benefit of her bargain and has spent money purchasing
13 Four Loko at a price premium when it actually had significantly less value
14 than was reflected in the price she paid for it.

15 33. In fact, had she known the true facts about Four Loko, she would
16 not have purchased it at all.

17 **V. CLASS ACTION ALLEGATIONS**

18 34. Plaintiff realleges and incorporates by reference the allegations
19 set forth in each of the preceding paragraphs of this Complaint.

20 35. Pursuant to California Civil Code §1781, California Code of Civil
21 Procedure §382, and Federal Rule of Civil Procedure (“FRCP”) 23, Plaintiff
22 brings this class action and seeks certification of the claims and certain issues
23 in this action on behalf of herself and all persons who, during the Class Period
24 (defined as the period extending back four years prior to the filing of this
25 action, or to the date Four Loko was first sold in its caffeinated formulation,
26 whichever is most recent), purchased for personal use the caffeinated Four
27 Loko manufactured, advertised and sold by Defendant.

28 36. Defendant’s practices and omissions were applied uniformly to all

1 members of the Class, including any subclass arising out of the California
2 statutory claims, so that the questions of law and fact are common to all
3 members of the Class. All members of the putative Class were and are
4 similarly affected by not receiving disclosure of the risks associated with
5 drinking Four Loko, and the relief sought herein is for the benefit of Plaintiff
6 and members of the putative Class.

7 37. Excluded from the Class are employees and agents of Defendant,
8 the Judge and his or her relatives back to the second degree of affinity, officers
9 and directors of Defendant, and counsel for Plaintiff and the Class.

10 38. Plaintiff is informed and believes and, on that basis, alleges that
11 the proposed Class is so numerous that joinder of all members would be
12 impracticable. Based on the annual sales of Four Loko and its popularity, it is
13 apparent that the number of consumers of Four Loko would be so large as to
14 make joinder impossible.

15 39. Questions of law and fact common to the Plaintiff Class exist that
16 predominate over questions affecting only individual members, including,
17 inter alia:

- 18 a. Whether Defendant's practices, representations and failure
19 to warn of the dangers of Four Loko made in connection
20 with the labeling, packaging, advertising, marketing,
21 promotion and sales of Four Loko were deceptive, unlawful
22 or unfair in any respect, thereby violating California's
23 Unfair Competition Law ("UCL"), Bus. & Prof. Code §
24 17200, et seq.;
- 25 b. Whether Defendant's practices, representations and failure
26 to warn of the dangers of Four Loko made in connection
27 with the labeling, packaging, advertising, marketing,
28 promotion and sales of Four Loko were deceptive, unlawful

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

or unfair in any respect, thereby violating California’s False Advertising Law (“FAL”), Bus. & Prof Code § 17500, et seq.;

- c. Whether Defendant’s practices made in connection with the labeling, packaging, advertising, marketing, promotion and sales of Four Loko violated California’s Consumer Legal Remedies Act (“CLRA”), California Civil Code § 1750, et seq.;
- d. Whether Defendant misrepresented the characteristics or other aspects of Four Loko;
- e. Whether Defendant failed to disclose, withheld or misrepresented material information regarding adverse health effects from the use of Four Loko in an effort to deceive consumers;
- f. Whether Defendant knowingly and intentionally concealed from Plaintiff and members of the putative Class material information regarding adverse health effects from the use of Four Loko;
- g. Whether Defendant’s conduct as set forth above injured consumers and, if so, the nature and extent of the injury; and
- h. Whether Defendant have been unjustly enriched, such that disgorgement of profits is proper, for the wrongful conduct set forth herein.

40. The claims asserted by Plaintiff in this action are typical of the claims of the members of the Plaintiff Class, as the claims arise from the same course of conduct by Defendant and the relief sought is common.

41. Plaintiff will fairly and adequately represent and protect the

1 interests of the members of the Plaintiff Class. Plaintiff has retained counsel
2 competent and experienced in both consumer protection and class action
3 litigation.

4 42. Certification of this class action is appropriate under California
5 Civil Code §1781, California Code of Civil Procedure §382, and FRCP 23
6 because the questions of law or fact common to the respective members of
7 the Class predominate over questions of law or fact affecting only individual
8 members. This predominance makes class litigation superior to any other
9 method available for the fair and efficient adjudication of these claims. Absent
10 a class action, it would be highly unlikely that the representative Plaintiff or
11 any other members of the Class would be able to protect their own interests
12 because the cost of litigation through individual lawsuits might exceed
13 expected recovery.

14 43. Certification also is appropriate because Defendant acted or
15 refused to act on grounds generally applicable to the Class, thereby making
16 appropriate the relief sought on behalf of the Class as a whole. Further, given
17 the large number of consumers of Four Loko, allowing individual actions to
18 proceed in lieu of a class action would run the risk of yielding inconsistent and
19 conflicting adjudications.

20 44. A class action is a fair and appropriate method for the
21 adjudication of the controversy, in that it will permit a large number of claims
22 to be resolved in a single forum simultaneously, efficiently, and without the
23 unnecessary hardship that would result from the prosecution of numerous
24 individual actions and the duplication of discovery, effort, expense and
25 burden on the Courts that individual actions would engender.

26 45. The benefits of proceeding as a class action, including providing a
27 method for obtaining redress for claims that would not be practical to pursue
28 individually, outweigh any difficulties that might be argued with regard to the

1 management of this class action.

2 **VI. FIRST CAUSE OF ACTION**

3 **Violations of the UCL, Bus. & Prof. Code §§17200, et seq.**

4 ***(Against Phusion and Does 1 through 5, inclusive)***

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

7 47. This cause of action is brought on behalf of Plaintiff and members
8 of the general public pursuant to Cal. Bus. & Prof. Code §§17200, et seq.,
9 which provides that “unfair competition shall mean and include any unlawful,
10 unfair or deceptive business act or practice and unfair, deceptive, untrue or
11 misleading advertising and any act prohibited by Chapter I (commencing
12 with Section 17500) as Part 3 of Division 7 of the Business and Professions
13 Code.”

14 48. Plaintiff alleges that Defendant committed unfair business acts
15 and/or practices.

16 49. The utility of Defendant’s practices related to the advertising,
17 labeling, packaging, marketing, promotion and selling of Four Loko without
18 warning of the dangers inherent in consuming a caffeinated beverage with
19 high alcohol content is negligible, if any, when weighed against the harm to
20 the general public, Plaintiff and members of the Class.

21 50. The harmful impact upon members of the general public and the
22 Class who purchased and used Four Loko outweighs any reasons or
23 justifications by Defendant for the unfair business practices Defendant
24 employed to sell Four Loko described herein.

25 51. Defendant had an improper motive (profit before accurate
26 marketing) in its practices related to the advertising, labeling, packaging,
27 marketing, promotion and selling of Four Loko, as set forth above.

28 52. The use of such unfair business acts and practices was and is

1 under the sole control of Defendant, and was deceptively hidden from
2 members of the general public in Defendant's advertising, labeling, packaging,
3 marketing, promotion and selling of Four Loko.

