

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

VICKY BERGMAN, MICHAEL)
CARTON, CYNTHIA FINNK, ROCCO)
LANO, LAURINA LEATO, MARILYN)
LISTANDER, ROGER MAMMON,)
AMY JOSEPH, and WILLIAM)
DUMONE, on behalf of themselves and)
and all others similarly situated,)

Plaintiffs,)

vs.)

DAP PRODUCTS INC. and NATIONAL)
EXPRESS INC.,)

Defendants.)

Civil Action No.: 1:14-cv-3205-WDQ
CLASS ACTION

JURY TRIAL DEMANDED

CONSOLIDATED CLASS ACTION COMPLAINT

Plaintiffs Vicky Bergman, Michael Carton, Cynthia Finnk, Rocco Lano, Laurina Leato, Marilyn Listander, Roger Mammon, Amy Joseph and William Dumone (collectively “Plaintiffs”), on behalf of themselves and all persons similarly situated, by and through their attorneys, allege as follows.

INTRODUCTION

1. This is a class action brought by Plaintiffs, individually and on behalf of all other similarly situated consumers who purchased an XHose or XHose Pro (hereinafter referenced interchangeably as “XHose”) product manufactured, marketed, distributed, or sold by DAP Products, Inc. (“DAP”) and National Express, Inc. (“National Express”) (collectively the “Defendants”). Defendants advertised the XHose as being an expandable, lightweight garden hose that was tough, durable, and long-lasting. Defendants further advertised the XHose as

being able to both expand and contract without “kinking,” as experienced with typical garden hoses.

2. As compared to more traditional rubber garden hoses, the XHose is constructed of a thin cloth layer exterior and a thin plastic internal tube interior. By virtue of this design, Defendants claim that the benefit of the XHose is that it is able to contract when there is no water in the hose, providing for easier storage.

3. Defendants’ marketing and packaging states that the XHose is tough, durable, and long-lasting. Contrary to Defendants’ representations, however, the XHose is defective and predisposed to leaking, bursting, seeping, and dripping due to no fault of the consumer.

4. Defendants knew, or should have known, that the XHose is defective and not fit for its ordinary and intended purpose as a garden hose. Defendants, however, actively concealed this material fact from Plaintiffs and the members of the Class.

5. Despite their active concealment of the defect and the numerous internet complaints regarding the XHose, Defendants continue to market and sell the XHose to consumers throughout the United States, causing them millions of dollars in damages.

PARTIES

I. Plaintiffs

A. Vicky Bergman

6. Plaintiff Vicky Bergman is a citizen of the state of California and currently resides in Huntington Beach, California. On or about November 18, 2013, she called the toll-free number of Defendant’s distributor National Express and ordered a 50’ XHose Pro, with a second 50’ hose to be included for a charge for “shipping and handling,” paying a total of \$69.85 for the two hoses. Prior to doing so, she viewed and reasonably believed and relied upon advertising on

Defendants' television infomercials and website, which were prepared and approved by Defendants and their agents and designed to encourage persons to purchase the XHose rather than a traditional garden hose.

7. On December 2, 2013, Bergman called the National Express toll-free number and ordered another 50' XHose Pro and a 75' XHose Pro, with "free" second versions of each included for a shipping and handling charge, paying a total of \$161.70 for the four hoses. Of the six XHose Pros in her possession, she gave away two as gifts and kept four for personal use.

8. By the following January or February, three of Bergman's four XHose Pros "popped" near the middle of the hoses, making them unusable as garden hoses. She then called the National Express toll-free number but was not offered the option to get her money back. Instead, Defendants sent her four replacement XHose Pros.

9. By April or May, 2014, at least two more of Bergman's XHose Pros had "popped." She again called National Express, and was told that it was too late to get her money back. Instead, after making multiple follow-up calls, Defendants eventually sent her four replacement hoses. Plaintiff then experienced problems with all four of the new replacement XHose Pros. One exploded and a piece of it went flying, one ripped, and two others have experienced significant kinking.

10. In June, 2014, Bergman called National Express two additional times, resulting in the shipment of six additional replacement hoses. However, the last sets of replacement hoses have been the most problematic, with defects ranging from exploding to kinking and leaking from the fittings.

11. Bergman has maintained physical possession of the nineteen XHose Pros Defendants sent her, of which three remain unopened in their packages. As alleged herein,

sixteen of the XHoses have become unusable as garden hoses due to exploding, tearing, kinking or leaking. She would not have purchased the XHose, or would have immediately sought a refund, had Defendants disclosed the product's inherently defective nature.

B. Michael Carton

12. Plaintiff Michael Carton ("Carton") is a citizen of the state of Wisconsin and currently resides in Elm Grove, Wisconsin. In June 2014, he purchased two 75' XHoses from an Ace Hardware store in Wisconsin. Prior to doing so, he viewed and reasonably believed and relied upon advertising on Defendants' television infomercials and website, which were prepared and approved by Defendants and their agents and designed to encourage persons to purchase the XHose rather than a traditional garden hose. He chose the XHose over comparable products because of these representations, even though the XHose was significantly more expensive than comparable hoses in the marketplace.

13. Within thirty days of purchasing the XHoses, on its third use, one of Carton's XHoses failed when the internal rubber hose separated at the brass fitting. He returned the defective XHose to the Ace Hardware store where he had purchased it and received a replacement XHose.

14. In July 2014, both the replacement XHose and the other original XHose failed when the interior hoses burst. As a result, all three of Carton's XHoses are no longer suitable for use as garden hoses. He would not have purchased the XHose, or would have immediately sought a refund, had Defendants disclosed the product's inherently defective nature.

C. Cynthia Finnk

15. Plaintiff Cynthia Finnk ("Finnk") is a citizen of the state of Florida and currently resides in Tampa, Florida. In December 2013, Finnk purchased one 75' XHose Pro ("Hose 1")

from XHosepro.com and received a second XHose Pro free (“Hose 2”). Prior to doing so, she viewed and reasonably believed and relied upon advertising on Defendants’ television infomercials and website, which were prepared and approved by Defendants and their agents and designed to encourage persons to purchase the XHose rather than a traditional garden hose.

16. In or around May 2014, Hose 1 exploded in the center while in use. On May 23, 2014, Finnk called the number provided with her purchase (the “Complaint Number”) seeking a refund but was informed by the representative with whom she spoke, “Elizabeth,” that the 90-day refund period had expired. Elizabeth agreed to send her two replacement XHose Pros (“Hose 3” and “Hose 4”).

17. In or around June 2014, Hose 2 exploded in the center while in use. On June 12, 2014, Finnk again contacted the Complaint Number and spoke with “Taisha,” who agreed to send two additional replacement XHose Pros (“Hose 5” and “Hose 6”). Hoses 3, 4, 5, and 6 all exploded in the center while in use shortly thereafter.

18. On June 20, 2014, Finnk yet again contacted the Complaint Number and spoke with “Steve,” who agreed to send two more replacement XHose Pros (“Hose 7” and “Hose 8”).

19. In or around July 2014, Hoses 7 and 8 exploded in the center while in use. On July 18, 2014, Finnk contacted the Complaint Number for the fourth time, again speaking with “Steve.” She reiterated her request for a refund, explaining that all 8 hoses she had received had burst. Steve refused to refund her money, instead agreeing to send two more replacement XHose Pros (“Hose 9” and “Hose 10”) and advising that she would not be provided any additional replacement hoses.

20. As of the date of this filing, neither Finnk nor anyone else has attempted to use Hoses 9 and 10. She would not have purchased the XHose, or would have immediately sought a

refund, had Defendants disclosed the product's inherently defective nature.

D. Rocco Lano

21. Plaintiff Rocco Lano ("Lano") is a citizen of the state of Delaware and currently resides in Wilmington, Delaware. In February 2013, he purchased one 50' XHose ("Hose 1") from xhose.com and received a second XHose for the cost of shipping and handling ("Hose 2"). Prior to doing so, he viewed and reasonably believed and relied upon advertising on Defendants' television infomercials and website, which were prepared and approved by Defendants and their agents and designed to encourage persons to purchase the XHose rather than a traditional garden hose.

22. Hose 1 blew out at the fitting where it connected to the faucet. Lano contacted the Complaint Number and was provided a replacement hose ("Hose 3") approximately three weeks later. In order to receive the replacement hose, he was required to ship the defective hose back at his own expense.

23. Hose 2 blew out at the on/off valve approximately two days after Hose 1 malfunctioned, and Hose 3 blew out in the center shortly thereafter. Lano again contacted the Complaint Number and, to replace the defective Hose 2, was sent two 25' XHoses ("Hose 4" and "Hose 5"). Hose 4 arrived with a crushed brass faucet connector and Hose 5 soon blew out in the center during use. As a result, his XHoses are no longer suitable for use as garden hoses. He would not have purchased the XHose, or would have immediately sought a refund, had Defendants disclosed the product's inherently defective nature.

E. Laurina Leato

24. Plaintiff Laurina Leato ("Leato") is a citizen of the state of Illinois and currently resides in Midlothian, Illinois. In September 2012, she purchased two 50' XHoses and an XHose

Holder from xhose.com.

25. In July 2013, Leato purchased one 25' XHose from a Menard's retail store in Crestwood, Illinois. Prior to doing so, she viewed and reasonably believed and relied upon advertising on Defendants' television infomercials and website, which were prepared and approved by Defendants and their agents and designed to encourage persons to purchase the XHose rather than a traditional garden hose.

26. Within months of first use, the inner hose on each of the three XHoses Leato purchased began leaking at the connection to the coupling, rendering the XHoses no longer suitable for use as garden hoses. When she contacted Defendant National Express Online, she was told that she was not entitled to a refund of the purchase price or replacements for the defective hoses because the 90-day warranty on the products had expired. She would not have purchased the XHose, or would have immediately sought a refund, had Defendants disclosed the product's inherently defective nature.

