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

MELANIE BARBER, KI BURKE, and  
JOSEPH GREGORIO on Behalf of  
Themselves and all Others Similarly  
Situated,

Plaintiffs,

v.

JOHNSON & JOHNSON, MCNEIL-  
PPC, INC., JOHNSON & JOHNSON  
CONSUMER, INC., and RANIR LLC,

Defendants.

Case No. 8:16-cv-1954

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

1 Plaintiffs Melanie Barber, Ki Burke, and Joseph Gregorio (“Plaintiffs”), on  
2 behalf of themselves and all others similarly situated, make the following allegations  
3 against defendants Johnson & Johnson, McNeil-PPC Inc., Johnson & Johnson  
4 Consumer Inc., and Ranir LLC (collectively, the “Defendants”). Plaintiffs’  
5 allegations are based on the investigation of their counsel and upon information and  
6 belief, except as to allegations specifically pertaining to themselves and their  
7 counsel, which are based on personal knowledge.

8 **NATURE OF ACTION**

9 1. To capitalize on consumer demand for whiter teeth, Defendants make  
10 false and misleading representations about their Deeply White + peroxide toothpaste,  
11 and their Deeply White + peroxide mouthwash (the “Deeply White Products,” or the  
12 “Products”). Since Defendants know that sales in the whitening category of oral  
13 care products are over two billion a year and continuing to grow, Defendants use  
14 “Deeply Whitening” representations to sell the Deeply White Products at a premium  
15 price. Defendants make false and misleading whitening claims with one goal in  
16 mind – reaping enormous profits at the expense of unsuspecting consumers.

17 2. Specifically, Defendants claim that the Deeply White Products  
18 effectively deeply whiten teeth, effectively go beyond surface stain removal to  
19 deeply whiten teeth, provide superior whitening, and contain the same whitening  
20 ingredient that dentists use. But the Deeply White Products cannot deeply whiten  
21 teeth, do not go below surface stain removal, do not provide superior whitening, and  
22 contain only a trace amount of the peroxide that dentists use.

23 3. Peroxide in Rembrandt Deeply White toothpaste and mouthwash cannot  
24 deeply whiten teeth for several reasons. First, the peroxide in the Products does not  
25 stay on teeth for long enough. Second, the peroxide in the Products is not in close  
26 enough proximity to teeth because there is no dental tray or strip to hold the peroxide  
27 on teeth. Third, the Products do not contain enough peroxide to reach the dentin  
28

1 layer of teeth. Thus, the peroxide in the Deeply White Products does not function as  
2 a whitening agent on intrinsic stains.

3 4. Defendants' marketing campaign involves numerous false and  
4 misleading statements, as well as omissions of material fact, concerning the Products  
5 that have injured Plaintiffs and the Class by inducing them to purchase premium  
6 priced products.

7 5. Because Plaintiffs and others like them were taken in by Defendants'  
8 false promise of deeper whitening, Plaintiffs bring this class action against  
9 Defendants to seek a reimbursement of the premium Plaintiffs and the class members  
10 paid based on Defendants' representations that the Deeply White Products are  
11 capable of deep whitening.

12 6. Plaintiffs seek relief in this action individually and on behalf of all  
13 purchasers of the Deeply White Products for breach of express and implied  
14 warranties. Plaintiffs Barber and Burke also seek relief in this action individually  
15 and on behalf of purchasers of Deeply White Products in California for violation of  
16 Civil Code §§ 1750, *et seq.*, the California Consumer Legal Remedies Act  
17 ("CLRA"), Bus. & Prof. Code §§ 17200, *et seq.*, California's Unfair Competition  
18 Law ("UCL"), and Bus. & Prof. Code §§ 17500, *et seq.*, California's False  
19 Advertising Law ("FAL"). Plaintiff Joseph Gregorio also seeks relief in this action  
20 individually and on behalf of purchasers of Deeply White Products in New York for  
21 Defendants' violations of New York Gen. Bus. Law § 349, and New York Gen. Bus.  
22 Law § 350.

### 23 **THE PARTIES**

24 7. Plaintiff Melanie Barber is a resident of Lake Forest, California.  
25 Beginning in or around the fall of 2015, Ms. Barber regularly purchased Rembrandt  
26 Deeply White + peroxide toothpaste from several retailers, including Walgreens,  
27 CVS, and Rite Aid. Ms. Barber purchased Rembrandt Deeply White + peroxide  
28 toothpaste based on the "Deeply White" name of the toothpaste, as well as claims on

1 the label that the toothpaste whitens deeper, that peroxide would provide superior  
2 whitening, that the toothpaste would go below the surface to remove deep stains, that  
3 the toothpaste goes beyond surface stain whitening, and that it contained the same  
4 ingredient that dentists use. She would not have purchased Rembrandt Deeply White  
5 + peroxide toothpaste if the label had not stated that it would deeply whiten her teeth.  
6 Ms. Barber used Rembrandt Deeply White + peroxide toothpaste as directed for six  
7 months but stopped using it because she did not notice any changes on the deeper  
8 stains on her teeth.

9       8. Plaintiff Ki Burke is a resident of San Pedro, California. Beginning in  
10 or around the summer of 2015, Ms. Burke regularly purchased Rembrandt Deeply  
11 White + peroxide toothpaste and Rembrandt Deeply White + peroxide mouthwash.  
12 Ms. Burke purchased the Products from several retailers, including CVS, Walgreens,  
13 and Walmart. Ms. Burke purchased the Rembrandt Deeply White Products based on  
14 claims on the labels, including but not limited to, that they contained the same  
15 whitening ingredient that dentists use, that they would remove deep stains, and that  
16 they would whiten her teeth deeper. She would not have purchased the Rembrandt  
17 Deeply White Products if the labels had not stated that they would deeply whiten her  
18 teeth and that they contained the same ingredient that dentists use. Although she  
19 used the Deeply White Products for about a year, the Deeply White Products did not  
20 deeply whiten her teeth, or affect any of the intrinsic stains on her teeth.

21       9. Plaintiff Joseph Gregorio is a resident of New York, New York. Mr.  
22 Gregorio purchased Rembrandt Deeply White + peroxide toothpaste eight or nine  
23 times during the past few years. Mr. Gregorio purchased Rembrandt Deeply White  
24 from several retailers, including Bed Bath & Beyond, Duane Reade, and Walgreens.  
25 Mr. Gregorio purchased Rembrandt Deeply White + peroxide toothpaste based on  
26 statements on the labels, including but not limited to that, it would whiten intrinsic  
27 stains, would go beyond surface stain whitening, whiten deeper, and that it contained  
28 active dental peroxide – the same whitening ingredient that dentists use. He would

1 not have purchased Rembrandt Deeply White + peroxide toothpaste if the labels had  
2 not claimed that it would go beyond surface stain removal, that it would whiten  
3 deeper stains, and that it contained the same ingredient that dentists use. Even  
4 though Mr. Gregorio used Rembrandt Deeply White + peroxide toothpaste as  
5 directed, it didn't work to deeply whiten his teeth.

6 10. Defendant Johnson & Johnson is a New Jersey corporation with its  
7 principal place of business at One Johnson Plaza, New Brunswick, New Jersey  
8 08933. Johnson & Johnson is a multinational corporation engaged in the  
9 manufacture and sale of medical devices, pharmaceuticals, and consumer goods.  
10 Johnson and Johnson is engaged in the business of manufacturing, mass marketing,  
11 and distributing Deeply White Products throughout the United States.

12 11. Defendant McNeil-PPC, Inc. is a subsidiary of Defendant Johnson &  
13 Johnson that is organized under the laws of New Jersey with its principal place of  
14 business at 199 Grandview Road Skillman, New Jersey 08558. McNeil -PPC also  
15 maintains its headquarters at 7050 Camp Hill Road, Fort Washington, Pennsylvania.  
16 Defendant McNeil-PPC, develops, produces and markets oral healthcare products,  
17 including the Deeply White Products.

