

1 BLOOD HURST & O'REARDON, LLP
Timothy G. Blood (149343)
2 Thomas J. O'Reardon II (247952)
701 B Street, Suite 1700
3 San Diego, CA 92101
Telephone: 619-338-1100
4 Facsimile: 619-338-1101

5 BONNETT, FAIRBOURN, FRIEDMAN
& BALINT, P.C.
6 Elaine A. Ryan
Patricia N. Syverson (203111)
7 2325 E. Camelback Road, Suite 300
Phoenix, AZ 85016
8 Telephone: 602-274-1100
Facsimile: 602-274-1199

BONNETT, FAIRBOURN, FRIEDMAN
& BALINT, P.C.
Todd D. Carpenter (234464)
600 West Broadway, Suite 900
San Diego, CA 92101
Telephone: 619-756-7748
Facsimile: 619-798-5894
tcarpenter@bffb.com

9 Attorneys for Plaintiff and Proposed
10 Class Counsel

11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13 MARK DUFFER, on Behalf of Himself
and All Others Similarly Situated and the
14 General Public,

15 Plaintiff,

16 v.

17 CHATTEM, INC.,

18 Defendant.

Case No.: 11-cv-02735 W WVG

SECOND AMENDED COMPLAINT

CLASS ACTION

1. Violation of the Unfair Competition Law, California Business Professions Code § 17200 et seq.;
2. Violation of the Consumers Legal Remedies Act, California Civil Code § 1750 et seq.; and
3. Breach of Express Warranty

DEMAND FOR JURY TRIAL

1 Plaintiff Plaintiff Mark Duffer (“Plaintiff” or “Plaintiff Duffer”), by and through his
2 attorneys, brings this action on behalf of himself, all others similarly situated and the General
3 Public against Defendant Chattem, Inc. (“Chattem”) and states:

4 **NATURE OF THE ACTION**

5 1. Chattem markets, distributes, and sells over-the-counter consumer health care
6 products including oral health care products under the ACT[®] brand name. ACT[®] mouthwash
7 is sold in a variety of formulations, including ACT[®] Total Care[™] Anticavity Fluoride
8 Mouthwash (“ACT Total Care” or “the Product”). Chattem promoted ACT Total Care to
9 consumers as providing comprehensive (“total”) oral health care benefits.

10 2. Through an extensive and comprehensive nationwide marketing campaign,
11 including on the ACT Total Care packaging and labeling, as well as on its various websites
12 and print advertising, Chattem claimed that using ACT Total Care provides all consumers with
13 specific oral health care benefits, including: Strengthens Teeth, Rebuilds Enamel, Helps
14 Prevent Cavities, Fights Unsightly Plaque, Kills Bad Breath Germs, and Freshens Breath—all
15 of which are prominently represented on the front and center of the ACT Total Care label.
16 According to Chattem’s CEO, ACT Total Care is the “everything in one mouthwash.” In
17 announcing the Product, the CEO told analysts, “[i]t’s all about total health of your mouth,
18 total care of your mouth.”

19 3. Chattem’s misleading marketing campaigns begin with a deceptive name for
20 the ACT product, “Total Care,” and a deceptive marketing tagline “the mouthwash that does it
21 all.”

22 4. By representing to consumers that ACT Total Care “fights” plaque, Chattem
23 implied, and intended for consumers to believe, that ACT Total Care had the ability to actually
24 *remove* plaque. However, contrary to its claims, ACT Total Care does not reduce, remove or
25 otherwise “fight” plaque. Chattem’s only active ingredient, sodium fluoride, does not provide
26 anti-plaque benefits. Further, the ingredient matrix in ACT Total Care does not reduce,
27 remove or otherwise fight plaque. Chattem has never had valid scientific or clinical
28 substantiation for its claim.

1 10. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(a) and (b) because
2 a substantial part of the events or omissions giving rise to Plaintiff's claims occurred while he
3 resided in this judicial district. Venue is also proper under 18 U.S.C. § 1965(a) because
4 Chattem transacts substantial business in this District.

5 **PARTIES**

6 11. At all times relevant to this matter, Plaintiff Duffer resided, and continues to
7 reside, in Carlsbad, California. During the relevant time period, Plaintiff was exposed to
8 Chattem's advertising claims for ACT Total Care, including the representations on the ACT
9 Total Care label, purchased ACT Total Care, and suffered injury in fact and lost money as a
10 result of the unfair trade practices described herein.

11 12. Plaintiff purchased and used the product throughout the Class Period, most
12 recently in the spring and summer of 2010 from a Rite Aid in Carlsbad, California and the
13 military commissary at the Camp Pendleton Marine Corps base, and paid the retail price of
14 approximately \$5.49 for each 18-ounce bottle. Plaintiff read the ACT Total Care Product label
15 and relied on the antiplaque and total oral health benefit claims, as set forth herein, found on
16 the ACT Total Care label and product packaging and as advertised on the in-store displays.
17 The antiplaque and total oral health benefit claims were a material factor in Plaintiff's decision
18 to purchase and use ACT Total Care. Plaintiff's reliance on Chattem's representations was
19 reasonable given that Chattem has a reputation as a reliable and trustworthy company.
20 Plaintiff used ACT Total Care as directed to prevent cavities, fight plaque, and for total oral
21 health care. Plaintiff would not have purchased the premium-priced ACT Total Care had he
22 known the truth about Chattem's antiplaque and total oral health benefit claims. Thus,
23 Plaintiff has suffered injury in fact and lost money and property as a result of the alleged
24 misconduct. He has been injured in the amount paid for the ACT Total Care Products.

25 13. Defendant Chattem, Inc., is a privately held company incorporated under the
26 laws of the state of Tennessee. Chattem's corporate headquarters is located in Chattanooga,
27 Tennessee. Chattem is registered to do business in the state of California. Chattem marketed,
28 promoted, distributed, and sold ACT Total Care to millions of consumers throughout the

1 United States, including tens of thousands of consumers in California and in San Diego
2 County.

3 **FACTUAL ALLEGATIONS**

4 **A. Chattem’s False, Misleading, and Deceptive Advertising for its ACT
5 Total Care**

6 14. Chattem’s roots in consumer over-the-counter health care products date back
7 over 100 years and include a diverse array of brand-name pharmaceuticals, toiletries and
8 cosmetic items. In 2007, Chattem acquired five top brands from Johnson & Johnson,
9 including anticavity mouthwash ACT.

10 15. While Johnson & Johnson owned the ACT® brand, it sold the mouthwash under
11 the product name “Act® x2 Anticavity Fluoride.” Chattem changed the product name to “ACT
12 Total Care” and added antiplaque and total oral health care claims to the label and packaging.

13 16. To promote the new line of products, Chattem engaged in an extensive and
14 comprehensive nationwide marketing campaign, which was launched in 2008 by Chattem’s
15 Chairman and Chief Executive Officer, Alexander “Zan” Guerry. While addressing a group of
16 financial analysts and market research organizations, Mr. Guerry introduced ACT Total Care
17 as Chattem’s product “with the greatest upside of all our new products next year.”¹ He
18 compared the new ACT Total Care with a popular selling toothpaste, Colgate Total®,² and a
19 popular selling over-the-counter cold medicine, Vicks® NyQuil®,³ because it “did everything”
20 and “does the total thing.” See Earnings Call Transcript. Mr. Guerry touted that “ACT Total
21 Care is the first and only mouthwash that address all of those things. It restores enamel,
22 strengthens teeth, plaque, gingivitis, kills germs, prevents cavities, freshens breath . . . This is
23 everything in one mouthwash.” *Id.*

24 ¹ See Chattem, Inc. F3Q08 (Qr End 08/31/08) Earnings Call Transcript, available at
25 <http://seekingalpha.com/article/97417-chattem-inc-f3q08-qtr-end-08-31-08-earnings-call-transcript> (“Earnings Call Transcript”).

26 ² Colgate Total® “was the first toothpaste that did everything – plaque, gingivitis,
27 strengthen teeth . . . the whole line up.” See Earnings Call Transcript.

28 ³ Vicks® NyQuil®, was marketed as “the sniffly, sneezing, coughing, do everything”
cold medicine.

1 17. Chattem’s misleading and deceptive marketing was an immediate success.
 2 Mr. Guerry announced that ACT Total Care “tested with consumers extraordinarily well,” as
 3 did Chattem’s preliminary commercials. Additionally, Mr. Guerry boasted that: “The trade
 4 [was] excited. They’re looking for innovation and new news into the oral care category, and
 5 we’re just getting an unbelievable trade reception.” And, while the trade was showing great
 6 reception for Chattem’s other products, Mr. Guerry announced that “ACT has been unusually
 7 receptive.”

8 18. The excitement stemmed from the fact that, prior to the release of ACT Total
 9 Care, mouthwashes were either marketed for cavity prevention *or* plaque and gingivitis
 10 removal. That is, no other mouthwash claimed that it would prevent cavities *and* remove, *i.e.*,
 11 “fight”, plaque and gingivitis. Chattem recognized that it could charge a significant premium
 12 for a product that was comprehensive in function.

13 19. To take full advantage of that market niche, Chattem named its Product “ACT
 14 Total Care” to get across the message it “did everything” and “does the total thing.” Right
 15 under the “ACT Total Care” product name and front-and-center on the Product’s label,
 16 Chattem represented that the Product “FIGHTS Unsightly Plaque” as well as helps prevent
 17 cavities. The Product label appeared as follows:

18 (Front Label)



18 (Back Label)



1 20. From the launch of ACT Total Care, Chattem spared little expense in marketing
2 this Product to the greatest audience possible. Chattem signed celebrity Christie Brinkley as
3 its spokesperson for the new line of ACT Total Care, which—according to Mr. Guerry—was
4 done “very infrequently.” *See* Earnings Call Transcript. “We think Christie Brinkley brings
5 every bit as much to the mouthwash category. It’s all about the total health of your mouth,
6 total care of your mouth. Who better stands for freshness, total health than Christie Brinkley,
7 who basically built the Cover Girl franchise?” *Id.* Chattem placed displays of ACT Total Care
8 in almost every major retailer “with Christie Brinkley’s smiling face on those displays.”

9 21. Mr. Guerry described Chattem’s unprecedented advertising campaign
10 supporting ACT Total Care: “ACT Total Care will be backed not only by exceptional levels of
11 advertising featuring Christie Brinkley, but also the biggest promotion in merchandising
12 support ever.”

13 **B. Chattem’s Marketing Claim is Not Supported By Scientific Evidence**

14 22. Through its ACT Total Care packaging, its online websites, and in its
15 advertisements and marketing materials Chattem conveyed one message: ACT Total Care
16 prevents cavities *and* removes, reduces, or otherwise “fights” plaque. This claim is false,
17 deceptive, and unsupported by scientific research.⁴

18 23. There are no proper clinical studies that provide substantiation, clinical or
19 otherwise, for Chattem’s antiplaque claims about ACT Total Care.