F. Marilyn Listander

27. Plaintiff Marilyn Listander ("Listander") is a citizen of the state of Texas and currently resides in Round Rock, Texas. In or around 2012, she purchased two 50' XHoses and received two free hoses (respectively "Hose 1," "Hose 2," "Hose 3," and "Hose 4") from xhose.com and by calling the number on a television advertisement she viewed. Prior to doing so, she viewed and reasonably believed and relied upon advertising on Defendants' television infomercials and website, which were prepared and approved by Defendants and their agents and designed to encourage persons to purchase the XHose rather than a traditional garden hose.

28. Hoses 1 and 2 both failed within six weeks of their first use when they split open at the sewn seam running along the side of the hose. Listander then began using Hoses 3

and 4, both of which also split open at the same seam within a similar time period. She then contacted the Complaint Number and was eventually provided four replacement hoses (“Hose 5,” “Hose 6,” “Hose 7,” and “Hose 8”). Hoses 5, 6, 7, and 8 all experienced the same failure as Hoses 1-4 within six weeks of first use.

29. Despite these failures, and because Listander found the product to be effective as a garden hose prior to these uniform failures, she purchased a 50’ XHose Pro and received a second XHose Pro for free (“Hose 9” and “Hose 10”). Both of the XHose Pros experienced the same failure as every previous XHose she had purchased within two months of their first use.

30. Listander again contacted the Complaint Number and was provided two replacement hoses (“Hose 11” and “Hose 12”). Hoses 11 and 12 also experienced the same failure within two months of their first use. She would not have purchased the XHose, or would have immediately sought a refund, had Defendants disclosed the product’s inherently defective nature.

G. Roger Mammon

31. Plaintiff Roger Mammon (“Mammon”) is a citizen of the state of California and currently resides in Oakley, California. In August 2013, Mammon purchased one 50’ XHose Pro (“Hose 1”) from xhose.com and received a second 50’ XHose Pro (“Hose 2”) for the cost of shipping and handling. Prior to doing so, he viewed and reasonably believed and relied upon advertising on Defendants’ television infomercials and website, which were prepared and approved by Defendants and their agents and designed to encourage persons to purchase the XHose rather than a traditional garden hose.

32. In July 2014, after only being used approximately 12 times, Hose 1 failed during use while connected to Hose 2. Specifically, the expandable, interior hose in Hose 1 suddenly

separated from the brass lining and contracted, damaging Hose 1 and rendering it no longer suitable for use as a garden hose. Mammon would not have purchased the XHose, or would have immediately sought a refund, had Defendants disclosed the product's inherently defective nature.

H. Amy Joseph

33. Plaintiff Amy Joseph ("Plaintiff Joseph") is a citizen of the state of Illinois. In September 2014, Plaintiff Joseph purchased one XHose from an Ace Hardware store. Prior to doing so, Plaintiff viewed and reasonably believed and relied upon advertising on Defendants' television infomercials, website, and product packaging, which were prepared and approved by Defendants and their agents and designed to encourage persons to purchase the XHose rather than a traditional garden hose. Plaintiff Joseph would not have purchased the XHose, or would have immediately sought a refund, had Defendants disclosed the product's inherently defective nature.

I. William Dumone

34. Plaintiff William Dumone is a citizen of the state of California and currently resides in Los Angeles County, California. In 2014, he purchased the X-Hose Pro from a Rite Aid retail store in the Greater Los Angeles area. Prior to doing so, he viewed and reasonably believed and relied upon advertising on Defendants' television infomercials and website, which were prepared and approved by Defendants and their agents and designed to encourage persons to purchase the XHose rather than a traditional garden hose. He paid approximately \$39.99 for the X-Hose Pro.

35. Dumone's XHose failed shortly after purchase. He notified Defendants of the failure by letter. He would not have purchased the XHose, or would have immediately sought a

refund, had Defendants disclosed the product's inherently defective nature.

Defendants

36. Defendant DAP Products, Inc. ("DAP") is a Delaware corporation with its headquarters and principal place of business located at 2400 Boston Street, Suite 200, Baltimore, MD 21224-4775. Defendant is a leading manufacturer and supplier of caulks, sealants, construction adhesives, insulating foams, spackling, glazing and other general home care and improvement products. Defendant designs, manufactures, and sells its products, including the XHose, through Defendant National Express, Inc., DAP's own interactive website and a nationwide distribution network, as well as through traditional brick-and-mortar retail stores and national retailers such as Walmart, Home Depot, Target, Menards and Ace Hardware, among others.

37. Defendant National Express, Inc. is a Connecticut corporation with its headquarters and principal place of business at 2 Morgan Avenue, Norwalk, Connecticut 06851. National Express is described on its website (<http://www.nationalexpresstv.com>) (last visited September 12, 2014) as "an independently owned direct response company focusing on bringing products directly to consumers via Television, Internet, Print, Mail Order, and Retail. Founded in 1981, it is one of the oldest and most respected companies in the direct response industry. National Express, Inc. has a long history of working closely with inventors, suppliers, and corporations...." National Express further states on its website that the company "has the expertise and experience as well as the dedication to the consumer with unparalleled customer support that enables us to quickly and efficiently test and roll-out products." One of National Express's "top selling products" is the XHose. *Id.* National Express was responsible for testing the XHose prior to selling the product to consumers, marketing the XHose and providing

customer service to consumers purchasing the XHose.

38. At all times relevant to Plaintiffs' allegations, National Express, Inc. is and was DAP's representative, affiliate, or employee and, in carrying out its obligations with respect to the testing of the X-Hose as well as the marketing and sale of the XHose to consumers, it was acting within the course and scope of such agency, representation, affiliate relationship, or employment.

39. DAP has exercised control over the marketing and distribution activities of its agent such that, with respect to the subject matter of this action, any individuality or separateness between them has ceased and each of them is the alter ego of the other. Adherence to the fiction of the separate existence of DAP and its agent would, under the circumstances alleged herein, sanction fraud or promote injustice. All acts and omissions alleged to have been done by DAP or its agents, were done with the consent, knowledge, and ratification of DAP.

JURISDICTION AND VENUE

40. This Court has subject matter jurisdiction over this class action pursuant to 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005, because the matter in controversy exceeds \$5 million, exclusive of interest and costs, and is a class action in which some members of the Class are citizens of states different than Defendants. *See* 28 U.S.C. § 1332(d)(2)(A).

41. This Court has personal jurisdiction over DAP because its corporate headquarters and principal place of business are located in this District.

42. This Court has personal jurisdiction over National Express because it is authorized to do business and does conduct business throughout the United States, including within this judicial district; Defendants have specifically marketed and sold the XHose in the United States, including this District; and they have sufficient minimum contacts with the

various states of the United States and/or sufficiently avail themselves of the markets of the various states of the United States through their promotion, sales, and marketing within the United States, including this District, to render the exercise of jurisdiction by this Court permissible.

43. Venue properly lies in this District pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the acts giving rise to Plaintiffs' claims occurred in this District and Defendants conduct substantial business in this District.

FACTUAL BACKGROUND

44. Defendants designed, marketed, distributed, and sold XHoses on television, on the internet and through various retail outlets, including Walmart, Home Depot, Target, Menards and Ace Hardware. Defendants have sold tens of millions of dollars' worth of XHoses.

45. XHose and XHose Pro basically are the same product. Although Defendants' advertisements claim the XHose Pro is made from more durable material, including "a tough multilayered expandable inner hose," XHose Pro differs from the original XHose only insofar as it incorporates brass fittings and has a larger diameter. Indeed, XHose and XHose pro suffer from identical design and/or manufacturing defects that render them unsuitable for their ordinary and intended purpose as garden hoses.

46. Unbeknownst to consumers, Defendants' XHoses contain design and/or manufacturing defect(s) that result in leaking, bursting, seeping, and dripping. Defendants not only knew of these defects before placing the hoses into the stream of commerce, but actively concealed the hose's inherently defective nature from Plaintiffs and the Class in order to preserve ill-gotten gains while continuing to collect illicit payments and profits.

A. Misrepresentations on the XHose's Website and Packaging

47. Defendants market and have marketed the XHose as a tough, durable, and long-lasting gardening hose. Specifically, Defendants represented on the XHose website (www.xhose.com) that the XHose:

- Is “[s]uper strong and durable yet ultra lightweight;”¹
- “Absolutely will not twist, tangle, or kink;”²
- “EXPANDS up to 3 times its size when water is turned on;”³
- “CONTRACTS back in just seconds when water is turned off;”⁴
- Contains a “[t]ough rubber inner hose covered in durable, super-strong webbing;”⁵ and
- Is “built strong to last long.”⁶



¹ See www.XHose.com (last visited September 12, 2014).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* (embedded video at 00:53. The video further depicts young children safely and easily carrying and handling the hose).



48. Consistent with their online misrepresentations, Defendants' product packaging also contains misrepresentations concerning the longevity, durability and performance capabilities of the XHose. As is reflected on the XHose product packaging, Defendants say that the XHose is:

- Lightweight- Just 1 oz
- Won't Kink!
- Super Strong and Durable!



With respect to the XHose Pro, Defendants represent that the hose is of "Professional Quality,"

that it will produce a “More Powerful Spray” and that it contains “Solid Brass Fittings” and that it is made of “Durable Material” that is “Stronger Than Ever.”



B. Defendants’ Commercials Conceal the XHose’s Inherently Defective Nature

49. Defendants make similar claims in their commercials. The commercials, which are shown on Defendants’ website and during television broadcasts nationwide, tout the XHose’s durability and longevity, ease of use, and ability to expand and contract without kinking. Defendants also claim that the XHose is “built strong to last long,” “tough,” “durable” and

“super strong.”

50. For instance, the XHose Pro television commercial makes several claims for the product:

(Michael Berardi [Purported XHose Inventor]): Are you confused by all the expanding hoses on the market? Don't be fooled by imitations.

