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9 Attorneys for Plaintiff Teah Lynn,
10 Individually and on behalf of all others
11 similarly situated individuals

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

14
15 TEAH LYNN, individually and on behalf of a
16 class of similarly situated individuals,

17 Plaintiff,

18 v.

19 RITE AID CORPORATION, a Delaware
20 Corporation, and DOES 1 through 100,
21 inclusive;

22
23 Defendant.

Case No.:

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

24 Plaintiff Teah Lynn (“Plaintiff”), individually and on behalf of all others similarly situated,
25 through the undersigned attorneys, upon personal knowledge as to his own actions and status, and
26 upon information and belief based upon the investigation of counsel as to the remaining allegations,
27 allege as follows: Plaintiff Teah Lynn (“Plaintiff”) brings this action on behalf of herself and all
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1 others similarly situated, i.e., purchasers of, (referred to below as “Product”), through the
2 undersigned attorneys. Plaintiff brings this action against Defendant Rite Aid Corporation (“Rite
3 Aid” or “Defendant”).

4 **NATURE OF THE ACTION**

5 1. Plaintiff’s claim is premised on several false or misleading claims that Defendant,
6 Rite Aid Corporation makes on the labels of Rite Aid Day Logic Ultimate Sheer Continuous Spray
7 Sunscreen with an advertised SPF of 85 (“Product”). Defendant markets and sells this product as an
8 SPF 85 sunscreen, when in fact its SPF is well under 85. Plaintiff and the class purchased this
9 sunscreen without knowing that the SPF claims were false, and they paid a premium for this
10 sunscreen based on its purported SPF level. Plaintiff and the class bring this action in order to
11 recoup these overcharges.

12 2. More specifically, Defendant manufactures and sells the Product with an advertised
13 SPF of 85. Defendant also charges a premium for this higher level of protection. While the Product
14 sells for \$1.90/oz., Defendant’s SPF 70 sunscreen sells \$1.33/oz.

15 3. Ms. Lynn—under the assumption that she was in fact purchasing a sunscreen with an
16 SPF of 85—purchased the Product. However, independent studies conducted in accordance with
17 FDA guidelines have recently revealed that Defendant’s sunscreen does not contain an SPF of 85—
18 it contains an SPF of 22.

19 4. Ignoring the fact that Ms. Lynn was misled into purchasing a product that could have
20 physically harmed her, Defendant’s sunscreen was drastically overpriced. In fact, given that its SPF
21 was less than 30, the Product may not have been worth anything at all.

22 5. Given the above, Ms. Lynn, on behalf of herself and the class, seeks a return of the
23 overcharges paid for the Product, and to enjoin Defendant from continuing to sell a sunscreen that
24 lacks the sun protection attributes advertised on its label.

25 6. Plaintiff seeks to represent a class consisting of thousands of consumers in California
26 who purchased the Product based upon its falsely or misleadingly advertised SPF number. Plaintiff
27 asserts claims under California’s Unfair Competition Law, Consumer Legal Remedies Act, and
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1 False Advertising Law, as well as claims for breach of an express warranty and breaches of implied
2 warranties of merchantability. She also asserts claims for negligent misrepresentation, and
3 restitution/unjust enrichment. Ms. Lynn seeks damages and equitable remedies, including injunctive
4 relief, for herself and members of the class, which is defined below.

5 **JURISDICTION AND VENUE**

6 7. This Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. §
7 1332 because: (i) there are 100 or more class members; (ii) there is an aggregate amount in
8 controversy exceeding \$5,000,000, exclusive of interest and costs, to a reasonable probability; and
9 (iii) there is minimal diversity because at least one Plaintiff is a citizen of a state different from the
10 Defendant.

11 8. Venue is proper in this District pursuant to 28 U.S.C. § 1391 inasmuch as (i) many of
12 the acts and transactions giving rise to this action occurred in this District; (ii) Defendant is
13 authorized to conduct business in this District and have intentionally availed themselves of the laws
14 and markets within this District through the marketing, distribution, and sale of their products in this
15 District; and (iii) Defendant currently does substantial business in this District.

16 **PARTIES**

17 9. Plaintiff Teah Lynn is a resident of Los Angeles County, California. As noted in more
18 detail below, she purchased the Product several times over the last four years, from various stores in
19 California. Her most recent purchase of the product was from a Rite-Aid location located on
20 Bedford Drive in Beverly Hills, California.