20 24. There is consensus within the legitimate scientific community concerning the
21 proper research and testing that must be conducted to substantiate oral health benefit claims.
22 In 2003, a Food and Drug Administration (“FDA”) scientific subcommittee was charged with
23 evaluating the effectiveness of ingredients in over-the-counter products to reduce or prevent
24 plaque or gingivitis. *See* Oral Health Care Drug Products for Over-the-Counter Human Use;

25 _____
26 ⁴ *See* Heifetz, S.B., Meyers, R.J. and Kingman, A., *A Comparison of the Anticaries*
27 *Effectiveness of Daily and Weekly Rinsing with Sodium Fluoride Solutions: Final Results After*
28 *3 Years*, *Journal of Dental Research*, 60 (Special Issue A), Abstract 645 (March 1981)
(Referenced on the ACT Total Care website to substantiate Chattem’s anticavity effectiveness
claims, however, the article does not conclude that sodium fluoride prevents plaque and gum
disease.)

1 Antigingivitis/Antiplaque Drug Products; Establishment of a Monograph, 68 C.F.R. § 32232
2 (2003). The FDA’s Dental Plaque Subcommittee emphasized the importance of proper
3 clinical testing:

4 The Subcommittee believes that the effectiveness of an OTC antigingivitis
5 ingredient, antigingivitis/antiplaque ingredient, or ingredient combination
6 should be demonstrated by evidence of a clinically significant endpoint,
specifically a reduction and/or prevention of gingivitis.

7 *Id.* at § 32246. The Subcommittee further stated that “[p]reference should be given to using
8 double-blind studies with a placebo control,” and required positive evidence of effectiveness
9 and clinical importance from a minimum of two, independent studies of sufficient duration,
10 and with proper randomization. *Id.*

11 25. ACT Total Care’s only active ingredient is sodium fluoride. However,
12 scientific evidence demonstrates that sodium fluoride does not remove, *i.e.*, “fight” plaque.
13 For example, in 1991, a six-month clinical study concluded that:

14 [O]ral hygiene regiment used by the participants in the [sodium
15 fluoride] placebo group *failed to prevent gingivitis*. This
16 conclusion is confirmed by the data obtained at the six-month
examination, which demonstrated that the level of gingivitis
basically remained unchanged from 1.5 to 6 months.

17 *See* Cubells A.B., *et al.*, *The Effect of A Triclosan/Copolymer/Fluoride Dentifrice on Plaque*
18 *Formation and Gingivitis: A Six-Month Clinical Study*, *The Journal of Clinical Dentistry*, Vol.
19 II, No. 3, 63-69 (1991) (emphasis added). The scientists specifically stated that “clinical trials
20 and animal experiments have clearly demonstrated the central role played by microbial plaque
21 in the development of gingivitis.” *Id.* at 63.

22 26. Another study compared the effectiveness of sodium fluoride rinse on 471
23 children between 12-14 years of age. Koch G. & Lindhe J., *The effect of supervised oral*
24 *hygiene on the gingival of children: The effect of sodium fluoride*, *Journal of Periodontal*
25 *Research*, Vol. 2, Issue 1, 64-69 (1967). After three years of daily supervision, the study
26 concluded that the group rinsing with sodium fluoride had *statistically higher* plaque indices
27 than the group rinsing with distilled water. *See id.* at 66, Table V.

1 27. In its 2003 report, the FDA stated that “[s]pecific plaque control implies the
2 control of specific pathogens, using strategies that will preferentially suppress certain species
3 or categories of microorganisms. This approach generally requires the use of antimicrobial
4 agents, typically antibiotics, with a specific antimicrobial spectrum.” 68 C.F.R. § 32238
5 (2003). The FDA’s Dental Plaque Subcommittee did not, and has never, recognized sodium
6 fluoride as a safe or effective ingredient in the prevention or reduction of plaque or gingivitis.

7 28. Other studies that have analyzed whether sodium fluoride aids in the prevention
8 or reduction of plaque or gingivitis conclude that it does not. For example, in an 8-month,
9 double-blind, placebo-controlled, 253-person study, participants were given a 0.2% sodium
10 fluoride or placebo mouthwash. At the end of the study period, the researchers concluded
11 “that there was neither a detrimental nor a beneficial action on the gingival from the fluoride
12 mouth rinse.” The two groups also showed “no difference” in initial and final plaque scores.⁵

13 29. In furtherance of its deceptive advertising, on its website Chattem identified a
14 study which purportedly substantiated the oral health benefit claims for ACT Total Care.
15 However, the one study Chattem references on its website only concludes that sodium fluoride
16 is effective in *preventing cavities*. See Heifetz, S.B., Meyers, R.J. and Kingman, A., *A
17 Comparison of the Anticaries Effectiveness of Daily and Weekly Rinsing with Sodium Fluoride
18 Solutions: Final Results After 3 Years*, Journal of Dental Research, 60 (Special Issue A),
19 Abstract 645 (March 1981).

20 30. Not only is the active ingredient in ACT Total Care not effective in fighting
21 plaque, the inactive ingredients in combination with the active ingredient are not effective in
22 fighting plaque.

23 31. Chattem lists several “inactive ingredients” on the ACT Total Care back-panel:
24 water, alcohol, sorbitol [a sweetener], poloxamer 407 [a surfactant], propylene glycol [an
25 emulsifier], sodium benzoate [a preservative], flavor, sodium phosphate [a preservative],
26 cetylpyridinium chloride [an antiseptic], polysorbate 20 [an emulsifier], sodium saccharin [a

27 _____
28 ⁵ A.M. Frandsen, B.J. McClendon et al., *The Effect of Oral Rinsing With Sodium
Fluoride on the Gingiva of Children*, Scan. J. Dent. Res. 1972: 80: 445-448.

1 sweetener], disodium phosphate [an anticaking agent], calcium disodium EDTA [a stabilizer],
2 blue 1 (283-004) [a dye].

3 32. Only one of the “inactive” ingredients—cetylpyridinium chloride (“CPC”)—
4 has been scientifically proven and approved by the FDA to be safe and effective for use as an
5 antigingivitis/antiplaque agent. However, the effectiveness of CPC as an antiplaque agent has
6 only been proven when the CPC is formulated at concentration of 0.045% to 0.1% as the only
7 “active” ingredient in a product.⁶

8 33. In fact, the FDA Plaque Subcommittee (the “Subcommittee”) *declined* to accept
9 “combination products,” such as ACT Total Care, for over-the-counter eligibility as antiplaque
10 products. Specifically, the Subcommittee warned, and scientific studies have shown, that
11 CPC’s antimicrobial (*i.e.*, antiplaque/antigingivitis) properties are compromised by the
12 product’s formulation (*e.g.*, surfactants, emulsifiers, and other excipients). *Id.* at 32247 (“any
13 formulation that diminishes the activity of [CPC’s] cationic group or that competes with this
14 group may inactivate the product.”); *see also id.* at 32248 (“[T]he biological effectiveness and
15 chemical availability of [CPC] in a mouth rinse appear to be greatly affected by the particular
16 formulation *it is clear that inactivation of [CPC] is likely based on formulation.*)
17 (emphasis added).⁷

18 34. The FDA even “invite[d] supporting data and information demonstrating that
19 these combination products can be generally recognized as safe and effective for OTC use.”
20 *Antiplaque Monograph*, at 32232. But neither Chattem nor any of its competitors presented
21 persuasive evidence to the FDA on the efficacy of combination products.

22
23
24 ⁶ See U.S. Department of Health and Human Services, *Oral Health Care Drug Products*
25 *for Over-the-Counter Human Use; Antigingivitis/Antiplaque Products; Establishment of a*
Monograph; proposed rule, Federal Register Vol. 68, 32232, 32247-48 (May 29, 2003)
26 (“*Antiplaque Monograph*”).

27 ⁷ See also Mankodi S., *et al.*, *A 6-month clinical trial to study the effects of*
28 *cetylpyridinium chloride mouthrinse on gingivitis and plaque*, Am. J. Dent., Vol. 18, 9A (July
2005) (“Mankodi Study”) (“the efficacy of CPC mouthrinses can be compromised by
formulation excipients, such as emulsifiers, leading to situations where two CPC mouthwashes
could contain the same level of CPC by differ significantly in their relative efficacy.”).

1 35. The scientific evidence proves that CPC is only biologically effective for the
2 prevention of plaque and gingivitis when the mouth rinse is formulated to ensure sufficient
3 chemical availability. See *Anti plaque Monograph*, at 32247-48; Mankodi Study, at 1; Yates
4 R., et al., *The effect of a potassium citrate, cetylpyridinium chloride, sodium fluoride*
5 *mouthrinse on dentine hypersensitivity, plaque and gingivitis*, J. Clin. Periodontol, Vol. 25,
6 813-820 (1998).

7 36. Chattem does not state the concentration and bioavailability of CPC in ACT
8 Total Care. Moreover, Chattem does not provide any scientific support, and there is no
9 scientific evidence, to demonstrate that CPC's antimicrobial properties are not compromised
10 by the other ingredients in ACT Total Care. See, e.g., Stookey G.K, et al., *A 6-month clinical*
11 *study assessing the safety and efficacy of two cetylpyridinium chloride mouthrinses*, Am. J.
12 Dent., Vol. 18, 27A (July 2005); Mankodi Study, at 9A-13A.

13 37. On July 22, 2010, after investigating a complaint by Proctor and Gamble, the
14 maker of competing oral care products, the National Advertising Division of the Council of
15 Better Business Bureaus (the "NAD"), an advertising industry's self-regulatory forum, found it
16 to be "necessary and proper" that Chattem discontinue the claims "[ACT Total Care] Fights
17 Unsightly Plaque.* (*as part of a dentist advised oral health program)' and '[ACT Total Care
18 is] the mouthwash that does it all' and provides 'Total Care.'" Only then did Chattem stop
19 making the false and deceptive plaque claims.

