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**THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

KRISTINE MAIN, on behalf of  
herself and all others similarly  
situated,

Plaintiff,

vs.

GATEWAY GENOMICS, LLC dba  
SNEAKPEEK; and DOES 1 through  
20, inclusive, and each of them,

Defendants.

Case No. '15CV2945 AJB WVG

**CLASS ACTION**

**COMPLAINT FOR DAMAGES  
AND EQUITABLE RELIEF FOR  
VIOLATIONS OF:**

- (1) Violations of Cal. *Bus. Prof. Code* §§ 17200, *et seq.* ("UCL");
- (2) Violations of Cal. *Bus. Prof. Code* §§ 17500, *et seq.* ("FAL");
- (3) Fraud;
- (4) Breach of Express Warranty;
- (5) Breach of Implied Warranty of Merchantability;
- (6) Breach of Implied Warranty of Fitness for a Particular Purpose;

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- (7) Unjust Enrichment;  
 (8) Violations of California Consumer Legal Remedies Act, Cal. *Civ. Code* §§ 1750, *et seq.* (“CLRA”);  
 and  
 (9) Texas Deceptive Trade Practices-Consumer Protection Act (“DTPA”), Tex. *Bus. & Com. Code* § 17.50.

**DEMAND FOR JURY TRIAL**

**DECLARATION OF KRISTINE MAIN**

Plaintiff Kristine Main (“Plaintiff”), on behalf of herself and all others similarly situated, alleges the following upon information and belief based upon personal knowledge, investigation of counsel and published reports:

**NATURE OF THE CASE**

1. Plaintiff brings this action for herself and others consumers nationwide as a class action seeking damages and any other available legal or equitable remedies for consumers who purchased the SneakPeek Early Gender Test.

**JURISDICTION & VENUE**

2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because defendant GATEWAY GENOMICS, LLC dba SNEAKPEEK (“Defendant” or “SneakPeek”) is a limited liability company with its principal place of business in La Jolla, California. Plaintiff is a resident of Ohio and seeks to represent a nationwide class which, when aggregated among a proposed class in the thousands, exceeds the \$5,000,000.00 threshold for federal court jurisdiction. Therefore, both diversity jurisdiction and the damages threshold under the Class Action Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.

3. Venue is proper in the United States District Court for the Southern District of California pursuant to 28 U.S.C. §§ 1391(b) because Defendants do business within the State of California and the County of San Diego. Furthermore, SneakPeek's principal place of business is within the County of San Diego pursuant to the "nerve center" test adopted by the United States Supreme Court in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), so this venue is convenient to the parties and is an appropriate venue for a civil action for damages and injunctive relief.

### **PARTIES**

4. Plaintiff, Kristine Main ("Plaintiff"), is a natural person residing in Ohio. At the time of Plaintiff's purchase of the SneakPeek Test, Plaintiff resided in Texas.

5. Defendant GATEWAY GENOMICS, LLC dba SNEAKPEEK ("Defendant" or "SneakPeek") is a Delaware limited liability corporation with its principal place of business in La Jolla, California. Plaintiff is informed and believes that SneakPeek does business throughout the State of California, including the County of San Diego. SneakPeek may be served through its registered agent for service of process Incorp Services, Inc., 1201 Orange Street, Suite 600, One Commerce Center, Wilmington, Delaware 19899.

6. The above named Defendants, and their subsidiaries and agents, are collectively referred to as "Defendants." The true names and capacities of the Defendants sued herein as DOES 1 through 20, inclusive, are currently unknown to Plaintiff, who therefore sues such Defendants by fictitious names. Each of the Defendants designated herein as a DOE is legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the Complaint to reflect the true names and capacities of the DOE Defendants when such identities become known.

7. Plaintiff is informed and believes and thereon alleges that at all

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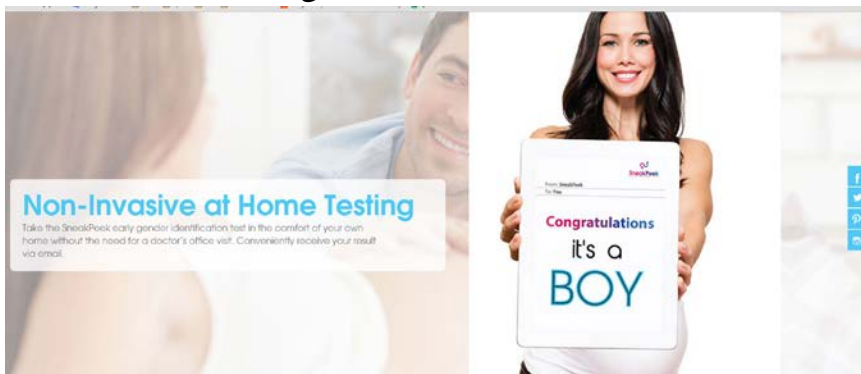
1 relevant times, each and every Defendant was acting as an agent and/or  
 2 employee of each of the other Defendants and was the owner, agent, servant,  
 3 joint venturer and employee, each of the other and each was acting within the  
 4 course and scope of its ownership, agency, service, joint venture and  
 5 employment with the full knowledge and consent of each of the other  
 6 Defendants. Plaintiff is informed and believes and thereon alleges that each of  
 7 the acts and/or omissions complained of herein was made known to, and ratified  
 8 by, each of the other Defendants.

9 8. At all times mentioned herein, each and every Defendant was the  
 10 successor of the other and each assumes the responsibility for each other's acts  
 11 and omissions.

### 12 **FACTUAL ALLEGATIONS**

13 9. Defendant advertises that "SneakPeek is the early detection gender  
 14 test that has been designed to be taken in the stress free environment of your own  
 15 home. Within 24 hours of receiving your sample we will identify the gender of  
 16 your baby. Inside the kit you will find everything you need to collect your  
 17 sample. Our state of the art lab will process your sample and detect the presence  
 18 of fetal DNA and determine the gender of your baby with 99% accuracy."

19 10. Defendant claims its test utilizes the natural process of shared fetal  
 20 circulating DNA in the mother and from a drop of blood can determine the  
 21 baby's gender as early as nine weeks into a pregnancy. SneakPeek advertises its  
 22 "Non-Invasive at Home Testing" as follows:



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11. Plaintiff purchased the SneakPeek Early Gender Test (the “Test”) on February 5, 2015. This was after Plaintiff reviewed and relied on the representations from Defendant’s website and marketing materials and the statements that it was 99 percent accurate in determining the gender of a baby. SneakPeek claimed it could make this determination earlier than a sonogram. Plaintiff did not wish to wait for a sonogram in order to know the sex of her unborn child, and was willing to pay \$169 for a non-invasive test that could give her the same results as a sonogram before a sonogram could do so. In other fora, Defendants contend the test is 98.8 percent accurate if the child is going to be a boy and 94.8 percent of the time if the unborn child is going to be a girl.

12. The touted ability of the Test to predict the sex of her unborn child prior to a sonogram being able to do so; the ease of obtaining quick results with the Test; and the advertised high accuracy rates of the Test were all material to Plaintiff in purchasing the Test.

13. SneakPeek charged Plaintiff at least \$169 for the Fast Track service to learn her baby’s gender in under 72 hours. Defendant also charges \$99 for results in five to seven days. The SneakPeek Early Gender Test arrived the following day in El Paso, Texas.

14. Plaintiff was fourteen weeks pregnant at the time of taking the test. SneakPeek claims a woman must be at least nine weeks pregnant at the time of the test.

15. On February 9, 2015, Plaintiff received an email from SneakPeek Team (sneakpeek@sneakpeektest.com) with the subject “Your SneakPeek Results Are In!” The email is below:

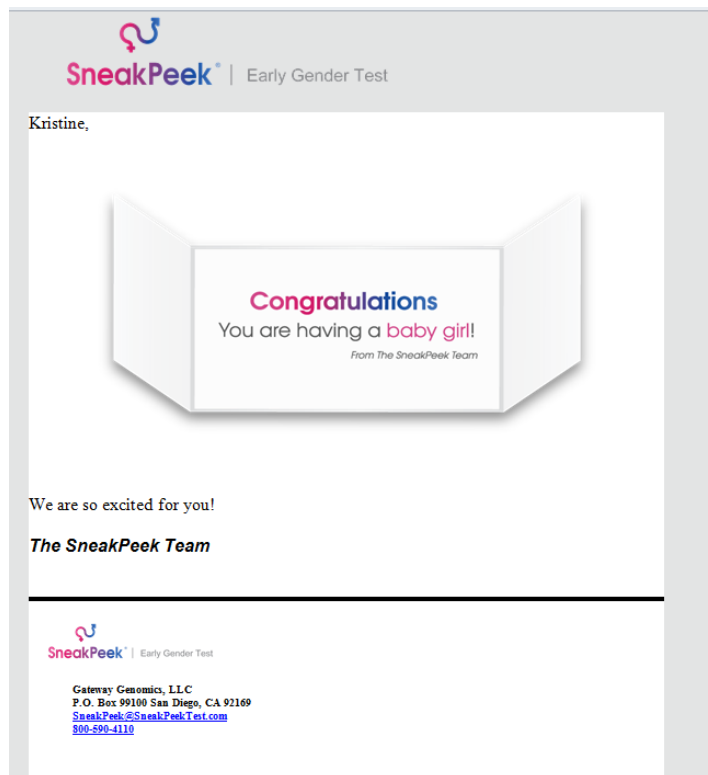
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16. On July 25, 2015, Plaintiff gave birth to a baby boy.

17. Plaintiff is not the only person to rely on SneakPeek's 99 percent accuracy claim and pay Defendants money for a product that is not anywhere near as accurate as promised. Consumers are paying upwards of a \$100 to find out the gender of their child before a sonogram. The results are not 99 percent accurate but much closer to a flip of a coin. A sampling of online complaints are below:



**No Title Available**

27 of 30 people found the following review helpful



**STAY FAR FAR AWAY.**, February 21, 2015

Sneak peek is a a SCAM! Once you get your results GOOD LUCK getting in touch with them.. It's impossible! Also don't try to write anything on their Facebook page because they will BLOCK you. What's wrong sneak peek?! Truth

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1 hurt so you write fake reviews and hide things on Facebook?! They claim 99%  
 2 accuracy yet can't even manage 60% correct! SCAM SCAM SCAM. Look up the  
 3 pink or blue gender test this is IDENTICAL! I bought this test when it first came  
 4 out before others received any confirmations. I wish I didn't purchase because it  
 5 doesn't ease your mind or even GUESS CORRECTLY. There will be PLENTY  
 6 of women looking for refunds in August and I'm sure this company will NOT be  
 7 refunding which wouldn't surprise me. STAY FAR FAR FAR AWAY from this  
 8 company. You'll have better accuracy peeing on some baking soda.

9  
 10 Also for the "REVIEWER" AKA sneakpeek who said baby center women don't  
 11 know what they're talking about... Seriously? We all took the test together and  
 12 are getting REAL BLOODWORK and ultrasound confirmations of your test  
 13 being WRONG. Can't argue with REAL medical tests.

14 \*\*\*\*

15 ★★★★★ they pulled from selling on Amazon months ago because of all the  
 16 bad reviews. Now it's back with tons of fake ..., October 22, 2015

17 **This review is from: SneakPeek - Early Gender Prediction DNA Test**  
 18 **(Health and Beauty)**

19 I took this test back when it first came on the scene. It told me BOY. I'm  
 20 currently holding in my hands a baby GIRL. Save your money this test is a  
 21 JOKE, they pulled from selling on Amazon months ago because of all the bad  
 22 reviews. Now it's back with tons of fake reviews. SAVE YOUR MONEY IT  
 23 DOESNT WORK. Also, for such an honest company, why would you BLOCK  
 24 people on FACEBOOK for expressing their opinions? Junk.

