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SUNDIAL BRANDS LLC
7

8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10
11 MARIANNE PADILLA, individually and
on behalf of all others similarly situated,

12 Plaintiff,

13 v.

14 SUNDIAL BRANDS LLC, a New York
15 Limited Liability Company, and
16 NUBIAN HERITAGE, INC., a New
York Corporation, and DOES 1-25,
inclusive,

17 Defendant.
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Case No.

**NOTICE OF REMOVAL OF
ACTION TO UNITED STATES
DISTRICT COURT**

[Alameda County Superior Court
Case No. RG16823809]

Case No. _____
NOTICE OF REMOVAL TO USDC

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453, as amended by the Class Action Fairness Act of 2005 (“CAFA”), Defendant SUNDIAL BRANDS LLC (“Sundial”), hereby removes this action from the Superior Court of the State of California, County of Alameda, to the United States District Court for Northern District of California. The grounds for removal are as follows:

1. On July 20, 2016, Marianne Padilla (“Plaintiff”) filed a complaint in the Superior Court of the State of California, County of Alameda, against Sundial, Case No. RG16823809 (the “Complaint”). Attached hereto as **Exhibit A** is a true and correct copy of the Complaint.

2. Exhibit A constitutes all the process, pleadings, and orders provided by counsel for Plaintiff to counsel for Sundial, which are hereby incorporated by reference.

3. On July 20, 2016, the Complaint was sent via electronic mail to counsel for Sundial by counsel for Plaintiff. To Sundial’s knowledge, neither Defendant has been properly served. Accordingly, this Notice of Removal is timely, as it is filed within thirty (30) days of Sundial’s receipt of the Complaint. *See* 28 U.S.C. § 1446(b).

REMOVAL IS PROPER UNDER CAFA¹

4. This action is a civil action which may be removed to this Court by Sundial pursuant to the provisions of 28 U.S.C. §§ 1332(d), 1441, and 1453.

5. The Complaint was filed by Plaintiff on behalf of a putative class, defined as:

¹ This Notice of Removal is based on the allegations in the Complaint, and is filed subject to and with full reservation of rights. No admission of fact, law, or liability is intended by this Notice of Removal, and all defenses, motions, and pleas are expressly reserved.

1 All persons who are California residents who purchased any of the
 2 Products during the period from four years before the filing of this
 3 complaint until the date of class certification

4 (Compl. ¶ 37.)

5 6. The Complaint alleges that Sundial "...utilize[s] advertisements and
 6 packaging that include uniform and unlawful misrepresentations that misled
 7 Plaintiff and the other members of the Class." (Compl. ¶ 43.)

8 7. The Complaint asserts six causes of action: three causes of action for
 9 violation of California Unfair Competition Law (unlawful, unfair and fraudulent
 10 practices), violation of the Consumer Legal Remedies Act, breach of California
 11 Commercial Code §2313, and violation of California's False Advertising Law. The
 12 Complaint seeks restitution of the purchase price for all of the class members'
 13 purchases of the products. (Compl. ¶ F.)

14 8. CAFA provides that a class action against a non-governmental entity
 15 may be removed if (1) the number of proposed class members is not less than 100;
 16 (2) any member of the proposed plaintiff class is a citizen of a State different from
 17 any defendant; and (3) the aggregate amount in controversy, exclusive of interest
 18 and costs, exceeds \$5,000,000. Each of these requirements is met here.

19 9. The Declaration of Shawn Creedon in Support of Notice of Removal
 20 ("Creedon Declaration") is being filed concurrently with this Notice of Removal.

21 **NUMEROSITY**

22 10. California residents purchase the Products referenced in the Complaint
 23 at retailers throughout California and online. The Products have been sold in
 24 California over the past four years (Creedon Decl. ¶ 4.)

25 11. The Complaint alleges that the class consists who purchased any of the
 26 Products during the period from four years before the filing of this complaint until
 27 the date of class certification. (Compl. ¶ 37.)
 28

12. Based on Sundial's sales data, and the Complaint's allegations, the number of proposed class members is not less than 100. (See Creedon Decl. ¶ 4.)

MATTER IN CONTROVERSY IN EXCESS OF \$5,000,000

13. Where a complaint does not specify the amount of damages sought, the removing defendant bears the burden of establishing the amount in controversy by a "preponderance of the evidence." *Abrego v. Dow Chemical Co.*, 443 F.3d 676, 683 (9th Cir. 2006) (sufficient evidence shows "more likely than not" that jurisdictional minimum is met). "The demonstration concerns what the plaintiff is claiming (and thus the amount in controversy between the parties) not whether the plaintiff is likely to win or be awarded everything." *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005).

14. CAFA provides that, "[i]n any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(6).

15. In the Complaint, Plaintiff seeks restitution to the Class of all money paid for the Products and the restore those funds to class members (Compl. ¶¶ 36, 76).

16. Based upon Sundial's sales data, class members have spent in excess of \$5,000,000 on the Products over the past four years. (Creedon Decl. ¶ 5.)

17. Accordingly, based on the Complaint's allegations and Sundial's sales data, the \$5,000,000 amount in controversy requirement is satisfied here, exclusive of interest and costs.

DIVERSITY OF CITIZENSHIP

18. As alleged in the Complaint, Plaintiff resides in the State of California. (Compl. ¶ 7.) Plaintiff also seeks to represent a class of California residents. (Compl. ¶ 37.) Sundial is informed and believes that Plaintiff is a California resident.

1 19. Sundial is a New York corporation that has its principal place of
2 business in New York. (Compl. ¶ 2.) Thus, Sundial is a citizen of New York.

3 20. Accordingly, the “minimal diversity” requirement under CAFA—*i.e.*,
4 that “any member of a class of plaintiffs is a citizen of a State different from any
5 defendant”—is satisfied for purposes of removal of this action. 28 U.S.C.
6 § 1332(d)(2)(A).

7 21. This action does not fall within any of the exclusions in 28 U.S.C.
8 §§ 1332(d) and 1446 because Sundial is not a citizen of the forum state of
9 California.

10 22. For all the foregoing reasons, this Court has original jurisdiction under
11 28 U.S.C. §§ 1332(d), 1441, and 1453.

12 23. Counsel for Sundial certifies, pursuant to 28 U.S.C. § 1446(d), that it
13 will promptly give notice of filing of this Notice of Removal to Plaintiff through
14 Plaintiff’s counsel of record and will promptly file with the Clerk of the Superior
15 Court of the State of California, County of Alameda, a copy of this Notice of
16 Removal.

17 Dated: July 26, 2016

MORRISON & FOERSTER LLP

19 By: /s/ William F. Tarantino
20 William Tarantino
WTarantino@mofo.com

21 Attorneys for Defendant
22 SUNDIAL BRANDS LLC
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EXHIBIT A

SUM-100

SUMMONS (CITACION JUDICIAL)

NOTICE TO DEFENDANT: (AVISO AL DEMANDADO):

SUNDIAL BRANDS LLC, a New York Limited Liability Company;
Additional Parties Form is attached

YOU ARE BEING SUED BY PLAINTIFF: (LO ESTÁ DEMANDANDO EL DEMANDANTE):

MARIANNE PADILLA, on behalf of herself and all others similarly
situated

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

**ENDORSED
FILED
ALAMEDA COUNTY**

JUL 19 2016

CLERK OF THE SUPERIOR COURT
By *Jamie Thomas*
JAMIE THOMAS, Deputy

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **¡AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desear el caso.