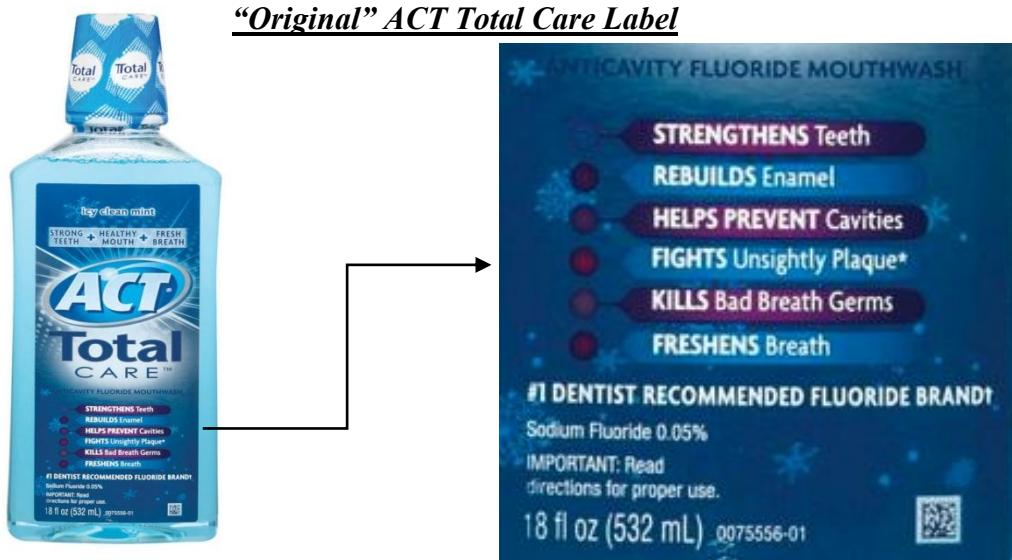
20 38. On the heels of the NAD's investigation, on September 27, 2010, the FDA
21 issued warning letters (the "FDA's warning letters") to three of Chattem's competitors who
22 were also marketing, distributing and selling competing "total care" mouthwashes that claimed
23 to fight plaque. The FDA warned these competitors that their products were misbranded,
24 mislabeled and their advertisements were misleading because the only listed active ingredient,
25 sodium fluoride, has not been proven to prevent plaque.⁸

26
27 ⁸ See Letter from U.S. Food and Drug Administration, to Johnson and Johnson
28 Consumer Products, Inc. (September 27, 2010), available at
<http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm227362.htm>; Letter from
U.S. Food and Drug Administration, to CVS Corporation (September 27, 2010), available at

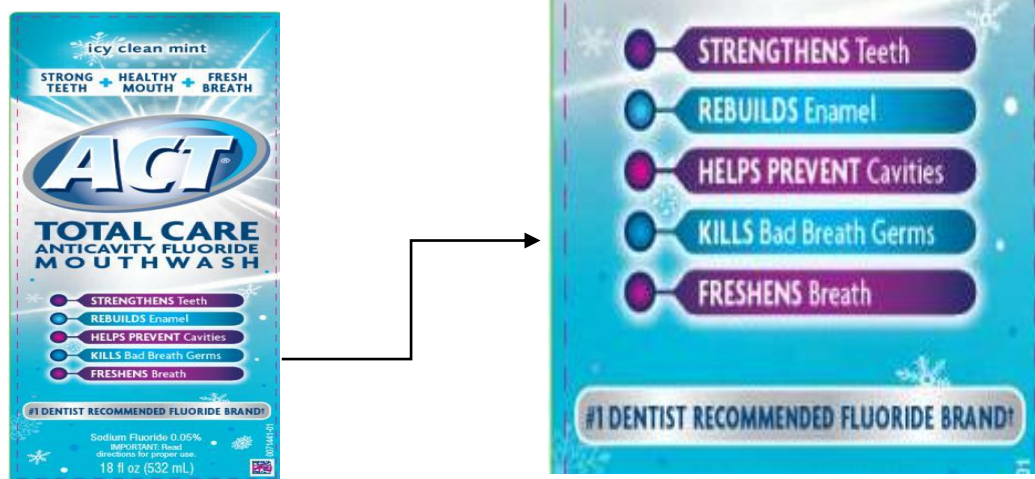
1 39. Following the NAD’s investigation, Chattem belatedly relabeled the ACT Total
2 Care Product. Chattem’s “new” ACT Total Care Product contains the *exact same active and*
3 *inactive ingredients* as ACT Total Care originally did, *but* the oral health benefit claims no
4 longer include representations regarding ACT Total Care’s ability to “fight[] unsightly
5 plaque.” However, Chattem has never publicly disclosed the fact that ACT Total Care did not
6 provide the purported anti-plaque benefits.

7 40. The following is a side-by-side comparison of the original and revised ACT
8 Total Care label:

9 **“Original” ACT Total Care Label**



18 **“New” ACT Total Care Label**



27 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm227368.htm>; Letter from
28 U.S. Food and Drug Administration, to Walgreen Company (September 27, 2010), *available*
at <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm227381.htm>.

1 **C. Chattem Charged A Price Premium Over Mouthwashes That Claim To**
2 **Only Prevent Cavities Or Only Prevent Plaque**

3 41. Chattem set out to deceive the public with its misleading and deceptive claims.
4 Chattem’s message was use ACT Total Care, and get the benefits of two products—one that
5 helps prevent cavities *and* one that removes, *i.e.*, “fights”, plaque.

6 42. Based on its false benefits message, Chattem charged a significant price
7 premium for its ACT Total Care Product. A 33.8-ounce bottle of ACT Total Care retailed for
8 \$7.49 at a local retailer in California. A competing product, Crest[®] Pro-Health Complete
9 Clean Anticavity Fluoride Rinse,⁹ which did not claim to fight plaque but did contain the same
10 active sodium fluoride ingredient, sold for \$5.99 at the same local retailer in California.
11 Chattem was able to charge the premium price for its ACT Total Care over competing
12 products with the same active ingredient because it falsely and misleadingly claimed that ACT
13 Total Care helped prevent cavities *and* fight plaque.

14 43. Chattem also sells a product named ACT[®] Anticavity Fluoride Rinse, which
15 contains the *same* active sodium fluoride ingredient as ACT Total Care, but does not claim to
16 fight plaque. An 18-ounce bottle of ACT[®] Anticavity Fluoride sold for \$4.49 compared to the
17 same sized bottle of ACT Total Care priced at \$5.49 at a local retailer in California.

18 44. These in-store price premiums also were reflected in online retailer sales. For
19 example, online retailer “Soap.com” sold an 18-ounce bottle of ACT Total Care for \$5.40,
20 while the same 18-ounce bottle of ACT Anticavity Fluoride Rinse sold for \$4.60.¹⁰

21 45. ACT Total Care also sold at a premium over products with active ingredients
22 that purportedly fight plaque (*i.e.*, antimicrobial/antiseptic mouthwashes), but not cavities. For
23 example, a 33.8-ounce bottle of ACT Total Care retailed for \$7.49 at an online retailer doing

24 ⁹ Sodium fluoride is the only active ingredient in Crest Pro-Health Complete Clean
25 Anticavity Fluoride Rinse.

26 ¹⁰ Compare <http://www.soap.com/product/productdetail.aspx?productid=47053> with
27 <http://www.soap.com/product/productdetail.aspx?productid=47047> (Last visited February 27,
28 2011); See also [http://www.walgreens.com/store/c/act-total-care-anticavity-fluoride-
rinse/ID=prod4294327-product](http://www.walgreens.com/store/c/act-total-care-anticavity-fluoride-rinse/ID=prod4294327-product) (Last visited March 2, 2011);
[http://www.walgreens.com/store/c/act-total-care-anticavity-fluoride-rinse/ID=prod4294328-
product](http://www.walgreens.com/store/c/act-total-care-anticavity-fluoride-rinse/ID=prod4294328-product) (Last visited March 5, 2011).

1 business in California,¹¹ while a competing antiplaque/antigingivitis product, Listerine®
2 Antiseptic Mouthwash,¹² retailed for \$4.99 at the same online retailer doing business in
3 California.¹³

4 46. Thus, Chattem has collected substantial profits by falsely claiming that ACT
5 Total Care prevents cavities *and* removes, *i.e.*, “fights”, plaque. Chattem’s unjustly obtained
6 profits are based on its use of false, misleading, and unsubstantiated oral health care benefit
7 claims that ACT Total Care prevents cavities *and* fights plaque.

8 47. Each and every person who purchased ACT Total Care with the plaque benefit
9 misrepresentations has been exposed to Chattem’s misleading advertising message.

10 48. The violative claims described in the above paragraphs, combined with the
11 appearance of the “Total Care” name, suggested to a reasonable consumer that ACT Total
12 Care was comprehensive in function, and would provide the stated benefits, including
13 antiplaque benefits. However, these assertions were made without any reasonable scientific
14 support.

15 49. Chattem’s “total care” health benefit and plaque removal claims at issue in this
16 case are false, deceptive, and misleading, and lacked substantiation at the time the
17 representations were made. Therefore, these representations were false, misleading, and
18 reasonably likely to deceive the public.

19 CLASS ACTION ALLEGATIONS

20 50. Plaintiff brings this action on behalf of himself and all those similarly situated
21 pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure.

22 _____
23 ¹¹ See <http://www.walgreens.com/store/c/act-total-care-anticavity-fluoride-rinse/ID=prod4294327-product> (Last visited March 5, 2011).

24 ¹² Listerine® Antiseptic Mouthwash does not contain sodium fluoride, does not advertise
25 that it prevents cavities, and lists the following active ingredients: Eucalyptol (0.092%
26 Antiplaque/Antigingivitis); Menthol (0.042% Antiplaque/Antigingivitis); Methyl Salicylate
27 (0.060% Antiplaque/Antigingivitis); Thymol (0.064% Antiplaque/Antigingivitis). See
28 <http://www.walgreens.com/store/c/listerine-fresh-burst-antiseptic-mouthwash/ID=prod1212-product> (last visited March 5, 2011).

¹³ See <http://www.walgreens.com/store/c/listerine-fresh-burst-antiseptic-mouthwash/ID=prod1212-product> (Last visited March 5, 2011).

1 51. The proposed Class consists of:

2 All persons who purchased ACT Total Care Anticavity branded
3 products in the United States from January 1, 2009, to June 30,
4 2010.

5 Excluded from the Settlement Class are: (i) those who
6 purchased the ACT Total Care branded products for purpose of
7 resale; (ii) those with claims for personal injuries arising from
8 the ingestion of one or more ACT Total Care branded products;
9 (iii) Defendant and its officers, directors and employees; (iv) any
10 person who files a valid and timely Request for Exclusion; and
11 (v) the Judge(s) to whom this Action is assigned and any
12 members of their immediate families.

13 52. ***Numerosity.*** The members of the Class are so numerous that their individual
14 joinder is impracticable. Plaintiff is informed and believes, and on that basis alleges, that the
15 proposed Class contains many thousands of members. The precise number of Class members
16 is unknown to Plaintiff. The true number of Class members is known by Chattem, however,
17 and thus, may be notified of the pendency of this action by first class mail, electronic mail, and
18 by published notice.

19 53. ***Existence and Predominance of Common Questions of Law and Fact.***
20 Common questions of law and fact exist as to all members of the Class and predominate over
21 any questions affecting only individual Class members. These common legal and factual
22 questions include, but are not limited to, the following:

23 (a) whether the claims discussed above are true, or are misleading, or
24 reasonably likely to deceive;

25 (b) whether Chattem's alleged conduct violates public policy;

26 (c) whether the alleged conduct constitutes violations of the laws asserted;

27 (d) whether Chattem engaged in false or misleading advertising;

28 (e) whether Plaintiff and Class members have sustained monetary loss and
the proper measure of that loss; and

(f) whether Plaintiff and Class members are entitled to an award of punitive
damages.

1 54. **Typicality.** Plaintiff's claims are typical of the claims of the members of the
2 Class in that Plaintiff is a member of the class he seeks to represent.

3 55. **Adequacy of Representation.** Plaintiff will fairly and adequately protect the
4 interests of the members of the Class. Plaintiff has retained counsel experienced in complex
5 consumer class action litigation, and Plaintiff intends to prosecute this action vigorously.
6 Plaintiff has no adverse or antagonistic interests to those of the Class.

7 56. **Superiority.** A class action is superior to all other available means for the fair
8 and efficient adjudication of this controversy. The damages or other financial detriment
9 suffered by individual Class members is relatively small compared to the burden and expense
10 that would be entailed by individual litigation of their claims against Chattem. It would thus
11 be virtually impossible for the Class, on an individual basis, to obtain effective redress for the
12 wrongs done to them. Furthermore, even if Class members could afford such individualized
13 litigation, the court system could not. Individualized litigation would create the danger of
14 inconsistent or contradictory judgments arising from the same set of facts. Individualized
15 litigation would also increase the delay and expense to all parties and the court system from
16 the issues raised by this action. By contrast, the class action device provides the benefits of
17 adjudication of these issues in a single proceeding, economies of scale, and comprehensive
18 supervision by a single court, and presents no unusual management difficulties under the
19 circumstances here.