25 \*\*\*\*

26 1.0 out of 5 stars Love the idea but I think it is really more ...

27 By Anna on November 19, 2015

28 Size: SneakPeek



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1 Did not give me accurate results. I did everything correctly. Tested at 15 weeks.  
 2 Got a girl result. Amniocentesis along with ultrasound says boy. You have to  
 3 send in a copy of birth certificate to get a refund. Love the idea but I think it is  
 4 really more of a coin flip.

5 [Comment](#) Was this review helpful to you? [Yes](#) [No](#) [Report abuse](#)

6 \*\*\*\*\*

7 [1.0 out of 5 stars](#) incorrect results, not accurate for me.

8 By [Amazon Customer](#) on November 6, 2015

9 [Size: SneakPeek](#)

10 Incorrect results. Not accurate for me. Purchased last year and had my baby in  
 11 August. Sneak peek was wrong

12 \*\*\*\*\*

13 By [Rachel Hubbard](#) on November 6, 2015

14 [Size: SneakPeek FastTrack Verified Purchase](#)

15 Told me the wrong gender. Told me I was having a boy and I have a beautiful  
 16 daughter who is wearing a lot of little boy clothes.

17 \*\*\*\*\*

18 By [N. Cooper](#) on October 22, 2015

19 [Size: SneakPeek](#)

20 I ordered this in January 2015 from Amazon. I took it just like the directions  
 21 stated and received my results. We were over the moon excited! Then I found a  
 22 Baby Center group where other women had bought and used the test. Most were  
 23 a couple of weeks ahead of me and they started getting their results and Sneak  
 24 Peek was only right 60% of the time. I was floored and felt completely stunned  
 25 that I paid \$99 just for a guess. I left a review on Amazon at that time and  
 26 eventually SneakPeek shut down Amazon sales. Today I was looking for a baby  
 27 product and what do I see--Sneak Peek is active on Amazon again!

28 Ladies, please do yourself a favor and just wait the extra 6 weeks (16 weeks) and

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1 getting a gender determination ultrasound. Do not put yourself through the stress  
 2 (like I did) of waiting to see if the Sneak Peek guess result is correct.

3 \*\*\*\*\*

4 By [Kayla](#) on October 22, 2015

5 [Size: Sneak Peek](#)

6 Was told I was having a baby girl according to sneak peek. My 20 weeks  
 7 ultrasound showed me that I was having a boy. My delivery back in July  
 8 PROVED MY BABY WAS A BOY!!! so frustrating and I have let to receive my  
 9 guaranteed refund.

10 \*\*\*\*\*

11 [Jennifer M.](#) on October 21, 2015

12 [Size: Sneak Peek](#)

13 I bought this test directly from Sneak Peek back in January 2015. I found out  
 14 about the test on a Babycenter.com forum. I and a bunch of other ladies in the  
 15 August 2015 Babycenter group took the test and then waited on our ultrasounds  
 16 to confirm. After tallying our SP results compared to the babies we birthed and  
 17 SP was just about 60% accurate. All of our ultrasound results were correct, but  
 18 SP, not so much! The main advantage I got from taking this test was meeting a  
 19 lot of other super awesome ladies online. We all bonded over being gullible  
 20 enough to believe this test. So if you have \$99 to blow on a 60% chance, go for it  
 21 - you may meet a group of awesomely gullible ladies like yourself :) We even  
 22 have a Facebook group called "SP Sucks."

23  
 24 Did you know that SP used to be sold on Amazon prior to now? Nope, because  
 25 they had to pull the product down because we flooded it with so many negative  
 26 reviews and video proof of them being wrong. We'll do it again in an effort to  
 27 save all of you from wasting your money.

28 \*\*\*\*\*

By [Amazon Customer](#) on October 21, 2015

[Size: SneakPeek](#)

Great packaging, cool product, too bad it was incorrect. SneakPeek said I was having a boy, yet I gave birth to a beautiful, healthy baby girl.

\*\*\*\*

On the message boards at community.babycenter.com, there was a group for women expecting in August 2015. Many purchased SneakPeek. The results were not 99 percent accurate. They were closer to 60 percent accurate.

20. Consumers are fooled into believing that the Test scientifically adduces the gender of their unborn babies with 99 percent accuracy, when in fact the Test produces a result akin to the proverbial coin flip. SneakPeek is aware of its Test's inaccuracies.

21. Furthermore, SneakPeek challenges the accuracy of sonograms via its twitter feed:



### **CLASS ALLEGATIONS**

22. Plaintiff brings this action pursuant to Rule 23(a) and Rule (b)(3) of the Federal Rules of Civil Procedure, or pursuant to Rule 23(a) and Rule (b)(2)

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of the Federal Rules of Civil Procedure and/or other applicable law, on behalf of herself and all others similarly situated, as a member of the proposed class (hereafter "the Class") defined as follows:

All consumers nationwide who purchased the SneakPeek Early Gender Test. Plaintiff represents, and is a member of the Class, consisting of All persons within the United States who received any telephone call from Defendant to said person's cellular telephone made through the use of any automatic telephone dialing system or an artificial or prerecorded voice and such person had not previously not provided their cellular telephone number to Defendant within the four years prior to the filing of this Complaint.

23. Excluded from the Class are governmental entities, Defendants, any entity in which Defendants have a controlling interest, and Defendants' officers, directors, affiliates, legal representatives, employees, co-conspirators, successors, subsidiaries, and assigns. Also excluded from the Class are any judges, justices or judicial officers presiding over this matter and the members of their immediate families and judicial staff.

24. This action is properly maintainable as a class action. This action satisfies the numerosity, typicality, adequacy, predominance and superiority requirements for a class action.

25. **Numerosity:** The proposed Class is so numerous that individual joinder of all members is impracticable. Due to the nature of the trade and commerce involved, Plaintiff does not know the number of members in the Class, but believes the Class members number in the thousands, if not more. Plaintiff alleges that the Class may be ascertained by the records maintained by Defendants.

26. Plaintiff and members of the Class were harmed by the acts of

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Defendant(s) in at least the following ways: Defendant(s) illegally marketed the Test as being 99% accurate causing Plaintiff and Class members to incur certain charges for the Test which Plaintiff and Class members would not have otherwise paid and thus damaging Plaintiff and Class members.

27. **Common Questions of Law and Fact Predominate:** There are only a few legal and factual issues to determine if there is liability for each of those questions of law and fact, common issues to the Class predominate over any questions that may affect individual Class members, in that the claims of all Class members for each of the claims herein can be established with common proof. Common questions of fact and law include, but are not limited to, the following:

- (a) Whether the SneakPeek Early Gender Test is 99% accurate in the real world, as claimed in SneakPeek's marketing;
- (b) Whether the SneakPeek Early Gender Test is 99% accurate in the laboratory, as claimed in SneakPeek's marketing;
- (c) Whether the SneakPeek Early Gender Test is based on significant scientific research, as claimed in SneakPeek's marketing;
- (d) Whether the SneakPeek Early Gender Test can accurately predict an unborn baby's gender within nine weeks of conception, as claimed in SneakPeek's marketing;
- (e) Whether Defendant is liable as a result;
- (f) The nature and extent of restitution and/or damages and other remedies to which the conduct of SneakPeek entitles the Class; and
- (g) Whether the Defendant(s) should be enjoined from engaging in such conduct in the future.

28. **Typicality:** Plaintiff's claims are typical of the claims of members

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1 of the Class, as Plaintiff was subject to the same common course of conduct by  
 2 Defendant(s) as all Class members. The injuries to each member of the Class  
 3 were caused directly by Defendant(s)' wrongful conduct as alleged herein.

4       **29. Adequacy of Representation:** Plaintiff will fairly and adequately  
 5 represent and protect the interests of the Class. Plaintiff has retained counsel  
 6 with substantial experience in handling complex class action litigation. Plaintiff  
 7 and his counsel are committed to prosecuting this action vigorously on behalf of  
 8 the Class and have financial resources to do so.

9       **30. Superiority of Class Action:** A class action is superior to other  
 10 available methods for the fair and efficient adjudication of the present  
 11 controversy. Class members have little interest in individually controlling the  
 12 prosecution of separate actions because the individual damage claims of each  
 13 Class member are not substantial enough to warrant individual filings. In sum,  
 14 for many, if not most, Class members, a class action is the only feasible  
 15 mechanism that will allow them an opportunity for legal redress and justice.  
 16 Plaintiff is unaware of any litigation concerning the present controversy already  
 17 commenced by members of the Class. The conduct of this action as a class  
 18 action in this forum, with respect to some or all of the issues presented herein,  
 19 presents fewer management difficulties, conserves the resources of the parties  
 20 and of the court system, and protects the rights of each Class member.

21       **31.** Moreover, individualized litigation would also present the potential  
 22 for varying, inconsistent, or incompatible standards of conduct for Defendants,  
 23 and would magnify the delay and expense to all parties and to the court system  
 24 resulting from multiple trials of the same factual issues. The adjudication of  
 25 individual Class members' claims would also, as a practical matter, be  
 26 dispositive of the interests of other members not parties to the adjudication, and  
 27 could substantially impair or impede the ability of other Class members to  
 28 protect their interests.

### FIRST CAUSE OF ACTION

**(Against All Defendants)**

34. California’s Unfair Competition Law (“UCL”) prohibits acts of “unfair competition,” including any unlawful, unfair, fraudulent or deceptive business act or practice as well as “unfair, deceptive, untrue or misleading advertising.”

(a) Violating the California False Advertising Law, Cal. *Bus. & Prof.* Code §§ 17500, *et seq.*, by disseminating or causing to be disseminated untrue or misleading advertising;

(b) Violating the California Consumer Legal Remedies Act (“CLRA”), Cal. *Civ. Code* §§ 1750, *et seq.*, by representing that the Test has characteristics and benefits that it does not have, representing that the Test is of a particular standard when it is not and by advertising the Test with an intent not to sell it as advertised. disseminating or causing to be disseminated untrue or misleading advertising;

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(c) Committing common law fraud;

(d) Violating the other statutes and common law causes of action as alleged in the instant Complaint.

36. Defendant also violated and continues to violate the UCL through one or more of the following unfair and/or fraudulent practices:

(a) Selling to Plaintiff and Class members a product not suited for its advertised use; and

(b) Failing to disclose to Plaintiff and Class members that the Tests sold do not perform at the advertised accuracy rate.

37. Plaintiff relied on Defendant's conduct to her detriment. As set forth above, Plaintiff visited Sneakpeek's website prior to purchasing the Test and relied upon Sneakpeek's representations regarding the high accuracy rates of the Test and the ability of the Test to predict the sex of unborn children as early as nine weeks into the pregnancy, prior to a sonogram being able to do so, through a simple non-invasive blood test. These representations were material to Plaintiff, and she relied on them to her detriment in purchasing the Test. Plaintiff also relied on similar representations regarding the ability of the Test to predict the gender of unborn children on the Test's packaging.

38. As a direct and proximate result of Defendant's unlawful, unfair, and fraudulent business practices, Plaintiff and the members of the Class have suffered injury and have lost money or property.