The name and address of the court is:
(El nombre y dirección de la corte es): Alameda County Superior Court
1225 Fallon Street
Oakland, CA 94612

CASE NUMBER
(Número de Caso): **16-16823809**

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Mark N. Todzo, Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117, (415) 913-7800

DATE:
(Fecha)

JUL 19 2016

Chad Finke

Clerk, by
(Secretario)

Jamie Thomas

, Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

[SEAL]

NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):
3. ☐ on behalf of (specify):
under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)
☐ other (specify):
4. ☐ by personal delivery on (date):

SUM-200(A)

SHORT TITLE: Padilla v. Sundial Brands LLC, et al.	CASE NUMBER:
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INSTRUCTIONS FOR USE

- This form may be used as an attachment to any summons if space does not permit the listing of all parties on the summons.
- If this attachment is used, insert the following statement in the plaintiff or defendant box on the summons: "Additional Parties Attachment form is attached."

List additional parties (Check only one box. Use a separate page for each type of party.):


☐ Plaintiff
 ☒ Defendant
 ☐ Cross-Complainant
 ☐ Cross-Defendant

NUBIAN HERITAGE, INC., a New York Corporation, and DOES 1-25.

Page 2 of 2

Page 1 of 1

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Mark N. Todzo (SBN 168389) Lexington Law Group 503 Divisadero Street San Francisco, CA 94117 TELEPHONE NO.: (415) 913-7800 FAX NO.: (415) 759-4112 ATTORNEY FOR (Name): Center for Environmental Health		FOR COURT USE ONLY ENDORSED FILED ALAMEDA COUNTY JUL 19 2016 CLERK OF THE SUPERIOR COURT By  JAMIE THOMAS, Deputy
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Alameda STREET ADDRESS: 1225 Fallon Street MAILING ADDRESS: CITY AND ZIP CODE: Oakland, California 94612 BRANCH NAME: Rene C. Davidson Courthouse		
CASE NAME: Padilla v. Sundial Brands LLC, et al.		
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000)	<input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)	
Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)		CASE NUMBER: RG16823809 JUDGE: DEPT:

Items 1-6 below must be completed (see instructions on page 2).

1. Check **one** box below for the case type that best describes this case:
- | | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Auto Tort
<input type="checkbox"/> Auto (22)
<input type="checkbox"/> Uninsured motorist (46)
Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
<input type="checkbox"/> Asbestos (04)
<input type="checkbox"/> Product liability (24)
<input type="checkbox"/> Medical malpractice (45)
<input type="checkbox"/> Other PI/PD/WD (23)
Non-PI/PD/WD (Other) Tort
<input type="checkbox"/> Business tort/unfair business practice (07)
<input type="checkbox"/> Civil rights (08)
<input type="checkbox"/> Defamation (13)
<input type="checkbox"/> Fraud (16)
<input type="checkbox"/> Intellectual property (19)
<input type="checkbox"/> Professional negligence (25)
<input type="checkbox"/> Other non-PI/PD/WD tort (35)
Employment
<input type="checkbox"/> Wrongful termination (36)
<input type="checkbox"/> Other employment (15) | Contract
<input type="checkbox"/> Breach of contract/warranty (06)
<input type="checkbox"/> Rule 3.740 collections (09)
<input type="checkbox"/> Other collections (09)
<input type="checkbox"/> Insurance coverage (18)
<input type="checkbox"/> Other contract (37)
Real Property
<input type="checkbox"/> Eminent domain/Inverse condemnation (14)
<input type="checkbox"/> Wrongful eviction (33)
<input type="checkbox"/> Other real property (26)
Unlawful Detainer
<input type="checkbox"/> Commercial (31)
<input type="checkbox"/> Residential (32)
<input type="checkbox"/> Drugs (38)
Judicial Review
<input type="checkbox"/> Asset forfeiture (05)
<input type="checkbox"/> Petition re: arbitration award (11)
<input type="checkbox"/> Writ of mandate (02)
<input type="checkbox"/> Other judicial review (39) | Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403)
<input checked="" type="checkbox"/> Antitrust/Trade regulation (03)
<input type="checkbox"/> Construction defect (10)
<input type="checkbox"/> Mass tort (40)
<input type="checkbox"/> Securities litigation (28)
<input type="checkbox"/> Environmental/Toxic tort (30)
<input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41)
Enforcement of Judgment
<input type="checkbox"/> Enforcement of judgment (20)
Miscellaneous Civil Complaint
<input type="checkbox"/> RICO (27)
<input checked="" type="checkbox"/> Other complaint (not specified above) (42)
Miscellaneous Civil Petition
<input type="checkbox"/> Partnership and corporate governance (21)
<input type="checkbox"/> Other petition (not specified above) (43) |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
2. This case ☒ is ☐ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|-------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| a. <input type="checkbox"/> Large number of separately represented parties | d. <input checked="" type="checkbox"/> Large number of witnesses |
| b. <input checked="" type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. <input checked="" type="checkbox"/> Substantial amount of documentary evidence | f. <input checked="" type="checkbox"/> Substantial postjudgment judicial supervision |
3. Remedies sought (check all that apply): a. ☒ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☐ punitive
4. Number of causes of action (specify): Seven
5. This case ☒ is ☐ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: July 19th, 2016

Mark N. Todzo

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

CIVIL CASE COVER SHEET

CM-010

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers. If you are filing a first paper (for example, a complaint) in a civil case, you must complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check **one** box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the **primary** cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

To Parties in Rule 3.740 Collections Cases. A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than \$25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

To Parties in Complex Cases. In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort

Auto (22)—Personal Injury/Property Damage/Wrongful Death
Uninsured Motorist (46) *(if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto)*

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

Asbestos (04)
Asbestos Property Damage
Asbestos Personal Injury/Wrongful Death
Product Liability *(not asbestos or toxic/environmental)* (24)
Medical Malpractice (45)
Medical Malpractice—Physicians & Surgeons
Other Professional Health Care Malpractice
Other PI/PD/WD (23)
Premises Liability (e.g., slip and fall)
Intentional Bodily Injury/PD/WD (e.g., assault, vandalism)
Intentional Infliction of Emotional Distress
Negligent Infliction of Emotional Distress
Other PI/PD/WD

Non-PI/PD/WD (Other) Tort

Business Tort/Unfair Business Practice (07)
Civil Rights (e.g., discrimination, false arrest) *(not civil harassment)* (08)
Defamation (e.g., slander, libel) (13)
Fraud (16)
Intellectual Property (19)
Professional Negligence (25)
Legal Malpractice
Other Professional Malpractice *(not medical or legal)*
Other Non-PI/PD/WD Tort (35)