20 57. In the alternative, the Class may also be certified because:

21 (a) the prosecution of separate actions by individual Class members would
22 create a risk of inconsistent or varying adjudication with respect to individual Class members
23 that would establish incompatible standards of conduct for the Chattem; and/or

24 (b) the prosecution of separate actions by individual Class members would
25 create a risk of adjudications with respect to them that would, as a practical matter, be
26 dispositive of the interests of other Class members not parties to the adjudications, or
27 substantially impair or impede their ability to protect their interests.

28 (c) Unless a Class is certified, Chattem will retain monies received as a

1 result of its conduct that were taken from Plaintiff and Class members.

2
3 **COUNT I**

4 **Violation of Business & Professions Code §17200, et seq.**

5 58. Plaintiff repeats and realleges the allegations contained in the paragraphs above,
6 as if fully set forth herein.

7 59. Plaintiff brings this claim individually and on behalf of the Class.

8 60. As alleged herein, Plaintiff has suffered injury in fact and lost money or
9 property as a result of Chattem’s conduct because he purchased ACT Total Care mouthwash
10 misrepresenting that the product had plaque benefits.

11 61. The Unfair Competition Law, Business & Professions Code §17200, *et seq.*
12 (“UCL”), prohibits any “unlawful,” “fraudulent” or “unfair” business act or practice and any
13 false or misleading advertising. In the course of conducting business, Chattem committed
14 unlawful business practices by, *inter alia*, making the representations (which also constitutes
15 advertising within the meaning of §17200) and omissions of material facts, as set forth more
16 fully herein, and violating Civil Code §§1572, 1573, 1709, 1711, 1770, Business &
17 Professions Code §§17200, *et seq.*, 17500, *et seq.*, and the common law.

18 62. Plaintiff and the Class reserve the right to allege other violations of law which
19 constitute other unlawful business acts or practices. Such conduct is ongoing and continues to
20 this date.

21 63. Chattem’s actions also constitute “unfair” business acts or practices because, as
22 alleged above, *inter alia*, Chattem engages in false advertising, misrepresents and omits
23 material facts regarding ACT Total Care’s efficacy as a “total” oral health care mouthwash,
24 and thereby offends an established public policy, and engages in immoral, unethical,
25 oppressive, and unscrupulous activities that are substantially injurious to consumers.

26 64. As stated in this Complaint, Plaintiff alleges violations of consumer protection,
27 unfair competition and truth in advertising laws, resulting in harm to consumers. Chattem’s
28 acts and omissions also violate and offend the public policy against engaging in false and

1 misleading advertising, unfair competition and deceptive conduct towards consumers. This
2 conduct constitutes violations of the unfair prong of Business & Professions Code §17200, *et*
3 *seq.*

4 65. There were reasonably available alternatives to further Chattem’s legitimate
5 business interests, other than the conduct described herein.

6 66. Business & Professions Code §17200, *et seq.*, also prohibits any “fraudulent
7 business act or practice.”

8 67. Chattem’s actions, claims, nondisclosures, and misleading statements, as
9 alleged in this Complaint, were false, misleading and likely to deceive the consuming public
10 within the meaning of Business & Professions Code §17200, *et seq.*

11 68. Plaintiff and other members of the Class have in fact been deceived as a result
12 of their reliance on Chattem’s representations and omissions. This reliance has caused harm to
13 Plaintiff and other members of the Class. Plaintiff and other Class members have suffered
14 injury in fact and lost money as a result of these unlawful, unfair, and fraudulent practices.

15 69. As a result of its deception, Chattem has been able to reap unjust revenue and
16 profit.

17 70. Plaintiff, on behalf of himself, all others similarly situated, and the general
18 public, seeks restitution and disgorgement of all money obtained from Plaintiff and the
19 members of the Class collected as a result of unfair competition and all other relief this Court
20 deems appropriate, consistent with Business & Professions Code §17203.

21 **COUNT II**

22 **Violations of the Consumers Legal Remedies Act –**
23 **Civil Code §1750 *et seq.***

24 71. Plaintiff repeats and realleges the allegations contained in the paragraphs above,
25 as if fully set forth herein.

26 72. Plaintiff brings this claim individually and on behalf of the Class.

27 73. This cause of action is brought pursuant to the Consumers Legal Remedies Act,
28 California Civil Code §1750, *et seq.* (the “Act”). Plaintiff is a consumer as defined by

1 California Civil Code §1761(d). Chattem’s ACT Total Care is a good within the meaning of
2 the Act.

3 74. Chattem violated the Act by engaging in the following practices proscribed by
4 California Civil Code §1770(a) in transactions with Plaintiff and the Class which were
5 intended to result in, and did result in, the sale of ACT Total Care:

6 (5) Representing that [ACT Total Care has] . . . approval, characteristics, . . . uses
7 [or] benefits . . . which [it does] not have

8 * * *

9 (7) Representing that [ACT Total Care is] of a particular standard, quality or
10 grade . . . if [it is] of another.

11 * * *

12 (9) Advertising goods . . . with intent not to sell them as advertised.

13 * * *

14 (16) Representing that [ACT Total Care has] been supplied in accordance with a
15 previous representation when [it has] not.

16 75. Chattem violated the Act by representing through its advertisements ACT Total
17 Care as described above when it knew, or should have known, that the representations and
18 advertisements were false and misleading and unsubstantiated.

19 76. Pursuant to California Civil Code §1782(d), Plaintiff and the Class seek a Court
20 order for restitution and disgorgement.

21 77. Pursuant to §1782 of the Act, by letter dated March 11, 2011, Chattem was
22 notified in writing by certified mail of the particular violations of §1770 of the Act and
23 demanded that Chattem rectify the problems associated with the actions detailed above and
24 give notice to all affected consumers of its intent to so act.

25 78. Chattem has failed to rectify or agree to rectify the problems associated with the
26 actions detailed above or give notice to all affected consumers within 30 days of the date of
27 written notice pursuant to §1782 of the Act. Therefore, Plaintiff further seeks actual, punitive
28 and statutory damages, as appropriate.

1 79. Chattem's conduct is malicious, fraudulent and wanton.

2 80. Pursuant to §1780(d) of the Act, attached as Exhibit B to the Class Action
3 Complaint dated November 22, 2011, is the affidavit showing that this action has been
4 commenced in the proper forum.

5 **COUNT III**

6 **Breach of Express Warranty**

7 81. Plaintiff repeats and realleges the allegations contained in the paragraphs above,
8 as if fully set forth herein.

9 82. Plaintiff brings this claim individually and on behalf of the Class.

10 83. Plaintiff, and each member of the Class, formed a contract with Chattem at the
11 time Plaintiff and the other members of the Class purchased ACT Total Care. The terms of
12 that contract include the promises and affirmations of fact made by Chattem on its ACT Total
13 Care packaging and labeling, and through its marketing campaign, as described above. This
14 product packaging and advertising constitutes express warranties, became part of the basis of
15 the bargain, and is part of a standardized contract between Plaintiff and the members of the
16 Class on the one hand, and Chattem on the other.

17 84. All conditions precedent to Chattem's liability under this contract have been
18 performed by Plaintiff and the Class.

19 85. Chattem breached the terms of this contract, including the express warranties,
20 with Plaintiff and the Class by not providing the ACT Total Care which could provide the
21 benefits described above.

22 86. As a result of Chattem's breach of its contract, Plaintiff and the Class have been
23 damaged in the amount of the purchase price of the ACT Total Care they purchased.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, prays
26 for judgment against Chattem as follows:

27
28

1 A. For an order declaring this a class action pursuant to Rule 23 of the Federal
2 Rules of Civil Procedure on behalf of the proposed class described herein and appointing
3 Plaintiff to serve as class representative and Plaintiff’s counsel as Lead Counsel for the Class;

4 B. For an order awarding restitution of the monies Chattem wrongfully acquired
5 by its wrongful and illegal conduct;

6 C. For an order requiring disgorgement of monies wrongfully obtained as a result
7 of Chattem’s wrongful and illegal conduct;

8 D. For appropriate actual, statutory and punitive damages, arising from Chattem’s
9 wrongful and illegal conduct;

10 E. For an award of reasonable attorneys’ fees and all costs and expenses incurred
11 in the course of prosecuting this action;

12 F. For pre-judgment and post-judgment interest at the legal rate; and

13 G. For such other and further relief as the Court deems just and proper.

14 **JURY DEMAND**

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

16 Dated: January 23, 2013

BLOOD HURST & O’REARDON, LLP
TIMOTHY G. BLOOD
THOMAS J. O’REARDON II

18 By: /s/ Thomas J. O’Reardon II
THOMAS J. O’REARDON II

19 701 B Street, Suite 1700
20 San Diego, CA 92101
21 Tel: 619-338-1100
22 Fax: 619-338-1101
tblood@bholaw.com
toreardon@bholaw.com

23 BONNETT, FAIRBOURN, FRIEDMAN
& BALINT, P.C.

24 Elaine A. Ryan
25 Patricia N. Syverson (203111)
26 2325 E. Camelback Road, Suite 300
27 Phoenix, AZ 85016
Telephone: 602-274-1100
Facsimile: 602-274-1199
eryan@bffb.com
psyverson@bffb.com

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BONNETT, FAIRBOURN, FRIEDMAN
& BALINT, P.C.

Todd D. Carpenter (234464)
600 West Broadway, Suite 900
San Diego, CA 92101
Telephone: 619-756-7748
Facsimile; 619-798-5894
tcarpenter@bffb.com

*Attorneys for Plaintiff and Proposed Class
Counsel*

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List.

Executed January 23, 2013.

s/ Thomas J. O'Reardon II
THOMAS J. O'REARDON II

BLOOD HURST & O'REARDON, LLP
701 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/338-1100
619/338-1101 (fax)
toreardon@bholaw.com

1 BLOOD HURST & O'REARDON, LLP
Timothy G. Blood (149343)
2 Thomas J. O'Reardon II (247952)
701 B Street, Suite 1700
3 San Diego, CA 92101
Telephone: 619-338-1100
4 Facsimile: 619-338-1101

5 BONNETT, FAIRBOURN, FRIEDMAN
& BALINT, P.C.
6 Elaine A. Ryan
Patricia N. Syverson (203111)
7 2325 E. Camelback Road, Suite 300
Phoenix, AZ 85016
8 Telephone: 602-274-1100
Facsimile: 602-274-1199

BONNETT, FAIRBOURN, FRIEDMAN
& BALINT, P.C.
Todd D. Carpenter (234464)
600 West Broadway, Suite 900
San Diego, CA 92101
Telephone: 619-756-7748
Facsimile: 619-798-5894
tcarpenter@bffb.com

9 Attorneys for Plaintiff and Proposed
10 Class Counsel

11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13 MARK DUFFER, on Behalf of Himself
and All Others Similarly Situated and the
14 General Public,

15 Plaintiff,

16 v.

