

NO. 2017-68194

**BRIAN H. BURDEN, Individually,  
 And On Behalf of All Others  
 Similarly Situated**

*Plaintiffs,*

vs.

**COSTA DEL MAR, INC.**

*Defendant.*

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**IN THE DISTRICT COURT OF**

**HARRIS COUNTY, TEXAS**

151st **JUDICIAL DISTRICT**

**CLASS ACTION PETITION AND DEMAND FOR JURY TRIAL**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COME NOW, Plaintiff BRIAN H. BURDEN (“Plaintiff”), brings this action individually and on behalf of a Plaintiff class (the “Class”) consisting of all persons in Texas who purchased sunglasses manufactured by Defendant Costa Del Mar, Inc. (hereinafter “Defendant” or “Costa”) and sought to have the sunglasses repaired or replaced by Costa during the relevant time period. Plaintiff hereby alleges as follows:

**INTRODUCTION**

1. Pursuant to Tex. R. Civ. P. 190, Plaintiff intends to conduct discovery under Level Three Plan. In accordance with Tex. R. Civ. P. 47, the Class collectively seeks monetary damages in this matter in excess of \$1,000,000 and non-monetary relief.

2. Costa aggressively promotes and advertises its sunglasses as being “backed for life,” and touts its sunglasses warranty as “the best in the industry,” with “no gimmicks” and “no disclaimers.” On the side of every sunglasses box, Costa proudly advertises: “[I]f our sunglasses are damaged by accident, normal wear and tear, or misuse, we replace scratched lenses, frames, and other parts for a nominal fee.” These claims are false, deceptive, and

misleading. Purchasers are not charged a “nominal” fee for damages due to accident, normal wear and tear, or misuse, but are instead charged \$89.00 for replacement glass lenses, \$69.00 for replacement plastic lenses, or \$49.00 for replacement frames, plus an \$11.95 “diagnostic” fee, along with shipping and handling charges.

3. Costa’s claim that it will repair damaged sunglasses “for a nominal fee” is false and deceptive, designed to lure consumers into paying a premium for a warranty against damage due to accident, normal wear and tear, or misuse, only for consumers to later discover the bait-and-switch. Unfortunately, Costa’s “no gimmicks” warranty is just that – a gimmick – designed to trick consumers and maximize revenue for Costa’s repair center at the expense of Costa’s customers.

4. As a consequence of Costa’s false warranties and unfair and deceptive practices, Plaintiff and the class members have purchased Costa sunglasses under the false impression that their sunglasses are protected for life against damage due to accident, normal wear and tear, or misuse. Costa’s customers could not know or have discovered with reasonable diligence, at the time of purchase, that the warranties and promises were false.

5. Significantly, each consumer has been exposed to the same material misrepresentations and omissions which are prominently displayed on the product packaging for Costa’s sunglasses prior to purchasing the product.

6. Plaintiff Burden brings this case pursuant to Texas Rule of Civil Procedure 42 on behalf of a state-wide class of Costa sunglass purchasers, seeking injunctive relief and damages, treble damages, costs of suit, interest, and reasonable attorneys’ fees, for Costa’s falsely advertised products and sham warranty.

**PARTIES, JURISDICTION AND VENUE**

7. Plaintiff Brian H. Burden is a resident of Tarrant County, Texas.

8. Costa is a Florida corporation with its principal place of business in Daytona Beach, Florida and may be served through its registered agent for service of process, Corporation Service Company d/b/a CSC – Lawyers Incorporating Service Company, 211 E. 7<sup>th</sup> Street, Suite 620, Austin, Texas 78701-3218.

9. Costa is “the fourth largest and fastest growing sunglass brand in America.” <https://www.costadelmar.com/us/en/costa-careers/careers-landing.html> (last visited September 26, 2017).

10. Costa does business throughout the State of Texas and, specifically, in Harris County, Texas. Costa has received and continues to receive substantial revenue and profits in Harris County and throughout the State of Texas.

11. The Court has original subject-matter jurisdiction over this proposed class action pursuant to Tex. Gov. Code § 24.007, *et seq.*, as this is an action for damages in excess of the jurisdictional limit of the Court, exclusive of interest, costs and attorneys’ fees.