(Michael Berardi): Hi, I'm Michael Berardi. I'm the inventor of the X-Hose, the original blue expanding hose. In fact, I've been awarded two U.S. patents for my invention. My X-Hose is the only patented expanding hose on the market and it bears the trusted DAP Products name. Now I'm very proud to introduce my new DAP X-Hose Pro. With solid brass fittings, a wider 3/4 inch diameter and constructed from even stronger materials. Works like my original X-Hose. Just turn the water on and my X-Hose Pro automatically expands and expands and expands as you effortlessly guide it to where you need to go and when you're finished my X-Hose Pro will automatically follow you back and contract for easy storage. My DAP X-Hose Pro is great for homeowners and professionals.

(Heiko Sommerer, Whiteglove Mobile Detailing): I own a mobile detailing company and this hose saves me a lot of time and energy on my job. It never kinks, it is super lightweight, and hardly takes up any space in my trailer.

(Michael Berardi): This 50 foot 3/4 inch rubber hose weighs over 11 pounds. My 50 foot 3/4 inch X-Hose Pro weighs only about 2 pounds. My DAP XHose Pro is actually made from a tough, multi layered expandable inner hose and a folded outer covering made from durable super-strong webbing. Because of it's patented design, my X-Hose Pro will never kink. Get my new DAP X-Hose Pro for only \$29.95 but call right now and get a second X-Hose Pro free, just pay processing and handling. My DAP X Hose Pro also comes with a lifetime quality guarantee. If it ever fails just return it for a free replacement.

(Michael Berardi): Durable solid brass fittings, super strong materials strong enough to pull and SUV! 3/4 inch diameter for a powerful spray and incredibly light so call now! I promise you'll love it!

See <http://www.ispot.tv/ad/7tAp/xhose-pro-the-only-one>.

51. Plaintiffs viewed and relied on Defendants' marketing materials and the representations on the product packaging prior to purchasing their XHoses and believed Defendants' representations regarding the durability, strength, longevity and performance capabilities of the XHoses to be true.

C. Defendants' "Lifetime Guarantee" is a Sham

52. Contrary to Defendants' representations, however, the XHose is not durable or strong, does not last a long time and does not have the performance capabilities Defendants claim.

53. Indeed, Defendants initially offered a "lifetime guarantee" for the Xhose Pro, warranting that "[i]f it ever fails, we'll replace it!"



54. Defendants later reduced the "Lifetime Quality Guarantee" for the Xhose Pro to a 90-day money back guarantee. Plaintiffs and other Class members relied on Defendants' illusory "guarantees" and refund policy when making their purchases, believing that Defendants would refund their money if their XHoses failed.

55. Defendants also claim to further warrant their products "from defects in material and workmanship under normal household use and conditions for one year from the date of

⁷ Image available at <http://web.archive.org/web/20130817054310/https://www.xhosepro.com/> (last visited September 15, 2014).

original purchase,” and agree to replace a failed hose or refund the sales price.⁸

56. When consumers, including members of the Class, purchase the XHose and later request their "money back" from Defendants, it is difficult or impossible for them to contact Customer Service. Thus, when the XHose breaks, the consumer faces an unsatisfactory choice. He can right the wrong if he returns the products promptly, but, the cost of doing so is high: he will lose the excessive shipping and handling charges he has already paid, and incur a return shipping charge at a high single order rate.

57. Alternatively, the consumer can simply bear the loss and endure a sense of violation. By setting up the shipping and handling charges and "guarantee program" the way they have, Defendants effectively - and deliberately - chill most consumers from taking action to return the misrepresented products.

58. Defendants' "money back guarantee" and “warranty” are simply empty promises used to dupe customers into purchasing these inherently defective products.

D. The XHose is Inherently Defective and “Guaranteed” to Fail

59. Contrary to Defendants’ representations, however, XHose is not durable, is not strong, does experience kinking and does not last a long time. Due to poor manufacturing and/or design, XHose is prone to leaking, kinking, bursting, exploding, seeping, and dripping, all of which will render it useless. XHose is unfit for its ordinary and intended purpose as a garden hose because it cannot transport water without eventually failing.

60. Due to the many defects plaguing these products, XHoses also are dangerous and pose an unreasonable safety risk. As set forth in several of the consumer complaints reproduced below, when XHose “bursts” or “explodes,” the interior lining is propelled from the outer

⁸ <http://www.homedepot.com/p/DAP-3-4-in-x-50-ft-XHOSE-Pro-Expandable-Water-Hose-7079899104/205144009>

covering at a high velocity, placing both the XHose's operator and any bystanders at risk of physical injury.

61. XHoses are inherently defective and virtually guaranteed to fail. It appears that thousands of purchasers of XHoses have experienced leaking, bursting, seeping, and dripping. A number of internet blogs and other websites publish consumer complaints describing the exact same defects as those described herein and suffered by Plaintiffs. On Amazon.com, for example, 275 of the 409 customer reviews of the XHose, nearly 70% of all reviews, give the product 1 out of 5 stars, lodging a large volume of complaints including the following, which represent only a small smattering of the hundreds of negative reviews (all customer reviews *sic*):

This product is crap, December 30, 2013

This review is from: Dap 09116 Xhose 25-Foot Incredible Expanding Hose (Tools & Home Improvement)

What a dishonest company. If I ever see the name dap again I will not purchase any product from this company. ***I purchased two 75' hoses. Both have burst. First one was replaced without any problem. Second one, they want me to pay shipping and return their product before they replace. I already paid them over \$21.00 in shipping when I purchased the first two hoses. There is a pattern here, one of dishonestly.*** So my next step will be to file a complaint with the Better Business Bureau. So I suggest to all of you whom have been taken by this American company, let others know by filing a complaint with the BBB. If enough of us complain they will be forced to change their policy. I have no problem signing this. I am, Paul Morgan.

XHose Pro warranty and advertising deceptive, March 23, 2014

This review is from: Dap Xhose PRO The Original Expanding Hose with Black Solid Brass Fittings, 50-Foot X Hose (75 Ft. Xhose)

The ¾" XHose Pro with brass fittings is convenient, easy to use BUT it has limited uses and caution has to be exercised when using it. If you're watering you garden or using it on a sprinkler it is fine. The problem occurs when the hose is charged and you stop the water flow. I purchased my 75 footer primarily for washing the car. This is when the problem happens. When washing a car, you first wet the car down, shut the nozzle off, then soap and clean car, and then rinse off the soap. The problem is that when you turn off the nozzle the hose it is still charged and most probably laying charged in the sunlight. The sun will heat the charged hose until you are ready for the rinse. During this time (5-10 minutes) there is a very strong possibility that the hose will pop rendering it useless. So now, I wash the car in sections in order not to keep the hose from overheating and popping. As I said, as long as you keep the water running while using it, you're

probably OK.....you just can't turn the nozzle off for any length of time. ***The hose comes with a lifetime warranty, but the warranty requires that you pay the freight both ways. For the 75' hose it will cost you approx. \$7.00 to mail it, and then you will also have to send a check for \$10.95 for each hose to pay for their postage. That means your "Lifetime Warranty" will cost you a minimum of \$18.00. Very deceptive advertising to say the least. Whenever I've sent a defective item under warranty back to the manufacturer for repair or replacement I have NEVER had to pay for them to ship it back to me.***

Because of the amount of hoses that are being returned for defect, I believe that the possibility of consumer fraud should be looked into by the Attorney General's office, and that some attorney may entertain the possibility of a Class Action suit. In my opinion, all the cheaper hoses on the market will probably perform the same way, so you might as well buy the cheaper one at 1/4th of the cost and just buy another if it breaks or pops. That will save you the \$18.00 replacement cost of an XHose Pro, and several weeks waiting for a replacement (if it's in stock). This hose is definitely NOT WORTH THE MONEY!!!!!!! ***Additionally, there is a possibility that if these types of hoses pop the hose will immediately begin to retract and if there is a nozzle attached the hose might possibly whip that nozzle causing it to strike you. It hit me in the shin, but if there was a small child close to it the injury could have been more serious. Even without a nozzle attached, the brass fitting itself can also cause an injury.*** I would strongly suggest that the XHose Pro manufacturer consider a reflective type covering or at the very least a much lighter color webbing and inner hose color that would not as easily absorb the heat radiated by the sun. Direct sunlight is this if you have to keep it out of the sun?

Have had 3 burst and 1 bad connection, April 14, 2014

This review is from: Dap 09116 Xhose 25-Foot Incredible Expanding Hose (Tools & Home Improvement)

I ordered the Xhose Pro (w/ brass connections) in May 2013, didn't even receive my order until October due to backorder that I was not informed about until I called multiple times. ***I used the hose maybe 3 times but it appeared to kink /block. By December it had burst inside and water was coming out the middle of the hose. Got replacements under the "lifetime warranty" Those both burst within 2-3 months also. Got another replacement set. 1 had a bad connection from 1st use (water squirts out at main connection) and 2nd hose just burst, been 2 months of daily use. Company will only replace under "lifetime warranty" twice. After which you have to mail them your broken hoses + a check/money order for shipping and handling of each replacement hose (\$8.95 each). Rip off. Please don't waste your money.***

Loved it.....for the short time I got to use it, June 8, 2014

This review is from: NEW 25/50/75ft Foot expandable xhose flexible hose USA Standard Garden hose water pipe/ water gun Spray Nozzle Free shipping (75ft) (Misc.)

First and foremost, I ordered the 75' and received a 25'. Didn't want the hassle, so kept it anyway. Purchased in July 2013, used it for 3 months. Took it out two weeks ago and it leaks. Very disappointed. Contact information for the company unavailable anywhere.