4 53. Defendant committed a deceptive act or practice by failing to
5 properly disclose to consumers the dangers associated with drinking Four
6 Loko, as set forth in detail above. Defendant also committed a deceptive act
7 or practice by using fruit flavor names for the product, as well as vibrant colors
8 and designs in the packaging and labeling of Four Loko, and by promoting
9 the stocking of Four Loko near non-alcoholic energy drinks.

10 54. These deceptive acts and practices had a capacity, tendency,
11 and/or likelihood to deceive or confuse reasonable consumers into believing
12 that Four Loko posed no greater risk to the health of those who drank it than
13 did other non-caffeinated alcoholic beverages.

14 50. Defendant also committed unlawful business practices by
15 violating the FAL and CLRA as set forth in detail below. The violations of
16 these statutes serve as predicate violations of this prong of the UCL.

17 55. As a purchaser and consumer of Defendant's Four Loko, and as a
18 member of the general public in California who purchased and used Four
19 Loko, Plaintiff is entitled to and does bring this class action seeking all
20 available remedies under the UCL.

21 56. Defendant's practices, as set forth above, were intended to
22 promote the sale of Four Loko and constitute unfair, deceptive and/or
23 unlawful business practices within the meaning of California Bus. & Prof.
24 Code §17200, et seq.

25 57. Pursuant to California Bus. & Prof. Code §17203, Plaintiff, on
26 behalf of herself and members of the general public, seeks an order of this
27 Court restoring all monies that may have been acquired by Defendant as a
28 result of such unfair, deceptive and/or unlawful business acts or practices.

1 58. Plaintiff and members of the general public may be irreparably
2 harmed and/or denied an effective and complete remedy if such an order is
3 not granted.

4 59. As a result of Defendant's violations of the UCL, Plaintiff and the
5 Class are entitled to restitution for out-of-pocket expenses and economic
6 harm.

7 60. Pursuant to Civil Code §3287(a), Plaintiff and members of the
8 Class are further entitled to pre-judgment interest as a direct and proximate
9 result of Defendant's wrongful conduct. The amount on which interest is to
10 be applied is a sum certain and capable of calculation, and Plaintiff and
11 members of the Class are entitled to interest in an amount according to proof.

12 **VII. SECOND CAUSE OF ACTION**

13 **Violations of the FAL, Bus. & Prof. Code §§17500, et seq.**

14 *(Against Phusion and Does 6 through 10, inclusive)*

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

17 62. In violation of California Bus. & Prof. Code §17500, Defendant
18 has disseminated, or caused to be disseminated advertising, labeling,
19 packaging, marketing, and promotion of Four Loko that is deceptive because
20 of its failure to warn of the particular dangers inherent in consuming a
21 caffeinated beverage with high alcohol.

22 63. Defendant compounded this deception by using fruit names for
23 the product, as well as vibrant colors and designs in the advertising, packaging
24 and labeling of Four Loko, and by promoting the stocking of Four Loko near
25 non-alcoholic energy drinks.

26 64. These acts deceptively represented Four Loko as posing no
27 greater risk to the health of those who drank it than did other non-caffeinated
28 alcoholic beverages.

1 65. Defendant's representations and omissions for Four Loko are by
2 their very nature unfair, deceptive and/or unlawful within the meaning of
3 California Bus. & Prof. Code §17500, et seq., and were likely to deceive
4 reasonable consumers.

5 66. In making and disseminating the representations and omissions
6 alleged herein, Defendant knew or should have known they were misleading,
7 particularly given the existence of peer-reviewed scientific studies indicating
8 the dangers of caffeinated alcoholic beverages, as referenced in the FDA
9 warning letter. Accordingly, Defendant acted in violation of California's Bus.
10 & Prof. Code §17500, et seq.

11 67. As a direct and proximate result of Defendant's wrongful
12 conduct, Plaintiff and the Class members have suffered substantial harm.

13 68. Pursuant to Bus. & Prof. Code §17535, Plaintiff, on behalf of
14 herself and members of the general public, seeks an order of this Court
15 restoring all monies that may have been acquired by Defendant as a result of
16 such deceptive acts and/or practices.

17 69. As a result of Defendant's violations of the FAL, Plaintiff and the
18 Class are entitled to restitution for out-of-pocket expenses and economic
19 harm.

20 70. Pursuant to Civil Code §3287(a), Plaintiff and members of the
21 Class are further entitled to pre-judgment interest as a direct and proximate
22 result of Defendant's wrongful conduct. The amount on which interest is to
23 be applied is a sum certain and capable of calculation, and Plaintiff and
24 members of the Class are entitled to interest in an amount according to proof.

25 **VIII. THIRD CAUSE OF ACTION**

26 **Violations of the CLRA, Cal. Civil Code § 1750, et seq.**

27 ***(Against Phusion and Does 11-15, inclusive)***

28 71. Plaintiff incorporates by reference each preceding paragraph as

1 though fully set forth at length herein.

2 72. This cause of action is brought pursuant to the CLRA.

3 73. Plaintiff and each member of the Class are “consumers” within
4 the meaning of Civil Code §1761(d).

5 74. The purchases of Four Loko by Plaintiff and each member of the
6 Class were and are “transactions” within the meaning of Civil Code §1761(e).

7 75. Defendant’s marketing, promotion, and sales of Four Loko within
8 California, as alleged herein, violated the CLRA in at least the following
9 respect as set forth in detail above: in violation of Civil Code §1770(a)(7),
10 Defendant represented that Four Loko is of a particular standard, quality, or
11 grade, which it is not.

12 76. Plaintiff seeks and is entitled to equitable relief in the form of an
13 order:

- 14 a. Requiring Defendant to make full restitution of all monies
15 wrongfully obtained as a result of the conduct described
16 above; and
17 b. Requiring Defendant to disgorge all ill-gotten gains flowing
18 from the conduct described above.

19 77. Plaintiff, by and through counsel, is notifying Defendant in
20 writing of the particular violations of section 1770 of the CLRA and
21 demanding that it take certain corrective actions within the period prescribed
22 by the CLRA for such demands.

23 78. In the event that Defendant fails to adequately respond to the
24 demands for corrective action within the time prescribed by the CLRA,
25 Plaintiff intends to amend this pleading to request statutory damages, actual
26 damages, plus punitive damages, interest and attorneys’ fees as authorized by
27 §1780(a) of the CLRA.

28 79. Regardless of an award of damages, however, Plaintiff seeks and is

1 entitled to, pursuant to §1780(a)(2) of the CLRA, an order for the equitable
2 relief described above, as well as costs, attorney's fees and any other relief
3 which the Court deems proper.

4 IX. FOURTH CAUSE OF ACTION

5 Fraudulent Concealment

6 *(Against Phusion and Does 16 through 20, inclusive)*

7 80. Plaintiff incorporates by reference each preceding paragraph as
8 though fully set forth at length herein.

9 81. Plaintiff alleges that Defendant withheld and suppressed facts in
10 its advertising, labeling, packaging, marketing and promotion of Four Loko
11 that led consumers to falsely believe that Four Loko posed no greater risk to
12 the health of those who drank it than did other non-caffeinated alcoholic
13 beverages.