12. Costa is subject to the jurisdiction of this Court because Costa operates, conducts, engages in, and carries on a business in the state of Texas.

13. Venue is proper in this judicial district pursuant to Tex. Civ. Prac. & Rem. Code § 15.002(a)(1) because all or a substantial part of the events of omissions giving rise to the claims herein occurred in Harris County, Texas.

**FACTUAL ALLEGATIONS**

***Costa’s Brand Image: Quality Products and a “No Gimmicks” Warranty***

14. Costa manufactures, markets, advertises and sells its sunglasses across the

United States. Upon information and belief, a significant portion of these sales occur in Texas.

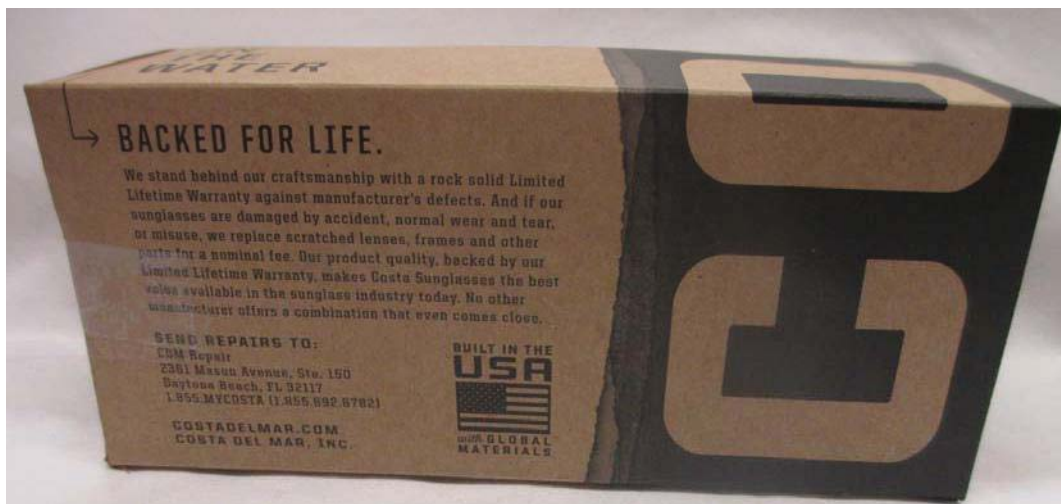
15. Costa advertises itself as “the leading manufacturer of the world’s clearest, polarized performance sunglasses,” and states that it creates “the highest quality, best performing sunglasses.” <https://www.costadelmar.com/us/en/costa-careers-landing.html> (last visited September 26, 2017).

16. Costa touts itself as “the best value available in the sunglass industry,” due to a combination of its high product quality and its “rock solid” sunglasses warranty.

17. All Costa sunglasses are sold in a uniform Costa box, upon which Costa prominently prints the below warranty:

**BACKED FOR LIFE.**

We stand behind our craftsmanship with a rock solid Limited Lifetime Warranty against manufacturer’s defects. And if our sunglasses are damaged by accident, normal wear and tear, or misuse, we replace scratched lenses, frames, and other parts for a nominal fee. Our product quality, backed by our Limited Lifetime Warranty, makes Costa Sunglasses the best value available in the sunglass industry today. No other manufacturer offers a combination that even comes close.