17 CHATTEM, INC.,

18 Defendant.

Case No.: 11-cv-02735 W WVG

SECOND AMENDED COMPLAINT

CLASS ACTION

1. Violation of the Unfair Competition Law, California Business Professions Code § 17200 et seq.;
2. Violation of the Consumers Legal Remedies Act, California Civil Code § 1750 et seq.; and
3. Breach of Express Warranty

DEMAND FOR JURY TRIAL

1 Plaintiff Plaintiff Mark Duffer (“Plaintiff” or “Plaintiff Duffer”), by and through his
2 attorneys, brings this action on behalf of himself, all others similarly situated and the General
3 Public against Defendant Chattem, Inc. (“Chattem”) and states:

4 **NATURE OF THE ACTION**

5 1. Chattem markets, distributes, and sells over-the-counter consumer health care
6 products including oral health care products under the ACT[®] brand name. ACT[®] mouthwash
7 is sold in a variety of formulations, including ACT[®] Total Care[™] Anticavity Fluoride
8 Mouthwash (“ACT Total Care” or “the Product”). Chattem promoted ACT Total Care to
9 consumers as providing comprehensive (“total”) oral health care benefits.

10 2. Through an extensive and comprehensive nationwide marketing campaign,
11 including on the ACT Total Care packaging and labeling, as well as on its various websites
12 and print advertising, Chattem claimed that using ACT Total Care provides all consumers with
13 specific oral health care benefits, including: Strengthens Teeth, Rebuilds Enamel, Helps
14 Prevent Cavities, Fights Unsightly Plaque, Kills Bad Breath Germs, and Freshens Breath—all
15 of which are prominently represented on the front and center of the ACT Total Care label.
16 According to Chattem’s CEO, ACT Total Care is the “everything in one mouthwash.” In
17 announcing the Product, the CEO told analysts, “[i]t’s all about total health of your mouth,
18 total care of your mouth.”

19 3. Chattem’s misleading marketing campaigns begin with a deceptive name for
20 the ACT product, “Total Care,” and a deceptive marketing tagline “the mouthwash that does it
21 all.”

22 4. By representing to consumers that ACT Total Care “fights” plaque, Chattem
23 implied, and intended for consumers to believe, that ACT Total Care had the ability to actually
24 *remove* plaque. However, contrary to its claims, ACT Total Care does not reduce, remove or
25 otherwise “fight” plaque. Chattem’s only active ingredient, sodium fluoride, does not provide
26 anti-plaque benefits. Further, the ingredient matrix in ACT Total Care does not reduce,
27 remove or otherwise fight plaque. Chattem has never had valid scientific or clinical
28 substantiation for its claim.

1 5. Chattem’s nationwide advertising campaign was extensive and comprehensive.
 2 Chattem spent many thousands of dollars to convey its deceptive message to consumers
 3 throughout the United States, including California. Chattem conveyed its deceptive claims
 4 about ACT Total Care through a fully-integrated advertising campaign combining a variety of
 5 media, including television, newspapers, magazines, direct mail, the Internet, point-of-sale
 6 displays, and on the ACT Total Care packages and labeling.

7 6. As a result of the misleading message conveyed through its advertising and
 8 labeling, Chattem was able to charge a significant price premium of approximately 25% or
 9 more for ACT Total Care over other mouthwash products, including other ACT mouthwash
 10 products.

11 7. Plaintiff brings this action on behalf of himself and other similarly situated
 12 California residents who purchased ACT Total Care to obtain redress for those who have
 13 purchased ACT Total Care. Plaintiff alleges violations of the Consumers Legal Remedies Act,
 14 the Unfair Competition Law and breach of express warranty created by Chattem’s advertising,
 15 including its labeling.

JURISDICTION AND VENUE

17 8. This Court has original jurisdiction pursuant to 28 U.S.C. §1332(d)(2). The
 18 matter in controversy, exclusive of interest and costs, exceeds the sum or value of \$5,000,000
 19 and is a class action in which there are in excess of 100 class members and the members of the
 20 Class are citizens of a state different from Chattem. Further, greater than two-thirds of the
 21 Class members reside in states other than the state in which Chattem is a citizen.

22 9. This Court has personal jurisdiction over Chattem because Chattem is
 23 authorized to do business and does conduct business in California. Chattem has marketed,
 24 promoted, distributed, and sold ACT Total Care in California, and Chattem has sufficient
 25 minimum contacts with this State and/or sufficiently avails itself of the markets in this State
 26 through its promotion, sales, and marketing within this State to render the exercise of
 27 jurisdiction by this Court permissible.

28

1 10. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(a) and (b) because
 2 a substantial part of the events or omissions giving rise to Plaintiff's claims occurred while he
 3 resided in this judicial district. Venue is also proper under 18 U.S.C. § 1965(a) because
 4 Chattem transacts substantial business in this District.

5 PARTIES

6 11. At all times relevant to this matter, Plaintiff Duffer resided, and continues to
 7 reside, in Carlsbad, California. During the relevant time period, Plaintiff was exposed to
 8 Chattem's advertising claims for ACT Total Care, including the representations on the ACT
 9 Total Care label, purchased ACT Total Care, and suffered injury in fact and lost money as a
 10 result of the unfair trade practices described herein.

11 12. Plaintiff purchased and used the product throughout the Class Period, most
 12 recently in the spring and summer of 2010 from a Rite Aid in Carlsbad, California and the
 13 military commissary at the Camp Pendleton Marine Corps base, and paid the retail price of
 14 approximately \$5.49 for each 18-ounce bottle. Plaintiff read the ACT Total Care Product label
 15 and relied on the antiplaque and total oral health benefit claims, as set forth herein, found on
 16 the ACT Total Care label and product packaging and as advertised on the in-store displays.
 17 The antiplaque and total oral health benefit claims were a material factor in Plaintiff's decision
 18 to purchase and use ACT Total Care. Plaintiff's reliance on Chattem's representations was
 19 reasonable given that Chattem has a reputation as a reliable and trustworthy company.
 20 Plaintiff used ACT Total Care as directed to prevent cavities, fight plaque, and for total oral
 21 health care. Plaintiff would not have purchased the premium-priced ACT Total Care had he
 22 known the truth about Chattem's antiplaque and total oral health benefit claims. Thus,
 23 Plaintiff has suffered injury in fact and lost money and property as a result of the alleged
 24 misconduct. He has been injured in the amount paid for the ACT Total Care Products.

25 13. Defendant Chattem, Inc., is a privately held company incorporated under the
 26 laws of the state of Tennessee. Chattem's corporate headquarters is located in Chattanooga,
 27 Tennessee. Chattem is registered to do business in the state of California. Chattem marketed,
 28 promoted, distributed, and sold ACT Total Care to millions of consumers throughout the

1 United States, including tens of thousands of consumers in California and in San Diego
2 County.

3 **FACTUAL ALLEGATIONS**

4 **A. Chattem’s False, Misleading, and Deceptive Advertising for its ACT
5 Total Care**

6 14. Chattem’s roots in consumer over-the-counter health care products date back
7 over 100 years and include a diverse array of brand-name pharmaceuticals, toiletries and
8 cosmetic items. In 2007, Chattem acquired five top brands from Johnson & Johnson,
9 including anticavity mouthwash ACT.

10 15. While Johnson & Johnson owned the ACT® brand, it sold the mouthwash under
11 the product name “Act® x2 Anticavity Fluoride.” Chattem changed the product name to “ACT
12 Total Care” and added antiplaque and total oral health care claims to the label and packaging.

13 16. To promote the new line of products, Chattem engaged in an extensive and
14 comprehensive nationwide marketing campaign, which was launched in 2008 by Chattem’s
15 Chairman and Chief Executive Officer, Alexander “Zan” Guerry. While addressing a group of
16 financial analysts and market research organizations, Mr. Guerry introduced ACT Total Care
17 as Chattem’s product “with the greatest upside of all our new products next year.”¹ He
18 compared the new ACT Total Care with a popular selling toothpaste, Colgate Total®,² and a
19 popular selling over-the-counter cold medicine, Vicks® NyQuil®,³ because it “did everything”
20 and “does the total thing.” See Earnings Call Transcript. Mr. Guerry touted that “ACT Total
21 Care is the first and only mouthwash that address all of those things. It restores enamel,
22 strengthens teeth, plaque, gingivitis, kills germs, prevents cavities, freshens breath . . . This is
23 everything in one mouthwash.” *Id.*

24 ¹ See Chattem, Inc. F3Q08 (Qr End 08/31/08) Earnings Call Transcript, available at
25 <http://seekingalpha.com/article/97417-chattem-inc-f3q08-qtr-end-08-31-08-earnings-call-transcript> (“Earnings Call Transcript”).

26 ² Colgate Total® “was the first toothpaste that did everything – plaque, gingivitis,
27 strengthen teeth . . . the whole line up.” See Earnings Call Transcript.

28 ³ Vicks® NyQuil®, was marketed as “the sniffly, sneezing, coughing, do everything”
cold medicine.

1 17. Chattem’s misleading and deceptive marketing was an immediate success.
 2 Mr. Guerry announced that ACT Total Care “tested with consumers extraordinarily well,” as
 3 did Chattem’s preliminary commercials. Additionally, Mr. Guerry boasted that: “The trade
 4 [was] excited. They’re looking for innovation and new news into the oral care category, and
 5 we’re just getting an unbelievable trade reception.” And, while the trade was showing great
 6 reception for Chattem’s other products, Mr. Guerry announced that “ACT has been unusually
 7 receptive.”

8 18. The excitement stemmed from the fact that, prior to the release of ACT Total
 9 Care, mouthwashes were either marketed for cavity prevention *or* plaque and gingivitis
 10 removal. That is, no other mouthwash claimed that it would prevent cavities *and* remove, *i.e.*,
 11 “fight”, plaque and gingivitis. Chattem recognized that it could charge a significant premium
 12 for a product that was comprehensive in function.

13 19. To take full advantage of that market niche, Chattem named its Product “ACT
 14 Total Care” to get across the message it “did everything” and “does the total thing.” Right
 15 under the “ACT Total Care” product name and front-and-center on the Product’s label,
 16 Chattem represented that the Product “FIGHTS Unsightly Plaque” as well as helps prevent
 17 cavities. The Product label appeared as follows:

18 (Front Label)



18 (Back Label)



1 20. From the launch of ACT Total Care, Chattem spared little expense in marketing
2 this Product to the greatest audience possible. Chattem signed celebrity Christie Brinkley as
3 its spokesperson for the new line of ACT Total Care, which—according to Mr. Guerry—was
4 done “very infrequently.” *See* Earnings Call Transcript. “We think Christie Brinkley brings
5 every bit as much to the mouthwash category. It’s all about the total health of your mouth,
6 total care of your mouth. Who better stands for freshness, total health than Christie Brinkley,
7 who basically built the Cover Girl franchise?” *Id.* Chattem placed displays of ACT Total Care
8 in almost every major retailer “with Christie Brinkley’s smiling face on those displays.”

9 21. Mr. Guerry described Chattem’s unprecedented advertising campaign
10 supporting ACT Total Care: “ACT Total Care will be backed not only by exceptional levels of
11 advertising featuring Christie Brinkley, but also the biggest promotion in merchandising
12 support ever.”