39. Plaintiff respectfully requests that the Court require Defendant to provide restitution to Plaintiff and Class members, award Plaintiff and Class members reasonable attorneys' fees and expenses, and award such other relief as the Court may deem just and proper.

40. The unlawful, unfair, and fraudulent business practices described herein present a continuing threat to members of the Class and members of the general public in that Defendant continues to engage in these practices, and will



1 not cease doing so unless and until forced to do so by this Court. Defendant's  
2 conduct will continue to cause irreparable injury to the Subclass unless enjoined.

### 3 **SECOND CAUSE OF ACTION**

4 **(VIOLATION OF THE CALIFORNIA FALSE ADVERTISING LAW,**

5 **CAL. BUS. & PROF. CODE §§ 17500, *ET SEQ.*)**

6 **(Against All Defendants)**

7 41. Plaintiff hereby incorporates by reference and re-alleges each and  
8 every allegation set forth in each and every preceding paragraph of this  
9 Complaint, as though fully set forth herein.

10 42. California's False Advertising Law, Cal. *Bus. & Prof. Code* §§  
11 17500, *et seq.* ("FAL"), provides that "[i]t is unlawful for any . . . corporation . . .  
12 with intent . . . to dispose of . . . personal property . . . to induce the public to  
13 enter into any obligation relating thereto, to make or disseminate or cause to be  
14 made or disseminated . . . from this state before the public in any state, in any  
15 newspaper or other publication, or any advertising device, or by public outcry or  
16 proclamation, or in any other manner or means whatever, including over the  
17 Internet, any statement . . . which is untrue or misleading, and which is known, or  
18 which by the exercise of reasonable care should be known, to be untrue or  
19 misleading . . . ."

20 43. Defendant's representations, including statements made on  
21 Defendant's website, packaging, and all other written and oral materials  
22 disseminated by Defendant to promote its Test, constitute advertising for  
23 purposes of this cause of action.

24 44. Such advertising contained statements which were false, misleading,  
25 or which omitted material information which Defendant was under a duty to  
26 disclose and which were known or should have been known to Defendant to be  
27 false, misleading, or deceptive.

28 45. Plaintiff relied on Defendant's conduct to her detriment. As set forth

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1 above, Plaintiff visited SneakPeek's website prior to purchasing the Test and  
 2 relied upon SneakPeek's representations regarding the high accuracy rates of the  
 3 Test and the ability of the Test to predict the sex of unborn children as early as  
 4 nine weeks into the pregnancy, prior to a sonogram being able to do so, through a  
 5 simple non-invasive blood test. These representations were material to Plaintiff,  
 6 and she relied on them to her detriment in purchasing the Test. Plaintiff also  
 7 relied on similar representations regarding the ability of the Test to predict the  
 8 gender of unborn children on the Test's packaging.

9 46. As a direct and proximate result of Defendant's misleading  
 10 advertising, Plaintiff and the members of the Class have suffered injury in fact  
 11 and have lost money or property.

12 47. The misleading advertising described herein presents a continuing  
 13 threat to the Class and members of the public in that Defendant persists and  
 14 continues to engage in these practices, and will not cease doing so unless and  
 15 until forced to do so by this Court. Defendant's conduct will continue to cause  
 16 irreparable injury to the Subclass unless enjoined or restrained.

### 17 **THIRD CAUSE OF ACTION**

#### 18 **(FRAUD)**

#### 19 **(Against All Defendants)**

20 48. Plaintiff hereby incorporates by reference and re-alleges each and  
 21 every allegation set forth in each and every preceding paragraph of this  
 22 Complaint, as though fully set forth herein.

23 49. Defendant made the following material representations to Plaintiff  
 24 and Class members in writing: that the Test was 99% accurate. Defendant made  
 25 these representations on its website and in other marketing materials. The  
 26 representations to Plaintiff were similar or identical as those made to other Class  
 27 members.

28 50. Plaintiff and Class members relied on the representations to

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1 discover the gender of their unborn children before sonograms (and before the  
2 advertised 10 week time for SneakPeek).

3 51. The foregoing representations were false. In truth, Defendant's Test  
4 is not 99% accurate, and is much closer to the 50% of the proverbial coin flip.  
5 SneakPeek knew at the time the statements were false. The representations were  
6 made to Plaintiff and Class members with the intent to entice them to purchase  
7 SneakPeek's Test in reliance on the statements.

8 52. Plaintiff and plaintiff Class members were ignorant of the falsity of  
9 Defendant's representations at the time they were made and at the time Plaintiff  
10 and plaintiff Class members purchased their Tests, and believed them to be true.  
11 As set forth above, Plaintiff visited SneakPeek's website prior to purchasing the  
12 Test and reasonably relied upon SneakPeek's representations regarding the high  
13 accuracy rates of the Test and the ability of the Test to predict the sex of unborn  
14 children as early as nine weeks into the pregnancy, prior to a sonogram being  
15 able to do so, through a simple non-invasive blood test. These representations  
16 were material to Plaintiff, and she reasonably relied on them to her detriment in  
17 purchasing the Test. Plaintiff also relied on similar representations regarding the  
18 ability of the Test to predict the gender of unborn children on the Test's  
19 packaging.

20 53. In reliance on these representations, Plaintiff and plaintiff Class  
21 members were induced to and did purchase the Tests to their detriment. Had  
22 Plaintiff and plaintiff Class members known the true facts, they would not have  
23 taken such action. Plaintiff's and plaintiff Class members' reliance on  
24 Defendant's representations was justified because Defendant was the one  
25 offering the Test for sale, and possessed superior knowledge of the facts, as they  
26 were peculiarly within the knowledge of Defendant.

27 54. Defendant made substantially the same representations to all  
28 plaintiff Class members who purchased the Tests. Because the representations

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1 were material, reliance and justification for the reliance may be inferred or  
 2 presumed on a class-wide basis for Plaintiff and all plaintiff Class members.

3 55. As a result of Defendant's fraudulent conduct as alleged above,  
 4 Plaintiff and plaintiff Class members have suffered damages.

5 56. The foregoing conduct of Defendant (i) constituted an intentional  
 6 misrepresentation, deceit, or concealment of a material fact known to the  
 7 Defendant with the intention on the part of Defendant of thereby depriving  
 8 Plaintiff and plaintiff Class members of property or legal rights or otherwise  
 9 causing Plaintiff and plaintiff Class members injury; (ii) was intended by  
 10 Defendant to cause injury to Plaintiff and plaintiff Class members or was  
 11 despicable conduct that was carried on by Defendant with a willful and conscious  
 12 disregard of the rights or safety of others; and/or (iii) was despicable conduct that  
 13 subjected Plaintiff and plaintiff Class members to cruel and unjust hardship in  
 14 conscious disregard of Plaintiff's and plaintiff Class members' rights so as to  
 15 justify an award of punitive damages against Defendant.

16 57. Plaintiff brings this cause of action on behalf of the nationwide  
 17 Class under California law.

#### 18 **FOURTH CAUSE OF ACTION**

#### 19 **(BREACH OF EXPRESS WARRANTY)**

#### 20 **(Against All Defendants)**

21 58. Plaintiff hereby incorporates by reference and re-alleges each and  
 22 every allegation set forth in each and every preceding paragraph of this  
 23 Complaint, as though fully set forth herein.

24 59. SneakPeek made a promise to Plaintiff and the Plaintiff Class  
 25 Members that the Tests were 99 percent accurate.

26 60. The Tests were not 99 percent accurate.

27 61. Plaintiff and the plaintiff Class Members took reasonable steps to  
 28 notify SneakPeek within a reasonable time that the Test was not as represented,

whether or not SneakPeek received such notice.

62. Plaintiff and Class members were harmed as a result and the failure of the Test's accuracy, which was what was purchased, was a substantial factor in causing Plaintiff and the plaintiff Class Members' harm.

### **FIFTH CAUSE OF ACTION**

#### **(BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY)**

#### **(Against All Defendants)**

63. Plaintiff hereby incorporates by reference and re-alleges each and every allegation set forth in each and every preceding paragraph of this Complaint, as though fully set forth herein.

64. Defendant impliedly warrants that its Tests are fit for the ordinary purpose for which they are sold.

65. The ordinary purpose for which Defendant's Tests are sold is to provide purchasers with a prediction of the gender of their unborn children that is greater than 99% accurate.

66. Defendant breached its implied warranty of merchantability by selling Tests which were so defective as to render them less accurate than advertised and provide no better predictions than pure 50/50 chance.

67. Plaintiff, and every member of the Class alleged herein have been similarly damaged as a result of this breach of warranty.

68. Plaintiff brings this cause of action on behalf of the nationwide Class under California law.

### **SIXTH CAUSE OF ACTION**

#### **(BREACH OF IMPLIED WARRANTY OF FITNESS)**

#### **(Against All Defendants)**

69. Plaintiff hereby incorporates by reference and re-alleges each and every allegation set forth in each and every preceding paragraph of this Complaint, as though fully set forth herein.

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70. SneakPeek is, and at all relevant times has been, in the business of designing, manufacturing, distributing, and selling gender prediction tests.

71. SneakPeek knew that consumers who purchased its Tests relied upon Defendant's expertise and skill, judgment and knowledge in furnishing tests which were capable of predicting the gender of their unborn children with a 99% accuracy rate.

72. SneakPeek's Tests are not fit for that purpose in that their design or manufacture is so defective as to render them less accurate than advertised and provide no better predictions than pure 50/50 chance.

73. Plaintiff, and every member of the Class alleged herein, have been similarly damaged as a result of this breach of warranty.

74. Plaintiff brings this cause of action on behalf of the nationwide Class under California law.

### **SEVENTH CAUSE OF ACTION**

#### **(UNJUST ENRICHMENT)**

#### **(Against All Defendants)**

75. Plaintiff hereby incorporates by reference and re-alleges each and every allegation set forth in each and every preceding paragraph of this Complaint, as though fully set forth herein.

76. Defendant has received a benefit at the expense of Plaintiff and plaintiff Class members.

77. Defendant improperly obtained money from Plaintiff and plaintiff Class members as a result of their purchases of the Test despite not providing a product up to the promised standards. No substantial justification exists for Defendant's conduct. Accordingly, Defendant has received a benefit and has unjustly retained this benefit at the expense of Plaintiff and the plaintiff Class.

78. As a direct and proximate result of Defendant's misconduct, Plaintiff and plaintiff Class members have paid money for goods not provided

1 and thereby entitled to restoration of their monies.

2 79. Plaintiff brings this cause of action on behalf of the nationwide  
3 Class under California law.

4 **EIGHTH CAUSE OF ACTION**

5 **(VIOLATION OF CAL. CIVIL CODE §§ 1750, *ET SEQ.*,**

6 **CALIFORNIA LEGAL REMEDIES ACT)**

7 **(Against All Defendants)**

8 80. Plaintiff hereby incorporates by reference and re-alleges each and  
9 every allegation set forth in each and every preceding paragraph of this  
10 Complaint, as though fully set forth herein.

11 81. This cause of action is brought pursuant to the Consumers Legal  
12 Remedies Act, Cal. *Civ. Code* §§ 1750, *et seq.* (the “CLRA”).

13 82. The CLRA applies to Defendant’s actions and conduct described  
14 herein because it extends to transactions that are intended to result, or which have  
15 resulted, in the sale or lease of goods or services to consumers.

16 83. Plaintiff and members of the Class are “consumers” within the  
17 meaning of Cal. *Civ. Code* § 1761(d).

