



3. FineVine sells oral care products containing activated charcoal, including the following products: “Activated Coconut Charcoal Powder” (also referred to herein as “**Charcoal Powder**” herein) and “Activated Coconut Charcoal Toothpaste” (also referred to herein as “**Charcoal Toothpaste**”).<sup>1</sup> Hereinafter, these products, as well as any other FineVine toothpastes and toothpowders containing activated charcoal that have been available for purchase within the relevant statute(s) of limitations, will be referred to collectively as the “**Charcoal Dentifrices.**”<sup>2</sup>

4. FineVine misleadingly and negligently promotes its Charcoal Dentifrices as natural teeth whiteners and detoxifiers that are safe for gums, teeth and enamel (going so far as to state: “perfectly safe for even the most delicate teeth”) as well as generally effective for dental hygiene and cosmetic benefits, and healthy and beneficial for daily, long-term oral care use. FineVine also claims the Charcoal Dentifrices will fight and reduce cavities, plaque, bacteria, and gingivitis, as well as strengthen teeth and enamel, protect gums, and prevent tooth decay. FineVine misleadingly and negligently portrays charcoal as an ingredient with purported detoxifying and adsorptive properties that affect, and are beneficial to, oral health and that effectuate cosmetic and hygiene benefits.

5. Claims printed on the product packaging and labeling of the Charcoal Toothpaste include: “natural teeth whitening,” “safe,” and “destroys bad breath.” Printed on the packaging and labeling of the Charcoal Powder is: “all natural teeth whitening,” “safe,” as well as logos stating “protect teeth,” and “sensitive teeth.”

6. The same and similar claims, as well as many additional representations, are made on the FineVine website, on Amazon.com, and elsewhere in extensive online marketing and print

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<sup>1</sup> See generally <https://finevinebrand.com/collections/oral-care> (last accessed December 5, 2019) (the toothpowder and toothpaste have flavor options, including spearmint and peppermint, but, as to each product type, the different flavors contain the same active ingredients and nearly identical labels and packaging).

<sup>2</sup> “Dentifrice” is a term for tooth-cleansing pastes and powders.

advertising. FineVine presents these products as “dentist recommended” and goes so far as to state: “If you’re concerned about how this great teeth whitening product affects your dental health, don’t be. . . .”

7. FineVine’s marketing strategy has been very successful, and the Charcoal Dentifrices have become one of the top sellers in its product category. However, that success is built around messaging that is misleading and deceptive to consumers, and that, in gross negligence, omits material information concerning the safety and efficacy of use of charcoal in oral care.

8. FineVine had duties to uphold as to its claims and omissions concerning the Charcoal Dentifrices. For example, the Federal Trade Commission (“FTC”) requires that marketers ensure that advertising claims are truthful, not misleading, and supported by a reasonable basis before disseminating such claims. The FTC and the Federal Drug Administration (“FDA”) further require that, for the types of products and claims at issue, FineVine must have competent and reliable scientific evidence to substantiate the claims conveyed.

9. Despite these and other legal obligations, FineVine did not possess the requisite evidence to substantiate its claims concerning the benefits and safety of its Charcoal Dentifrices, as such evidence did not exist at the times it made its claims, nor does it currently exist.

10. The consensus of respected dentists, researchers and industry experts weighs against the use of charcoal dentifrices, due to the lack of scientific substantiation on safety and efficacy, as well as risks of harm. For example, in 2017, findings published in the Journal of the American Dental Association (JADA) concluded that there is insufficient laboratory or clinical data to substantiate the safety and efficacy of dentifrice containing activated charcoal and cautioned against its use. In 2019 the British Dental Journal (BDJ) again confirmed a lack of

substantiation in the form of scientific, sound and reliable studies. The 2019 BDJ article expressed concern that charcoal toothpastes are a “marketing gimmick” that could, in fact, cause harm to oral health, structures, and aesthetics. Many qualified dental professionals have also spoken out on these findings and other safety, therapeutic and cosmetic concerns, and have cautioned against the use of charcoal dentifrices. Dr. Ada Cooper, a spokesperson for the American Dental Association, recently commented on the lack of safety substantiation (and reported hazards) for charcoal dentifrice and stated: “Just because something is popular doesn’t mean it’s safe.”<sup>3</sup>

11. Notably, the American Dental Association (“ADA”) has not approved *any* charcoal dentifrices for its ADA Seal of Acceptance (the “ADA Seal”). The ADA Seal certifies the safety and efficacy of a dentifrice, based on clinical data and research.

12. FineVine knew or should have known that many of its claims regarding the Charcoal Dentifrices lacked a credible basis or substantiation, and that they were misleading, deceptive, and/or false. FineVine also omitted material facts, including that scientific literature counter-indicates the safety and efficacy of charcoal in oral care use. Such representations and omissions were material and likely to deceive a reasonable consumer, yet FineVine nonetheless negligently and recklessly proceeded with its opportunistic marketing campaign, and it continues to do so, without regard to the consequences to the deceived consumer.

13. In addition to its inaccurate, false and grossly negligent claims and omissions on the benefits and safety of the Charcoal Dentifrices, FineVine engaged in multiple deceptive practices to induce consumers to take additional stock in, and rely upon, their marketing claims. For example, FineVine has negligently misled consumers to believe its claims are substantiated and that the Charcoal Dentifrices are “dentist recommended” and “dentist approved.” And, for

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<sup>3</sup> “Beware Whitening Promise of Charcoal Toothpastes,” The Family Dental Center, Mar. 2019, [<https://thefamilydentalcenter.com/blog/beware-whitening-promise-of-charcoal-toothpastes/>]. (emphasis added).

several years FineVine has advertised the Charcoal Dentifrices at a ‘discount’ from a higher listed full retail price; however, the price reduction was not a true bargain, but instead another deceptive practice, intended to induce consumers to attribute high value to its products, as well to make a quick purchase during the ‘sale.’ It also claims superior safety and quality to other comparable products on the market and charges a price premium over other available similar dentifrices.

14. FineVine engages in its false advertising and deceptive practices, and generally promotes the brand as exceptionally conscientious of health and safety, in order to secure consumer confidence in the brand and its Charcoal Dentifrices and, more specifically, to induce consumer purchases. FineVine intended for consumers to rely on its claims, which are ubiquitously made in advertising and marketing materials, and printed on the products’ packaging and labeling. FineVine knowingly presented its inaccurate claims and engaged in deceptive practices precisely due to FineVine’s belief that such conduct was likely to deceive the consumer and induce a purchase in reliance thereon.

15. Plaintiffs and potential class members reasonably relied upon and attributed value to the asserted benefits, efficacy, safety, value and other qualities of the Charcoal Dentifrices, and did not know, nor could they reasonably have known, of FineVine’s omissions of material information and misrepresentations, deceptive and false marketing practices, negligent breach of its duties and lack of federally required substantiation on safety and efficacy. As a direct and proximate result of this misconduct by FineVine, Plaintiffs and others similarly situated have suffered actual damages, including out-of-pocket losses from their purchases of one or more Charcoal Dentifrices. Through its negligent and unlawful conduct, FineVine successfully induced Plaintiffs and the putative class members to pay for oral care products that (i) do not perform by ‘naturally’ whitening, detoxifying, adsorbing, strengthening teeth, fighting disease, and other

promises; (ii) are not gentle or “perfectly safe” for teeth, gums and enamel as was represented; (iii) are not of the value and quality for the price premium paid; (iv) do not meet basic oral hygiene needs that other, less expensive dentifrices would; and (v) may in fact be detrimental and harmful to oral health and aesthetics. Furthermore, some consumers have experienced the negative effects that activated charcoal can cause, including discoloration of the gumline, gum irritation, excessive abrasion of tooth enamel and dentin, yellowing of the teeth, and damage to dental implants.

16. FineVine’s false and misleading claims and omissions enabled it to sell the FineVine Charcoal Dentifrices in great quantity.

17. FineVine prioritizes its own profits and jeopardizes consumers’ oral health, safety, and wellbeing when it makes unsubstantiated claims on the safety and efficacy of the Charcoal Dentifrices and fails to make material disclosures. It makes the untrue claim that its products are “dentist recommended,” and makes its unsubstantiated health, efficacy and safety claims despite its legal duties to substantiate the same, and to ensure the safety and efficacy of its products. Material omissions include the potential hazards of using charcoal in dentifrice, and that scientific literature counter-indicates the safety and efficacy of charcoal in oral care use. As such, FineVine’s conduct in its advertising, marketing, labeling, and sale of the Charcoal Dentifrices was, and continues to be, grossly negligent, wanton and recklessly indifferent to others, substantially injurious to consumers, as well as immoral, unethical, unscrupulous, unconscionable and in contravention of public policy.

18. Defendant’s conduct is in violation of Oklahoma consumer laws and constitutes unlawful practices under the Oklahoma Consumer Protection Act (15 Okla. Stat. § 751 *et seq.*) and statutory deceit (76 Okla. Stat. Ann. §§ 1-4). Defendant’s conduct is in violation of Arizona consumer laws and constitutes unlawful practices under the Arizona Consumer Fraud Act (Ariz.

Rev. Stat. Ann. §§ 44-1521 *et seq.*). Defendant's conduct also constitutes a breach of express and implied warranties, and violations of common law including negligent misrepresentation and fraud. Defendant was unjustly enriched as a result.

19. Plaintiffs bring this proposed Class Action on behalf of themselves and other similarly situated consumers in the United States who purchased FineVine Charcoal Dentifrices for personal use within the relevant statute of limitations period (the "**Nationwide Class**"), as well as a proposed subclass of members who purchased the FineVine Charcoal Dentifrices in the state of Oklahoma (the "**OK Subclass**"), a proposed subclass of members who purchased the FineVine Charcoal Dentifrices in the state of Arizona (the "**AZ Subclass**"). Together, the Nationwide Class, the OK Subclass, and AZ Subclass (and any other alternative class(es) that may be proposed subsequent to this filing) are collectively referred to herein as the "**Classes**"). For the alleged violations of state statutory law and common law, Plaintiffs seek, on behalf of themselves and the members of the Classes, to recover compensatory and statutory damages, treble or punitive damages as available, attorneys' fees and costs, as well as declaratory and injunctive relief.

## II. PARTIES

20. Plaintiff Samantha Hartanovich ("Plaintiff Hartanovich" or "Ms. Hartanovich" herein) is a natural person and a citizen of the State of Oklahoma. She lives within the Northern District of Oklahoma. On June 14, 2017 Ms. Hartanovich purchased Activated Charcoal Teeth Whitening Toothpaste Coconut Charcoal Toothpaste in the mint flavor, for \$12.97, on Amazon.com from seller FineVine Organics, and had it shipped to her Tulsa address. Ms. Hartanovich saw FineVine's marketing and advertisements online as well as the product packaging and labeling and purchased the toothpaste in reliance on FineVine's representations made thereon. These included that the product was natural, safe, non-abrasive, had whitening power, lacked harsh

chemicals or fluoride, and contained coconut oil. She was also struck by the professional look of the packaging and its quality, and the inclusion of official looking stamps that appeared to certify natural ingredients and safety. She expected that the product would meet its representations on efficacy, safety and benefits, including but not limited to the prevention of cavities, teeth strengthening, teeth whitening, the promotion of oral health, and high quality and safety of the product. However, Ms. Hartanovich's expectations, which were based on FineVine's own representations, were not met. She is an aggrieved consumer who suffered actual damages and injury-in-fact as a result of her purchase of a toothpaste that cannot deliver the promised health and cosmetic benefits; that, rather than 'naturally whitening' her teeth, was actually abrading her enamel; that none of the ingredients in the Charcoal Toothpastes can prevent cavities or strengthen teeth; that was not of the value represented or worth the price that was paid; and that has not been proven safe for use; and is risky to use and potentially detrimental to oral health. Ms. Hartanovich became aware of the nature of her claims made herein in the fall of 2019, when she discovered the announcement of a potential class action against purveyors of charcoal toothpastes and other products. Ms. Hartanovich has standing to assert claims on all Charcoal Toothpastes sold by FineVine (of varying flavors or sold at different times), because the toothpaste products are nearly identical, and FineVine's negligent and unlawful conduct as to the toothpaste she purchased was identical or substantially similar to other Charcoal Toothpastes sold by FineVine, as are the packaging, labeling and marketing claims and omissions that induced consumer purchases, and injuries suffered by others as a result. Ms. Hartanovich also has standing to assert claims on all the Charcoal Dentifrices sold by FineVine, because, while the paste and powder are different product types, FineVine's conduct as to all the Charcoal Dentifrices was identical or substantially similar,

as were the claims and omissions made to induce consumer purchases, and the injuries suffered by others as a result.

21. Plaintiff Donna Gilbert (“Plaintiff Gilbert” or “Ms. Gilbert” herein) is a natural person and a citizen of the State of Arizona. On multiple occasions in 2018 and 2017, Ms. Gilbert and her now-deceased husband purchased the FineVine Charcoal Powder on Amazon.com. She relied predominantly on FineVine’s representations concerning the high quality of the charcoal used in the Charcoal Powder and the purported detoxifying properties and claimed ability to adsorb, cleanse and remove toxins, and provide other health and cosmetic benefits. Ms. Gilbert suffered actual damages, including out-of-pocket damages, as a result of the purchases of Charcoal Powder products from FineVine. These products were not as represented and cannot deliver the promised health, dental hygiene, and cosmetic benefits. By example, rather than ‘naturally whitening,’ the Charcoal Powder was actually abrading her enamel. Moreover, the mouth detox, adsorption properties and benefits FineVine represented the charcoal could effectuate, have no reasonable basis in fact. Additionally, the products were not of the value represented or worth the price that was paid; their safety has not been substantiated or clinically proven; and they are risky to use and potentially detrimental to oral health. Ms. Gilbert became aware of the nature of her claims made herein in the fall of 2019, when she discovered the announcement of a potential class action against purveyors of charcoal toothpastes and other products. Ms. Gilbert has standing to assert claims on all Charcoal Powders sold by FineVine (of varying flavors or sold at different times), because the powder products are nearly identical, and FineVine’s negligent and unlawful conduct as to the toothpowder she purchased was identical or substantially similar to other Charcoal Powders sold by FineVine, as are the packaging, labeling and marketing claims and omissions that induced consumer purchases, and injuries suffered by others as a result. Ms. Gilbert

also has standing to assert claims on all the Charcoal Dentifrices sold by FineVine, because, while the paste and powder are different product types, FineVine's conduct as to all the Charcoal Dentifrices was identical or substantially similar, as were the claims and omissions made to induce consumer purchases, and the injuries suffered by others as a result.

22. Defendant FineVine, LLC (aka FineVine herein) is a citizen of the state of New Jersey. It is registered in the state of New Jersey and has its principal place of business at 33109 Elm Court, Lawrence Township, New Jersey 08648. Defendant is a personal care products company, engaged in the business of selling oral care and teeth whitening products and other products to consumers from its website, [www.finevinebrand.com](http://www.finevinebrand.com), and through Amazon.com and from other third-party retailers' online platforms and/or brick-and-mortar stores. FineVine conducts mass marketing campaigns and distributes its FineVine Charcoal Dentifrices throughout the United States.

### **III. JURISDICTION AND VENUE**

23. This Court has jurisdiction over this matter under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2), as the amount in controversy exceeds \$5 million, exclusive of interest and costs; there are 100 or more class members; and each of the Plaintiffs are each citizens of a state different from the Defendant.

24. This Court has personal jurisdiction over Defendant FineVine because Defendant purposefully availed itself of the privilege of conducting business in Oklahoma; because it transacts business, and supplies goods and services in Oklahoma; because many of the acts, claims and omissions giving rise to this action occurred in and were disseminated in the state of Oklahoma; and because Plaintiff Hartanovich made her online purchase while in the state of Oklahoma and the product was delivered to and used in Oklahoma; and other transactions between

FineVine and other putative class members for the sale and purchase of the Charcoal Dentifrices occurred in Oklahoma. Defendant has sufficient minimum contacts with the state of Oklahoma and intentionally availed itself, and continues to avail itself, of the jurisdiction of this Court through its business ventures; specifically, the promotion, sale, and distribution of its products (including the FineVine Charcoal Dentifrices) in this state through print and online advertising and marketing targeted at Oklahoma residents.

25. Venue is proper in this district under 28 U.S.C. § 1391(a) because a substantial part of the events or omissions giving rise to the claims asserted herein occurred in this district, as Defendant does business throughout this district (including promoting, selling, marketing, and distributing the FineVine Charcoal Dentifrices at issue), and Plaintiff Hartanovich made her online purchase of the FineVine Charcoal Toothpaste in this district and received and used the product in this district.

#### IV. FACTUAL ALLEGATIONS

##### A. Background

26. Activated charcoal is made from coal, wood, coconut shells, sawdust, bamboo, or similar ingredients. The raw material is superheated, treated with different chemicals, and then superheated a second time with steam.<sup>4</sup>

27. Activated charcoal has adsorptive qualities that have proven to be quite useful in certain limited contexts. For decades, it has been used in the emergency medical treatment of certain types of poisonings and drug overdoses, because, when administered correctly, it can adsorb certain heavy metals, drugs and other toxins.<sup>5</sup> The effectiveness of medicinal activated

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<sup>4</sup>“Activated Charcoal FAQ,” General Carbon Corp. [<http://generalcarbon.com/facts-about-activated-carbon/activated-carbon-faq/>] (last accessed June 26, 2019) (General Carbon Corp. is an activated charcoal manufacturer).

