

1 Laurence M. Rosen, Esq. (SBN 219683)
2 **THE ROSEN LAW FIRM, P.A.**
3 355 South Grand Avenue, Suite 2450
4 Los Angeles, CA 90071
5 Telephone: (213) 785-2610
6 Facsimile: (213) 226-4684
7 Email: lrosen@rosenlegal.com

8 *Counsel for Plaintiff*

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11 , Individually and on
12 Behalf of All Others Similarly Situated,

13 Plaintiff,

14 v.

15 NATIONAL BEVERAGE CORP., NICK
16 A. CAPORELLA, GREGORY P. COOK,
17 and GEORGE R. BRACKEN,

18 Defendants.

Case No:

**CLASS ACTION COMPLAINT FOR
VIOLATION OF THE FEDERAL
SECURITIES LAWS**

JURY TRIAL DEMANDED

19
20 Plaintiff (“Plaintiff”), individually and on behalf of all other
21 persons similarly situated, by Plaintiff’s undersigned attorneys, for Plaintiff’s
22 Complaint against Defendants (defined below), alleges the following based upon
23 personal knowledge as to Plaintiff and Plaintiff’s own acts, and upon information and
24 belief as to all other matters based on the investigation conducted by and through
25 Plaintiff’s attorneys, which included, among other things, a review of the Defendants’
26 public documents, announcements made by Defendants, a review of U.S. Securities
27 and Exchange Commission (“SEC”) filings by National Beverage Corp., (“National
28

1 Beverage” or the “Company”), wire and press releases published by and regarding
2 the Company, and information readily obtainable on the Internet. Plaintiff believes
3 that substantial evidentiary support will exist for the allegations set forth herein after
4 a reasonable opportunity for discovery.

5 **NATURE OF THE ACTION**

6 1. This is a federal securities class action on behalf of a class consisting of
7 all persons other than Defendants who purchased National Beverage securities
8 between July 16, 2015 and September 28, 2016, both dates inclusive (the “Class
9 Period”), seeking to recover compensable damages caused by Defendants’ violations
10 of federal securities laws and pursue remedies under the Securities Exchange Act of
11 1934 (the “Exchange Act”).

12 **JURISDICTION AND VENUE**

13 2. The claims asserted herein arise under and pursuant to Sections 10(b)
14 and 20(a) of the Exchange Act, (15 U.S.C. §78j (b) and 78t (a)), and Rule 10b-5
15 promulgated thereunder (17 C.F.R. §240.10b-5).

16 3. This Court has jurisdiction over the subject matter of this action pursuant
17 to §27 of the Exchange Act (15 U.S.C. §78aa) and 28 U.S.C. § 1331.

18 4. Venue is proper in this District pursuant to §27 of the Exchange Act and
19 28 U.S.C. §1391(b) as the Company conducts business in this District and a
20 significant portion of the Defendants’ actions, and the subsequent damages, took
21 place within this District.

22 5. In connection with the acts, conduct and other wrongs alleged in this
23 Complaint, Defendants, directly or indirectly, used the means and instrumentalities of
24 interstate commerce, including but not limited to, the United States mails, interstate
25 telephone communications and the facilities of the national securities exchange.
26
27
28

1 **PARTIES**

2 6. Plaintiff, as set forth in the accompanying certification, incorporated by
3 reference herein, purchased National Beverage securities at artificially inflated prices
4 during the Class Period and has been damaged thereby.

5 7. Defendant National Beverage is a Delaware corporation headquartered
6 at 8100 SW Tenth Street, Suite 4000, Fort Lauderdale, Florida 33324. The Company
7 also maintains an office in La Mirada, California. The Company, through its
8 subsidiaries, develops, produces, markets, and sells a portfolio of flavored beverage
9 products primarily in North America. During the Class Period, National Beverage
10 securities were traded on NASDAQ under the symbol "FIZZ."

11 8. Defendant Nick A. Caporella ("Caporella") has been the Chairman and
12 Chief Executive Officer ("CEO") of the Company since 1985.

13 9. Defendant Gregory P. Cook ("Cook") has been the Chief Accounting
14 Officer of the Company since July 15, 2014, and has been Vice President of the
15 Company since September 2012. Defendant Cook has also been Controller of the
16 Company since August 2007.

17 10. Defendant George R. Bracken ("Bracken") has been the Executive Vice
18 President of Finance of the Company since July 2012, and served as the Senior Vice
19 President of Finance of the Company from October 2000 to July 2012.

20 11. Defendants Caporella, Cook, and Bracken are collectively referred to
21 hereinafter as the "Individual Defendants."