18 84. The Tests that Plaintiff and each member of the Class purchased are  
19 “goods” within the meaning of Cal. *Civ. Code* § 1761(a).

20 85. Defendant has violated, and continues to violate, the CLRA in at  
21 least the following respects:

- 22 (a) in violation of Cal. *Civ. Code* § 1770(a)(5), Defendant has  
23 represented that the Test has characteristics and benefits that it  
24 does not have;
- 25 (b) in violation of Cal. *Civ. Code* § 1770(a)(7), Defendant has  
26 represented that the Test is of a particular standard when it is not;  
27 and
- 28 (c) in violation of Cal. *Civ. Code* § 1770(a)(9), Defendant has



1                   advertised the Test with an intent not to sell it as advertised.

2           86.     Plaintiff relied on Defendant's conduct to her detriment. As set forth  
3 above, Plaintiff visited SneakPeek's website prior to purchasing the Test and  
4 relied upon SneakPeek's representations regarding the high accuracy rates of the  
5 Test and the ability of the Test to predict the sex of unborn children as early as  
6 nine weeks into the pregnancy, prior to a sonogram being able to do so, through a  
7 simple non-invasive blood test. These representations were material to Plaintiff,  
8 and she relied on them to her detriment in purchasing the Test. Plaintiff also  
9 relied on similar representations regarding the ability of the Test to predict the  
10 gender of unborn children on the Test's packaging.

11           87.     Plaintiff requests that this Court enjoin Defendant from continuing  
12 to employ the unlawful methods, acts and practices alleged above, pursuant to  
13 Cal. *Civ. Code* § 1780(a)(2). Unless Defendant is permanently enjoined from  
14 continuing to engage in such violation of the CLRA, future consumers of  
15 Defendant's Tests will be damaged by Defendant's acts and practices in the same  
16 way as have Plaintiff and members of the Class.

17           88.     Plaintiff and members of the Class are not seeking damages for this  
18 claim at this time. Plaintiff and members of the Class will seek damages pursuant  
19 to Cal. *Civ. Code* § 1782 if Defendant does not correct, repair, replace or  
20 otherwise rectify the deceptive practices complaint of herein within 30 days from  
21 notice.

## 22                   **NINTH CAUSE OF ACTION**

23           **(VIOLATION OF TEXAS BUSINESS & COMMERCE CODE §§ 17.50, *ET SEQ.*)**

24           **(Against All Defendants)**

25           89.     Plaintiff hereby incorporates by reference and re-alleges each and  
26 every allegation set forth in each and every preceding paragraph of this  
27 Complaint, as though fully set forth herein.

28           90.     Tex. *Bus. & Com. Code* § 17.50 is part of Texas' Deceptive Trade  
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Practices-Consumer Protection Act (“DTPA”) and provides in relevant part:

(a) A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish:

(1) the use or employment by any person of a false, misleading or deceptive act or practice that is:

(A) specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; and

(B) relied on by a consumer to the consumer’s detriment;

...

(2) breach of an express or implied warranty; [or]

(3) any unconscionable action or course of action by any person...

91. In doing the acts alleged above, Defendant breached implied warranties, in violation of *Tex. Bus. & Com. Code* § 17.50(a)(2).

92. In doing the acts alleged above, Defendant also engaged in an unconscionable action or course of action, in violation of *Tex. Bus. & Com. Code* § 17.50(a)(3). Specifically, Defendant engaged in acts or practices which, to Plaintiff’s and plaintiff Class members’ detriment, took advantage of the lack of knowledge, ability, experience or capacity of Plaintiff and plaintiff Class members to a grossly unfair degree. Defendant’s unconscionable actions and courses of action include but are not limited to, the following, which is set forth more fully above: Defendant misrepresented and deceived customers into believing they would receive a highly accurate gender prediction test when in fact they were purchasing a product with no better predictive accuracy than pure chance.

93. Defendant knew at the time that it made its representations and

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omissions that they were false. Nevertheless, it took advantage of Plaintiff's and plaintiff Class members' lack of knowledge by aggressively marketing its Tests and inducing Plaintiff and plaintiff Class members to purchase them.

94. Defendant also engaged in an unconscionable action or course of action by engaging in acts or practices which, to Plaintiff's and plaintiff Class members' detriment, resulted in a gross disparity between the value received and the consideration paid for the Tests, since Defendant represented that the Tests were approximately 99% accurate but, in truth, the Tests had no better predictive accuracy than pure chance, and were therefore worthless, despite the consideration paid.

95. In doing the acts alleged above, Defendant also engaged in the following acts set forth in *Tex. Bus. & Com. Code* § section 17.46, among others, which provides in pertinent part:

(b) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful

...

(c) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts: ...

(5) representing that goods or services have ...characteristics, ... [or] benefits ... which they do not have...;

(7) representing that goods or services are of a particular standard, quality, or grade ... if they are of another; ...

(9) advertising goods or services with intent not to sell them as advertised;...

(24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the

1 consumer into a transaction into which the consumer would  
2 not have entered had the information been disclosed.

3 96. Plaintiff and plaintiff Class members relied on Defendant's conduct  
4 to their detriment. As set forth above, Plaintiff visited SneakPeek's website prior  
5 to purchasing the Test and relied upon SneakPeek's representation regarding the  
6 high accuracy rates of the Test and the ability of the Test to predict the sex of  
7 unborn children as early as nine weeks into the pregnancy, prior to a sonogram  
8 being able to do so, through a simple non-invasive blood test. These  
9 representations were material to Plaintiff, and she relied on them to her detriment  
10 in purchasing the Test. Plaintiff also relied on similar representations regarding  
11 the ability.

12 97. Plaintiff and plaintiff Class members have sustained "economic  
13 damages" as defined in the DTPA as a result of Defendant's violations of the  
14 DTPA.

15 98. Defendant's conduct was committed "knowingly" as that term is  
16 defined in section 17.45(9) in that Defendant had actual awareness at the time of  
17 the act or practice complained of, of the falsity, deception, or unfairness of the  
18 act or practice giving rise to Plaintiff's and plaintiff Class members' claims, or,  
19 with respect to Defendant's breach of implied warranty, Defendant had an actual  
20 awareness of the act, practice, condition, defect, or failure constituting the breach  
21 of warranty.

22 99. Defendant's conduct was committed "intentionally" as that term is  
23 defined in section 17.45(13) in that Defendant had an actual awareness of the  
24 falsity, deception, or unfairness of the act or practice, or the condition, defect, or  
25 failure constituting a breach of warranty giving rise to the Plaintiff's and plaintiff  
26 Class members' claims, coupled with the specific intent that the Plaintiff and  
27 plaintiff Class members act in detrimental reliance on the falsity or deception or  
28 in detrimental ignorance of the unfairness.

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100. Plaintiff and plaintiff Class members are entitled to three times the amount of their economic damages pursuant to Tex. *Bus. & Com. Code* 17.50(b)(1).

101. Plaintiff and plaintiff Class members are entitled to injunctive and other appropriate relief as a result of Defendant's violation of Tex. *Bus. & Com. Code* § 17.50, including without limitation, an order for restitution, attorneys' fees and costs.

102. Plaintiff and plaintiff Class members are entitled to three times the amount of their economic damages pursuant to Tex. *Bus. & Com. Code* § 17.50(b)(1).

103. Plaintiff and plaintiff Class members are entitled to injunctive and other appropriate relief as a result of Defendant's violation of Tex. *Bus. & Com. Code* § 17.50, including without limitation, an order for restitution, attorneys' fees and costs.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, individually and on behalf of the Class, prays for relief and judgment as follows:

1. An order certifying this action as a class action and appointing Plaintiff and his counsel to represent the Class;

2. For compensatory damages as to all causes of action where compensatory damages are available;

3. For restitution as to all causes of action where restitution is available;

4. For disgorgement of all wrongfully obtained compensation as to all causes of action where disgorgement is available;

5. For preliminary and permanent injunctive relief prohibiting Defendant from continuing the wrongful practices alleged herein;

6. For exemplary damages as to all causes of action where exemplary

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1 damages are available;

2 7. For reasonable costs and attorneys' fees as permitted by law; and

3 8. For such other relief that the Court deems just and proper.

4  
5 Dated: December 16, 2015

Respectfully submitted,

6 By: /s/ John P. Kristensen

7 John P. Kristensen (SBN 224132)

8 *john@kristensenlaw.com*

9 David L. Weisberg (SBN 211675)

10 *david@kristensenlaw.com*

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14 Fax: (310) 507-7906  
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**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a trial by jury for all such triable claims.

Dated: December 16, 2015

Respectfully submitted,

By: /s/ John P. Kristensen

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**PURSUANT TO CALIFORNIA CIVIL CODE § 1780(d)**

1. I submit this declaration pursuant to Section 1780(d) of the *Consumer Legal Remedies Act* (Cal. Civ. Code §§ 1750, *et seq.*). I have personal knowledge of the matters set forth below and if called as a witness, I could and would be competent to testify thereto.

3. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December 16, 2015 in Ohio.

Kristine Main

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*Attorneys for Plaintiff and all others similarly  
situated*

**THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

KRISTINE MAIN, on behalf of  
herself and all others similarly  
situated,

Plaintiff,

vs.

GATEWAY GENOMICS, LLC dba  
SNEAKPEEK; and DOES 1 through  
20, inclusive, and each of them,

Defendants.

Case No. '15CV2945 AJB WVG

**CLASS ACTION**

**COMPLAINT FOR DAMAGES  
AND EQUITABLE RELIEF FOR  
VIOLATIONS OF:**

- (1) Violations of Cal. *Bus. Prof. Code* §§ 17200, *et seq.* ("UCL");
- (2) Violations of Cal. *Bus. Prof. Code* §§ 17500, *et seq.* ("FAL");
- (3) Fraud;
- (4) Breach of Express Warranty;
- (5) Breach of Implied Warranty of Merchantability;
- (6) Breach of Implied Warranty of Fitness for a Particular Purpose;

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- (7) Unjust Enrichment;  
 (8) Violations of California Consumer Legal Remedies Act, Cal. *Civ. Code* §§ 1750, *et seq.* (“CLRA”);  
 and  
 (9) Texas Deceptive Trade Practices-Consumer Protection Act (“DTPA”), Tex. *Bus. & Com. Code* § 17.50.

**DEMAND FOR JURY TRIAL**

**DECLARATION OF KRISTINE MAIN**

Plaintiff Kristine Main (“Plaintiff”), on behalf of herself and all others similarly situated, alleges the following upon information and belief based upon personal knowledge, investigation of counsel and published reports:

**NATURE OF THE CASE**

1. Plaintiff brings this action for herself and others consumers nationwide as a class action seeking damages and any other available legal or equitable remedies for consumers who purchased the SneakPeek Early Gender Test.

**JURISDICTION & VENUE**

2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because defendant GATEWAY GENOMICS, LLC dba SNEAKPEEK (“Defendant” or “SneakPeek”) is a limited liability company with its principal place of business in La Jolla, California. Plaintiff is a resident of Ohio and seeks to represent a nationwide class which, when aggregated among a proposed class in the thousands, exceeds the \$5,000,000.00 threshold for federal court jurisdiction. Therefore, both diversity jurisdiction and the damages threshold under the Class Action Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.

3. Venue is proper in the United States District Court for the Southern District of California pursuant to 28 U.S.C. §§ 1391(b) because Defendants do business within the State of California and the County of San Diego. Furthermore, SneakPeek's principal place of business is within the County of San Diego pursuant to the "nerve center" test adopted by the United States Supreme Court in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), so this venue is convenient to the parties and is an appropriate venue for a civil action for damages and injunctive relief.

