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CENTRAL DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

TIMOTHY BORIS, BONNIE
COOPER, TONY F. GIRARD, and
ERIKA NEWSOME, on behalf of
themselves and all others similarly
situated,

Plaintiffs,

vs.

WAL-MART STORES, INC. and
WALMART.COM,

Defendants.

Case No. CV13-07090 ABC (FFMx)

First
**AMENDED CLASS ACTION
COMPLAINT**

JURY TRIAL DEMAND

Complaint Filed September 24, 2013

1 Plaintiffs Timothy Boris, Bonnie Cooper, Tony F. Girard, and Erika
 2 Newsome (hereinafter, "Plaintiffs") bring this Class Action Complaint against
 3 Defendants Wal-Mart Stores, Inc. ("Wal-Mart") and Walmart.com
 4 ("Walmart.com"), (collectively, "Defendants"), individually and on behalf of a
 5 proposed Class, including subclasses, as defined herein. Plaintiffs allege the
 6 following upon information and belief, except for those allegations that pertain
 7 to Plaintiffs, which are based on Plaintiffs' personal knowledge:

8 NATURE OF THE ACTION

9 1. Wal-Mart and Walmart.com sell their own brand of vitamins and
 10 drugs under the "Equate" label, including Equate Extra Strength Headache
 11 Relief ("Equate ES") and Equate Migraine Relief ("Equate Migraine"). Equate
 12 ES and Equate Migraine are generic copies of Excedrin Extra-Strength
 13 ("Excedrin ES") and Excedrin Migraine, respectively, two well-known brand-
 14 name Over The Counter ("OTC") medications manufactured and sold by
 15 Novartis (which acquired the original manufacturer, Bristol-Myers Squibb, in
 16 2005). The pills contained in a bottle of Equate ES (or Excedrin ES) and those
 17 contained in a bottle of Equate Migraine (or Excedrin Migraine) contain *the*
 18 *same active ingredients in the same amounts*, yet Defendants charge
 19 substantially more for Equate Migraine. Defendants sell Equate ES for
 20 approximately \$2.82¹ for 200 pills. They charge more than triple—over
 21 \$9.00—for the same number of Equate Migraine pills.

22 2. Despite the pills having the same active ingredients in the same
 23 amounts, Defendants deceptively market Equate Migraine as being a superior
 24 and more-potent drug as compared to Equate ES. In addition to the huge price
 25 differential, Defendants' package Equate Migraine with a prominent red
 26

27 ¹ Defendants recently lowered the price of Equate ES to \$2.82. For much of the Class
 28 Period, Defendants sold the same 200 count package of Equate ES for approximately \$4.00.

1 background, compared to the sedate green background on the packaging for
2 Equate ES. As the millions of Americans who suffer from migraine headaches
3 can attest—as well as those who do not suffer from them—migraine headaches
4 are a severe form of headache, involving other symptoms such as nausea and
5 photosensitivity. The red background of the Equate Migraine package is
6 intended to indicate that the product more effectively treats this more severe
7 malady.

8 3. No reasonable consumer would pay more than three times as
9 much for Equate Migraine than for Equate ES unless he or she was deceived
10 into thinking that Equate Migraine was better (stronger, more effective) for
11 treating headaches (both migraine and non-migraine).

12 **JURISDICTION AND VENUE**

13 4. This Court has subject matter jurisdiction over this action pursuant
14 to 28 U.S.C. § 1332. Diversity of citizenship exists between Plaintiffs and the
15 Class members, on the one hand, and Defendants, on the other, and the amount
16 in controversy is greater than \$75,000.

17 5. This Court also has subject matter jurisdiction over this action
18 pursuant to 28 U.S.C. §1332(d)(2). The proposed Class has more than 100
19 members, the Class contains at least one member of diverse citizenship from
20 Defendants, and the amount in controversy exceeds \$5 million.

21 6. This Court has personal jurisdiction over Defendant Wal-Mart
22 because it has multiple store locations in the State of California and because it
23 regularly transacts business within the State of California.

24 7. This Court has personal jurisdiction over Walmart.com because it is
25 headquartered in San Bruno, California, regularly transacts business within the
26 State of California, and the Walmart.com Terms of Use specify that any action
27 arising from use of the Company's website must be brought in a state or
28 federal court in California.