18 12. Defendant Johnson & Johnson Consumer Inc. is a New Jersey  
19 corporation with its headquarters and principal place of business at 199 Grandview  
20 Road Skillman, New Jersey 08558. Defendant Johnson & Johnson Consumer Inc.,  
21 develops, produces and markets oral healthcare products, including the Deeply  
22 White Products.

23 13. Defendants Johnson & Johnson, McNeil-PPC, Inc., and Johnson &  
24 Johnson Consumer Inc., are collectively referred to herein as Johnson & Johnson.

25 14. Defendant Ranir, LLC ("Ranir") is a Delaware limited liability  
26 company with its principal place of business at 4701 East Paris Avenue SE, Grand  
27 Rapids, Michigan 49512. Ranir is a leading global manufacturer of store brand oral  
28 care products and value branded oral care products sold under the Plackers

1 trademark. In July of 2016, Ranir acquired Rembrandt from Defendant Johnson &  
2 Johnson.

3 15. At all relevant times, each of the Defendants acted jointly to perpetrate  
4 the acts described herein. At all relevant times alleged in this matter, each Defendant  
5 acted in concert with, with the knowledge and approval of and/or as the agent of the  
6 other Defendant within the course and scope of the agency, regarding the acts and  
7 omissions alleged.

### 8 JURISDICTION AND VENUE

9 16. This Court has jurisdiction over this action pursuant to 28 U.S.C. §  
10 1332(d) because there are more than 100 Class Members, the aggregate amount in  
11 controversy exceeds \$5,000,000.00, exclusive of interest, fees, and costs, and at least  
12 one Class member is a citizen of a state different from at least one Defendant.

13 17. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because  
14 Defendants do business throughout this District, Plaintiffs Burke and Barber reside  
15 in this District, Plaintiffs Burke and Barber purchased the Deeply White Products  
16 several times in this District, and the Deeply White Products are sold extensively in  
17 this District.

### 18 FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

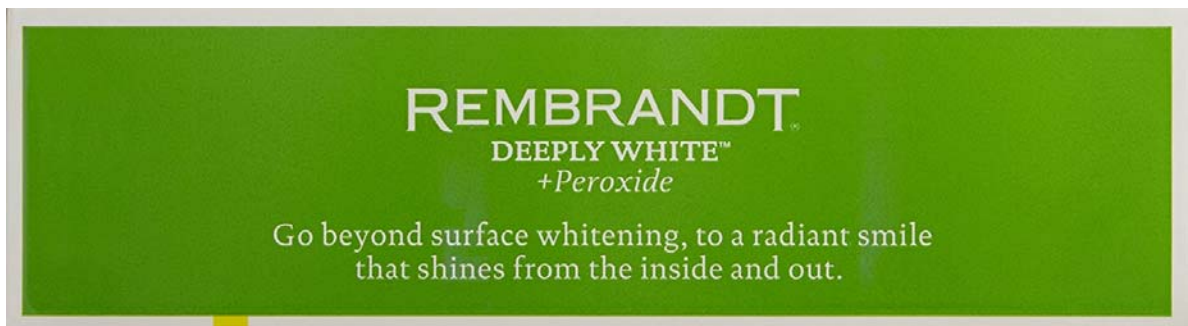
#### 19 **A. Rembrandt's False and Misleading Labels and Advertising**

20 18. Although Defendants prominently boast that they “introduced the  
21 REMBRANDT® Deeply White™ collection to push boundaries and redefine  
22 white,” they in fact pushed right through the boundaries of truthful advertising.  
23

24 19. As shown below, Defendants make the following false and misleading  
25 representations on the labels of Rembrandt Deeply White + peroxide toothpaste:

- 26 • “Deeply White”
- 27 • “Whitens Deeper”
- 28 • “Peroxide Toothpaste Formulated for Superior Whitening”

- 1 • “Goes beyond surface stain whitening, to a radiant smile that shines from  
2 the inside and out”
- 3 • “Tooth discoloration is caused by two types of stains – surface stains, and  
4 deep stains. Unlike most whitening toothpastes, which only whiten on the  
5 surface, this daily-use deep whitening formula is expertly designed to  
6 provide double whitening action – ON THE SURFACE: gently polishes  
7 away surface stains without scratching the enamel – BELOW THE  
8 SURFACE: safely whitens below the enamel to help remove deep stains  
9 where they start”
- 10 • “Active Dental Peroxide – the same enamel-safe whitening ingredient that  
11 dentists use”



	<b>Drug Facts</b> <b>Active ingredient</b> Sodium Monofluorophosphate 0.884% (w/w).....Anticavity	<b>Purpose</b> Anticavity	<b>Drug Facts (continued)</b> <b>Other information</b> • store at 20°–25°C (68°–77°F)
	<b>Use</b> • aids in the prevention of dental cavities	<b>Inactive ingredients</b> glycerin, hydrated silica, urea peroxide, aluminum hydroxide, modified food starch, flavor, sodium citrate, propylene glycol, cocamidopropyl betaine, papain, sodium lauryl sulfate, carborer, sodium saccharin, calcium disodium EDTA	
	<b>Warnings</b> • Stop use and ask a dentist if oral irritation or tooth sensitivity occurs • Keep out of reach of children under 12 years of age • If more than amount used for brushing is accidentally swallowed, seek professional assistance or contact a Poison Control Center right away	<b>Questions or comments?</b> 1-800-548-3663 www.rembrandt.com	
	<b>Directions</b> adults and children 12 years of age and older: • brush teeth thoroughly, preferably after each meal or at least 2 times a day, or as directed by a dentist or physician • children under 12 years: ask a dentist or physician	Distributed by: Johnson & Johnson Healthcare Products Division of McNeil-PPC, Inc., Skillman, NJ 08558-9418 • ©McNEIL-PPC, Inc. 2010 • 30011412 The trade dress of this REMBRANDT® package is subject to trademark protection. This proprietary formula contains Active Dental Peroxide which releases oxygen for superior whitening. As a result, it is common for the tube to appear slightly inflated or release air when opened.	

	<b>Drug Facts</b> <b>Active ingredient</b> Sodium Monofluorophosphate 0.884% (w/w).....	<b>Purpose</b> Anticavity	<b>Drug Facts (continued)</b> <b>Other information</b> • store at 20°–25°C (68°–77°F)
	<b>Use</b> • aids in the prevention of dental cavities	<b>Inactive ingredients</b> glycerin, hydrated silica, urea peroxide, aluminum hydroxide, modified food starch, flavor, sodium citrate, propylene glycol, cocamidopropyl betaine, papain, sodium lauryl sulfate, carborer, sodium saccharin, calcium disodium EDTA	
	<b>Warnings</b> • Stop use and ask a dentist if oral irritation or tooth sensitivity occurs • Keep out of reach of children under 12 years of age • If more than amount used for brushing is accidentally swallowed, seek professional assistance or contact a Poison Control Center right away	<b>Questions or comments?</b> 1-800-548-3663 www.rembrandt.com	
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1           20. As shown below, Defendants make the following false and misleading  
2 representations on the labels of Rembrandt Deeply White + peroxide mouthwash:

- 3           • “Deeply White”
- 4           • “Deeply Whitens”
- 5           • “Fluoride Mouthwash Designed for Superior Whitening”
- 6           • “Deeply Whitens with the same enamel-safe ingredient dentists use”
- 7           • “Go beyond surface whitening, to a radiant smile that shines from the  
8           inside out”



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21. Defendants also omitted that dental strips, dental trays, and professional whitening all provide superior whitening. Defendants further omit that Deeply White Products provide no more whitening than other whitening toothpastes and mouthwashes. Defendants also omit that the peroxide in Deeply White products is only an iota of the peroxide that dentists use.