Employment

Wrongful Termination (36)
Other Employment (15)

Contract

Breach of Contract/Warranty (06)
Breach of Rental/Lease
Contract *(not unlawful detainer or wrongful eviction)*
Contract/Warranty Breach—Seller
Plaintiff *(not fraud or negligence)*
Negligent Breach of Contract/Warranty
Other Breach of Contract/Warranty
Collections (e.g., money owed, open book accounts) (09)
Collection Case—Seller Plaintiff
Other Promissory Note/Collections Case
Insurance Coverage *(not provisionally complex)* (18)
Auto Subrogation
Other Coverage
Other Contract (37)
Contractual Fraud
Other Contract Dispute

Real Property

Eminent Domain/Inverse Condemnation (14)
Wrongful Eviction (33)
Other Real Property (e.g., quiet title) (26)
Writ of Possession of Real Property
Mortgage Foreclosure
Quiet Title
Other Real Property *(not eminent domain, landlord/tenant, or foreclosure)*

Unlawful Detainer

Commercial (31)
Residential (32)
Drugs (38) *(if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential)*

Judicial Review

Asset Forfeiture (05)
Petition Re: Arbitration Award (11)
Writ of Mandate (02)
Writ—Administrative Mandamus
Writ—Mandamus on Limited Court Case Matter
Writ—Other Limited Court Case Review
Other Judicial Review (39)
Review of Health Officer Order
Notice of Appeal—Labor
Commissioner Appeals

Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)

Antitrust/Trade Regulation (03)
Construction Defect (10)
Claims Involving Mass Tort (40)
Securities Litigation (28)
Environmental/Toxic Tort (30)
Insurance Coverage Claims *(arising from provisionally complex case type listed above)* (41)

Enforcement of Judgment

Enforcement of Judgment (20)
Abstract of Judgment (Out of County)
Confession of Judgment *(non-domestic relations)*
Sister State Judgment
Administrative Agency Award *(not unpaid taxes)*
Petition/Certification of Entry of Judgment on Unpaid Taxes
Other Enforcement of Judgment Case

Miscellaneous Civil Complaint

RICO (27)
Other Complaint *(not specified above)* (42)
Declaratory Relief Only
Injunctive Relief Only *(non-harassment)*
Mechanics Lien
Other Commercial Complaint Case *(non-tort/non-complex)*
Other Civil Complaint *(non-tort/non-complex)*

Miscellaneous Civil Petition


Partnership and Corporate Governance (21)
Other Petition *(not specified above)* (43)
Civil Harassment
Workplace Violence
Elder/Dependent Adult Abuse
Election Contest
Petition for Name Change
Petition for Relief From Late Claim
Other Civil Petition

1 LEXINGTON LAW GROUP
Mark N. Todzo, State Bar No. 168389
2 Howard Hirsch, State Bar No. 213209
Abigail Blodgett, State Bar No. 278813
3 503 Divisadero Street
San Francisco, CA 94117
4 Telephone: (415) 913-7800
Facsimile: (415) 759-4112
5 mtodzo@lexlawgroup.com
hhirsch@lexlawgroup.com
6 ablodgett@lexlawgroup.com

7 Attorneys for Plaintiff
Marianne Padilla
8

ENDORSED
FILED
ALAMEDA COUNTY

JUL 19 2016

CLERK OF THE SUPERIOR COURT
By 
JANIE THOMAS, Deputy

9
10 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA

RG16823809

12 MARIANNE PADILLA, on behalf of herself
13 and all others similarly situated,

Case No. _____

14 Plaintiff,

CLASS ACTION COMPLAINT

15 vs.

16
17 SUNDIAL BRANDS LLC, a New York Limited
Liability Company, and NUBIAN HERITAGE,
18 INC., a New York Corporation, and DOES 1-25,

19 Defendants.
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1 Plaintiff Marianne Padilla ("Plaintiff"), on behalf of herself and those similarly
2 situated, based on information and belief and investigation of counsel, except for information
3 based on personal knowledge, hereby alleges:

4 **INTRODUCTION**

5 1. American hair loss sufferers spend more than \$3.5 billion a year in an attempt to
6 treat thinning and lost hair. In order to exploit this market, Defendants sell hair and scalp products
7 marketed as hair growth products under the Shea Moisture and Nubian Heritage brand names.
8 Defendants' hair growth products are advertised, marketed, labeled, sold, and represented as
9 products that promote hair growth. These products prominently feature the word "grow" on the
10 front label, which is known as the principal display panel (the "Products").¹ For example, many
11 Products represent in large typeface on the front label that such Products will "Strengthen, Grown
12 & Restore" hair.

13 2. Unfortunately for consumers, Defendants' representations are not true. Contrary to
14 the names of the Products and the representations on the principal display panels, the Products do
15 not stimulate or cause hair growth.

16 3. According to the FDA, there is only a single ingredient for over-the-counter use,
17 minoxidil, which has been shown to promote hair growth and is approved by the Food and Drug
18 Administration ("FDA") for that purpose in certain concentrations. Thus, the only nonprescription
19 products approved for hair growth are specific topical formulations of minoxidil. The FDA has
20 further determined that labeling claims for all other hair growth products besides those containing
21 minoxidil for over the counter ("OTC") external use are "either false, misleading, or unsupported
22 by scientific data," and that these products "cannot be considered generally recognized as safe and
23 effective for [their] intended use." 21 C.F.R. § 310.527(a). None of the Products contain
24 minoxidil as an ingredient. Thus, the hair growth labeling claims on the Products are false,
25 misleading, and unsupported by scientific data.

26
27 ¹ For example, Defendants' Products include, but are not limited to, Jamaican Black Castor
28 Oil Strengthen, Grow & Restore hair and scalp products, Raw Shea Butter hair and scalp products,
and Indian Hemp & Tamanu Grow & Strengthen products.

4. Plaintiff and members of the Classes reasonably believed Defendants' representations that the Products would help grow hair, and would not have purchased the Products or paid such a high price for the Products but for Defendants' false and misleading representations that the Products would cause or promote hair growth.

5. Defendants' conduct of advertising, marketing, selling, labeling, and representing that the Products cause hair growth, when they in fact do not, constitutes unlawful, unfair, and deceptive conduct, is likely to deceive members of the public, is unethical, oppressive, unscrupulous, and substantially injurious to consumers, and violates California's legislatively declared policies against misbranding over-the-counter drug products and misrepresenting the characteristics of goods and services. As such, Defendants' marketing, labeling, and advertising practices violate California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* (hereinafter the "UCL"), California's Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.* (hereinafter the "CLRA") and California's False Advertising Law, Cal. Bus. & Prof. Code § 17500, *et seq.* (hereinafter the "FAL"). Accordingly, Plaintiff and members of the Class seek an order enjoining Defendants' acts of unfair competition and awarding restitution and damages to the individual victims of Defendants' unfair and deceptive practices.

6. Defendants' representations that the Products cause or promote hair growth also constitute a material provision of both the express warranties between Defendants and Plaintiff and the members of the Class as to the Products, which have been breached due to Defendants' conduct.