21 10. Defendant Rite Aid Corporation is a Delaware corporation with its headquarters and
22 principal place of business in Camp Hill, Pennsylvania. Rite Aid Corporation is thus treated as a
23 citizen of the state of Pennsylvania. It maintains a registered agent for service of process at C T
24 Corporation System, 818 W 7th Street, Suite 930, Los Angeles, California 90017. Plaintiff is
25 informed and believes that there are approximately 568 Rite Aid Corporation retail locations in the
26 State of California

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STATEMENT OF FACTS

I. A sunscreen’s SPF number is supposed to accurately reflect the strength of that sunscreen.

11. Consumers like Plaintiff buy sunscreen to prevent sunburns and other harmful health effects resulting from exposure to UV radiation. In addition to the red rash that commonly develops after being overexposed to the sun, overexposure can ultimately result in the development of several forms of skin cancer, including melanoma, which can be fatal. Such sun-induced health problems have, in fact, been on the rise for several decades now. According to the National Cancer Institute, the prevalence of melanoma has tripled since the 1970s, and its fatality rate has doubled.¹

12. Sunscreen is designed to prevent burning and decrease the skin’s exposure to UV radiation. It works by absorbing this radiation or reflecting it away from the skin.

13. A sunscreen’s Sun Protection Factor (“SPF”) informs consumer of the level of sunburn protection provided by the sunscreen. SPF is a standardized rating system for measuring the fraction of sunburn-producing UV rays that reach the skin, which is based on objective evidence and standardized protocols. The SPF number indicates the approximate measure of time that a person who has applied the sunscreen can stay in the sun without getting burned. SPF 85, for example, will allow a person to stay in the sun 85-times longer without burning than if that person were wearing no protection at all. Accordingly, a sunscreen with a higher SPF—such as SPF 85—will filter out more UV radiation and provide more protection than a sunscreen with a lower SPF.

14. Almost every medical organization in the country recommends that individuals regularly use sunscreen to protect themselves from the damaging effects of UV radiation. They also recommend minimum levels of SPF. The American Academy of Dermatologists,² for example, recommends that individuals use a sunscreen with an SPF of 30 or higher.

¹ ENVIRONMENTAL WORKING GROUP, Skin Cancer on the Rise, <http://www.ewg.org/sunscreen/report/skin-cancer-on-the-rise/#.WdaAhVuPKHs> (last visited September 14, 2018).

² AMERICAN ACADEMY OF DERMATOLOGY, Sunscreen FAQs, <https://www.aad.org/media/stats/prevention-and-care/sunscreen-faqs> (last visited September 14, 2018).

1 18. On several occasions, including in March of 2018, Ms. Lynn purchased the Product, which
2 she intended to use on herself. She made these purchases at the Rite Aid location in Beverly Hills,
3 California.

4 19. In deciding to buy Defendant's sunscreen, Ms. Lynn saw and relied on the 85 SPF
5 claims on its label. The degree of sun protection provided by a sunscreen is the, if not, the most,
6 material element in a decision to purchase a particular sunscreen, a product whose function is to
7 protect from sunburn and UV damage.

8 20. Plaintiff's reliance on the accuracy of the Product was reasonable. There is nothing
9 unusual about a consumer believing in the accuracy of advertised SPF levels and Plaintiff had no
10 reason here to suspect the Product contained less UV protection than Defendant claimed.
11 Obviously, the true SPF of the Product is not readily apparent to consumers; this is specialized
12 knowledge uniquely possessed by Defendant as the distributor, marketer, producer, manufacturer,
13 and seller of the Product.

14 21. Indeed, the Product is a "credence good" because its properties and purported
15 benefits cannot be independently assessed or verified by the consumer at the time of purchase, and
16 such properties and benefits are made known to consumers only through the information provided
17 on the label by the product's manufacturer and distributor. *See* Richard A. Posner, *An Economic*
18 *Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1489 (1999) ("A good is a credence
19 good if the consumer cannot readily determine its quality by inspection or even use, so that he has
20 to take its quality 'on faith.'").

21 22. As such, in purchasing the Product, Plaintiff and the class members necessarily and
22 justifiably relied upon the written statements on the Product as accurate.

23 **III. Independent studies indicate that the Product contains an SPF of only 22.**

24 23. In the summer of 2018, an independent lab tested the Product. The lab's testing
25 complied with all FDA testing methods embodied in FDA Final Rule, 21 CFR Parts 201 and 310
26 (Federal Register/Vol 76, No 117/Friday, June 17, 2011/Rules and Regulations, including 21 CFR
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1 201.327). A copy of the test results and the test protocol evidencing strict adherence to FDA testing
2 methods is attached hereto as Exhibit “A” and incorporated herein by reference.

3 24. The lab’s test revealed that the Product sunscreen spray contains an SPF of 22—not
4 85, as Defendant indicates on their labels. The lab’s test results were derived from the testing
5 methods embodied in FDA Final Rule referenced above.

6 25. Because the actual SPF of the Product is far below 85, Defendant’s claims that the
7 Product has an SPF of 85 are false or misleading.

8 26. Defendant’s claims were intentionally false or misleading since Defendant would
9 have been aware that the true SPF the Product was much lower than 85.

10 27. Defendant knew from its own product knowledge and independent testing that the
11 SPF of the Product fell far short of this advertised level.