**B. Defendants Make Substantially Similar Representations in Marketing Materials to Drive Customers to the Labeling Representations on the Shelf**

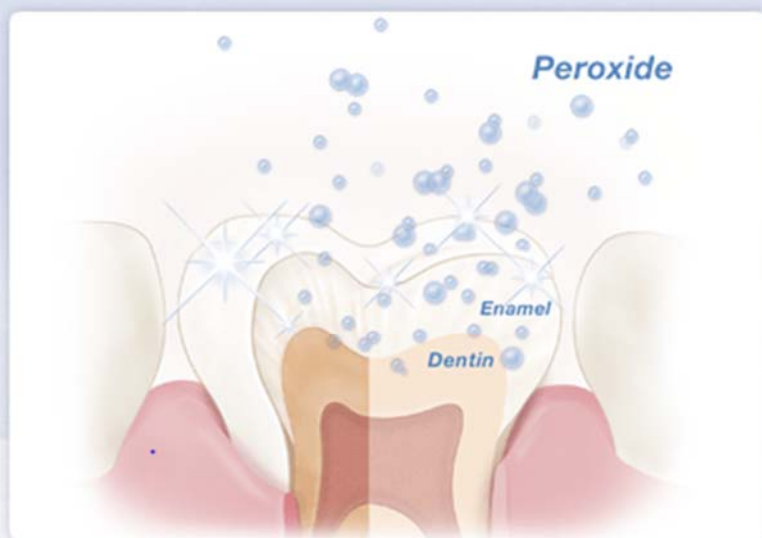
22. Defendants make representations on the Rembrandt website that are substantially similar to the ones they make on the Product labels that every purchaser

1 sees at the shelf.<sup>1</sup> For example, the Rembrandt website provides an illustration on  
2 how the peroxide in the Deeply White Products supposedly penetrates the enamel to  
3 reach the dentin layer of a tooth:  
4

### 5 **How REMBRANDT® Works**

6 The illustrations below explain how our key REMBRANDT® ingredients work

7 **Our rapid-release peroxide penetrates deep to effectively whiten teeth. The image below**  
8 **illustrates how this process works.**



18 As you can see in the diagram above, our rapid-release peroxide works on contact to release  
19 deep stains inside teeth, visibly whitening your smile.

20 You can find our rapid-release peroxide in REMBRANDT® products such as DEEPLY WHITE®  
21 + Peroxide Whitening Mouthwash, DEEPLY WHITE® + Peroxide Fresh Mint Toothpaste,  
22 DEEPLY WHITE® + Peroxide Winter Mint Toothpaste and our DEEPLY WHITE® 2 Hour  
23 Whitening Kit.

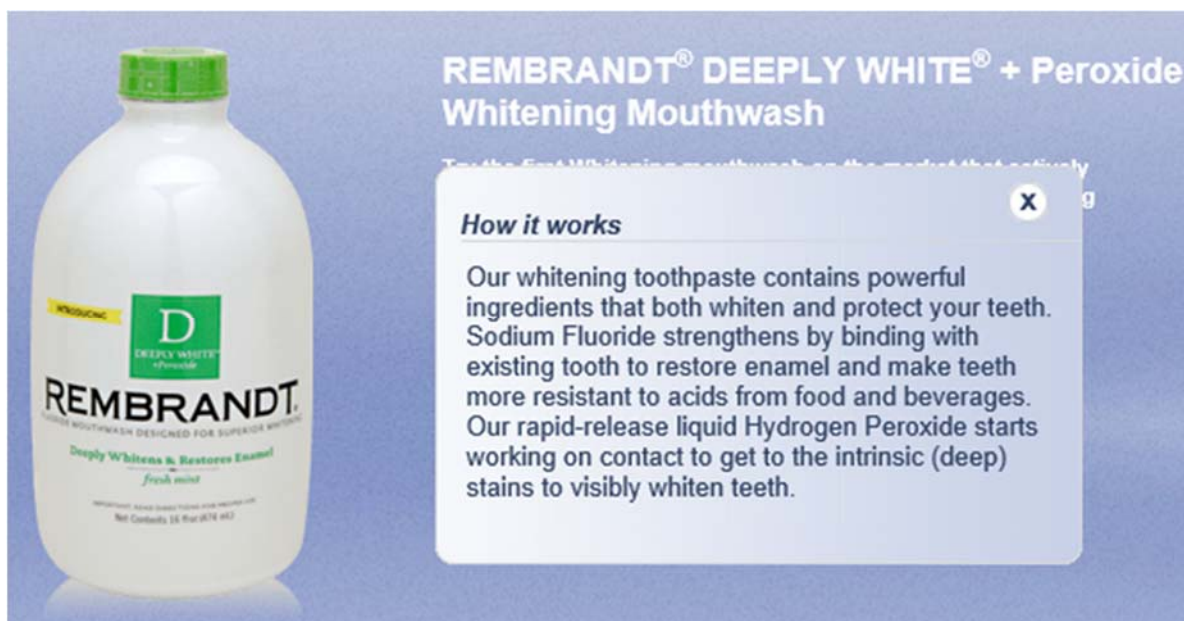
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27 <sup>1</sup> <http://www.rembrandt.com/teeth-whitening/how-rembrandt-whitening-works.html>  
28 (last visited October 26, 2016)

23. Defendants also make similar misrepresentations on the Rembrandt website about Deeply White + peroxide mouthwash.<sup>2</sup> Defendants explain that liquid peroxide “starts working on contact to get to the intrinsic (deep) stains to visibly whiten teeth”:



24. Defendants also utilize online videos and commercials to reinforce the false labeling message that Rembrandt Deeply White Products deeply whiten teeth. For example, the following commercial, which aired nationwide and on various networks,<sup>3</sup> shows two men wearing lab coats while scrubbing yellow graffiti off the surface of a giant tooth to depict how other over-the-counter whitening products clean off surface stains. After the surface stains have been scrubbed off, “DEEP STAINS” are left inside the tooth. Then, the commercial illustrates how the Deeply White Products purportedly target the deeper stains in the dentin layer of teeth. A

<sup>2</sup> <http://www.rembrandt.com/teeth-whitening-products/whitening-mouthwash.html> (last visited October 26, 2016)

<sup>3</sup> For example, the commercial aired on Dateline NBC, and/or the Today Show, and/or on Late Night with Jimmy Fallon on July 3rd, 4th, 7th, 9th, and 15th of 2011; August 5th, 15th, and 31st of 2011; and September 2 and 23rd of 2011.

1 voice over explains that the Deeply White Products use “the same enamel safe  
2 whitening ingredient dentists use to noticeably whiten teeth from the inside and out.”  
3 At the end, all that’s left behind is a tooth so white it’s clear, with the words “Deeply  
4 White” inside the tooth.<sup>4</sup>



<sup>4</sup> <https://vimeo.com/30329025> (last visited October 26, 2016)



### C. Consumers Want Whiter Teeth

25. Over the past two decades, whitening has become the most popular aesthetic dental treatment. The popularity of whitening is due in part to consumers' perception that maintaining a healthy, whiter smile makes them look better and younger. Studies have found that the appearance of white teeth correlates with perceptions of physical and oral health, as well as with views of social competence and intellectual ability.<sup>5</sup>

26. According to a 2008 survey by the American Dental Association, 55% of respondents considered having a "nice smile" as "very important" to "physical attractiveness." That percentage was much higher than "nice hair" (30%), "nice build or figure" (24%), "nice eyes" (35%), and "nice skin" (37%). Further, 73% of respondents agreed with the statement that "no matter how nice a person's smile is, yellow teeth really ruin the effect."

<sup>5</sup> Van der Geld P, Oosterveld P, Van Heck G, Kuijpers-Jagtman AM. Smile attractiveness. Self-perception and influence on personality. *The Angle Orthodontist* 2007;77(5):759-65.

1           27.     Additionally, a 2014 study conducted by the American Academy of  
2     Cosmetic Dentistry found that 99.7% of respondents believed that a smile is an  
3     important social asset, that 96% believed that an attractive smile makes a person  
4     more attractive to the opposite sex, and that 74% believed that an unattractive smile  
5     can hurt a person’s chance for career success. Recent studies have revealed that up  
6     to 55% of consumers are dissatisfied with their tooth color.<sup>6</sup>

7           28.     Societal trends that increasingly focus on whitening, combined with the  
8     fact that teeth become darker as people get older, means that there is tremendous  
9     demand for whitening among an aging baby boomer population. In 2008, the  
10    American Academy of Cosmetic Dentistry (“AACD”) reported that bleaching  
11    procedures and tooth whitening had increased by more than 300% over the previous  
12    5 years. Dr. James Hastings, the president of AACD, observed that “[t]eeth  
13    whitening is still the most popular cosmetic dentistry procedure.”