1 reasonably believed, based upon the marketing and pricing of Equate
2 Migraine, that it was a superior, more potent, product as compared to Equate
3 ES.

4 13. Plaintiff Tony F. Girard is a resident and citizen of Portage,
5 Pennsylvania. During the Class Period, Plaintiff Girard was exposed to the
6 misleading marketing, packaging, and pricing of Equate ES and Equate
7 Migraine on its website, Walmart.com. Plaintiff Girard purchased Equate
8 Migraine through the website because the color of the packaging and steep
9 price premium made it appear that the drug was more effective to treat
10 migraine headaches. Additionally, the website listed all three active
11 ingredients for the Equate Migraine product but only listed one of the active
12 ingredients in Equate ES, further making Equate Migraine appear to be more
13 effective. Defendants' web site also claimed Equate Migraine treats migraine
14 headaches, from which Plaintiff Girard occasionally suffers. Based upon the
15 misrepresentation and Defendants' misleading advertising and marketing, he
16 reasonably believed Equate Migraine was a superior, more potent, product as
17 compared to Equate ES.

18 14. Plaintiff Erika Newsome is a resident and citizen of New York.
19 During the Class Period, Plaintiff Newsome was exposed to the misleading
20 marketing, packaging, and pricing of Equate ES and Equate Migraine.
21 Plaintiff Newsome purchased Equate Migraine because the color of the
22 packaging and price premium made it appear to more effectively treat migraine
23 headaches, from which Plaintiff Newsome suffers and, additionally, because
24 she reasonably believed, based upon the packaging and pricing of Equate
25 Migraine, that it was a superior, more potent, product as compared to Equate
26 ES.

FACTUAL ALLEGATIONS

15. Since 1960, Excedrin ES has been sold for headache relief, combining acetaminophen, aspirin and caffeine. Its formula contains 250 mg of acetaminophen, 250 mg of aspirin, and 65 mg of caffeine in each pill.

16. In 1998, Excedrin Migraine was introduced to the market. The active ingredients in Excedrin Migraine are the *same* as in Excedrin ES—250 mg of acetaminophen, 250 mg of aspirin, and 65 mg of caffeine in each pill.

17. Defendants sell Excedrin ES and Excedrin Migraine for essentially the same price.

18. Defendants also sell generic versions of Excedrin ES and Excedrin Migraine under their Equate brand. Just like the Excedrin products, Equate Migraine and Equate ES have the same active ingredients in the same amounts. Defendants sell Equate ES and Equate Migraine in distinctly different packages and for very different prices.

19. Equate ES is packaged as shown below.

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20. Equate Migraine, shown below, is packaged in a similar way, but features a red (an emergency indicating color) rather than a green background. The predominantly red background of the Equate Migraine product is intended to, and does, prompt consumers to expect the product is more potent than Equate ES which is sold side-by-side in a predominantly green package. The strength of the color red in advertising and its association with danger and urgency have been documented since at least the 1930s. *See Roy M. Dorcus, Habitual Word Associations to Colors as a Possible Factor in Advertising*, 16 J. APPLIED PSYCH. 277, 279-283 (1932) (Ex. A).



21. By marketing the products in this way, Defendants create the illusion that the pills contained in bright red Equate Migraine package are more potent than those contained in the green Equate ES package.

22. Defendant's deception is reinforced by the manner in which Wal-Mart displays Equate ES and Equate Migraine side-by-side on its shelves and in close proximity on the Walmart.com web site.

23. With regard to the online marketing of Equate Migraine, Defendants' website falsely lists Equate ES as having only one active ingredient, acetaminophen 250 mg, while listing three active ingredients for Equate Migraine (acetaminophen 250 mg, *plus* aspirin 250 mg, and caffeine 65

1 mg). In truth, both pills have the same three active ingredients, and in the
2 same amounts.

3 24. In addition to visually misleading consumers into believing that
4 Equate Migraine is more effective, and more potent than Equate ES,
5 Defendants reinforce that fallacy by pricing Equate Migraine at more than
6 **three times** Equate ES. On both the Walmart.com website and in Wal-Mart
7 stores, two 100-count bottles of Equate ES sell for \$2.82. Defendants sell the
8 same pill count of Equate Migraine for **\$9.22**.