12 28. Defendant made its SPF misrepresentations with the intent that consumers rely upon
13 them, in order to boost the Product’s sales and increase the price they could charge for the Product.
14 As noted above, the SPF 85 claim figures prominently on Defendant’s label, and because
15 consumers would generally be willing to pay more for sunscreens that promise higher levels of UV
16 protection.

17 29. By misrepresenting the SPF value of the Product, Defendant was able to charge more
18 for this product than they otherwise would have been, i.e., they were able to charge a premium for
19 this product, which Plaintiff and other class members paid.

20 30. This idea is borne out by a survey of Defendant’s own products, which indicates that
21 their false SPF claims allowed them to charge a substantial premium for the Product. While the
22 Product sells for \$1.90/oz., Defendant’s SPF 70 sunscreen sells \$1.33/oz.³ In other words, a 5-oz
23 can of the Product (SPF 85), which sells for \$9.49, would have only been worth \$6.65 (at most) had
24 its SPF been accurately advertised.

25 31. Had Plaintiff known that the actual SPF rating of the Product was substantially lower
26 than 85, she would not have purchased the Product, or she would not have paid as much as she did
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28 ³ <https://www.riteaid.com/shop/daylogic-continuous-spray-sunscreen-spf-70-6-fl-oz-1-count-8020383> (last visited September 18, 2018)

1 for the Product. In other words, Plaintiff suffered economic injury by being misled into paying a
2 premium for Defendant's sunscreen; by being misled into purchasing an essentially valueless
3 product; by being deprived of the full intended use of the purchased product; and by being deprived
4 of the benefit of the bargain that she was promised by Defendant.

5 32. Defendant's false or misleading SPF statements thus directly and proximately
6 resulted in economic harm to Plaintiff. She now seeks all appropriate relief, as described below.
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8 **CLASS ALLEGATIONS**

9 33. Plaintiff brings this action pursuant to Federal Rule of Civil Procedure 23(b)(2) and
10 Rule 23(b)(3) on behalf of himself and as a class defined below:
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12 **California Class ("Class" and/or "Class Members"):** All individuals who, from
13 four years prior to filing of this Complaint through to date of certification purchased
14 Rite Aid Day Logic Ultimate Sheer Continuous Spray Sunscreen with an advertised
15 SPF of 85 in California.

16 34. Excluded from the Class is Defendant, any entity in which Defendant has a
17 controlling interest, and Defendant's agents, legal representatives, predecessors, successors, assigns,
18 franchisees and employees. Also excluded from the Class are the judge and staff to whom this case
19 is assigned, and any member of the judge's immediate family.
20

21 35. Plaintiff reserves the right to revise the definition of the Class based on facts learned
22 during discovery.

23 36. **Numerosity - Federal Rule of Civil Procedure 23(a)(1).** The exact number of
24 persons in the Class, as herein identified and described, is unknown but is estimated to number in
25 the thousands. The Class is so numerous that joinder of individual members herein is impracticable.
26 The precise number of Class Members is presently unknown to Plaintiff, but may be ascertained
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1 from Defendant's books and sales records. Class Members may be notified of the pendency of this
2 action by mail, email, Internet and instore postings, and/or publication.

3 37. Plaintiff will fairly and adequately represent and protect the interests of the other
4 members of the Class. Plaintiff has retained counsel with substantial experience in prosecuting
5 complex litigation and class actions. Plaintiff and his counsel are committed to vigorously
6 prosecuting this action on behalf of the members of the Class, and have the financial resources to do
7 so. Neither Plaintiff nor his counsel has any interest adverse to those of the other members of the
8 Class.
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10 38. Absent a class action, most members of the Class would find the cost of litigating
11 their claims to be prohibitive, and will have no effective remedy. The class treatment of common
12 questions of law and fact is also superior to multiple individual actions or piecemeal litigation in
13 that it conserves the resources of the courts and the litigants, and promotes consistency and
14 efficiency of adjudication.
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16 39. Defendant has acted and failed to act on ground generally applicable to the Plaintiff
17 and the other members of the Class in falsely advertising and mislabeling its products as containing
18 sunscreen with an SPF value of 85, requiring the Court's imposition of uniform relief to ensure
19 compatible standards of conduct toward members of the Classes.
20

21 40. The factual and legal basis of Defendant's liability to Plaintiff and to Class members
22 are the same, resulting in injury to the Plaintiff and to all of the other Class members as a result of
23 the Defendant's conduct of falsely advertising and mislabeling its products as containing sunscreen
24 with an SPF value of 85. Plaintiff and Class members have suffered harm and damages a result of
25 Defendant's unlawful and wrongful conduct.