Great.....for the three months I got to use it.
awful product/worse company, June 18, 2014

By Tony Ambricco - See all my reviews

X Hose (50 Ft. Xhose)

I purchased 2 of the DAP XHOSE PRO 50'. After the first 15 minutes the one length lost pressure and began to shrink up. ***I called the company and they sent a replacement. After about a month, one of the 2 lengths "popped" and lost pressure. I called the company and told them I was returning the hoses and wanted a refund. Well, I had to pay for return shipping. After a few days I tracked my package and it had been delivered. After a week, my credit card had not been credited so I called the company and they said all they are going to credit is the price of the hose, not the shipping (brass fittings are heavy) charges. I told them their product was not up to the standards they claim and because of that I had to return them and should be reimbursed. This is a scam. DO NOT BUY THIS PRODUCT!***

Defective item, but no support from Amazon.com., June 18, 2014

This review is from: Dap Xhose PRO The Original Expanding Hose with Black Solid Brass Fittings, 50-Feet

X Hose (75 Ft. Xhose)

I received my xhose on April 9, 2014 put it away until I was going to need it. I started using it in early June 2014 and found that it had twists and lumps inside the hose that was preventing it from working properly. ***I called Amazon.com and they did give me some phone numbers to call for the Xhose company and and told me the 30 day return policy had elapsed, even though it was defective. I called the numbers I was given, and got the runaround, was given more numbers to call, and finally ended up with a number going back to Amazon.com corporate that did not work. I paid \$55 for this hose including shipping and handling, and I honestly thought that Amazon.com would protect my purchase. I have bought many items off of Amazon.com, and I suppose I was very lucky I had no problems. I ended up buying two new hose nozzle sprays down at the hardware store and luckily one is allowing the hose to work fairly well. The lumps and twists are still pushing their way out of the side of the house. I am truly disappointed in Amazon.com. \$55 is not a huge amount of money, but it is a lot of money to me. I am now thankful it was not a large money purchase.***

Total WAIST of Time & Money, July 21, 2014

Verified Purchase (What's this?)

This review is from: Dap 09106 Xhose PRO The Original Expanding Hose, Black with Solid Brass Fittings, 25-Feet (Tools & Home Improvement)

Broke very quickly, zero help with replacement! The hose blew out after only a handful of uses (washing car). I maybe used this 5 times in 8 weeks and boom, complete CRAP! Tried calling customer support, but x-hose doesn't sell on amazon apparently and the 30 day warranty is hard to collect on when you only use the item for 15 min. in the first 30 days.

AVOID AT ALL COSTS! It is a cool idea, but save your money for a real hose.

Water, Water, everywhere...., July 25, 2014

By E D Crenshaw Jr - See all my reviews

Verified Purchase(What's this?)

This review is from: Dap Xhose PRO The Original Expanding Hose with Black Solid Brass Fittings, 50-Foot X Hose (75 Ft. Xhose)

This hose was a disaster. Advertised "heavy duty" strength it had blown up in one month, water everywhere. Use caution when purchased, and having trouble finding a place to return. If anyone knows a SIMPLE way to get my money back please advise. Thanks

Don't believe the one year warranty, June 30, 2014

By Bill R (Panama City Beach FL, USA) - See all my reviews

Verified Purchase(What's this?)

This review is from: Dap Xhose PRO The Original Expanding Hose with Black Solid Brass Fittings, 50-Foot X Hose (50 Ft. Xhose)

DAP customer service told me Amazon is not an Authorized Seller so Dap will not honor the warranty.....This is the 3rd expanding hose I have purchased. The other two had plastic connections and leaked shortly after purchasing them. When I saw this ad claiming this one was different because it has solid brass fittings, 3/4" diameter and was "Professional Quality", I was fooled into thinking they have finally developed the technology and decided to give the expandable hose one more try.....Well this one lasted 3 months before leaking....This is the final straw. I'm going back to traditional hoses.

Bad product, June 29, 2014

By Kathleen D. - See all my reviews

This review is from: Dap Xhose PRO The Original Expanding Hose with Black Solid Brass Fittings, 50-Foot X Hose (50 Ft. Xhose)

It's not that I hate the hose I'm extremely disappointed with the quality of the product. I absolutely loved the concept and ease of the hose, but after several weeks of almost daily use, 20 minutes a day, the first hose developed a leak where the hose connects to the brass fitting. ***Within a week the second one burst. I asked the cemetery to check the PSI, because this hose is tested to 250 PSI and the cemetery tested at 90 PSI. I called the company about the first hose and they shipped a replacement, but when I called about the 2nd hose they told me to send in the warranty card that I never received. Buyer beware!!!***

DAP = CRAP, July 9, 2014

This review is from: NEW 25/50/75ft Foot expandable xhose flexible hose USA Standard Garden hose water pipe/ water gun Spray Nozzle Free shipping (75ft) (Misc.)

There is a reason DAP rhymes with crap and it is not just their faulty product. They have a guarantee and they will honor it IF you send the cut ends of the hose AND the proof of purchase. Now who saves a receipt for a garden hose? It is one thing when they sell a defective product and quite another when they offer a meaningless guarantee. So is their theory that we are out wandering the earth like Cain (Kung Fu) looking for discarded expandable hoses we can redeem for money so they require the sales receipt to prove we actually paid money for their faulty product? PLEASE instead try the Rumford Gardner product. It works and the company can't be as disreputable as DAP/Crap

XHose had terrible customer service via Web - buy elsewhere!

July 27, 2013

This review is from: Dap 09116 Xhose 25-Foot Incredible Expanding Hose (Tools & Home Improvement)

Several competitors of the Xhose are available and I understand you can buy the product at retail outlets. However, DO NOT ORDER XHOSE ON THE INTERNET. *This company's customer service is essentially non-existent. The only information you can obtain is the order status and that status is always "In Process." But the hoses are never actually delivered. We've been waiting for weeks as the summer comes and goes - still no change in status and still no hoses. One of the worst vendors I've encountered since the advent of internet shopping.*

Flex hose, the hose that doesn't flex..., August 21, 2014

By Allen Spurr "wazzelby" (Colorado) - See all my reviews

(REAL NAME)

This review is from: Dap Xhose PRO The Original Expanding Hose with Black Solid Brass Fittings, 50-Foot X Hose (75 Ft. Xhose)

If I could give less than 1 star I would... Purchased 2 hoses and both blew out within a week of purchasing them. I used 1 for washing my car (once) and the other for watering our garden in the yard (3 times). The first hose split right in the middle and the second one blew out right at the coupler. These are an obvious gimmick and don't work worth a crap.. *Tried to return them for an exchange and couldn't after getting the run around having to call multiple phone numbers.*

PLEASE do not waste your money on these things.

Buyer Be Ware !!!, August 19, 2014

By Larry Parsons - See all my reviews

This review is from: Dap Xhose PRO The Original Expanding Hose with Black Solid Brass Fittings, 50-Foot X Hose (50 Ft. Xhose)

This hose has a one year warranty... Didn't last 5 months. Hose separated just behind the brass fitting leaving the hose worthless.

Amazon, Distributor or the Manufacturer. No one would stand behind the Warranty.. I'm out 45 bucks.. Glad I only bought one.

Third x-hose, third time it broke, August 28, 2013

Verified Purchase (What's this?)

This review is from: Dap 09116 Xhose 25-Foot Incredible Expanding Hose (Tools & Home Improvement)

First time, a balloon-type bubble appeared and continued to grow before I could turn off the water. The hose then burst. The second time, my husband attached the hose to the spigot, turned on the water, and the front part of the hose blew off, spewing water all over him. The third time was not a charm! Attached the hose to the spigot and once again, the front black plastic part blew off and we all got soaked. The black piece was never found. The problems with this hose DO NOT outweigh its convenience. ***In addition, there is no email address or customer service number to call if you have a problem. I had to search for my receipt, which I received directly from X-hose, and they would not issue a refund, but rather a replacement. This was one of the replacements that blew up! Stay away from this product. Do not buy it!***

They are Junk!, August 26, 2013

By J. Prewitt (Florida) - See all my reviews

This review is from: Dap 09114 Xhose 50-Foot Incredible Expanding Hose (Tools & Home Improvement)

Didn't realize Amazon sold these or would have bought from here. Sorry Amazon. These hoses are pieces of junk, was leaked out of the box, the other we didn't even open. Called Xhose (national express online) and asked for a replacement. I was instructed to ship the hose at my cost back to them and a determination would be made whether I had mishandled the hose in any way. Well, chalk this on up to not doing enough research on complaints against them.

Do Not Buy Tis Hose! Unless you are a glutton for punishment....

And nowhere on DAP's site do they say "Made in China"; so there we are...

Amazon should consider dropping this product, it is no good...

62. Consumer complaints regarding the XHose on the Home Depot website are strikingly similar, with 92 of 140 reviews giving the product 1 out of 5 stars, consistently noting issues with leaking, seeping, and bursting.⁹

⁹ See <http://www.homedepot.com/p/DAP-3-4-in-x-50-ft-XHOSE-Pro-Expandable-Water-Hose-7079899104/205144009> (last visited September 12, 2014).

E. Defendants' Actively Conceal the XHose's Defects

63. Defendants were, and still are, under a continuing duty to disclose the defective nature of the XHose to consumers. Defendants have actively concealed the existence and nature of the defect in the XHose from Plaintiffs and the Class.

64. Defendants were, and are, under a continuing duty to disclose the defective nature of its XHose to consumers. Yet, Defendants endeavor to actively conceal the existence and nature of the defect in the XHose from Plaintiffs and the Class by replacing failed XHoses with similarly defective products, rather than refunding Class members as promised.

65. Moreover, it appears that Defendants' agents conceal the defective nature of the Xhose by affirmatively misrepresenting that only a small percentage of XHoses experience the deficiencies set forth herein, and that XHoses are subject to minimal failure rates, thereby inducing consumers to purchase defective XHoses and ensuring that existing customers opt to forgo a refund in favor of replacement hoses they are made to believe will not fail.