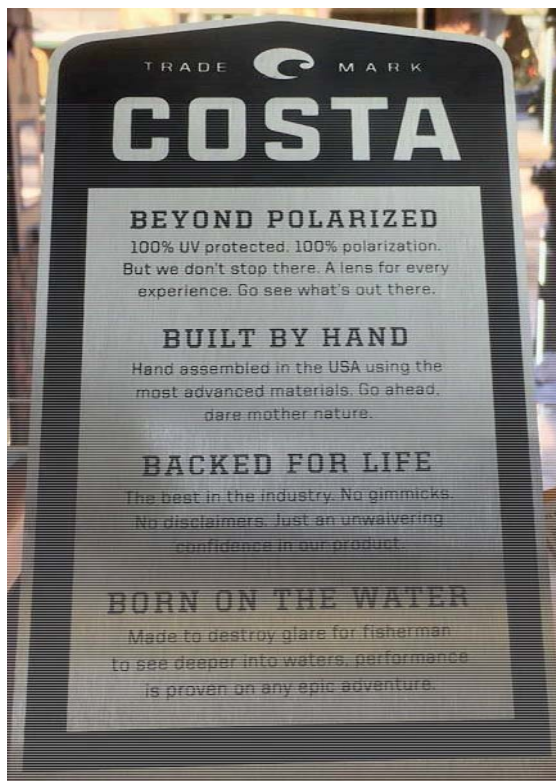


18. Costa’s in-store displays stress that Costa’s sunglasses are “backed for life,” and advertise Costa’s warranty as “[t]he best in the industry,” with no gimmicks and no

disclaimers:

### **BACKED FOR LIFE**

The best in the industry. No gimmicks. No disclaimers. Just an unwavering confidence in our product.



### ***Plaintiff Burden Purchased a Pair of Costa Brine Sunglasses in Texas.***

19. On or about September 22, 2015, Plaintiff Brian Burden purchased a pair of Costa Brine sunglasses from a sporting goods store in Fort Worth, Texas, for \$179.96.

20. On the back of Plaintiff's Costa sunglasses box, Costa displays the following statement: "[I]f our sunglasses are damaged by accident, normal wear and tear, or misuse, we replace scratched lenses, frames, and other parts for a nominal fee."

21. Several months later, in 2016, the frame of Plaintiff's Costa sunglasses broke due to normal wear and tear.

22. In April 2016, Plaintiff Burden sent the sunglasses to Costa seeking repair and/or replacement of the frames for a nominal fee as promised.

23. Instead of charging a nominal fee, Costa charged Plaintiff \$63.39 for repair, including a diagnostic fee, not including shipping. Costa charged Plaintiff nearly forty percent (40%) of the cost of a brand new pair of sunglasses, far more than a nominal fee.

24. Costa markets itself to consumers as “the best value available in the sunglass industry,” due to a combination of its high product quality and its “rock solid” sunglasses warranty.

25. But while Costa touts the high quality of its sunglasses, upon information and belief, Costa’s frames and lenses are manufactured overseas, primarily in China, Taiwan, and Japan.

26. On the side of every sunglasses box, Costa proudly advertises that it will replace damaged sunglasses and parts due to “accident, normal wear and tear, or misuse...for a nominal fee.”

27. But these claims are false, deceptive, and misleading. Purchasers are not charged a “nominal” fee for repair due to misuse, but are instead charged \$89.00 for replacement glass lenses, \$69.00 for replacement plastic lenses, or \$49.00 for replacement frames, plus an \$11.95 “diagnostic” fee, along with shipping and handling charges. These charges are not disclosed in advance of the purchase.

28. Black’s Law Dictionary defines the term “nominal” as: “(Of a price or amount) trifling, esp. as compared to what would be expected <the lamp sold for a nominal price of ten cents>.” *See* Black’s Law Dictionary 1148 (9th ed. 2009).

29. Merriam-Webster defines the term “nominal” as “being so small or trivial as to

be a mere token.” See “Nominal,” Merriam-Webster.com (last accessed July 20, 2017).

30. A customer would reasonably believe that a “nominal” fee would be, at most, a few dollars.

31. Costa’s misrepresentations and omissions were uniformly printed on the side of every Costa sunglasses box, and were communicated to Plaintiff Burden and every other member of the Class at every point of purchase.

32. Upon calling the phone number listed on the Costa sunglass box (1.855.MYCOSTA, or 1.855.692.6782), the recording instructs that Costa does not provide repair assessments over the phone. Accordingly, customers generally must pay to ship their sunglasses to Costa, and then pay an \$11.95 diagnostic cost, before Costa will provide a repair assessment or disclose the cost of the repairs, which exceeds a “nominal” fee.

33. Costa’s sham warranty and false and deceptive misrepresentations and omissions were and are material, and are likely to deceive and mislead a reasonable consumer.

34. Upon information and belief, Costa has profited enormously from its fraudulently marketed products and its carefully orchestrated label and image.