26 41. **Commonality and Predominance- Federal Rule of Civil Procedure 23(a)(2) and**
27 **23(b)(3).** There are many questions of law and fact common to the claims of Plaintiff and the Class
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1 members, and those questions predominate over any questions that may affect individual members
2 of each Class. Common questions for the Classes include but are not limited to the following:

- 3 a) Whether Defendant's name of the product and use of images representing an SPF value
4 of 85 constitute an express warranty that the product in fact has an SPF value of 85;
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6 b) Whether Defendant breached its express warranties with Plaintiff and class members;
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8 c) Whether Defendant's labeling is unlawful, unfair, deceptive, or misleading to reasonable
9 consumers under UCL;
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11 d) Whether Defendant's conduct violates Cal. Bus. & Profs. Code §17200, Cal. Civil Code
12 §1750, and the Cal. Bus. & Profs. Code §17500.
13
14 e) Whether Defendant's product contain sunscreen with an SPF value of 85;
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16 f) Whether a reasonable consumer would expect that sunscreen products labeled with a
17 numerical "85" would in fact contain sunscreen with an SPF value of 85;
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19 g) Whether, as a result of Defendant's conduct, Plaintiff and the class members are entitled
20 to equitable relief and/or other relief, and, if so, the nature of such relief; and
21
22 h) The method of calculation and extent of damages for Plaintiff and members of the
23 Classes.
24

25 42. Defendant engaged in a common course of conduct giving rise to the legal rights
26 Plaintiff seeks to enforce, on behalf of himself and the other Class Members. Similar or identical
27 statutory and common law violations, business practices, and injuries are involved. Individual
28 questions, if any, pale in comparison, in both quality and quantity, to the numerous common
questions that dominate this action.

43 **Typicality - Federal Rule of Civil Procedure 23(a)(3).** Plaintiff's claims are typical
of the claims of the other members of the Class because, among other things, all Class Members
were comparably injured through Defendant's uniform misconduct described above. Further, there

1 are no defenses available to Defendant that are unique to Plaintiff or to any particular Class
2 Members.

3 44. **Adequacy of Representation - Federal Rule of Civil Procedure 23(a)(4).** Plaintiff
4 is an adequate Class representative because her interests do not conflict with the interests of the
5 other Class Members he seeks to represent; he has retained counsel competent and experienced in
6 complex class action litigation; and he will prosecute this action vigorously. Plaintiff and the
7 undersigned counsel will fairly and adequately protect the Classes' interests.
8

9 45. **Insufficiency of Separate Actions- Federal Rule of Civil Procedure 23(b)(1).**
10 Absent a representative class action, members of the Classes would continue to suffer the harm
11 described herein, for which they would have no remedy. Even if separate actions could be brought
12 by individual consumers, it would not be desirable. The resulting multiplicity of lawsuits would
13 cause undue burden and expense for both the Court and the litigants, as well as create a risk of
14 inconsistent rulings and adjudications that might be dispositive of the interests of similarly situated
15 purchasers, substantially impeding their ability to protect their interests, while establishing
16 incompatible standards of conduct for Defendant. The proposed Classes thus satisfy the
17 requirements of Fed. R. Civ. P. 23(b)(1).
18

19 46. **Superiority - Federal Rule of Civil Procedure 23(b)(3).** A class action is superior
20 to any other available means for the fair and efficient adjudication of this controversy, and no
21 unusual difficulties are likely to be encountered in the management of this class action. The
22 damages or other financial detriment suffered by Plaintiff and the other members of the Classes are
23 relatively small compared to the burden and expense that would be required to individually litigate
24 their claims against Defendant, so it would be impracticable for Class Members to individually seek
25 redress for Defendant's wrongful conduct. Even if Class Members could afford individual litigation,
26 the court system could not. Individualized litigation would create a potential for inconsistent or
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1 contradictory judgments, and increase the delay and expense to all parties and the court system. By
2 contrast, the class action device presents far fewer management difficulties and provides the
3 benefits of single adjudication, economy of scale, and comprehensive supervision by a single court
4 herein.

5
6 **FIRST CLAIM FOR RELIEF**

7 **CALIFORNIA UNFAIR COMPETITION LAW,**

8 **CAL. BUS.&PROF. CODE §§ 17200, ET SEQ.**

9 47. Plaintiff repeats and incorporates by reference all preceding paragraphs as if fully set
10 forth herein.

11 48. The Unfair Competition Law, California Business & Professions Code §§ 17200, et seq.
12 (the “UCL”), prohibits any “unlawful,” “unfair,” or “fraudulent” business act or practice, which can
13 include false or misleading advertising.

14 49. In the course of conducting its business, Defendant violated the UCL by—among
15 other things—claiming that the Product contained an SPF of 85, when in fact its SPF was
16 substantially lower.