66. The following customer inquiries and responses by XHose agent "Jenn" were obtained from Defendants' official XHose blog, "The Spigot," www.xhose.com/blog, under the title "XHOSE: Deal or Dud?" (emphasis added):

Rosemary says:

January 20, 2014 at 12:25 pm

I was getting ready to order, but thought I should check the reviews first. Sounds like a perfect hose, but after seeing the reviews, I think I'll pass. The green one had plastic that broke. Ok, so make a new one with brass fittings. Now the black one leaks or blows up and one on another site said it kinks. Customers seem to have a hard time contacting X Pro Hose and takes months to receive the product. Too many proto types. I'm disappointed because I really wanted them.



Jenn says:

[January 23, 2014 at 11:18 am](#)

Rosemary, the expandable hose is a relatively new invention. The XHOSE is the original expandable hose and we have been continually improving the design, including the debut of the XHOSE Pro last spring. The XHOSE Pro has brass fittings, as you noted, and a wider inner hose for a more powerful spray. It is also kink-free. Plus, we do our best to satisfy each customer. ***The XHOSE Pro has a minimal failure rate*** and, on the off chance you were to receive a defective XHOSE, we would be happy to replace it for you. We hope you'll consider giving the XHOSE Pro a try!



Rosemary says:

[January 24, 2014 at 2:23 pm](#)

Well, I ordered them and just hoping they will last.



Jenn says:

[January 27, 2014 at 12:28 pm](#)

That's great! We hope you love them!

Bill says:

[January 26, 2014 at 5:05 pm](#)

Well....I guess I won't be buying the XHose, they almost had me though.



Jenn says:

[January 27, 2014 at 12:10 pm](#)

Bill, ***the XHOSE Pro units keep improving and have an exceptionally low failure rate.*** If

you order an XHOSE Pro and it doesn't work for you, we would be happy to replace it for you. We hope you'll give XHOSE a try!

Greg says:

[February 1, 2014 at 11:09 am](#)

I was reading about the Xhose Pro with the DAP backing and brass fittings after seeing a TV commercial. Went to the Amazon site and all of the reviews are very negative, all of them one star and one person wanting to give it zero stars. If this is so bad, how can the company survive, make commercials and continue to replace the defective units. Something is wrong very wrong here.



Jenn says:

[February 3, 2014 at 9:15 am](#)

Greg, the XHOSE Pro is a fairly new product and undergoes constant changes and improvements to be the best garden hose possible. **XHOSE has a very low failure rate but some people have received defective hoses.** We are glad to replace those hoses with new hoses to meet each customer's needs. Of the people I know with an XHOSE Pro, it's a big hit and makes yard work, gardening, and cleanup easier and we hope you'll give it a try to see what so many people love about the XHOSE Pro.

Priscilla Moffett says:

[February 2, 2014 at 3:21 pm](#)

I tried to order on line but it says the web site has changed I have to delete cookies....well I don't want to do that because I order from other sites as well..... This problem caused me to check out the blog and I guess i don't want it after all....seems people are not impressed!



Jenn says:

[February 3, 2014 at 9:14 am](#)

Priscilla, there are thousands of people who have an XHOSE and love what it does and how it works! **Out of all the people who have received an XHOSE, a very small percentage have received defective units which we then replace for**

them. We suggest you try the upgraded XHOSE Pro and if you don't like it for some reason, feel free to send it back within 90 days for the money back guarantee. We hope you'll give it a try!

67. As alluded to in several of the consumer complaints reproduced above, and as confirmed by Plaintiffs' own experiences, Defendants replace failed XHoses with products that also fail, and often require Class members to pay for return shipment of these similarly defective XHoses.

68. Defendants' fraudulent, deceptive and unfair practices have, and continue to cause Plaintiff, as well as members of the Class, out-of-pocket loss in the amount of the price paid for these worthless products.

THE COURT SHOULD APPLY MARYLAND LAW

69. The substantive laws of Maryland should apply to the proposed Nationwide Class, as defined below, because Plaintiffs properly brought suit in this District, which is where DAP is headquartered and home to most of the acts and decisions involved in this case.

70. Maryland's substantive laws may be constitutionally applied to the claims of Plaintiffs and the Class under the Due Process Clause, 14th Amend., § 1, and the Full Faith and Credit Clause, art. IV., § 1, of the U.S. Constitution. Maryland has significant contact, or significant aggregation of contacts, to the claims asserted by Plaintiffs and all Class members, thereby creating state interests that ensure that the choice of Maryland state law is not arbitrary or unfair.

71. Specifically, DAP's principal place of business in Baltimore, Maryland. DAP's primary manufacturing facility is also located in Baltimore, Maryland, Therefore, Maryland has an interest in regulating DAP's conduct under its laws because DAP own property and conduct substantial business in Maryland. DAP's decision to reside in Maryland and avail itself of

Maryland law renders the application of Maryland law to the claims herein constitutionally permissible.

72. A substantial number of Class members also reside in Maryland.

73. DAP's misconduct occurred from Maryland. These harmful acts similarly injured and affected all Plaintiffs and Class members residing in the United States. As a result, Maryland is where the conduct causing injury to the Plaintiffs and Class members occurred and emanated.

CLASS ACTION ALLEGATIONS

74. This action is brought on behalf of Plaintiffs, individually and as a class action, pursuant to FED. R. CIV. P. 23(a), 23(b)(2) and/or 23(b)(3) on behalf of a nationwide class of consumers. Specifically, the nationwide class consists of:

All persons in the United States who purchased a DAP XHose (the "Nationwide Class" or "Class").

Excluded from the Nationwide Class are Defendants, any entity in which Defendants have a controlling interest or which has a controlling interest in Defendants, and Defendants' legal representatives, assigns and successors. Also excluded are the judge to whom this case is assigned and any member of the judge's immediate family.

75. In the alternative to the Nationwide Class, and pursuant to FED. R. CIV. P. 23(c)(5), Plaintiffs seek to represent the following state subclasses (collectively, the "State Classes"):

- All persons in California who purchased a DAP XHose (the "California Class")
- All persons in Delaware who purchased a DAP XHose (the "Delaware Class")
- All persons in Florida who purchased a DAP XHose (the "Florida Class")
- All persons in Illinois who purchased a DAP XHose (the "Illinois Class")

- All persons in Texas who purchased a DAP XHose (the “Texas Class”)
- All persons in Wisconsin who purchased a DAP XHose (the “Wisconsin Class”)

Excluded from the California, Delaware, Florida, Illinois, Texas and Wisconsin Classes are Defendants, any entity in which Defendants have a controlling interest or which has a controlling interest in Defendants, and Defendants’ legal representatives, assigns and successors. Also excluded are the judge to whom this case is assigned and any member of the judge’s immediate family.

76. The rights of each member of the Class were violated in a similar fashion based upon Defendants’ uniform misconduct.

77. This action has been brought and may be properly maintained as a class action for the following reasons:

- a. Numerosity: Members of the Class are so numerous that their individual joinder is impracticable. Plaintiffs are informed and believe, and on that basis allege, that the proposed Class contains thousands of members. Upon information and belief, Defendants marketed and sold XHoses to tens, if not hundreds, of thousands of consumers throughout the United States. The Class is therefore sufficiently numerous to make joinder impracticable, if not impossible. The precise number of Class members is unknown to Plaintiffs.
- b. Existence and Predominance of Commons Questions of Fact and Law: Common questions of law and fact exist as to all members of the Class. These questions predominate over the questions affecting individual Class members. These common legal and factual questions include, but are not limited to, the following:

- i. whether Defendants' XHose is defective;
- ii. whether Defendants knew the XHose was defective;
- iii. whether Defendants intentionally concealed or failed to disclose to Plaintiffs and the Class the inherent nature of the defect in the XHoses;
- iv. whether Defendants had a duty to Plaintiffs and the Class to disclose the inherent defect in the XHoses, and whether Defendants breached that duty;
- v. whether a reasonable consumer would consider the defective nature of the XHose to be material in deciding whether to purchase the XHose;
- vi. the appropriate nature of class-wide equitable relief; and
- vii. the appropriate measurement of restitution and/or measure of damages to award to Plaintiffs and members of the Class.

These and other questions of law or fact common to the members of the Class predominate over any questions affecting only individual members of the Class.

- c. Typicality: Plaintiffs' claims are typical of the claims of the Class since Plaintiffs purchased XHoses that were designed, manufactured, and marketed by Defendants as being tough, durable, and long-lasting, as did each member of the Class. Furthermore, Plaintiffs and all members of the Class sustained monetary and economic injuries arising out of Defendants' wrongful conduct. Plaintiffs are advancing the same claims and legal theories on behalf of themselves and all absent class members.
- d. Adequacy: Plaintiffs are adequate representatives of the Class because their

interests do not conflict with the interests of the Class they seek to represent; they have retained counsel competent and highly experienced in complex consumer class action litigation; and they intend to prosecute this action vigorously. The interests of the Class will be fairly and adequately protected by Plaintiffs and their counsel.

- e. Superiority: A class action is superior to other available means of fair and efficient adjudication of the claims of Plaintiffs and members of the Class. The injury suffered by each individual Class member is relatively small in comparison to the burden and expense of individual prosecution of the complex and extensive litigation necessitated by Defendants' conduct. It would be virtually impossible for members of the Class individually to effectively redress the wrongs done to them. Even if the members of the Class could afford such individual litigation, the court system could not. Individualized litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all parties, and to the court system, presented by the complex legal and factual issues of the case. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.
- f. Ascertainability: Class members are readily ascertainable, and can be identified by Defendants' records. Upon information and belief all (or nearly all) class members can be identified by Defendants' business records.
- g. Defendants have acted, and refused to act, on grounds generally applicable to the

Class, thereby making appropriate final injunctive relief with respect to the class as a whole.