14 82. This is false, as set forth in detail above.

15 83. Defendant was bound to disclose the truth about these matters,
16 but failed to do so.

17 84. Defendant knew that these claims were false, given the prevalence
18 of peer-reviewed scientific studies indicating the dangers of caffeinated
19 alcoholic beverages, as referenced in the FDA warning letter.

20 85. Nevertheless, Defendant concealed the dangers inherent in Four
21 Loko's combination of high levels of caffeine with high alcohol content, and it
22 took steps in the advertising, labeling, packaging, marketing and promotion of
23 Four Loko to prevent consumers from learning the true facts regarding the
24 product.

25 86. The concealment of the true facts from Plaintiff and members of
26 the Class was done with the intent to induce Plaintiff and members of the
27 Class to purchase and use Four Loko.

28 87. The reliance by Plaintiff and members of the Class was

1 reasonable and justified in that Defendant appeared to be, and represented
2 itself to be, a reputable business.

3 88. As a direct and proximate result of the fraud and deceit alleged,
4 Plaintiff and members of the Class suffered actual damages in that they have
5 been deprived of the benefit of their bargain and have spent money
6 purchasing Four Loko at a price premium when it actually had significantly
7 less value than was reflected in the price they paid for it.

8 89. Plaintiff alleges that Defendant intended for consumers to rely on
9 its advertising, labeling, packaging, marketing and promotion of Four Loko,
10 as well as its suppression of the true facts about Four Loko, in purchasing and
11 drinking the product.

12 90. Plaintiff and other members of the general public, in purchasing
13 and using the Four Loko as herein alleged, did rely on Defendant's
14 advertising, labeling, packaging, marketing and promotion of Four Loko, as
15 well as Defendant's suppression of facts, all to their damage as alleged.

16 91. In doing these things, Defendant was guilty of malice, oppression
17 and fraud, and Plaintiff and members of the Class are, therefore, entitled to
18 recover punitive damages.

19 **X. PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiff, on behalf of herself and all others similarly
21 situated, prays for a judgment:

- 22 A. Certifying the Class as requested herein;
- 23 B. Awarding Plaintiff and the proposed Class members damages;
- 24 C. Awarding restitution and disgorgement of Defendant's revenues
25 to Plaintiff and the proposed Class members;
- 26 D. Awarding declaratory and injunctive relief as permitted by law or
27 equity, including directing Defendant to identify, with Court supervision,
28 victims of their conduct and pay them restitution and disgorgement of all

1 monies acquired by Defendant by means of any act or practice declared by
2 this Court to be wrongful;

3 E. Ordering that Defendant be required to make full restitution of
4 all monies wrongfully obtained as a result of the conduct described above and
5 required to disgorge all ill-gotten gains flowing from the conduct described
6 above.

7 F. Ordering that Defendant be required to engage in a corrective
8 advertising campaign;

9 G. Awarding attorneys' fees and costs; and

10 H. Providing such further relief as may be just and proper.

11 **XI. JURY DEMAND**

12 Plaintiff demands a trial by jury on all issues so triable.

13 Respectfully submitted,

14 Dated: November 22, 2010

HEWELL LAW FIRM

15 By: 
16 (VIA FAX/ELECTRONIC TRANSMISSION)
17 Harold M. Hewell

18 Howard W. Rubinstein
19 *howardr@pdq.net*
20 LAW OFFICES OF HOWARD W.
21 RUBINSTEIN
22 P.O. Box 4839
23 Aspen, Colorado 81612
24 (832) 715-2788 · (561) 688-0630 (f)

25 *Attorneys for Plaintiff*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBITS

<u>Exhibit:</u>	<u>Description:</u>	<u>Pages:</u>
A	“Serious Concerns Over Alcoholic Beverages with Added Caffeine,” Consumer Update, FDA Consumer Health Information, Food and Drug Administration, November 2010.	25
B	“Phusion Projects to Remove Caffeine, Guarana and Taurine from Products,” press release by Phusion Projects LLC, November 16, 2010.	27-28
C	“Warning Letter,” dated November 17, 2010, from Joann M. Givens, Acting Director, Office of Compliance, Center for Food Safety and Applied Nutrition, Food and Drug Administration, to Jaisen Freeman, Chris Hunter and Jeff Wright, Phusion Projects, LLC (dba Drink Four Brewing Company).	30-32
D	“FDA Warning Letters issued to four makers of caffeinated alcoholic beverages,” FDA News Release, November 17, 2010.	34-35
E	“Schumer: FDA To Effectively Ban Caffeinated Alcoholic Drinks; FTC Will Notify Manufacturers That They May Be Engaged In Illegal Marketing Of Unsafe Beverages,” press release from the Office of U.S Senator Charles E. Schumer, November 16, 2010.	37-38

Exhibit A

Serious Concerns Over Alcoholic Beverages with Added Caffeine

Caffeinated alcoholic beverages, or CABs, are alcoholic beverages that contain caffeine as an additive and are packaged in combined form.

Alcoholic beverages to which caffeine has been added as a separate ingredient have raised health concerns at the Food and Drug Administration (FDA) as well as in other federal, state, and local agencies.

On Nov. 17, 2010, FDA announced that it had sent warning letters to four companies that make malt versions of these beverages, advising them that the caffeine included as a separate ingredient is an "unsafe food additive."

These warning letters were not directed at alcoholic beverages that only contain caffeine as a natural constituent of one or more of their ingredients, such as a coffee flavoring.

A Troubling Mix

According to data and expert opinion, caffeine can mask sensory cues that people may rely on to determine how intoxicated they are. This means that individuals drinking these beverages may consume more alcohol—and become more intoxicated—than they realize. At the same time, caffeine does not change blood alcohol content levels, and thus does not reduce the risk of harms associated with drinking alcohol.

Studies suggest that drinking caffeine and alcohol together may lead to hazardous and life-threatening behaviors. For example, serious concerns are raised about whether the combination of alcohol and caffeine is associated with an increased risk of alcohol-related consequences, including alcohol poisoning, sexual assault, and riding with a driver who is under the influence of alcohol.

Malt versions of premixed alcoholic



beverages come in containers holding between 12 and 32 liquid ounces. Some may also contain stimulant ingredients in addition to caffeine. Their advertised alcohol-by-volume value is as high as 12 percent, compared to standard beer's usual value of 4 to 5 percent.

These alcoholic beverages are available in many states in convenience stores and other outlets. They often come in large, boldly colored cans comparable in size to "tall" cans of beer—or in containers resembling regular beer bottles.

FDA Warns Four Firms

FDA issued its November 2010 warning letters to four companies that make caffeinated alcoholic beverages: Charge Beverages Corp., New Century Brewing Co. LLC, Phusion Projects LLC (which does business as the Drink Four Brewing Co.), and United Brands.