13 **B. Chattem’s Marketing Claim is Not Supported By Scientific Evidence**

14 22. Through its ACT Total Care packaging, its online websites, and in its
15 advertisements and marketing materials Chattem conveyed one message: ACT Total Care
16 prevents cavities *and* removes, reduces, or otherwise “fights” plaque. This claim is false,
17 deceptive, and unsupported by scientific research.⁴

18 23. There are no proper clinical studies that provide substantiation, clinical or
19 otherwise, for Chattem’s antiplaque claims about ACT Total Care.

20 24. There is consensus within the legitimate scientific community concerning the
21 proper research and testing that must be conducted to substantiate oral health benefit claims.
22 In 2003, a Food and Drug Administration (“FDA”) scientific subcommittee was charged with
23 evaluating the effectiveness of ingredients in over-the-counter products to reduce or prevent
24 plaque or gingivitis. *See* Oral Health Care Drug Products for Over-the-Counter Human Use;

25 _____
26 ⁴ *See* Heifetz, S.B., Meyers, R.J. and Kingman, A., *A Comparison of the Anticaries*
27 *Effectiveness of Daily and Weekly Rinsing with Sodium Fluoride Solutions: Final Results After*
28 *3 Years*, *Journal of Dental Research*, 60 (Special Issue A), Abstract 645 (March 1981)
(Referenced on the ACT Total Care website to substantiate Chattem’s anticavity effectiveness
claims, however, the article does not conclude that sodium fluoride prevents plaque and gum
disease.)

1 Antigingivitis/Antiplaque Drug Products; Establishment of a Monograph, 68 C.F.R. § 32232
2 (2003). The FDA’s Dental Plaque Subcommittee emphasized the importance of proper
3 clinical testing:

4 The Subcommittee believes that the effectiveness of an OTC antigingivitis
5 ingredient, antigingivitis/antiplaque ingredient, or ingredient combination
6 should be demonstrated by evidence of a clinically significant endpoint,
specifically a reduction and/or prevention of gingivitis.

7 *Id.* at § 32246. The Subcommittee further stated that “[p]reference should be given to using
8 double-blind studies with a placebo control,” and required positive evidence of effectiveness
9 and clinical importance from a minimum of two, independent studies of sufficient duration,
10 and with proper randomization. *Id.*

11 25. ACT Total Care’s only active ingredient is sodium fluoride. However,
12 scientific evidence demonstrates that sodium fluoride does not remove, *i.e.*, “fight” plaque.
13 For example, in 1991, a six-month clinical study concluded that:

14 [O]ral hygiene regiment used by the participants in the [sodium
15 fluoride] placebo group *failed to prevent gingivitis*. This
16 conclusion is confirmed by the data obtained at the six-month
examination, which demonstrated that the level of gingivitis
basically remained unchanged from 1.5 to 6 months.

17 *See* Cubells A.B., *et al.*, *The Effect of A Triclosan/Copolymer/Fluoride Dentifrice on Plaque*
18 *Formation and Gingivitis: A Six-Month Clinical Study*, *The Journal of Clinical Dentistry*, Vol.
19 II, No. 3, 63-69 (1991) (emphasis added). The scientists specifically stated that “clinical trials
20 and animal experiments have clearly demonstrated the central role played by microbial plaque
21 in the development of gingivitis.” *Id.* at 63.

22 26. Another study compared the effectiveness of sodium fluoride rinse on 471
23 children between 12-14 years of age. Koch G. & Lindhe J., *The effect of supervised oral*
24 *hygiene on the gingival of children: The effect of sodium fluoride*, *Journal of Periodontal*
25 *Research*, Vol. 2, Issue 1, 64-69 (1967). After three years of daily supervision, the study
26 concluded that the group rinsing with sodium fluoride had *statistically higher* plaque indices
27 than the group rinsing with distilled water. *See id.* at 66, Table V.

1 27. In its 2003 report, the FDA stated that “[s]pecific plaque control implies the
2 control of specific pathogens, using strategies that will preferentially suppress certain species
3 or categories of microorganisms. This approach generally requires the use of antimicrobial
4 agents, typically antibiotics, with a specific antimicrobial spectrum.” 68 C.F.R. § 32238
5 (2003). The FDA’s Dental Plaque Subcommittee did not, and has never, recognized sodium
6 fluoride as a safe or effective ingredient in the prevention or reduction of plaque or gingivitis.

7 28. Other studies that have analyzed whether sodium fluoride aids in the prevention
8 or reduction of plaque or gingivitis conclude that it does not. For example, in an 8-month,
9 double-blind, placebo-controlled, 253-person study, participants were given a 0.2% sodium
10 fluoride or placebo mouthwash. At the end of the study period, the researchers concluded
11 “that there was neither a detrimental nor a beneficial action on the gingival from the fluoride
12 mouth rinse.” The two groups also showed “no difference” in initial and final plaque scores.⁵

13 29. In furtherance of its deceptive advertising, on its website Chattem identified a
14 study which purportedly substantiated the oral health benefit claims for ACT Total Care.
15 However, the one study Chattem references on its website only concludes that sodium fluoride
16 is effective in *preventing cavities*. See Heifetz, S.B., Meyers, R.J. and Kingman, A., *A
17 Comparison of the Anticaries Effectiveness of Daily and Weekly Rinsing with Sodium Fluoride
18 Solutions: Final Results After 3 Years*, Journal of Dental Research, 60 (Special Issue A),
19 Abstract 645 (March 1981).

20 30. Not only is the active ingredient in ACT Total Care not effective in fighting
21 plaque, the inactive ingredients in combination with the active ingredient are not effective in
22 fighting plaque.

23 31. Chattem lists several “inactive ingredients” on the ACT Total Care back-panel:
24 water, alcohol, sorbitol [a sweetener], poloxamer 407 [a surfactant], propylene glycol [an
25 emulsifier], sodium benzoate [a preservative], flavor, sodium phosphate [a preservative],
26 cetylpyridinium chloride [an antiseptic], polysorbate 20 [an emulsifier], sodium saccharin [a

27 _____
28 ⁵ A.M. Frandsen, B.J. McClendon et al., *The Effect of Oral Rinsing With Sodium
Fluoride on the Gingiva of Children*, Scan. J. Dent. Res. 1972: 80: 445-448.

1 sweetener], disodium phosphate [an anticaking agent], calcium disodium EDTA [a stabilizer],
2 blue 1 (283-004) [a dye].

3 32. Only one of the “inactive” ingredients—cetylpyridinium chloride (“CPC”)—
4 has been scientifically proven and approved by the FDA to be safe and effective for use as an
5 antigingivitis/antiplaque agent. However, the effectiveness of CPC as an antiplaque agent has
6 only been proven when the CPC is formulated at concentration of 0.045% to 0.1% as the only
7 “active” ingredient in a product.⁶

8 33. In fact, the FDA Plaque Subcommittee (the “Subcommittee”) *declined* to accept
9 “combination products,” such as ACT Total Care, for over-the-counter eligibility as antiplaque
10 products. Specifically, the Subcommittee warned, and scientific studies have shown, that
11 CPC’s antimicrobial (*i.e.*, antiplaque/antigingivitis) properties are compromised by the
12 product’s formulation (*e.g.*, surfactants, emulsifiers, and other excipients). *Id.* at 32247 (“any
13 formulation that diminishes the activity of [CPC’s] cationic group or that competes with this
14 group may inactivate the product.”); *see also id.* at 32248 (“[T]he biological effectiveness and
15 chemical availability of [CPC] in a mouth rinse appear to be greatly affected by the particular
16 formulation *it is clear that inactivation of [CPC] is likely based on formulation.*)
17 (emphasis added).⁷

18 34. The FDA even “invite[d] supporting data and information demonstrating that
19 these combination products can be generally recognized as safe and effective for OTC use.”
20 *Antiplaque Monograph*, at 32232. But neither Chattem nor any of its competitors presented
21 persuasive evidence to the FDA on the efficacy of combination products.

22
23
24 ⁶ See U.S. Department of Health and Human Services, *Oral Health Care Drug Products*
25 *for Over-the-Counter Human Use; Antigingivitis/Antiplaque Products; Establishment of a*
Monograph; proposed rule, Federal Register Vol. 68, 32232, 32247-48 (May 29, 2003)
26 (“*Antiplaque Monograph*”).

27 ⁷ See also Mankodi S., *et al.*, *A 6-month clinical trial to study the effects of*
28 *cetylpyridinium chloride mouthrinse on gingivitis and plaque*, Am. J. Dent., Vol. 18, 9A (July
2005) (“Mankodi Study”) (“the efficacy of CPC mouthrinses can be compromised by
formulation excipients, such as emulsifiers, leading to situations where two CPC mouthwashes
could contain the same level of CPC by differ significantly in their relative efficacy.”).

1 35. The scientific evidence proves that CPC is only biologically effective for the
2 prevention of plaque and gingivitis when the mouth rinse is formulated to ensure sufficient
3 chemical availability. *See Antiplaque Monograph*, at 32247-48; Mankodi Study, at 1; Yates
4 R., *et al.*, *The effect of a potassium citrate, cetylpyridinium chloride, sodium fluoride*
5 *mouthrinse on dentine hypersensitivity, plaque and gingivitis*, J. Clin. Periodontol, Vol. 25,
6 813-820 (1998).

7 36. Chattem does not state the concentration and bioavailability of CPC in ACT
8 Total Care. Moreover, Chattem does not provide any scientific support, and there is no
9 scientific evidence, to demonstrate that CPC's antimicrobial properties are not compromised
10 by the other ingredients in ACT Total Care. *See, e.g.*, Stookey G.K., *et al.*, *A 6-month clinical*
11 *study assessing the safety and efficacy of two cetylpyridinium chloride mouthrinses*, Am. J.
12 Dent., Vol. 18, 27A (July 2005); Mankodi Study, at 9A-13A.

13 37. On July 22, 2010, after investigating a complaint by Proctor and Gamble, the
14 maker of competing oral care products, the National Advertising Division of the Council of
15 Better Business Bureaus (the "NAD"), an advertising industry's self-regulatory forum, found it
16 to be "necessary and proper" that Chattem discontinue the claims "[ACT Total Care] Fights
17 Unsightly Plaque.* (*as part of a dentist advised oral health program)' and '[ACT Total Care
18 is] the mouthwash that does it all' and provides 'Total Care.'" Only then did Chattem stop
19 making the false and deceptive plaque claims.