PARTIES

7. Plaintiff Marianne Padilla is a resident of California and purchased one or more of the Products. At various times throughout the class period, Plaintiff purchased several of the Products at a retail store in Cathedral City, California. The front label of the Products, which Plaintiff reviewed prior to purchase, prominently displays the words "Heal, Grow & Strengthen." At the time of purchase, Plaintiff relied on Defendants' representations and reasonably believed based on the front of the label that the Products would cause or promote hair growth. Had Plaintiff known that the Products were wholly ineffective at causing or promoting hair growth,

1 Plaintiff would not have bought the Products at all, or would not have paid more for the Products
2 than the cost of other hair and scalp care products that do not claim to promote hair growth.

3 8. Defendant Sundial Brands LLC is a New York limited liability company with its
4 principal place of business in New York. Defendant Sundial Brands LLC advertises, markets,
5 distributes, and sells the Products in California.

6 9. Defendant Nubian Heritage, Inc. is a New York corporation with its principal place
7 of business in New York. Defendant Nubian Heritage, Inc. advertises, markets, distributes, and
8 sells the Products in California.

9 10. DOES 1 through 25 are persons or entities whose true names and capacities are
10 presently unknown to Plaintiff, and who therefore are sued by such fictitious names. Plaintiff is
11 informed and believes, and on that basis alleges, that each of the fictitiously named defendants
12 perpetrated some or all of the wrongful acts alleged herein and are responsible in some manner for
13 the matters alleged herein. Plaintiff will amend this Complaint to state the true names and
14 capacities of such fictitiously named defendants when ascertained.

15 11. Defendants Sundial Brands, LLC, Nubian Heritage, Inc. and DOES 1-25 are
16 collectively referred to herein as "Defendants."

17 **JURISDICTION AND VENUE**

18 12. This Court has jurisdiction over all causes of action asserted herein pursuant to the
19 California Constitution, Article VI, Section 10, because this case is a cause not given by statute to
20 other trial courts. This Court also has jurisdiction over certain causes of action asserted herein
21 pursuant to Business & Professions Code §§ 17203 and 17204, which allow enforcement in any
22 Court of competent jurisdiction.

23 13. This Court has jurisdiction over Defendants because each is a corporation or other
24 entity that has sufficient minimum contacts in California, is a citizen of California, or otherwise
25 intentionally avails itself of the California market either through the distribution, sale and/or
26 marketing of the Products in the State of California or by having a facility located in California so
27 as to render the exercise of jurisdiction over it by the California courts consistent with traditional
28 notions of fair play and substantial justice.

14. Venue in the County of Alameda is proper under California Business & Professions Code § 17203, Code of Civil Procedure §§ 395 and 395.5, and Civil Code § 1780, because this Court is a court of competent jurisdiction and the Products are sold throughout this County. Concurrently with filing this Complaint, Plaintiffs are filing an affidavit pursuant to Civil Code § 1780(c) regarding the propriety of venue in Alameda County.

COMMON FACTUAL ALLEGATIONS

15. Seeking to profit on consumers' fear and anxiety surrounding their thinning and lost hair, Defendants market the Products as hair growing hair care and scalp treatments.

16. Defendants prominently represent on the principal display panels of all of the Products that the Products will either "Strengthen, Grow & Restore," "Grow & Strengthen," "Strengthen & Grow," "Heal, Grow & Strengthen," or "Heal, Strengthen & Grow" hair.

17. Each of these representations, at least one of which appears on each Product, includes the word "grow." The term "grow" is commonly defined as "to cause to grow," "to increase, expand."² As a result, the packaging represents to consumers that the Products will cause hair to grow or promote hair growth and that they are therefore superior to other products on the market that do not make this claim.

18. The Products are deceptively and uniquely marketed, in contrast to other hair and scalp care products, as products that will promote hair growth, when they in fact do not. Indeed, the Products are significantly more expensive than similar products that do not claim to promote hair growth.

19. In 1938, Congress enacted the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301, *et seq.* after Congress "became increasingly concerned about unsafe drugs and fraudulent marketing." *Wyeth v. Levine*, 555 U.S. 555, 566 (2009). Through the FDCA, the FDA regulates the marketing of OTC drug products.

20. Among other things, the FDCA prohibits the sale of adulterated or misbranded drugs, and requires manufacturers to apply to the FDA for premarket approval of new drugs or

² See Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/grow>.

1 comply with an OTC drug monograph. *See* 21 U.S.C. § 331.

2 21. Under the FDCA

3 The term "drug" means (A) articles recognized in the official United States
4 Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or
5 official National Formulary, or any supplement to any of them; and (B) articles
6 intended for use in the diagnosis, cure, mitigation, treatment, or prevention of
7 disease in man or other animals; and (C) articles (other than food) intended to affect
8 the structure or any function of the body of man or other animals; and (D) articles
9 intended for use as a component of any article specified in clause (A), (B), or (C).

10 21 U.S.C. §321(g), *see also*, Cal. Health and Safety Code §109925. The Products are
11 represented as being able to cure, mitigate and treat hair loss and as affecting the function
12 of the user's hair growth. Accordingly, the Products are drug products. While the
13 Products may also be cosmetics within the statutory definitions of that term, the Products
14 must still comply with all of the legal requirements for drug products. *See, e.g.*, 21 C.F.R.
15 § 701.3(d); FDA Cosmetic Labeling Manual, 1991 WL 11250880, *1 ("Products that are
16 cosmetics but are also intended to treat or prevent disease, or affect the structure or
17 functions of the human body, are considered also drugs and must comply with both the
18 drug and cosmetic provisions of the law.)

19 22. Any product that is labeled, represented, or promoted as a hair growth product is a
20 drug under the FDCA. *See* 21 CFR §310.527(b).

21 23. A manufacturer seeking premarket approval of a new OTC drug must submit a
22 detailed new drug application ("NDA"), which must include:

23 [E]vidence consisting of adequate and well-controlled investigations, including
24 clinical investigations, by experts qualified by scientific training and experience
25 to evaluate the effectiveness of the drug involved, on the basis of which it could
26 fairly and responsibly be concluded by such experts that the drug will have the
27 effect it purports or is represented to have under the conditions of use prescribed,
28 recommended, or suggested in the labeling or proposed labeling thereof.

21 U.S.C. § 355(d). Moreover, after the FDA approves a new drug application, any change in the
drug's labeling requires a supplement to the application, and further approval by the FDA, either
before or after the change. 21 C.F.R. §§ 314.70(b), (c), 314.71.

24. An OTC drug manufacturer need not seek premarket approval if its marketing of

1 the OTC drug is in compliance with an OTC drug monograph. Unlike NDAs which are based on
2 drug products, monographs specify the active ingredients that can be contained within OTC drug
3 products. An OTC drug product containing ingredients that comply with standards established in
4 an applicable monograph is considered to be “generally recognized as safe and effective” and does
5 not require specific FDA approval before marketing.³ In drafting the monographs, the FDA
6 divided OTC drugs into drug categories, which were then assigned to an advisory review panel of
7 qualified experts who evaluate the safety and effectiveness of the OTC drugs, review the drugs’
8 labeling, and advise the FDA Commissioner on the promulgation of monographs establishing
9 conditions under which OTC drugs listed within each monograph are generally recognized as safe,
10 effective, and not misbranded. 21 C.F.R. § 330.10(a).