35. Further, consumers are not able to discover the true nature of Costa’s deceptive advertising from reading the label. Costa does not display its allegedly “nominal” repair costs on its website. And in general (unless the telephone operator violates Costa’s internal policy), a consumer is not able to receive pricing or repair information over the phone. Thus, discovery of the true nature of Costa’s deception requires owning a pair of Costas, sending in the Costas for repair, and paying the \$11.95 diagnostic cost.

36. As an immediate, direct, and proximate result of Costa’s false, misleading, and deceptive representations and omissions, and sham warranty, Costa injured Plaintiff

Burden and the Class members in that they:

- a. Paid money for a product that was falsely warranted and represented;
- b. Paid more for a product that was falsely warranted and represented than they would have paid had the product not been falsely warranted and represented;
- c. Were deprived the benefit of the bargain because the Costa sunglasses they purchased were different from what Costa warranted;
- d. Were deprived the benefit of the bargain because the Costa sunglasses they purchased had less value than what was represented;
- e. Paid more than a “nominal” fee for repairs; and
- f. Did not receive a product that measured up to their expectations as created by Costa.

37. Had Costa not made the false, misleading, and deceptive representations and omissions, Plaintiff Burden and the Class Members would not have been injured as listed above.

38. Plaintiff Burden and the Class Members paid money for Costa sunglasses, but did not obtain the full value of the advertised products due to Costa’s false warranty misrepresentations and omissions. Plaintiff Burden and the Class Members purchased or paid more for Costa sunglasses than they would have had they known the truth about Costa.

#### **CLASS REPRESENTATION ALLEGATIONS**

39. Plaintiff brings this action both on behalf of himself and as a class action pursuant to Tex. R. Civ. P. 42, on behalf of the following class (the “Class”):

All citizens of the State of Texas who, within the two years preceding the filing of this Complaint (the “Class Period”), sought to have sunglasses (or components thereof), which they purchased from Costa, repaired or replaced by Costa. Excluded from the Class are: (1) Defendant, any entity or division in which Defendant has a controlling interest, and their legal representatives, officers, directors, assigns, and successors; and (2) the judge to whom this case is assigned and the judge’s staff.

40. Plaintiff reserves the right to amend the Class definition if further information



and discovery indicates that the Class definition should be narrowed, expanded, or otherwise modified, including but not limited to, the creation of subclasses, if necessary.

41. Plaintiff does not know the exact number of Class members because such information is in the exclusive control of Costa. Based on the annual sales and popularity of Costa sunglasses, it is readily apparent that the number of consumers in the Class is so large as to make joinder impracticable, if not impossible.

**A. Existence and Predominance of Common Questions of Law and Fact**

42. Numerous questions of law or fact arise from Costa's conduct that are common to the Class, including but not limited to:

- a. Whether Costa engaged in deceptive and unfair trade practices and breach of warranty claiming that Costa will repair sunglasses damaged due to accident, normal wear and tear, or misuse for a nominal fee;
- b. Whether Plaintiff Burden and the other members of the Class were injured by Costa's conduct and, if so, the appropriate class-wide measure of damages for Class members;
- c. The scope of any declaratory relief to which Plaintiff Burden and the other Class members are entitled; and
- d. The scope of any injunctive relief to which Plaintiff Burden and the other Class members are entitled.

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

**B. Typicality and Numerosity**

44. Plaintiff's claims are typical of the claims of the Class because the Class members all purchased Costa sunglasses purportedly backed by Costa's claim that it would repair sunglasses damaged due to accident, normal wear and tear, or misuse for a nominal fee. The injuries of each Class member were caused directly by Costa's wrongful conduct. In addition, the factual underpinning of Costa's misconduct is common to all Class members

and represents a common thread of misconduct resulting in injury to all members of the Class. Plaintiff's claims arise from the same practices and course of conduct that give rise to the claims of the Class members and are based on the same legal theories.

45. The Class is composed of thousands of persons geographically dispersed throughout the State of Texas, the joinder of whom in one action is impractical.