9 25. To put this price premium in context, Defendants charge almost no
10 price premium for Excedrin Migraine versus Excedrin ES, the name brand
11 versions of Defendants' products. For example, Defendants sell a 100-count
12 bottle of Excedrin ES for only 50 cents less than same count of Excedrin
13 Migraine. In fact, when sold in 200-count bottles, Defendants do not charge
14 any price premium for the two Excedrin products.

15 26. Defendants use a huge pricing disparity between Equate Migraine
16 and Equate ES to convey product supremacy. The effectiveness of this
17 marketing technique has been scientifically verified. In fact, the perceived link
18 between higher prices and greater perceived efficacy is so strong that test
19 subjects given "higher priced" placebos find them to be more effective in
20 relieving pain than those receiving placebos that had been "discounted." See
21 Rebecca L. Waber et al., *Commercial Features of Placebo and Therapeutic*
22 *Efficacy*, 299 JAMA 1016-17 (2008) (Ex. B).

23 27. The 225% severe price premium becomes even more misleading
24 when viewed together with Wal-Mart's slogan:

25 Walmart

26 Save money. Live better.
27
28

1 28. Defendants lead consumers to believe that they are on their side, and
2 would not charge their consumers more than *three times* as much for a product
3 that is not more efficacious than the cheaper product.

4 29. In 2013, Plaintiffs purchased Equate Migraine based on their belief
5 that it was a more potent and efficacious product than Equate ES. In
6 particular, Defendants led Plaintiffs to believe that Equate Migraine was more
7 potent than Equate ES.

8 30. As a result of Defendants' deceptive marketing, including its pricing
9 of its Equate products, Plaintiffs and other consumers suffered injury in fact
10 and lost money or property.

11 31. Consumers, including Plaintiffs and the Class, purchased Equate
12 Migraine for \$9.22, rather than Equate ES for \$4 or \$2.82, because they were
13 led to believe that Equate Migraine was stronger and more effective than
14 Equate ES. They had an ascertainable loss in the amount of \$5.22 or \$6.40 per
15 transaction, the difference between what Defendants charged them for Equate
16 Migraine and what they charge for the same amount of Equate ES.

17 32. Defendants' deceptive marketing, including their premium pricing,
18 was material to Plaintiffs and other consumers. Absent the deception, a
19 consumer would not pay more than triple for a bottle of Equate Migraine when
20 it contains the same active ingredients in the same proportion as the
21 considerably less expensive bottle of Equate ES.

22 **CLASS ALLEGATIONS**

23 33. Plaintiffs Boris, Cooper, Girard, and Newsome bring this action as a
24 class action on behalf of themselves and the Class (the "Class") consisting of:

25 All persons and entities residing in the United States
26 who, at anytime within the applicable statute of
27 limitations (the "Class Period"), purchased Equate
28

1 Migraine at a price in excess of the price of Equate
2 ES.

3 34. Plaintiff Boris also brings this suit as a class action on behalf of the
4 following subclass ("California State Subclass"):

5 All persons and entities residing in the State of
6 California who, at any time within the applicable
7 statute of limitations (the "California Subclass
8 Period"), purchased Equate Migraine at a price in
9 excess of the price of Equate ES.

10 35. Plaintiff Cooper also brings this suit as a class action on behalf of the
11 following subclass ("New Jersey State Subclass"):

12 All persons and entities residing in the State of New
13 Jersey who, at any time within the applicable statute
14 of limitations (the "New Jersey Subclass Period"),
15 purchased Equate Migraine at a price in excess of the
16 price of Equate ES.

17 36. Plaintiff Girard also brings this suit as a class action on behalf of the
18 following subclass ("On-line Purchaser Subclass"):

19 All persons and entities residing in the United States
20 who, during the California Subclass Period,
21 purchased Equate Migraine at a price in excess of the
22 price of Equate ES.