14          29.     As noted by the Los Angeles Times, “Whitening mania is especially  
15    obvious in the toothpaste aisle. Just about every major brand now comes in special  
16    whitening formulas.”<sup>7</sup> In an effort to capitalize on the booming Tooth Whitening  
17    Market, Defendants’ introduced the REMBRANDT® Deeply White™ collection in  
18    2011. Moreover, to differentiate its products from its competitors, Defendants  
19    sought to equate the effectiveness of the Deeply White Products with more  
20    expensive in-office dental treatments. For example, Defendants boast:

21                 So, how is Deeply White™ different than any other whitening products  
22                 you can buy? Deeply White™ is the first all-in-one fluoride toothpaste  
23                 to contain **Active Dental Peroxide**— the same enamel-safe ingredient  
                    dentists use to whiten deep stains, not just surface stains.<sup>8</sup>

24                 <sup>6</sup> Alkhatib MN, Holt R, Bedi R. Age and perception of dental appearance and tooth  
25                 colour. *Gerodontology* 2005;22(1):32-6.

26                 <sup>7</sup> <http://articles.latimes.com/2011/jul/04/health/la-he-skeptic-whitening-toothpaste-20110704> (last visited October 26, 2016)

27                 <sup>8</sup> <http://www.rembrandt.com/teeth-whitening/behind-scenes.html>  
28                 (last visited October 26, 2016)

1           30. Against that background, it's clear that Defendants' ubiquitous deep  
2 whitening representations are material to consumers. In fact, Defendants note on  
3 their website that:<sup>9</sup>

4           To truly understand the consumer and what they are looking for,  
5 REMBRANDT® spends a lot of time **interacting with consumers** to  
6 get to know their individual needs. At the same time, there is a lot of  
7 activity to **develop new technologies**. This includes basic research on  
8 teeth, staining, effects of age on tooth appearance and how to improve  
9 not just the appearance, but the health of the teeth and mouth. Once  
10 technology is identified, the team then moves into the product  
11 development phase where the products are actually made, focusing on  
12 getting the consistency, flavor, form, fit, texture and comfort just right  
13 to deliver that great consumer experience.

14           31. In short, Defendants' deep whitening claims are material to consumers'  
15 purchasing decisions.

16           **D. The Deeply White Products Do Not “Deeply Whiten” Teeth**

17           32. Defendants representations that the Deeply White Products deeply  
18 whiten teeth are false and misleading because peroxide in toothpaste and mouthwash  
19 does not work on deep stains. Peroxide in toothpaste and mouthwash does not  
20 whiten intrinsic stains because the amount of peroxide is too small, and then it gets  
21 rinsed away before it can deeply whiten teeth.<sup>10</sup>

22           33. Intrinsic or deep whitening implies that the active ingredient, peroxide,  
23 physically penetrates the pellicle, the enamel layer and then into the deeper dentin  
24 layer of teeth. But it has long been known and demonstrated not only in studies, but  
25 clinically as well, that this process, or degree of penetration is a slow and difficult  
26 process requiring all of the following: (1) **time** (preferably 4 hour daily applications  
27 for 2 to 4 weeks), (2) **proximity** (active ingredient held intimately against the tooth

28 <sup>9</sup> <http://www.rembrandt.com/teeth-whitening/behind-scenes.html> (last visted October 26, 2016)

<sup>10</sup> Unlike deep or intrinsic stains, surface stains can be relatively easily removed on a daily base with regularly use of a dentifrice (toothpaste). Intrinsic or deep stains, on the other hand, are located below the enamel surface.



1 surface in a protected and ideal environment such as a custom made whitening tray),  
2 and (3) **strength** (the proper chemical concentration - 10% peroxide to 30%  
3 carbamide peroxide - and therefore a therapeutic dose of the active ingredient).  
4 Peroxide in toothpastes and mouthwash meet none of these conditions.

5 34. The peroxide in the Deeply White Products<sup>11</sup> is only in contact with  
6 teeth for one minute when used as directed. As a result, the peroxide in Deeply  
7 White meets neither the time nor the proximity requirements for whitening deep  
8 stains.

9 35. In contrast, the typical bleaching tray at home technique uses a 10-15%  
10 carbamide peroxide solution in a custom-made bleach tray that is in direct contact  
11 with teeth and that must be worn for a minimum of two hours.<sup>12</sup> In fact, even  
12 Defendants market a Whitening Kit that uses a tray filled with peroxide gel that is  
13 held directly against teeth for a total treatment time of two (2) hours.<sup>13</sup>

14 36. Deeply White Products also do not contain enough peroxide “[b]ecause  
15 the toothpaste gets all over your mouth, including your gums, and because you might  
16 swallow some, the amount of hydrogen peroxide is small.”<sup>14</sup> Thus, like the time and  
17 proximity conditions, the strength condition is not met.

18 37. Moreover, Defendants’ Products contain much less peroxide than  
19 dentists use to whiten deep stains. Thus, Defendants’ claim that the Products contain  
20 “the same enamel-safe whitening ingredient that dentists use” is false and  
21

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22  
23 <sup>11</sup> The peroxide in Rembrandt Deeply Toothpaste is carbamide peroxide or urea  
24 peroxide. Hydrogen peroxide is released from carbamide peroxide when it mixes  
25 with saliva. The peroxide in Rembrandt Deeply Mouthwash is hydrogen peroxide.

26 <sup>12</sup> Illumnine Professional Bleaching, Technical Manual (2001)

27 <sup>13</sup> <http://www.rembrandt.com/teeth-whitening-products/whitening-kits.html#>

28 <sup>14</sup> De Vizio, *What are the disadvantages of using whitening toothpaste?*,  
Teeth Whitening, Sharecare (July 27, 2011) (<http://www.sharecare.com/health/teethwhitening/Disadvantagesofusingwhiteningtoothpaste>)

1 misleading. For similar reasons, Defendants products do not provide “Superior  
2 Whitening.”

3 38. Since peroxide in toothpaste and mouthwash does not meet the time,  
4 proximity, or strength requirements for deep whitening, dentists agree that peroxide  
5 in toothpaste does not work on intrinsic stains. The following are just a few  
6 examples where dentists explain the inability of peroxide in toothpaste and  
7 mouthwash to deeply whiten teeth:

- 8 • “Whitening toothpastes ... help remove surface stains through  
9 use of a mild abrasive ... Some toothpaste may contain an  
10 additional chemical or polishing agent to bolster its effectiveness.  
11 Common examples of these are peroxide, titanium dioxide and  
12 baking soda. However, **none of these products actually alter  
13 the shade of the tooth.**”<sup>15</sup>
- 12 • **“Most toothpastes and mouthrinses that advertise a  
13 whitening effect contain hydrogen peroxide – since these are  
14 being swallowed and are not given a lot of time in contact  
15 with the tooth surface, they do not provide much whitening  
16 benefit.** In fact, they are most likely to irritate the soft tissues of  
17 the mouth such as the gums, tongue, and palate.”<sup>16</sup>
- 16 • “There’s no doubt that whitening toothpastes can clean stains off  
17 teeth and give them a little extra gleam. But the term ‘whitening’  
18 is misleading. **Unlike trays and strips that can bleach deep  
19 within a tooth ... toothpastes can reach only the surface ...  
20 bleaches in toothpastes are useless because they’ll get rinsed  
21 away before they do anything.**”<sup>17</sup>
- 20 • “The newer whitening toothpastes whiten your teeth chemically  
21 with a hydrogen peroxide-based chemical. **These toothpastes  
22 contain the right chemical for whitening, but you’re never  
23 going to get the results with only two, or even five minutes of  
24 brushing.**

**Proper whitening requires you to hold the peroxide up  
against the tooth for several hours or more. You can think of**

24 \_\_\_\_\_  
25 <sup>15</sup> DMD Mennito, Anthony S., *A Simple Guide to Tooth Whitening*

26 <sup>16</sup> <http://mccabefamilydentistry.ca/how-does-tooth-whitening-work/>

27 <sup>17</sup> See Woolston, Chris, *Are Whitening Toothpastes a Bright Idea?*, The Healthy  
28 Skeptic, Los Angeles Times (July 4, 2011) (*available at*  
<http://articles.latimes.com/2011/jul/04/health/la-he-skeptic-whitening-toothpaste-20110704>).