The caffeinated malt beverages referenced in these warning letters are

- Core High Gravity HG Green
- Core High Gravity HG Orange
- Four Loko
- Joose
- Lemon Lime Core Spiked
- Moonshot (This product is labeled as "premium beer with caffeine")
- Max

The manufacturers of these products have failed to show that the direct addition of caffeine to their malt beverages is "generally recognized as safe" by qualified experts. Rather, there is evidence that the combinations of caffeine and alcohol in these products pose a public health concern.

"Consumers should avoid these caffeinated alcoholic beverages, which do not meet the FDA's standards for safety," says Joshua M. Sharfstein, M.D., FDA's principal deputy commissioner.

The agency has given the firms 15 days to respond to the warning letters and then may proceed to court to stop their sale. In addition, other alcoholic beverages containing added caffeine may be subject to agency action in the future if scientific data indicate that the use of caffeine in those products does not meet safety standards. **FDA**

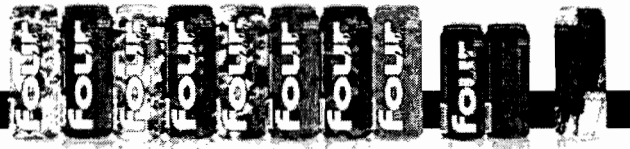
Find this and other Consumer Updates at www.fda.gov/ForConsumers/ConsumerUpdates

Sign up for free e-mail subscriptions at www.fda.gov/consumer/consumernews.html

Exhibit B



Phusion Projects, LLC



FOR IMMEDIATE RELEASE

MEDIA CONTACT:

(888) 901-6344

media@drinkfour.com

Phusion Projects to Remove Caffeine, Guarana and Taurine from Products

Tuesday, November 16, 2010, Chicago, Ill. – Phusion Projects today announced the company’s intent to reformulate its products to remove caffeine, guarana and taurine nationwide, saying it has taken the necessary steps to do so and is informing its employees and distributors of the plans. Going forward, Phusion will produce only non-caffeinated versions of Four Loko.

In a statement, Chris Hunter, Jeff Wright and Jaisen Freeman, Phusion’s three co-founders and current managing partners said:

“We have repeatedly contended – and still believe, as do many people throughout the country – that the combination of alcohol and caffeine is safe. If it were unsafe, popular drinks like rum and colas or Irish coffees that have been consumed safely and responsibly for years would face the same scrutiny that our products have recently faced.

“In addition, if our products were unsafe, we would not have expected the federal agency responsible for approving alcoholic beverage formulas – the Tobacco Tax and Trade Bureau (TTB) – to have approved them. Yet, all of our product formulas and packaging were reviewed and approved by the TTB before being offered to consumers.

“We are taking this step after trying – unsuccessfully – to navigate a difficult and politically-charged regulatory environment at both the state and federal levels.

“Over the last several months we have been more than willing to talk with regulators and policymakers on the national, state and local levels. Our company has a history of being as cooperative as we possibly can to ensure that our products are consumed safely, responsibly and only by of-age adults.

“We hoped that clear, consistent, industry-wide standards regulating pre-packaged caffeinated alcoholic beverages would be the outcome of these conversations. We also hoped others would share our commitment to transparency and fairness.

“By taking this action today, we are again demonstrating leadership, cooperation and responsible corporate citizenship.”

Making concessions like this is something the company has a history of doing. It added multiple additional label warnings to its cans at the request of regulators; its alcohol-by-volume warnings are in a font as large as is allowed by law; and where required, Phusion sells versions of its product with reduced alcohol content.

Additionally, the company works with its distributors to share information about the appropriate way to stock and market its products; it works with retailers to provide point of sale information that reinforces the importance of asking for ID when selling any alcoholic beverage; and it includes warnings and labels on its cans that go above and beyond what the federal government requires – helping to ensure that consumers are informed and that its products don't end up in the hands of minors.

In an open letter to regulators this month, Phusion said it would welcome the opportunity to work together to create uniform standards for all liquor and malt-based caffeinated alcoholic beverages. The company also stated that uniformity means uniformity in how the laws are written, applied and enforced. The company, unfortunately, was not given that opportunity.

About Phusion Projects

Phusion Projects, LLC is a Chicago-based alcoholic beverage company that sells its products nationwide. Its Four Loko and Four MaXed drinks combine alcohol with caffeine, guarana and taurine, while its Earthquake product is a non-caffeinated High Gravity Lager. From the company's inception, Phusion Projects has been committed to making contributions to communities, operating as a responsible member of the alcoholic beverage industry and setting unmatched standards in this regard. To learn more about Phusion and our commitment to responsible drinking, please visit our website: <http://www.phusionprojects.com>.

###

Exhibit C



[Home](#) > [Inspections, Compliance, Enforcement, and Criminal Investigations](#) > [Enforcement Actions](#) > [Warning Letters](#)

Inspections, Compliance, Enforcement, and Criminal Investigations

Phusion Projects Inc. 11/17/10



Department of Health and Human Services

Public Health Service
Food and Drug Administration
College Park, MD 20740

NOV 17, 2010

WARNING LETTER

OVERNIGHT MAIL via UPS

Mr. Jaisen Freeman
Mr. Chris Hunter
Mr. Jeff Wright
Phusion Projects, LLC (dba Drink Four Brewing Company)
1658 N. Milwaukee Avenue, Suite 424
Chicago, IL 60647

Re: 134051

Dear Messrs. Freeman, Hunter, and Wright

The Food and Drug Administration (FDA) has reviewed the regulatory status of the ingredients declared on the label of your product, "Four Loko"¹ which contains caffeine that has been directly added to an alcoholic beverage and packaged in combined caffeine and alcohol form. As it is used in your product, caffeine is an unsafe food additive, and therefore your product is adulterated under section 402(a)(2)(C) of the Federal Food, Drug, and Cosmetic Act (the Act) [21 U.S.C. § 342(a)(2)(C)]. Regulations on the general provisions for food additives are located in Title 21, Code of Federal Regulations, Part 170 (21 CFR 170). You may find copies of the Act and these regulations through links in FDA's Internet home page at <http://www.fda.gov>¹.

As defined in section 201(s) of the Act [21 U.S.C. § 321(s)], the term "food additive" refers to any substance the intended use of which results in its becoming a component of any food, unless the substance is the subject of a prior sanction or is generally recognized as safe (GRAS) among qualified experts under the conditions of its intended use. Under section 409 of the Act [21 U.S.C. § 348], a food additive is unsafe unless a regulation is in effect that prescribes the conditions under which the additive may be safely used, and the additive and its use or intended use are in conformity with that regulation. There is no food additive regulation authorizing the use of caffeine as a direct addition to alcoholic beverages, and we are not aware of any information to establish that caffeine added directly to alcoholic beverages is the subject of a prior sanction. Likewise, we are not aware of any basis to conclude that caffeine is GRAS under these conditions of use.

FDA's regulations in 21 CFR Part 170 describe the eligibility criteria for classification of a substance added to food as GRAS. Under 21 CFR 170.30(a)-(c), general recognition of safety must be based on the views of qualified experts. The basis of such views may be either (1) scientific procedures or (2) in the case of a substance used in food prior to January 1, 1958, through experience based on common use in food. Further, general recognition of safety requires common knowledge about the substance throughout the scientific community knowledgeable about the safety of substances directly added to food.