23 37. Plaintiff Newsome also brings this suit as a class action on behalf of
24 the following subclass ("New York State Subclass"):

25 All persons and entities residing in the State of New
26 York who, during the applicable statute of limitations
27 (the "New York Subclass Period"), purchased Equate
28

1 Migraine at a price in excess of the price of Equate
2 ES.

3 38. The Class and each subclass satisfy the numerosity, commonality,
4 typicality, adequacy, predominance and superiority requirements of Federal
5 Rule of Civil Procedure 23(a) and (b)(3).

6 39. The members of the Class and each subclass are so numerous that
7 joinder of all members is impracticable. Although the precise number of Class
8 members is unknown to Plaintiffs at this time and can be determined only by
9 appropriate discovery, it is reasonably estimated that the Class (and each of the
10 subclasses) consist of at least tens of thousands of members.

11 40. Plaintiffs are purchasers of Equate Migraine and have been subjected
12 to Defendants' deceptive and misleading course of conduct, which tricked,
13 mislead and significantly confused consumers. Plaintiffs are members of the
14 Class and/or their subclass, and their claims are typical of the claims of the
15 members of the Class and subclasses. The harm suffered by Plaintiffs and all
16 other Class members was and is caused by the same misconduct by
17 Defendants.

18 41. Plaintiffs will fairly and adequately represent and protect the
19 interests of the Class. Plaintiffs have no interests antagonistic to, nor in
20 conflict with, the Class. Plaintiffs have retained competent counsel, who are
21 experienced in consumer and commercial class action litigation, to further
22 ensure such protection and who intend to prosecute this action vigorously.

23 42. A class action is superior to other available methods for the fair and
24 efficient adjudication of this controversy. Because the monetary damages
25 suffered by individual Class members are relatively small, the expense and
26 burden of individual litigation make it impossible for individual Class
27 members to seek redress for the wrongful conduct asserted herein. If Class
28 treatment of these claims was not available, Defendants would likely continue

1 their wrongful conduct, would unjustly retain improperly obtained revenues,
2 and/or would otherwise escape liability for its wrongdoing as asserted herein.

3 43. Common questions of law and fact exist as to all members of the
4 Class, which predominate over any questions that may affect individual Class
5 members. Among the questions of law and fact common to the Class and
6 subclasses are the following:

- 7 a. whether Defendants' deceptive marketing and pricing of its
8 Equate Migraine and ES products caused reasonable
9 consumers to pay more for Equate Migraine as opposed to
10 Equate ES;
- 11 b. whether Defendants violated California Business and
12 Professions Code 17500, *et seq.*;
- 13 c. whether Defendants violated California Business and
14 Professions Code 17200, *et seq.*;
- 15 d. whether Defendants violated New Jersey Consumer Fraud Act
16 N.J.S.A. 56:8-1 *et seq.*;
- 17 e. whether Defendants violated New York General Business Law
18 § 349;
- 19 f. the interpretation of the Walmart.com Terms of Use and
20 application of the California choice of law provision to all
21 members of the class;
- 22 g. whether Defendants' alleged misleading marketing, packaging
23 and pricing of Equate Migraine was material to reasonable
24 consumers;
- 25 h. whether Defendant breached the implied covenant of good
26 faith and fair dealing in its sales transactions with Plaintiffs
27 and the Class Members; and
28

1 i. the appropriate measure of damages or other relief to which
2 Plaintiffs and the Class members are entitled.

3 44. Information concerning Equate Migraine and Equate ES sales is
4 available from Defendants' books and records.

5 45. Plaintiffs know of no difficulty which will be encountered in the
6 management of this litigation which would preclude its maintenance as a class
7 action.

8 46. The prosecution of separate actions by individual members of the
9 Class would run the risk of inconsistent or varying adjudications, which might
10 establish incompatible standards of conduct for the Defendants. Prosecution as
11 a class action will eliminate the possibility of repetitious litigation.

12 47. Defendants have acted or refused to act on grounds generally
13 applicable to the Class, thereby making appropriate final injunctive relief or
14 corresponding declaratory relief with respect to the Class as a whole.

15 48. Plaintiffs are not challenging any statement on Defendants' labels
16 that is required by the Food and Drug Administration.