11 25. In 1989, a final drug monograph was issued for the category of hair growers and
12 hair loss prevention drug products for OTC human use. *Id.* § 310.527. At that time, the FDA
13 determined that there were no effective OTC treatments for thinning hair or hair loss. The
14 monograph provides that “any OTC drug product for external use containing an ingredient offered
15 for use as a hair grower or for hair loss prevention cannot be considered generally recognized as
16 safe and effective for its intended use.” *Id.* § 310.527(a). The monograph also provides that “all
17 labeling claims for OTC hair grower and hair loss prevention drug products for external use are
18 either false, misleading, or unsupported by scientific data.” *Id.*

19 26. Subsequent to the issuance of this final drug monograph, FDA approved Rogaine
20 (minoxidil two percent topical solution) for OTC external use as a hair growth stimulant. FDA,
21 Center for Drug Evaluation & Research, Approval Letter for App. No. NDA 20-834 (Nov. 14,
22 1997). Thus, minoxidil is currently the only ingredient approved for OTC external use as a hair
23 growth stimulant.

24 27. California’s Sherman Food, Drug, and Cosmetic Law (the “Sherman Law”) has
25 adopted federal nonprescription drug regulations as state regulations. Cal. Health & Safety Code
26 § 110111. Thus, the final drug monograph for OTC hair growers and hair loss prevention is

27 ³ FDA, Regulatory Mechanisms for Marketing OTC Drug Products,
28 <http://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDER/ucm106386.htm> (last visited April 19, 2016).

1 incorporated into California state law. The Sherman Law declares any drug to be “misbranded” if
2 its labeling is “false or misleading in any particular.” *Id.* § 111330.

3 28. The Sherman Law also declares that it is unlawful for any person to disseminate
4 any false advertisement of any drug. *Id.* § 110390. As with misbranding, an “advertisement is
5 false if it is false or misleading in any particular.” *Id.*

6 29. None of the Products contain minoxidil, nor do any of them contain ingredients that
7 are approved by FDA as hair grower products for OTC human use.

8 30. Thus, Defendants’ representations that their Products will cause hair growth are
9 unlawful, false, deceptive, and misleading.

10 31. Defendants’ representations on the principal display panels of the Products that the
11 Products will “Strengthen, Grow & Restore,” “Grow & Strengthen,” “Strengthen & Grow,” “Heal,
12 Grow & Strengthen,” and “Heal, Strengthen & Grow” mislead consumers into believing the
13 Products will cause hair to grow, when they in fact do not.

14 32. Defendants know that use of the word “Grow,” always accompanied by the words
15 “Strengthen,” “Heal,” “Restore,” or some combination thereof, on the front label of the Products
16 misleads consumers into believing the Products will cause or promote hair growth.

17 33. Defendants’ ongoing practice of advertising, marketing, labeling, selling, and
18 representing that the Products cause or promote hair growth, when in fact they do not, is likely to
19 deceive ordinary consumers of the Products and has in fact deceived Plaintiff. Plaintiff reasonably
20 understood the labeling of the Products to mean that the Products will cause or promote hair
21 growth. In reliance on Defendants’ claims, Plaintiff purchased Products she would not have
22 purchased but for Defendants’ false promotion of the Products as causing or promoting hair
23 growth, or paid a premium for the Products in comparison to similar hair and scalp products that
24 do not claim to grow hair.

25 34. Plaintiff and members of the Classes have suffered injury in fact and have lost
26 money or property because they paid a premium for the Products that they would have not
27 otherwise paid as a direct result of Defendants’ unlawful false, misleading, deceptive, and unfair
28 representations that the Products would cause or promote hair growth. Had Plaintiff and the

1 members of the Classes known the true nature of the Products, they would not have paid as much
2 for them.

3 35. Defendants' scheme to exploit consumer demand for hair growth products by
4 falsely advertising the Products as having the ability to grow hair has been extraordinarily
5 successful.

6 36. Defendants have profited enormously from unlawful, false and misleading
7 representations that the Products cause or promote hair growth. The purpose of this action is to
8 put an end to Defendants' deceptive marketing of the Products, and to secure monetary relief for
9 Defendants' unjust enrichment stemming from their deceptive and misleading product claims.

10 CLASS ALLEGATIONS

11 37. Pursuant to California Code of Civil Procedure § 382, Plaintiff brings this action on
12 behalf of herself and the following Class of similarly situated individuals:

13 All persons who are California residents who purchased any of the Products
14 during the period from four years before the filing of this complaint until
the date of class certification.

15 (the "Class"). The following persons and entities are specifically excluded from the Class:

16 Defendants; the officers, directors, or employees of Defendants; any entity in which Defendants
17 has a controlling interest; and any affiliate, legal representative, heir, or assign of Defendants.

18 Also excluded are any federal, state, or local governmental entities, any judicial officer presiding
19 over this action and the members of their immediate family and judicial staff, and any juror
20 assigned to this action.

21 38. The Class is sufficiently numerous, as it includes thousands of persons who have
22 purchased the Products. Plaintiff is unable to state the precise number of potential members of the
23 proposed Classes because that information is in the possession of Defendants and their retail
24 customers. However, the number of members in the proposed Classes is so numerous that joinder
25 would be impracticable. The exact size of the proposed Class and the identity of their members
26 will be readily ascertainable from the business records of Defendants and Defendants' retailers as
27 well as Class members' own records and testimony. The disposition of the claims of the Class
28

1 members in this class action will substantially benefit both the parties and the Court.

2 39. There is a community of interest among members of the proposed Classes in that
3 there are questions of law and fact common to the proposed Class that predominate over questions
4 affecting other only individual members. Proof of a common set of facts will establish the liability
5 of Defendants and the right of each member of the Class to relief.

6 40. Plaintiff asserts claims that are typical of the claims of the Class. Plaintiff and all
7 members of the Class have been subjected to the same wrongful conduct because they have
8 purchased the Products based on Defendants' misleading representations and omissions about the
9 qualities of the Products.

10 41. Plaintiff will fairly and adequately represent and protect the interests of the other
11 members of the Class. Plaintiff has no interests that are antagonistic to those of other members of
12 the Classes. Plaintiff is committed to the vigorous prosecution of this action and has retained
13 counsel experienced in litigation of this nature to represent her. Plaintiff anticipates no difficulty
14 in the management of this litigation as a class action.