17 50. These false or misleading SPF claims constitute “fraudulent” business practices
18 under the UCL. As noted in more detail above, and in the “Fraud” section below, Defendant
19 intentionally mislabeled Product as possessing an SPF of 85, when in fact the SPF was far below 85
20 this false labeling has always been included on the sunscreen; and Plaintiff observed this labeling
21 every time she purchased the Product, which was several times over the last four years, including
22 March of 2018; and Plaintiff made these purchases at several Rite Aid stores in Los Angeles,
23 California.

24 51. Also as noted above, Plaintiff justifiably relied on Defendant’s SPF claims, which
25 can’t be verified on sight and were made by one of the nation’s largest and most well established
26 sunscreen manufacturers. For similar reasons, Defendant’s SPF claims were likely to deceive
27 members of the public.

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SECOND CLAIM FOR RELIEF

CALIFORNIA CONSUMERS LEGAL REMEDIES ACT,

CAL. CIVIL CODE §§ 1750, ET SEQ.

59. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

60. This cause of action is brought pursuant to the California Consumers Legal Remedies Act, Cal. Civil Code §§ 1750, et seq. (the “CLRA”). Plaintiff and each member Class is a consumer as defined by California Civil Code § 1761(d).

61. Defendant is a “person” within the meaning of Cal. Civ. Code §§ 1761(c) and 1770, and provides “goods” within the meaning of Cal. Civ. Code §§ 1761(a) and 1770. Defendant’s customers, including Plaintiff and Class members, are “consumers” within the meaning of Cal. Civ. Code §§ 1761(d) and 1770. Each purchase of Defendant’s Product by Plaintiff and each Class member constitutes a “transaction” within the meaning of Cal. Civ. Code §§ 1761(e) and 1770.

62. Defendant violated and continues to violate the CLRA by claiming that the Product has an SPF of 85, when in fact the SPF is much lower. This misrepresentation constitutes, at least, the following proscribed practices under California Civil Code § 1770(a): “(5) [r]epresenting that [products] have . . . characteristics, . . . uses [or] benefits . . . which they do not have”; “(7) [r]epresenting that [products] are of a particular standard, quality, or grade . . . if they are of another”; and “(9) [a]dvertising goods . . . with intent not to sell them as advertised.”

63. Defendant knew from its own product knowledge and independent testing that the SPF of the Product fell far short of this advertised level.

64. Plaintiff reasonably relied on—and consumers like Plaintiff were likely to be deceived by—Defendant’s SPF misrepresentations. As noted above, consumers generally take a sunscreen’s SPF number at face value, primarily because it can only be determined after rigorous testing and is not self-evident at the point of purchase. Defendant is also a national, well-established sunscreen manufacturer that would presumably accurately determine—and honestly advertise—its products’ SPF numbers.

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THIRD CLAIM FOR RELIEF

**CALIFORNIA FALSE ADVERTISING LAW,
CAL. BUS.&PROF. CODE §§ 17500, ET SEQ.**

72. Plaintiff repeats and incorporates by reference all preceding paragraphs as if fully set forth herein.

73. California’s False Advertising Law (the “FAL”)—Cal. Bus. & Prof. Code §§ 17500, et seq.—prohibits “any statement” that is “untrue or misleading” and made “with the intent directly or indirectly to dispose of” property or services.

74. As noted above, Defendant falsely claimed that the Product had an SPF of 85, when in fact that SPF was far below 85.

75. Further, Defendant made this misrepresentation in order to boost sales of the Product.

76. Reasonable consumers, like Plaintiff, were likely to be misled by this misrepresentation. Again, as noted above, there is no means of verifying an SPF prior to purchase, and reliance on manufacture SPF claims is standard.

77. Plaintiff also suffered economic injury as a result of Defendant’s SPF misrepresentations. As noted above, but for Defendant’s false SPF claims, Plaintiff would not have paid as much as she did for the Product; i.e., she was misled into paying a price premium for that sunscreen.

78. On account of Defendant’s misrepresentations, Plaintiff and the Class have been injured in the amount of the overcharge that they paid for the Product.

FOURTH CLAIM FOR RELIEF

NEGLIGENT MISREPRESENTATION

79. Plaintiff repeats and incorporates by reference all preceding paragraphs as if fully set forth herein.

80. Defendant misrepresented a fact. They advertised the Product as possessing an SPF of 85, when in fact the SPF was much less than this.

1 81. There were no reasonable grounds for Defendant to believe that this
2 misrepresentation was true. As experienced sunscreen manufacturers responsible for testing the
3 sunscreens that they sell, Defendant should have known that the Product did not in fact contain an
4 SPF of 85. Furthermore, Defendant was aware of various improprieties and manufacturing
5 practices at its private label manufacturing facility, which failed to meet industry standards and
6 placed Defendant on notice of the fact that this product was improperly manufactured, tested, and
7 labeled.

8 82. This misrepresentation was material. Consumers purchase sunscreen to protect
9 themselves from the sun. Accordingly, the degree of sun protection advertised on the Product was a
10 material—if not the sole—factor in Plaintiff’s decision to purchase Defendant’s product. And this
11 would be true of any reasonable consumer.