17 **FIRST CAUSE OF ACTION**
18 **(California False Advertising Law –**
19 **Cal. Bus. & Prof. Code § 17500, *et seq.***
20 **On Behalf Of The Class, The California**
21 **State Subclass, And The On-Line**
22 **Purchaser Subclass Against All Defendants)**

23 49. Plaintiffs incorporate by reference and reassert each allegation
24 contained in Paragraphs 1 through 48 and further allege as follows.

25 50. Defendants engaged in unlawful conduct under California Business
26 & Professions Code § 17500, *et seq.*, by marketing Equate Migraine to
27 consumers in a way that suggested it was a superior, more effective, product
28 that Equate ES when Defendants knew that Equate Migraine and Equate ES
contained the exact same active ingredients in the same amounts. Plaintiffs

1 and the Class reasonably relied upon Defendants' material representations
2 and/or omissions made in violation of California Business & Professions Code
3 § 17500, *et seq.*

4 51. Defendants' conduct with respect to the promotion and marketing of
5 Equate Migraine, via its false or misleading statement on Wal-Mart's website
6 that Equate ES has only one active ingredient, by charging 225% more for
7 Equate Migraine than for Equate ES, and packaging the products in specific,
8 different color packaging, constitutes an unconscionable commercial practice,
9 deception, fraud, false pretense, misrepresentation of material facts.

10 52. As a direct and proximate result of Defendants' violations, Plaintiffs,
11 the Class, the California State Subclass, and the On-line Purchaser Subclass
12 purchased Equate Migraine at a price above the price charged for Equate ES
13 and, therefore, suffered injury in fact and lost money.

14 53. Plaintiffs are informed and believe that as a further direct and
15 proximate result of the marketing described above, Defendants have received
16 from members of the Class, including the California State Subclass, money
17 obtained through their violation of California Business & Professions Code §
18 17500, *et seq.*, which Defendants continue to hold for their sole benefit.

19 54. Accordingly, Plaintiffs, on behalf of themselves and all others
20 similarly situated, seek equitable relief in the form of an order requiring
21 Defendants to refund to Plaintiffs, and members of the Class, the California
22 State Subclass, and the On-line Purchaser Subclass all monies they paid for
23 Equate Migraine above and beyond the price then charged for Equate ES and,
24 in addition, an order requiring Defendants to cease portraying Equate Migraine
25 as stronger or more effective than Equate ES.

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SECOND CAUSE OF ACTION
(California Unfair Competition Law –
Cal. Bus. & Prof. Code § 17200, *et seq.*
On Behalf Of The Class, The California
State Subclass, And The On-Line
Purchaser Subclass Against All Defendants)

55. Plaintiffs incorporate by reference and reassert each allegation contained in Paragraphs 1 through 54 and further allege as follows.

56. Defendants engaged in unlawful conduct under California Business & Professions Code § 17200, *et seq.*, by marketing Equate Migraine to consumers in a way that positioned it as a superior, more effective, product than Equate ES when Defendants knew that Equate Migraine and Equate ES were identical products.

57. Defendants' conduct is unlawful in that it violates the False Advertising Law, California Business & Professions Code § 17500, *et seq.*

58. Defendants' conduct is unfair in that it offends established public policy or is immoral, unethical, oppressive, unscrupulous, unconscionable, or substantially injurious to Plaintiffs, and members of the Class, the California State Subclass, and the On-line Purchasers Subclass. The harm to each arising from Defendants' conduct outweighs any legitimate benefit Defendants have derived from the conduct.

59. Defendants' misrepresentations and omissions are material and likely to mislead a reasonable consumer.

60. Plaintiffs relied on Defendants' misrepresentations and omissions.

61. Defendants' conduct with respect to the promotion and marketing of Equate Migraine, via its false or misleading statement on Wal-Mart's website that Equate ES has only one active ingredient, by charging 225% more for Equate Migraine than for Equate ES, and packaging the products in specific,

1 different color packaging, constitutes an unconscionable commercial practice,
2 deception, fraud, false pretense, or misrepresentation of material facts.

3 62. Plaintiffs relied on Defendants' materially misleading marketing.

4 63. As a direct and proximate result of Defendants' violations, Plaintiffs
5 would not have otherwise purchased Equate Migraine, or would have paid less,
6 and therefore, suffered injury in fact and lost money.