1 the second type of whitening toothpaste like sandpaper – the  
 2 increased abrasiveness in whitening toothpaste helps to polish  
 3 and remove surface staining. This is effective for removing  
 4 surface staining from coffee, tea, and berries.

**Be aware that you are only removing stains, not changing the  
 5 intrinsic color of your teeth.**

I don't recommend these toothpastes because they remove tooth  
 6 structure by scraping away dentin and enamel."<sup>18</sup>

- 7 • **“Toothpastes with hydrogen peroxide are not very effective**  
 8 **because the peroxide reacts with other substances on the teeth.**  
 9 **The effectiveness is also dependent on the duration of time**  
 10 **peroxide is on the teeth. The longer it is in contact with the tooth**  
 11 **surface, the better it works. Since brushing is usually done**  
 12 **quickly, peroxide does not have much time to work**  
 13 **properly.”<sup>19</sup>**
- 14 • “Unless a peroxide toothpaste is left in contact with teeth for 30  
 15 minutes it's probably not going to have an effect.”<sup>20</sup>

16 39. Moreover, scientific research also shows that the whitening effect of  
 17 hydrogen peroxide in toothpaste is not clinically significant. As researchers  
 18 summarized in the Brazilian Dental Journal: “In vitro studies show that brushing  
 19 with toothpaste containing bleaching products do not promote significant results in  
 20 discolored teeth compared to conventional dentifrices [toothpastes], concluding that  
 21 these dentifrices, due to their mechanical action (abrasion) and the increase of high-  
 22 performance abrasives as hydrated silica, act just at removing pigmentation, giving a  
 23 false sense of whitening.”<sup>21</sup>

24 <sup>18</sup> Burhenne, Mark, *How Toothpaste Packaging Messes With Your Mind*, Ask the  
 25 Dentist (Oct. 15, 2014) (*available at* <http://askthedentist.com/toothpastemarketing/>)

26 <sup>19</sup> Dynamic Dental Educators, *Teeth Whitening*, ADA Continuing Education  
 27 Recognition Program (May 1, 2014).

28 <sup>20</sup> Coleman, Claire, *Is whitening toothpaste just a waste of money?*, Daily Mail, (Jan.  
 29 20, 2013 (*available at* <http://www.dailymail.co.uk/femail/article-2265539/Is-whitening-toothpaste-just-waste-money-They-promise-dazzling-Hollywood-smile-investigation-reveals-products-barely-make-difference.html>))

<sup>21</sup> Horn, Bruna Andrade, *Clinical Evaluation of the Whitening Effect of Over-the-Counter Dentifrices on Vital Teeth*, Braz. Dent. J. Vol. 25 No. 3 (2014).



1 Products are sold in major retail stores across the United States, including stores such  
2 as Target, and Walgreens. Major online retailers include Amazon.com and  
3 Drugstore.com. Upon information and belief, the Class includes more than one  
4 million members.

5 48. The Classes are ascertainable because the Class Members can be  
6 identified by objective criteria – the purchase of Deeply White Products during the  
7 Class Period. Individual notice can be provided to Class Members “who can be  
8 identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B).

9 49. There are numerous questions of law and fact common to the Class  
10 which predominate over any individual actions or issues, including but not limited  
11 to:

- 12 (a) Whether Defendants breached an express warranty made to  
13 Plaintiffs and the Class;
- 14 (b) Whether Defendants breached the implied warranty of fitness for  
15 a particular purpose;
- 16 (c) Whether Defendants’ marketing of the Deeply White Products is  
17 false, misleading, and/or deceptive;
- 18 (d) Whether Defendants marketing of the Deeply White Products is  
19 an unfair business practice;
- 20 (e) Whether the Deeply White Products go beyond surface stains to  
21 deeply whiten teeth;
- 22 (f) Whether the Deeply White Products provide superior whitening;
- 23 (g) Whether Defendants’ claim that the Products contain the same  
24 ingredients that dentists use is misleading;
- 25 (h) Whether Defendants were unjustly enriched by their conduct;
- 26 (i) Whether Defendants violated the CLRA;
- 27 (j) Whether Defendants violated the UCL;
- 28 (k) Whether Defendants violated the FAL;

- 1 (l) Whether Defendants violated the GBL:
- 2 (m) Whether Class Members suffered an ascertainable loss as a result
- 3 of Defendants' misrepresentations; and
- 4 (n) Whether, as a result of Defendants' misconduct as alleged herein,
- 5 Plaintiffs and the Class Members are entitled to restitution,
- 6 injunctive and/or monetary relief and, if so, the amount and
- 7 nature of such relief.

8 50. Plaintiffs' claims are typical of the claims of the members of the Classes  
9 as all members of the Classes are similarly affected by Defendants' wrongful  
10 conduct. Plaintiffs have no interests antagonistic to the interests of the other  
11 members of the Classes. Plaintiffs and all members of the Classes have sustained  
12 economic injury arising out of Defendants' violations of common and statutory law  
13 as alleged herein.

14 51. Plaintiffs are adequate representatives of the Class because their  
15 interests do not conflict with the interests of the Class Members they seek to  
16 represent, they have retained counsel competent and experienced in prosecuting class  
17 actions, and they intend to prosecute this action vigorously. The interests of the  
18 Class Members will be fairly and adequately protected by Plaintiffs and their  
19 counsel.

20 52. The class mechanism is superior to other available means for the fair  
21 and efficient adjudication of the claims of Plaintiffs and the Class Members. Each  
22 individual Class Member may lack the resources to undergo the burden and expense  
23 of individual prosecution of the complex and extensive litigation necessary to  
24 establish Defendants' liability. Individualized litigation increases the delay and  
25 expense to all parties and multiplies the burden on the judicial system presented by  
26 the complex legal and factual issues of this case. Individualized litigation also  
27 presents a potential for inconsistent or contradictory judgments. In contrast, the class  
28 action device presents far fewer management difficulties and provides the benefits of

1 single adjudication, economy of scale, and comprehensive supervision by a single  
2 court on the issue of Defendants’ liability. Class treatment of the liability issues will  
3 ensure that all claims are consistently adjudicated.

4 **COUNT I**

5 **(Breach of Express Warranty)**

6 53. Plaintiffs repeat the allegations contained in the paragraphs above as if  
7 fully set forth herein.

8 54. Plaintiffs bring this Count individually and on behalf of the members of  
9 the Class.

10 55. In connection with the sale of the Deeply White Products, Defendants  
11 expressly warranted that the Deeply White Products were effective and would whiten  
12 intrinsic stains below the tooth’s surface. Defendants issued express warranties  
13 including:

- 14 • “Deeply White”
- 15 • “Whitens Deeper”
- 16 • “Peroxide Toothpaste Formulated for Superior Whitening”
- 17 • “Goes beyond surface stain whitening, to a radiant smile that shines from  
18 the inside and out”
- 19 • “Tooth discoloration is caused by two types of stains – surface stains, and  
20 deep stains. Unlike most whitening toothpastes, which only whiten on the  
21 surface, this daily-use deep whitening formula is expertly designed to  
22 provide double whitening action – ON THE SURFACE: gently polishes  
23 away surface stains without scratching the enamel – BELOW THE  
24 SURFACE: safely whitens below the enamel to help remove deep stains  
25 where they start”
- 26 • “Active Dental Peroxide – the same enamel-safe whitening ingredient that  
27 dentists use”
- 28 • “Fluoride Mouthwash Designed for Superior Whitening”

- “Deeply Whitens with the same enamel-safe ingredient dentists use”

56. Defendants’ affirmations of fact and promises made to Plaintiffs and the Class on labels, became part of the basis of the bargain between Defendants on the one hand, and Plaintiffs and the Class Members on the other, thereby creating express warranties that the Deeply White Products would conform to Defendants’ affirmations of fact, representations, promises, and descriptions.