FDA's regulations in 21 CFR Part 170 define "common use in food" and establish eligibility criteria for classification as GRAS through experience based on common use in food. Under 21 CFR 170.30, common use in food means "a substantial history of consumption of a substance for food use by a significant number of consumers." Under 21 CFR 170.30(c)(1), "[g]eneral recognition of safety through experience based on common use in food prior to January 1, 1958, shall be based solely on food use of the substance prior to January 1, 1958, and shall ordinarily be based upon generally available data and information." Importantly, however, the fact that a substance was added to food before 1958 does not, in itself, demonstrate that such use is safe, unless the pre-1958 use is sufficient to demonstrate to qualified experts that the substance is safe when added to food. See section 201(s) of the Act [21 U.S.C. § 321(s)]; see also *Fmali Herb, Inc. v. Heckler*, 715 F.2d 1385, 1389-90 (9th Cir. 1983) ("Under the statute, 'common use in food' of a ingredient does not automatically exempt the substance from pretesting requirements. Instead, 'common use in food' merely describes one form of evidence that may be introduced by a proponent for the purpose of meeting the ultimate standard...").

Similarly, FDA's regulations in 21 CFR Part 170 define "scientific procedures" and establish eligibility criteria for classification as GRAS through scientific procedures. Under 21 CFR 170.30(h), scientific procedures "include those human, animal, analytical, and other scientific studies, whether published or unpublished, appropriate to establish the safety of a substance." Under 21 CFR 170.30(b), general recognition of safety based upon scientific procedures "shall require the same quantity and quality of scientific evidence as is required to obtain approval of a food additive regulation for the ingredient." Section 170.30(b) further states that general recognition of safety through scientific procedures is ordinarily based upon published studies which may be corroborated by unpublished studies and other data and information.

FDA's regulations in 21 CFR Part 170 also define "safe" and "safety." Under 21 CFR 170.3(i), "[s]afe or safety means that there is a reasonable certainty in the minds of competent scientists that the substance is not harmful under the intended conditions of use." The regulations identify factors to be considered in determining the safety of a substance added to food. 21 CFR 170.3(i).

By letter dated November 12, 2009, FDA requested that, within 30 days, your company provide evidence of the rationale, along with supporting data and information, for concluding that the use of caffeine in your product is GRAS or prior sanctioned. The letter informed your company that if FDA determined that the use of caffeine in your alcoholic beverage is neither GRAS nor the subject of a prior sanction, the agency would take appropriate action to ensure that the product is removed from the marketplace. FDA's letter also reiterated that it is the continuing responsibility of your company to ensure that the foods it markets are safe and in compliance with all applicable legal and regulatory requirements.

FDA acknowledges that, in response to the agency's November 12 letter, your firm submitted a letter within the 30 day timeframe requested, indicating that you would submit a GRAS Notice pursuant to proposed 21 CFR 170.36 (62 FR 18938; April 17, 1997) at a later date. The agency received your GRAS Notice (GRN No. 000347) ("GRAS Notice"), dated June 25, 2010, and filed it on June 30, 2010. But, as discussed in more detail below, FDA has reviewed that notice and continues to have safety concerns about your caffeinated alcoholic beverage product. Accordingly, the agency is issuing this warning letter.

To establish that the use of a substance in food is GRAS under its specific conditions of use (for example, the GRAS status of caffeine when directly added to an alcoholic beverage), there must be consensus among qualified experts that the substance is safe under its conditions of use, based on

Exhibit "C," Page 1

Complaint, Page 30 of 38

publicly available data and information. FDA is aware that, based on the publicly available literature, a number of qualified experts have concerns about the safety of caffeinated alcoholic beverages. Moreover, the agency is not aware of data or other information to establish the safety of the relevant conditions of use for your product. Therefore, the criteria for GRAS status have not been met for the caffeine in your beverage.

Based upon the publicly available literature, FDA has the following specific concerns about the safety of caffeine when used in the presence of alcohol.²

- Reports in the scientific literature have described behavioral effects that may occur in young adults when energy drinks are consumed along with alcoholic beverages (O'Brien et al., 2008; Thombs et al., 2010; Miller, 2008).
- Studies suggest that the combined ingestion of caffeine and alcohol may lead to hazardous and life-threatening situations because caffeine counteracts some, but not all, of alcohol's adverse effects. In one study, a mixture of an energy drink and alcohol reduced subjects' subjective perception of intoxication but did not improve diminished motor coordination or slower visual reaction times using objective measures (Ferreira et al., 2006). In a dual-task model, subjects co-administered caffeine and alcohol reported reduced perception of intoxication but no reduction in alcohol-induced impairment of task accuracy (Marczinski and Fillmore, 2006).
- Because caffeine alters the perception of alcohol intoxication, the consumption of pre-mixed products containing added caffeine and alcohol may result in higher amounts of alcohol consumed per drinking occasion, a situation that is particularly dangerous for naïve drinkers (Oteri et al., 2007).

GRAS status is not an inherent property of a substance, but must be assessed in the context of the intended conditions of use of the substance (section 201(s) of the Act [21 U.S.C. § 321(s)]). The assessment includes a consideration of the population that will consume the substance (21 CFR 170.30 (b); section 409(b) of the Act [21 U.S.C. § 348(b)]). Therefore, the scientific data and information that support a GRAS determination must consider the conditions under which the substance is safe for the use for which it is marketed. Reports in the scientific literature have raised concerns regarding the formulation and packaging of pre-mixed products containing added caffeine and alcohol. For example, these products, presented as fruity soft drinks in colorful single-serving packages, seemingly target the young adult user. Furthermore, the marketing of the caffeinated versions of this class of alcoholic beverage appears to be specifically directed to young adults (Bonnie and O'Connell, 2004). FDA is concerned that the young adults to whom these pre-mixed, added caffeine and alcohol products are marketed are especially vulnerable to the adverse behavioral effects associated with consuming caffeine added to alcohol, a concern reflected in the publicly available literature (O'Brien et al., 2008; Simon and Mosher, 2007).

It is FDA's view that the caffeine content of your beverage could result in central nervous system effects if a consumer drank one or more containers of your product. Therefore, FDA believes that the consumption of your product, "Four Loko," may result in adverse behavioral outcomes because the caffeine is likely to counteract some, but not all, of the adverse effects of alcohol. The agency is unaware of any data that address the complex, potentially hazardous behaviors that have been identified in the scientific literature as associated with these beverages or that otherwise alleviate our concerns about the effects of consuming these pre-mixed caffeine and alcohol beverages. Moreover, FDA is not aware of any publicly available data to establish affirmatively safe conditions of use for caffeine added directly to alcoholic beverages and packaged in a combined form.

As noted, FDA has reviewed the information in your GRAS Notice as well as other publicly available information and continues to have safety concerns about your caffeinated alcoholic beverage product. In considering the totality of the information presented in the GRAS Notice, FDA notes that the GRAS Notice did not cite any scientific literature of which the agency was not already aware.³ Furthermore, we wish to comment generally on two lines of argument presented in your GRAS Notice.