7 64. Plaintiffs, on behalf of themselves, and members of the Class, the
8 California State Subclass, and the On-line Purchasers Subclass, seek
9 reimbursement of monies they paid for Equate Migraine above and beyond the
10 price then being charged by Defendants for Equate ES. Additionally, Plaintiffs
11 seek equitable and injunctive relief on behalf of themselves and the Class
12 members pursuant to Cal. Business & Professions Code § 17203.

13 **THIRD CAUSE OF ACTION**

14 **(Violation of California Consumer Legal Remedies Act,**
15 **California Civil Code § 1750, *et seq.***
16 **On Behalf Of The Class, The California**
17 **State Subclass, And The On-Line**
18 **Purchaser Subclass Against All Defendants)**

19 65. Plaintiffs incorporate by reference and reassert each allegation
20 contained in Paragraphs 1 through 64 and further allege as follows.

21 66. Plaintiffs bring this cause of action on behalf of themselves and on
22 behalf of all other members of the Class, the California State Subclass and the
23 On-line Purchaser Subclass.

24 67. Defendants are "persons" as defined by California Civil Code §
25 1761(c).

26 68. Plaintiffs and members of the Class and Subclasses are "consumers"
27 within the meaning of California Civil Code § 1761(d).
28

1 69. Plaintiffs have complied with the notice provisions of the California
2 Consumer Legal Remedies Act ("CLRA") and are therefore entitled to seek
3 damages. Defendants failed to provide appropriate relief for their violations of
4 the CLRA. Therefore, Plaintiffs now seek monetary, compensatory and
5 punitive damages, in addition to the injunctive and equitable relief they
6 previously sought.

7 70. Defendants' conduct with respect to the promotion and marketing of
8 Equate Migraine, via its false or misleading statement on Wal-Mart's website
9 that Equate ES has only one active ingredient, by charging 225% more for
10 Equate Migraine than for Equate ES, and packaging the products in specific,
11 different color packaging, violated California Civil Code §§ 1770(a)(2),
12 1770(a)(5), and 1770(a)(7).

13 71. Defendants' unfair and deceptive acts occurred repeatedly and were
14 capable of deceiving a substantial portion of the purchasing public.

15 72. Defendants' misrepresentations and omissions are material and
16 likely to mislead a reasonable consumer.

17 73. Plaintiffs relied on Defendants' misrepresentations and omissions.

18 74. As a direct and proximate result of Defendants' unfair or deceptive
19 acts or practices, Plaintiffs and members of the Class have suffered and will
20 continue to suffer actual damages.

21 75. Plaintiffs and members of the Class are entitled to equitable relief.
22 Plaintiffs seek an order requiring Defendants to (a) pay damages according to
23 proof; (b) immediately cease the conduct alleged herein; (c) make full
24 restitution of all monies wrongfully obtained; and (d) disgorge all ill-gotten
25 venues and/or profits.
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27
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FOURTH CAUSE OF ACTION

**(Violation of New Jersey Consumer Fraud Act N.J.S.A. 56:8-1 *et seq.*
on behalf of the New Jersey State Subclass)**

76. Plaintiff Cooper incorporates by reference and reasserts each allegation contained in Paragraphs 1 - 75 and further alleges as follows.

77. The New Jersey Consumer Fraud Act prohibits “[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise” including any sale or distribution of any services. N.J.S.A. 56:8-2; N.J.S.A. 56:8-1(c), (e).

78. Defendants’ marketing of Equate Migraine falls within the purview of the New Jersey Consumer Fraud Act.

79. Defendants, as corporations, companies or sellers, are “persons” within the meaning of the New Jersey Consumer Fraud Act, and as such are prohibited from engaging in unconscionable business practices, deceptive acts, utilizing false pretenses, and effectuating misrepresentations.

80. Defendants’ conduct with respect to the promotion and marketing of Equate Migraine, including suggesting to consumers that Equate Migraine is more effective for migraines, the false or misleading statement on Wal-Mart’s website that Equate ES has only one active ingredient, the fact that Defendants charge 225% more for Equate Migraine than for Equate ES, and packages them in a different color packaging, constitutes an unconscionable commercial practice, deception, fraud, false pretense, misrepresentation of material facts.