57. Defendants breached their express warranties because the Deeply White Products do not in fact deeply whiten teeth, do not go beyond surface stain removal, do not whiten deeper, do not provide superior whitening, do not deeply whiten, do not remove deep stains, and do not contain a comparable ingredient to the whitening ingredient that dentists use. In short, the Deeply White Products do not perform as expressly warranted.

58. Plaintiffs and the Class Members were injured as a direct and proximate result of Defendants’ breach because: (a) they would not have purchased the Deeply White Products if they had known the true facts; (b) they paid for the Deeply White Products due to the mislabeling; and (c) the Deeply White Products did not have the quality, effectiveness, or value as promised. As a result, Plaintiffs and the Class have been damaged.

## **COUNT II**

### **(Breach of Implied Warranty of Fitness for a Particular Purpose)**

59. Plaintiffs repeat the allegations contained in the paragraphs above as if fully set forth herein.

60. Plaintiffs bring this Count individually and on behalf of the members of the Class.

61. Defendants marketed, distributed, and/or sold the Deeply White Products with implied warranties that they were fit for the particular purpose of deeply whitening teeth, and going beyond surface stain removal to whiten below the tooth’s surface. However, the peroxide in the Deeply White Products have no effect



1 on intrinsic stains in teeth and do not deeply whiten teeth. At the time the Deeply  
2 White Products were sold, Defendants knew or should have known that Plaintiffs  
3 and the Class Members would rely on Defendants' skill and judgment regarding the  
4 efficacy of the Deeply White Products.

5 62. In reliance on Defendants' skill and judgment and the implied  
6 warranties of fitness for the purpose, Plaintiffs and the Class Members purchased the  
7 Deeply White Products for use in deeply whitening teeth.

8 63. The Deeply White Products were not altered by Plaintiffs or the Class  
9 Members.

10 64. Plaintiffs and the Class Members were injured as a direct and proximate  
11 result of Defendants' breach because: (a) they would not have purchased the Deeply  
12 White Products if the true facts concerning their efficacy had been known; (b) they  
13 paid an increased price for the Deeply White Products based on Defendants'  
14 representations regarding their efficacy; and (c) the Deeply White Products did not  
15 have the characteristics, uses, or benefits as promised. As a result, Plaintiffs and the  
16 Class Members have been damaged.

17 **COUNT III**

18 **(Consumer Legal Remedies Act, Civil Code §§ 1750, et. seq.)**

19 65. Plaintiffs Barber and Burke bring this Count individually and on behalf  
20 of the California Class.

21 66. Plaintiffs repeat the allegations contained in the paragraphs above as if  
22 fully set forth herein.

23 67. Plaintiffs and the California Class Members are consumers who  
24 purchased Deeply White Products for personal, family, or household purposes.  
25 Accordingly, Plaintiffs and the California Class Members are "consumers" as that  
26 term is defined by the CLRA in Cal. Civ. Code § 1761(d). Plaintiffs and the  
27 California Class Members are not sophisticated experts with independent knowledge  
28 of the formulation or efficacy of the Deeply White Products.

1           68. At all relevant times, the Deeply White Products constituted “good[s]”  
2 as that term is defined in Cal. Civ. Code § 1761(a).

3           69. At all relevant times, Defendants were “person[s]” as that term is  
4 defined in Civ. Code § 1761(c).

5           70. At all relevant times, Plaintiffs’ purchase of the Deeply White Products,  
6 and the purchases of the Deeply White Products by other Class Members, constituted  
7 “transactions” as that term is defined in Cal. Civ. Code § 1761(e). Defendants’  
8 actions, representations, and conduct has violated, and continues to violate the  
9 CLRA, because they extend to transactions that intended to result, or which have  
10 resulted in, the sale of the Deeply White Products to consumers.

11           71. The policies, acts, and practices described in this Complaint were  
12 intended to and did result in the sale of Deeply White Products to Plaintiffs and the  
13 Class. Defendants’ practices, acts, policies, and course of conduct violated the  
14 CLRA §1750 *et seq.* as described above.

15           72. Defendants represented that the Deeply White Products had  
16 sponsorship, approval, characteristics, uses, and benefits which they did not have in  
17 violation of Cal. Civ. Code § 1770(a)(5).

18           73. Defendants represented that the Deeply White Products were of a  
19 particular standard, quality, and grade, when they were another, in violation of  
20 California Civil Code § 1770(a)(7).

21           74. Defendants violated California Civil Code §§ 1770(a)(5) and (a)(7) by  
22 representing that the Deeply White Products were effective at deeply whitening  
23 teeth, effective at going beyond surface stain removal to deeply whiten teeth, could  
24 provide superior whitening, and contained a comparable ingredient that dentists use.  
25 In fact, the Deeply White Products cannot deeply whiten teeth, do not go below  
26 surface stain removal, do not provide superior whitening, and contain much less  
27 peroxide than dentists use.  
28

1           75. Furthermore, as described above, Defendants made material omissions  
2 about the peroxide in their Products as compared to what dentists use, as well as with  
3 respect to their Products' ability to whiten as compared to other whitening products  
4 and treatments.

5           76. Defendants represented that the Deeply White Products were of a  
6 particular standard or quality when Defendants were aware that they were of another  
7 in violation of § 1770(a)(7) of the CLRA. Defendants represented that the Deeply  
8 White Products were effective at deeply whitening teeth, effective at going beyond  
9 surface stain removal to deeply whiten teeth, could provide superior whitening, and  
10 contained a comparable ingredient that dentists use. In fact, the Deeply White  
11 Products cannot deeply whiten teeth, do not go below surface stain removal, do not  
12 provide superior whitening, and contain much less peroxide than dentists use.

13           77. Defendants advertised the Deeply White Products with the intent not to  
14 sell them as advertised in violation of § 1770(a)(9) of the CLRA. Defendants did not  
15 intend to sell the Deeply White Products as advertised because Defendants knew that  
16 the Deeply White Products cannot deeply whiten teeth, do not go below surface stain  
17 removal, do not provide superior whitening, and contain much less peroxide than  
18 dentists use.

19           78. Plaintiffs and the California Class Members suffered injuries caused by  
20 Defendants' misrepresentations because: (a) Plaintiffs and the Class Members would  
21 not have purchased the Deeply White Products if they had known the true facts; (b)  
22 Plaintiffs and the Class paid an increased price for the Deeply White Products due to  
23 the mislabeling of the Deeply White Products; and (c) the Deeply White Products did  
24 not have the level of quality, effectiveness, or value as promised.

25           79. Wherefore, Plaintiffs seek injunctive relief for this violation of the  
26 CLRA.

1 COUNT IV

2 (False Advertising Law, Business & Professions Code §§17500 et seq.)

3 80. Plaintiffs Barber and Burke bring this Count individually and on behalf  
4 of the California Class.

5 81. Plaintiffs repeat the allegations contained in the paragraphs above as if  
6 fully set forth herein.

7 82. California’s FAL (Bus. & Prof. Code §17500, *et seq.*) makes it  
8 “unlawful for any person to make or disseminate or cause to be made or  
9 disseminated before the public in this state, . . . in any advertising device . . . or in  
10 any other manner or means whatever, including over the Internet, any statement,  
11 concerning . . . personal property or services, professional or otherwise, or  
12 performance or disposition thereof, which is untrue or misleading and which is  
13 known, or which by the exercise of reasonable care should be known, to be untrue or  
14 misleading.”