VIOLATIONS ALLEGED

COUNT I

**VIOLATIONS OF MARYLAND'S CONSUMER PROTECTION ACT ("MCPA")
(MD. CODE COM. LAW § 13-301, *et seq.*)
(On Behalf of the Nationwide Class)**

78. Plaintiffs and the Nationwide Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

79. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

80. Plaintiffs bring this claim on behalf of themselves and the Nationwide Class against Defendants.

81. Defendants are "person[s]" as that term is defined in MD. CODE, COM. LAW § 13-101(H).

82. Plaintiffs and the Class are "consumers" as that term is defined in MD. CODE, COM. LAW § 13-101(C)(1).

83. Defendants engaged in unfair and deceptive acts in violation of the MCPA by the practices described herein, and by knowingly and intentionally concealing from Plaintiffs and Class members that the XHoses suffer from substantial and unreasonably dangerous design and/or manufacturing defects, and the costs, risks, and diminished value of the products as a result of these deficiencies. At a minimum, Defendants' acts and practices violate the following sections of the MCPA:

(1) making false, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind

which has the capacity, tendency, or effect of deceiving or misleading consumers

(2)(i) Representing that consumer goods have a sponsorship, approval, accessory, characteristic, ingredient, use, benefit, or quantity which they do not have;

(2)(iv) Representing that consumer goods are of a particular standard, quality, grade, style, or model which they are not

(3) Failing to state a material fact that tends to deceive, namely, failing to disclose that XHoses do not work as advertised and eventually will fail;

(5)(i) Advertising goods and services with the intent not to sell them as advertised.

(9)(i) Engaging in a deception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with the promotion or sale of any consumer goods.

84. Defendants' unfair or deceptive acts or practices occurred repeatedly in

Defendants' trade or business, were capable of deceiving a substantial portion of the purchasing public, and imposed a serious safety risk on the public.

85. Defendants knew that XHoses are defectively designed or manufactured, are virtually guaranteed to fail prematurely, and are not suitable for their intended use.

86. Through its deceptive and false advertisements and product claims, Defendants knowingly and intentionally misrepresented the quality, characteristics and durability of XHoses, as well as the suitability of the same for their ordinary and intended use.

87. Defendants were and are under a duty to Plaintiffs and the Class to disclose the defective and unreasonably dangerous nature of XHoses because:

- a. Defendants were and are in a superior position to know the true state of facts about the various defects plaguing XHoses, as well as their unreasonably dangerous nature;
- b. Plaintiffs and the Class could not reasonably have been expected to learn or discover that the XHoses suffer from significant and

dangerous design and/or manufacturing defects until such defects manifest;

- c. Defendants knew that Plaintiffs and the Class could not reasonably have been expected to learn or discover the defective nature of XHoses until manifestation of the defect; and
- d. Defendants actively concealed these defects by providing to Plaintiffs and the Class similarly defective replacement XHoses until their 90-day money-back guarantee had expired.

88. In failing to disclose that XHoses are inherently defective, unreasonably dangerous and unsuited for their intended use, Defendants have and continued to knowingly and intentionally conceal material facts and breach their duty not to do so.

89. Defendants also engaged in deceptive conduct by providing Plaintiffs and Class members with similarly defective replacement hoses in lieu of a refund until the 90-day refund period had expired. Defendants' scheme of active concealment ensured that the refund period expired by the time Plaintiffs and the Class realized the XHoses are inherently defective, thereby allowing Defendants to unlawfully retain the proceeds of its scheme.

90. The facts affirmatively misrepresented and /or concealed or not disclosed by Defendants to Plaintiffs and the Class are material in that a reasonable consumer would have considered them important in deciding whether to purchase XHoses. Had Plaintiffs and the Class known about the defective nature of XHoses, they would not have purchased them.

91. Plaintiffs and the other Class members' money damages were proximately caused by Defendants' fraudulent and deceptive business practices.

92. Plaintiffs and the Class are entitled to equitable and monetary relief under the MCPA.

COUNT II
VIOLATION OF THE ILLINOIS CONSUMER FRAUD AND
DECEPTIVE BUSINESS PRACTICES ACT
(815 ILCS § 505/2, *et seq.*)
(On Behalf of the Illinois Class)

93. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

94. Plaintiffs Leato and Joseph bring this Count individually and on behalf of the Illinois Class.

95. The Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”) 815 ILCS 505/2, prohibits unfair or deceptive acts or practices in connection with any trade or commerce, including, among other things, “the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact,...whether any person has in fact been misled, deceived, or damaged thereby.” The ICFA also prohibits suppliers from representing that their goods are of a particular quality or grade that they are not.

96. Defendants’ misrepresentations and material omissions, identified above, constitute unfair competition or unfair, unconscionable, deceptive, fraudulent or unlawful acts or business practices in violation of the ICFA.

97. Defendants’ deceptive or unfair practices took place in the course of trade and commerce.

98. Defendants intended for Leato and Joseph and the Illinois Class to rely on these deceptive and unfair practices when they and the Illinois Class purchased the XHose.

99. Leato, Joseph and the Illinois Class have suffered injuries in fact and actual damages, including financial losses resulting from overpayment for the XHose due to

Defendants' violations of the ICFA, as alleged herein. These injuries are of the type the ICFA was designed to prevent and are the direct and proximate result of Defendants' unlawful conduct.

COUNT III
VIOLATION OF THE CALIFORNIA UNFAIR COMPETITION LAW
(CAL. BUS. & PROF. CODE § 17200, *et seq.*)
(On Behalf of the California Class)

42. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

43. Plaintiffs Bergman, Mammon and Dumone bring this count individually and on behalf of the California Class.

44. Under the California Unfair Competition Law (the "UCL"), "any unlawful, unfair or fraudulent business act or practice" constitutes unfair competition.

Fraudulent Acts and Practices

45. Any business act or practice that is likely to deceive members of the public constitutes a fraudulent business act or practice under the UCL.

46. Defendants have engaged in conduct that is likely to deceive members of the public. Specifically, Defendants have falsely claimed that the XHose is tough, durable, and long-lasting when it is in fact defective, prone to leaking, seeping, and bursting and is not fit for its ordinary and intended purpose as a garden hose.

47. By committing the acts alleged above, Defendants have engaged in fraudulent business acts and practices constituting unfair competition within the meaning of CAL. BUS. & PROF. CODE §17200.

Unlawful Acts and Practices

48. The violation of any law constitutes an unlawful business practice under CAL. BUS. & PROF. CODE §17200.

49. Defendants' conduct violates Section 5 of the Federal Trade Commission ("FTC") Act, 15 U.S.C. § 45, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. By representing that the XHose is tough, durable, and long-lasting when in fact it is defective, prone to leaking, seeping, and bursting and is not fit for its ordinary and intended purpose as a garden hose, Defendants violated Section 5 of the FTC Act.

50. By violating the FTC Act, Defendants have engaged in unlawful business acts and practices constituting unfair competition within the meaning of CAL. BUS. & PROF. CODE §17200.

Unfair Acts and Practices

51. Any business practice that offends an established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers constitutes an "unfair" practice under the UCL.

52. Defendants have engaged, and continue to engage, in unfair business practices. This conduct includes representing that the XHose is tough, durable, and long-lasting when it is in fact defective, prone to leaking, seeping, and bursting and is not fit for its ordinary and intended purpose as a garden hose.

53. Defendants have engaged in conduct that violates the legislatively declared policies of the FTC Act against committing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. In doing so, Defendants gain an unfair advantage over their competitors, whose advertising must comply with the FTC Act.

54. Defendants' conduct, including misrepresenting the toughness, durability, and longevity of the XHose, is substantially injurious to consumers. Such conduct has caused, and

continues to cause, substantial injury to consumers because consumers would not have purchased the XHoses, or paid such a high price for the XHoses, but for Defendants' false representations regarding the XHoses' toughness, durability, and longevity. Consumers have thus overpaid for the XHoses and such injury is not outweighed by any countervailing benefits to consumers or competition.

55. No benefit to consumers or competition results from Defendants' conduct. Since consumers reasonably rely on Defendants' representations regarding the XHose at the time of purchase, consumers could not have reasonably avoided the injury resulting from the purchase of an XHose that does not actually have the qualities – including toughness, durability, and longevity – represented by Defendants.

56. By committing the acts alleged above, Defendants have engaged in unfair business acts and practices which constitute unfair competition within the meaning of the UCL.

57. As a result of the conduct described above, Defendants have been unjustly enriched at the expense of Bergman, Mammon and Dumone and the California Class.

58. An action for injunctive relief and restitution is specifically authorized under CAL. BUS. & PROF. CODE §17203.

59. Wherefore, Plaintiffs pray for judgment against Defendants, as set forth hereafter.

COUNT IV
VIOLATION OF CALIFORNIA FALSE ADVERTISING LAW
(CAL. BUS. & PROF. CODE § 17500, *et seq.*)
(On Behalf of the California Class)

60. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

61. Plaintiffs Bergman, Mammon and Dumone bring this Count individually and on behalf of the California Class.

62. CAL. BUS. & PROF. CODE § 17500 states: “It is unlawful for any ... corporation ... with intent directly or indirectly to dispose of real or personal property ... to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated ... from this state before the public in any state, in any newspaper or other publication, or any advertising device, ... or in any other manner or means whatever, including over the Internet, any statement ... which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.”

63. Defendants caused to be made or disseminated throughout California and the United States, through advertising materials and the xhose.com website, statements that were untrue or misleading, and which were known, or which by the exercise of reasonable care should have been known to Defendants, to be untrue and misleading to consumers, including Bergman, Mammon and Dumone and the other California Class members.

64. Defendants have violated § 17500 because the misrepresentations and omissions regarding the toughness, durability, and longevity of the XHoses as set forth in this Complaint were material and likely to deceive a reasonable consumer.