First, your GRAS Notice relies primarily upon safety studies of caffeine alone (i.e., not in the presence of alcohol) to support your view that caffeine is safe under the relevant conditions of use (that is, in combination with alcohol). Importantly, however, the current scientific literature, which we cite above, establishes that significant safety concerns are raised by the co-consumption of caffeine and alcohol. Accordingly, data and information addressing the safety of caffeine alone are not sufficient to establish the safety, and the general recognition of the safety, of beverages that combine caffeine with alcohol.

Second, we note that one section of your GRAS Notice reviews some of the studies that have reported the adverse behavioral effects elicited by the co-consumption of caffeine and alcohol and identifies purported deficiencies in the design and interpretation of these studies. Even if certain studies in the scientific literature have limitations due to their design or the interpretation of their results, the peer-reviewed literature as a whole is sufficient to raise, among qualified experts, safety concerns about alcoholic beverages to which caffeine has been directly added. Similarly, even if the results from no single study are sufficiently comprehensive to characterize fully the potential responses to beverages containing caffeine added to alcohol, these studies are collectively sufficient to raise concerns about consumption of this combination and to support the conclusion that more research is required. Furthermore, FDA is not aware of any reports in the literature that refute the association between the co-consumption of alcohol and caffeine and adverse behavioral results or that otherwise affirmatively establish the safety of these beverages. Indeed, our review of this literature, as well as certain related studies in animals, shows that there are currently no studies or other information that refute the safety concerns or otherwise affirmatively establish the safety of caffeine directly added to alcoholic beverages. Therefore, we are not aware of a sufficient basis to support a conclusion that caffeine, when directly added to alcohol to form a single beverage, is generally recognized as safe.

The agency is aware that your company received a Certification/Exemption of Label/Bottle Approval (COLA) from the Alcohol and Tobacco Tax and Trade Bureau (TTB) and that, as part of your application for the COLA, you informed TTB that your product would contain caffeine. A COLA does not constitute a food additive petition approval, a statement regarding GRAS status, or a prior sanction, and you are obligated to abide by the provisions of the Federal Food, Drug, and Cosmetic Act.

In light of the safety concerns identified above, the use of added caffeine in the alcoholic beverage product "Four Loko" does not satisfy the criteria for GRAS status outlined above. Further, FDA is aware of no other exemption from the food additive definition that would apply to caffeine when used as an ingredient in an alcoholic beverage product. Therefore, caffeine as used in your product is a food additive under section 201(s) of the Act [21 U.S.C. § 321(s)] and is subject to the provisions of section 409 of the Act [21 U.S.C. § 348]. Under the latter, a food additive is required to be approved by FDA for its proposed conditions of use prior to marketing. Because caffeine is not an approved food additive for its use in your product, "Four Loko," this product is adulterated within the meaning of section 402(a)(2)(C) of the Act [21 U.S.C. § 342 (a)(2)(C)].

You should take prompt action to correct this violation and prevent its recurrence. Failure to do so may result in enforcement action without further notice. The Act authorizes the seizure of illegal products and injunctions and prosecutions against manufacturers and distributors of those products. Also, we want you to be aware that FDA did not conduct an all-inclusive review of your product, "Four Loko," or any other product that you may manufacture or distribute. Under the applicable law, it is your responsibility, as a manufacturer of this product, to ensure that the foods your firm markets are safe and otherwise in compliance with all applicable legal requirements.

Please advise this office in writing within fifteen (15) days from your receipt of this letter as to the specific steps you have taken to correct the violation identified above and to assure that similar violations do not occur. Your response should include any documentation necessary to show that correction has been achieved. If you cannot complete all corrections within the 15 days, please explain the reason for your delay and the date by which each such item will be corrected and documented.

Please send your reply to Seyra Hammond, Food and Drug Administration, Center for Food Safety and Applied Nutrition, Office of Compliance (HFS-605), 5100 Paint Branch Parkway, College Park, MD 20740.

Sincerely,

/s/

Joann M. Givens

Acting Director
Office of Compliance

Center for Food Safety
and Applied Nutrition,
cc: Food and Drug Administration
Chicago District Office

References

- Bonnie, R. and O'Connell, M., Editors, Reducing underage drinking: a collective responsibility. The National Academies Press, 2004.
- Ferreira SE, de Mello MT, Pompeia S, and de Souza-Formigoni ML. Effects of energy drink ingestion on alcohol intoxication. Alcohol Clin Exp Res 30, 598-605, 2006.
- Heckman, MA, Sherry, K., and Gonzalez de Mejia, E. Energy drinks: an assessment of their market size, consumer demographics, ingredient profile, functionality, and regulations in the United States. Compr Rev Food Sci Food Saf, 9, 303-317, 2010.
- Marczinski, CA and Fillmore, MT. Clubgoers and their trendy cocktails: implications of mixing caffeine into alcohol on information processing and subjective reports of intoxication. Exp Clin Psychopharmacol, 14, 450-458, 2006.
- Miller, KE. Wired: energy drinks, jock identity, masculine norms, and risk taking. J Am College Health, 56, 481-489, 2008.
- O'Brien, MC, McCoy, TP, Rhodes, SD, Wagoner, A, and Wolfson, M. Caffeinated cocktails: energy drink consumption, high-risk drinking, and alcohol-related consequences among college students. Acad Emerg Med 15, 453-460, 2008.
- Oteri A, Salvo F, Caputi AP, and Calapai G. Intake of energy drinks in association with alcoholic beverages in a cohort of students of the School of Medicine of the University of Messina. Alcohol Clin Exp Res 31, 1677-1680, 2007.
- Simon M. and Mosher J. Alcohol, energy drinks, and youth: a dangerous mix. Marin Institute, 2007.
- Thombs, DL, O'Mara, RJ, Tsukamoto, M, Rossheim, ME, Weiler, RM, Merves, ML, and Goldberger, BA. Event-level analysis of energy drink consumption and alcohol intoxication in bar patrons. Addict Behav 35, 325-330, 2010.

¹ This letter addresses the following flavors of "Four Loko": cranberry lemonade, uva, watermelon, fruit punch, lemonade, and blue raspberry.

² As used in the discussion below, the term "energy drink" identifies beverages that contain a significant amount of calories and caffeine as well as other ingredients, such as taurine, herbal extracts, or vitamins (Heckman et al., 2010).

³ We note that in an e-mail dated August 10, 2010, the Office of Food Additive Safety did request three references cited within your GRAS Notice. We had been aware of these references but due to their age, had not been able to locate them.

Links on this page:

1. <http://www.fda.gov>

Exhibit D



[Home](#) > [News & Events](#) > [Newsroom](#) > [Press Announcements](#)

News & Events

FDA NEWS RELEASE

For Immediate Release: Nov. 17, 2010

Media Inquiries: Michael Herndon, 301-796-4673, michael.herndon@fda.hhs.gov

Consumer Inquiries: 888-INFO-FDA

FDA Warning Letters issued to four makers of caffeinated alcoholic beverages

These beverages present a public health concern

The U.S. Food and Drug Administration today warned four companies that the caffeine added to their malt alcoholic beverages is an "unsafe food additive" and said that further action, including seizure of their products, is possible under federal law.