**C. Adequate Representation**

46. Plaintiff Burden will fairly and adequately represent the interests of the Class members and neither Plaintiff Burden nor his counsel have any interests that conflict with or are antagonistic to the interests of the Class members. Plaintiff has retained highly competent and experienced class action attorneys to represent their interests and those of the members of the Class. Counsel from the law firm filing this action has filed a parallel lawsuit against Defendant Costa seeking class certification in the State of Florida which is currently pending. Plaintiff and his counsel have the necessary resources to adequately and vigorously litigate this class action, and Plaintiff and his counsel are aware of their fiduciary responsibilities to the Class members and will diligently discharge those duties by seeking the maximum possible recovery for the Class.

**D. Superiority**

47. There is no plain, speedy, or adequate remedy other than by maintenance of this class action. The prosecution of individual remedies by members of the Class is impractical and will tend to establish inconsistent standards of conduct for Costa and will result in the impairment of Class members' rights and the disposition of their interests through actions to which they are not parties. Class treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously,

efficiently, and without the unnecessary duplication of effort and expense that numerous individual actions would create. Further, as the damages suffered by individual members of the Class may be relatively small, the expense and burden of individual litigation would make it difficult or impossible for individual members of the Class to redress the wrongs done to them, while an important public interest will be served by addressing the matter as a class action. Class treatment of common questions of law and fact would also be superior to multiple individual actions or piecemeal litigation in that class treatment will conserve the resources of the Court and the litigants, and will promote consistency and efficiency of adjudication.

48. Should individual class members be required to bring separate actions, this Court and other courts throughout Texas would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single court.

**E. Refusal to Act on Grounds Common to the Class.**

49. Costa has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate declaratory and injunctive relief with respect to the Class as a whole.

**COUNT I**

**VIOLATION OF THE TEXAS DECEPTIVE AND UNFAIR TRADE PRACTICES  
ACT, TEX. BUS. & COMM. CODE §§ 17.46, *ET SEQ.***

50. Plaintiff Burden, individually and on behalf of all others similarly situated,

realleges and incorporates the allegations of paragraphs 1 through 49 above.

51. This cause of action is brought pursuant to the Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code §§ 17.46 *et seq.* (the “DTPA”).

52. The stated purposes of the DTPA are to “protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty....” Tex. Bus. & Com. Code § 17.44.

53. Plaintiff Burden and all Class members are “consumers,” and the transactions at issue in this Petition constitute “trade or commerce” as defined by Tex. Bus. & Com. Code §§ 17.45(4) and (6). Costa sunglasses are a “good” within the meaning of the Act. *Id.*

54. Costa violated and continues to violate the DTPA by engaging in false, misleading and deceptive business practices, including offering a sham warranty.

55. Costa prominently advertises the terms and conditions of its warranty on the side of each box of sunglasses. The box states: “[I]f our sunglasses are damaged by accident, normal wear and tear, or misuse, we replace scratched lenses, frames, and other parts for a nominal fee.” However, contrary to its representations, Costa does not repair sunglasses damaged by accident, normal wear and tear, or misuse for a nominal fee, and withholds such information from consumers at the time of sale.

56. It is Costa’s policy not to provide repair assessments over the phone. Nor does Costa display repair costs on its website. Thus, a customer cannot learn the true cost of Costa’s repair services until the customer mails its sunglasses to Costa (at the customer’s expense) and pays an \$11.95 diagnostic charge.

57. Costa’s acts and omissions constitute unfair and deceptive business practices because Costa’s claim that it will repair damaged sunglasses for a “nominal” fee is false and

likely to mislead a reasonable consumer. Costa's actions amount to a breach of warranty in violation of the Texas Business and Commerce Code § 17.50(a)(2).

58. A reasonable consumer would believe that a "nominal" fee would be no more than a few dollars, and certainly far less than Costa charges.

59. Plaintiff and the other Class members had no way of reasonably knowing that the sunglasses they purchased did not have the warranty that was marketed and advertised by Costa or that Costa would breach its expressed warranty. Thus, they could not have reasonably avoided the injury each of them suffered.

60. As a producing (and proximate and direct) cause of the violations herein, Plaintiff Burden and the Class members have suffered injury in fact, actual damages, and have lost money as a result of Costa's breach of warranty and their unlawful, unfair, and fraudulent conduct. Namely, Plaintiff Burden and the Class members paid more for their Costa sunglasses than such sunglasses are worth and paid more than nominal fees for replacement and/or repair, contrary to the warranty. Accordingly, Plaintiff Burden and the Class members are entitled to compensatory damages, including but not limited to the difference in value between the Costa sunglasses as originally delivered and as they should have been delivered, injunctive relief, costs and reasonable attorneys' fees.