81. Defendants have engaged in an unconscionable commercial practice in violation of the New Jersey consumer Fraud Act (N.J.S.A. 56:8-2) in that they conveyed to Plaintiff and other members of the New Jersey State Subclass

1 the false impression that the product sold as Equate Migraine was superior to
 2 Equate ES for those suffering from migraine headaches even though the two
 3 products had identical active ingredients in identical proportions.

4 82. Were it not for Defendants' unconscionable practices, Plaintiff and
 5 the New Jersey State Subclass would not have purchased Equate Migraine at a
 6 higher price than Equate ES. Accordingly, Plaintiff and the New Jersey State
 7 Subclass suffered an ascertainable loss as a result of being improperly induced
 8 to pay more for Equate Migraine than Equate ES during the Class Period. The
 9 amount of the ascertainable loss is the difference between that charged for
 10 Equate Migraine and that charged for Equate ES. Plaintiff seeks damages
 11 pursuant to N.J.S.A. 58:8-19 for all harm sustained by the Plaintiff and all
 12 members of the New Jersey State Subclass in connection with the
 13 unconscionable commercial practices alleged herein.

14 83. Because the deceptive conduct and false pretense, etc., described
 15 above are continuing, New Jersey State Subclass members are continually
 16 being injured by Defendants' unlawful conduct and Defendants are continuing
 17 to profit thereby.

18 84. Plaintiff seeks an order for preliminary and/or permanent injunctive
 19 relief requiring Defendants to (i) discontinue advertising, marketing,
 20 packaging, pricing and otherwise implying that Equate Migraine is stronger
 21 and more effective for migraine headaches than Equate ES and (ii) discontinue
 22 sale of the offending packages at such incredibly disparate prices.

23 **FIFTH CAUSE OF ACTION**

24 **(Violation of New York General Business Law § 349 25 on behalf of the New York Subclass)**

26 85. Plaintiff Newsome incorporates by reference and reasserts each
 27 allegation contained in Paragraphs 1 - 84 and further alleges as follows.
 28

1 86. Defendants' actions alleged herein constitute unlawful, unfair, and
2 deceptive business practices. Those actions include misrepresenting that
3 Equate Migraine is somehow more suited for relief of migraine headaches than
4 Equate ES.

5 87. Defendants' conduct constitutes acts, uses and/or employment by
6 Defendants or their agents or employees of deception, unconscionable and
7 unfair commercial practices, false pretenses, false promises, misrepresentations
8 and/or the knowing concealment, suppression, or omission of material facts
9 with the intent that others rely upon such concealment, suppression or
10 omission, in connection with the sale or advertisement of goods in violation of
11 Section 349 of New York's General Business Law.

12 88. Defendants' deceptive conduct was generally directed at the
13 consuming public.

14 89. Defendants' unfair and deceptive trade acts and practices have
15 directly, foreseeably, and proximately caused damages and injury to Plaintiff
16 and other members of the New York State Subclass.

17 90. Defendants' violations of Section 349 of New York's General
18 Business Law have damaged Plaintiff and other New York State Subclass
19 members, and threaten additional injury if the violations continue.

20 91. Defendants' deceptive conduct has caused harm to New York State
21 Subclass members in that they have paid higher prices for Equate Migraine
22 than they would have paid for Equate ES.

23 92. Plaintiff Newsome, on her own behalf, and on behalf of the New
24 York State Subclass members, seeks damages, injunctive relief, including an
25 order enjoining Defendants' Section 349 violations alleged herein, and court
26 costs and attorneys' fees, pursuant to NY Gen Bus. Law § 349.

SIXTH CAUSE OF ACTION
(Unjust Enrichment/Restitution brought by all
Plaintiffs on behalf of the Class)

93. Plaintiffs incorporate by reference and reassert each allegation contained in Paragraphs 1 - 92 and further allege as follows.

94. Plaintiffs' cause of action for restitution is pled in the alternative to other causes of action asserted herein.

95. As a result of Defendants' misconduct in the form of deceptive marketing and pricing of its Equate Migraine products as set forth above, Defendants have received a benefit at the expense of Plaintiffs and the Class members that would be unjust for Defendants to retain.

