

1 HUSSIN LAW FIRM
2 TAMMY GRUDER HUSSIN, ESQ.
3 1596 N. Coast Highway 101
4 Encinitas, CA 92024
5 Tel. 877.677.5397
6 Cell. 760.331.3930
7 Fax 877.667.1547
8 Tammy@HussinLaw.com

9 WASKOWSKI JOHNSON YOHALEM LLP
10 DANIEL R. JOHNSON (Il. 6283164)
11 954 W. Washington Blvd. Suite 720
12 Chicago, IL 60607
13 Telephone: (312) 278-3153
14 Fax: (312) 690-4641
15 *pro hac vice* planned

16 KOZONIS & KLINGER, LTD.
17 GARY M. KLINGER (Il. 6303726)
18 227 W. Monroe Street, Suite 2100
19 Chicago, Illinois 60606
20 Phone: 312.283.3814
21 Fax: 773.496.8617
22 gklinger@kozonislaw.com
23 *pro hac vice* planned

24 Attorneys for Plaintiff
25 **Gail Sibley**

26
27 **UNITED STATES DISTRICT COURT**
28 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

19 GAIL SIBLEY, on behalf of herself and all)
20 others similarly situated,)
21 Plaintiff,)
22 vs.)
23 VI-JON, INC.; and DOES 1 through 100,)
24 inclusive,)
25 Defendant.)

Case No.

) **CLASS ACTION COMPLAINT FOR**
) **VIOLATION OF THE CALIFORNIA**
) **FALSE ADVERTISING ACT;**
) **VIOLATION OF THE CALIFORNIA**
) **UNFAIR COMPETITION LAW; AND**
) **VIOLATION OF THE CALIFORNIA**
) **CONSUMER LEGAL REMEDIES ACT**
) **AND RELATED CONSUMER**
) **PROTECTION STATUTES**

1 Plaintiff Gail Sibley (“Plaintiff”), on behalf of herself and those similarly situated, based on
2 information, belief and investigation of her counsel, except for information based on her personal
3 knowledge, complains and alleges as follows against Defendant Vi-Jon, Inc. (“Defendant”):

4 **INTRODUCTION**

5 1. This case addresses Defendant’s unlawful, unfair and deceptive business practices
6 connected with the advertising, marketing, and sales of Germ-X, an alcohol-based hand sanitizer.¹
7 Germ-X is advertised, marketed, and sold as a product that will prevent or reduce human infection
8 from the flu and other viruses. However, Defendant has no reliable studies to make such a
9 representation.

10 2. On January 17, 2020, the United States Food & Drug Administration (the “FDA”)
11 issued a warning letter to GOJO Industries, Inc. (“GOJO”) regarding its representations that Purell,
12 another alcohol-based hand sanitizer could be used to prevent the flu. In that letter, the FDA stated
13 that it is not aware of “any adequate and well-controlled studies” supporting a representation that
14 alcohol-based hand sanitizers produce a clinical reduction in infection or disease of the flu or other
15 viruses.

16 3. Purell and Germ-X have the same active ingredient, ethyl alcohol. Purell has the
17 same or higher levels of ethyl alcohol than Germ-X. Accordingly, the FDA’s point in its letter to
18 GOJO about the lack of reliable evidence that alcohol-based hand sanitizers prevent infection from
19 the flu and other viruses applies equally to Germ-X, if not more so.

20 4. For years, Defendant has been building its brand as a product that prevents humans
21 from getting the flu and other viruses. Its posts on social media show pictures and include captions
22 and links to suggestions that Germ-X will produce a clinical reduction in infection or disease of the
23 flu or other viruses. And, Defendant’s advertising works.

24 5. Plaintiff purchased Germ-X because of Defendant’s advertising and branding, which
25 suggest that Germ-X will reduce infection and the disease of the flu and other viruses.

26
27 ¹ “Germ-X” is defined herein as the alcohol-based hand sanitizer product line offered by Defendant, which
28 includes but is not necessarily limited to the following: Germ-X® Aloe Hand Sanitizer, Germ-X® Advanced
Aloe Hand Sanitizer, Germ-X® Original Hand Sanitizer and Germ-X® Original Advanced Hand Sanitizer,
and “Germ Blaster”.

1 19. Walmart’s website listed Germ-X under the heading “Coronavirus / Flu Prevention.”
2 (Id.)

3 20. An inexhaustive search of Defendant’s Facebook posts from the account @Germx
4 shows that Defendant has been suggesting that Germ-X prevents or reduces flu and other virus
5 infections for years. (See Facebook Screenshots attached as Exhibit B.)