15 42. Common legal and factual questions, which do not vary among Class members and
16 which may be determined without reference to the individual circumstances of any Class member,
17 including the following:

- 18 a. whether Defendants advertise, market, label, and sell the Products by
19 representing that the Products cause or promote hair growth;
- 20 b. whether the Products are drug products within the meaning of federal and
21 California law;
- 22 c. whether Defendants' representations on the principal display panels of the
23 Products that the Products cause or promote hair growth was an express
24 warranty to the members of the Class;
- 25 d. whether Defendants' conduct in advertising and marketing the Products
26 constitutes a violation of the CLRA;
- 27 e. whether Defendants' conduct in advertising and marketing the Products
28 constitutes a violation of the Sherman Law;

- 1 f. whether Defendants' conduct constitutes fraudulent, unfair, or unlawful
- 2 conduct as defined by the UCL;
- 3 g. whether Plaintiff and the Class members are entitled to injunctive and other
- 4 equitable relief based on Defendants' violations of the Sherman Law, UCL,
- 5 and CLRA;
- 6 h. whether Plaintiff and the Class members are entitled to compensatory and
- 7 damages as a result of Defendants' violations of the CLRA; and
- 8 i. the appropriate remedies for Defendants' conduct.

9 43. Defendants utilize advertisements and packaging that include uniform and unlawful
10 misrepresentations that misled Plaintiff and the other members of the Class. Thus, there is a well-
11 defined community of interest in the questions of law and fact involved in this action and affecting
12 the parties.

13 44. Proceeding as a class action provides substantial benefits to both the parties and the
14 Court because this is the most efficient method for the fair and efficient adjudication of the
15 controversy. Members of the Class have suffered and will suffer irreparable harm and damages as
16 a result of Defendants' wrongful conduct. Because of the nature of the individual Class members'
17 claims, few, if any, could or would otherwise afford to seek legal redress against Defendants for
18 the wrongs complained of herein. Therefore, a representative class action is appropriate, the
19 superior method of proceeding, and essential to the interests of justice insofar as the resolution of
20 Class members' claims is concerned. Absent a representative class action, members of the Classes
21 would continue to suffer losses for which they would have no remedy, and Defendants would
22 unjustly retain the proceeds of their ill-gotten gains. Even if separate actions could be brought by
23 individual members of the Classes, the resulting multiplicity of lawsuits would cause undue
24 hardship, burden, and expense for the Court and the litigants, as well as create a risk of
25 inconsistent rulings that might be dispositive of the interests of the other members of the Classes
26 who are not parties to the adjudications or may substantially impede their ability to protect their
27 interests.

FIRST CAUSE OF ACTION

(Plaintiff Padilla, On Behalf of Herself and the Class, Alleges Violations of California's Unfair Competition Law Based on Unlawful Acts and Practices)

45. The violation of any law constitutes an unlawful business practice under California Business & Professions Code § 17200.

46. The relevant section of the Sherman Law declares any drug to be "misbranded" if it is "false or misleading in any particular." *See* Cal. Health & Safety Code §§ 111330, 110390.

47. The Sherman Law defines a "person" as "any individual, firm, partnership, trust, corporation, limited liability company, company, estate, public or private institution, association, organization, group, city, county, city and county, political subdivision of this state, other governmental agency within the state, and any representative, agent, or agency of any of the foregoing." Cal. Health & Safety Code § 109995.

48. Defendant Sundial Brands LLC is a limited liability company and Defendant Nubian Heritage, Inc. is a corporation and, therefore, they are each a "person" within the meaning of the Sherman Act.

49. The drug monograph for hair grower and hair loss prevention drug products for OTC human use provides that "any OTC drug product for external use containing an ingredient offered for use as a hair grower or for hair loss prevention cannot be considered generally recognized as safe and effective for its intended use" and is "misbranded." 21 C.F.R. § 310.527(a), (b). The drug monograph also provides that "all labeling claims for OTC hair grower and hair loss prevention drug products for external use are either false, misleading, or unsupported by scientific data." *Id.* § 310.527(a). While the FDA has now determined that products containing minoxidil as an ingredient may make hair growth and hair loss prevention claims, none of the Products contain minoxidil.

50. Defendants' labeling each of the Products as a hair grower constitutes misbranding under federal law. Because the Sherman Law has adopted federal nonprescription drug regulations, Cal. Health & Safety Code § 110111, and declares any drug to be "misbranded" if it is "false or misleading in any particular," Defendants are in violation of the Sherman Law. *See* Cal. Health & Safety Code § 111330.

51. Defendants conduct also violates the Sherman Law's prohibition against disseminating any false advertisement of any drug because they falsely advertise each of their Products as a hair grower, when in fact, the Products do not grow hair. Cal. Health & Safety Code § 110390.

52. As detailed more fully below, the acts and practices alleged herein were intended to or did result in the sale of the Products in violation of the CLRA, Cal. Civ. Code § 1750, *et seq.*, specifically California Civil Code §§ 1770(a)(5), 1770(a)(7), and 1770(a)(9).

53. By violating California's Sherman Law and the CLRA, Defendants have engaged in unlawful business acts and practices which constitute unfair competition within the meaning of California Business & Professions Code § 17200.

54. An action for injunctive relief and restitution is specifically authorized under California Business & Professions Code § 17203.

55. Plaintiff purchased the Products after reviewing the front label of such Products containing Defendants' representations that the Products would cause or promote hair growth. Plaintiff purchased the Products, which cost more due to Defendants' unlawful representations that the products would cause or promote hair growth on the Products' labels. Plaintiff would not have purchased the Products at all, or would not have paid such a high price for the Products, but for Defendants' false promotion that the Products cause or promote hair growth. Plaintiff has thus suffered injury in fact and lost money or property as a direct result of Defendants' misrepresentations.

SECOND CAUSE OF ACTION
(Plaintiff Padilla, On Behalf of Herself and the Class, Alleges
Violations of California's Unfair Competition Law Based On Fraudulent Acts and Practices)

56. Plaintiff incorporates by reference the allegations set forth above.

57. Under California Business & Professions Code § 17200, any business act or practice that is likely to deceive members of the public constitutes a fraudulent business act or practice.

1 58. Defendants have engaged and continue to engage in conduct that is likely to
 2 deceive members of the public. This conduct includes, but is not limited to, misrepresenting that
 3 the Products cause or promote hair growth when, in fact, they do not. As described above, federal
 4 nonprescription drug regulations, adopted in full by California's Sherman Law, provides that all
 5 labeling claims for OTC hair growers are either false, misleading, or unsupported by scientific
 6 data. Accordingly, Defendants' violations of the Sherman Law are *per se* deceptive under
 7 California law.

8 59. Plaintiff purchased the Products after reviewing the front label of such Products
 9 containing Defendants' representations that the Products were would cause or promote hair
 10 growth. Plaintiff reasonably believed that the Products would promote hair growth and purchased
 11 the Products in reliance on Defendants' representations that the Products would cause or promote
 12 hair growth. Plaintiff would not have purchased the Products at all, or would not have paid such a
 13 high price for the Products, but for Defendants' false promotion that the Products would cause or
 14 promote hair growth. Plaintiff has thus suffered injury in fact and lost money or property as a
 15 direct result of Defendants' misrepresentations and material omissions.