96. As a result of Defendants' unjust enrichment, Plaintiffs and the Class Members are entitled to the return of the financial unjust benefit conferred by Plaintiffs and Class members on Defendants.

SEVENTH CAUSE OF ACTION
(Breach of Covenant of Good Faith and Fair Dealing
brought by all Plaintiffs on behalf of the Class)

97. Plaintiffs incorporate by reference and reassert each allegation contained in Paragraphs 1 - 96 and further allege as follows.

98. Plaintiffs' cause of action for breach of the covenant of good faith and fair dealing is pled in the alternative to other causes of action asserted herein.

99. The covenant to act in good faith and with fair dealing is implied and incorporated into every contract. This imposes upon each party to the contract a duty of good faith and fair dealing. The covenant is implied to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenant) frustrates the other party's rights of the benefits of the contract. A breach of a specific provision of the

1 contract is not a necessary prerequisite to a breach of the implied covenant of
2 good faith and fair dealing.

3 100. Defendants breached the implied covenant of good faith and fair
4 dealing in its sales transactions with Plaintiffs and the Class Members by
5 marketing Equate Migraine to consumers in a way that positioned it as a
6 superior, more effective, product than Equate ES, when Defendants knew that
7 Equate Migraine and Equate ES were products for which no huge price
8 difference could be justified. Defendants' conduct frustrated the benefits
9 Plaintiffs and the Class Members received from the relevant sales transactions
10 by causing Plaintiffs and the Class Members to pay more money than justified
11 for Equate Migraine.

12 101. Defendants charging a 225% price premium for Equate Migraine
13 over Equate ES is also unconscionable and a further breach of its duty of good
14 faith and fair dealing.

15 102. Plaintiffs and the Class Members have sustained damages resulting
16 from Defendants' breach of the covenant of good faith and fair dealing.

17 103. As a direct result of Defendants' breaches, Plaintiffs and the Class
18 Members seek restitution of monies they paid for Equate Migraine above and
19 beyond the price then being charged by Wal-Mart for Equate ES.

20 104. Because the deceptive conduct and false pretense, etc, described
21 above are continuing, Class members are continually being injured by
22 Defendants' unlawful conduct and Defendants are continuing to profit thereby.

23 105. Plaintiffs seek an order for preliminary and/or permanent injunctive
24 relief requiring Defendants to (i) discontinue advertising, marketing,
25 packaging, pricing and otherwise implying that Equate Migraine is stronger
26 and more effective for migraine headaches than Equate ES; (ii) discontinue
27 advertising, marketing, and otherwise promoting that Walmart saves
28

1 consumers money with respect to the sale of Equate Migraine; and (iii) take the
2 offending packages off the shelves or replace them.

3 106. There is no adequate remedy at law.

4 **PRAYER FOR RELIEF**

5 **WHEREFORE**, Plaintiffs, on behalf of themselves and the Class or
6 Subclasses, requests the following relief:

- 7 A. An order that this action may be maintained as a Class Action under
8 Rule 23 of the Federal Rules of Civil Procedure, that Plaintiffs be
9 appointed Class representatives for the Class, and subclasses and
10 that Plaintiffs' counsel be appointed as counsel for the Class and
11 subclasses;
- 12 B. A permanent injunction against Defendants, restraining, preventing
13 and enjoining Defendants from engaging in the illegal practices
14 alleged;
- 15 C. An order requiring Defendants to disgorge the monies wrongfully
16 obtained through the use of their illegal practices;
- 17 D. Actual damages;
- 18 E. An award of attorneys' fees;
- 19 F. An award of the costs of suit reasonably incurred by Plaintiffs and
20 their counsel;
- 21 G. An award of interest, including prejudgment interest, at the legal rate,
22 and;

23 ///

24 ///

25 ///

26 ///

27 //

1 H. Such other and further relief as the Court deems necessary and
2 appropriate.

3 DATED: December 13, 2013

By: 

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DEMAND FOR JURY TRIAL

PLAINTIFFS, ON BEHALF OF THEMSELVES AND ALL
OTHERS SIMILARLY SITUATED, HEREBY DEMAND A TRIAL BY
JURY OF ALL CLAIMS SO TRIABLE IN THE ABOVE REFERENCED
MATTER.

DATED: December 13, 2013

By: 

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