

Contacts:

**Adam Segall** +1 212 504 6492

adam.segall@cwt.com

**Matthew Clark** +1 202 728 8766

matthew.clark@fticonsulting.com

# NewsRelease

For Immediate Release:

## Cadwalader Scores Important Victory in AriZona Iced Tea Dispute

### **New York Appellate Court Rules in Favor of AriZona Beverages Management**

**New York, NY, July 26, 2012**, Cadwalader, Wickersham & Taft LLP (Cadwalader), counsel to AriZona Beverages and affiliated entities, and its co-founder and Chairman Don Vultaggio, welcomed the July 24, 2012 decision by the New York State Supreme Court Appellate Division, First Department, affirming the trial court's opinions:

- (a) Denying a motion to declare invalid the election by Beverage Marketing USA ("BMU") to purchase the shares of co-founder John Ferolito;
- (b) Denying Mr. Ferolito and his family's motion to compel the Company to make cash distributions of "60% of the AriZona Entities' net income"; and
- (c) Denying Mr. Ferolito and his family's motion to disqualify Cadwalader as counsel.

"The cumulative effect of these decisions places this case in the best possible position for prompt judicial resolution. It secures the ongoing and effective current management of the company and ensures that the company has a bright future in New York", stated Lou Solomon, counsel to AriZona. This decision, taken together with the First Department's 2010 affirmance of Justice Shulman's decision upholding the validity of transfer restrictions limiting the rights of shareholders to sell their shares, reaffirms the importance in New York of the freedom of contract without allowing the abuse of contracts to game the system.

In affirming the validity of BMU's election to purchase the shares of Mr. Ferolito, the Appellate Division foiled his attempt to force Mr. Vultaggio and his family to bear 100% of the cost of any such purchase. Mr. Ferolito had argued that pursuant to an Owners' Agreement, he, as a shareholder, had to agree to the election by the Company. The Appellate Division held there was "no merit to this position" and that, absent an explicit agreement to the contrary, allowing "a shareholder who commences a judicial dissolution proceeding" to "continue to assert management rights with respect to the corporation's right of election . . . would thwart the statutory purpose of promoting the continuation of corporate enterprises". The Appellate Division further explained that Ferolito's argument "would fly in the face of logic as well as the purposes of the statutory scheme enacted by the Legislature". This determination confirms that, as Justice Shulman stated in one of the affirmed decisions, Mr. Ferolito's current status is that of a "shareholder in name only". *In re Dissolution of Penepent Corp.*, 96 N.Y.2d 186, 192 (2001).

The Appellate Division similarly foiled Mr. Ferolito's attempt to force the Company to make substantial distributions to him. The Company argued that "the decision not to distribute profits was necessitated by Ferolito's actions" and that "the money would be necessary to purchase Ferolito's BMU shares". The Appellate Division affirmed the denial of this motion because it was a "successive" summary judgment motion and there were disputed issues of fact. In denying disqualification, the Appellate Division also reaffirmed that despite numerous attempts over 4 years to do so, Ferolito could not disrupt the Company's decision to choose its own counsel, Cadwalader. The Court explained that "[i]n these circumstances, where the non-petitioning shareholder [Mr. Vultaggio] runs the day-to-day operations of the corporation threatened with dissolution, any 'differing interest' with respect to [an election to purchase shares] does not necessarily require separate counsel" and "one law firm can adequately represent both BMU and Vultaggio under these circumstances."

Finally, the Appellate Division reversed on the law the order of Justice Shulman that granted the Company's motion to dismiss a common-law dissolution claim that had been filed by the John Ferolito, Jr. Grantor Trust, a non-voting shareholder. The Court found that, "it does not appear" as though the Legislature intended the statute "to be the exclusive remedy for aggrieved shareholders". Justice Shulman had dismissed that claim without prejudice and the Appellate Division's order will now allow the Trust's claim, which the Company believes to be baseless, to be determined before or together with any valuation issues. Mr. Solomon stated that the Trust's claims "are patently ridiculous" and "we want to go to a prompt trial".

## **About Cadwalader, Wickersham & Taft LLP**

Cadwalader, Wickersham & Taft LLP, established in 1792, is one of the world's leading international law firms, with offices in New York, London, Charlotte, Washington, Houston, Beijing, Hong Kong and Brussels. Cadwalader serves a diverse client base, including many of the world's top financial institutions and corporations, undertaking business in more than 50 countries. The firm offers legal expertise in antitrust, banking, business fraud, corporate finance, corporate governance, energy, environmental, financial restructuring, healthcare, intellectual property, litigation, mergers and acquisitions, private equity, private wealth, real estate, regulation, securitization, structured finance, and tax. More information about Cadwalader can be found at [www.cadwalader.com](http://www.cadwalader.com).