The companies receiving Warning Letters and their products are:

- Charge Beverages Corp.: Core High Gravity HG, Core High Gravity HG Orange, and Lemon Lime Core Spiked
- New Century Brewing Co., LLC: Moonshot
- Phusion Projects, LLC (doing business as Drink Four Brewing Co.): Four Loko
- United Brands Company Inc.: Joose and Max

FDA's action follows a scientific review by the Agency. FDA examined the published peer-reviewed literature on the co-consumption of caffeine and alcohol, consulted with experts in the fields of toxicology, neuropharmacology, emergency medicine, and epidemiology, and reviewed information provided by product manufacturers. FDA also performed its own independent laboratory analysis of these products.

"FDA does not find support for the claim that the addition of caffeine to these alcoholic beverages is 'generally recognized as safe,' which is the legal standard," said Dr. Joshua M. Sharfstein, Principal Deputy Commissioner. "To the contrary, there is evidence that the combinations of caffeine and alcohol in these products pose a public health concern."

Experts have raised concerns that caffeine can mask some of the sensory cues individuals might normally rely on to determine their level of intoxication. The FDA said peer-reviewed studies suggest that the consumption of beverages containing added caffeine and alcohol is associated with risky behaviors that may lead to hazardous and life-threatening situations.

The agency said the products named in the Warning Letters are being marketed in violation of the Federal Food, Drug, and Cosmetic Act (the FDCA). Each Warning Letter requests that the recipient inform the FDA in writing within 15 days of the specific steps that will be taken to remedy the violation and prevent its recurrence. If a company does not believe its products are in violation of the FDCA, it may present its reasoning and any supporting information as well.

If the FDA believes that the violation continues to exist, the agency may pursue an enforcement action that could include seizure of the products or an injunction to prevent the firm from continuing to produce the product until the violation has been corrected.

FDA's action today follows a November 2009 request to manufacturers to provide information on the safety of adding caffeine to their products.

FDA is aware that on November 16, Phusion Projects, LLC, the maker of Four Loko, announced its intention to remove caffeine and other stimulants from its drinks. FDA views this announcement as a positive step. FDA has not yet heard officially from the company about this announcement, including how quickly it will remove present product from circulation and how quickly it will reformulate its product. FDA intends to work with Phusion Projects, LLC and the other manufacturers to assure their products meet safety standards.

For More Information:

- [Caffeinated Alcoholic Beverages -- FDA Web Page](#)¹
- [Caffeinated Alcoholic Beverages -- Consumer Update](#)²
- [Caffeinated Alcoholic Beverages -- Warning Letters:](#)
 - [Charge Beverages Corp.: Core High Gravity HG Green, Core High Gravity HG Orange, and Lemon Lime Core Spiked](#)³
 - [New Century Brewing Co., LLC: Moonshot](#)⁴
 - [Phusion Projects, LLC \(doing business as Drink Four Brewing Co.\): Four Loko](#)⁵
 - [United Brands Company Inc.: Joose and Max](#)⁶
- [Qs & As on Caffeine in Alcoholic Beverages](#)⁷
- [Caffeinated Alcoholic Beverages -- FDA Page on Flickr](#)⁸
- [Caffeinated Alcoholic Beverages -- CDC Fact Sheet](#)⁹
- [FTC Sends Warning Letters to Marketers of Caffeinated Alcohol Drinks](#)¹⁰
- [TTB Issues Warning on the Sale or Shipment of Caffeinated Alcohol Beverages Determined by FDA to Be Adulterated](#)¹¹

#

Visit the FDA on Facebook¹²

RSS Feed for FDA News Releases¹³ [what is RSS?¹⁴]


Links on this page:

1. <http://www.fda.gov/Food/FoodIngredientsPackaging/ucm190366.htm>

2. <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm233987.htm>
3. <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm233990.htm>
4. <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm234028.htm>
5. <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm234023.htm>
6. <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm234002.htm>
7. <http://www.fda.gov/Food/FoodIngredientsPackaging/ucm233726.htm>
8. <http://www.flickr.com/photos/fdapotos/sets/72157625403077684/>
9. <http://www.cdc.gov/alcohol/fact-sheets/cab.htm>
10. <http://www.ftc.gov/opa/2010/11/alcohol.shtm>
11. http://www.ttb.gov/main_pages/caffeine-added.shtml
12. <http://www.facebook.com/FDA>
13. <http://www.fda.gov/AboutFDA/ContactFDA/StayInformed/RSSFeeds/PressReleases/rss.xml>
14. <http://www.fda.gov/AboutFDA/ContactFDA/StayInformed/RSSFeeds/ucm144575.htm>

- Home
- About Chuck
- NY Regions
- Newsroom
- Services for New Yorkers
- For Students
- Contact Chuck

Press Release

 [Printer-friendly Version](#)

FOR IMMEDIATE RELEASE: November 16, 2010

SCHUMER: FDA TO EFFECTIVELY BAN CAFFEINATED ALCOHOLIC DRINKS; FTC WILL NOTIFY MANUFACTURERS THAT THEY MAY BE ENGAGED IN ILLEGAL MARKETING OF UNSAFE BEVERAGES

After Months of Pressure by Schumer, FDA to Send Notice to Manufacturers of Caffeinated Alcoholic Beverages that Product is Not Considered Safe; Move Will Effectively Ban Products from the Market

FTC to Send Notices to Manufacturers That They Are Engaged in the Marketing of Unsafe Alcoholic Drinks

Schumer: Let This Serve as a Warning to Anyone Who Tries to Peddle Dangerous Beverages to Our Kids, Do it, And We Will Shut You Down

U.S Senator Charles E. Schumer announced today that the Food and Drug Administration (FDA) will rule that caffeine is an unsafe food additive to alcoholic beverages, effectively making products such as Four Loko, Jooze, and others like them, prohibited for sale in the United States. Additionally, the Federal Trade Commission (FTC) plans to notify manufacturers that they are engaged in the potential illegal marketing of unsafe alcoholic drinks. These announcements come after months of intense pressure by Senator Schumer to have the drinks banned because of serious risks to consumer health and safety.

“Let these rulings serve as a warning to anyone who tried to peddle dangerous and toxic brews to our children. Do it and we will shut you down,” said Schumer. “This ruling should be the nail in the coffin of these dangerous and toxic drinks. Parents should be able to rest a little easier knowing that soon their children won’t have access to this deadly brew.”

After calls by Schumer to ban the drinks in New York, just this past week, the State Liquor Authority and the state’s largest beer distributors agreed to stop selling these dangerous drinks in New York. In addition to New York’s efforts, Oklahoma, Utah, Michigan, and Washington acted to ban the drinks as did a number of colleges, including Ramapo College, Worcester State University, the University of Rhode Island and the Wentworth Institute of Technology.