### **PARTIES**

4. Plaintiff, Kristine Main ("Plaintiff"), is a natural person residing in Ohio. At the time of Plaintiff's purchase of the SneakPeek Test, Plaintiff resided in Texas.

5. Defendant GATEWAY GENOMICS, LLC dba SNEAKPEEK ("Defendant" or "SneakPeek") is a Delaware limited liability corporation with its principal place of business in La Jolla, California. Plaintiff is informed and believes that SneakPeek does business throughout the State of California, including the County of San Diego. SneakPeek may be served through its registered agent for service of process Incorp Services, Inc., 1201 Orange Street, Suite 600, One Commerce Center, Wilmington, Delaware 19899.

6. The above named Defendants, and their subsidiaries and agents, are collectively referred to as "Defendants." The true names and capacities of the Defendants sued herein as DOES 1 through 20, inclusive, are currently unknown to Plaintiff, who therefore sues such Defendants by fictitious names. Each of the Defendants designated herein as a DOE is legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the Complaint to reflect the true names and capacities of the DOE Defendants when such identities become known.

7. Plaintiff is informed and believes and thereon alleges that at all

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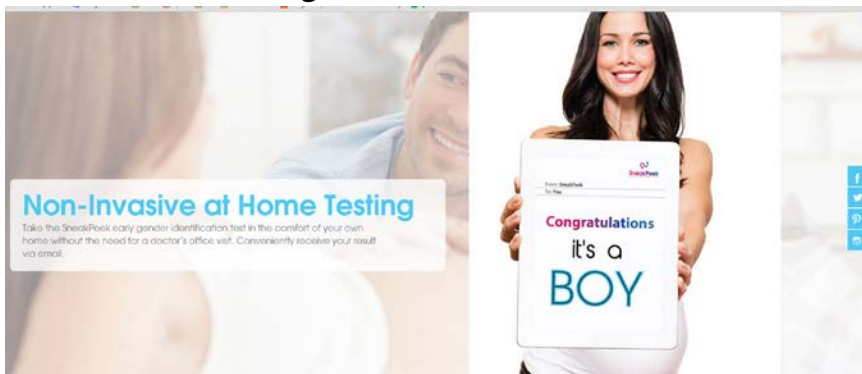
1 relevant times, each and every Defendant was acting as an agent and/or  
 2 employee of each of the other Defendants and was the owner, agent, servant,  
 3 joint venturer and employee, each of the other and each was acting within the  
 4 course and scope of its ownership, agency, service, joint venture and  
 5 employment with the full knowledge and consent of each of the other  
 6 Defendants. Plaintiff is informed and believes and thereon alleges that each of  
 7 the acts and/or omissions complained of herein was made known to, and ratified  
 8 by, each of the other Defendants.

9 8. At all times mentioned herein, each and every Defendant was the  
 10 successor of the other and each assumes the responsibility for each other's acts  
 11 and omissions.

## 12 **FACTUAL ALLEGATIONS**

13 9. Defendant advertises that "SneakPeek is the early detection gender  
 14 test that has been designed to be taken in the stress free environment of your own  
 15 home. Within 24 hours of receiving your sample we will identify the gender of  
 16 your baby. Inside the kit you will find everything you need to collect your  
 17 sample. Our state of the art lab will process your sample and detect the presence  
 18 of fetal DNA and determine the gender of your baby with 99% accuracy."

19 10. Defendant claims its test utilizes the natural process of shared fetal  
 20 circulating DNA in the mother and from a drop of blood can determine the  
 21 baby's gender as early as nine weeks into a pregnancy. SneakPeek advertises its  
 22 "Non-Invasive at Home Testing" as follows:



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11. Plaintiff purchased the SneakPeek Early Gender Test (the “Test”) on February 5, 2015. This was after Plaintiff reviewed and relied on the representations from Defendant’s website and marketing materials and the statements that it was 99 percent accurate in determining the gender of a baby. SneakPeek claimed it could make this determination earlier than a sonogram. Plaintiff did not wish to wait for a sonogram in order to know the sex of her unborn child, and was willing to pay \$169 for a non-invasive test that could give her the same results as a sonogram before a sonogram could do so. In other fora, Defendants contend the test is 98.8 percent accurate if the child is going to be a boy and 94.8 percent of the time if the unborn child is going to be a girl.

12. The touted ability of the Test to predict the sex of her unborn child prior to a sonogram being able to do so; the ease of obtaining quick results with the Test; and the advertised high accuracy rates of the Test were all material to Plaintiff in purchasing the Test.

13. SneakPeek charged Plaintiff at least \$169 for the Fast Track service to learn her baby’s gender in under 72 hours. Defendant also charges \$99 for results in five to seven days. The SneakPeek Early Gender Test arrived the following day in El Paso, Texas.

14. Plaintiff was fourteen weeks pregnant at the time of taking the test. SneakPeek claims a woman must be at least nine weeks pregnant at the time of the test.

15. On February 9, 2015, Plaintiff received an email from SneakPeek Team (sneakpeek@sneakpeektest.com) with the subject “Your SneakPeek Results Are In!” The email is below:

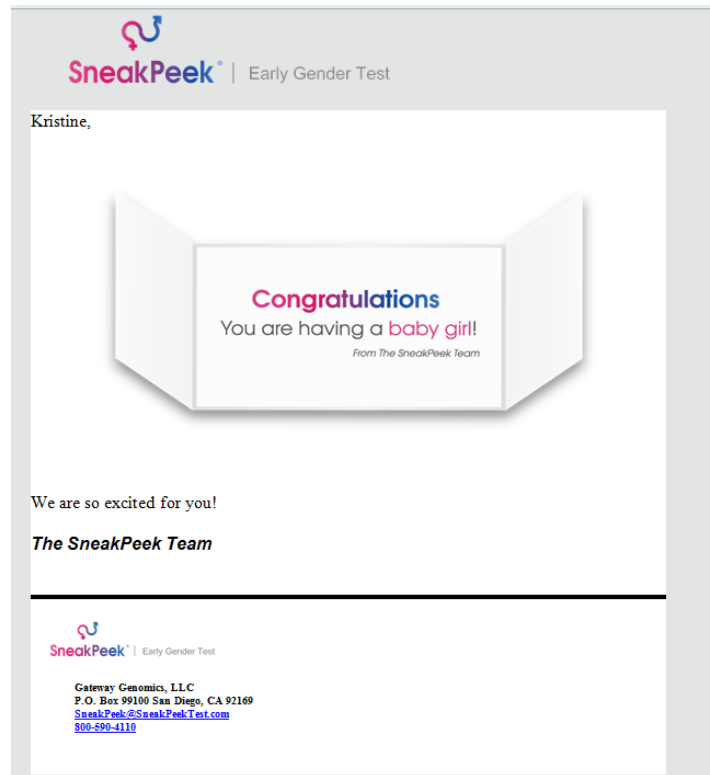
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16. On July 25, 2015, Plaintiff gave birth to a baby boy.

17. Plaintiff is not the only person to rely on SneakPeek's 99 percent accuracy claim and pay Defendants money for a product that is not anywhere near as accurate as promised. Consumers are paying upwards of a \$100 to find out the gender of their child before a sonogram. The results are not 99 percent accurate but much closer to a flip of a coin. A sampling of online complaints are below:



**No Title Available**

27 of 30 people found the following review helpful



**STAY FAR FAR AWAY.**, February 21, 2015

Sneak peek is a a SCAM! Once you get your results GOOD LUCK getting in touch with them.. It's impossible! Also don't try to write anything on their Facebook page because they will BLOCK you. What's wrong sneak peek?! Truth

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1 hurt so you write fake reviews and hide things on Facebook?! They claim 99%  
 2 accuracy yet can't even manage 60% correct! SCAM SCAM SCAM. Look up the  
 3 pink or blue gender test this is IDENTICAL! I bought this test when it first came  
 4 out before others received any confirmations. I wish I didn't purchase because it  
 5 doesn't ease your mind or even GUESS CORRECTLY. There will be PLENTY  
 6 of women looking for refunds in August and I'm sure this company will NOT be  
 7 refunding which wouldn't surprise me. STAY FAR FAR FAR AWAY from this  
 8 company. You'll have better accuracy peeing on some baking soda.

9  
 10 Also for the "REVIEWER" AKA sneakpeek who said baby center women don't  
 11 know what they're talking about... Seriously? We all took the test together and  
 12 are getting REAL BLOODWORK and ultrasound confirmations of your test  
 13 being WRONG. Can't argue with REAL medical tests.

14 \*\*\*\*

15 ★★★★★ they pulled from selling on Amazon months ago because of all the  
 16 bad reviews. Now it's back with tons of fake ..., October 22, 2015

17 **This review is from: SneakPeek - Early Gender Prediction DNA Test**  
 18 **(Health and Beauty)**

19 I took this test back when it first came on the scene. It told me BOY. I'm  
 20 currently holding in my hands a baby GIRL. Save your money this test is a  
 21 JOKE, they pulled from selling on Amazon months ago because of all the bad  
 22 reviews. Now it's back with tons of fake reviews. SAVE YOUR MONEY IT  
 23 DOESNT WORK. Also, for such an honest company, why would you BLOCK  
 24 people on FACEBOOK for expressing their opinions? Junk.

25 \*\*\*\*

26 1.0 out of 5 stars Love the idea but I think it is really more ...

27 By Anna on November 19, 2015

28 Size: SneakPeek

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1 Did not give me accurate results. I did everything correctly. Tested at 15 weeks.  
 2 Got a girl result. Amniocentesis along with ultrasound says boy. You have to  
 3 send in a copy of birth certificate to get a refund. Love the idea but I think it is  
 4 really more of a coin flip.

5 [Comment](#) Was this review helpful to you? [Yes](#) [No](#) [Report abuse](#)

6 \*\*\*\*\*

7 [1.0 out of 5 stars](#) incorrect results, not accurate for me.

8 By [Amazon Customer](#) on November 6, 2015

9 [Size: SneakPeek](#)

10 Incorrect results. Not accurate for me. Purchased last year and had my baby in  
 11 August. Sneak peek was wrong

12 \*\*\*\*\*

13 By [Rachel Hubbard](#) on November 6, 2015

14 [Size: SneakPeek FastTrack Verified Purchase](#)

15 Told me the wrong gender. Told me I was having a boy and I have a beautiful  
 16 daughter who is wearing a lot of little boy clothes.

17 \*\*\*\*\*

18 By [N. Cooper](#) on October 22, 2015

19 [Size: SneakPeek](#)

20 I ordered this in January 2015 from Amazon. I took it just like the directions  
 21 stated and received my results. We were over the moon excited! Then I found a  
 22 Baby Center group where other women had bought and used the test. Most were  
 23 a couple of weeks ahead of me and they started getting their results and Sneak  
 24 Peek was only right 60% of the time. I was floored and felt completely stunned  
 25 that I paid \$99 just for a guess. I left a review on Amazon at that time and  
 26 eventually SneakPeek shut down Amazon sales. Today I was looking for a baby  
 27 product and what do I see--Sneak Peek is active on Amazon again!

28 Ladies, please do yourself a favor and just wait the extra 6 weeks (16 weeks) and

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1 getting a gender determination ultrasound. Do not put yourself through the stress  
 2 (like I did) of waiting to see if the Sneak Peek guess result is correct.