6 21. Indeed, the flu, consumer’s fear of the flu, and their reliance on Defendant’s
7 misrepresentations about Germ-X’s ability to keep them safe from the flu, is a large part of
8 Defendant’s success.

9 22. As reported in the Boston Globe, “Germ-X, a leading hand sanitizer brand, may get a
10 big boost in sales this fall because of concern about H1N1 when students return to school, said
11 Kristin Ebert, a spokeswoman for Vi-Jon Inc., which manufactures Germ-X.” (See Boston Globe
12 Article, attached as Exhibit C.) Indeed, the St. Louis Business Journal reported that Gene Streb,
13 national account manager for Vi-Jon, stated: “[s]hortages of the flu vaccine appear to be driving the
14 jump in Germ-X sales ... ‘People are looking for alternatives to help eliminate the germs that are
15 associated with the outbreak of flu.’” (See St. Louis Business Journal article attached as Exhibit D.)

16 23. On January 17, 2020, the FDA issued a warning letter to GOJO, pointing to similar
17 advertising on Defendant’s websites and social media, which the FDA said suggested that Purell,
18 GOJO’s alcohol-based hand sanitizer, produces a clinical reduction in infection or disease of the flu
19 or other viruses. The FDA stated that it is not aware of “any adequate and well-controlled studies”
20 supporting that claim. (See FDA Letter, attached as Exhibit E.)

21 24. Purell and Germ-X are both hand sanitizers using the same active ingredient, ethyl
22 alcohol. In fact, Germ-X has the same or lower percentage of ethyl alcohol. Accordingly, the FDA’s
23 statement and concern about a lack of clinical evidence is equally applicable to Defendant’s product,
24 Germ-X.

25 25. What’s more, other scientific authorities have similarly concluded that alcohol-based
26 sanitized like Defendant’s product are not effective for the uses advertised by Defendant and alleged
27 herein.²

28 _____
² See, e.g., <http://www.cidrap.umn.edu/news-perspective/2019/09/hand-sanitizer-shown-less-effective->

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2 26. Plaintiff Sibley purchased Germ-X because she thought it would prevent or reduce
3 infection from the flu and other viruses. She purchased Germ-X on at least six occasions over the
4 last 4 years at a number of retailers, including but not limited to, Target and CVS. Based on the
5 Germ-X advertising campaign and branding, she believed that Germ-X would prevent or reduce
6 infection from the flu and other viruses. She would not have purchased Germ-X or paid as much
7 for it as she paid, if she knew there was no reliable evidence to support Defendant's deceptive
8 advertising and that it was not effective for the use advertised by Defendant and alleged herein.

9 27. Plaintiff brings this action to stop Defendant's deceptive practices and undo the harm
10 that it has caused to consumers in California and across the country.

11 CLASS ALLEGATIONS

12 28. Plaintiff brings this action on behalf of herself and the Classes defined as follows:

13 **Multi-State Class Based on Violation of State Consumer Protection Statutes:**

14 All individuals and entities in the states of California, Florida, Illinois,
15 Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey,
16 New York, Rhode Island, Washington and Wisconsin who purchased Germ-X in
17 California, Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri,
18 New Hampshire, New Jersey, New York, Rhode Island, Washington or
19 Wisconsin during the applicable statute of limitations period from the beginning
20 of any applicable limitations period through the date of class certification (the
21 "Consumer Protection Multi-State Class").³

22 **California Sub-Class:** All persons who purchased Germ-X in California during
23 the applicable statute of limitations period ("the California Class").

24 29. Plaintiff is unable to state the precise number of potential Class Members because
25 that information is in the possession of Defendant. However, the number of putative Class Members

26
27 [hand-washing-against-flu.](#)

28 ³ California Business & Professions Code section 17200, *et seq.*, prohibits any "unlawful, unfair or fraudulent business act or practice" and California's Consumer Legal Remedies Act, California Civil Code section 1770 *et seq.* similarly protects consumers from unfair business practices. The states in the Consumer Protection Multi-State Class are limited to states with similar consumer protection laws namely: Florida (Fla. Stat. § 501.201 *et seq.*); Illinois (815 ILCS 505/1, *et seq.*); Massachusetts (Mass. Gen. Laws Ch. 93A *et seq.*); Michigan (Mich. Comp. Laws § 445.901, *et seq.*); Minnesota (Minn. Stat. § 325F.67, *et seq.*); Missouri (Mo. Rev. Stat. § 407.010, *et seq.*); New Hampshire (N.H. Rev. Stat. § 358-A:1); New Jersey (N.J. Stat. § 56:8-1, *et seq.*); New York (N.Y. Gen. Bus. Law § 349, *et seq.*); Rhode Island (R.I. Gen. L. § 6-13.1, *et seq.*); Washington (RCW 19.86.010, *et seq.*); and Wisconsin (WIS. STAT. § 100.18, *et seq.*).