<sup>5</sup>See generally, Robert W. Derlet & Timothy E. Albertson, “Activated Charcoal—Past, Present and Future,” 145 *West J. Med.* 493 (Oct. 1986)

charcoal in the emergency room setting is limited and dependent on specific factors, such as the type of drug or toxin, timing between ingestion of the toxin and ingestion of the medicinal charcoal, and dosage of each.<sup>6</sup>

28. Activated charcoal has also been used in industrial and environmental settings to extract certain organic and inorganic substances from water.<sup>7</sup> For example, it is sometimes used to remove excess amounts of fluoride from drinking water.<sup>8</sup> It is used in juice manufacturing to control color and remove organic compounds.<sup>9</sup> Activated charcoal can also adsorb water-soluble vitamins, including forms of Vitamins C and B.<sup>10</sup>

29. Inspired by the use of activated charcoal in these limited and particular contexts, enterprising companies like Defendant have been eager to extrapolate charcoal's adsorptive properties for use in a much broader context, often with little to no substantiation. Products containing activated charcoal are increasingly prevalent and are promoted with vague claims of 'detoxifying' properties as well false or overstated health and beauty benefits. Activated charcoal has been marketed to the public as capable of extracting nearly any undesirable element or substance, and in nearly any context.

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[<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1306980/pdf/westjmed00158-0063.pdf>].

<sup>6</sup>*Id.*; see also Derlet & Alberston, *supra* note 3, at 493–92 & Table 1; Jennifer A. Lowry, "Use of Activated Charcoal in Pediatric Populations," World Health Organization: Subcommittee of Expert Committee on the Selection and Use of Essential Medicines, Jan. 2008, at 2, [[https://www.who.int/selection\\_medicines/committees/subcommittee/2/charcoal\\_rev.pdf](https://www.who.int/selection_medicines/committees/subcommittee/2/charcoal_rev.pdf)] (reviewing literature on medical use of activated charcoal).

<sup>7</sup>See generally "The History of Activated Carbon," Jurassic Activated Carbon, Feb. 9, 2014 [<https://www.jurassiccarbon.com/blogs/news/12186281-the-history-of-activated-carbon>].

<sup>8</sup>Manisha Poudyal & Sandhya Babel, "Removal of Fluoride using Granular Activated Carbon and Domestic Sewage Sludge," 82 *Int'l Proceedings of Chem., Biological, and Env'tl. Eng'g* 139 (2015) [<http://www.ipcbee.com/vol82/027-IIEEA2015-C3024.pdf>]; see also Behrooz Eftekhari et al., "The Effectiveness of Home Water Purification Systems on the Amount of Fluoride in Drinking Water," *J. of Dentistry, Shiraz U. of Med. Sci.*, Sept. 2015, at 278, (noting that use of home water purification systems, including several using carbon-based filtration methods, reduced the amount of fluoride in water).

<sup>9</sup>Cetin Kadakal et al., "Research Note: Effect of Activated Charcoal on Water-Soluble Vitamin Content of Apple Juice," 27 *J. of Food Quality* 171 (Apr. 2004) [<https://doi.org/10.1111/j.1745-4557.2004.tb00647.x>].

<sup>10</sup>*Id.*

30. Yet, writes Scott Gavura in *Activated Charcoal, The Wellness Scam* (Science Based Medicine, Aug. 8, 2019): “what’s popularly called a ‘detox’ today has nothing to do with actual medical detoxification,” and “[f]ake detox, the kind you find in magazines, and sold in pharmacies, juice bars, and health food stores, is **make-believe medicine. The use of the term ‘toxin’ in this context is meaningless.... but it sounds just scientific enough to be plausible.**”<sup>11</sup> Mr. Gavura goes on, “if you hear the words ‘detox’ uttered anywhere but an emergency room, keep in mind that you’re hearing a **marketing pitch, not credible health evidence.**”<sup>12</sup> “Despite the marketing hype, activated charcoal has no ability to suck out the toxic chemicals from the rest of your body.”<sup>13</sup>

31. Multiple scientific and consumer publications have made note of this logical fallacy and have debunked the broadly asserted ‘detoxifying’ properties of activated charcoal (particularly in its most commonly available form as an ingestible supplement). In April 2017, Consumer Reports published *Activated Charcoal Isn’t a Magic Health Bullet*, wherein Julia Calderone writes: “In recent years, people have tried to translate the very limited success of activated charcoal in the ER to their everyday lives, assuming that if it can adhere to and remove certain drugs in an emergency room, it can stop all kinds of toxins, making an already healthy person even healthier.”<sup>14</sup> Lisa Sasson, M.S., R.D., clinical associate professor of nutrition at New York University is quoted as saying “**this logical leap is not based in science.**”<sup>15</sup>

32. In another example from 2017, the Superfoodly.com website published *Activated Charcoal Uses May Be Harmful, Possibly Cancerous?* stating: “The problem is that none of these

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<sup>11</sup> Scott Gavura, “Activated Charcoal, The Wellness Scam,” *Science Based Medicine*, Aug. 8, 2019 [<https://sciencebasedmedicine.org/activated-charcoal-the-wellness-scam/>].

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> *Id.* (emphasis added).

<sup>14</sup> Julia Calderone, “Activated Charcoal Isn’t a Magic Health Bullet,” Consumer Reports (April 13, 2017) [<https://consumerreports.org/dietary-supplements/activated-charcoal-fad-not-a-magic-health-bullet/>].

<sup>15</sup> *Id.*

cleansing/detox benefits are backed by science.... **using [charcoal] to remove toxins from your body is nonsensical**, unless you literally just ingested poison (and even then, only certain types will it absorb). There are no clinical trials or peer reviewed research which suggests activated charcoal removes toxins daily when used as a supplement.”<sup>16</sup>

33. Simultaneous with the charcoal trend, consumer demand for teeth-whitening products has risen. The global market for teeth-whitening products is expected to reach \$7.4 billion by 2024.<sup>17</sup> Dentists, dental scientists, and researchers have raised concerns about the rapid growth of dental health ‘fads,’ including the use of charcoal dentifrice, which, even when “there is a lack of . . . scientifically supported information around such items, [] this does not stop them from being used.”<sup>18</sup> As Dr. Ada Cooper, a spokesperson for the American Dental Association, recently stated: **“Just because something is popular doesn’t mean it’s safe.”**<sup>19</sup>

34. FineVine has successfully leveraged the charcoal trend and consumer enthusiasm for teeth whitening with its development, marketing, and sales of its Charcoal Dentifrices.

#### **B. Contemporary Scientific Studies Challenge the Safety and Efficacy of Activated Charcoal for Use in Dentifrice**

35. The first use of charcoal for oral hygiene dates back to Hippocrates in ancient Greece.<sup>20</sup> The Romans apparently followed this practice, along with other questionable oral care practices such as rinsing their mouths with urine.<sup>21</sup>

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<sup>16</sup> “Activated Charcoal Uses May Be Harmful, Possibly Cancerous?,” Superfoodly (July 28, 2017) [<https://www.superfoodly.com/activated-charcoal-uses-side-effects/>].

<sup>17</sup> <https://www.hexaresearch.com/research-report/teeth-whitening-products-market>.

<sup>18</sup> Marco Antonio Dias da Silva & Anthony Damien Walmsey, “Fake News and Dental Education,” 226 *British Dental Journal* 397, 397-99 (2019).

<sup>19</sup> “Beware Whitening Promise of Charcoal Toothpastes,” The Family Dental Center, Mar. 2019, [<https://thefamilydentalcenter.com/blog/beware-whitening-promise-of-charcoal-toothpastes/>]. (emphasis added).

<sup>20</sup> See S.W.B. Newsom, “Hygiene and the Ancient Romans,” *J. of Infection Prevention*, at 25, June 2004 [<https://journals.sagepub.com/doi/abs/10.1177/14690446040050030601>].

<sup>21</sup> C. Valerius Catullus, “On Egnatius of the White Teeth,” circa B.C. 84–54, (Tr. Richard Francis Burton, 1894), [<http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.02.0005:poem%3D39>] (poem by the Roman poet Catullus referring to the practice of whitening teeth by rinsing with urine).

36. In the United States, there have been several attempts to introduce charcoal as an oral health product. According to commentary published in the Journal of the American Dental Association (“JADA”) in 1932, a product named “Kramer’s Original Charcoal Dental Cream,” had been pronounced “not acceptable” as an Accepted Dental Remedies (ADR) by the Council on Dental Therapeutics (the “Council”). The Council found that “[c]linical experiences are recorded in which the particles of charcoal became imbedded in the gum tissue and produced a bluish line near the margin, which is removable only by surgical means.”<sup>22</sup> When the Kramer’s brand produced no evidence to rebut the clinical results, the Council denied it as an ADR **“because it is a dentifrice intended for daily use that contains charcoal, a potentially harmful substance.”**<sup>23</sup>

37. Decades after the American dentistry establishment officially rejected charcoal for use in dentifrice, the topic has again resurfaced, in light of the burgeoning consumer trend. One study, presented at the Academy of General Dentistry 2015 Annual Meeting, concluded that “activated charcoal was more abrasive than a whitening toothpaste on acrylic resins” and warned that “[t]he fine black charcoal powder may become embedded in defects such as margins or cracks present on older dentition.”<sup>24</sup>

38. In 2017, the Journal of the American Dental Association published a literature review to “examine the efficacy and safety of charcoal and charcoal-based dentifrices.” John K. Brooks et al., *Charcoal and Charcoal-Based Dentifrices*, 148 JADA 661 (2017) (referred to herein as “*Charcoal-Based Dentifrices* (JADA 2017)” or “the 2017 JADA article”). The authors, Dr. John Brooks, DDS, Dr. Nasir Bashirelahi, PhD, and Dr. Mark A. Reynolds, DDS, PhD, reviewed the

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<sup>22</sup> John K. Brooks et al., “Commentaries: More on Charcoal and Charcoal-Based Dentifrices,” 148 JADA 785 (2017), [<http://dx.doi.org/10.1016/j.adaj.2017.09.027>] (quoting S.M. Gordan, “Kramer’s Original Charcoal Dental Cream: not acceptable for A.D.R.,” 33 JADA 912, 912–13 (1946)).

<sup>23</sup> *Id.*

<sup>24</sup> Brantley McCarty et al., “Activated Charcoal as a Whitening Dentifrice,” Presented at Academy of General Dentistry 2015 Annual Meeting, June 18–21, 2015, San Francisco, CA [<https://www.epostersonline.com/agd2015/node/72>] (last accessed June 5, 2019).

first 50 consecutive charcoal dentifrices from Google.com and Amazon.com to assess how the marketing claims of these products compared with efficacy and safety of charcoal-based dentifrices as found in the available scientific literature.<sup>25</sup>

39. The authors of *Charcoal-Based Dentifrices* (JADA 2017) reviewed advertising claims about the charcoal-based dentifrices on the market and found: “Nearly one-half of the charcoal-based dentifrices were advertised as being capable of detoxification, with most claiming to detoxify the oral cavity or teeth. **Our review failed to identify scientific support in the literature that topical application of charcoal can provide any detoxification benefits to the teeth or oral mucosa.**”<sup>26</sup>

40. The authors of the 2017 JADA article additionally reported that “[c]harcoal has been recognized as an abrasive mineral to the teeth and gingiva, and its inclusion in tooth preparations raises concern about damage to these oral structures, as well as increasing caries susceptibility due to the potential loss of enamel.”<sup>27</sup>

41. In conclusion, the authors of *Charcoal-Based Dentifrices* (JADA 2017) stated:

In our literature review, **we found insufficient scientific evidence to substantiate the cosmetic, health benefits** (antibacterial, antifungal, or antiviral; **reduced caries; tooth whitening; oral detoxification**), **or safety claims** of marketed charcoal-based dentifrices. Controlled clinical trials and laboratory investigations of charcoal-based dentifrices . . . are needed to determine product efficacy and safety.<sup>28</sup>

42. In May 2019, the British Dental Journal confirmed that supporting scientific evidence remained lacking, and again raised the same and similar concerns reflected in the 2017

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<sup>25</sup>John K. Brooks et al., “Charcoal and Charcoal-Based Dentifrices,” 148 *JADA* 661 (2017).

<sup>26</sup>*Id.* (emphasis added). The authors were unable to identify any randomized, controlled clinical trials with a follow-up duration of 3 months or longer testing the safety or effectiveness of charcoal-based dentifrices. All of the available studies lacked adequate controls to measure clinical oral improvements with charcoal-based dentifrices.

<sup>27</sup>*Id.* (emphasis added).

<sup>28</sup>*Id.* (emphasis added).

JADA article. Linda H. Greenwall et al., *Charcoal-Containing Dentifrices*, 226 *BDJ* 697, 698 (2019) (referred to herein as “*Charcoal-Containing Dentifrices* (BDJ 2019)” or “the 2019 *BDJ* article”). It further noted the tendency for build-up of charcoal particles in surface defects, fissures, and gumline, and resulting poor aesthetic effects.<sup>29</sup>

43. The May 2019 article in the *British Dental Journal*, *Charcoal-Containing Dentifrices* (BDJ 2019), concluded that charcoal-based dentifrices “may be considered to be a **fashionable, marketing ‘gimmick’**” that is “based on folklore on the use of different forms of charcoal for oral and dental remedies,” or improperly based on “present day uses of charcoal for medical purposes.”<sup>30</sup> The 2019 *BDJ* article lamented the prevalent and “**worrying approach**” in the marketing of charcoal dentifrices that places “a strong emphasis on benefits which appeal to consumers, which have yet to be disproved,” and that favor a “‘scientifically claimed until proved wrong’ approach . . . over substantiated, evidence-based promotion.”<sup>31</sup> The authors opined that “**the ethics of such an approach to the marketing of health-influencing products is at best questionable. False and deceptive messaging, together with the selective provision of information could be classed as misleading practice, contrary to the consumers’ best interests and protection.**”<sup>32</sup>

**C. The American Dental Association has Not Approved any Activated Charcoal Dentifrice for its ADA Seal of Acceptance**

44. The American Dental Association (“ADA”) was founded in 1859.<sup>33</sup> Per the ADA’s description of its mission, the ADA “exists to power the profession of dentistry and to assist our

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<sup>29</sup>*Id.*

<sup>30</sup>Linda H. Greenwall et al., “Charcoal-Containing Dentifrices,” 226 *British Dental Journal* 697, 698 (2019).

<sup>31</sup>*Id.* (emphasis added).

<sup>32</sup>*Id.* (emphasis added).

<sup>33</sup><https://www.ada.org/en/about-the-ada/ada-history-and-presidents-of-the-ada> (last accessed November 18, 2019).

members in advancing the overall oral health of their patients.”<sup>34</sup> The ADA presents itself as a “strong advocate[] for public health” working with an aim to keep patients “healthy from the dental chair to daily care at home.”<sup>35</sup>

45. In furtherance of the ADA’s public health goals, the organization administers the ADA Seal of Acceptance Program (“Seal Program”), which began in 1931.<sup>36</sup> The ADA began the Seal Program to combat “extravagant claims” about what dental products could do.<sup>37</sup> Since that time, the ADA Seal of Acceptance has become “[u]niversally recognized by consumers as a symbol of safety and effectiveness” and “is carried on more than 300 oral health products, including toothpastes, toothbrushes, dental floss, mouth rinses, denture adherents, and chewing gum.”<sup>38</sup> Companies can submit dental products to the Seal Program by including “data from clinical or laboratory studies that demonstrate safety and efficacy according to product category requirements developed by the ADA Council on Scientific Affairs.”<sup>39</sup> Members of the ADA Council review submissions for adherence to product category requirements and, if necessary, utilize consultants with relevant specific area expertise.<sup>40</sup> Once a product’s safety and efficacy has been demonstrated, the ADA Council will award the Seal Acceptance.<sup>41</sup>

46. A variety of major brands have sought and received the ADA Seal of Acceptance for certain products, including, but not limited to, Crest, Efferdent, ACT, CVS, Equate (Walmart),

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<sup>34</sup> <https://www.ada.org/en/about-the-ada> (last accessed November 18, 2019).

<sup>35</sup> *Id.*

<sup>36</sup> <https://www.ada.org/en/science-research/ada-seal-of-acceptance> (last accessed November 18, 2019).

<sup>37</sup> <https://www.ada.org/en/science-research/ada-seal-of-acceptance/ada-seal-faq>, “What is the ADA Seal?” (last accessed November 18, 2019).

<sup>38</sup> <https://www.ada.org/en/about-the-ada> (last accessed November 18, 2019).

<sup>39</sup> <https://www.ada.org/en/science-research/ada-seal-of-acceptance/ada-seal-faq>, “What determines if a dental product qualifies for the Seal?” (last accessed November 18, 2019).

<sup>40</sup> <https://www.ada.org/en/science-research/ada-seal-of-acceptance/ada-seal-faq>, “How are products evaluated?” (last accessed November 18, 2019).

<sup>41</sup> *Id.*

Listerine, Up and Up (Target), Oral-B, and Colgate.<sup>42</sup> **Significantly, the ADA has not granted the ADA Seal of Acceptance to any product with activated charcoal.**<sup>43</sup>

47. Defendant FineVine has not received the ADA Seal of Acceptance for the products named herein.<sup>44</sup> Based upon the prevailing scientific literature regarding the lack of safety and efficacy of activated charcoal in dental products, FineVine would have been aware of the unsuitability of the ADA Seal of Acceptance for its Charcoal Dentifrices. Nevertheless, it has chosen to make the exact sort of false, deceptive, and/or misleading extravagant claims that inspired the creation of the ADA's Seal Program.

**D. FineVine's Representations on the Charcoal Dentifrices' Labeling, Packaging, Advertising, and Marketing**

48. Since at least 2017, Defendant has packaged, marketed, distributed, and sold some or all of its FineVine Charcoal Dentifrices.

49. Examples of the external cardboard box, product packaging, and labels for FineVine's Charcoal Toothpaste include:

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<sup>42</sup> <https://www.ada.org/en/science-research/ada-seal-of-acceptance/ada-seal-shopping-list> (last accessed November 18, 2019).

<sup>43</sup> See <https://www.ada.org/en/science-research/ada-seal-of-acceptance/ada-seal-shopping-list> (last accessed November 18, 2019).

<sup>44</sup> <https://www.ada.org/en/science-research/ada-seal-of-acceptance/ada-seal-shopping-list> (last accessed November 18, 2019).





50. Examples of the product packaging and labels for FineVine's Charcoal Powder include:





51. The FineVineBrand.com website includes the following representations regarding FineVine's Charcoal Toothpaste:



<sup>45</sup> <https://finevinebrand.com/collections/oral-care/products/activated-charcoal-teeth-whitening-toothpaste> (last accessed December 17, 2019).