3 \*\*\*\*\*

4 By [Kayla](#) on October 22, 2015

5 [Size: Sneak Peek](#)

6 Was told I was having a baby girl according to sneak peek. My 20 weeks  
 7 ultrasound showed me that I was having a boy. My delivery back in July  
 8 PROVED MY BABY WAS A BOY!!! so frustrating and I have let to receive my  
 9 guaranteed refund.

10 \*\*\*\*\*

11 [Jennifer M.](#) on October 21, 2015

12 [Size: Sneak Peek](#)

13 I bought this test directly from Sneak Peek back in January 2015. I found out  
 14 about the test on a Babycenter.com forum. I and a bunch of other ladies in the  
 15 August 2015 Babycenter group took the test and then waited on our ultrasounds  
 16 to confirm. After tallying our SP results compared to the babies we birthed and  
 17 SP was just about 60% accurate. All of our ultrasound results were correct, but  
 18 SP, not so much! The main advantage I got from taking this test was meeting a  
 19 lot of other super awesome ladies online. We all bonded over being gullible  
 20 enough to believe this test. So if you have \$99 to blow on a 60% chance, go for it  
 21 - you may meet a group of awesomely gullible ladies like yourself :) We even  
 22 have a Facebook group called "SP Sucks."

23  
 24 Did you know that SP used to be sold on Amazon prior to now? Nope, because  
 25 they had to pull the product down because we flooded it with so many negative  
 26 reviews and video proof of them being wrong. We'll do it again in an effort to  
 27 save all of you from wasting your money.

28 \*\*\*\*\*

1 By [Amazon Customer](#) on October 21, 2015

2 [Size: SneakPeek](#)

3 Great packaging, cool product, too bad it was incorrect. SneakPeek said I was  
4 having a boy, yet I gave birth to a beautiful, healthy baby girl.

5 \*\*\*\*\*

6 On the message boards at community.babycenter.com, there was a group  
7 for women expecting in August 2015. Many purchased SneakPeek. The results  
8 were not 99 percent accurate. They were closer to 60 percent accurate.

9 20. Consumers are fooled into believing that the Test scientifically  
10 adduces the gender of their unborn babies with 99 percent accuracy, when in fact  
11 the Test produces a result akin to the proverbial coin flip. SneakPeek is aware of  
12 its Test's inaccuracies.

13 21. Furthermore, SneakPeek challenges the accuracy of sonograms via  
14 its twitter feed:



## 26 CLASS ALLEGATIONS

27 22. Plaintiff brings this action pursuant to Rule 23(a) and Rule (b)(3) of  
28 the Federal Rules of Civil Procedure, or pursuant to Rule 23(a) and Rule (b)(2)

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of the Federal Rules of Civil Procedure and/or other applicable law, on behalf of herself and all others similarly situated, as a member of the proposed class (hereafter "the Class") defined as follows:

All consumers nationwide who purchased the SneakPeek Early Gender Test. Plaintiff represents, and is a member of the Class, consisting of All persons within the United States who received any telephone call from Defendant to said person's cellular telephone made through the use of any automatic telephone dialing system or an artificial or prerecorded voice and such person had not previously not provided their cellular telephone number to Defendant within the four years prior to the filing of this Complaint.

23. Excluded from the Class are governmental entities, Defendants, any entity in which Defendants have a controlling interest, and Defendants' officers, directors, affiliates, legal representatives, employees, co-conspirators, successors, subsidiaries, and assigns. Also excluded from the Class are any judges, justices or judicial officers presiding over this matter and the members of their immediate families and judicial staff.

24. This action is properly maintainable as a class action. This action satisfies the numerosity, typicality, adequacy, predominance and superiority requirements for a class action.

25. **Numerosity:** The proposed Class is so numerous that individual joinder of all members is impracticable. Due to the nature of the trade and commerce involved, Plaintiff does not know the number of members in the Class, but believes the Class members number in the thousands, if not more. Plaintiff alleges that the Class may be ascertained by the records maintained by Defendants.

26. Plaintiff and members of the Class were harmed by the acts of

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Defendant(s) in at least the following ways: Defendant(s) illegally marketed the Test as being 99% accurate causing Plaintiff and Class members to incur certain charges for the Test which Plaintiff and Class members would not have otherwise paid and thus damaging Plaintiff and Class members.

27. **Common Questions of Law and Fact Predominate:** There are only a few legal and factual issues to determine if there is liability for each of those questions of law and fact, common issues to the Class predominate over any questions that may affect individual Class members, in that the claims of all Class members for each of the claims herein can be established with common proof. Common questions of fact and law include, but are not limited to, the following:

- (a) Whether the SneakPeek Early Gender Test is 99% accurate in the real world, as claimed in SneakPeek's marketing;
- (b) Whether the SneakPeek Early Gender Test is 99% accurate in the laboratory, as claimed in SneakPeek's marketing;
- (c) Whether the SneakPeek Early Gender Test is based on significant scientific research, as claimed in SneakPeek's marketing;
- (d) Whether the SneakPeek Early Gender Test can accurately predict an unborn baby's gender within nine weeks of conception, as claimed in SneakPeek's marketing;
- (e) Whether Defendant is liable as a result;
- (f) The nature and extent of restitution and/or damages and other remedies to which the conduct of SneakPeek entitles the Class; and
- (g) Whether the Defendant(s) should be enjoined from engaging in such conduct in the future.

28. **Typicality:** Plaintiff's claims are typical of the claims of members



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1 of the Class, as Plaintiff was subject to the same common course of conduct by  
2 Defendant(s) as all Class members. The injuries to each member of the Class  
3 were caused directly by Defendant(s)' wrongful conduct as alleged herein.

4       **29. Adequacy of Representation:** Plaintiff will fairly and adequately  
5 represent and protect the interests of the Class. Plaintiff has retained counsel  
6 with substantial experience in handling complex class action litigation. Plaintiff  
7 and his counsel are committed to prosecuting this action vigorously on behalf of  
8 the Class and have financial resources to do so.

9       **30. Superiority of Class Action:** A class action is superior to other  
10 available methods for the fair and efficient adjudication of the present  
11 controversy. Class members have little interest in individually controlling the  
12 prosecution of separate actions because the individual damage claims of each  
13 Class member are not substantial enough to warrant individual filings. In sum,  
14 for many, if not most, Class members, a class action is the only feasible  
15 mechanism that will allow them an opportunity for legal redress and justice.  
16 Plaintiff is unaware of any litigation concerning the present controversy already  
17 commenced by members of the Class. The conduct of this action as a class  
18 action in this forum, with respect to some or all of the issues presented herein,  
19 presents fewer management difficulties, conserves the resources of the parties  
20 and of the court system, and protects the rights of each Class member.

21       **31.** Moreover, individualized litigation would also present the potential  
22 for varying, inconsistent, or incompatible standards of conduct for Defendants,  
23 and would magnify the delay and expense to all parties and to the court system  
24 resulting from multiple trials of the same factual issues. The adjudication of  
25 individual Class members' claims would also, as a practical matter, be  
26 dispositive of the interests of other members not parties to the adjudication, and  
27 could substantially impair or impede the ability of other Class members to  
28 protect their interests.



### FIRST CAUSE OF ACTION

33. Plaintiff hereby incorporates by reference and re-alleges each and every allegation set forth in each and every preceding paragraph of this Complaint, as though fully set forth herein.

34. California’s Unfair Competition Law (“UCL”) prohibits acts of “unfair competition,” including any unlawful, unfair, fraudulent or deceptive business act or practice as well as “unfair, deceptive, untrue or misleading advertising.”

35. Defendant violated and continues to violate the UCL through one or more of the following unlawful practices:

- (a) Violating the California False Advertising Law, Cal. *Bus. & Prof. Code* §§ 17500, *et seq.*, by disseminating or causing to be disseminated untrue or misleading advertising;
- (b) Violating the California Consumer Legal Remedies Act (“CLRA”), Cal. *Civ. Code* §§ 1750, *et seq.*, by representing that the Test has characteristics and benefits that it does not have, representing that the Test is of a particular standard when it is not and by advertising the Test with an intent not to sell it as advertised. disseminating or causing to be disseminated untrue or misleading advertising;

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(c) Committing common law fraud;

(d) Violating the other statutes and common law causes of action as alleged in the instant Complaint.

36. Defendant also violated and continues to violate the UCL through one or more of the following unfair and/or fraudulent practices:

(a) Selling to Plaintiff and Class members a product not suited for its advertised use; and

(b) Failing to disclose to Plaintiff and Class members that the Tests sold do not perform at the advertised accuracy rate.

37. Plaintiff relied on Defendant's conduct to her detriment. As set forth above, Plaintiff visited Sneakpeek's website prior to purchasing the Test and relied upon Sneakpeek's representations regarding the high accuracy rates of the Test and the ability of the Test to predict the sex of unborn children as early as nine weeks into the pregnancy, prior to a sonogram being able to do so, through a simple non-invasive blood test. These representations were material to Plaintiff, and she relied on them to her detriment in purchasing the Test. Plaintiff also relied on similar representations regarding the ability of the Test to predict the gender of unborn children on the Test's packaging.

38. As a direct and proximate result of Defendant's unlawful, unfair, and fraudulent business practices, Plaintiff and the members of the Class have suffered injury and have lost money or property.

39. Plaintiff respectfully requests that the Court require Defendant to provide restitution to Plaintiff and Class members, award Plaintiff and Class members reasonable attorneys' fees and expenses, and award such other relief as the Court may deem just and proper.

40. The unlawful, unfair, and fraudulent business practices described herein present a continuing threat to members of the Class and members of the general public in that Defendant continues to engage in these practices, and will

1 not cease doing so unless and until forced to do so by this Court. Defendant's  
2 conduct will continue to cause irreparable injury to the Subclass unless enjoined.

### 3 **SECOND CAUSE OF ACTION**

4 **(VIOLATION OF THE CALIFORNIA FALSE ADVERTISING LAW,**

5 **CAL. BUS. & PROF. CODE §§ 17500, *ET SEQ.*)**

6 **(Against All Defendants)**

7 41. Plaintiff hereby incorporates by reference and re-alleges each and  
8 every allegation set forth in each and every preceding paragraph of this  
9 Complaint, as though fully set forth herein.

10 42. California's False Advertising Law, Cal. *Bus. & Prof. Code* §§  
11 17500, *et seq.* ("FAL"), provides that "[i]t is unlawful for any . . . corporation . . .  
12 with intent . . . to dispose of . . . personal property . . . to induce the public to  
13 enter into any obligation relating thereto, to make or disseminate or cause to be  
14 made or disseminated . . . from this state before the public in any state, in any  
15 newspaper or other publication, or any advertising device, or by public outcry or  
16 proclamation, or in any other manner or means whatever, including over the  
17 Internet, any statement . . . which is untrue or misleading, and which is known, or  
18 which by the exercise of reasonable care should be known, to be untrue or  
19 misleading . . . ."

20 43. Defendant's representations, including statements made on  
21 Defendant's website, packaging, and all other written and oral materials  
22 disseminated by Defendant to promote its Test, constitute advertising for  
23 purposes of this cause of action.

24 44. Such advertising contained statements which were false, misleading,  
25 or which omitted material information which Defendant was under a duty to  
26 disclose and which were known or should have been known to Defendant to be  
27 false, misleading, or deceptive.