16 60. By committing the acts alleged above, Defendants have engaged in fraudulent
 17 business acts and practices, which constitute unfair competition within the meaning of California
 18 Business & Professions Code § 17200.

19 61. An action for injunctive relief and restitution is specifically authorized under
 20 California Business & Professions Code § 17203.

21 **THIRD CAUSE OF ACTION**
 22 **(Plaintiff Padilla, On Behalf of Herself and the Class, Alleges**
 23 **Violations of California's Unfair Competition Law Based on Unfair Acts and Practices)**

24 62. Plaintiff incorporates by reference the allegations set forth above.

25 63. Under California Business & Professions Code § 17200, any business act or
 26 practice that is unethical, oppressive, unscrupulous, or substantially injurious to consumers, or that
 27 violates a legislatively declared policy, constitutes an unfair business act or practice.

28 64. Defendants have engaged, and continue to engage, in conduct which is immoral,
 unethical, oppressive, unscrupulous, or substantially injurious to consumers. This conduct

1 includes, but is not limited to, misrepresenting that the Products cause or promote hair growth,
2 even though they do not. The gravity of harm caused by Defendants' conduct as described herein
3 far outweighs the utility, if any, of such conduct.

4 65. Defendants have engaged, and continue to engage, in conduct that violates the
5 legislatively declared policy of the Sherman Act against misbranding and false advertising of
6 nonprescription drugs. Cal. Health & Safety Code §§ 111330, 110390. Defendants have further
7 engaged, and continue to engage, in conduct that violates the legislatively declared policy of the
8 CLRA against misrepresenting the characteristics, uses, benefits, and quality of goods for sale.
9 Defendants gain an unfair advantage over their competitors, whose advertising must comply with
10 the CLRA and California Business & Professions Code § 17508.

11 66. Defendants' conduct, including misrepresenting the benefits of the Products, is
12 substantially injurious to consumers. Such conduct has and continues to cause substantial injury
13 to consumers because consumers would not have purchased the Products at all, or would not have
14 paid such a high price for the Products, but for Defendants' false promotion of the Products as
15 causing or promoting hair growth. Consumers have thus overpaid for the Products. Such injury is
16 not outweighed by any countervailing benefits to consumers or competition. Indeed, no benefit to
17 consumers or competition results from Defendants' conduct. Since consumers reasonably rely on
18 Defendants' representations regarding the Products and injury results from ordinary use of the
19 Products, consumers could not have reasonably avoided such injury. *Davis v. Ford Motor Credit*
20 *Co.*, 179 Cal. App. 4th 581, 597-98 (Cal. Ct. App. 2009); *see also Drum v. San Fernando Valley*
21 *Bar Ass'n*, 182 Cal. App. 4th 247, 257 (Cal. Ct. App. 2010) (outlining the third test based on the
22 definition of "unfair" in section 5 of the Federal Trade Commission Act).

23 67. By committing the acts alleged above, Defendants have engaged in unfair business
24 acts and practices which constitute unfair competition within the meaning of California Business
25 & Professions Code § 17200.

26 68. An action for injunctive relief and restitution is specifically authorized under
27 California Business & Professions Code § 17203.

28

69. Plaintiff purchased the Products after reviewing the front label of such Products containing Defendants' representations that the Products would cause or promote hair growth. Plaintiff purchased the Products in reliance on Defendants' representations that the Products would cause or promote hair growth. Plaintiff would not have purchased the Products at all, or would not have paid such a high price for the Products, but for Defendants' false promotion that the Products would cause or promote hair growth. Plaintiff has thus suffered injury in fact and lost money or property as a direct result of Defendants' misrepresentations and material omissions.

FOURTH CAUSE OF ACTION
(Plaintiff Padilla, On Behalf of Herself and the Class,
Alleges Violations of California's Consumers Legal Remedies Act)

70. Plaintiff incorporates by reference the allegations set forth above.

71. Plaintiff purchased the Products for her own personal use. Plaintiff purchased the Products after reviewing the front label of such Products containing Defendants' representations that the Products would cause or promote hair growth.

72. The acts and practices of Defendants as described above were intended to deceive Plaintiff and the members of the Class as described herein, and have resulted and will result in damages to Plaintiff and members of the Class. This conduct includes, but is not limited to, misrepresenting that the Products will cause or promote hair growth, even though they do not. These actions violated and continue to violate the CLRA in at least the following respects:

a. In violation of CLRA § 1770(a)(5), Defendants' acts and practices constitute representations that the Products have characteristics, uses, or benefits which they do not;

b. In violation of CLRA § 1770(a)(7), Defendants' acts and practices constitute representations that the Products are of a particular quality which they are not; and

c. In violation of CLRA § 1770(a)(9), Defendants' acts and practices constitute the advertisement of the goods in question without the intent to sell them as advertised.

73. Due to Defendants' acts, Plaintiff and the Class members have suffered damages.

74. By committing the acts alleged above, Defendants have violated the CLRA.

75. In compliance with the provisions of California Civil Code § 1782, Plaintiff provided written notice by overnight mail to Defendants on October 9, 2015 regarding her intention to seek damages under California Civil Code § 1750, *et seq.*, unless Defendants offered appropriate consideration or other remedies to all affected consumers. During the ensuing months, Plaintiff made significant attempts to resolve her claims short of litigation. However, on July 12, 2016, Plaintiff gave notice that she was terminating the tolling agreement the parties had signed, allowing her to file this complaint. As of the date of the filing of this Complaint, Defendants have not done so. Accordingly, Plaintiff seek damages pursuant to California Civil Code §1781(a) on behalf of herself and the Class.

76. Plaintiff and the other Class members are entitled, pursuant to California Civil Code §1780(1)(2), to an order enjoining the above-described wrongful acts and practices of Defendants, providing actual damages and restitution to Plaintiff Padilla and the Class members, and ordering the payment of costs and attorneys' fees and any other relief deemed appropriate and proper by the Court under California Civil Code § 1780.

77. Concurrently with filing this Complaint, Plaintiff filed an affidavit pursuant to Civil Code § 1780(d) regarding the propriety of venue. Venue is proper pursuant to Civil Code § 1780(d) as a substantial portion of the transactions at issue occurred in this District.

FIFTH CAUSE OF ACTION
(Plaintiff Padilla, On Behalf of Herself and the Class, Alleges Violations of California Commercial Code § 2313 Based on Breach of Express Warranty)

78. Plaintiff Padilla incorporates by reference the allegations set forth above.

79. Defendants' representations that the Products cause or promote hair growth constitute affirmations of fact made in regards to the Products as well as descriptions of the Products.

80. Defendants' representations that the Products cause or promote hair growth are made on the Products' principal display panels, and are thus part of the basis of the bargain between Defendants and purchasers of the Products.

81. As set forth in the paragraphs above, Defendants' statements concerning the Products are false.

1 82. All conditions precedent to Defendants' liability under the above-referenced
2 contract have been performed by Plaintiff Padilla and the other Class members.

3 83. Defendants breached their express warranties about the Products because, as
4 alleged above, the Products do not cause or promote hair growth.