<sup>46</sup> <https://finevinebrand.com/collections/oral-care/products/activated-charcoal-teeth-whitening-toothpaste> (last accessed December 17, 2019).

- SAFE & NATURAL STAIN REMOVAL. An effective alternative for whiter teeth and gums without toxic ingredients, fluoride or bleach. Safely cleans and polishes teeth, strengthens enamel, improves gum health and freshens breath. Removes coffee, tea, wine and tobacco stains, naturally!

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<sup>47</sup> <https://finevinebrand.com/collections/oral-care/products/activated-charcoal-teeth-whitening-toothpaste> (last accessed December 17, 2019).

<sup>48</sup> <https://finevinebrand.com/collections/oral-care/products/charcoal-teeth-whitening-toothpaste-made-in-usa-whitens-teeth-naturally-and-removes-bad-breath-best-natural-vegan-organic-toothpaste-spearmint-flavor> (last accessed December 17, 2019).



WHITEN YOUR TEETH NATURALLY

LET OUR ANTISEPTIC & REMINERALIZING  
INGREDIENTS DO ALL THE HARD WORK!

STRENGTHEN YOUR SENSITIVE TEETH & PROTECT  
YOUR GUMS NATURALLY

FRESHEN UP YOUR BAD BREATH & REGAIN YOUR  
LOST CONFIDENCE

100% HEALTHIER, STRONGER & WHITER TEETH OR  
YOUR MONEY BACK!

50

<sup>49</sup> <https://finevinebrand.com/collections/oral-care/products/charcoal-teeth-whitening-toothpaste-made-in-usa-whitens-teeth-naturally-and-removes-bad-breath-best-natural-vegan-organic-toothpaste-spearmint-flavor> (last accessed December 17, 2019).

<sup>50</sup> <https://finevinebrand.com/collections/oral-care/products/charcoal-teeth-whitening-toothpaste-made-in-usa-whitens-teeth-naturally-and-removes-bad-breath-best-natural-vegan-organic-toothpaste-spearmint-flavor> (last accessed December 17, 2019).

✔️ WHITEN YOUR TEETH NATURALLY by choosing the FineVine premium charcoal teeth whitening toothpaste, which contains organic activated coconut charcoal, Xylitol and peppermint oil. Now you can finally start smiling with confidence again and effectively remove harmful bacteria, coffee, wine, cigarette or tea stains from your sensitive teeth. 51

✔️ STRENGTHEN YOUR SENSITIVE TEETH & PROTECT YOUR GUMS NATURALLY thanks to our dentist recommended activated charcoal toothpaste, which is more efficient and healthier than other tooth whiteners, such as messy charcoal powders, strips, gels or light pens. Rest assured that our black charcoal whitening toothpaste will not remove enamel from your teeth and will promote gum health. SAFE FOR KIDS

✔️ FRESHEN UP YOUR BAD BREATH & REGAIN YOUR LOST CONFIDENCE with our carbon charcoal toothpaste for sensitive teeth. Our refreshing mint-flavored coconut toothpaste will help eliminate bacteria from your mouth, thus offering you a minty-fresh breath that lasts for hours. Now your mouth will feel fresh and cleansed for longer thanks to our fluoride free charcoal toothpaste.

✔️ 100% HEALTHIER, STRONGER & WHITER TEETH OR YOUR MONEY BACK! That's our unconditional peace-of-mind guarantee! We believe in honest smiles and that's exactly why we back our dentist approved charcoal teeth toothpaste with our full refund guarantee! If you are not 100% thrilled with your mess-free and refreshing natural coconut charcoal toothpaste, we will offer you a full refund. No questions asked! 52

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<sup>51</sup> <https://finevinebrand.com/collections/oral-care/products/100-natural-charcoal-teeth-whitening-toothpaste> (last accessed December 17, 2019).

<sup>52</sup> <https://finevinebrand.com/collections/oral-care/products/100-natural-charcoal-teeth-whitening-toothpaste> (last accessed December 17, 2019).

52. The FineVineBrand.com website includes the following representations regarding FineVine's Charcoal Powder:



53

Natural teeth whitening

Whitens over time

Activated Coconut Formula

Long Lasting

Detoxifies Your mouth

54

<sup>53</sup> <https://finevinebrand.com/collections/oral-care/products/whitening-charcoal> (last accessed December 17, 2019).

<sup>54</sup> <https://finevinebrand.com/collections/oral-care/products/whitening-charcoal> (last accessed December 17, 2019).

**6 KEY BENEFITS**



- WHITEN TEETH
- REMOVE TOOTH STAINS
- REMOVE BAD BREATH
- FLUORIDE FREE
- KILLS BACTERIA
- SAFE & EFFECTIVE

55

<sup>55</sup> <https://finevinebrand.com/collections/oral-care/products/charcoal-teeth-whitening-powder> (last accessed December 17, 2019).

**ALL NATURAL TOOTH AND GUM POWDER:** Great alternative teeth whitening treatment without using any chemicals or bleach. More effective and safer than teeth whitening strips, gels, pen, lights & other whitening products that can strip your tooth enamel. 2 - 3 months supply

MADE IN THE USA – FineVine teeth whitening charcoal is 100% natural, 100% vegan with ingredients that aren't mixed with harmful chemicals, artificial colors and flavors. You won't find any fluoride, hydrogen peroxide, surfactant, or GMO in this activated coconut powder.

SAFE ON SENSITIVE TEETH – FineVine Active charcoal is specially formulated to ensure even the most delicate teeth won't suffer. Our unique blend of ingredients works hard to restore your best smile, while safely removes coffee stains, detoxify your mouth, Fights cavities, plaque, bacteria, gingivitis and preventing tooth decay.

ORGANIC ACTIVATED COCONUT CHARCOAL can be used as a toothpaste replacement OR in addition to your toothpaste, helping your teeth and gum stay healthy. Gently brush your teeth with our activated charcoal daily for 30 days to ensure best results.

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<sup>56</sup> <https://finevinebrand.com/collections/oral-care/products/charcoal-teeth-whitening-powder-1> (last accessed December 17, 2019). The same claims are made in identical fashion on Amazon .com at <https://www.amazon.com/Charcoal-Teeth-Whitening-Powder-NATURALLY/dp/B07BZVJDNB> (last accessed December 10, 2019).

**GET THE PERFECT BRIGHT SMILE:** No matter how well you take care of your teeth, some discoloration is bound to happen. Well, not anymore: this amazing natural activated coconut charcoal powder will help your smile get white, bright and charming.

**PERFECTLY SAFE FOR YOUR TEETH:** If you're concerned about how this great teeth whitening product affects your dental health, don't be: the natural activated coconut charcoal powder is perfectly safe and healthy for your teeth, gum, and enamel.

**NO MORE COFFEE & CIGARETTE STAINS:** Chronic habits like smoking and drinking coffee, tea, or wine can have a significant, aesthetically unpleasant effect on your teeth color. The teeth whitening powder is here to take care of that too, helping your teeth to gradually revert to their natural color

**PREMIUM QUALITY MATERIALS:** When it comes to our premium teeth whitening powder, we make a point of using nothing but premium quality natural and non-toxic materials, as well as state-of-the-art production processes and strict quality control.

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<sup>57</sup> <https://finevinebrand.com/collections/oral-care/products/teeth-whitening-powder-made-in-usa-naturally-whiten-teeth> (last accessed December 17, 2019). The same claims appear in identical fashion on Amazon.com at <https://www.amazon.com/Coco-Smiles-Whitening-Activated-Toothpaste/dp/B071ZHSGY> (last accessed December 10, 2019).



58

**Discover The Ultimate Natural Secret To A Charming Bright Smile - Starting Today!**

This 100% natural tooth polish removes stains and discolouration from the surface of your teeth to significantly whiten and brighten your smile. Activated charcoal is used today and has been used throughout the centuries to treat people who have accidentally ingested poison - with its porous surface, it attaches to toxins and impurities in the body to draw them out. It works in just the same way on plaque and stains on teeth - safely and efficiently lifting these off!

Best oral detox for a fresher breath with NO SYNTHETIC ADDITIVES, colours, preservatives, foaming agents, artificial flavours, fluoride etc.

59

53. FineVine makes identical or substantially similar claims and representations about their Charcoal Dentifrices elsewhere online, including Amazon.com.<sup>60</sup> For example, the following also appears on Amazon.com:

<sup>58</sup> <https://finevinebrand.com/collections/oral-care/products/whitening-charcoal> (last accessed December 10, 2019).

<sup>59</sup> <https://finevinebrand.com/collections/oral-care/products/whitening-charcoal> (last accessed December 10, 2019).

The identical statement is made on Amazon.com. <https://www.amazon.com/Coco-Smiles-Whitening-Activated-Toothpaste/dp/B071ZHSRGY> (last accessed December 10, 2019).

<sup>60</sup> See <https://www.amazon.com/stores/page/EDA8F815-017B-453C-B116-762F764C282B> (last accessed December 17, 2019) (FineVine’s Amazon Storefront for “Oral Care” products). See also <https://www.amazon.com/Coco-Smiles->

### Premium Natural Activated Coconut Charcoal Teeth Whitening Solution

Whether due to coffee, smoking, neglect, or genetics, it doesn't matter why your teeth have turn yellow and ugly. You can officially say goodbye to them, and hello to your new bright, white, and charming smile.

By using this amazing activated charcoal teeth whitening powder, your teeth will day after day start to regain their lost bright, white, and spotless image - and you'll find yourself smiling a whole lot more!

100% Natural, Pure & Safe For Your Teeth & Gums

Unlike teeth whitening products that utilize peroxides and other chemicals, some of them of questionable safety, this powder is nothing more than activated coconut charcoal powder: strong and effective, yet 100% natural and safe for the health of your teeth and gums!

Premium Teeth Whitener Powder

61

## E. FineVine's Marketing Claims are Debunked or Unsubstantiated by Scientific Evidence, Misleading and/or Untrue

### (i) *Detoxifying and Adsorbing*

54. FineVine markets its Charcoal Dentifrices as a natural and powerful detoxifier due to the adsorptive properties of the activated charcoal ingredient. Defendant touts both the paste and powder products as capable of detoxifying the mouth and consistently represents the purported detoxifying and adsorptive properties of charcoal as beneficial to oral health and even enabling specific functions, such as lifting stains and whitening teeth. On its website, FineVine specifically describes the “main key” ingredient charcoal as follows: “Activated charcoal is a highly absorbent substance. It removes toxins when they adhere to the surface of the charcoal.”<sup>62</sup>

55. FineVine's claims are specious and make misuse of the term “detoxification.” As previously discussed, detoxification is a *medical term* that refers to emergency treatments for

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[Whitening-Activated-Toothpaste/dp/B071ZHSRGY](https://www.amazon.com/Whitening-Activated-Toothpaste/dp/B071ZHSRGY) (last accessed December 17, 2019) (FineVine's Activated Coconut Charcoal Powder – Peppermint flavor); <https://www.amazon.com/Charcoal-Teeth-Whitening-Powder-NATURALLY/dp/B07BZVJDNB> (last accessed December 17, 2019) (FineVine's Activated Coconut Charcoal Powder – Spearmint flavor); <https://www.amazon.com/Charcoal-Whitening-Toothpaste-Activated-Charcoal/dp/B071VK9Y28> (last accessed December 17, 2019) (FineVine's Activated Coconut Charcoal Toothpaste – Peppermint flavor); <https://www.amazon.com/Charcoal-Teeth-Whitening-Toothpaste-NATURALLY/dp/B07F2PGS2H> (last accessed December 17, 2019) (FineVine's Activated Coconut Charcoal Toothpaste – Spearmint flavor).

<sup>61</sup> <https://www.amazon.com/Coco-Smiles-Whitening-Activated-Toothpaste/dp/B071ZHSRGY> (last accessed December 10, 2019). Nearly identical claims can also be found at: <https://www.amazon.com/Charcoal-Teeth-Whitening-Powder-NATURALLY/dp/B07BZVJDNB> (last accessed December 10, 2019).

<sup>62</sup> <https://finevinebrand.com/collections/oral-care/products/whitening-charcoal> (last accessed December 10, 2019).

dangerous levels of drugs, alcohol, or poisons, like heavy metals.<sup>63</sup> Moreover, there are no clinical trials or peer reviewed research which suggest activated charcoal removes toxins daily when used as a supplement.”<sup>64</sup> “Despite the marketing hype, activated charcoal has no ability to suck out the toxic chemicals from the rest of your body.”<sup>65</sup>

56. Even more implausible than the ‘detoxifying’ effects of ingestible supplements, are purported ‘detoxifying’ properties in topically applied personal care products, such as dentifrice. The logic of employing charcoal in this context is even more attenuated and is, in fact, *wholly unsupported*. As one wellness writer has put it:

**“At the root of the activated charcoal health fad is the misuse, or misunderstanding, of the word ‘toxin.’** In a detox-crazy world, toxins are used to refer to impurities or anything undesirable in your body: **stains on your teeth**, dirt or dust on your skin, naturally present sugars in your juice, a hangover after a night out. **Personal care products (like teeth whiteners**, face masks, soaps, shampoos, and deodorants) containing activated charcoal **bank on the idea that impurities can be draw out during use. . . . But there is little to no research to prove that the trace amounts of activated charcoal, combined with other ingredients, in these products are effective and much more than just marketing.**”<sup>66</sup>

57. Despite the lack of scientific substantiation, FineVine goes to great length to bolster the plausibility of its detox claims. For example, FineVine characterizes the benefits and functions of charcoal as an adsorptive detoxifier on its website and on Amazon with the following:

“This 100% natural tooth polish removes stains and discolouration from the surface of your teeth to significantly whiten and brighten your smile. Activated charcoal is used today and has been used throughout the centuries to treat people who have

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<sup>63</sup> Scott Gavura, “Activated Charcoal, The Wellness Scam,” *Science Based Medicine*, Aug. 8, 2019 [<https://sciencebasedmedicine.org/activated-charcoal-the-wellness-scam/>].

<sup>64</sup> “Activated Charcoal Uses May Be Harmful, Possibly Cancerous?,” Superfoodly (July 28, 2017) [<https://www.superfoodly.com/activated-charcoal-uses-side-effects/>]; Scott Gavura, “Activated Charcoal, The Wellness Scam,” *Science Based Medicine*, Aug. 8, 2019 [<https://sciencebasedmedicine.org/activated-charcoal-the-wellness-scam/>]; Julia Calderone, “Activated Charcoal Isn’t a Magic Health Bullet,” *Consumer Reports* (April 13, 2017) [<https://consumerreports.org/dietary-supplements/activated-charcoal-fad-not-a-magic-health-bullet/>].

<sup>65</sup> Scott Gavura, “Activated Charcoal, The Wellness Scam,” *Science Based Medicine*, Aug. 8, 2019 [<https://sciencebasedmedicine.org/activated-charcoal-the-wellness-scam/>].

<sup>66</sup> Katie Mui, “Activated Charcoal: The Powerful Detox Ingredient You Don’t Want in Your Regular Diet,” GoodRx, Feb. 7, 2019 [<https://www.goodrx.com/blog/what-is-activated-charcoal-detox-medication-interactions/>]. (emphasis added).

accidentally ingested poison – **with its porous surface, it attaches to toxins and impurities in the body to draw them out. It works in just the same way on plaque and stains on teeth – safely and efficiently lifting these off!**<sup>67</sup>

58. FineVine’s detoxification claims are a marketing gimmick with no basis in fact. Very similar claims have been assessed by dental experts and determined to be unsupportable (see, e.g., the 2017 JADA and 2019 BJD articles). Put simply, **there is no scientific support “that topical application of charcoal can provide any detoxification benefits to the teeth or oral mucosa.”**<sup>68</sup> **This includes “antibacterial, antifungal, or antiviral” benefits, as well as reduced caries or a more general (and ill-defined) notion of “oral detoxification.”**<sup>69</sup> And, to the extent charcoal-based dentifrices do appear to effectuate certain purported oral hygiene or aesthetic benefits, it is not its porousness, but rather the *high abrasiveness* of the charcoal particle that enables any seemingly positive results, and in a short-sighted and risky manner.

**(ii) Naturally Whitening**

59. FineVine’s whitening claims for the Charcoal Dentifrices (made on its product packaging, labeling, marketing and advertising) include but are not limited to: “natural teeth whitening,” “all natural teeth whitening,” “whiten teeth,” “teeth whitening and stain removal solution,” “an effective alternative for whiter teeth and gums without toxic ingredients, fluoride or bleach,” “whiten your teeth naturally,” “alternative teeth whitening treatment without using any chemicals or bleach,” “more effective and safer than teeth whitening strips, gels, pens, lights & other whitening products that can strip your tooth enamel,” “significantly whiten and brighten your smile,” “a revolutionary teeth whitening toothpaste has arrived” and others.

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<sup>67</sup> <https://finevinebrand.com/collections/oral-care/products/whitening-charcoal> (last accessed December 10, 2019). The identical statement is made on Amazon.com. <https://www.amazon.com/Coco-Smiles-Whitening-Activated-Toothpaste/dp/B071ZHSRGY> (last accessed December 10, 2019).

<sup>68</sup> John K. Brooks et al., “Charcoal and Charcoal-Based Dentifrices,” 148 *JADA* 661 (2017).