28 45. Plaintiff relied on Defendant's conduct to her detriment. As set forth

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1 above, Plaintiff visited SneakPeek's website prior to purchasing the Test and  
 2 relied upon SneakPeek's representations regarding the high accuracy rates of the  
 3 Test and the ability of the Test to predict the sex of unborn children as early as  
 4 nine weeks into the pregnancy, prior to a sonogram being able to do so, through a  
 5 simple non-invasive blood test. These representations were material to Plaintiff,  
 6 and she relied on them to her detriment in purchasing the Test. Plaintiff also  
 7 relied on similar representations regarding the ability of the Test to predict the  
 8 gender of unborn children on the Test's packaging.

9 46. As a direct and proximate result of Defendant's misleading  
 10 advertising, Plaintiff and the members of the Class have suffered injury in fact  
 11 and have lost money or property.

12 47. The misleading advertising described herein presents a continuing  
 13 threat to the Class and members of the public in that Defendant persists and  
 14 continues to engage in these practices, and will not cease doing so unless and  
 15 until forced to do so by this Court. Defendant's conduct will continue to cause  
 16 irreparable injury to the Subclass unless enjoined or restrained.

### 17 **THIRD CAUSE OF ACTION**

#### 18 **(FRAUD)**

#### 19 **(Against All Defendants)**

20 48. Plaintiff hereby incorporates by reference and re-alleges each and  
 21 every allegation set forth in each and every preceding paragraph of this  
 22 Complaint, as though fully set forth herein.

23 49. Defendant made the following material representations to Plaintiff  
 24 and Class members in writing: that the Test was 99% accurate. Defendant made  
 25 these representations on its website and in other marketing materials. The  
 26 representations to Plaintiff were similar or identical as those made to other Class  
 27 members.

28 50. Plaintiff and Class members relied on the representations to

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1 discover the gender of their unborn children before sonograms (and before the  
2 advertised 10 week time for SneakPeek).

3 51. The foregoing representations were false. In truth, Defendant's Test  
4 is not 99% accurate, and is much closer to the 50% of the proverbial coin flip.  
5 SneakPeek knew at the time the statements were false. The representations were  
6 made to Plaintiff and Class members with the intent to entice them to purchase  
7 SneakPeek's Test in reliance on the statements.

8 52. Plaintiff and plaintiff Class members were ignorant of the falsity of  
9 Defendant's representations at the time they were made and at the time Plaintiff  
10 and plaintiff Class members purchased their Tests, and believed them to be true.  
11 As set forth above, Plaintiff visited SneakPeek's website prior to purchasing the  
12 Test and reasonably relied upon SneakPeek's representations regarding the high  
13 accuracy rates of the Test and the ability of the Test to predict the sex of unborn  
14 children as early as nine weeks into the pregnancy, prior to a sonogram being  
15 able to do so, through a simple non-invasive blood test. These representations  
16 were material to Plaintiff, and she reasonably relied on them to her detriment in  
17 purchasing the Test. Plaintiff also relied on similar representations regarding the  
18 ability of the Test to predict the gender of unborn children on the Test's  
19 packaging.

20 53. In reliance on these representations, Plaintiff and plaintiff Class  
21 members were induced to and did purchase the Tests to their detriment. Had  
22 Plaintiff and plaintiff Class members known the true facts, they would not have  
23 taken such action. Plaintiff's and plaintiff Class members' reliance on  
24 Defendant's representations was justified because Defendant was the one  
25 offering the Test for sale, and possessed superior knowledge of the facts, as they  
26 were peculiarly within the knowledge of Defendant.

27 54. Defendant made substantially the same representations to all  
28 plaintiff Class members who purchased the Tests. Because the representations

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1 were material, reliance and justification for the reliance may be inferred or  
 2 presumed on a class-wide basis for Plaintiff and all plaintiff Class members.

3 55. As a result of Defendant's fraudulent conduct as alleged above,  
 4 Plaintiff and plaintiff Class members have suffered damages.

5 56. The foregoing conduct of Defendant (i) constituted an intentional  
 6 misrepresentation, deceit, or concealment of a material fact known to the  
 7 Defendant with the intention on the part of Defendant of thereby depriving  
 8 Plaintiff and plaintiff Class members of property or legal rights or otherwise  
 9 causing Plaintiff and plaintiff Class members injury; (ii) was intended by  
 10 Defendant to cause injury to Plaintiff and plaintiff Class members or was  
 11 despicable conduct that was carried on by Defendant with a willful and conscious  
 12 disregard of the rights or safety of others; and/or (iii) was despicable conduct that  
 13 subjected Plaintiff and plaintiff Class members to cruel and unjust hardship in  
 14 conscious disregard of Plaintiff's and plaintiff Class members' rights so as to  
 15 justify an award of punitive damages against Defendant.

16 57. Plaintiff brings this cause of action on behalf of the nationwide  
 17 Class under California law.

#### 18 **FOURTH CAUSE OF ACTION**

#### 19 **(BREACH OF EXPRESS WARRANTY)**

#### 20 **(Against All Defendants)**

21 58. Plaintiff hereby incorporates by reference and re-alleges each and  
 22 every allegation set forth in each and every preceding paragraph of this  
 23 Complaint, as though fully set forth herein.

24 59. SneakPeek made a promise to Plaintiff and the Plaintiff Class  
 25 Members that the Tests were 99 percent accurate.

26 60. The Tests were not 99 percent accurate.

27 61. Plaintiff and the plaintiff Class Members took reasonable steps to  
 28 notify SneakPeek within a reasonable time that the Test was not as represented,

whether or not SneakPeek received such notice.

62. Plaintiff and Class members were harmed as a result and the failure of the Test's accuracy, which was what was purchased, was a substantial factor in causing Plaintiff and the plaintiff Class Members' harm.

### **FIFTH CAUSE OF ACTION**

#### **(BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY)**

##### **(Against All Defendants)**

63. Plaintiff hereby incorporates by reference and re-alleges each and every allegation set forth in each and every preceding paragraph of this Complaint, as though fully set forth herein.

64. Defendant impliedly warrants that its Tests are fit for the ordinary purpose for which they are sold.

65. The ordinary purpose for which Defendant's Tests are sold is to provide purchasers with a prediction of the gender of their unborn children that is greater than 99% accurate.

66. Defendant breached its implied warranty of merchantability by selling Tests which were so defective as to render them less accurate than advertised and provide no better predictions than pure 50/50 chance.

67. Plaintiff, and every member of the Class alleged herein have been similarly damaged as a result of this breach of warranty.

68. Plaintiff brings this cause of action on behalf of the nationwide Class under California law.

### **SIXTH CAUSE OF ACTION**

#### **(BREACH OF IMPLIED WARRANTY OF FITNESS)**

##### **(Against All Defendants)**

69. Plaintiff hereby incorporates by reference and re-alleges each and every allegation set forth in each and every preceding paragraph of this Complaint, as though fully set forth herein.



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70. SneakPeek is, and at all relevant times has been, in the business of designing, manufacturing, distributing, and selling gender prediction tests.

71. SneakPeek knew that consumers who purchased its Tests relied upon Defendant's expertise and skill, judgment and knowledge in furnishing tests which were capable of predicting the gender of their unborn children with a 99% accuracy rate.

72. SneakPeek's Tests are not fit for that purpose in that their design or manufacture is so defective as to render them less accurate than advertised and provide no better predictions than pure 50/50 chance.

73. Plaintiff, and every member of the Class alleged herein, have been similarly damaged as a result of this breach of warranty.

74. Plaintiff brings this cause of action on behalf of the nationwide Class under California law.

### **SEVENTH CAUSE OF ACTION**

#### **(UNJUST ENRICHMENT)**

#### **(Against All Defendants)**

75. Plaintiff hereby incorporates by reference and re-alleges each and every allegation set forth in each and every preceding paragraph of this Complaint, as though fully set forth herein.

76. Defendant has received a benefit at the expense of Plaintiff and plaintiff Class members.

77. Defendant improperly obtained money from Plaintiff and plaintiff Class members as a result of their purchases of the Test despite not providing a product up to the promised standards. No substantial justification exists for Defendant's conduct. Accordingly, Defendant has received a benefit and has unjustly retained this benefit at the expense of Plaintiff and the plaintiff Class.

78. As a direct and proximate result of Defendant's misconduct, Plaintiff and plaintiff Class members have paid money for goods not provided

1 and thereby entitled to restoration of their monies.

2 79. Plaintiff brings this cause of action on behalf of the nationwide  
3 Class under California law.

4 **EIGHTH CAUSE OF ACTION**

5 **(VIOLATION OF CAL. CIVIL CODE §§ 1750, *ET SEQ.*,**

6 **CALIFORNIA LEGAL REMEDIES ACT)**

7 **(Against All Defendants)**

8 80. Plaintiff hereby incorporates by reference and re-alleges each and  
9 every allegation set forth in each and every preceding paragraph of this  
10 Complaint, as though fully set forth herein.

11 81. This cause of action is brought pursuant to the Consumers Legal  
12 Remedies Act, Cal. *Civ. Code* §§ 1750, *et seq.* (the “CLRA”).

13 82. The CLRA applies to Defendant’s actions and conduct described  
14 herein because it extends to transactions that are intended to result, or which have  
15 resulted, in the sale or lease of goods or services to consumers.

16 83. Plaintiff and members of the Class are “consumers” within the  
17 meaning of Cal. *Civ. Code* § 1761(d).

18 84. The Tests that Plaintiff and each member of the Class purchased are  
19 “goods” within the meaning of Cal. *Civ. Code* § 1761(a).

20 85. Defendant has violated, and continues to violate, the CLRA in at  
21 least the following respects:

- 22 (a) in violation of Cal. *Civ. Code* § 1770(a)(5), Defendant has  
23 represented that the Test has characteristics and benefits that it  
24 does not have;
- 25 (b) in violation of Cal. *Civ. Code* § 1770(a)(7), Defendant has  
26 represented that the Test is of a particular standard when it is not;  
27 and
- 28 (c) in violation of Cal. *Civ. Code* § 1770(a)(9), Defendant has

1                   advertised the Test with an intent not to sell it as advertised.

2           86.     Plaintiff relied on Defendant's conduct to her detriment. As set forth  
3 above, Plaintiff visited SneakPeek's website prior to purchasing the Test and  
4 relied upon SneakPeek's representations regarding the high accuracy rates of the  
5 Test and the ability of the Test to predict the sex of unborn children as early as  
6 nine weeks into the pregnancy, prior to a sonogram being able to do so, through a  
7 simple non-invasive blood test. These representations were material to Plaintiff,  
8 and she relied on them to her detriment in purchasing the Test. Plaintiff also  
9 relied on similar representations regarding the ability of the Test to predict the  
10 gender of unborn children on the Test's packaging.

11           87.     Plaintiff requests that this Court enjoin Defendant from continuing  
12 to employ the unlawful methods, acts and practices alleged above, pursuant to  
13 Cal. *Civ. Code* § 1780(a)(2). Unless Defendant is permanently enjoined from  
14 continuing to engage in such violation of the CLRA, future consumers of  
15 Defendant's Tests will be damaged by Defendant's acts and practices in the same  
16 way as have Plaintiff and members of the Class.

17           88.     Plaintiff and members of the Class are not seeking damages for this  
18 claim at this time. Plaintiff and members of the Class will seek damages pursuant  
19 to Cal. *Civ. Code* § 1782 if Defendant does not correct, repair, replace or  
20 otherwise rectify the deceptive practices complaint of herein within 30 days from  
21 notice.