12 83. Defendant intended that consumers, like Plaintiff, would rely on the SPF 85 claim
13 that they included on the labels of The Product. Again, that claim is designed solely for consumers,
14 like Plaintiff, who will ultimately purchase and use the sunscreen.

15 84. Plaintiff’s reliance on this SPF claim was justifiable. Again, Plaintiff had no way of
16 verifying this claim before purchase, and consumers generally rely on advertised SPFs instead of
17 paying the substantial costs to have them tested by specialty labs.

18 85. Plaintiff was proximately damaged by Defendant’s misrepresentations. Again, but
19 for Defendant’s SPF claims, Plaintiff would not have paid as much as she did for the Product
20 sunscreen, or she would not have purchased the Product at all.

21 86. Further, Defendant was in a “special relationship” with Plaintiff, and thus owed her a
22 duty of care:

- 23
- 24 a) The SPF misrepresentations on Defendant’s Product was intended solely to affect the
25 purchasing decisions of consumers, like Plaintiff, who will ultimately base their decision on
26 these SPF claims and who ultimately use the Product.
- 27 b) It was foreseeable that, by misrepresenting an SPF number as being higher than it is, and
28 charging a premium for that added protection, Defendant would economically harm
consumers by misleading them into paying an unjustified premium for a sunscreen that
lacked the advertised protection.

- 1 c) This harm was certain.
- 2 d) Defendant's decision to label the Product with an SPF of 85 was the close, proximate cause
3 of Plaintiff's deception and the fact that she was overcharged for this product.
- 4 e) Misrepresenting the SPF of a sunscreen is immoral for several reasons, the most obvious
5 being that it puts the consumer at risk of being burned, and heightens their risk of skin
6 cancer, by relying on ineffective sunscreen. Charging a steep premium for a sunscreen that
7 does not actually protect the consumer from the sun also immorally deprives consumers of
8 money that could have been spent on more useful, necessary items.
- 9 f) Holding sunscreen manufacturers accountable—to sunscreen consumers—for SPF
10 misrepresentations would deter future misrepresentations, with no perceivable drawbacks.

11 87. Accordingly, Plaintiff seeks damages on behalf of herself and the Class in the
12 amount of the overcharges paid for the Product.

13 **FIFTH CLAIM FOR RELIEF**

14 **QUASI-CONTRACT / RESTITUTION / UNJUST ENRICHMENT**

15 88. Plaintiff repeats and incorporates by reference all preceding paragraphs as if fully set
16 forth herein.

17 89. Plaintiff and the Class members have conferred substantial benefits on Defendant by
18 purchasing the Product, including any profits that Defendant received from these purchases, if not
19 the entire purchase price.

20 90. Defendant has knowingly and willingly accepted and enjoyed these benefits.

21 91. Defendant either knew or should have known that the payments rendered by Plaintiff
22 and the Class members were given and received with the expectation that the Product would be as
23 represented and warranted. For Defendant to retain the benefit of the payments under these
24 circumstances is inequitable.

25 92. Through deliberate misrepresentations made in connection with the advertising,
26 marketing, promotion, and sale of the Product, including representing that the product had an SPF
27 of 85, Defendant reaped benefits that resulted in Defendant wrongfully receiving profits.

28 93. Equity demands disgorgement of Defendant's ill-gotten gains. Defendant will be
unjustly enriched unless Defendant is ordered to disgorge those profits for the benefit of Plaintiff
and the Class members.

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105. Defendant also had actual or constructive notice of the false labeling information. Defendant previously knew of the falsity of the label on the Product given—among other things—Defendant’s testing of this product.

106. To date, Defendant has refused to remedy their breach of express warranty.

107. This breach has caused Plaintiff and the Class members to suffer injuries, pay for falsely labeled products, and enter into transactions that they would not have entered into for the consideration paid. As a direct and proximate result of Defendant’s breach of express warranty, Plaintiff and the Class members have suffered damages and continue to suffer damages, including economic damages, in terms of the difference between the value of the product as promised and the value of the product as delivered.

108. As a result of Defendant’s breach of an express warranty, Plaintiff and the Class members are entitled to legal and equitable relief including damages, costs, attorneys’ fees, rescission, and other relief as deemed appropriate, for an amount to compensate them for not receiving the benefit of their bargain.

SEVENTH CLAIM FOR RELIEF

BREACH OF AN IMPLIED WARRANTY OF MERCHANTABILITY⁵

109. Plaintiff repeats and incorporates by reference all preceding paragraphs as if set forth fully herein.

110. Defendant is a merchant with respect to the goods at issue here— sunscreen spray.

111. By placing the Product into the stream of commerce, Defendant made—and breached—at least two implied warranties.

112. First, to be merchantable, a product must conform with any written representations on its labels. Because the true SPF of the Product does not, in fact, comport with the advertised SPF, Defendant has breached an implied warranty of merchantability.

