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9 **UNITED STATES DISTRICT COURT**  
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 JOANNA CEBALLOS-BIRNEY,  
individually and on behalf of all others  
12 similarly situated,

13 Plaintiff,

14 vs.

15 WALMART INC.,

16 Defendant.  
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Case No. '20CV1224 BEN RBB

**CLASS ACTION COMPLAINT**

1. **Violation of California Consumers Legal Remedies Act (“CLRA”); Cal. Civ. Code §§ 1750, et seq.**
2. **Violation of California’s False Advertising Laws (“FAL”); Cal. Bus. & Prof. Code §§ 17500, et seq.**
3. **Violation of California’s Unfair Competition Laws (“UCL”) Unlawful, Fraudulent & Unfair Business Practices; Cal. Bus. & Prof. Code §§ 17200, et seq.**
4. **Violation of The Magnuson-Moss Warranty Act; 15 U.S.C. §§ 2301 et seq.**
5. **Breach of Express Warranty**
6. **Unjust Enrichment**

**DEMAND FOR JURY TRIAL**

**NATURE OF THE CASE**

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1. This is a putative class action on behalf of Plaintiff Joanna Ceballos-Birney (“Plaintiff”), and all others similarly situated, against Defendant Walmart Inc. (“Walmart” or “Defendant”).

2. Defendant is one of the biggest leading retailers in the United States. Defendant owns and operates brick-and-mortar retail stores throughout the United States. Defendant markets, advertises, and sells various products, including, but not limited to pain reliever and fever reducers, to consumers in its brick-and-mortar stores.

3. Defendant distributes its own brand of pain reliever and fever reducer under the “equate™” label, including Infant’s Pain & Fever Acetaminophen - equate™ (“Infant’s Products”) and Children’s Pain & Fever Acetaminophen - equate™ (“Children’s Products”), two well-known brand-name Over The Counter (“OTC”) medications. The Infant’s Products and Children’s Products are collectively hereinafter referred to as the “Products.”

4. Acetaminophen, the active ingredient in the Products, can be dangerous, and perhaps even fatal, if taken in large doses. The potential risk associated with an acetaminophen overdose terrifies parents and caregivers and causes them to be extra careful when buying medicine for their children. Defendant exploits this fear by misleading consumers.

5. It is the manner in which Defendant markets, prices, and sells the Products in its brick-and-mortar stores that forms the underlying basis for this action.

6. Defendant’s advertisements, marketing representations, and placement of the Products in its brick-and-mortar stores are misleading, untrue, and likely to deceive reasonable consumers. Defendant purposely packages Infant’s Products with distinctive and colored lettering of the word “infant’s” on the product’s front-label, while packaging Children’s Products with distinctive and colored lettering of

1 the word “Children’s” on the product’s front-label. Accordingly, Defendant  
2 distributes, markets, and sells the Products in a manner which deceives reasonable  
3 consumers into thinking that infants cannot safely take Children’s Products.

4 7. Furthermore, despite the fact that the Products contain the same exact  
5 amount of acetaminophen in the same dosage amounts, Defendant markets and sells  
6 Infant’s Products to consumers, such as Plaintiff, at a substantially higher price than  
7 Children’s Products. In stores, the Infant’s Products cost approximately three times  
8 more per ounce than Children’s Products for the same amount of medicine.

9 8. No reasonable consumer would pay approximately three times more  
10 for Infant’s Products, as compared to Children’s Products, unless he or she was  
11 deceived into thinking that infants cannot safely take Children’s Products.

12 **JURISDICTION AND VENUE**

13 9. Jurisdiction and venue are properly vested in this Court because a  
14 substantial portion of the acts, events, and/or failure to act giving rise to the claims  
15 alleged herein occurred in this judicial district. Additionally, Defendant has  
16 substantial business contacts with the State of California, or otherwise avails itself  
17 of the markets within California, through promotion, sale, marketing and  
18 distribution of the Products in California, to render the exercise of jurisdiction by  
19 this Court proper and necessary. Furthermore, Defendant can be brought before this  
20 Court pursuant to California’s long-arm jurisdictional statute.