22 12. Each of the Individual Defendants:

- 23 (a) directly participated in the management of the Company;
24 (b) was directly involved in the day-to-day operations of the
25 Company at the highest levels;
26 (c) was privy to confidential proprietary information concerning the
27 Company and its business and operations;
28

1 (d) was directly or indirectly involved in drafting, producing,
2 reviewing and/or disseminating the false and misleading statements and
3 information alleged herein;

4 (e) was directly or indirectly involved in the oversight or
5 implementation of the Company's internal controls;

6 (f) was aware of or recklessly disregarded the fact that the false and
7 misleading statements were being issued concerning the Company; and/or

8 (g) approved or ratified these statements in violation of the federal
9 securities laws.

10 13. The Company is liable for the acts of the Individual Defendants and its
11 employees under the doctrine of *respondeat superior* and common law principles of
12 agency because all of the wrongful acts complained of herein were carried out within
13 the scope of their employment.

14 14. The scienter of the Individual Defendants and other employees and
15 agents of the Company is similarly imputed to the Company under *respondeat*
16 *superior* and agency principles.

17 15. The Company and the Individual Defendants are collectively referred to
18 hereinafter as the "Defendants."

19 **SUBSTANTIVE ALLEGATIONS**

20 **Materially False and Misleading Statements**

21 16. On July 16, 2015, the Company filed a Form 10-K for the fiscal year
22 ended May 2, 2015 (the "2015 10-K") with the SEC, which provided the Company's
23 year-end financial results and position and stated that the Company's internal control
24 over financial reporting and disclosure controls and procedures were effective as of
25 May 2, 2015. The 2015 10-K was signed by Defendants Cook, Caporella, and
26 Bracken. The 2015 10-K also contained signed SOX certifications by Defendants
27 Caporella and Bracken attesting to the accuracy of financial reporting, the disclosure
28

1 of any material changes to the Company’s internal controls over financial reporting,
2 and the disclosure of all fraud.

3 17. On July 14, 2016, the Company filed a Form 10-K for the fiscal year
4 ended April 30, 2016 (the “2016 10-K”) with the SEC, which provided the
5 Company’s year-end financial results and position and stated that the Company’s
6 internal control over financial reporting and disclosure controls and procedures were
7 effective as of April 30, 2016. The 2016 10-K was signed by Defendants Cook,
8 Caporella, and Bracken. The 2016 10-K also contained signed SOX certifications by
9 Defendants Caporella and Bracken attesting to the accuracy of financial reporting, the
10 disclosure of any material changes to the Company’s internal controls over financial
11 reporting, and the disclosure of all fraud.

12 18. The statements referenced in ¶¶ 16 – 17 above were materially false
13 and/or misleading because they misrepresented and failed to disclose the following
14 adverse facts pertaining to the Company’s business, operational and financial results,
15 which were known to Defendants or recklessly disregarded by them. Specifically,
16 Defendants made false and/or misleading statements and/or failed to disclose that: (1)
17 the Company lacked effective internal controls over financial reporting due, in part,
18 to undisclosed channeling of expenses through off the books entities; (2) the
19 Company lacked effective internal controls over financial reporting due, in part, to
20 undisclosed material related parties transactions; and (3) as a result, Defendants’
21 statements about the Company’s business, operations and prospects were materially
22 false and misleading and/or lacked a reasonable basis at all relevant times.

23
24 **The Truth Emerges**

25 19. On September 28, 2016, Glaucus Research Group published a report on
26 the Company (the “Glaucus Report”) asserting, among other things, that based upon a
27
28

1 2014 lawsuit¹ brought by a former marketing director of the Company’s wholly
2 owned subsidiary, Faygo Beverages Inc., “[the Company’s] expenses are run through
3 off the books entities.” The Glaucus Report further states that a 2015 lawsuit² alleges
4 that a Company employee was physically present at, operated, directed and managed
5 an independent distributor, Maverick Distributing Company, LLC, not listed as a
6 subsidiary or related party in any of the Company’s filings, which “suggest[s] that
7 FIZZ runs sales through undisclosed related parties.”

8 20. On this news, shares of the Company fell \$3.81 per share or over 8%
9 from its previous closing price to close at \$42.67 per share on September 28, 2016,
10 damaging investors.

11 21. As a result of Defendants’ wrongful acts and omissions, and the
12 precipitous decline in the market value of the Company’s common shares, Plaintiff
13 and other Class members have suffered significant losses and damages.

14 **PLAINTIFF’S CLASS ACTION ALLEGATIONS**

15 22. Plaintiff brings this action as a class action pursuant to Federal Rule of
16 Civil Procedure 23(a) and (b)(3) on behalf of a class consisting of all persons other
17 than Defendants who acquired National Beverage securities during the Class Period
18 and who were damaged thereby (the “Class”). Excluded from the Class are
19 Defendants, the officers and directors of the Company, at all relevant times, members
20 of the Individual Defendants’ immediate families and their legal representatives,
21 heirs, successors or assigns and any entity in which Defendants have or had a
22 controlling interest.
23

24 _____
25 ¹ This lawsuit was filed in the United States District Court for the Eastern District of
26 Michigan and is styled as *Rosenthal v. National Beverage Corp et al*, Docket No.
27 4:14-cv-12384 (E.D. Mich. Jun 18, 2014).