1 is so numerous that joinder would be impracticable. The Classes and the identity of the Class
2 Members will be readily ascertainable based on objective criteria. The Classes are determinable
3 and manageable in size and can be notified through reasonable expenditure of time and money.
4 Furthermore, the California Class consists largely of persons residing in California.

5 30. The Class definitions are reasonably limited in time. The definition's time period is
6 limited to purchases made during the applicable statute of limitations.

7 31. Common questions of law and fact predominate over questions affecting only
8 individual Class Members. Individual questions are limited to the easily determined and provable
9 issue of how much was paid by the individual Class Members for Germ-X. Common questions of
10 law and fact predominate, including:

- 11 a. Whether Defendant advertises, markets, and sells Germ-X by representing or
12 implying that Germ-X will produce a clinical reduction in infection or disease of the
13 flu or other viruses;
- 14 b. Whether Defendant's advertising, marketing, and selling of Germ-X by representing
15 or implying that Germ-X will produce a clinical reduction in infection or disease of
16 the flu or other viruses are likely to deceive a reasonable consumer;
- 17 c. Whether a reliable study or evidence that Germ-X will produce a clinical reduction
18 in infection or disease of the flu or other viruses existed prior to the filing of this
19 Complaint;
- 20 d. Whether any fine print statements in Germ-X advertising materials is likely to be
21 read and understood by a reasonable consumer;
- 22 e. Whether Defendant's advertising, marketing, and selling of Germ-X violates
23 California consumer protection laws;
- 24 f. Whether Defendant engaged in unfair competition;
- 25 g. Whether Defendant has been unjustly enriched by its collection and retention of
26 payments for Germ-X when it represented, inaccurately, that Germ-X prevented or
27 reduced viruses, including but not limited to the flu and norovirus; and
28

1 h. Whether Defendant should be enjoined from further false, misleading or deceptive
2 advertisements and/or unfair competition and be forced to pay restitution to Class
3 Members for the amounts paid for Germ-X.

4 32. Plaintiff is a member of the Classes she seeks to represent, and Plaintiff's claims are
5 typical of the claims of other Class Members. The misleading and deceptive advertising campaign
6 stating and implying that Germ-X prevents and reduces the flu and other viruses was made to the
7 general public. Defendant has the same obligations to Plaintiff and to all Class Members with
8 respect to the advertising and sales of Germ-X. Furthermore, the nature of the damages and their
9 causation will be the same for Plaintiff as for other Class Members.

10 33. Plaintiff's claims against Defendant for false, misleading or deceptive advertising and
11 for unfair competition are also typical of Class Members. Plaintiff has suffered actual injury in fact
12 by purchasing Germ-X because she thought it would prevent or reduce flu and other viruses as a
13 result of Defendant's deceptive advertising and sales materials.

14 34. The Classes are so numerous that joinder of all Class Members is impractical.
15 Plaintiff is unable to state the exact number of Class Members without discovery of the Defendant's
16 records. However, as alleged above, Plaintiff believes that based on the number of retail
17 establishments selling Germ-X in California and across the country there are hundreds of thousands
18 of Class Members if not more.

19 35. Plaintiff will fairly and adequately represent and protect the interests of the Classes
20 because (i) Plaintiff has retained experienced litigation counsel and counsel will adequately
21 represent the interests of the Classes; (ii) Plaintiff and her counsel are aware of no conflicts of
22 interest between Plaintiff and absent Class Members; and (iii) Plaintiff will assist counsel in the
23 prosecution of this action.

24 36. A class action provides a fair and efficient method of adjudicating this controversy,
25 and is superior to other available methods of adjudication in that (i) neither the size of the Classes,
26 nor any other factor, make it likely that difficulties will be encountered in the management of this
27 action as a class action; (ii) the prosecution of separate actions by individual Class Members or the
28 individual joinders of all Class Members in this action is impracticable, and would create a massive

1 and unnecessary burden on the resources of California Courts, and could result in inconsistent
2 adjudications, while a single class action can determine, with judicial economy, the rights of each
3 member of the Classes; (iii) because of the disparity of resources available to Defendant versus those
4 available to individual Class Members, prosecution of separate actions would work a financial
5 hardship on many Class Members; (iv) there is no plain, speedy, or adequate remedy available to
6 Class Members other than by maintenance of this class action because Plaintiff is informed and
7 believes, and based thereon alleges, that the damage to each Class Member is relatively modest
8 compared to the costs of litigating the issues in this action, making it economically unfeasible to
9 pursue remedies other than in a class action; and (v) the conduct of this action as a class action
10 conserves the resources of the parties and the Court system and protects the rights of each Class
11 Member and meets all due process requirements as to fairness to all parties. A class action is also
12 superior to the maintenance of these claims on a claim by claim basis because all of the claims arise
13 out the same circumstances and course of conduct.