15 83. Throughout the Class Period, Defendants committed acts of false  
16 advertising, as defined by the FAL, by using false and misleading statements to  
17 promote the sale of the Deeply White Products, as described above, and including,  
18 but not limited to, that the Deeply White Products were effective at deeply whitening  
19 teeth, effective at going beyond surface stain removal to deeply whiten teeth, could  
20 provide superior whitening, and contained a comparable ingredient that dentists use.

21 84. Defendants knew or should have known, through the exercise of  
22 reasonable care, that their statements were untrue and misleading.

23 85. Defendants’ actions in violation of the FAL were false and misleading  
24 such that the general public is and was likely to be deceived.

25 86. As a direct and proximate result of these acts, consumers have been and  
26 are being harmed. Plaintiffs and members of the Class have suffered injury and  
27 actual out-of-pocket losses as a result of Defendants’ FAL violation because: (a)  
28 Plaintiffs and the Class would not have purchased the Deeply White Products if they

1 had known the true facts regarding the effectiveness of Deeply White Products; (b)  
2 Plaintiffs and the Class paid an increased price due to the misrepresentations about  
3 the Deeply White Products; and (c) the Deeply White Products did not have the  
4 promised quality, effectiveness, or value.

5 87. Plaintiffs bring this action pursuant to Bus. & Prof. Code § 17535 for  
6 injunctive relief to enjoin the practices described herein and to require Defendants to  
7 issue corrective disclosures to consumers. Plaintiffs and the California Class are  
8 therefore entitled to: (a) an order requiring Defendants to cease the acts of unfair  
9 competition alleged herein; (b) full restitution of all monies paid to Defendants as a  
10 result of their deceptive practices; (c) interest at the highest rate allowable by law;  
11 and (d) the payment of Plaintiffs' attorneys' fees and costs pursuant to, *inter alia*,  
12 California Code of Civil Procedure §1021.5.

### 13 COUNT V

#### 14 (The "Unlawful Prong" of the Unfair Competition Law, Bus. 15 & Prof. Code §§ 17200 et seq.)

16 88. Plaintiffs Barber and Burke bring this Count individually and on behalf  
17 of the California Class.

18 89. Plaintiffs repeat the allegations contained in the paragraphs above as if  
19 fully set forth herein.

20 90. The UCL, Bus. & Prof. Code § 17200 *et seq.*, provides, in pertinent  
21 part: "Unfair competition shall mean and include unlawful, unfair or fraudulent  
22 business practices and unfair, deceptive, untrue or misleading advertising ...." The  
23 UCL also provides for injunctive relief and restitution for UCL violations.

24 91. "By proscribing any unlawful business practice, section 17200 borrows  
25 violations of other laws and treats them as unlawful practices that the UCL makes  
26 independently actionable." *Cel-Tech Communications, Inc. v. Los Angeles Cellular*  
27 *Telephone Co.*, 20 Cal. 4th 163, 180 (1999) (citations and internal quotation marks  
28 omitted).

1 92. Virtually any law or regulation – federal or state, statutory, or common  
2 law – can serve as a predicate for an UCL “unlawful” violation. *Klein v. Chevron*  
3 *U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1383 (2012).

4 93. Defendants violated the “unlawful prong” by violating the CLRA, and  
5 the FAL, as well as by breaching express and implied warranties as described herein.

6 94. As a direct and proximate result of these acts, consumers have been and  
7 are being harmed. Plaintiffs and members of the Class have suffered injury and  
8 actual out-of-pocket losses as a result of Defendants’ UCL “unlawful prong”  
9 violation because: (a) Plaintiffs and the Class would not have purchased Deeply  
10 White Products if they had known the true facts regarding the effectiveness and  
11 contents of the Deeply White Products; (b) Plaintiffs and the Class paid an increased  
12 price due to the misrepresentations about the Deeply White Products; and (c) the  
13 Deeply White Products did not have the promised quality, effectiveness, or value.

14 95. Pursuant to Bus. & Prof. Code §17203, Plaintiffs and the California  
15 Class are therefore entitled to: (a) an order requiring Defendants to cease the acts of  
16 unfair competition alleged herein; (b) full restitution of all monies paid to  
17 Defendants as a result of their deceptive practices; (c) interest at the highest rate  
18 allowable by law; and (d) the payment of Plaintiffs’ attorneys’ fees and costs  
19 pursuant to, *inter alia*, California Code of Civil Procedure §1021.5.

20 **COUNT VI**

21 **(The “Fraudulent Prong” of the Unfair Competition Law, Bus.**

22 **& Prof. Code §§ 17200 et seq.)**

23 96. Plaintiffs Barber and Burke bring this Count individually and on behalf  
24 of the California Class.

25 97. Plaintiffs repeat the allegations contained in the paragraphs above as if  
26 fully set forth herein.  
27  
28

1           98. The UCL, Bus. & Prof. Code § 17200 *et seq.*, provides, in pertinent  
2 part: “Unfair competition shall mean and include unlawful, unfair or fraudulent  
3 business practices and unfair, deceptive, untrue or misleading advertising ....”

4           99. Defendants’ conduct, described herein, violated the “fraudulent” prong  
5 of the UCL because Defendants represented that the Deeply White Products were  
6 effective at deeply whitening teeth, effective at going beyond surface stain removal  
7 to deeply whiten teeth, could provide superior whitening, and contained a  
8 comparable ingredient that dentists use. In fact, the Deeply White Products cannot  
9 deeply whiten teeth, do not go below surface stain removal, do not provide superior  
10 whitening, and contain much less peroxide than dentists use.

11           100. Furthermore, as described above, Defendants made material omissions  
12 about the peroxide in their Products as compared to what dentists use, as well as with  
13 respect to their Products’ ability to whiten as compared to other whitening products  
14 and treatments.

15           101. Plaintiffs and the California Class Members are not sophisticated  
16 experts with independent knowledge of the formulation or efficacy of the Deeply  
17 White Products, and they acted reasonably when they purchased the Deeply White  
18 Products based on their belief that Defendants’ representations were true.

19           102. Defendants knew or should have known, through the exercise of  
20 reasonable care, that their representations about the Deeply White Products were  
21 untrue and misleading.

22           103. As a direct and proximate result of these acts, consumers have been and  
23 are being harmed. Plaintiffs and members of the Class have suffered injury and  
24 actual out-of-pocket losses as a result of Defendants’ UCL “fraudulent prong”  
25 violation because: (a) Plaintiffs and the Class would not have purchased the Deeply  
26 White Products if they had known the true facts regarding the effectiveness of the  
27 Deeply White Products; (b) Plaintiffs and the Class paid an increased price due to the  
28

1 misrepresentations about the Deeply White Products; and (c) the Deeply White  
2 Products did not have the promised quality, effectiveness, or value.

3 104. Pursuant to Bus. & Prof. Code §17203, Plaintiffs and the California  
4 Class are therefore entitled to: (a) an order requiring Defendants to cease the acts of  
5 unfair competition alleged herein; (b) full restitution of all monies paid to  
6 Defendants as a result of their deceptive practices; (c) interest at the highest rate  
7 allowable by law; and (d) the payment of Plaintiffs’ attorneys’ fees and costs  
8 pursuant to, *inter alia*, California Code of Civil Procedure §1021.5.

9 **COUNT VII**

10 **(The “Unfair Prong” of the Unfair Competition Law, Bus.**  
11 **& Prof. Code §§ 17200 et seq.)**

12 105. Plaintiffs Barber and Burke bring this Count individually and on behalf  
13 of the California Class.

14 106. Plaintiffs repeat the allegations contained in the paragraphs above as if  
15 fully set forth herein.

16 107. The UCL, Bus. & Prof. Code § 17200 *et seq.*, provides, in pertinent  
17 part: “Unfair competition shall mean and include unlawful, unfair or fraudulent  
18 business practices and unfair, deceptive, untrue or misleading advertising ....”