Popular drinks such as Four Loko and Jooze contain as much as 2-3 coffee cups worth of caffeine and 2-3 cans of beer per container – a potent, dangerous mix that can be extremely hazardous for teens and adults alike. Last month, nine students passed out and were hospitalized after drinking Four Loko, leading states and universities across the country to issue ban, limit, or issue warnings about the drink.

Compounded with its health risks, beverages like Four Loko pose a unique danger because they target young people. The style of the beverages – with a vibrantly colored

Resource Center

-  [Contact Chuck](#)
Send Chuck an email using our webform
-  [FY 2011 Appropriations Requests](#)
Chuck's 2011 appropriations requests
-  [Schedule a Tour](#)
Plan your trip to Washington D.C.
-  [Chuck around New York](#)
See what Chuck has been doing in your area lately
-  [Medicare Help](#)
Help for problems dealing with Medicare
-  [Tax Time Assistance](#)
Resources to help with federal taxes and the IRS
-  [Veterans Assistance](#)
Help for those who have served our nation
-  [Grants Assistance](#)
Guide to applying for federal grants
-  [Foreclosure Help](#)
Foreclosure related assistance
-  [Services for New Yorkers](#)
For help cutting through the federal government's red tape
-  [Protecting Consumers](#)
Help and Resources for New York consumers



Search The Site

Search for a bill

Search for bills from the 111th Congress



aluminum can colors and funky designs – appeal to younger consumers, increasing the likelihood that the beverages will be consumed by young adults and creating a problem for parents and business owners who might be misled by the branding. Four Loko is also stocked next to other energy drinks, creating further confusion.

Last week, Schumer was joined in his efforts to ban the drink by Jacqueline Celestino, grandmother of Nicole Lynn Celestino, an 18 year old from Long Island who passed away after drinking the caffeinated alcoholic beverage Four Loko. Nicole, went into cardiac arrest after drinking Four Loko this past August, she had taken a diet pill that day. Nicole’s family has become outspoken advocates for a ban on alcoholic caffeinated drinks like Four Loko.

The dangers of these drinks are well known. A recent study found that young and underage drinkers who combine alcohol with caffeine, which occurs with increasing frequency given the prevalence of beverages like Four Loko and Joose, are more likely to suffer injury, be the victim of sexual assault, drive while intoxicated, and require medical attention than drinkers who consume caffeine-free beverages. In 2008, Anheuser-Busch InBev NV and MillerCoors LLC reformulated caffeinated alcoholic beverages under pressure from several states and regulatory bodies, but smaller companies like the manufacturers of Four Loko and Joose managed to remain unnoticed.

###

Washington D.C.
 313 Hart Senate Office Building
 Washington D.C. 20510
 Phone: 202-224-6542
 Fax: 202-228-9027
 TTD: 202-224-0420

New York City
 757 Third Avenue
 Suite 17-02
 New York, NY 10017
 Phone: 212-486-4430
 Fax: 212-486-7693
 TDD: 212-486-7603

Albany
 Leo O'Brien Building
 Room 420
 Albany, NY 12207
 Phone: 518-431-4070
 518-431-4076

Binghamton
 15 Henry Street
 Room M103
 Binghamton, NY 13901
 Phone: 607-772-6792

Buffalo
 130 South Elmwood Avenue
 #660
 Buffalo, NY 14202
 Phone: 716-846-4111
 Fax: 716-846-4113

Hudson Valley
 One Park Place, Suite 100
 Peckskill, NY 10566
 Phone: 914-734-1532
 Fax: 914-734-1673

Long Island
 145 Pine Lawn Road #300
 Melville, NY 11747
 Phone: 631-753-0976
 Fax: 631-753-0997

Rochester
 100 State Street, Room 3040
 Rochester, NY 14614
 Phone: 585-263-5806
 Fax: 585-263-3173

Syracuse
 100 South Clinton Street
 Room 841
 Syracuse, NY 13261-7318
 Phone: 315-423-5471
 Fax: 315-423-5185



Privacy Statement | Site Map | Contact Chuck | En Español | Mobile Site

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

BY FAX

I (a) PLAINTIFFS (Check box if you are representing yourself)
LUCINDA SERRANO, as an individual, and on behalf of all others similarly situated

DEFENDANTS
PHUSION PROJECTS, LLC, a Delaware limited liability company dba Drink Four Brewing Co., and DOES 1 through 20, inclusive

(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.)
Harold M. Hewell, HEWELL LAW FIRM, 105 West F Street, Second Floor, San Diego, California 92101. (619) 235-6854/(888) 298-0177 (f), Email: hmhewell@hewell-lawfirm.com

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an X in one box only.)

1 U.S. Government Plaintiff 3 Federal Question (U.S. Government Not a Party)

2 U.S. Government Defendant 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES - For Diversity Cases Only (Place an X in one box for plaintiff and one for defendant.)

	PTF	DEF		PTF	DEF
Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business in this State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. ORIGIN (Place an X in one box only.)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify): 6 Multi-District Litigation 7 Appeal to District Judge from Magistrate Judge

V. REQUESTED IN COMPLAINT: JURY DEMAND: Yes No (Check "Yes" only if demanded in complaint.)

CLASS ACTION under F.R.C.P. 23: Yes No MONEY DEMANDED IN COMPLAINT: \$ _____

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005); California statutory causes of action and common law fraudulent concealment.

VII. NATURE OF SUIT (Place an X in one box only.)

OTHER STATUTES	CONTRACT	TORTS	TORTS	PRISONER	LABOR
<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Act <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Info. Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes	<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Fed. Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury-Med Malpractice <input type="checkbox"/> 365 Personal Injury-Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus-Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	PERSONAL PROPERTY <input checked="" type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability BANKRUPTCY <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 American with Disabilities - Employment <input type="checkbox"/> 446 American with Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus/Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition FORFEITURE / PENALTY <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609

CV10 8964

FOR OFFICE USE ONLY: Case Number: _____
AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET**

VIII(a). IDENTICAL CASES: Has this action been previously filed in this court and dismissed, remanded or closed? No Yes
If yes, list case number(s): _____

VIII(b). RELATED CASES: Have any cases been previously filed in this court that are related to the present case? No Yes
If yes, list case number(s): _____

Civil cases are deemed related if a previously filed case and the present case:

- (Check all boxes that apply) A. Arise from the same or closely related transactions, happenings, or events; or
 B. Call for determination of the same or substantially related or similar questions of law and fact; or
 C. For other reasons would entail substantial duplication of labor if heard by different judges; or
 D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: (When completing the following information, use an additional sheet if necessary.)

(a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named plaintiff resides.
 Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
County of San Bernardino.	

(b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named defendant resides.
 Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
	Principal place of business in Illinois; a Delaware limited liability company.

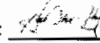
(c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** claim arose.

Note: In land condemnation cases, use the location of the tract of land involved.

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Counties of San Bernardino and Los Angeles.	

* Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties

Note: In land condemnation cases, use the location of the tract of land involved

X. SIGNATURE OF ATTORNEY (OR PRO PER):  (VIA FAX/ELECTRONIC TRANSMISSION) Date November 22, 2010

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))