61. In addition, Costa's sham warranty was made and breached knowingly and intentionally. Accordingly, the Court should award additional damages available under Texas Business and Commerce Code § 17.50(b)(1), including treble damages.

62. Pursuant to Texas Business and Commerce Code § 17.50(b)(2), Plaintiff Burden and the Class members further seek injunctive relief barring Costa from continuing to falsely and deceptively advertise and label its sunglasses to the public.

Injunctive relief is necessary and proper because, unless so enjoined, Costa will continue to engage in the deceptive actions explained herein. Injunctive relief is further appropriate here because:

- a. Plaintiff can demonstrate a likelihood of irreparable harm and lack of an adequate remedy at law;
- b. Plaintiff can demonstrate a substantial likelihood of success on the merits of the breach of warranty claim;
- c. The threatened injury to the public as a result of Costa's deceptive and unlawful actions outweighs any possible harm to Costa; and
- d. Granting a preliminary injunction will benefit, and not disserve, the public interest.

## **COUNT II**

### **VIOLATION OF THE MAGNUSON-MOSS WARRANTY ACT, 15 U.S.C. §§ 2301, *ET SEQ.***

63. Plaintiff Burden, individually and on behalf of all others similarly situated, realleges and incorporates the allegations of paragraphs 1 through 49 above.

64. Costa's acts and omissions, as alleged herein, further violate the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, et seq. ("MMWA"), which governs consumer product warranties and sets forth the rights of consumers and the obligations of warrantors who provide written warranties.

65. The MMWA allows consumers to bring civil actions for both legal and equitable relief. 15 U.S.C. §2310(d)(1).

66. Plaintiff and the Class members are consumers as defined in 15 U.S.C. § 2301(3).

67. Costa is a supplier and warrantor as defined in 15 U.S.C. §§ 2301(4) and (5).

68. Costa sunglasses constitute a consumer product as defined in 15 U.S.C.

§2301(1).

69. Costa has provided a written warranty to Plaintiff Burden and members of the Class that its sunglasses, if damaged by accident, normal wear and tear, or misuse, will be repaired for “a nominal fee.”

70. Costa has breached the terms of its written warranty by failing to repair sunglasses damaged by accident, normal wear and tear, or misuse, for “a nominal fee.”

71. Plaintiff and the other Class members provided timely notice to Costa of the breach on behalf of themselves and all members of the Class through a letter sent to Costa on September 26, 2017.

72. Through this letter, Plaintiff and the Class members provided Costa with a reasonable opportunity to cure Costa’s failure to comply with the terms of its written warranty.

73. In response to the letter, Costa failed to cure its noncompliance.

74. Costa’s breach of the written warranty resulted in damages to Plaintiff and other members of the Class, who bought Costa sunglasses but did not receive the goods as warranted.

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

- a) An order certifying that this action is properly brought and may be maintained as a class action, that Plaintiff be appointed the class representative, and that Plaintiff’s counsel be appointed counsel for the class;
- b) An order declaring Defendant’s conduct to be in violation of applicable law and enjoining Defendant from pursuing the unlawful acts and practices alleged herein;
- c) An injunction barring Costa from continuing to falsely and deceptively advertise and label its sunglasses to the public;
- d) Compensatory damages, and all other damages allowable under the law,

sustained by Plaintiff and the class;

- e) Additional damages, including treble damages allowable by law;
- f) Payment of costs of suit herein incurred;
- g) Pre-judgment and post-judgment interest at the maximum rate allowable at law on any amounts awarded;
- h) Payment of reasonable attorneys' fees pursuant to 17.46, *et seq.*, Texas Business and Commerce Code, and 15 U.S.C. § 2310(d)(2); and
- i) Such other and further relief as the Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

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

Dated this 13th day of October, 2017.

Respectfully submitted,

**HOLLAND & KNIGHT LLP**

/s/ Charles T. Jeremiah

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