14 **FIRST CLAIM**

15 **Violation of the California False Advertising Act –**
16 **Business & Professions Code §§ 17500, et seq.)**
17 **(On Behalf of the California Class and Against Defendant and Does 1 through 100)**

18 37. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through
19 36, and each and every part thereof with the same force and effect as though fully set forth herein.

20 38. Defendant engaged in unfair and deceptive advertising, in violation of California
21 Business and Professions Code § 17500, et seq., by misrepresenting to Plaintiff and Class Members
22 in advertisements that Germ-X prevented or reduced infection from the flu and other viruses, when,
23 in fact, there was no reliable evidence supporting such advertising.

24 39. These acts and practices, as described above, have deceived Plaintiff and Class
25 Members, causing them to lose money by purchasing Germ-X or paying more for it than they
26 otherwise would, as herein alleged, and have deceived and are likely to deceive the consuming
27 public. Accordingly, Defendant's business acts and practices, as alleged herein, have caused injury
28 to Plaintiff and Class Members.

- 1 b. Making false representations that Germ-X is of a particular quality, which it is not,
2 in violation of California Civil Code § 1770(a)(7);
- 3 c. Advertising Germ-X without the intent to sell it as advertised, in violation of
4 California Civil Code § 1770(a)(9); and
- 5 d. Representing that the subject of a transaction has been supplied in accordance with
6 a previous representation when it has not, in violation of California Civil Code §
7 1770(a)(16).

8 46. Plaintiff and Class Members reserve the right to allege other violations of law that
9 constitute other unlawful business acts or practices. Such conduct is ongoing and continues to this
10 date.

11 47. Defendant’s acts, omissions, misrepresentations, practices and non-disclosures as
12 alleged herein also constitute deceit under Cal. Civ. Code § 1710: “[t]he suppression of a fact, by
13 one who is bound to disclose it, or who gives information of other facts which are likely to mislead
14 for want of communication of that fact.”

15 48. Defendant’s acts, omissions, misrepresentations, practices and non-disclosures as
16 alleged herein also constitute violations of Sections 17200, *et seq.*’s prohibition against fraudulent
17 acts and practices.

18 49. Defendant’s acts, omissions, misrepresentations, practices and non-disclosures as
19 alleged herein also constitute “unfair” business acts and practices within the meaning of Business
20 & Professions Code sections 17200, *et seq.* in that Defendant’s conduct is substantially injurious to
21 consumers, offends public policy, and is immoral, unethical, oppressive, and unscrupulous as the
22 gravity of the conduct outweighs any alleged benefits attributable to such conduct. Plaintiff asserts
23 violations of the public policy of engaging in false and misleading advertising, unfair competition,
24 and deceptive conduct towards consumers. There were reasonable alternatives available to further
25 Defendant’s legitimate business interests, other than the conduct described herein. This conduct
26 constitutes violations of the unfair prong of California Business & Professions Code sections 17200,
27 *et seq.*

28

1 50. Defendant's conduct is also a breach of warranty. Defendant's representations that
2 Germ-X prevents or reduces the flu and other viruses constitute affirmations of fact made with
3 regard to Germ-X, as well as descriptions of Germ-X, that are part of the basis of the bargain
4 between Defendant and purchasers of Germ-X. Because those representations are material and false,
5 Defendant has breached their express warranty as to Germ-X and have violated California
6 Commercial Code §2313.

7 51. Defendant's unfair business practices and conduct described herein were the
8 immediate cause of damages suffered by Plaintiff and Class Members.

9 52. Defendant's unfair business practices and conduct described herein caused Plaintiff
10 and Class Members to buy or pay more for Germ-X.

11 53. Furthermore, Defendant's misrepresentations and omissions caused Plaintiff and
12 Class Members actual damages because had they known the truth about Germ-X, they would not
13 have purchased it or paid so much for it.

14 54. Defendant's conduct caused and continues to cause substantial injury to Plaintiff.
15 Plaintiff and the other Class Members have suffered injury in fact and have lost money as a result
16 of Defendant's wrongful conduct.