⁵ The claims arise under California Commercial Code § 2314 and the Song–Beverly Act (Cal. Civ. Code §§ 1790, et seq.).

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equitable.

JURY DEMAND

Plaintiffs demand a trial by jury on all issues so triable. Plaintiff also respectfully requests leave to amend this Complaint to conform to evidence, if such amendment is needed for trial.

Dated: October 11, 2018

LATTIE | MALANGA | LIBERTINO, LLP

By: /s/ Gerald B. Malanga
Gerald B. Malanga, Esq.
Attorneys for Plaintiff Teah Lynn,
individually and on behalf of all others
similarly situated

Dated: October 11, 2018

LAW OFFICE OF ALICE A. CURRY

By: /s/ Alice A. Curry
Alice A. Curry, Esq.
Attorneys for Plaintiff Teah Lynn,
individually and on behalf of all others
similarly situated

EXHIBIT A



CRLS2018-066: Evaluation of the Static Sun Protection Factor (SPF) of Sunscreen-Containing Formulas According to the FDA Final Rule [1]

August 21, 2018

Final Report

- Objective:** To measure the static sun protection factor (SPF) of over-the-counter (OTC) sunscreen-containing formulas according to the FDA Final Rule [1]
- Test Product:** B. daylogic – ultimate sheer continuous spray sunscreen Lot171703E, Exp. 05/19
- Study Dates:** March 19, 2018 to August 16, 2018
- Results:** Twelve subjects completed the test. The mean static SPF of the test product, daylogic – ultimate sheer continuous spray sunscreen, was 22.66 (n=10, SD=1.39). The test product does not meet the FDA Final Rule requirements for labeling as Static SPF 85. [1]
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CRLS2018-066
B. daylogic – ultimate sheer continuous spray sunscreen
Lot171703E, Exp. 05/19
Lattie Malanga Libertino, LLP
FDA Final Rule Static SPF

Summary:

On the first day of the study each subject received a series of UV doses from a xenon arc solar simulator to an unprotected site on the mid-back. The solar simulator was a single-port xenon arc lamp with a 1 mm WG320 UVC blocking filter, a 1 mm UG-11 visible and infrared blocking filter and a heat rejecting dichroic mirror (Model 16S, Solar Light Co., Philadelphia). On the second day the minimal erythema dose (MED) was determined as the lowest UV dose which produced perceptible erythema with clearly defined borders. Then 100 mg of the test product and 100 mg of the 7% Padimate-O/3% Oxybenzone standard were applied to separate, adjacent 50 cm² areas of the mid-back (standard sunscreen provided by Cosmetech Laboratories, Inc., Fairfield, NJ). Each sunscreen-protected site was divided into five subsite test areas that were at least 0.5 cm² in area for UV exposures.

The test product had an expected SPF of 85. The 7% Padimate-O/3% Oxybenzone standard sunscreen had an expected SPF of 16.3. After a 15-minute drying period, five UV doses increasing in geometric increments of 1.15 (0.76, 0.87, 1.00, 1.15 and 1.32) times the product of the MED and 85 were administered to the test sunscreen-protected area and five UV doses increasing in geometric increments of 1.15 (0.76, 0.87, 1.00, 1.15 and 1.32) times the product of the MED and 16.3 were administered to the standard sunscreen protected area. A series of five UV doses increasing in geometric increments of 1.25 (0.64, 0.80, 1.00, 1.25 and 1.56) times the Initial MED_u were also administered to a second unprotected site. On the third day the MED was determined for the sunscreen-protected sites (MED_p) and the unprotected sites (MED_u). The SPF of each sunscreen was calculated as the ratio of the MED_p for each sunscreen-protected site to the Final MED_u.

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According to the FDA Final Rule [1], the labeled SPF must be calculated as follows:

SPF values for individual subjects (SPFi) will be calculated as:

$$\text{SPFi} = \text{MEDp}/\text{MEDu}$$

The mean SPF and standard deviation (SD) will be calculated from valid SPFi values.

The Standard Error (SE) will be calculated as:

$$\text{SE} = \text{SD}/\sqrt{n}$$

Where n equals the number of subjects who provided valid test results.

The t value from Student's t distribution table corresponding to the upper 5% point with n-1 degrees of freedom will be obtained.

The labeled SPF value will be determined as the largest whole number less than the following calculation after 10 at least 10 subjects:

$$\text{Labeled SPF} = \text{Mean SPF} - (t * \text{SE})$$

In order for the SPF determination of the test product to be valid, the SPF value of the 7% Padimate-O and 3% Oxybenzone Standard should fall within the standard deviation range of the expected SPF (i.e. 16.3 ± 3.43 or 12.87 to 19.73)

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Results:

Twelve subjects, six men and six women, who provided written, informed consent, completed the study. Subjects included, six with skin type II and six with skin type III.¹ Ages ranged from 26 to 62 years and the mean age was 41.08 (n=12, SD=13.55). Subject demographic and static SPF results are listed in Table 1.