<sup>69</sup> *Id.*

60. When a toothpaste or toothpowder is advertised as “whitening,” most reasonable consumers believe it will leave their teeth whiter. However, dentists and researchers have warned that charcoal dentifrice companies’ “whitening” claims are misleading, due to the failure to clarify the distinction between intrinsic and extrinsic whitening mechanisms. As opposed to intrinsic whiteners, the *British Dental Journal* explains, many “products whiten teeth, to different extents, by the removal of surface (extrinsic) stains, which may reform relatively quickly in, for example, a smoker. Typically, these products do not change the intrinsic colour of the tooth, which is largely determined by the colour of the dentine.”<sup>70</sup>

61. Linda Greenwell, in her 2017 article *Charcoal Toothpastes: What We Know So Far*, concluded: “[t]here is no evidence that the use of charcoal toothpaste has an effect on intrinsic (internal) staining of teeth or on intrinsic whitening of the teeth.”<sup>71</sup> In 2019 Ms. Greenwell, as co-author *Charcoal-Containing Dentifrices* (*BDJ* 2019), re-affirmed the conclusion that activated charcoal “does not change the colour of the teeth other than by abrasive action similar to that of a ‘smoker’s toothpaste’. . . .”<sup>72</sup> “The common interchangeable use and misuse of the terms ‘whitening’ and ‘bleaching’ is therefore misleading and confusing to consumers and patients, with the marketing of some charcoal and other dentifrices being no exception.”<sup>73</sup>

62. The FineVine Charcoal Dentifrices do not intrinsically whiten teeth. As such, any claimed “whitening” properties of the FineVine Charcoal Dentifrices are limited to the removal of extrinsic surface stains, and therefore misleading.<sup>74</sup>

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<sup>70</sup>Linda H. Greenwall et al., “Charcoal-Containing Dentifrices,” 226 *British Dental J.* 697, 699 (2019).

<sup>71</sup> Linda Greenwall & Nairn H.F. Wilson, Opinion, “Charcoal Toothpastes: What We Know So Far,” *Clinical Pharmacist* (July 13, 2017) [<https://www.pharmaceutical-journal.com/opinion/correspondence/charcoal-toothpastes-what-we-know-so-far/20203167.article?firstPass=false>].

<sup>72</sup> Linda H. Greenwall et al., “Charcoal-Containing Dentifrices,” 226 *British Dental J.* 697, 699 (2019).

<sup>73</sup> *Id.*

<sup>74</sup> John K. Brooks et al., “Charcoal and Charcoal-Based Dentifrices,” 148 *JADA* 661 (2017).

63. FineVine’s “whitening” claims are deceptive for the additional reason that it presents the Charcoal Dentifrices as possessive of “naturally” whitening qualities due to the unique and inherent attributes of activated charcoal – essentially that whitening is effectuated by adsorbing and lifting stains. This is misleading and deceptive. Charcoal functions as an abrasive agent. Its composition and fractal-shaped particles make it highly abrasive to tooth enamel.<sup>75</sup> As such, any extrinsic stain-lifting that could be viewed as ‘whitening’ is achieved simply by mechanical abrading of extrinsic stains, and is *not achieved from adsorptive qualities of the charcoal*; rather it is achieved by the *particularly abrasive effects of the charcoal*.

64. Put another way, the FineVine Charcoal Dentifrices “work” to “whiten” teeth by abrading away the stains and deposits having the charcoal particles scrape off the surface of the teeth, i.e. the tooth enamel. The adsorptive qualities of charcoal are irrelevant in the context of purported teeth whitening, and FineVine’s representations in this regard are misleading and deceptive, similarly to its frivolous ‘detoxifying’ claims.

65. FineVine’s separation out of ‘whitening’ claims from claims concerning the removal of stains further muddies the reality of what is occurring and misleads the consumer.

66. The use of abrasives in ‘whitening’ toothpastes is common, and function to mechanically lift extrinsic stains, reduce the adhesion of dental biofilms and chromophores from the enamel surface, and otherwise improve discoloration and clean the teeth. However, there are numerous commonly accepted and widely used abrasives that are effective and much milder than charcoal and have undergone clinical testing as well as ADA scrutiny. Charcoal is particularly abrasive due to its unique particle shape and composition. There are no long-term clinical studies of the effects of its use, and charcoal is not in the ADA-approved list of abrasives.

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<sup>75</sup> See, e.g., Matthias Epple et al., “A Critical Review of Modern Concepts for Teeth Whitening,” 79 *Dentistry J.*, 7 (Aug. 1, 2019) [<https://www.mdpi.com/2304-6767/7/3/79/htm>].

67. Moreover, long-term use of the FineVine Charcoal Dentifrices could potentially result in a darkened and yellow tooth appearance. This is because, when teeth are regularly brushed with highly abrasive substances such as charcoal, the enamel can wear down and cause the tooth's dull, internal dentin to show through.<sup>76</sup> As Dr. Ada Cooper, spokesperson for the American Dental Association, has explained: "Using materials that are too abrasive can actually make your teeth look more yellow, because it can wear away the tooth's enamel and expose the softer, yellower layer called dentin."<sup>77</sup>

68. The removal of enamel by abrasive whitening dentifrices not only exposes the yellowish dentin, but also causes teeth to stain even more easily in the future – with the sensitive dentin exposed and no longer protected by enamel. This runs counter to FineVine's claim: "The teeth whitening and stain removal solution that alleviates the past, improves the present, and strengthens your future."<sup>78</sup>

**(iii) *Safety and adequacy for daily, long-term dental hygiene use***

69. The FineVine Charcoal Dentifrices are claimed by FineVine as "[m]ore effective and safer than teeth whitening strips, gels, pen, lights & other whitening products that strip your tooth enamel," "specially formulated to ensure even the most delicate teeth won't suffer," "safe on sensitive teeth," "safe and effective," "perfectly safe and healthy for your teeth, gum[s], and enamel," and "more efficient and healthier than other tooth whiteners." FineVine tells consumers that they can "[r]est assured that our black charcoal whitening toothpaste will not remove enamel

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<sup>76</sup> John K. Brooks et al., "Charcoal and Charcoal-Based Dentifrices," 148 *JADA* 661 (2017) ("Charcoal has long been recognized as an abrasive mineral to the teeth and gingiva, and its inclusion in tooth preparations raises concerns about damage to these oral structures, as well as increasing caries susceptibility due to the potential loss of enamel.").

<sup>77</sup> "Beware Whitening Promise of Charcoal Toothpastes," The Family Dental Center, Mar. 2019, [<https://thefamilydentalcenter.com/blog/beware-whitening-promise-of-charcoal-toothpastes/>].

<sup>78</sup> <https://finevinebrand.com/collections/oral-care/products/activated-charcoal-teeth-whitening-toothpaste> (last accessed December 17, 2019).

from your teeth and will promote gum health”. The products are presented as “dentist recommended” and “dentist approved.” Another example, concerning the Charcoal Powder, is FineVine’s statement:

“PERFECTLY SAFE FOR YOUR TEETH: If you’re concerned about how this great teeth whitening product affects your dental health, don’t be: the natural activated coconut charcoal powder is perfectly safe and healthy for your teeth, gum[s], and enamel.”

70. Printed on the FineVine Charcoal Dentifrices’ packaging and throughout its marketing efforts are instructions for using the product that approximate a regular brushing routine suggesting that FineVine’s claimed benefits come from brushing normally. This all sends a message that the Charcoal Dentifrices are appropriate as a consumer’s primary everyday source of oral hygiene and to the exclusion of other oral care products.

***Abrasive damage to teeth, enamel, and gums***

71. While proclaiming to “protect teeth,” “will not remove enamel,” “strengthen enamel,” “promote gum health,” “improve gum health,” “protect your gums,” *et cetera*, FineVine also fails to disclose material facts, such that activated charcoal has not been substantiated as safe and effective for use in dentifrice, and both JADA and the BDI have confirmed insufficient scientific evidence to substantiate safety claims (as well as cosmetic and health benefits).

72. Activated charcoal is known to be a highly abrasive and harmful substance to tooth enamel.<sup>79</sup> Multiple scientific studies have noted its abrasiveness presents a risk to enamel and gingiva in the context of oral care products. As noted in the 2017 JADA article: “[c]harcoal has been recognized as an abrasive mineral to the teeth and gingiva, and its inclusion in tooth

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<sup>79</sup> See, e.g., John K. Brooks et al., “Commentaries: More on Charcoal and Charcoal-Based Dentifrices,” 148 *JADA* 785 (2017) [<http://dx.doi.org/10.1016/j.adaj.2017.09.027>] (quoting S.M. Gordan, “Kramer’s Original Charcoal Dental Cream: not acceptable for A.D.R.,” 33 *JADA* 912, 912–13 (1946)) (Concluding a charcoal dental cream was not an acceptable dental remedy “because it is a dentifrice intended for daily use that contains charcoal, a potentially harmful substance”).

preparations raises concern about damages to these oral structures, as well as increasing caries susceptibility due to the potential loss of enamel.”<sup>80</sup> The 2019 BDJ article again noted the risk to enamel and gingiva posed by charcoal’s abrasivity.<sup>81</sup>

***Oral health effects from abrasive damage***

73. Moreover, the abrasive damage to tooth enamel caused by charcoal can set the stage for spiraling into additional oral health issues. It has been shown that increased surface roughness of teeth creates an environment conducive to increased bacteria in the oral cavity. This, in turn, can lead to other problems and is correlated with high caries and periodontal disease.

74. On a general level, the optimal formulated toothpaste maximizes cleaning while minimizing abrasiveness. The abrasives employed in a toothpaste should effectively polish teeth and remove biofilms and stains, but not abrade on the tooth structure itself. The findings of a controlled scientific study, published in a 2017 article, *Surface Changes of Enamel After Brushing with Charcoal Toothpaste*, confirmed that charcoal-based toothpastes are more abrasive and affecting on the surface roughness on a tooth as compared to other non-charcoal whitening toothpastes.<sup>82</sup> Charcoal’s abrasiveness is related to its composition and its irregular “star shaped” particles.<sup>83</sup> The “research concluded that there were increasing surface roughness values of tooth surfaces after the use of toothpaste containing charcoal, and the increased surface roughness was statistically significant . . . .”<sup>84</sup> Increased surface roughness on a tooth’s enamel is “a strategic place for bacteria to adhere to the tooth’s surface,” and “[t]he presence of bacteria in the oral cavity is one of the causes of high caries and periodontal disease risk.”<sup>85</sup>

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<sup>80</sup> John K. Brooks et al., “Charcoal and Charcoal-Based Dentifrices,” 148 *JADA* 661 (2017).

<sup>81</sup> Linda H. Greenwall et al., “Charcoal-Containing Dentifrices,” 226 *British Dental Journal* 697, (2019).

<sup>82</sup> U I Pertiwi et al., *Surface Changes of Enamel After Brushing with Charcoal Toothpaste*, IOP Conf. Series: Journal of Physics: IOP Conf. Series 884 (2017) [[iopscience.iop.org](http://iopscience.iop.org)] (doi:10.1088/1742-6596/884/1/012002).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

75. Still more problematic, experts have noted that certain characteristics of Charcoal Toothpastes tend to prolong users' brushing time and increase brushing vigorousness, which can serve to *further exacerbate the abrasive effect* of charcoal dentifrices. The first such characteristic is the distinct black color of pastes containing charcoal. "Charcoal-containing toothpastes are black in colour and brushing off the colour tends to prolong brushing, or the use of excessive brushing force, which may lead to the abrasion of teeth."<sup>86</sup> The same phenomena occurs with dentifrices claimed to have 'whitening' properties, as consumers might brush more frequently and vigorously to achieve the desired whitening more quickly, not realizing that "excessive brushing with a charcoal-based dentifrice may cause more harm than good."<sup>87</sup>

#### ***Negative aesthetic results***

76. Studies also show bad aesthetic effects in some users. "Particles of charcoal included in charcoal toothpaste may accumulate in crevices and other defects in teeth, including cracks in the teeth of older individuals."<sup>88</sup> For "patients with established periodontal disease," the use of charcoal-based dentifrices may result in "the accumulation of charcoal particles deep in periodontal defects and pockets, causing grey/black discoloration of the periodontal tissues."<sup>89</sup>

77. Studies have also shown that the staining and discoloration caused by charcoal dentifrices can impact dental implants. When grey lines are created by the buildup of charcoal particles between dental restorations and teeth, it can ultimately "necessitate the costly replacement of the affected filings, veneers or crowns."<sup>90</sup>

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<sup>86</sup> Linda Greenwall & Nairn H.F. Wilson, Opinion, "Charcoal Toothpastes: What We Know So Far," *Clinical Pharmacist* (July 13, 2017).

<sup>87</sup> Linda H. Greenwall et al., "Charcoal-Containing Dentifrices," 226 *British Dental Journal* 697, (2019). (emphasis added).

<sup>88</sup> Linda Greenwall & Nairn H.F. Wilson, Opinion, "Charcoal Toothpastes: What We Know So Far," *Clinical Pharmacist* (July 13, 2017).

<sup>89</sup> Linda H. Greenwall et al., *Charcoal-Containing Dentifrices*, 226 *British Dental Journal* 697, (2019).

<sup>90</sup> Linda Greenwall & Nairn H.F. Wilson, Opinion, "Charcoal Toothpastes: What We Know So Far," *Clinical Pharmacist* (July 13, 2017).

*The replacement of widely accepted ingredients with charcoal (whose safety and efficacy has not been established) jeopardizes consumers' oral hygiene and oral health*

78. Researchers have noted that the over-marketing of the health and safety benefits of charcoal dentifrices can cause customers to abandon fluoride toothpastes for fluoride-free varieties, believing various over-hyped and unproven claims on the purported oral hygiene properties and benefits of charcoal dentifrice. The authors of the 2019 BJD article noted “[p]ossibly more concerning is the potential for individuals changing from the use of a regular fluoride-containing toothpaste to the use of a charcoal toothpaste which contains no fluoride, thereby increasing their risk of caries.”<sup>91</sup> The authors of the 2017 JADA article also raised this concern, and advised that dentists should “educate their patients about the unproven claims of oral benefits and possible health risks associated with the use of charcoal dentifrices and **the potential increased risk of developing caries with the use of these nonfluoridated . . . products.**”<sup>92</sup>

79. This same phenomena (of abandoning other tried and true toothpastes for the untested Charcoal Dentifrices) extends beyond just fluoride. FineVine promises multiple oral hygiene benefits from regular use of the Charcoal Dentifrices and assigns unrealistic functions to the charcoal ingredient, while leaving out other ingredients known to serve said function(s).

80. FineVine claims “antiseptic” properties and that its toothpaste “will help eliminate bacteria from your mouth,” as well as numerous other claims concerning freshening bad breath and restoring confidence with fresher breath. However, charcoal is not an antiseptic, and does not have antibacterial properties. Nor does it otherwise play a role in freshening breath or treating halitosis. The 2019 BJD article states:

Given the adsorption capabilities of activated charcoal, which make it an antidote to acute poisoning and drug overdose, it could be assumed that it would be good constituent of a dentifrice for adsorbing the substances responsible for halitosis.

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<sup>91</sup> Linda H. Greenwall et al., *Charcoal-Containing Dentifrices*, 226 *British Dental Journal* 697, (2019).

<sup>92</sup>*Id.* (emphasis added).

Brushing with a charcoal-based dentifrice may leave the mouth feeling fresh, but such mouth freshness, possibly tempered by an earthy aftertaste of charcoal, may be short-lived, as charcoal does not counter the causes of halitosis. Furthermore, the adsorptive nature of charcoal in the dentifrices may limit the effects of flavourings, essential oils and any other constituents included in the formulation to mask mouth odour, thus limiting the effects of the dentifrices on halitosis.<sup>93</sup>

81. FineVine makes many claims concerning strengthening enamel and re-mineralizing teeth. However, charcoal does not have re-mineralizing or other properties that would strengthen enamel in any way. On the other hand, it is well and long-established that fluoride does have such properties. In the context of cases in which toothpastes contain *both* charcoal and fluoride, the BDJ has noted that charcoal can inactivate the fluoride, and “[a]s such, charcoal-based toothpastes, despite containing fluoride may have limited capacity to remineralise enamel, let alone increase its resistance to caries and tooth wear processes.”<sup>94</sup>

82. Similarly, there is no substantiation or reasonable factual basis to claim that charcoal plays a role in preventing cavities, gingivitis, or tooth decay, as FineVine claims for both the paste and powder Charcoal Dentifrices, nor is there evidence that other ingredients (such as bentonite clay) provide the claimed benefits.<sup>95</sup> As discussed elsewhere herein, these medicinal disease-related claims are subject to federal regulations concerning “drugs,” (as opposed to “cosmetics”), and required a higher level of substantiation and other duties.

83. FineVine has negligently and misleadingly made numerous material health, disease and cosmetic claims that consumers reasonably relied upon in making a purchase decision on one or more of the Charcoal Dentifrices, and to their own substantial risk and damage. The BDJ has

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<sup>93</sup> Linda H. Greenwall et al., *Charcoal-Containing Dentifrices*, 226 *British Dental Journal* 697, (2019).

<sup>94</sup> Linda H. Greenwall et al., *Charcoal-Containing Dentifrices*, 226 *British Dental Journal* 697, (2019); John K. Brooks et al., “Charcoal and Charcoal-Based Dentifrices,” 148 *JADA* 661 (2017).

<sup>95</sup> See, e.g., John K. Brooks et al., “Charcoal and Charcoal-Based Dentifrices,” 148 *JADA* 661 (2017); see also, e.g., claimed benefits of “Main Key Ingredients” in FineVine’s marketing image reproduced on page 32 herein, from the URL provided in footnote No. 58.

warned of this very type of situation when it comes to over-hyped charcoal dentifrices. Extreme marketing tactics and deceptive and false promises, in the absence of disclosures of the truth about inadequate substantiation, cause consumers to unwittingly risk their long-term oral health by purchasing and using a charcoal dentifrice in lieu of a non-charcoal product containing safe and effective ingredients. As the 2019 BDJ article authors noted:

“The unsubstantiated claims that certain charcoal-based dentifrices, any of which are described as eco-friendly, ecological, herbal, natural, organic or pure, have antibacterial, antiseptic and/or anti-fungal qualities, may lull consumers into thinking that the use of such dentifrices may be a sustainable way to prevent or possibly even treat periodontal disease, over and above whatever claims they are inclined to believe. Such persuasion of consumers, many of whom may have established oral and dental disease, is considered to be opportunistic marketing, with little regard to the consequences of the exploitation.”<sup>96</sup>

84. FineVine’s replacement of tested ingredients with the untested ingredient of charcoal is particularly ill-advised in light of the fact that the assumed premise of charcoal’s purported mode of action is not only untested and unsubstantiated, it is considered by many to be simply nonsensical: i.e., that the activated charcoal *binds* to surface stain deposits, tannins, plaque, bacteria, odors, and any other noxious or undesirable element, then *adsorbs* such elements into the porous charcoal particle and is brushed away, leaving clean and polished teeth, a detoxified mouth, and fresh breath.