65. Bergman, Mammon and Dumone and the other California Class members have suffered an injury in fact, including the loss of money or property, as a result of Defendants’ unfair, unlawful, and/or deceptive practices. In purchasing the XHose, Plaintiffs Bergman, Mammon and Dumone and the other California Class members relied on the misrepresentations and/or omissions of Defendants’ with respect to the toughness, durability, and longevity of the XHoses. Defendants’ representations turned out not to be true because the XHoses are defective, are prone to leaking, seeping, and bursting and are not fit for their ordinary and intended purpose as a garden hose. Had Plaintiffs Bergman, Mammon and Dumone and the other California Class

members known this, they would not have purchased the XHoses and/or paid as much for them. Accordingly, Bergman, Mammon and Dumone and the other California Class members overpaid for the XHoses and did not receive the benefit of their bargain.

66. All of the wrongful conduct alleged herein occurred, and continues to occur, in the conduct of Defendants' business. Defendants' wrongful conduct is part of a pattern or generalized course of conduct that is still perpetuated and repeated, both in the State of California and nationwide.

67. Bergman, Mammon and Dumone, individually and on behalf of the other California Class members, requests that this Court enter such orders or judgments as may be necessary to enjoin Defendants from continuing their unfair, unlawful, and/or deceptive practices and to restore to Bergman, Mammon and Dumone and the other California Class members any money Defendants acquired by unfair competition, including restitution and/or restitutionary disgorgement, and for such other relief set forth below.

COUNT V
VIOLATION OF SONG-BEVERLY CONSUMER WARRANTY ACT
FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY
(CAL. CIV. CODE §§ 1791.1, 1792)
(On Behalf of the California Class)

68. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

69. Plaintiffs Bergman, Mammon and Dumone bring this Count individually and on behalf of the California Class.

70. Bergman, Mammon and Dumone and the other California Class members who purchased the XHose in California are "buyers" within the meaning of Cal. Civ. Code § 1791(b).

71. The XHoses are "consumer goods" within the meaning of Civ. Code § 1791(a).

72. Defendants are “manufacturer[s]” of the XHoses within the meaning of CAL. CIV. CODE § 1791(j).

73. Defendants impliedly warranted to Bergman, Mammon and Dumone and the other California Class members that the XHoses were “merchantable” within the meaning of CAL. CIV. CODE §§ 1791.1(a) & 1792. However, the XHoses do not have the quality that a buyer would reasonably expect.

74. CAL. CIV. CODE § 1791.1(a) states:

‘Implied warranty of merchantability’ or ‘implied warranty that goods are merchantable’ means that the consumer goods meet each of the following:

- (1) Pass without objection in the trade under the contract description.
- (2) Are fit for the ordinary purposes for which such goods are used.
- (3) Are adequately contained, packaged, and labeled.
- (4) Conform to the promises or affirmations of fact made on the container or label.

75. The XHoses would not pass without objection in the trade under the contract description because they are defective, prone to leaking, seeping, and bursting and are not fit for their ordinary and intended purpose as a garden hose.

76. The XHoses are not fit for their ordinary purposes because they are defective and prone to leaking, seeping, and bursting.

77. The XHoses are not adequately contained, packaged and labeled because the product containers, packaging and labeling represent that the XHoses are tough, durable, and long-lasting when they are in fact defective, prone to leaking, seeping, and bursting and are not fit for their ordinary and intended purpose as a garden hose.

78. The XHoses do not conform to the promises or affirmations of fact made on their container or labels because the product containers and labels represent that the XHoses are tough, durable, and long-lasting when they are in fact defective, prone to leaking, seeping, and bursting and are not fit for their ordinary and intended purpose as a garden hose.

79. Defendants breached the implied warranty of merchantability by manufacturing and selling XHoses that would not pass without objection in the trade under the contract description; are not fit for the ordinary purposes for which such goods are used; are not adequately contained, packaged, and labeled; and do not conform to the promises or affirmations of fact made on their containers or labels. Furthermore, these defects have caused Plaintiffs and the other Class members to not receive the benefit of their bargain and have caused the XHoses to depreciate in value.

80. As a direct and proximate result of Defendants' breach of the implied warranty of merchantability, Bergman, Mammon and Dumone and the other California Class members received goods whose falsely marketed condition substantially impairs their value to Bergman, Mammon and Dumone and the other California Class members. Bergman, Mammon and Dumone and the other California Class members have been damaged as a result of the diminished value of the XHoses.

81. Pursuant to CAL. CIV. CODE §§ 1791.1(d) & 1794, Bergman, Mammon and Dumone and the other California Class members are entitled to damages and other legal and equitable relief including, at their election, the purchase price of the XHoses or the overpayment or diminution in value of the XHoses.

82. Pursuant to CAL. CIV. CODE § 1794, Bergman, Mammon and Dumone and the other California Class members are entitled to costs and attorneys' fees.

COUNT VI
VIOLATION OF CALIFORNIA CONSUMER LEGAL REMEDIES ACT
(CAL. BUS. & PROF. CODE § 1750, *et seq.*)
(On Behalf of the California Class)

83. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

84. Plaintiffs Bergman, Mammon and Dumone bring this Count on behalf of himself and the California Class seeking injunctive relief pursuant to the Consumer Legal Remedies Act, CAL. CIV. CODE §§ 1750 *et seq.* (“CLRA”).

85. California Civil Code § 1770(a)(5) specifically prohibits representing that goods “have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have.” § 1770(a)(7) further prohibits representing that goods “are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.” § 1770(a)(9) prohibits “[a]dvertising goods or services with intent not to sell them as advertised.”

86. Defendants have violated the CLRA by representing that the XHose has characteristics that it does not have and that it is of a particular quality when it is of another, and by advertising the XHose with the intent not to sell the product as advertised. Specifically, Defendants represented and advertised that the XHose is tough, durable, and long-lasting, when in fact the XHose is defective, prone to leaking, seeping, and bursting, and is not fit for its ordinary and intended use as a garden hose.

87. Defendants were and are under a duty to Plaintiffs and the Class to disclose the defective and unreasonably dangerous nature of XHoses because:

- a. Defendants were and are in a superior position to know the true state of facts about the various defects plaguing XHoses, as well as their unreasonably dangerous nature;
- b. Plaintiffs and the Class could not reasonably have been expected to learn or

discover that the XHoses suffer from significant and dangerous design and/or manufacturing defects until such defects manifest;

- c. Defendants knew that Plaintiffs and the Class could not reasonably have been expected to learn or discover the defective nature of XHoses until manifestation of the defect; and
- d. Defendants actively concealed these defects by providing to Plaintiffs and Class Members similarly defective replacement products until their 90-day money-back guarantee had expired.

88. In failing to disclose that XHoses are inherently defective, unreasonably dangerous and unsuited for their intended use, Defendant has and continues to knowingly and intentionally conceal material facts and breach its duty not to do so.

89. Defendants also engaged in deceptive conduct by providing Plaintiffs and Class members with similarly defective replacement hoses in lieu of a refund until the 90-day refund period had expired. Defendants' scheme of active concealment ensured that the refund period expired by the time Plaintiffs and the Class realized XHoses are inherently defective, thereby allowing Defendants to unlawfully retain the proceeds from its scheme.

90. The facts affirmatively misrepresented and/or concealed or not disclosed by Defendants to Bergman, Mammon and Dumone and the California Class are material in that a reasonable consumer would have considered them important in deciding whether to purchase the XHose. Had Bergman, Mammon and Dumone and the Class known about the defective nature of the XHose, they would not have purchased them. Bergman, Mammon and Dumone and the other California Class members' money damages were proximately caused by Defendants' fraudulent and deceptive business practices

91. Bergman, Mammon and Dumone and the California Class Members reasonably relied upon those material misrepresentations.

92. Pursuant to California Civil Code §§ 1780 and 1781, Bergman, Mammon and

Dumone and the California Class Members hereby request certification of the California Class, injunctive relief, and attorneys' fees, costs and expenses.

COUNT VII
VIOLATION OF THE DELAWARE CONSUMER FRAUD ACT
(DEL. CODE TIT. 6, § 2511, *et seq.*)
(On Behalf of the Delaware Class)

89. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

90. Plaintiff Lano brings this count individually and on behalf of the members of the Delaware Class defined above.

91. The Delaware Consumer Fraud Act (“DCFA”), DEL. CODE TIT. 6, § 2511, *et seq.* makes unlawful “[t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby.”

92. Defendants’ misrepresentations and material omissions regarding the defective nature of the XHose constitute deceptive, fraudulent, and false acts in violation of the DCFA.

93. Defendants’ deceptive, false, and fraudulent acts and omissions took place in the course of the sale and/or advertisement of merchandise.

94. Defendants intended for Lano and the Delaware Class to rely on these deceptive, false, and fraudulent acts and omissions when Lano and the Delaware Class purchased the XHose.

95. Lano and the Delaware Class have suffered injuries in fact and actual damages, resulting from Defendants' violation of the DCFA. These injuries are of the type the DCFA was designed to prevent, and are the direct and proximate result of Defendants' unlawful conduct.

COUNT VIII
**VIOLATION OF THE FLORIDA DECEPTIVE
AND UNFAIR TRADE PRACTICES ACT**
(FLA. STAT. § 501.201, *et seq.*)
(On Behalf of the Florida Class)

96. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

97. Plaintiff Finnk brings this count individually and on behalf of the members of the Florida Class defined above.

98. The Florida Deceptive and Unfair Trade Practices Act ("DUTPA"), FLA. STAT. § 501.201, *et seq.* makes unlawful any "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce."

99. Defendants' misrepresentations and material omissions regarding the defective nature of the XHose constitute unconscionable, unfair, and deceptive acts or practices in violation of the DUTPA.

100. Defendants' unconscionable, unfair, and deceptive acts and omissions took place in the conduct of trade or commerce.

101. Defendants intended for Finnk and the Florida Class to rely on these unconscionable, unfair, and deceptive acts and omissions when Finnk and the Florida Class purchased the XHose.