The mean static SPF of the test product, B. daylogic – ultimate sheer continuous spray sunscreen, was 22.66 (n=10, SD=1.39). The labeled SPF value, which is the mean SPF – (t * SE), rounded down to the nearest whole number, was 21.

The mean SPF of the 7% Padimate-O/3% Oxybenzone standard was 16.31 (n=12, SD=0.97). The SPF value of the 7% Padimate-O/3% Oxybenzone standard was within the required range [1].

Protocol Deviations:

No Protocol Deviations were reported.

Enrollment:

Subject B-07 lost to follow up after Day 1 procedures.

Data Exclusions:

Subjects B-01 and B-02 did not yield evaluable SPF data for the test product. No other data were excluded from this report.

Adverse Events:

No adverse events were reported.

Table 1. Subject Demographic, Static SPF Results for daylogic – ultimate sheer continuous spray sunscreen, Lot171703E and 7% Padimate/3% Oxybenzone Standard

CRLS2018-066:Lattie Malanga Libertino, LLP 2011 FDA Final Rule Static SPF														
										Lot 171703E Labeled SPF 85			7% Padimate-O/3% Oxybenzone Standard Labeled SPF 16.3	
Tech Initals	Subject #	CRLS ID#	Initials	Age	Sex	Skin Type	ITA	MED _{ul} (eff J/m ²)	MED _{ur} (eff J/m ²)	tpMED _p (eff J/m ²)	Achieved SPF	Expected SPF	ssMED _p (eff J/m ²)	Achieved SPF
CLM	B-01	2551	ERP	30	F	II	63.2	80.21	80.21	<5184.38	<64.64	85.00	1502.08	18.73
CLM	B-02	3869	TDC	42	F	II	47.5	100.45	100.45	<3286.15	<32.71	43.00	1635.90	16.29
CLM/BRO	B-03	1180	RLM	62	M	III	45.7	123.96	123.96	2727.08	22.00	22.00	2019.79	16.29
AOS/CLM	B-04	2899	RTR	35	F	II	54.5	101.27	101.27	2227.87	22.00	22.00	1649.20	16.29
CLM/LGD	B-05	4161	CAM	29	M	II	53.0	101.27	101.27	2227.87	22.00	22.00	1649.20	16.29
AOS	B-06	3049	SDF	51	F	III	51.6	102.08	102.08	2581.25	25.29	22.00	1662.50	16.29
CLM/LGD	B-08	244	CWF	49	M	II	56.2	80.21	80.21	1764.58	22.00	22.00	1305.21	16.27
CLM/BRO/LGD	B-09	2424	BNL	26	F	II	45.3	153.13	153.13	3871.88	25.29	22.00	2493.75	16.29
AOS/CLM	B-10	4383	RDM	59	M	III	43.6	102.08	102.08	2245.83	22.00	22.00	1662.50	16.29
CLM/LGD	B-11	3242	JWT	41	F	III	45.6	101.27	101.27	2227.87	22.00	22.00	1649.20	16.29
JL/LGD	B-12	4557	ASH	19	M	III	55.3	123.96	123.96	2727.08	22.00	22.00	1757.29	14.18
BRO/ALE	B-13	4562	TMC	50	M	III	46.9	123.96	123.96	2727.08	22.00	22.00	2019.79	16.29

Mean= 41.08 Mean= 50.7
 SD= 13.55 SD= 5.9
 n= 12 n= 12

Mean=	22.66
SD=	1.39
n=	10
SE=	0.44
t=	1.83
Labeled SPF =	21.85

Mean=	16.31
SD=	0.97
n=	12
SE=	0.28
t=	1.80
Labeled SPF =	15.81
Mean:	
Valid (Y/N)	Yes
Labeled:	
Valid (Y/N)	Yes

Subject B-07 disqualified - lost to follow up after day 1 procedures

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Conclusion:

The test product, B. daylogic – ultimate sheer continuous spray sunscreen, does not meet the FDA Final Rule requirements for labeling as Static SPF 85. [1]

Kacie Murdoch
Kacie Murdoch – Investigator

21 AUG 2018
Date

References:

1. U. S. Food and Drug Administration. Labeling and Effectiveness Testing; Sunscreen Drug Products for Over-the-Counter Human Use; Final Rule; 21 CFR Parts 201 and 310. Federal Register, Vol. 76, No. 117, June 17, 2011. pp. 35660-35665.
2. Guideline for the colorimetric determination of skin color typing and prediction of the minimal erythema dose (MED) without UV exposure. Colipa, 2007.