21 10. This action is brought pursuant to the Class Action Fairness Act, 28  
22 U.S.C. § 1332 (CAFA). Jurisdiction is vested in this Court in that there is minimal  
23 diversity and the aggregate amount in controversy exceeds five million dollars  
24 (\$5,000,000.00), exclusive of interest and costs.

25 11. Venue is proper pursuant to 28 U.S.C. § 1391 because a substantial part  
26 of the events and misrepresentations giving rise to Plaintiff’s claims occurred in this  
27 District.

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**PARTIES**

12. At all relevant times, Plaintiff Joanna Ceballos-Birney, has resided in San Diego, California. When Plaintiff purchased the Infant’s Products for the first time on or about October 2019, Plaintiff resided and was domiciled in San Diego, California. Plaintiff is the parent of three children, ages two (2), seven (7) and nine (9).

13. Plaintiff saw and relied upon the Infant’s Products packaging and labeling.

14. Plaintiff purchased the Infant’s Products because she believed that the Infant’s Products were specifically formulated and designed for infants based on the marketing and labeling of the Infant’s Products. Plaintiff believed that the Infant’s Products were different than the Children’s Products. If Plaintiff knew that the Infant’s Products were nothing more than the Children’s Products, she would not have purchased the Infant’s Products or paid a price premium for the Infant’s Products.

15. Had Defendant not made the false, misleading, and deceptive representation that the Infant’s Products were formulated and designed for “Infants,” nor omitted the fact that the Infant’s Products were nothing more than the Children’s Products with the word “Infant’s” prominently displayed, Plaintiff would not have been willing to pay the premium for the Infant’s Products, or she would not have been willing to purchase the Infant’s Products at all. Plaintiff purchased and paid more for the Infant’s Products than she would have if she had known the truth about the Infant’s Products. The Infant’s Products that Plaintiff received were worth less than the Infant’s Products for which she paid. Plaintiff was injured in fact and lost money as a result of Defendant’s deceptive conduct.

16. Plaintiff desires to purchase “Infant’s” products in the future and regularly visits retail locations where such products are sold. If Plaintiff knew that the Infant’s Products’ labels were truthful and non-misleading, she would continue

1 to purchase the Infant’s Products in the future.

2 17. At present, however, Plaintiff cannot purchase the Infant’s Products  
3 because she remains unsure whether the labeling of the Products is, and will be,  
4 truthful and non-misleading. If the Infant’s Products were in fact different from the  
5 Children’s Products, or if it were disclosed that the Infant’s Products were the same  
6 as the Children’s Products, Plaintiff would purchase the Products in the immediate  
7 future, and she would be willing to pay a price premium if they were in fact  
8 specially formulated for infants.

9 18. Defendant is a corporation incorporated under the laws of Delaware  
10 and is a “person” as defined in 33 U.S.C. § 1362(5) and 40 C.F.R. § 122.2.

11 19. Defendant is, and at all times mentioned in this Complaint, a  
12 corporation organized and existing under the laws of the State of Delaware with its  
13 principal place of business located at 708 Southwest 8th Street, Bentonville,  
14 Arkansas, 72716. Defendant conducts business in all fifty states of the United  
15 States, including this District. Defendant can sue and be sued in this Court.

16 **FACTUAL ALLEGATIONS**

17 20. Defendant distributes two different pediatric OTC painkillers—Infant’s  
18 Products and Children’s Products.

19 21. Prior to the acts complained herein, liquid acetaminophen marketed for  
20 “infants” was only available in 80 mg/0.8 mL or 80 mg/mL concentrations, while  
21 liquid acetaminophen marketed for “children” was only available in 160 mg/5 mL  
22 concentrations.

23 22. The difference in concentrations caused some consumers to  
24 accidentally provide the wrong dosage of medicine to their children, thereby causing  
25 them to overdose.

26 23. Between 2000 and 2009, U.S. Food and Drug Administration (FDA)  
27 received reports of twenty (20) children dying from acetaminophen toxicity, and at  
28 least three (3) deaths were tied to mix-ups involving the two pediatric medicines.