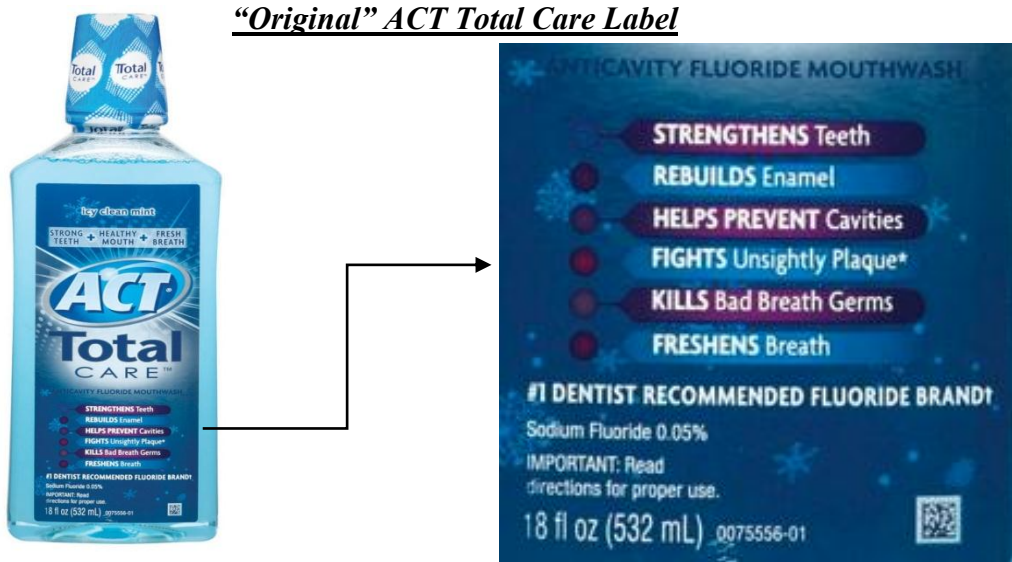
20 38. On the heels of the NAD's investigation, on September 27, 2010, the FDA
21 issued warning letters (the "FDA's warning letters") to three of Chattem's competitors who
22 were also marketing, distributing and selling competing "total care" mouthwashes that claimed
23 to fight plaque. The FDA warned these competitors that their products were misbranded,
24 mislabeled and their advertisements were misleading because the only listed active ingredient,
25 sodium fluoride, has not been proven to prevent plaque.⁸

26
27 ⁸ *See* Letter from U.S. Food and Drug Administration, to Johnson and Johnson
28 Consumer Products, Inc. (September 27, 2010), *available at*
<http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm227362.htm>; Letter from
U.S. Food and Drug Administration, to CVS Corporation (September 27, 2010), *available at*

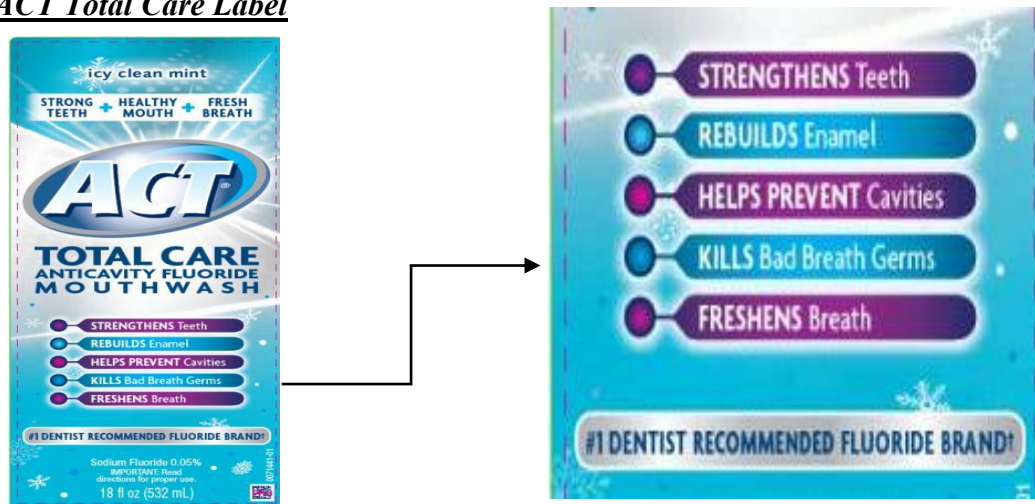
1 39. Following the NAD’s investigation, Chattem belatedly relabeled the ACT Total
2 Care Product. Chattem’s “new” ACT Total Care Product contains the *exact same active and*
3 *inactive ingredients* as ACT Total Care originally did, *but* the oral health benefit claims no
4 longer include representations regarding ACT Total Care’s ability to “fight[] unsightly
5 plaque.” However, Chattem has never publicly disclosed the fact that ACT Total Care did not
6 provide the purported anti-plaque benefits.

7 40. The following is a side-by-side comparison of the original and revised ACT
8 Total Care label:

9 **“Original” ACT Total Care Label**



18 **“New” ACT Total Care Label**



27 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm227368.htm>; Letter from
28 U.S. Food and Drug Administration, to Walgreen Company (September 27, 2010), *available*
at <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm227381.htm>.

1 **C. Chattem Charged A Price Premium Over Mouthwashes That Claim To**
2 **Only Prevent Cavities Or Only Prevent Plaque**

3 41. Chattem set out to deceive the public with its misleading and deceptive claims.
4 Chattem’s message was use ACT Total Care, and get the benefits of two products—one that
5 helps prevent cavities *and* one that removes, *i.e.*, “fights”, plaque.

6 42. Based on its false benefits message, Chattem charged a significant price
7 premium for its ACT Total Care Product. A 33.8-ounce bottle of ACT Total Care retailed for
8 \$7.49 at a local retailer in California. A competing product, Crest® Pro-Health Complete
9 Clean Anticavity Fluoride Rinse,⁹ which did not claim to fight plaque but did contain the same
10 active sodium fluoride ingredient, sold for \$5.99 at the same local retailer in California.
11 Chattem was able to charge the premium price for its ACT Total Care over competing
12 products with the same active ingredient because it falsely and misleadingly claimed that ACT
13 Total Care helped prevent cavities *and* fight plaque.

14 43. Chattem also sells a product named ACT® Anticavity Fluoride Rinse, which
15 contains the *same* active sodium fluoride ingredient as ACT Total Care, but does not claim to
16 fight plaque. An 18-ounce bottle of ACT® Anticavity Fluoride sold for \$4.49 compared to the
17 same sized bottle of ACT Total Care priced at \$5.49 at a local retailer in California.

18 44. These in-store price premiums also were reflected in online retailer sales. For
19 example, online retailer “Soap.com” sold an 18-ounce bottle of ACT Total Care for \$5.40,
20 while the same 18-ounce bottle of ACT Anticavity Fluoride Rinse sold for \$4.60.¹⁰

21 45. ACT Total Care also sold at a premium over products with active ingredients
22 that purportedly fight plaque (*i.e.*, antimicrobial/antiseptic mouthwashes), but not cavities. For
23 example, a 33.8-ounce bottle of ACT Total Care retailed for \$7.49 at an online retailer doing

24 ⁹ Sodium fluoride is the only active ingredient in Crest Pro-Health Complete Clean
25 Anticavity Fluoride Rinse.

26 ¹⁰ Compare <http://www.soap.com/product/productdetail.aspx?productid=47053> with
27 <http://www.soap.com/product/productdetail.aspx?productid=47047> (Last visited February 27,
28 2011); See also [http://www.walgreens.com/store/c/act-total-care-anticavity-fluoride-
rinse/ID=prod4294327-product](http://www.walgreens.com/store/c/act-total-care-anticavity-fluoride-rinse/ID=prod4294327-product) (Last visited March 2, 2011);
[http://www.walgreens.com/store/c/act-total-care-anticavity-fluoride-rinse/ID=prod4294328-
product](http://www.walgreens.com/store/c/act-total-care-anticavity-fluoride-rinse/ID=prod4294328-product) (Last visited March 5, 2011).

1 business in California,¹¹ while a competing antiplaque/antigingivitis product, Listerine®
2 Antiseptic Mouthwash,¹² retailed for \$4.99 at the same online retailer doing business in
3 California.¹³

4 46. Thus, Chattem has collected substantial profits by falsely claiming that ACT
5 Total Care prevents cavities *and* removes, *i.e.*, “fights”, plaque. Chattem’s unjustly obtained
6 profits are based on its use of false, misleading, and unsubstantiated oral health care benefit
7 claims that ACT Total Care prevents cavities *and* fights plaque.

8 47. Each and every person who purchased ACT Total Care with the plaque benefit
9 misrepresentations has been exposed to Chattem’s misleading advertising message.

10 48. The violative claims described in the above paragraphs, combined with the
11 appearance of the “Total Care” name, suggested to a reasonable consumer that ACT Total
12 Care was comprehensive in function, and would provide the stated benefits, including
13 antiplaque benefits. However, these assertions were made without any reasonable scientific
14 support.

15 49. Chattem’s “total care” health benefit and plaque removal claims at issue in this
16 case are false, deceptive, and misleading, and lacked substantiation at the time the
17 representations were made. Therefore, these representations were false, misleading, and
18 reasonably likely to deceive the public.

19 CLASS ACTION ALLEGATIONS

20 50. Plaintiff brings this action on behalf of himself and all those similarly situated
21 pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure.

22 _____
23 ¹¹ See <http://www.walgreens.com/store/c/act-total-care-anticavity-fluoride-rinse/ID=prod4294327-product> (Last visited March 5, 2011).

24 ¹² Listerine® Antiseptic Mouthwash does not contain sodium fluoride, does not advertise
25 that it prevents cavities, and lists the following active ingredients: Eucalyptol (0.092%
26 Antiplaque/Antigingivitis); Menthol (0.042% Antiplaque/Antigingivitis); Methyl Salicylate
27 (0.060% Antiplaque/Antigingivitis); Thymol (0.064% Antiplaque/Antigingivitis). See
28 <http://www.walgreens.com/store/c/listerine-fresh-burst-antiseptic-mouthwash/ID=prod1212-product> (last visited March 5, 2011).

¹³ See <http://www.walgreens.com/store/c/listerine-fresh-burst-antiseptic-mouthwash/ID=prod1212-product> (Last visited March 5, 2011).

1 51. The proposed Class consists of:

2 All persons who purchased ACT Total Care Anticavity branded
3 products in the United States from January 1, 2009, to June 30,
4 2010.

5 Excluded from the Settlement Class are: (i) those who
6 purchased the ACT Total Care branded products for purpose of
7 resale; (ii) those with claims for personal injuries arising from
8 the ingestion of one or more ACT Total Care branded products;
9 (iii) Defendant and its officers, directors and employees; (iv) any
10 person who files a valid and timely Request for Exclusion; and
11 (v) the Judge(s) to whom this Action is assigned and any
12 members of their immediate families.

13 52. ***Numerosity.*** The members of the Class are so numerous that their individual
14 joinder is impracticable. Plaintiff is informed and believes, and on that basis alleges, that the
15 proposed Class contains many thousands of members. The precise number of Class members
16 is unknown to Plaintiff. The true number of Class members is known by Chattem, however,
17 and thus, may be notified of the pendency of this action by first class mail, electronic mail, and
18 by published notice.

19 53. ***Existence and Predominance of Common Questions of Law and Fact.***
20 Common questions of law and fact exist as to all members of the Class and predominate over
21 any questions affecting only individual Class members. These common legal and factual
22 questions include, but are not limited to, the following:

23 (a) whether the claims discussed above are true, or are misleading, or
24 reasonably likely to deceive;

25 (b) whether Chattem's alleged conduct violates public policy;

26 (c) whether the alleged conduct constitutes violations of the laws asserted;

27 (d) whether Chattem engaged in false or misleading advertising;

28 (e) whether Plaintiff and Class members have sustained monetary loss and
the proper measure of that loss; and

 (f) whether Plaintiff and Class members are entitled to an award of punitive
damages.