19 108. Defendants’ misrepresentations and other conduct, described herein,  
20 violated the “unfair” prong of the UCL in that their conduct is substantially injurious  
21 to consumers, offends public policy, and is immoral, unethical, oppressive, and  
22 unscrupulous, as the gravity of the conduct outweighs any alleged benefits.  
23 Defendants’ conduct is unfair in that the harm to Plaintiffs and the Class arising from  
24 Defendants’ conduct outweighs the utility, if any, of those practices.

25 109. Defendants’ practices as described herein are of no benefit to consumers  
26 who are tricked into believing that the Deeply White Products were effective at  
27 deeply whitening teeth, effective at going beyond surface stain removal to deeply  
28 whiten teeth, could provide superior whitening, and contained a comparable



1 ingredient that dentists use. In fact, the Deeply White Products cannot deeply whiten  
2 teeth, do not go below surface stain removal, do not provide superior whitening, and  
3 contain much less peroxide than dentists use. Defendants' practice of injecting  
4 misinformation into the marketplace about the capabilities of toothpaste and  
5 mouthwash is unethical and unscrupulous especially because consumers trust  
6 companies like Defendants to provide accurate information about dental care.  
7 Taking advantage of that trust, Defendants misrepresent the effectiveness of Deeply  
8 White Products to sell more toothpaste and mouthwash at a premium price.  
9 Consumers believe that Defendants are an authority on the effectiveness and quality  
10 of toothpaste for dental care and therefore believe Defendants' representations that  
11 toothpaste and mouthwash can magically penetrate the tooth's surface when in fact  
12 the Deeply White Products only remove some surface stains caused by things like  
13 coffee and wine. Defendants' practices are also substantially injurious to consumers  
14 because, among other reasons, consumers pay for toothpaste and mouthwash that  
15 purportedly deeply whitens teeth, while in fact, they are unknowingly regularly using  
16 peroxide which causes sensitivity and sores when not enclosed in a dental tray  
17 against teeth and kept separate from the mouth and gums.

18       110. As a direct and proximate result of these acts, consumers have been and  
19 are being harmed. Plaintiffs and members of the Class have suffered injury an actual  
20 out-of-pocket losses as a result of Defendants' UCL "unfair prong" violation  
21 because: (a) Plaintiffs and the Class would not have purchased the Deeply White  
22 Products if they had known the true facts regarding the effectiveness and contents of  
23 the Deeply White Products; (b) Plaintiffs and the Class paid an increased price due to  
24 the misrepresentations about the Deeply White Products; and (c) the Deeply White  
25 Products did not have the promised quality, effectiveness, or value.

26       111. Pursuant to Bus. & Prof. Code §17203, Plaintiffs, and the California  
27 Class are therefore entitled to: (a) an order requiring Defendants to cease the acts of  
28 unfair competition alleged herein; (b) full restitution of all monies paid to

1 Defendants as a result of their deceptive practices; (c) interest at the highest rate  
2 allowable by law; and (d) the payment of Plaintiffs' attorneys' fees and costs  
3 pursuant to, *inter alia*, California Code of Civil Procedure §1021.5.

4 **COUNT VIII**

5 **(Deceptive Acts or Practices, New York Gen. Bus. Law. § 349)**

6 112. Plaintiff Gregorio brings this Count individually and on behalf of the  
7 members of the New York Subclass.

8 113. Plaintiff repeats the allegations contained in the paragraphs above as if  
9 fully set forth herein

10 114. By the acts and conduct alleged herein, Defendants committed unfair or  
11 deceptive acts and practices. These acts and conduct include, but are not limited to,  
12 Defendants' misrepresentations that the Deeply White Products were effective at  
13 deeply whitening teeth, effective at going beyond surface stain removal to deeply  
14 whiten teeth, could provide superior whitening, and contained a comparable ingredient  
15 that dentists use. Furthermore, as described above, Defendants made material  
16 omissions about the peroxide in their Products as compared to what dentists use, as  
17 well as with respect to their Products' ability to whiten as compared to other whitening  
18 products and treatments.

19 115. The foregoing deceptive acts and practices were directed at consumers.

20 116. The foregoing deceptive acts and practice are misleading in a material  
21 way because they fundamentally misrepresent the characteristics and benefits of the  
22 Deeply White Products to induce consumers to purchase the Deeply White Products.

23 117. Plaintiff and members of the New York Subclass were injured because:  
24 (a) they would not have purchased the Deeply White Products had they known that  
25 the Deeply White Products cannot deeply whiten teeth, do not go below surface stain  
26 removal, do not provide superior whitening, and contain much less peroxide than  
27 dentists use; (b) they overpaid for the Deeply White Products because they are sold  
28 at a price premium when compared to similar products that do not contain these

1 misrepresentations; and (c) the Deeply White Products did not have the  
2 characteristics and benefits promised. As a result, Plaintiff and the New York  
3 Subclass were damaged by the difference in value between the Deeply White  
4 Products as advertised and the Deeply White Products as actually sold.

5 118. As a result of Defendants' false, misleading, and deceptive statements  
6 and representations of fact, including but not limited to the misrepresentations  
7 described herein, Plaintiff and members of the New York Subclass have suffered and  
8 continue to suffer economic injury.

9 119. Plaintiff and members of the New York Subclass suffered an  
10 ascertainable loss caused by Defendants' misrepresentations equal to the price  
11 premium.

12 120. On behalf of himself and other members of the New York Subclass,  
13 Plaintiff seeks to enjoin the unlawful acts and practices described herein, to recover  
14 actual damages or fifty dollars, whichever is greater, three times actual damages, and  
15 reasonable attorneys' fees.

### 16 **COUNT IX**

#### 17 **(False Advertising, New York Gen. Bus. Law. § 350)**

18 121. Plaintiff Gregorio brings this Count individually and on behalf of the  
19 New York Subclass.

20 122. Plaintiff repeats the allegations contained in the paragraphs above as if  
21 fully set forth herein.

22 123. By the acts and conduct alleged herein, Defendants committed unfair or  
23 deceptive acts and practices. These acts and conduct include, but are not limited to,  
24 Defendants' misrepresentations that the Deeply White Products were effective at  
25 deeply whitening teeth, effective at going beyond surface stain removal to deeply  
26 whiten teeth, could provide superior whitening, and contained a comparable  
27 ingredient that dentists use.  
28

1           124. Based on the foregoing, Defendants have engaged in consumer-oriented  
2 conduct that is deceptive or misleading in a material way which constitutes false  
3 advertising in violation of Section 350 of the New York General Business Law.

4           125. Defendants' false, misleading, and deceptive statements and  
5 representations of fact, including but not limited to the misrepresentations and  
6 omissions described herein, were and are likely to mislead a reasonable consumer  
7 acting reasonably under the circumstances.

8           126. Defendants' false, misleading, and deceptive statements and  
9 representations of fact, including but not limited to the misrepresentations described  
10 herein, have resulted in consumer injury or harm to the public interest.

11           127. Plaintiffs and members of the New York Subclass were injured because:  
12 (a) they would not have purchased the Deeply White Products had they known that  
13 the Deeply White Products cannot deeply whiten teeth, do not go below surface stain  
14 removal, do not provide superior whitening, and contain much less peroxide than  
15 dentists use; (b) they overpaid for the Deeply White Products because they are sold  
16 at a price premium when compared to similar products that do not contain these  
17 misrepresentations; and (c) the Deeply White Products did not have the  
18 characteristics and benefits promised. As a result, Plaintiff and the New York  
19 Subclass were damaged by the difference in value between the Deeply White  
20 Products as advertised and the Deeply White Products as actually sold.

21           128. As a result of Defendants' false, misleading, and deceptive statements  
22 and representations of fact, including but not limited to the misrepresentations  
23 described herein, Plaintiff and members of the New York Subclass have suffered and  
24 continue to suffer economic injury.

25           129. Plaintiff and members of the New York Subclass suffered an  
26 ascertainable loss caused by Defendants' misrepresentations equal to the price  
27 premium.  
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Respectfully submitted,

**BURSOR & FISHER, P.A.**

By:                   /s/ Annick M. Persinger                    
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