5 84. Plaintiff and the other members of the Class were damaged in that they paid a
6 premium for the Products as a direct result of Defendants' breaches of express warranties that the
7 Products would cause or promote hair growth. Had Plaintiff and the Class members known the
8 true nature of the Products, they would not have purchased them or would not have paid such a
9 high price for the Products.

10 85. Within a reasonable time after she knew or should have known of such breach,
11 Plaintiff Padilla, on behalf of herself and the other members of the Class, placed Defendants on
12 notice thereof.

13
14 **SIXTH CAUSE OF ACTION**
15 **(Plaintiff Padilla, On Behalf of Herself and the Class, Alleges**
16 **Violations of California's False Advertising Law)**

17 86. Plaintiff incorporates by reference the allegations set forth above.

18 87. As alleged more fully above, Defendants have falsely advertised the Products by
19 falsely claiming that they cause or promote hair growth. Defendants have made statements on the
20 principal display panels of the Products that are untrue and misleading.

21 88. Defendants know, or by the exercise of reasonable care should know, that the
22 "grow" statements they make on their Products are untrue and misleading.

23 89. Plaintiff and members of the Class have suffered injury in fact and have lost money
24 or property because they paid a premium for the Products as a direct result of Defendants' false,
25 misleading, deceptive, and unfair representations that the Products cause or promote hair growth.
26 Had Plaintiff and members of the Class known the true nature of the Products, they would not
27 have purchased them or would not have paid such a high price for the Products.

28 90. Defendants' violations of the FAL continue to this day.

91. Pursuant to California Business and Professions Code § 17535, Plaintiff and the Class seek an order of this Court that includes, but is not limited to, an order requiring Defendants to remove and/or refrain from making representations on the Products' packaging that the Products cause or promote hair growth.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment and relief on behalf of herself and the Classes, against Defendants as follows:

A. An order certifying the proposed Class, appointing Plaintiff as the representative for the Class, and appointing Plaintiff's undersigned counsel as Class counsel for the Class;

B. An order preliminarily and permanently enjoining Defendants from conducting their business through the unlawful, unfair, or fraudulent business acts or practices, untrue and misleading advertising, and other violations of law described in this Complaint;

C. An order requiring Defendants to conduct a corrective advertising and information campaign advising consumers that the Products do not have the characteristics, uses, benefits, and qualities Defendants have claimed;

D. An order requiring Defendants to implement whatever measures are necessary to remedy the unlawful, unfair, or fraudulent business acts or practices, untrue and misleading advertising, and other violations of law described in this Complaint;

E. An order requiring Defendants to notify each and every member of the Class, at their own expense, of the pendency of the claims in this action in order to give such individuals and businesses an opportunity to obtain relief from Defendants;

F. An order requiring Defendants to pay restitution to restore all members of the Class with all funds acquired by means of any act or practice declared by this Court to be an unlawful, unfair, or a fraudulent business act or practice, untrue or misleading advertising, with plus pre- and post-judgment interest thereon;

G. An order requiring Defendants to disgorge all profits wrongfully derived by Defendants as a result of their acts or practices as alleged in this Complaint;

H. An order awarding actual damages to Plaintiff and the Class pursuant to the CLRA;

1 I. An order awarding Plaintiff her reasonable attorneys' fees and costs of suit
2 pursuant to California Code of Civil Procedure § 1021.5, California Civil Code § 1780(d), the
3 common fund doctrine, or any other appropriate legal theory; and

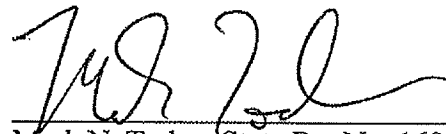
4 J. That the Court grant such other and further relief as may be just and proper.

5 **JURY DEMAND**

6 Plaintiff demands a trial by jury on all claims so triable.

7 DATED: July 19, 2016

Respectfully submitted,

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11 Howard Hirsch, State Bar No. 213209
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12 Attorneys for Plaintiff
13 Marianne Padilla

ENDORSED
FILED
ALAMEDA COUNTY

JUL 19 2015

CLERK OF THE SUPERIOR COURT
By *Jane Thomas*
JANE THOMAS, Deputy

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF ALAMEDA

16 MARIANNE PADILLA, on behalf of herself
17 and all others similarly situated,

18 Plaintiff,

19 vs.

20 SUNDIAL BRANDS LLC, a New York
21 Limited Liability Company, and NUBIAN
22 HERITAGE, INC., a New York Corporation,
23 and DOES 1-25,

24 Defendants.

Case No. RG16823809

AFFIDAVIT REGARDING PROPER
VENUE PURSUANT TO CAL. CIVIL
CODE § 1780(d)

1 I, Mark N. Todzo, declare as follows:

2 1. I am an attorney with the Lexington Law Group, and I represent Plaintiff Marianne
3 Padilla in the above-entitled action. This Affidavit is submitted concurrently with the filing of the
4 Complaint pursuant to, and in compliance with, California Civil Code § 1780(d).

5 2. Venue for this action is proper in the County of Alameda because a substantial
6 portion of the transactions at issue in the Complaint took place, and are taking place in this
7 County.

8 3. In particular, a substantial portion of the wrongful conduct at the heart of this case
9 – Defendants Sundial Brands LLC and Nubian Heritage, Inc.’s sales and marketing of hair care
10 and scalp products that prominently feature the work “Grow” on the principal display panel –
11 occurred in the County of Alameda and affected consumers in this County.

12 4. Venue is therefore proper in the County of Alameda pursuant to California Civil
13 Code § 1780(d).

14

15 I declare under penalty of perjury under the laws of the State of California that the
16 foregoing is true and correct. Executed on July 19th, 2016, at San Francisco, California.

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Mark N. Todzo

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6 Attorneys for Defendant
SUNDIAL BRANDS LLC

7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10
11 MARIANNE PADILLA, individually and
on behalf of all others similarly situated,

12 Plaintiff,

13 v.

14 SUNDIAL BRANDS LLC, a New York
15 Limited Liability Company, and
16 NUBIAN HERITAGE, INC., a New
York Corporation, and DOES 1-25,
inclusive,

17 Defendant.
18

Case No.

**DEFENDANT SUNDIAL
CREATIONS LLC'S RULE 7.1
CORPORATE DISCLOSURE**

[Alameda County Superior Court
Case No. RG16823809]

28 Case No. _____

DEFENDANT'S CORPORATE DISCLOSURE

1 Pursuant to Federal Rule of Civil Procedure 7.1 and Local Rule 3-15, the
2 undersigned, counsel of record for Defendant Sundial Brands LLC, a New York
3 corporation ("Defendant") states that Defendant does not issue stock to the public
4 and no publicly held corporation owns 10% or more of its stock. Interested parties
5 include parent company Sundial Group Holdings LLC and Sundial Group LLC.
6

7 Dated: July 26, 2016

MORRISON & FOERSTER LLP

9 By: /s/ William F. Tarantino
10 William Tarantino
WTarantino@mofo.com

11 Attorneys for Defendant
12 SUNDIAL BRANDS LLC
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