**F. FineVine Knew or Should Have Known its Material Claims and Omissions on Whitening, Detoxifying/Adsorptive Properties, Oral Hygiene Benefits and Safety were Misleading, Deceptive and/or False**

85. FineVine’s Charcoal Dentifrices are subject to a federal legal and regulatory framework concerning the marketing, advertising, branding, and labeling of drugs and cosmetics. Toothpastes and toothpowders are classified as cosmetics, drugs, or a combination thereof.

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<sup>96</sup> *Id.*

86. In this pleading, Plaintiffs acknowledge FineVine’s obligations and duties under this federal framework (and apparent non-compliance) for purposes related to the elements of the common law negligence and state statutory causes of action asserted herein (such as the existence of various legal duties and obligatory standards of care, as well as to underscore that FineVine knew or should have known of its noncompliance and that its conduct was wrongful, and that it had various duties to disclose).

87. FineVine has legal duties that include but are not limited to: (i) to ensure the safety of the Charcoal Dentifrices, (ii) to ensure the advertising claims and the label and packaging of the Charcoal Dentifrices are not misleading or deceptive in their claims and omissions, and (iii) to possess adequate substantiation for its claims. These obligations were created and are governed by, *inter alia*, the Federal Trade Commission Act (15 U.S.C. § 41 *et seq.*) (“FTC Act”), as well as the Federal Food, Drug and Cosmetic Act (21 U.S.C. §321 *et seq.*) (“FD&C Act”), the Fair Packaging and Labeling Act (15 U.S.C. §1451 *et seq.*) (“FP&L Act”) and the regulatory frameworks created thereunder. Such laws were created in the aim to protect consumers from unfair and deceptive practices (including unsafe or deceptively labeled or packaged products), as well as to protect against unfair competition.

88. As a company engaged in the interstate marketing, distribution and sale of its Charcoal Dentifrices, FineVine was or should have been aware of its legal duties under these laws, as well as the regulatory framework built thereunder. The Charcoal Dentifrices meet the definitions of a “cosmetic” as defined in the FTC and FD&C Acts as well as, in some instances a “drug” (based on the drug-like claims made concerning the prevention of disease, such as cavities or gingivitis).

89. Section 5 of the FTC Act broadly prohibits unfair and deceptive trade practices (15 U.S.C. § 45), and Section 12 of the FTC Act prohibits the dissemination of false and misleading advertisement of food, drugs, and cosmetics (15 U.S.C. §§ 52).<sup>97</sup> The FTC requires advertisers possess a reasonable basis for their advertising and marketing claims, and to have substantiated all of its claims (express and implied) before it disseminates them. The requisite level of substantiation for claims concerning health and safety is higher, and sometimes termed “competent and reliable scientific evidence.” Additionally, when an advertiser conveys to a consumer (expressly or impliedly) that it has certain level of support or evidence for its products, it must possess such substantiation *to the actual level it claims* to have it.

90. The FD&C Act prohibits the marketing and movement in interstate commerce of adulterated or misbranded food, drugs and cosmetics. 21 U.S.C. § 321 *et seq.* The FD&C Act defines “drug” and “cosmetic” at 21 USC §321(g)(1) and 21 USC §321(i), respectively.<sup>98 99</sup>

91. The FD&C Act provides that a drug or a cosmetic will be considered misbranded for numerous potential reasons, including if the drug or cosmetic’s “[ ] labeling is false or misleading in any particular.” 21 U.S.C. § 352(a) (misbranded drugs); 21 U.S.C. § 362(a) (misbranded cosmetics). Labeling will be deemed misleading not only because a label statement is deceptive in its representations, but also when a material fact is not revealed on a label. As to the latter, labeling will be deemed misleading if it fails to reveal facts that are material in light of

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<sup>97</sup> For purposes of Section 12 of the FTC Act, classification as a “drug” or “cosmetic” is based on the definitions at Section 15 (c) and (e) of the FTC Act, 15 U.S.C. § 55(c), (e).

<sup>98</sup> The Charcoal Dentifrices at issue qualify as cosmetics, as they are fluoride-free and are intended to be applied to the human body for cleansing, beautifying, promoting attractiveness, or altering the appearance.

<sup>99</sup> They also qualify as drugs, to the extent that they make claims concerning disease, such as fighting or preventing cavities (anticaries claims), for example. The FDA labeling requirements for over-the-counter (OTC) anticaries drug products, for example, are specific and numerous, as well as generally prohibitive of misbranding that might mislead the consumer. See, e.g., 21 CFR 355.50 (Labeling of anticaries drug products) and 21 CFR 330.1 (General conditions for general recognition as safe, effective and not misbranded).

other representations, or material with respect to the consequences resulting from the intended use of the product. 21 CFR 1.21 (Failure to reveal material facts).

92. A cosmetic is also considered misbranded if its safety has not been adequately substantiated, and it does not conspicuously bear the statement: “**Warning – The safety of this product has not been determined.**” 21 CFR 740.10. The safety of a cosmetic may be considered adequately substantiated if experts qualified by scientific training and experience can reasonably conclude from the available toxicological and other test data, chemical composition, and other pertinent information that the product is not injurious to consumers under conditions of customary use and reasonably foreseeable conditions of misuse.<sup>100</sup>

93. FineVine was, or should have been aware of, its obligations under the above-described legal and regulatory framework yet appears to have negligently disregarded its duties as to claim substantiation, safety, marketing and advertising, as well as product package and labeling. These further underscores that it knew or should have known its acts and practices were also unlawful under state consumer protection laws.

94. The regulatory framework also serves to underscore the existence of a duty to disclose, as well as of a special relationship in that FineVine held itself out and made claims it knew were regulated, were of a certain nature requiring specialized knowledge or expertise that a reasonable consumer would not have, and that were material to purchase as well as to consumers’ personal dental hygiene and maintenance of oral health.

95. Defendant FineVine knew or should have known that it did not possess the legally required substantiation for its claims.<sup>101</sup>

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<sup>100</sup> See, e.g., FDA Cosmetic Labeling Guide, <https://www.fda.gov/cosmetics/cosmetics-labeling-regulations/cosmetics-labeling-guide>.

<sup>101</sup> The FTC requires companies to “have a reasonable basis for advertising claims before they are disseminated, and “a firm’s failure to possess and rely upon a reasonable basis for objective claims constitutes an unfair and

96. Defendant FineVine also knew, or should have known, that the Charcoal Dentifrices did not possess the promised benefits and safety, that FineVine lacked the adequate substantiation and reasonable basis for its claims, and that there was a risk of harm. Scientific studies and journals that contradicted or questioned many of FineVine’s claims were published and available to FineVine at the time it disseminated its claims and marketing content. Moreover, FineVine would not have even had to look to academic or scientific resources, because the scientific findings were also reported in consumer reports and mainstream media outlets during the time the Charcoal Dentifrices were marketed and sold. Such media reports, reflecting the general concerns of dental professionals, further serve to controvert FineVine’s characterization that the Charcoal Dentifrices were “dentist recommended” and “dentist approved.” A small sampling of media coverage and public statements made during the time FineVine developed, marketed, and sold its Charcoal Dentifrices includes, but is not limited to, the following:

- ABC News, June 2017, *How Safe is Activated Charcoal?* reports concerns of Dr. Upen Patel, D.D.S., because charcoal dentifrices are not evaluated by the ADA for long term use, can erode enamel, abrasiveness, gums, and tissue, and the small charcoal particles “can get stuck in your gums and in small cracks in your teeth, so you can have these little black lines in your gums and your teeth you can’t get out.”<sup>102</sup>
- Prevention.com, September 2018, *Is Charcoal Toothpaste the Answer to Whiter Teeth?*, quoted Dr. Kenneth Magid, D.D.S., adjunct clinical associate professor at NYU College of Dentistry: “Not only do charcoal toothpastes not meet the criteria that I would use to recommend them, but they may be too abrasive and damaging to teeth.” “Since charcoal toothpastes aren’t regulated by any agency or approved by the ADA, many of the products may be too abrasive for regular use and can possibly remove the enamel outside of the teeth or damage porcelain restorations such as veneers or crowns.” “Once the enamel wears away, there’s no way to regrow it, and on top of that, it can actually make your teeth look duller and darker instead of brighter. This is due to the underlying dentin showing through.

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deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act. . . .” See FTC Policy Statement Regarding Advertising Substantiation, appended to *In the Matter of Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986).

<sup>102</sup> Irene Cruz, “How Safe Is Activated Charcoal?,” ABC 10 (June 9, 2017) [<https://www.abc10.com/article/news/local/how-safe-is-activated-charcoal/447456019>].

. . . In addition to darkening your smile, wearing down your enamel will also make your teeth more sensitive to temperature and prone to cavities.”<sup>103</sup>

- BBC, May 2019, *Charcoal Toothpastes ‘don’t whiten teeth,’* cited the British Dental Journal for the premise that “charcoal-based toothpastes, which claim to whiten teeth, are a ‘marketing gimmick’ which could increase the risk of tooth decay,” and are “more abrasive than regular toothpastes, potentially posing a risk to the enamel and gums.” The article quoted Dr. Greenwall-Cohen as stating that charcoal particles in toothpastes can “get caught up in the gums and irritate them,” and also be problematic for fillings.<sup>104</sup>
- Harper’s Bazaar, August 2018, *Is Charcoal Toothpaste Safe to Use?* (re-published in July 2019), reported on the doubts and issues raised by the British Dental Journal, noting, “[u]nlike your liver and kidneys, the teeth and gums don’t perform a detoxifying function of the body, and since so-called toxins aren’t generally hanging out in your mouth anyway, there’s not much point in using your tooth cleaning to purge them.”<sup>105</sup>
- DailyMail, May 2019, *Charcoal-based Toothpastes do NOT whiten teeth and may lead to tooth decay as dentists warn the products are reliant on ‘marketing gimmicks and folklore,’* quotes Professor Damien Walmsley, scientific adviser for the British Dental Association: “Charcoal-based toothpastes offer no silver bullets for anyone seeking a perfect smile, and come with real risks attached.” “These abrasive formulations may be effective at removing surface stains, but prolonged use may also wear away tooth enamel. Research now shows it could even cause discoloration of the gums.”<sup>106</sup>
- Dr. Ada Cooper, DDS, spokesperson for the American Dental Association, warned of charcoal toothpastes in *Beware Whitening Promise of Charcoal Toothpastes* in March 2019: “Just because something is popular doesn’t mean it’s safe.” “Charcoal is recognized as an abrasive material to teeth and gums.” “Using materials that are too abrasive can actually make your teeth look more yellow, because it can wear away the tooth’s enamel and expose the softer, yellower layer called dentin.”<sup>107</sup>

97. It is entirely implausible that Defendant FineVine, a major oral care company that possessed sophisticated marketing savvy and invested significant time, money and effort into the

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<sup>103</sup> Macaela Mackenzie, “Is Charcoal Toothpaste the Answer to Whiter Teeth?,” *Prevention* (Sept. 26, 2018) [<https://www.prevention.com/beauty/a23470865/charcoal-toothpaste/>].

<sup>104</sup> “Charcoal Toothpastes ‘don’t whiten teeth,’” BBC: Health, May 10, 2019 [<https://www.bbc.com/news/health-48216116>].

<sup>105</sup> Lauren Hubbard & Alexandra Tunell, “Is Charcoal Toothpaste Safe to Use?,” *Harper’s Bazaar*, Aug. 14, 2018 (updated: Harper’s Bazaar Staff, “Is Charcoal Toothpaste Safe to Use?,” July 31, 2019) [<https://www.harpersbazaar.com/beauty/health/advice/a3764/charcoal-toothpaste-pros-cons/>].

<sup>106</sup> Victoria Allen, “Charcoal-based Toothpastes do NOT whiten teeth and may lead to tooth decay as dentists warn the products are reliant on ‘marketing gimmicks and folklore,’” *DailyMail* (May 9, 2019), [<https://www.dailymail.co.uk/health/article-7010219/Charcoal-based-toothpastes-NOT-whiten-teeth.html>].

<sup>107</sup> The Family Dental Center, Mar. 2019, “Beware Whitening Promise of Charcoal Toothpastes,” [<https://thefamilydentalcenter.com/blog/beware-whitening-promise-of-charcoal-toothpastes/>].

marketing of its products, failed to notice reported concerns from the dentistry profession, scientific community, researchers, and the media that the safety and efficacy of charcoal dentifrices were wholly unsubstantiated, and consumer use was highly risky to oral health and aesthetics. (Unlike consumers, whose attention to the claims of the oral care industry will likely be limited to time in a shopping aisle looking at product packaging, or at online retail sites that present a company’s marketing claims.) Despite its various duties, and despite its knowledge (actual or imputed) of the above-described scientific journals, media reports and admonishments from the ADA and other dental experts, FineVine negligently proceeded with its misleading marketing campaign.

98. Moreover, in light of above sampling of statements from prominent dentists, as well as an ADA spokesperson, it is clear that FineVine’s claim the Charcoal Dentifrices are “dentist recommended” or “dentist approved” is false and inaccurate, and not substantiated with legitimate data, such as an objective survey of dentists’ observations and experience in their dental practice. Nonetheless, Defendant negligently proceeded to make these claims.

99. Red flags were also raised by Defendant’s own customers. Verified FineVine Charcoal Dentifrices consumers have raised concerns online for years – citing problems that comport with those identified in dentistry studies and other reports. In a review dated May 14, 2017, Amazon user “Yesenia Molina” reported the following after using the FineVine Activated Coconut Charcoal Powder: “Does not work, leaves charcoal inside the gum lines making your gums look unhealthy.”<sup>108</sup> Other verified purchasers reported the same issue.<sup>109</sup>

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<sup>108</sup> Customer Review, AMAZON.COM (May 14, 2017), [https://www.amazon.com/product-reviews/B07BZVJDNB/ref=cm\\_cr\\_ar\\_p\\_d\\_viewopt\\_kywd?ie=UTF8&filterByStar=one\\_star&reviewerType=all\\_reviews&sortBy=recent&pageNumber=1&filterByKeyword=line#reviews-filter-bar](https://www.amazon.com/product-reviews/B07BZVJDNB/ref=cm_cr_ar_p_d_viewopt_kywd?ie=UTF8&filterByStar=one_star&reviewerType=all_reviews&sortBy=recent&pageNumber=1&filterByKeyword=line#reviews-filter-bar) (last accessed December 6, 2019).

<sup>109</sup> See generally [https://www.amazon.com/product-reviews/B07BZVJDNB/ref=cm\\_cr\\_ar\\_p\\_d\\_viewopt\\_sr?ie=UTF8&filterByStar=two\\_star&reviewerType=all\\_reviews&sortBy=recent&pageNumber=1&filterByKeyword=line](https://www.amazon.com/product-reviews/B07BZVJDNB/ref=cm_cr_ar_p_d_viewopt_sr?ie=UTF8&filterByStar=two_star&reviewerType=all_reviews&sortBy=recent&pageNumber=1&filterByKeyword=line) (last accessed December 6, 2019).

100. These online reports mimic the same phenomenon reported in dentistry journals and publications (going as far back to a 1932 JADA report),<sup>110</sup> and should cause any responsible oral care business to seriously evaluate the safety and effectiveness of its products. Indeed, FineVine was under a continuing duty to warn if its product poses a risk, and its duty could be triggered by new information. However, in gross negligence and disregard for the safety of others, FineVine failed to make disclosures on substantiation and safety, or to issue warnings or corrective labeling.

**I. FineVine Intended Consumers Reliance and Induced Consumers' Purchase of the Charcoal Dentifrices**

101. FineVine's marketing was constructed in order to induce consumers to purchase the Charcoal Dentifrices over other products, and to do so at a price premium. The Charcoal Dentifrices are branded as "natural" with an emphasis on their being healthier, safer, and effective alternatives as compared to other tooth whitening and oral care products.<sup>111</sup>

102. The claims at issue in this Class Action Complaint – which are alleged herein as misleading, inaccurate, and/or false as well as negligently made and lacking a proper factual basis and required evidentiary substantiation – are also the very types of claims which are essential to a consumer's decision whether to purchase one or more of the Charcoal Dentifrices. The same is true of the omissions and deceptions alleged herein, which are material to the purchase decision. FineVine fails to disclose material information that, if known to a consumer, would inform their

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<sup>110</sup> John K. Brooks et al., "Commentaries: More on Charcoal and Charcoal-Based Dentifrices," 148 JADA 785 (2017), [<http://dx.doi.org/10.1016/j.adaj.2017.09.027>] (quoting S.M. Gordan, "Kramer's Original Charcoal Dental Cream: not acceptable for A.D.R.," 33 JADA 912, 912–13 (1946)).

<sup>111</sup> The products claim to omit "toxic ingredients, fluoride, or bleach," as well as other ingredients increasingly considered undesirable or unnatural (such as hydrogen peroxide, surfactants, preservatives, synthetic additives, artificial flavors or colors, and sodium lauryl sulfate (SLS)), in favor of "naturally" effective ingredients.

perception of the claims affirmatively made, and would affect, and did affect, the decision to make a purchase or not.

103. FineVine negligently disseminated its misleading claims, material omissions, and its false and deceptive marketing campaign, despite the capacity and likelihood to deceive reasonable consumers. It did so in order to induce reliance and the purchase of one or more of the Charcoal Dentifrices. FineVine negligently and misleadingly promotes the (unsubstantiated) attributes of activated charcoal despite warnings from dentists and the scientific community about charcoal dentifrices – at best a “marketing gimmick” and, at worst, harmful to teeth, dentistry implants and overall oral health.

**J. Reasonable Reliance by Consumers**

104. Each and every purchaser of the FineVine Charcoal Dentifrices was exposed to Defendant’s negligent and misleading claims. In addition to online and print marketing and ads, the claims are printed on external cardboard packaging and product labeling.