## 22                   **NINTH CAUSE OF ACTION**

23                   **(VIOLATION OF TEXAS BUSINESS & COMMERCE CODE §§ 17.50, *ET SEQ.*)**

24                   **(Against All Defendants)**

25           89.     Plaintiff hereby incorporates by reference and re-alleges each and  
26 every allegation set forth in each and every preceding paragraph of this  
27 Complaint, as though fully set forth herein.

28           90.     Tex. *Bus. & Com. Code* § 17.50 is part of Texas' Deceptive Trade  
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Practices-Consumer Protection Act (“DTPA”) and provides in relevant part:

(a) A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish:

(1) the use or employment by any person of a false, misleading or deceptive act or practice that is:

(A) specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; and

(B) relied on by a consumer to the consumer’s detriment;

...

(2) breach of an express or implied warranty; [or]

(3) any unconscionable action or course of action by any person...

91. In doing the acts alleged above, Defendant breached implied warranties, in violation of Tex. *Bus. & Com. Code* § 17.50(a)(2).

92. In doing the acts alleged above, Defendant also engaged in an unconscionable action or course of action, in violation of Tex. *Bus. & Com. Code* § 17.50(a)(3). Specifically, Defendant engaged in acts or practices which, to Plaintiff’s and plaintiff Class members’ detriment, took advantage of the lack of knowledge, ability, experience or capacity of Plaintiff and plaintiff Class members to a grossly unfair degree. Defendant’s unconscionable actions and courses of action include but are not limited to, the following, which is set forth more fully above: Defendant misrepresented and deceived customers into believing they would receive a highly accurate gender prediction test when in fact they were purchasing a product with no better predictive accuracy than pure chance.

93. Defendant knew at the time that it made its representations and

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omissions that they were false. Nevertheless, it took advantage of Plaintiff's and plaintiff Class members' lack of knowledge by aggressively marketing its Tests and inducing Plaintiff and plaintiff Class members to purchase them.

94. Defendant also engaged in an unconscionable action or course of action by engaging in acts or practices which, to Plaintiff's and plaintiff Class members' detriment, resulted in a gross disparity between the value received and the consideration paid for the Tests, since Defendant represented that the Tests were approximately 99% accurate but, in truth, the Tests had no better predictive accuracy than pure chance, and were therefore worthless, despite the consideration paid.

95. In doing the acts alleged above, Defendant also engaged in the following acts set forth in *Tex. Bus. & Com. Code* § section 17.46, among others, which provides in pertinent part:

(b) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful

...

(c) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts: ...

(5) representing that goods or services have ...characteristics, ... [or] benefits ... which they do not have...;

(7) representing that goods or services are of a particular standard, quality, or grade ... if they are of another; ...

(9) advertising goods or services with intent not to sell them as advertised;...

(24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the

1 consumer into a transaction into which the consumer would  
2 not have entered had the information been disclosed.

3 96. Plaintiff and plaintiff Class members relied on Defendant's conduct  
4 to their detriment. As set forth above, Plaintiff visited SneakPeek's website prior  
5 to purchasing the Test and relied upon SneakPeek's representation regarding the  
6 high accuracy rates of the Test and the ability of the Test to predict the sex of  
7 unborn children as early as nine weeks into the pregnancy, prior to a sonogram  
8 being able to do so, through a simple non-invasive blood test. These  
9 representations were material to Plaintiff, and she relied on them to her detriment  
10 in purchasing the Test. Plaintiff also relied on similar representations regarding  
11 the ability.

12 97. Plaintiff and plaintiff Class members have sustained "economic  
13 damages" as defined in the DTPA as a result of Defendant's violations of the  
14 DTPA.

15 98. Defendant's conduct was committed "knowingly" as that term is  
16 defined in section 17.45(9) in that Defendant had actual awareness at the time of  
17 the act or practice complained of, of the falsity, deception, or unfairness of the  
18 act or practice giving rise to Plaintiff's and plaintiff Class members' claims, or,  
19 with respect to Defendant's breach of implied warranty, Defendant had an actual  
20 awareness of the act, practice, condition, defect, or failure constituting the breach  
21 of warranty.

22 99. Defendant's conduct was committed "intentionally" as that term is  
23 defined in section 17.45(13) in that Defendant had an actual awareness of the  
24 falsity, deception, or unfairness of the act or practice, or the condition, defect, or  
25 failure constituting a breach of warranty giving rise to the Plaintiff's and plaintiff  
26 Class members' claims, coupled with the specific intent that the Plaintiff and  
27 plaintiff Class members act in detrimental reliance on the falsity or deception or  
28 in detrimental ignorance of the unfairness.

Kristensen Weisberg, LLP  
 12304 Santa Monica Blvd., Suite 100  
 Los Angeles, California 90025

100. Plaintiff and plaintiff Class members are entitled to three times the amount of their economic damages pursuant to Tex. *Bus. & Com. Code* 17.50(b)(1).

101. Plaintiff and plaintiff Class members are entitled to injunctive and other appropriate relief as a result of Defendant's violation of Tex. *Bus. & Com. Code* § 17.50, including without limitation, an order for restitution, attorneys' fees and costs.

102. Plaintiff and plaintiff Class members are entitled to three times the amount of their economic damages pursuant to Tex. *Bus. & Com. Code* § 17.50(b)(1).

103. Plaintiff and plaintiff Class members are entitled to injunctive and other appropriate relief as a result of Defendant's violation of Tex. *Bus. & Com. Code* § 17.50, including without limitation, an order for restitution, attorneys' fees and costs.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, individually and on behalf of the Class, prays for relief and judgment as follows:

1. An order certifying this action as a class action and appointing Plaintiff and his counsel to represent the Class;

2. For compensatory damages as to all causes of action where compensatory damages are available;

3. For restitution as to all causes of action where restitution is available;

4. For disgorgement of all wrongfully obtained compensation as to all causes of action where disgorgement is available;

5. For preliminary and permanent injunctive relief prohibiting Defendant from continuing the wrongful practices alleged herein;

6. For exemplary damages as to all causes of action where exemplary

**CLASS ACTION COMPLAINT; DEMAND FOR JURY TRIAL; DECLARATION OF KRISTINE MAIN**



1 damages are available;

2 7. For reasonable costs and attorneys' fees as permitted by law; and

3 8. For such other relief that the Court deems just and proper.

4  
5 Dated: December 16, 2015

Respectfully submitted,

6 By: /s/ John P. Kristensen

7 John P. Kristensen (SBN 224132)

8 *john@kristensenlaw.com*

9 David L. Weisberg (SBN 211675)

10 *david@kristensenlaw.com*

**KRISTENSEN WEISBERG, LLP**

11 12304 Santa Monica Blvd., Suite 100

12 Los Angeles, California 90025

13 Telephone: (310) 507-7924

14 Fax: (310) 507-7906

Kristensen Weisberg, LLP  
12304 Santa Monica Blvd., Suite 100  
Los Angeles, California 90025

**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a trial by jury for all such triable claims.

Dated: December 16, 2015

Respectfully submitted,

By: /s/ John P. Kristensen

John P. Kristensen (SBN 224132)

*john@kristensenlaw.com*

David L. Weisberg (SBN 211675)

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Fax: (310) 507-7906

Kristensen Weisberg, LLP  
12304 Santa Monica Blvd., Suite 100  
Los Angeles, California 90025

**DECLARATION OF KRISTINE MAIN**

**PURSUANT TO CALIFORNIA CIVIL CODE § 1780(d)**

I, Kristine Main, declare as follows:

1. I submit this declaration pursuant to Section 1780(d) of the *Consumer Legal Remedies Act* (Cal. Civ. Code §§ 1750, *et seq.*). I have personal knowledge of the matters set forth below and if called as a witness, I could and would be competent to testify thereto.

2. At all relevant times, I have been a resident of Texas and Ohio. It is my understanding that Defendant GATEWAY GENOMICS, LLC dba SNEAKPEEK ("Defendant" or "SneakPeek") is a Delaware limited liability corporation with its principal place of business and nerve center in La Jolla within San Diego County and conducts business out of California.

3. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December 16, 2015 in Ohio.

  
Kristine Main

Kristensen Weisberg, LLP  
12304 Santa Monica Blvd., Suite 100  
Los Angeles, California 90025

JS 44 (Rev. 12/12)

## CIVIL COVER SHEET

'15CV2945 AJB WVG

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

KRISTINE MAIN, on behalf of herself and all others similarly situated,

(b) County of Residence of First Listed Plaintiff Montgomery County, OH  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

John P. Kristensen / David L. Weisberg  
KRISTENSEN WEISBERG, LLP  
12304 Santa Monica Blvd, #100 Los Angeles, CA 90025 (310) 507-7924**DEFENDANTS**

GATEWAY GENOMICS, LLC dba SNEAKPEEK; and DOES 1 through 20, inclusive, and each of them,

County of Residence of First Listed Defendant San Diego County, CA  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question  
(U.S. Government Not a Party)
- ☒ 4 Diversity  
(Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input checked="" type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input checked="" type="checkbox"/> 4
Citizen of Another State	<input checked="" type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input checked="" type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

**V. ORIGIN** (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
 Cal. Civ. Code §§ 1750, Cal. Bus. Prof. Code §§ 17200 and 17500, Tex. Bus. & Com. Code § 17.50 28:1332 (srm)  
 Brief description of cause:  
 Fraud, Breach of Expressed and Implied Warranty, Consumer Protection Act

**VII. REQUESTED IN COMPLAINT:**

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$ 5,000,000.00

CHECK YES only if demanded in complaint:  
 JURY DEMAND: ☒ Yes ☐ No

**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE  
12/28/2015

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_



**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44****Authority For Civil Cover Sheet**

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
  - (b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
  - (c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; NOTE: federal question actions take precedence over diversity cases.)
- III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. **Origin.** Place an "X" in one of the six boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.



JS 44 (Rev. 12/12)

## CIVIL COVER SHEET

'15CV2945 AJB WVG

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

KRISTINE MAIN, on behalf of herself and all others similarly situated,

(b) County of Residence of First Listed Plaintiff Montgomery County, OH  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

John P. Kristensen / David L. Weisberg  
KRISTENSEN WEISBERG, LLP  
12304 Santa Monica Blvd, #100 Los Angeles, CA 90025 (310) 507-7924**DEFENDANTS**

GATEWAY GENOMICS, LLC dba SNEAKPEEK; and DOES 1 through 20, inclusive, and each of them,

County of Residence of First Listed Defendant San Diego County, CA  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question  
(U.S. Government Not a Party)
- ☒ 4 Diversity  
(Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                                   | DEF                                   |   | PTF                        | DEF                                   |
|---|---------------------------------------|---------------------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1            | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State                | <input checked="" type="checkbox"/> 2 | <input type="checkbox"/> 2            | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5            |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3            | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6            |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input checked="" type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

**V. ORIGIN** (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
 Cal. Civ. Code §§ 1750, Cal. Bus. Prof. Code §§ 17200 and 17500, Tex. Bus. & Com. Code § 17.50 28:1332 (srm)  
 Brief description of cause:  
 Fraud, Breach of Expressed and Implied Warranty, Consumer Protection Act

**VII. REQUESTED IN COMPLAINT:**

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$ 5,000,000.00

CHECK YES only if demanded in complaint:  
 JURY DEMAND: ☒ Yes ☐ No

**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE  
12/28/2015

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_



**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44****Authority For Civil Cover Sheet**

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
  - (b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
  - (c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; NOTE: federal question actions take precedence over diversity cases.)
- III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. **Origin.** Place an "X" in one of the six boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.