1           24. On December 22, 2011, the FDA informed the public that liquid  
2 acetaminophen marketed for infants would only be available in 160 mg/5 mL in  
3 order to prevent confusion and accidental acetaminophen toxicity.

4           25. Since then, the only differences in liquid acetaminophen marketed for  
5 infants versus children has been the price and dosing instrument included with the  
6 product (*i.e.*, Defendant’s Infant’s Products come with a syringe while the  
7 Children’s Products come with a plastic cup).

8           26. The Products have the same 160 milligram concentration of  
9 acetaminophen, are interchangeable and therefore suitable for infants and children,  
10 adjusting the dosage based only on the weight and age of the child.

11           27. Defendant has been engaging in the unfair, unlawful, deceptive, and  
12 fraudulent practice of manufacturing, marketing and selling the same product as two  
13 unique medicines, such that parents and caregivers mistakenly believe that they  
14 cannot purchase the significantly cheaper Children’s Products for an infant.

15           28. Defendant misleads consumers by using deceptive marketing  
16 techniques which obscure critical facts—that infants can safely take Children’s  
17 Products and that the Products are exactly the same—from consumers nationwide.

18           29. Defendant deceives consumers so that they will buy the deceptively-  
19 labeled Infant’s Products for infants, which cost significantly more than Children’s  
20 Products, even though the Products contain the same exact amount of  
21 acetaminophen in the same dosage amounts.

22           30. There are various conventions applied in sub-dividing the pediatric  
23 population by age. The FDA classification<sup>1</sup> for infants and children is as follows:  
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26 <sup>1</sup> Guidance for Industry – General Considerations for Pediatric Pharmacokinetic  
27 Studies for Drugs and Biological products, Draft Guidance, US FDA, 10 November  
28 1998.

1 infant (1 month to 2 years) and children (2 to 12 years).<sup>2</sup> Consumers may reasonably  
2 believe that a product that is labeled and marketed for consumption by infants  
3 should only be consumed by those between the ages of one (1) month to two (2)  
4 years old.

5 31. Defendant distributes, markets, and sells the Products in a manner that  
6 deceives reasonable consumers into thinking that infants cannot safely take the  
7 Children’s Products.

8 32. Specifically, Defendant distinguishes the two products by calling one  
9 “infant’s” and one “children’s” in distinctive and colored lettering.



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21 33. Additionally, at the top of the Infant’s Products, Defendant  
22 distinctively states “Compare to Infants’ Tylenol® Oral Suspension active  
23 ingredient,” while the top of the Children’s Products states, “Compare to Children’s  
24 Tylenol® Oral Suspension active ingredient.” Through this wording, Defendant  
25 attempts to deceive reasonable consumers into believing that the active ingredient

26 \_\_\_\_\_  
27 <sup>2</sup> <http://archives.who.int/eml/expcom/children/Items/PositionPaperAgeGroups.pdf>  
28 (last visited March 25, 2020)



1 in Infant Tylenol® is *different* than the active ingredient in Children’s Tylenol®,  
2 when it knows that the active ingredient is the same, further inducing reasonable  
3 consumers to purchase the more expensive Infant’s Products.



19 34. Defendant further misleads consumers by placing “Ages 2-3” on the  
20 Infant’s Products while 1) labeling the product “Infant’s” and 2) placing a photo of  
21 an infant on the principal display panel. Despite the inclusion of an age range,  
22 reasonable consumers believe that a product specifically labeled “Infant’s” that  
23 features a photo of an infant is just that, for infants. And no reasonable consumer  
24 (as confirmed by FDA age classification, which confirms an infant is ages 1 month  
25 to 2 years) would believe that an “infant” is a 2 or 3 year old.

26 35. Furthermore, despite the fact that the Products contain the same exact  
27 amount of acetaminophen in the same dosage amounts, Defendant markets and sells  
28 Infant’s Products to consumers, such as Plaintiff, at a substantially higher cost than



1 the Children’s Products. In stores, Infant’s Products cost approximately three times  
2 as much per ounce over Children’s Products for the same amount of medicine.