105. Consumers reasonably relied on Defendant’s claims. The ubiquitous marketing and stylistic branding together foster a reasonable expectation that FineVine is a trustworthy brand, that its claims were legitimate, and that the products were safe and effective. Consumers reasonably relied on the oft-repeated claims that the FineVine Charcoal Dentifrices had natural and safe whitening and detoxifying properties, as well as other dental hygiene benefits, were safe for everyday use, as well as generally appropriate, effective and not harmful in their intended use.

106. An average consumer lacked any meaningful ability to test or practicably verify FineVine’s claims. Consumers cannot reasonably be expected to research and independently ascertain the truthfulness of the claims made by the sellers they pay for products.

107. This is particularly so in the purchase of a dental product from an oral care company, and consumers can reasonably rely upon the expertise of an oral care company that introduces a dental product to the retail market and presents it as safe, effective and appropriate for dental hygiene and oral care maintenance needs, and even disease-fighting. Reasonable typical consumers lack sufficient training to discern the validity of such claims, which require a certain level of expertise and specialized knowledge; nor should consumers be reasonably expected to feel the need to question or investigate these types of claims.

108. Moreover, the branding intentionally fostered a belief in the brand's conscientious on health, safety and wellbeing, and such messaging was intend to inspire reliance, and even included "dentist recommended" and other statements such as "rest assured" and "honest smiles" and "full refund guarantee!"

**K. FineVine's Wrongful Conduct Injured Consumers**

109. Consumers have been harmed by these false, misleading and negligently made representations and omissions because they purchased the FineVine Charcoal Dentifrices that were not as represented and were also ineffective and/or harmful. Consumers relied on FineVine's claims and were induced to believe that the FineVine Charcoal Dentifrices provide properties, qualities, value, and safety benefits that other "retail" toothpastes and toothpowders do not, and also that other "natural" toothpastes and toothpowders do not.

110. Each consumer has been exposed to the same or substantially similar misleading and unlawful practices and each product contains identical or substantially similar claims, and each of the Charcoal Dentifrices were sold at a price premium. This premium is paid for an unproven and potentially harmful ingredient - charcoal. As such, each consumer suffered the same or

substantially similar injuries as the named Plaintiffs (one of whom purchased a Charcoal Powder, and the other purchased a Charcoal Toothpaste).

111. These products were not as represented and cannot deliver the promised health, dental hygiene, and cosmetic benefits, as previously discussed. For example, the mouth detox, adsorption properties and benefits FineVine represented the charcoal could effectuate, have no reasonable basis in fact and the promised performance and benefits (in the form of purported detox or natural whitening or other claims like re-mineralizing, strengthening, anti-carries, or antibacterial) simply were not, and could not have been, realized.

112. In addition to the price premium paid for falsely promised benefits, consumers have been damaged by the total purchase price, because they purchased a dentifrice that does not provide the basic safety and oral health maintenance that other non-charcoal dentifrices do, whether similarly priced or cheaper. Because charcoal powder is unproven as safe and effective for use in dentifrice (and potentially harmful), it is not an appropriate substitute for many such ingredients. As such, the consumer is harmed in a second way that is distinct from, and in addition to, the price premium paid for nonexistent benefits of activated charcoal. Not only do the Charcoal Dentifrices fail to bring any premium or additional benefit with the charcoal ingredient or the premium price charged, the products also may not provide basic oral hygiene maintenance that would have been provided by other non-charcoal, regular toothpastes. Consumers were damaged by the entire cost of a tube of toothpaste that was ineffective at maintenance of oral hygiene and potentially deleterious to oral health.

113. In addition to the price premium and/or the purchase price, Plaintiffs and putative Class members suffered actual damages and injuries-in-fact due to the fact that they were using oral care products that were deficient and potentially harmful. They were aggrieved because they

were using oral care products that were ineffective and carried significant risk due to the inclusion of charcoal. For example, they used the Charcoal Dentifrices (which had been represented as, inter alia, safe for gums, natural, healthy and effective for whitening, and non-abrasive to enamel) which were, unbeknownst to them, rather than safely and naturally whitening, were in fact abrading the enamel on their teeth. As previously discussed, the inclusion of charcoal particles can directly damage dental implants or the gumline. Charcoal also proximately causes damage that arrives in the form of oral health issues that can arise due to failure to meet basic oral health care needs and maintenance, as well as oral health issues that can spiral as consequences of the abrasive damage caused by charcoal.

***Additional Deceptive Pricing Practices***

114. The FineVine website presents images of all of the brand's oral care products available for purchase, with the purchase price listed below each pictured product.<sup>112</sup> The website page featuring all of the brand's available oral care products presents a rather confusing interface, and many of the products, including the Charcoal Powders and Charcoal Toothpastes, are imaged and listed multiple times. Clicking on the product image then links the user to the specific product in order to add to the cart and purchase.

115. FineVine's oral care product website page includes an image of the 100% Natural Charcoal Teeth Whitening Toothpaste (Spearmint), with a purchase price of \$16.00 printed underneath. This purchase price is further indicated to be a discount from an original full retail price of \$24.00.<sup>113</sup> The same image of this product, along with the same purchase price, discounted from the original full retail price, appears three times on the oral care product page.

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<sup>112</sup> <https://finevinebrand.com/collections/oral-care> (last accessed December 19, 2019).

<sup>113</sup> <https://finevinebrand.com/collections/oral-care> (last accessed December 19, 2019).

116. Also pictured and available for purchase on FineVine’s oral care product website page are both flavors of the Charcoal Teeth Whitening Powder (Mint and Spearmint) listed at a purchase price of \$19.99.<sup>114</sup>

117. Elsewhere on the same page, the same product appears again. Charcoal Teeth Whitening Powder (Spearmint) appears two more times, but instead of \$19.99, in each instance under the product image a purchase price of \$22.00 is listed and indicated as a discount from a full retail price of \$32.00. The same product also appears two more times, listed once at \$12.00 and elsewhere at \$12.99. Another powder product – the Charcoal Teeth Whitening Powder (Natural Flavor) is also pictured and listed at a purchase price of \$14.97 (with no discount reflected). While the size and quantity of the product is not indicated clearly, each of the several images for the same product (of various flavors) reflects the same labelling stating “3-6 month supply,” seemingly conveying that the charcoal powder product is of one standard amount, yet sold for multiple different prices, some reflected as reduced from an original retail price and others not purporting to be at a discount.<sup>115</sup>

118. Upon information and belief, FineVine has been representing prices for some or all of the Charcoal Dentifrices as discounts or reductions from original retail prices; however, there is no indication FineVine has ever in fact charged the purported full retail prices (represented in one instance as \$24.99 for the paste and as \$32.00 for the powder in others). Pricing in this way (that is, at a false priced reduction), misleads customers to believe they are receiving a bargain on a premium product, when in reality the ‘sale’ price is the regular price. This false and misleading pricing is a deceptive and unlawful practice intended to induce consumers to purchase the product

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<sup>114</sup> <https://finevinebrand.com/collections/oral-care> (last accessed December 19, 2019).

<sup>115</sup> <https://finevinebrand.com/collections/oral-care> (last accessed December 19, 2019).

while the ‘discount’ applies or during the sales period. Such pricing practices also unfairly harm competitors who do not price and/or advertise their products in an unlawful and deceptive manner.

119. FineVine took unfair advantage of its competitors and of its consumers, and has collected substantial profits as a result of numerous material omissions and false and misleading claims over the benefits and safety of the Charcoal Dentifrices, and other false and misleading purported properties and attributes (such as dentist endorsement and being a premium product offered at a price discounts). FineVine’s misrepresentations and omissions concerned material characteristics of its products, and it charged a higher price for such characteristics. Plaintiffs and purported class members paid a premium price for the mislabeled products.

120. Defendant has done so with knowledge not only that its claims were unsubstantiated, but it also knew or should have known of the potential for serious harm caused by the use of charcoal in dentifrice. Defendant’s conduct is deceptive, unethical, in violation of public policy, wanton and recklessly indifferent to others, and substantially injurious to consumers as well as to competitors. Defendant should not be permitted to retain its substantial benefit obtained from its injurious misconduct, which in justice and equity belong to Plaintiffs and members of the Classes, and caused them injury; nor should it, in justice and equity, be permitted to continue to benefit from its unfair and deceptive practices.

121. Without remedy (including injunctive relief), Plaintiffs, members of the putative Classes, and other consumers, cannot be confident that the labeling of products will be truthful and not misleading when they are making purchase decisions in the future.

## **V. CLASS ACTION ALLEGATIONS**

122. Pursuant to CAFA and the Federal Rules of Civil Procedure 23(a) and (b)(3), Plaintiffs bring this lawsuit as a Class Action on behalf of themselves and all other similarly

situated members of the Nationwide Common Law Class, the OK Subclass, and the AZ Subclass, as defined below. The proposed Nationwide Class, OK Subclass, AZ Subclass and other alternative subclasses are collectively referred to herein as the “Classes.” This Class Action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of those provisions.

The Nationwide Class is defined, subject to timely amendment following discovery, as follows:

All persons who purchased FineVine Charcoal Dentifrices (toothpastes and/or toothpowders) for personal dental use within the United States within the applicable statute of limitations (the “Nationwide Class”).

The OK Subclass is defined, subject to timely amendment following discovery, as follows:

All persons who purchased FineVine Charcoal Dentifrices (toothpastes and/or toothpowders) for personal dental use within the state of Oklahoma within the applicable statute of limitations (the “OK Subclass”).

The AZ Subclass is defined, subject to timely amendment following discovery, as follows:

All persons who purchased FineVine Charcoal Dentifrices (toothpastes and/or toothpowders) for personal dental use within the state of Arizona within the applicable statute of limitations (the “AZ Subclass”).

123. Due to the substantial similarity of FineVine’s alleged misrepresentations, acts, omissions, and conduct, as well as the injuries suffered by Plaintiffs and Class members, as to both the powder and paste product types, the above proposed Classes are based on purchase of Charcoal Dentifrices. However, in acknowledgement of the differences between the two product types, Plaintiffs alternatively propose Classes specific to the Charcoal Powder or the Charcoal Toothpaste, as deemed appropriate and as to certain causes of action. As previously pled herein, Plaintiff Hartanovich purchased a Charcoal Toothpaste product (in Oklahoma), and Plaintiff Gilbert purchased a Charcoal Powder product (in Arizona). However, as previously stated in

Section II (Parties) and as further stated *infra* under the subsection “Typicality,” it is believed that each Plaintiff has standing on her own to assert claims on behalf of purchasers of both types of the Charcoal Dentifrices.

124. Excluded from the Classes are: (1) Defendant and their subsidiaries, affiliates, employees, officers, directors, assigns, and successors, as well as any entities or divisions in which any of the Defendants have a controlling interest; (2) the Judge to whom this case is assigned to and any member of the Judge’s immediate family; and (3) anyone asserting claims for personal injury in connection with the FineVine Charcoal Dentifrices. Plaintiffs reserve the right to amend the definition of the Classes if discovery and/or further investigation reveal that the Classes should be expanded or otherwise modified.

125. **Numerosity:** Each of the Classes are so numerous that joinder of all members is impracticable. The exact number of each of the Classes’ members are presently unknown, and can only be ascertained from records maintained by, and in the possession and control of Defendant. However, Plaintiffs reasonably estimate that the Nationwide Class consists of tens of thousands of members, and the OK and AZ Subclasses consist of hundreds or thousands of members respectively.

126. **Commonality and Predominance:** Common questions of law and fact exist as to all members of each of the Classes, over questions affecting only individual members. Defendant engaged in a common course of conduct giving rise to the legal claims brought herein by Plaintiffs, on behalf of themselves and other putative members of the Classes. Similar or identical common law violations, business practices, and injuries are involved. For example, consumers were exposed to the same or substantially similar set of misrepresentations and omissions and packaging, labeling, and marketing; manifested a similar kind and degree of reliance; and also

suffered substantially similar injuries. Individual questions, if any, pale by comparison, in both quality and quantity, to the numerous common questions that predominate in this action.

127. Common questions predominate over any questions affecting only individual members of the Classes and include, but are not limited to, the following:

- a. Whether, in its product packaging, labeling, marketing and advertising, Defendant made false and misleading representations and material omissions;
- b. Whether Defendant made and breached an express warranty to the named Plaintiffs and the Classes;
- c. Whether Defendant breached the implied warranty of merchantability;
- d. Whether Defendant engaged in unfair, fraudulent, or unlawful business practices with respect to the advertising, marketing, and sale of the Charcoal Dentifrices;
- e. Whether Defendant's claims and material omissions concerning the Charcoal Dentifrices were likely to or had a tendency to deceive reasonable consumers;
- f. Whether the labeling, packaging and marketing of the Charcoal Dentifrices deceived consumers into paying a higher price than they otherwise would;
- g. Whether the acts and omissions of Defendant violated the Oklahoma Consumer Protection Act;
- h. Whether the acts and omissions of Defendant violated the Arizona Consumer Fraud Act;
- i. Whether Defendant committed deceit as defined under Oklahoma law;
- j. Whether Defendant should be enjoined from the continued unlawful marketing, advertising, promotion, distribution, labeling, and sale of the FineVine Charcoal Dentifrices;
- k. Whether Defendant was unjustly enriched by the sale of the FineVine Charcoal Dentifrices and the profits earned therefrom should be disgorged; and
- l. Whether the actions of Defendant warrant punitive or multiplied damages.

128. **Typicality:** Plaintiffs' claims are typical of the claims of the proposed Classes, as Plaintiffs and all members of the Classes purchased FineVine Charcoal Dentifrices after exposure to the same material misrepresentations and/or omissions appearing the packaging, Defendant's websites, Defendant's listing and claims made on Amazon.com and other online retail platforms, and/or other forms of advertising and marketing. Plaintiffs and members of the Classes have suffered the same or substantially similar injuries as a result. Plaintiffs are advancing the same claims and legal theories on behalf of themselves and all absent members of the Classes. As alleged above, each consumer has been exposed to the same or substantially similar deceptive practices regardless of whether they purchased the "Activated Coconut Charcoal Powder" or the "Activated Coconut Charcoal Toothpaste" because: 1) each product contains identical or substantially similar claims and omissions regarding the benefits and safety of activated charcoal; and 2) the inclusion of activated charcoal in each product gives rise to the harms described herein.

129. **Adequacy:** Plaintiffs will fairly and adequately represent and protect the interests of the Classes. Plaintiffs have retained counsel highly experienced in prosecuting consumer class actions. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of members of the Classes and have the resources to do so. Neither of the Plaintiffs nor their counsel have any interests adverse to those of the Classes.

130. **Superiority:** A class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Because of the relatively small size of the claims of the individual members of the respective Classes, absent a class action, most members would likely find the cost of litigating their claims against Defendant to be prohibitive or impractical. The class treatment of common questions of law and fact is also superior to multiple individual actions or piecemeal litigation in that it conserves the time and resources of the courts and the litigants and

promotes consistency and efficiency of adjudication. The class action device presents no management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

131. **Ascertainability:** The proposed Classes are each defined with reference to objective criteria. A reliable and administratively feasible mechanism exists for the determination of membership of each of the proposed Classes.

## **VI. CAUSES OF ACTION**

### **COUNT ONE**

#### *Nationwide Class*

#### **Breach of Express Warranty**

132. Plaintiffs re-assert and reference the allegations in this Complaint and incorporate them as if fully set forth herein.

133. Plaintiffs bring this claim under Article 2 of the Uniform Commercial Code (the “UCC”) (as codified under Oklahoma law at 12A Okla. Stat. § 2-313, under Arizona law at Ariz. Rev. Stat. § 47-2313, and other states where members of the Nationwide Class reside), and do so on behalf of themselves and the members of the Nationwide Class.<sup>116</sup>

134. Under Section 2-313 of the UCC, affirmations of fact or promise made by the seller to the buyer, which relate to the goods and are a basis of the bargain, create an express warranty that the goods shall conform to the affirmation or promise.

135. In connection with the sale of the Charcoal Dentifrices, Defendant issued written express warranties concerning the Charcoal Dentifrices. Express warranties concerning the Charcoal Dentifrices included, but were not limited to:

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<sup>116</sup> Alternatively, an express warranty claim is brought on behalf of alternatively proposed nationwide subclasses for each of the product types – the Charcoal Powders and the Charcoal Toothpastes. Express warranty claims as to each are nearly identical and substantially similar, but as indicated, the wording of and predominance of certain claims may be specific as to each.

- “natural teeth whitening,” “all natural teeth whitening,” and “whitens teeth naturally”
- “safe and effective”
- “100% natural, pure & safe for your teeth & gums”
- “perfectly safe for your teeth: if you’re concerned about how this great teeth whitening product affects your dental health, don’t be: the natural activated coconut charcoal powder is perfectly safe and healthy for your teeth, gum, and enamel.”
- “natural oral detox” and “best oral detox” and “mouth detox” and “detoxifies your mouth”
- “remove plaque”
- “remove tooth stains”
- “remove bad breath” and “destroys bad breath”
- “kills bacteria”
- “with [activated charcoal’s] porous surface, it attaches to toxins and impurities in the body to draw them out. It works in just the same way on plaque and stains on teeth – safely and effectively lifting these off!”
- “fights cavities, plaque, bacteria, gingivitis and preventing tooth decay”<sup>117</sup> and “reduce cavities, plaque, bacteria, and gingivitis which can lead to tooth decay”<sup>118</sup>
- “antiseptic & remineralizing ingredients”<sup>119</sup>
- “great for remineralizing teeth”<sup>120</sup>
- “extremely effective at killing anaerobic bacteria”<sup>121</sup>

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<sup>117</sup> FineVine expressly so stated concerning the Charcoal Toothpowders.

<sup>118</sup> FineVine expressly so stated concerning the Charcoal Toothpastes.

<sup>119</sup> FineVine expressly so stated concerning the Charcoal Toothpastes.

<sup>120</sup> FineVine claims the Charcoal Powders have remineralizing properties, although less prominently than for the Charcoal Toothpastes. In its description of the “Main Key Ingredients” concerning the powder, for example, FineVine states: “great for remineralizing teeth.” (see above image at Paragraph 52, Page 31).