1 54. **Typicality.** Plaintiff's claims are typical of the claims of the members of the
2 Class in that Plaintiff is a member of the class he seeks to represent.

3 55. **Adequacy of Representation.** Plaintiff will fairly and adequately protect the
4 interests of the members of the Class. Plaintiff has retained counsel experienced in complex
5 consumer class action litigation, and Plaintiff intends to prosecute this action vigorously.
6 Plaintiff has no adverse or antagonistic interests to those of the Class.

7 56. **Superiority.** A class action is superior to all other available means for the fair
8 and efficient adjudication of this controversy. The damages or other financial detriment
9 suffered by individual Class members is relatively small compared to the burden and expense
10 that would be entailed by individual litigation of their claims against Chattem. It would thus
11 be virtually impossible for the Class, on an individual basis, to obtain effective redress for the
12 wrongs done to them. Furthermore, even if Class members could afford such individualized
13 litigation, the court system could not. Individualized litigation would create the danger of
14 inconsistent or contradictory judgments arising from the same set of facts. Individualized
15 litigation would also increase the delay and expense to all parties and the court system from
16 the issues raised by this action. By contrast, the class action device provides the benefits of
17 adjudication of these issues in a single proceeding, economies of scale, and comprehensive
18 supervision by a single court, and presents no unusual management difficulties under the
19 circumstances here.

20 57. In the alternative, the Class may also be certified because:

21 (a) the prosecution of separate actions by individual Class members would
22 create a risk of inconsistent or varying adjudication with respect to individual Class members
23 that would establish incompatible standards of conduct for the Chattem; and/or

24 (b) the prosecution of separate actions by individual Class members would
25 create a risk of adjudications with respect to them that would, as a practical matter, be
26 dispositive of the interests of other Class members not parties to the adjudications, or
27 substantially impair or impede their ability to protect their interests.

28 (c) Unless a Class is certified, Chattem will retain monies received as a

1 result of its conduct that were taken from Plaintiff and Class members.

2
3 **COUNT I**

4 **Violation of Business & Professions Code §17200, et seq.**

5 58. Plaintiff repeats and realleges the allegations contained in the paragraphs above,
6 as if fully set forth herein.

7 59. Plaintiff brings this claim individually and on behalf of the Class.

8 60. As alleged herein, Plaintiff has suffered injury in fact and lost money or
9 property as a result of Chattem’s conduct because he purchased ACT Total Care mouthwash
10 misrepresenting that the product had plaque benefits.

11 61. The Unfair Competition Law, Business & Professions Code §17200, *et seq.*
12 (“UCL”), prohibits any “unlawful,” “fraudulent” or “unfair” business act or practice and any
13 false or misleading advertising. In the course of conducting business, Chattem committed
14 unlawful business practices by, *inter alia*, making the representations (which also constitutes
15 advertising within the meaning of §17200) and omissions of material facts, as set forth more
16 fully herein, and violating Civil Code §§1572, 1573, 1709, 1711, 1770, Business &
17 Professions Code §§17200, *et seq.*, 17500, *et seq.*, and the common law.

18 62. Plaintiff and the Class reserve the right to allege other violations of law which
19 constitute other unlawful business acts or practices. Such conduct is ongoing and continues to
20 this date.

21 63. Chattem’s actions also constitute “unfair” business acts or practices because, as
22 alleged above, *inter alia*, Chattem engages in false advertising, misrepresents and omits
23 material facts regarding ACT Total Care’s efficacy as a “total” oral health care mouthwash,
24 and thereby offends an established public policy, and engages in immoral, unethical,
25 oppressive, and unscrupulous activities that are substantially injurious to consumers.

26 64. As stated in this Complaint, Plaintiff alleges violations of consumer protection,
27 unfair competition and truth in advertising laws, resulting in harm to consumers. Chattem’s
28 acts and omissions also violate and offend the public policy against engaging in false and

1 misleading advertising, unfair competition and deceptive conduct towards consumers. This
2 conduct constitutes violations of the unfair prong of Business & Professions Code §17200, *et*
3 *seq.*

4 65. There were reasonably available alternatives to further Chattem’s legitimate
5 business interests, other than the conduct described herein.

6 66. Business & Professions Code §17200, *et seq.*, also prohibits any “fraudulent
7 business act or practice.”

8 67. Chattem’s actions, claims, nondisclosures, and misleading statements, as
9 alleged in this Complaint, were false, misleading and likely to deceive the consuming public
10 within the meaning of Business & Professions Code §17200, *et seq.*

11 68. Plaintiff and other members of the Class have in fact been deceived as a result
12 of their reliance on Chattem’s representations and omissions. This reliance has caused harm to
13 Plaintiff and other members of the Class. Plaintiff and other Class members have suffered
14 injury in fact and lost money as a result of these unlawful, unfair, and fraudulent practices.

15 69. As a result of its deception, Chattem has been able to reap unjust revenue and
16 profit.

17 70. Plaintiff, on behalf of himself, all others similarly situated, and the general
18 public, seeks restitution and disgorgement of all money obtained from Plaintiff and the
19 members of the Class collected as a result of unfair competition and all other relief this Court
20 deems appropriate, consistent with Business & Professions Code §17203.

21 **COUNT II**

22 **Violations of the Consumers Legal Remedies Act –**
23 **Civil Code §1750 *et seq.***

24 71. Plaintiff repeats and realleges the allegations contained in the paragraphs above,
25 as if fully set forth herein.

26 72. Plaintiff brings this claim individually and on behalf of the Class.

27 73. This cause of action is brought pursuant to the Consumers Legal Remedies Act,
28 California Civil Code §1750, *et seq.* (the “Act”). Plaintiff is a consumer as defined by

1 California Civil Code §1761(d). Chattem’s ACT Total Care is a good within the meaning of
2 the Act.

3 74. Chattem violated the Act by engaging in the following practices proscribed by
4 California Civil Code §1770(a) in transactions with Plaintiff and the Class which were
5 intended to result in, and did result in, the sale of ACT Total Care:

6 (5) Representing that [ACT Total Care has] . . . approval, characteristics, . . . uses
7 [or] benefits . . . which [it does] not have

8 * * *

9 (7) Representing that [ACT Total Care is] of a particular standard, quality or
10 grade . . . if [it is] of another.

11 * * *

12 (9) Advertising goods . . . with intent not to sell them as advertised.

13 * * *

14 (16) Representing that [ACT Total Care has] been supplied in accordance with a
15 previous representation when [it has] not.

16 75. Chattem violated the Act by representing through its advertisements ACT Total
17 Care as described above when it knew, or should have known, that the representations and
18 advertisements were false and misleading and unsubstantiated.

19 76. Pursuant to California Civil Code §1782(d), Plaintiff and the Class seek a Court
20 order for restitution and disgorgement.

21 77. Pursuant to §1782 of the Act, by letter dated March 11, 2011, Chattem was
22 notified in writing by certified mail of the particular violations of §1770 of the Act and
23 demanded that Chattem rectify the problems associated with the actions detailed above and
24 give notice to all affected consumers of its intent to so act.

25 78. Chattem has failed to rectify or agree to rectify the problems associated with the
26 actions detailed above or give notice to all affected consumers within 30 days of the date of
27 written notice pursuant to §1782 of the Act. Therefore, Plaintiff further seeks actual, punitive
28 and statutory damages, as appropriate.

1 79. Chattem's conduct is malicious, fraudulent and wanton.

2 80. Pursuant to §1780(d) of the Act, attached as Exhibit B to the Class Action
3 Complaint dated November 22, 2011, is the affidavit showing that this action has been
4 commenced in the proper forum.

5 **COUNT III**

6 **Breach of Express Warranty**

7 81. Plaintiff repeats and realleges the allegations contained in the paragraphs above,
8 as if fully set forth herein.

9 82. Plaintiff brings this claim individually and on behalf of the Class.

10 83. Plaintiff, and each member of the Class, formed a contract with Chattem at the
11 time Plaintiff and the other members of the Class purchased ACT Total Care. The terms of
12 that contract include the promises and affirmations of fact made by Chattem on its ACT Total
13 Care packaging and labeling, and through its marketing campaign, as described above. This
14 product packaging and advertising constitutes express warranties, became part of the basis of
15 the bargain, and is part of a standardized contract between Plaintiff and the members of the
16 Class on the one hand, and Chattem on the other.

17 84. All conditions precedent to Chattem's liability under this contract have been
18 performed by Plaintiff and the Class.

19 85. Chattem breached the terms of this contract, including the express warranties,
20 with Plaintiff and the Class by not providing the ACT Total Care which could provide the
21 benefits described above.

22 86. As a result of Chattem's breach of its contract, Plaintiff and the Class have been
23 damaged in the amount of the purchase price of the ACT Total Care they purchased.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, prays
26 for judgment against Chattem as follows:
27
28

1 A. For an order declaring this a class action pursuant to Rule 23 of the Federal
2 Rules of Civil Procedure on behalf of the proposed class described herein and appointing
3 Plaintiff to serve as class representative and Plaintiff's counsel as Lead Counsel for the Class;

4 B. For an order awarding restitution of the monies Chattem wrongfully acquired
5 by its wrongful and illegal conduct;

6 C. For an order requiring disgorgement of monies wrongfully obtained as a result
7 of Chattem's wrongful and illegal conduct;

8 D. For appropriate actual, statutory and punitive damages, arising from Chattem's
9 wrongful and illegal conduct;

10 E. For an award of reasonable attorneys' fees and all costs and expenses incurred
11 in the course of prosecuting this action;

12 F. For pre-judgment and post-judgment interest at the legal rate; and

13 G. For such other and further relief as the Court deems just and proper.

14 **JURY DEMAND**

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

16 Dated: January 23, 2013

BLOOD HURST & O'REARDON, LLP
TIMOTHY G. BLOOD
THOMAS J. O'REARDON II

18 By: /s/ Thomas J. O'Reardon II
THOMAS J. O'REARDON II

19 701 B Street, Suite 1700
20 San Diego, CA 92101
21 Tel: 619-338-1100
22 Fax: 619-338-1101
tblood@bholaw.com
toreardon@bholaw.com

23 BONNETT, FAIRBOURN, FRIEDMAN
& BALINT, P.C.

24 Elaine A. Ryan
25 Patricia N. Syverson (203111)
26 2325 E. Camelback Road, Suite 300
27 Phoenix, AZ 85016
Telephone: 602-274-1100
Facsimile: 602-274-1199
eryan@bffb.com
psyverson@bffb.com

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BONNETT, FAIRBOURN, FRIEDMAN
& BALINT, P.C.

Todd D. Carpenter (234464)
600 West Broadway, Suite 900
San Diego, CA 92101
Telephone: 619-756-7748
Facsimile; 619-798-5894
tcarpenter@bffb.com

*Attorneys for Plaintiff and Proposed Class
Counsel*

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List.

Executed January 23, 2013.

s/ Thomas J. O'Reardon II
THOMAS J. O'REARDON II

BLOOD HURST & O'REARDON, LLP
701 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/338-1100
619/338-1101 (fax)
toreardon@bholaw.com