28 ² This lawsuit was filed in Texas District Court, Harris County and is styled as
Thornell, Ronald vs. National Beverage Corporation, Docket No. 201551725-7 (Tex.
Dist. Ct. Sept. 02, 2015).

1 23. The members of the Class are so numerous that joinder of all members is
2 impracticable. Throughout the Class Period, the Company's securities were actively
3 traded on NASDAQ. While the exact number of Class members is unknown to
4 Plaintiff at this time and can be ascertained only through appropriate discovery,
5 Plaintiff believes that there are hundreds, if not thousands of members in the
6 proposed Class.

7 24. Plaintiff's claims are typical of the claims of the members of the Class as
8 all members of the Class are similarly affected by Defendants' wrongful conduct in
9 violation of federal law that is complained of herein.

10 25. Plaintiff will fairly and adequately protect the interests of the members
11 of the Class and has retained counsel competent and experienced in class and
12 securities litigation. Plaintiff has no interests antagonistic to or in conflict with those
13 of the Class.

14 26. Common questions of law and fact exist as to all members of the Class
15 and predominate over any questions solely affecting individual members of the Class.
16 Among the questions of law and fact common to the Class are:

- 17 • whether the Exchange Act were violated by Defendants' acts as
18 alleged herein;
- 19 • whether statements made by Defendants to the investing public
20 during the Class Period misrepresented material facts about the
21 financial condition and business of the Company;
- 22 • whether Defendants' public statements to the investing public
23 during the Class Period omitted material facts necessary to make
24 the statements made, in light of the circumstances under which
25 they were made, not misleading;
- 26 • whether the Defendants caused the Company to issue false and
27 misleading SEC filings during the Class Period;
- 28

- 1 • whether Defendants acted knowingly or recklessly in issuing false
2 and SEC filings;
- 3 • whether the prices of the Company's securities during the Class
4 Period were artificially inflated because of the Defendants'
5 conduct complained of herein; and
- 6 • whether the members of the Class have sustained damages and, if
7 so, what is the proper measure of damages.

8 27. A class action is superior to all other available methods for the fair and
9 efficient adjudication of this controversy since joinder of all members is
10 impracticable. Furthermore, as the damages suffered by individual Class members
11 may be relatively small, the expense and burden of individual litigation make it
12 impossible for members of the Class to individually redress the wrongs done to them.
13 There will be no difficulty in the management of this action as a class action.

14 28. Plaintiff will rely, in part, upon the presumption of reliance established
15 by the fraud-on-the-market doctrine in that:

- 16 • the Company's shares met the requirements for listing, and were
17 listed and actively traded on NASDAQ, a highly efficient and
18 automated market;
- 19 • As a public issuer, the Company filed periodic public reports with
20 the SEC and NASDAQ;
- 21 • the Company regularly communicated with public investors via
22 established market communication mechanisms, including
23 through the regular dissemination of press releases via major
24 newswire services and through other wide-ranging public
25 disclosures, such as communications with the financial press and
26 other similar reporting services; and
- 27 • the Company was followed by a number of securities analysts
28 employed by major brokerage firms who wrote reports that were
widely distributed and publicly available.

- 1 • employed devices, schemes and artifices to defraud;
- 2 • made untrue statements of material facts or omitted to state
- 3 material facts necessary in order to make the statements made, in
- 4 light of the circumstances under which they were made, not
- 5 misleading; or
- 6 • engaged in acts, practices and a course of business that operated as
- 7 a fraud or deceit upon plaintiff and others similarly situated in
- 8 connection with their purchases of National Beverage securities
- 9 during the Class Period.

10 35. The Company and the Individual Defendants acted with scienter in that
11 they knew that the public documents and statements issued or disseminated in the
12 name of the Company were materially false and misleading; knew that such
13 statements or documents would be issued or disseminated to the investing public; and
14 knowingly and substantially participated, or acquiesced in the issuance or
15 dissemination of such statements or documents as primary violations of the securities
16 laws. Defendants by virtue of their receipt of information reflecting the true facts of
17 the Company, their control over, and/or receipt and/or modification of the Company's
18 allegedly materially misleading statements, and/or their associations with the
19 Company which made them privy to confidential proprietary information concerning
20 the Company, participated in the fraudulent scheme alleged herein.

21 36. Individual Defendants, who are the senior officers and/or directors of
22 the Company, had actual knowledge of the material omissions and/or the falsity of
23 the material statements set forth above, and intended to deceive Plaintiff and the other
24 members of the Class, or, in the alternative, acted with reckless disregard for the truth
25 when they failed to ascertain and disclose the true facts in the statements made by
26 them or other personnel of the Company to members of the investing public,
27 including Plaintiff and the Class.