<sup>121</sup> FineVine claims the Charcoal Powders have antiseptic and antibacterial properties, although less prominently than for the Charcoal Toothpastes. In its description of the “Main Key Ingredients” concerning the powder, for example, FineVine states: “extremely effective at killing anaerobic bacteria,” “kill bacteria,” and other claims. (see above image at Paragraph 52, Page 31).

- “strengthen your sensitive teeth & protect your gums naturally”<sup>122</sup>
- “strengthen your sensitive gums – and promote overall gum health”<sup>123</sup>
- “keep gums healthy”<sup>124</sup>
- “support oral health – by killing harmful bacteria and removing toxins”<sup>125</sup>
- “promote dental health – and make sure that your teeth are stronger and whiter”<sup>126</sup>
- “will not remove enamel from your teeth and will promote gum health”<sup>127</sup>
- “strengthens enamel, improves gum health and freshens breath”<sup>128</sup>
- “100% healthier, stronger & whiter teeth or your money back!”<sup>129</sup>
- “dentist approved” and “dentist recommended”<sup>130</sup>

136. Defendant’s affirmations of fact or promise were made to Plaintiffs and members of the Nationwide Class on the product labelling and packaging of the FineVine Charcoal Dentifrices, on FineVine’s website, and other online retail sites and print advertising. These affirmations of fact or promise, on the products themselves as well as online, were disseminated throughout the United States, and were seen by Plaintiffs and members of the Class, during the purchase process.

137. These affirmations of fact or promise were material, and informative to the product and the purchase decision, and FineVine made them in order to induce the purchase. Defendant

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<sup>122</sup> FineVine expressly so stated concerning the Charcoal Toothpastes.

<sup>123</sup> FineVine expressly so stated concerning the Charcoal Toothpastes.

<sup>124</sup> FineVine claims the Charcoal Powders protect gums, although less prominently than for the Charcoal Toothpastes. In its description of the “Main Key Ingredients” concerning the powder, for example, FineVine states: “keep the gums healthy.” (see above image at Paragraph 52, Page 31).

<sup>125</sup> FineVine expressly so stated concerning the Charcoal Toothpastes.

<sup>126</sup> FineVine expressly so stated concerning the Charcoal Toothpastes.

<sup>127</sup> FineVine expressly so stated concerning the Charcoal Toothpastes.

<sup>128</sup> FineVine expressly so stated concerning the Charcoal Toothpastes.

<sup>129</sup> FineVine expressly so stated concerning the Charcoal Toothpastes.

<sup>130</sup> FineVine expressly so stated concerning the Charcoal Toothpastes.

knew that Plaintiffs and Class members were ignorant of the veracity of these promises and assertions of fact.

138. Plaintiffs and Class members reasonably and justifiably relied upon the express warranties, believing that the products would conform.

139. These affirmations of fact or promise were material and became part of the basis of the bargain between the Defendant on one hand, and Plaintiffs and Class members on the other, thereby creating express warranties that the FineVine Charcoal Dentifrices would conform to Defendant's affirmations of fact, representations, and promises.

140. Plaintiffs and Class members were in direct privity with Defendant and/or its agents or were intended third-party beneficiaries of the warranties breached herein to the extent required by law.

141. Plaintiffs and Class members reasonably and justifiably relied on Defendant's express warranties, believing that the Charcoal Dentifrices they purchased would conform to the express warranties.

142. Defendant breached its express warranties because the Charcoal Dentifrices do not, in fact conform to the affirmations of fact or promise, and the Charcoal Dentifrices do not perform as expressly warranted.

143. Plaintiffs and Class members were injured as a direct and proximate result of Defendant's breach because the Plaintiffs and Class members did not receive goods as warranted by Defendant. Plaintiffs and Class members did not receive the benefit of the bargain, as the Charcoal Dentifrices did not have the promised benefits, effectiveness, safety, value or other properties as represented. The Plaintiffs and Class members suffered injuries in part because, had

they known the true facts, they would not have purchased the FineVine Charcoal Dentifrices, as compared to similar products that did conform as warranted and represented.

144. As a direct and proximate result of Defendant's breaches of express warranty, Plaintiffs and Class members have been damaged by the difference in value between the Charcoal Dentifrices as advertised and the Charcoal Dentifrices as actually sold, in an amount to be proven at trial.

**COUNT TWO**  
***Nationwide Class***  
**Implied Warranty of Merchantability**

145. Plaintiffs re-assert and reference the allegations in this Complaint and incorporate them as if fully set forth herein.

146. Plaintiffs bring this claim under Article 2 of the UCC (as codified under Oklahoma law at 12A Okla. Stat. § 2-314, under Arizona law at Ariz. Rev. Stat. § 47-2314 and other states where members of the Nationwide Class reside) and do so on behalf of themselves and members the Nationwide Class.

147. Under Section 2-314 of the UCC, a warranty that the goods shall be merchantable is implied in the contract for their sale, if the seller is a merchant with respect to goods of that kind. To be considered merchantable, the good must be safe and fit for the intended use and conform to the promise or affirmations of fact made on the label or packaging.

148. In this case, Defendant qualifies as a merchant, and a warranty of merchantability was implied in the sale of Charcoal Dentifrices to the Plaintiffs and Class members. Defendant sold the Charcoal Dentifrices clearly labeled as having certain characteristics. Defendant knew the use for which the Charcoal Dentifrices were intended, and impliedly warranted them to be of merchantable quality, safe, and fit for use.

149. With each sale of falsely labeled Charcoal Dentifrice to the Plaintiffs and Class members, Defendant has breached the implied warranty of merchantability.

150. Plaintiffs and Class members reasonably and justifiably relied on Defendant's affirmations, as well as the projected trustworthiness of the brand and the company. Had the Plaintiffs and Class members known of the true nature of the Charcoal Dentifrices and that they were not of merchantable quality, not safe or fit for their intended use, and not in conformance with Defendant's representations, they would not have purchased them, or they would not have been willing to pay the inflated price.

151. As a direct and proximate result of Defendant's breaches of implied warranty of merchantability, Plaintiffs and the Class members have been damaged by the difference in value between the Charcoal Dentifrices as advertised and the Charcoal Dentifrices as actually sold, in an amount to be proven at trial.

### **COUNT THREE**

#### ***Nationwide Class***

#### **Negligent and Grossly Negligent Misrepresentations and Material Omissions**

152. Plaintiffs re-assert and reference the allegations in this Complaint and incorporate them as if fully set forth herein.

153. Plaintiffs bring this Count under common law for negligent and grossly negligent misrepresentation and do so on behalf of themselves and the members of the Nationwide Class.

154. Defendant had a duty to provide a honest, accurate, non-deceptive and lawful information concerning the Charcoal Dentifrices, so that consumers could make informed decisions regarding the purchase of one or more of the Charcoal Dentifrices. This included information concerning the safety, effectiveness, requisite substantiation, benefits, and other properties of the Charcoal Dentifrices.

155. Defendant had a duty not to conduct itself unlawfully or in contravention of public policy.

156. Defendant had statutory duties as to product labelling and advertising claims on the Charcoal Dentifrices, which included but were not limited to the duty to be truthful and non-misleading, to have a reasonable basis and proper substantiation for the claims made, and in proportion to any claimed level of substantiation.

157. For example, because the Charcoal Dentifrices constitute “cosmetics” and, to some degree, “drugs,” such products fell under the penumbra of the federal regulatory framework created by the FTC Act and the FD&C Act. Federal statutory law, as well as FTC and FDA rules and regulations required that Defendant have a reasonable basis and competent substantiation for the various claims and representations it made concerning the Charcoal Dentifrices in the labeling, packaging, advertisements and marketing of the Charcoal Dentifrices and to have it at the time the claims were made.

158. This delineated a clear standard of care and duties. Defendant had a duty to provide a warning to consumers that if and when it lacked adequate substantiation of its claims, and/or a duty to warn of the risk and potential harm from use of its products, per federal rules and regulations, including 21 CFR 740.10.

159. Defendant had a federally imposed duty not to misbrand the Charcoal Dentifrices or other mislabel them in contravention of federal laws, rules and regulations. See, e.g., 21 U.S.C. § 263, 21 CFR 1.21, 21 U.S.C. § 331, and 16 CFR 500-503. Pursuant to the FTC Act, Defendant had a duty not to disseminate false or materially misleading advertisements of drugs and cosmetics. See, e.g., 15 U.S.C. § 52, and 15 U.S.C. § 55(a)(1). Defendant had a duty not to engage in unfair and deceptive trade practices in violation of Section 5 of the FTC Act. 15 U.S.C. § 45.

160. Defendant also presented itself as having specialized, expert, or at least superior knowledge of oral health care needs, dental hygiene, and effective and safe dentifrices. Defendant created a special relationship and attendant duties by holding itself out to consumers as having such expertise and specialized knowledge. Defendant made and widely disseminated claims on the purported oral health maintenance, dental hygiene and cosmetic benefits of the Charcoal Dentifrices. Defendant held itself out to have a level of expertise and specialized knowledge in order to make such claims. It did so with the awareness that such claims were of a special and material nature, and also that a typical reasonable consumer would not possess, and cannot be expected to possess, the requisite expertise or specialized knowledge in order to discern the veracity of such claims. Defendant knew that such claims would be, and were in fact, material to a consumer's purchase decision, as well as consumers' ongoing dental hygiene and oral health. Defendant therefore had a special relationship to its consumers as to said claims; which created duties, including but not limited to a duty not to mislead and a duty to disclose.

161. Despite its duties and in breach of the same, Defendant negligently made false and misleading representations and material omissions to Plaintiffs and the Nationwide Class members, and/or omitted the disclosure of material facts its product packaging, labeling, marketing and advertising. Defendant also knew, or in the exercise of reasonable care, should have known, that consumers would be misled by these misrepresentations and omissions. Defendant acted without reasonable grounds for believing the representations were true. Defendant also knew or should have known the omissions rendered its claims on the Charcoal Dentifrices false or misleading. Defendant intended to induce reliance of the Plaintiffs and the Nationwide Class members with its representations and omissions.

162. Defendant also owed duty of care to the Plaintiffs and the Nationwide Class members to give appropriate warnings about all dangers and risks associated with the intended use of the Charcoal Dentifrices, of which it was or should have been aware. Defendant was under a continuing duty to warn and instruct the intended and foreseeable consumers of the Charcoal Dentifrices, including Plaintiffs and the Nationwide Class members, of the same.

163. Defendant's material misrepresentations and misleading and deceptive claims include, but are not limited to, its claims that the Charcoal Dentifrices: (i) whiten teeth naturally, effectively, and safely; (ii) detoxify the mouth and have adsorptive properties that whiten teeth, freshen breath, lift stains, remove plaque and provide other dental hygiene, oral health, and cosmetic benefits; (iii) are safe, effective, and generally beneficial to oral health with long-term daily use; (iv) won't strip enamel; (v) are safe for sensitive teeth and gums; (vi) strengthen teeth and enamel, and have remineralizing properties; (vii) have antiseptic or anti-bacterial properties and kill bacteria; (viii) fight or reduce cavities, plaque, bacteria, and gingivitis, and tooth decay; (ix) are dentist approved and recommended; and (x) are offered at a price reduction.

164. Defendant also omitted material facts that it was under a duty to disclose to consumers including that: (i) its safety and efficacy claims lacked a reasonable factual basis and/or credible and competent scientific substantiation; (ii) safety had not been evaluated for long-term use, (iii) the safety and effectiveness of charcoal for use in dentifrice was counter-indicated in scientific literature and may in fact be detrimental and harmful to oral health, dental hygiene, and aesthetics.

165. FineVine failed to disclose the lack of requisite substantiation to consumers, and also failed to warn consumers of risk or potential harm. Defendant was negligent and breached its duty of care by negligently failing to give adequate disclosures and warnings. Defendant knew that

Plaintiffs and the Nationwide Class members were ignorant of and/or could not reasonably be aware of these risks or of the other concealed and/or suppressed facts and information. Defendant knowingly failed to disclose and did so knowing of the materiality of such omission and did so with the intent to induce reliance and purchase.

166. Defendant was negligent and breached its duty of care by making the afore-described misleading and material misrepresentations, and it did so knowing that they lacked the requisite substantiation and/or were baseless and lacking credibility and/or false or misleading, and did so with the intent to induce reliance and purchase, and to do so at a significant price premium compared to other comparable products on the market that did not contain charcoal (and also as to other products that did contain charcoal).

167. Plaintiffs and Nationwide Class members reasonably and justifiably relied upon the Defendant's negligent and unsubstantiated misrepresentations and Defendant's suppression and omission of material information, which were in violation of Defendant's duties, and Plaintiffs and members of the Nationwide Class have been damaged thereby. Had Plaintiffs and members of the Class known the truth concerning the claims and omissions on the Charcoal Dentifrices, they would not have paid a substantial price premium for the products, and in fact likely would not have paid anything at all for the products.

168. As a direct and proximate result of Defendant's negligent breach of duties and wrongful conduct, Plaintiffs and Nationwide Class members have suffered, and continue to suffer, injury, and have sustain damages in an amount to be determined at trial, including but not limited to the amounts paid for the FineVine Charcoal Dentifrices.

169. Defendant knew or should have known that its conduct was unfair or deceptive, and/or prohibited by statute or rule.

170. Defendant grossly failed to exercise due care and acted in reckless disregard of its duties. Defendant knowingly prioritized its own profits over the safety and well-being of consumers who purchased one or more of the Charcoal Dentifrices and did so in reliance on material claims concerning oral health, cosmetic benefits and safety. Defendant was grossly negligent when it misrepresented the Charcoal Dentifrices in its marketing, labeling and/or sale of the Charcoal Dentifrices, negligently failed to warn, and other failures in breach of its standard of care to potential consumers of its oral health care products. As shown by the allegations herein, Defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others. Defendant's gross negligence caused damage and injury-in-fact to Plaintiffs and members of the Nationwide Class as a result.

171. Plaintiffs, on behalf of themselves and the members of the Nationwide Class, seek actual damages, punitive damages, restitution, injunction, and any other equitable relief that may be appropriate, as further pled herein.

**COUNT FOUR**  
***OK Subclass***  
**Violations of the Oklahoma Consumer Protection Act**  
**15 Okla. Stat. §§ 751, *et seq.***

172. Plaintiffs re-assert and reference the allegations in this Complaint and incorporate them as if fully set forth herein.

173. Plaintiff Hartanovich brings this Count individually and on behalf of the members of the OK Subclass, and does so pursuant to the Oklahoma Consumer Protection Act, 15 Okla. Stat. §§ 751 *et seq.* (the "OCPA"), which prohibits false or misleading representations, and deceptive or unfair acts or practices in the course of business in Oklahoma.

174. Defendant is a "person" within the meaning of the OCPA, as are Plaintiff Hartanovich and members of the OK Subclass. 15 Okla. Stat. § 752(1).

175. The Charcoal Dentifrices are “merchandise” within the meaning of the OCPA. 15 Okla. Stat. § 752(7).

176. Defendant engaged in a “consumer transaction” within the meaning of the OCPA with regards to the advertisement, offers of sale, sale and distribution of the Charcoal Dentifrices to consumers. 15 Okla. Stat. § 752(2).

177. By the acts and conduct alleged herein, Defendant committed unfair or deceptive acts and practices as well as unlawful advertisements (as defined in 15 Okla. Stat. § 752(9)). These acts and conduct include, but are not limited to, Defendant’s material misrepresentations and misleading and deceptive claims that the Charcoal Dentifrices: (i) whiten teeth naturally, effectively, and safely; (ii) detoxify the mouth and have adsorptive properties that whiten teeth, freshen breath, lift stains, remove plaque and provide other dental hygiene, oral health, and cosmetic benefits; (iii) are safe, effective, and generally beneficial to oral health with long-term daily use; (iv) won’t strip enamel; (v) are safe for sensitive teeth and gums; (vi) strengthen teeth and enamel, and have remineralizing properties; (vii) have antiseptic or anti-bacterial properties and kill bacteria; (viii) fight or reduce cavities, plaque, bacteria, and gingivitis, and tooth decay; (ix) are dentist approved and recommended; and (x) are offered at a price reduction.

178. Defendant’s unlawful conduct also included misleadingly omitting material facts, such as failing to disclose to consumers that (i) its safety and efficacy claims lacked a reasonable factual basis and/or credible and competent scientific substantiation; (ii) safety had not been evaluated for long-term use, (iii) the safety and effectiveness of charcoal for use in dentifrice was counter-indicated in scientific literature and may in fact be detrimental and harmful to oral health, dental hygiene, and aesthetics. FineVine failed to warn consumers of the lack of substantiation and failed to warn consumers of risk or potential harm.

179. The materially misleading statements and deceptive acts and practices alleged herein were directed at the public at large, in Oklahoma and across the United States. Defendant's acts and practices were likely to mislead a reasonable consumer acting reasonably under the circumstances.

180. FineVine charged a price premium for the promised cosmetic, dental hygiene and oral health benefits that were material but had not been substantiated and/or were known to be false, and that were not ultimately delivered.

181. Defendant's engagement in unfair and deceptive trade practices (as defined at 15 Okla. Stat. § 752) in the course of its business and with regards to the advertisement and sale of the Charcoal Dentifrices constitute unlawful practices in violation of the OCPA. 15 Okla. Stat. § 753(20). Defendant committed deceptive trade practices within the meaning of the OCPA because its misrepresentations, omissions or other practices deceived or could reasonably be expected to deceive or mislead a person, to the detriment of that person. 15 Okla. Stat. § 752(13). Defendant committed unfair trade practices within the meaning of the OCPA because its practices offend established public policy and were immoral, unethical, oppressive, unscrupulous and/or substantially injurious to consumers. 15 Okla. Stat. § 752(14).