17 55. Pursuant to Business & Professions Code section 17203, Plaintiff and the other Class
18 Members seek an order requiring Defendant to immediately cease such acts of unlawful, unfair, and
19 fraudulent business practices and requiring Defendant to engage in a corrective advertising
20 campaign.

21 56. Unless Defendant is enjoined from continuing to engage in these unfair, unlawful and
22 fraudulent business practices, Plaintiff, and the public, will continue to be injured by Defendant's
23 actions and conduct.

24 57. Defendant has thus engaged in unlawful, unfair, and fraudulent business acts and
25 practices, entitling Plaintiff and the other Class Members to judgment and equitable relief against
26 Defendant, as set forth in the Prayer for Relief, including full restitution and/or disgorgement of all
27 revenues, earnings, profits, compensation, and benefits which may have been obtained by Defendant
28

1 as a result of such business acts or practices, and enjoining Defendant from engaging in the practices
2 described herein.

3 **THIRD CLAIM**

4 **Violation of California's Consumer Legal Remedies Act,**
5 **California Civil Code section 1770 *et seq.*,**
6 **And the Consumer Protection Statutes of the States in the Class**
7 **(On Behalf of Both Classes Against Defendant and Does 1 through 100)**

8 58. Plaintiff incorporates by reference the allegations contained in paragraphs 1 - 36 and
9 each and every part thereof with the same force and effect as though fully set forth herein.

10 59. Defendant violated section 1770 of the Consumers Legal Remedies Act. Defendant
11 violated Section 1770 by:

- 12 a. Making false representations that Germ-X has characteristics, uses or benefits which
13 it does not, in violation of California Civil Code § 1770(a)(5)
- 14 b. Making false representations that Germ-X is of a particular quality, which it is not,
15 in violation of California Civil Code § 1770(a)(7);
- 16 c. Advertising Germ-X without the intent to sell it as advertised, in violation of
17 California Civil Code § 1770(a)(9); and
- 18 d. Representing that the subject of a transaction has been supplied in accordance with
19 a previous representation when it has not, in violation of California Civil Code §
20 1770(a)(16).

21 60. By committing the acts alleged above, Defendant violated the CLRA.

22 61. Plaintiff and the Class Members are entitled to, pursuant to California Civil Code
23 §1780(1)(2), an order enjoining the above-described wrongful acts and practices of Defendant, and
24 ordering the payment of costs and attorneys' fees and any other relief deemed appropriate and proper
25 by the Court under California Civil Code §1780.

26 62. Plaintiff is sending Defendant a letter demanding corrective actions pursuant to the
27 CLRA. Plaintiff will amend her complaint to add claims for monetary damages if Defendant fails
28 to take the corrective actions.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff individually and on behalf of all other members of the general public similarly situated, prays for relief and judgment against Defendant, and each of them, jointly and severally, as follows:

Class Certification

1. That this action be certified as a class action and the Classes certified;
2. That Plaintiff be appointed as the Class Representative for the Classes; and
3. That counsel for Plaintiff and the putative Classes be appointed as class counsel;

On the First Claim

1. That Defendant be enjoined from continuing to represent that Germ-X prevents or reduces infection from the flu or other viruses;
2. That Defendant be mandated to engage in a corrective advertising campaign to educate the public that there is no reliable evidence that Germ-X prevents or reduces infection from the flu or other viruses;
3. That Defendant be required to provide Plaintiff and Class Members with full restitution for purchases made based on Defendant’s false advertising; and
4. All such other and further relief as the Court deems just and proper.

On the Second Claim

1. That Plaintiff and Class Members be awarded their actual damages according to proof;
2. That Defendant be enjoined from continuing to represent that Germ-X prevents or reduces infection from the flu or other viruses;
3. That Defendant be mandated to engage in a corrective advertising campaign to educate the public that there is no reliable evidence that Germ-X prevents or reduces infection from the flu or other viruses;
4. That Plaintiff and Class Members be awarded punitive damages as to the appropriate cause of action;

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JURY DEMAND

Plaintiff Gail Sibley hereby demands a trial by jury of all claims so triable on behalf of herself and the Classes.

DATED: February 7, 2020

HUSSIN LAW FIRM

By: /s/ Tammy G. Hussin
Tammy Gruder Hussin

DATED: February 7, 2020

WASKOWSKI JOHNSON YOHALEM LLP

By: /s/ Daniel R. Johnson
Daniel R. Johnson (pro hac vice to be sought)

DATED: February 7, 2020

KOZONIS & KLINGER

By: /s/ Gary M. Klinger
Gary M. Klinger (pro hac vice to be sought)
Attorneys for Plaintiff and the putative Classes