102. Finnk and the Florida Class have suffered injuries in fact and actual damages, resulting from Defendants' violation of DUTPA. These injuries are of the type the DUTPA was designed to prevent, and are the direct and proximate result of Defendants' unlawful conduct.

COUNT IX
**VIOLATION OF THE TEXAS DECEPTIVE TRADE
PRACTICES AND CONSUMER PROTECTION ACT,**
(TEX. BUS. & COM. CODE § 17.41, *et seq.*)
(On Behalf of the Texas Class)

103. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

104. Plaintiff Listander brings this count individually and on behalf of the members of the Texas Class defined above.

105. The Texas Deceptive Trade Practices and Consumer Protection Act ("DTPA"), TEX. BUS. & COM. CODE § 17.41, *et seq.* makes unlawful any "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce."

106. Defendants' misrepresentations and material omissions regarding the defective nature of the XHose constitute false, misleading, and deceptive acts or practices in violation of the DTPA.

107. Defendants' false, misleading, and deceptive acts and omissions took place in the course of trade or commerce.

108. Defendants intended for Listander and the Texas Class to rely on these false, misleading, and deceptive acts and omissions when Listander and the Texas Class purchased the XHose.

109. Listander and the Texas Class have suffered injuries in fact and actual damages, resulting from Defendants' violation of DTPA. These injuries are of the type the DTPA was designed to prevent, and are the direct and proximate result of Defendants' unlawful conduct.

COUNT X
VIOLATION OF WISC. STAT. ANN. § 100.18: FRAUDULENT REPRESENTATIONS
(On Behalf of the Wisconsin Class)

110. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

111. Plaintiff Carton brings this count individually and on behalf of the members of the Wisconsin Class defined above.

112. Wisconsin Statutes Annotated § 100.18 makes it unlawful to, *inter alia*, make any "advertisement, announcement, statement or representation of any kind" in connection with the sale of merchandise that contains "any assertion, representation or statement of fact which is untrue, deceptive or misleading."

113. Defendants' misrepresentations and material omissions regarding the defective nature of the XHose constitute untrue, deceptive, and misleading assertions, representations, and statements of fact in violation of WISC. STAT. ANN. § 100.18.

114. Defendants' untrue, deceptive, and misleading assertions, representations, and statements of fact took place in connection with the sale of merchandise.

115. Defendants intended for Carton and the Wisconsin Class to rely on these untrue, deceptive, and misleading assertions, representations, and statements of fact when Plaintiff Carton and the Wisconsin Class purchased the XHose.

116. Carton and the Wisconsin Class have suffered injuries in fact and actual damages resulting from Defendants' violation of WISC. STAT. ANN. § 100.18. These injuries are of the

type WISC. STAT. ANN. § 100.18 was designed to prevent, and are the direct and proximate result of Defendants' unlawful conduct.

COUNT XI
BREACH OF EXPRESS WARRANTY
(On Behalf of the Nationwide Class or, Alternatively, Each of the State Classes)

117. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

118. Plaintiffs bring this count on behalf of themselves and the members of the Class against Defendants.

119. Defendants provided all purchasers of XHoses with the express warranties described herein, including warranties concerning the durability and functionality of the XHose, as well as Defendants' refund policy, all of which became part of the basis of the bargain. Accordingly, Defendants' warranties are express warranties.

120. The defects plaguing XHoses prevent them from functioning as expressly promised or cause them to fail prematurely, and are covered by these warranties.

121. Defendants breached these warranties by selling inherently defective XHoses to Plaintiffs and the Class and refusing to honor its warranties by instead providing them with similarly defective XHoses in lieu of the promised full refund.

122. Plaintiffs and members of the Class notified Defendants of the breach within a reasonable time, and/or were not required to do so because affording Defendants a reasonable opportunity to cure its breach of written warranty would have been futile. Defendants also know of the defect and yet have chosen to conceal it and to fail to comply with their warranty obligations.

123. As a direct result of Defendants' breach, Plaintiffs and the Class bought XHoses they otherwise would not have and did not receive the benefit of their bargain. Some members of the Class also have suffered damages by shipping failed XHoses back to Defendants at their own expense, only to receive similarly defective products in return.

124. Defendants' attempt to disclaim or limit these express warranties is unconscionable and unenforceable under the circumstances alleged herein. Specifically, Defendants' 90-day warranty limitation is unenforceable because it knowingly sold a defective product without informing consumers about the defect.

125. The time limits contained in Defendants' warranty period are unconscionable and inadequate to protect Plaintiffs and members of the Class. Among other things, Plaintiffs and Class members had no meaningful choice in determining these time limitations, the terms of which unreasonably favored Defendants. A gross disparity in bargaining power existed between Defendants and the Class, and Defendants knew or should have known that XHoses were defective at the time of sale and would fail well before expiration of their useful lives.

126. Plaintiffs and the Class have complied with all obligations under the warranty, or otherwise have been excused from performance of said obligations as a result of Defendants' conduct described herein.

COUNT XII
BREACH OF THE IMPLIED WARRANTY OF FITNESS FOR A
PARTICULAR PURPOSE
(On Behalf of the Nationwide Class or, Alternatively, Each of the State Classes)

127. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

128. Plaintiffs bring this count on behalf of themselves and the members of the Class against Defendants.

129. At the time of purchase, Defendants had reason to know of Plaintiffs' and the Class members' particular purpose for purchasing the XHose.

130. Plaintiffs and the Class members relied on Defendants to design, manufacture, and properly test a suitable gardening hose product, thereby creating an implied warranty that the goods would be fit for such purpose.

131. The defective XHoses were not fit for these purposes, thereby causing injuries to Plaintiffs and the Class members.

COUNT XIII
BREACH OF THE IMPLIED WARRANTY OF
MERCHANTABILITY
(On Behalf of the Nationwide Class or, Alternatively, Each of the State Classes)

132. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

133. Plaintiffs bring this count on behalf of themselves and the members of the Class against Defendants.

134. At all times mentioned herein, Defendants manufactured and sold the XHose, and prior to the time it was purchased by Plaintiffs and the putative Class, Defendants impliedly warranted to Plaintiffs that the XHose was of merchantable quality and fit for the use for which it was intended.

135. The XHoses were unfit for their intended use and were not of merchantable quality, as warranted by Defendants, but instead contained a manufacturing or design defect. Specifically, the XHose suffers from a design and/or manufacturing defect because it is prone to leaking, bursting, seeping, and dripping.

136. As a direct and proximate result of the breach of said warranties, Plaintiffs and the members of the Class suffered and will continue to suffer losses as alleged herein.

COUNT XIV
COMMON LAW FRAUD
(On Behalf of the Nationwide Class or, Alternatively, Each of the State Classes)

137. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

138. Plaintiffs bring this count on behalf of themselves and the members of the Class against Defendants.

139. Defendants made material omissions and misrepresentations concerning a presently existing or past fact. For example, Defendants misrepresented the quality, characteristics and durability of the XHose, and did not fully and truthfully disclose to its customers the inherently defective nature of the XHose, which was not readily discoverable until after purchase, often after Defendants' refund period had expired. As a result, Plaintiffs and Class members were fraudulently induced to purchase the XHose in an inherently defective condition that renders it unsuitable for its intended and ordinary purpose.

140. Defendants made these material omissions and misrepresentations with knowledge of their falsity, and with the intent that Plaintiffs and the Classes rely on them.

141. Plaintiffs and the Classes reasonably relied on these misrepresentations and omissions, and suffered damages as a result.

COUNT XV
BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING
(On Behalf of the Nationwide Class or, Alternatively, Each of the State Classes)

142. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

143. Plaintiffs bring this count on behalf of themselves and the members of the Class against Defendants.

144. Every contract contains an implied covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing is an independent duty and may be breached even if there is no breach of a contract's express terms.

145. Defendants breached the covenant of good faith and fair dealing by, *inter alia*, selling inherently defective XHoses that Defendants knew were unsuitable for their intended and ordinary purpose, and preventing Plaintiffs and Class members from securing a refund of monies paid for the XHose by providing similarly defective replacement hoses until after the refund period had expired.

146. Defendants acted in bad faith and/or with a malicious motive to deny Plaintiffs and the Class members some benefit of the bargain originally intended by the parties, thereby causing them injuries in an amount to be determined at trial.

COUNT XVI
UNJUST ENRICHMENT / COMMON LAW CLAIM FOR RESTITUTION
(On Behalf of the Nationwide Class or, Alternatively, Each of the State Classes)

147. Plaintiffs and the Class incorporate by reference each preceding and succeeding paragraph as though fully set forth herein.

148. Plaintiffs bring this count on behalf of themselves and the members of the Class against Defendants.

149. Because of their wrongful acts and omissions, Defendants charged a higher price for XHose than its true value and obtained monies which rightfully belong to Plaintiffs and the Class.

150. Defendants enjoyed the benefit of increased financial gains, to the detriment of Plaintiffs and other Class members. It would be inequitable and unjust for Defendants to retain these wrongfully obtained profits.

151. Plaintiffs, therefore, seek an order requiring Defendants to make restitution to them and other members of the Class.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray, on behalf of themselves and members of the Class, that this Court:

- A. determine that the claims alleged herein may be maintained as a class action under Rule 23(a), (b)(2), and/or (b)(3) of the Federal Rules of Civil Procedure, and issue order certifying the Class or Classes as defined above;
- B. award all actual, general, special, incidental, statutory, punitive and consequential damages to which Plaintiffs and Class members are entitled;
- C. award pre-judgment and post-judgment interest on such monetary relief;
- D. grant appropriate injunctive relief and/or declaratory relief as the Court may deem reasonable; and
- E. award reasonable attorneys' fees and costs; and grant such further and other relief that this Court deems appropriate.

JURY DEMAND

Plaintiffs, on behalf of themselves and the putative class, demand a trial by jury on all issues so triable.

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