182. Defendant engaged in unlawful practices in the course of its business that violated the specific provisions on unlawful practices under section 753 of the OCPA including: making false representations, knowingly or with reason to know, as to the characteristics, ingredients, uses, and benefits of the Charcoal Dentifrices, in violation of 15 Okla. Stat. § 753(5); making a false or misleading representation, knowingly or with reason to know, as to the sponsorship, approval or certification of the Charcoal Dentifrices, in violation of 15 Okla. Stat. § 753(2) and (5); representing, knowingly or with reason to know, that the Charcoal Dentifrices were of a particular

standard when they were of another, in violation of 15 Okla. Stat. § 753(7); advertising, knowingly or with reason to know, the subject of a consumer transaction with intent not to sell it as advertised, in violation of 15 Okla. Stat. § 753(9); and making false or misleading statements of fact, knowingly or with reason to know, concerning the price of the Charcoal Dentifrices, or the reason for, existence of, or amounts of price reduction, in violation of 15 Okla. Stat. § 753(11).

183. Defendant's misrepresentations and omissions were material to consumers and made in order to induce consumers' reliance and purchase of the FineVine Charcoal Dentifrices (and at a price premium). These deceptive practices could reasonably be expected to mislead, and did in fact mislead reasonable consumers, including Plaintiff Hartanovich and members of the OK Subclass.

184. Defendant knew, or had reason to know, that the foregoing misrepresentations, omissions and other practices were false and/or misleading. Defendant's violations of the OCPA were willful and knowing. As shown by the allegations herein, Defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others.

185. As a direct and proximate cause of FineVine's deceptive practices and unlawful conduct, Plaintiff Hartanovich and members of the OK Subclass have suffered, and continue to suffer, actual injuries and damage as a result of the OCPA violations, in an amount to be proven at trial. Plaintiff Hartanovich and OK Subclass members purchased one or more of the Charcoal Dentifrices, which did not possess the benefits, effectiveness, true value, safety and other qualities that FineVine had represented. Had they known the true facts about the numerous health, safety, cosmetic and other claims (such as that the Charcoal Dentifrices were 'whitening' by abrading their tooth enamel; that none of the ingredients could prevent cavities or remineralize or strengthen teeth; or that the safety and efficacy of charcoal was unsubstantiated and might have a deleterious

effect on oral health and aesthetics) and the resulting damage from purchasing and using the deceptively sold and falsely advertised products, they would not have purchased the Charcoal Dentifrices at all, or would have paid much less.

186. As a direct and proximate result of Defendant's statutory violations and deceptive, misleading and unfair practices, Plaintiff and the members of the Classes have been aggrieved, injured and suffered damages. Pursuant to 15 Okla. Stat. § 761.1 (providing, *inter alia*, "the aggrieved consumer shall have a private right of action for damages"), Plaintiff Hartanovich, on behalf of herself and OK Subclass members, as "aggrieved consumers" under the OCPA, seek to recover actual damages sustained as result of the afore-mentioned violations of the OCPA; the imposition of a civil penalty per violation of the OCPA; to recover reasonable attorneys' fees and costs; and any other statutorily available damages or relief the court deems proper. 15 Okla. Stat. § 761.1.

187. Plaintiff Hartanovich further demands punitive damages on her own behalf and on behalf of the members of the OK Subclass. Defendant has engaged in, and continues to engage in, unfair and deceptive practices that offend public policies, and are immoral, unethical, unscrupulous and substantially injurious to consumers.

188. Further to and in addition to the above remedies, Plaintiff Hartanovich seeks an order of this Court enjoining Defendant from continuing to engage in unlawful, unfair, deceptive, and/or fraudulent business practices, or any other conduct prohibited by the OCPA and other Oklahoma consumer protection laws. 78 Okla. Stat. § 54(A), (D). Plaintiff Hartanovich and the OK Subclass members may be irreparably harmed and/or denied an effective and complete remedy if such an order for injunctive relief is not granted. For example, they will not be able to trust or be confident that the labeling of the Charcoal Dentifrices and other products will be truthful and

not misleading when they are making purchase decisions in the future, and they themselves and/or other consumers will likely be similarly injured in the future. The unfair and deceptive acts and practices of Defendant, as described above, present a serious threat to Plaintiff and Class members, as well as to the general consuming public and competitive marketplace.

**COUNT FIVE**  
***OK Subclass***  
**Statutory Deceit**  
**Violations of 76 Okla. Stat. §§ 1-4**

189. Plaintiffs re-assert and reference the allegations in this Complaint and incorporate them as if fully set forth herein.

190. Plaintiff Hartanovich brings this Count individually and on behalf of the members of the OK Subclass.

191. Under Oklahoma law, the rights of others must be respected, and requires every person “to abstain from injuring the person or property of another or infringing upon on of his rights.” 76 Okla. Stat. § 1. “One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.” 76 Okla. Stat. § 2.

192. Oklahoma law defines and classifies deceits as: “[1] [t]he suggestion, as a fact, of that which is not true by one who does not believe it to be true; [2] [t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; [3] [t]he suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or [4] [a] promise, made without any intention of performing.” 76 Okla. Stat. § 3.

193. Oklahoma law provides that “[o]ne who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit.” 76 Okla. Stat. § 4.

194. Defendant willfully made multiple material representations regarding the characteristics of the Charcoal Dentifrices in order to induce purchases and with intent to defraud, which Defendant knew to be untrue and/or did not believe to be true and/or had no reasonable basis to believe to be true. These include, but are not limited to claims that the Charcoal Dentifrices: (i) whiten teeth naturally, effectively, and safely; (ii) detoxify the mouth and have adsorptive properties that whiten teeth, freshen breath, lift stains, remove plaque and provide other dental hygiene, oral health, and cosmetic benefits; (iii) are safe, effective, and generally beneficial to oral health with long-term daily use; (iv) won’t strip enamel; (v) are safe for sensitive teeth and gums; (vi) strengthen teeth and enamel, and have remineralizing properties; (vii) have antiseptic or anti-bacterial properties and kill bacteria; (viii) fight or reduce cavities, plaque, bacteria, and gingivitis, and tooth decay; (ix) are dentist approved and recommended; and (x) are offered at a price reduction.

195. Defendant also deceptively suppressed facts it was obligated to disclose to consumers, such as failing to disclose to consumers that: (i) its safety and efficacy claims lacked a reasonable factual basis and/or credible and competent scientific substantiation; (ii) safety had not been evaluated for long-term use, (iii) the safety and effectiveness of charcoal for use in dentifrice was counter-indicated in scientific literature and may in fact be detrimental and harmful to oral health, dental hygiene, and aesthetics.

196. Despite its duties to do so, FineVine failed to warn consumers of the lack of substantiation and failed to warn consumers of risk or potential harm.

197. Defendant either knew that of these adverse facts and the risk, and of its obligation to disclose and warn, and/or it recklessly ignored this information, and it did so while making other positive assertions and misrepresentations that were untrue or made without any reasonable basis in truth.

198. Defendant willfully made its deceptive marketing claims with the intention that they induce consumers, including Plaintiff Hartanovich and OK Subclass members, to purchase the FineVine Charcoal Dentifrices. Defendant did so with the intent to defraud the public, and thereby also had the intent to defraud every individual of the OK Subclass. 76 Okla. Stat. § 4.

199. In reliance upon, and misled by Defendant's deceitful marketing claims, Plaintiff Hartanovich and the OK Subclass members were actually misled and purchased one or more of the Charcoal Dentifrices, and suffered injury and damages as a result, in an amount to be proven at trial.

200. Plaintiff Hartanovich and the OK Subclass are entitled to recover their actual damages under 76 Okla. Stat. § 2.

201. Plaintiff Hartanovich further demands punitive damages on her own behalf and on behalf of the members of the OK Subclass.

**COUNT SIX**  
***AZ Subclass***  
**Violations of the Arizona Consumer Fraud Act**  
***Ariz. Rev. Stat. §§ 44-1521, et seq.***

202. Plaintiffs re-assert and reference the allegations in this Complaint and incorporate them as if fully set forth herein.

203. Plaintiff Gilbert brings this Count individually and on behalf of the members of the AZ Subclass, and does so pursuant to the Arizona Consumer Fraud Act. Ariz. Rev. Stat. §§ 44-1521, *et seq.* (the "ACFA"), which prohibits "[t]he act, use or employment by any person of any

deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damage thereby.” Ariz. Rev. Stat. § 44-1522(A).

204. Defendant is a “person” as defined by the ACFA, as are Plaintiff Gilbert and the members of the AZ Subclass. Ariz. Rev. Stat. § 44-1521(6).

205. The Charcoal Dentifrices are “merchandise” as defined by the ACFA. Ariz. Rev. Stat. § 44-1521(5).

206. As previously alleged above herein, Defendant made numerous material statements about the benefits and characteristics of the Charcoal Dentifrices that were false, deceptive or misleading, in connection with the sale, offers to sell, attempts to sell and advertisements of the Charcoal Dentifrices, and that were intended to be relied upon. These include, but are not limited to, representations that the Charcoal Dentifrices: (i) whiten teeth naturally, effectively, and safely; (ii) detoxify the mouth and have adsorptive properties that whiten teeth, freshen breath, lift stains, remove plaque and provide other dental hygiene, oral health, and cosmetic benefits; (iii) are safe, effective, and generally beneficial to oral health with long-term daily use; (iv) won’t strip enamel; (v) are safe for sensitive teeth and gums; (vi) strengthen teeth and enamel, and have remineralizing properties; (vii) have antiseptic or anti-bacterial properties and kill bacteria; (viii) fight or reduce cavities, plaque, bacteria, and gingivitis, and tooth decay; (ix) are dentist approved and recommended; and (x) are offered at a price reduction.

207. Defendant’s unlawful conduct also included the omission and suppression of material facts, such as failing to disclose to consumers that (i) its safety and efficacy claims lacked

a reasonable factual basis and/or credible and competent scientific substantiation; (ii) safety had not been evaluated for long-term use, (iii) the safety and effectiveness of charcoal for use in dentifrice was counter-indicated in scientific literature and may in fact be detrimental and harmful to oral health, dental hygiene, and aesthetics.

208. FineVine knew that its claims were unsubstantiated yet FineVine knowingly failed to disclose to the lack of substantiation to consumers. FineVine also knowingly failed to warn consumers of the risk or potential harm from use of the Charcoal Dentifrices.

209. Defendant's knowing and intentional false promises, misrepresentations, and omissions set forth above constitute unfair and deceptive acts or practices prohibited by the ACFA. Ariz. Rev. Stat. § 44-1522(A).

210. Defendant's misrepresentations and omissions and other unfair and deceptive acts and practices had the tendency, capacity, and likelihood to deceive and mislead a reasonable consumer acting reasonably in the circumstances. Defendant designed its misrepresentations and omissions in order to deceive and in order to induce their reliance and purchase of the Charcoal Dentifrices. In keeping with its intention, Defendant did, in fact, successfully mislead and deceive reasonable consumers and induce their reliance and purchase to their detriment, including Plaintiff Gilbert and members of the AZ Subclass.

211. FineVine's deceptive and unfair marketing practices and misleading claims and omissions therein, were uniform to consumers and conveyed a uniformly deceptive and misleading impression of the Charcoal Dentifrices. They were part of a widespread and systematic pattern and/or practice which was designed for its tendency and capacity to mislead.

212. The safety and efficacy of the Charcoal Dentifrices, and substantiation thereof, were material to Plaintiff Gilbert and members of the AZ Subclass making their respective

purchases. FineVine had a duty to accurately disclose the level of substantiation, or lack thereof, for its claims. It also had a duty to make accurate and clear disclosures concerning potential risk or harm from use.

213. The omission of lack of substantiation and risk of harm were material and intentionally made to induce consumer reliance; they were logically related and rationally significant to Plaintiff Gilbert and members of the AZ Subclass, in their consideration of the purchase transaction.

214. In contravention of these and other duties, FineVine omitted to make these and other material disclosures, and also made overt claims on safety and efficacy that were misleading and/or false and did so in order to induce consumer reliance. Defendant's claims on safety and efficacy could be measured and qualified and were not mere puffery.

215. Plaintiff Gilbert and members of the AZ Subclass were deceived and misled about the true performance, safety, efficacy, benefits, requisite substantiation, risk, value and other characteristics of the Charcoal Dentifrices. As a direct and proximate result of Defendant's unlawful acts, Plaintiffs and members of the AZ Subclass sustained actual damages when they purchased one or more of the misrepresented Charcoal Dentifrices.

216. The Charcoal Dentifrices did not and cannot deliver promised health or cosmetic benefits, do not have the promised value and are potentially worthless for the intended use, and in fact may be detrimental and pose serious risk.

217. As a direct and proximate result of Defendant's violations of the ACFA, Defendant caused actual damage to Plaintiff Gilbert and the AZ Subclass members and they are therefore entitled to damages and other relief as provided under the ACFA. The sustained actual damages

are in an amount to be determined at trial and will include the economic injury in the amount of the purchase price(s) of the Charcoal Dentifrice(s) they purchased and/or the price premium paid.

218. Pursuant to the ACFA, Plaintiff Gilbert and the AZ Subclass make claims for damages, attorneys' fees and costs.

219. Plaintiff Gilbert and members of the AZ Subclass also seek punitive damages as provided under the ACFA. Defendant knew or should have known that its conduct was unfair or deceptive, and/or prohibited by rule. As shown by the allegations herein, Defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others, thus warranting the imposition of punitive damages under Arizona law.

220. Plaintiff Gilbert and members of the AZ Subclass also seek an order for the consumer restitution and for disgorgement of Defendant's ill-gotten gains.

221. Plaintiff Gilbert and members of the AZ Subclass assert that Defendant willfully violated Section 44-1522 of the ACFA, because it knew or should have known that its conduct was of the nature prohibited by the ACFA. As such, they seek statutory penalties for willful violations of the ACPA, and for any other just and proper relief available under the ACFA.

222. Furthermore, if not stopped, Defendant will continue to cause harm to members of the AZ Subclass. Plaintiff and members of the Classes risk irreparable injury as a result of Defendant's violations of the ACFA, and these violations present a continuing risk to Plaintiff, the Classes, and the general public. Defendant's unlawful acts and practices complained of herein affect the public interest, consumer safety and the competitive market. Pursuant to the ACFA, Plaintiff and the Classes seek an assurance of discontinuance of the unlawful practices and seek such assurance in the form of a declaratory judgment and court order enjoining the wrongful acts and practices of Defendant, and for any other just and proper relief available under the ACFA.

**COUNT SEVEN**  
***Nationwide Class***  
**Unjust Enrichment**

223. Plaintiffs re-assert and reference the allegations in this Complaint and incorporate them as if fully set forth herein.

224. Plaintiffs bring this Count on behalf of themselves and the members of the Nationwide Class.

225. As a result of Defendant's deceptive, fraudulent and misleading labeling, advertising, marketing campaign, and sales of the Charcoal Dentifrices, Defendant induced Plaintiffs and Nationwide Class members to purchase the Charcoal Dentifrices, and Defendant unjustly retained a benefit in the form of the monies paid by the Plaintiffs and the Nationwide Class members, and to their detriment.

226. Charcoal Dentifrices did not have the benefits, safety, effectiveness, requisite substantiation, true value or other properties and characteristics that Defendant represented them to have. Had Plaintiffs and the Class members known the truth about the Charcoal Dentifrices and about Defendant's misrepresentations and omissions, they would not have purchased the products. They were damaged as a direct and proximate result of Defendant's deceptive and unfair practices.

227. Defendant accepted this unjust benefit, in the form of monies paid as a result of Defendant's deceptive and unfair practices.

228. Because the FineVine Charcoal Dentifrices were not as Defendant purported them to be, it is unequitable and unjust to permit Defendant to retain its ill-gotten financial benefits from the sale of the Charcoal Dentifrices.

229. Defendant was unjustly enriched at the expense of Plaintiffs and other members of the Nationwide Class, through the purchase price payments for the Charcoal Dentifrices, and as

such, Defendant's retention of this benefit violates the fundamental principles of justice, equity and good conscience.

230. Therefore, Plaintiffs and the Class members seek disgorgement and restitution of such ill-gotten gains and financial benefits, in an amount to be determined at trial, and further ask that the monies paid be returned with interest.

## **VII. PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated in the Nationwide Class, the OK Subclass, the AZ Subclass and any other created subclasses, pray for relief as follows:

- (a) Certification of this case as a class action, and of the Nationwide Class as well as the OK Subclass and AZ Subclass proposed herein (and any other subclasses) under the Federal Rules of Civil Procedure, designation of the Plaintiffs as the representatives of the Nationwide Class, of Plaintiff Hartanovich as the representative of the OK Subclass, and of Plaintiff Gilbert as the representative of the AZ Subclass, and appointment of the undersigned counsel as counsel for all of the Classes;
- (b) An order enjoining Defendant from making further misrepresentations regarding the FineVine Charcoal Dentifrices, including but not limited to statements that the Charcoal Dentifrices:
  - a. Naturally and safely whiten teeth;
  - b. Detoxify the mouth;
  - c. Have adsorptive properties that provide dental hygiene, oral health or cosmetic benefits;
  - d. Are safe for long-term daily use;

- e. Promote and protect oral health;
  - f. Are safe for teeth, enamel, and gums;
  - g. Won't strip enamel;
  - h. Remineralize or strengthen teeth;
  - i. Are anti-bacterial or antiseptic;
  - j. Prevent or fight any disease;
  - k. Are dentist recommended;
  - l. Are offered at a price reduction.
- (c) An order requiring Defendant to issue appropriate corrective advertisements, and to retract its prior false and misleading claims;
- (d) Restitution, disgorgement, refund and/or return of all monies, revenues and profits obtained by Defendant by means of misleading, deceptive and unlawful acts or practices;
- (e) Actual damages in an amount to be determined at trial;
- (f) Statutory damages in the maximum amount provided by law;
- (g) Punitive damages;
- (h) Costs, expenses, and reasonable attorneys' fees pursuant to applicable state statutes;
- (i) Pre-judgment and post-judgment interest; and
- (j) All such other and further relief as this Court may deem just and proper.

**JURY TRIAL DEMAND**

Plaintiffs and the Classes hereby demand a jury trial of the claims asserted in this Complaint.

Dated: May 19, 2020

Respectfully submitted,

/s/ William B. Federman

William B. Federman

(OBA # 2853)

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Classes*