3 36. Defendant knows that consumers, such as Plaintiff, are typically more  
4 cautious about what medicine they give to infants, especially when they are giving  
5 their infant a product that has caused accidental deaths in the past.

6 37. No reasonable consumer would be willing to pay more money—and  
7 certainly not three times as much per ounce—for Infant’s Products unless he or she  
8 had good reason to believe that Infant’s Products were different than or superior to  
9 the Children’s Products.

10 38. Indeed, Defendant’s misrepresentations and omissions, as described  
11 above, would be important to a reasonable consumer in deciding whether to  
12 purchase Infant’s Products.

13 **RULE 9(b) ALLEGATIONS**

14 39. Defendant made material misrepresentations and failed to adequately  
15 disclose that the Products are the same. Except as identified herein, Plaintiff and  
16 Class members are unaware, and therefore, unable to identify, the true names and  
17 identities of those individuals at Defendant who are responsible for such material  
18 misrepresentations and omissions.

19 40. Defendant made material misrepresentations regarding Infant’s  
20 Products. Specifically, Defendant marketed, priced and sold Infant’s Products in a  
21 manner to indicate to reasonable consumers that they are superior or somehow more  
22 appropriate for infants than Children’s Products to justify charging the inflated price  
23 of Infant’s Products. These representations were false and misleading because  
24 Infant’s Products are the same as Children’s Products.

25 41. Defendant’s advertising, in-store labeling, marketing, and placement of  
26 the Products contained the material misrepresentations, omissions, and non-  
27 disclosures continuously at every point of purchase and consumption throughout the  
28 Class Period.



1 predominance, and superiority requirement of Federal Rule of Civil Procedure  
2 23(a) and (b)(3).

3       50. **Numerosity:** The members of the Classes are so numerous that joinder  
4 of all members of the Classes is impracticable. Although the precise number of  
5 members of the Classes is unknown to Plaintiff at this time, on information and  
6 belief, the proposed Classes contain thousands of purchasers of Infant's Products  
7 who have been damaged by Defendant's conduct as alleged herein.

8       51. **Existence and Predominance of Common Questions of Law and**  
9 **Fact:** There are questions of law and fact common to the Classes. These questions  
10 predominate over individual questions because the actions of Defendant  
11 complained of herein were generally applicable to the Classes. These legal and  
12 factual questions include, but are not limited to:

- 13       a. Whether Infant's Products and Children's Products are the same;
- 14       b. Whether Defendant knew or should have known that Infant's Products  
15       and Children's Products are the same;
- 16       c. Whether Defendant's conduct and/or omissions in its marketing,  
17       pricing and selling the Infant's product in the manner discussed herein  
18       indicated to the members of the Classes that Infant's Products were  
19       superior or somehow more appropriate for infants than Children's  
20       Products;
- 21       d. Whether Defendant's misrepresentations and omissions were material  
22       to reasonable consumers;
- 23       e. Whether Defendant's labeling, marketing, and the sale of Infant's  
24       Products constitute false advertising;
- 25       f. Whether Defendant's conduct injured Plaintiff and the Classes and, if  
26       so, the extent of the damages; and
- 27       g. The appropriate remedies for Defendant's conduct.

28       52. All questions as to the representations and publicly disseminated

1 advertisements and statements attributable to Defendant at issue herein are similarly  
2 common. A determination of Defendant's knowledge regarding the misleading and  
3 deceptive nature of the statements made in its website, advertisements, and labels  
4 will be applicable to all members of the Classes. Further, whether Defendant  
5 violated any applicable state laws and pursued the course of conduct complained of  
6 herein, whether Defendant acted intentionally or recklessly in engaging in the  
7 conduct described herein, and the extent of the appropriate measure of injunctive  
8 and declaratory relief, damages and restitutionary relief are common questions to the  
9 Classes.

10       53. **Typicality:** Plaintiff's claims are typical of the Classes because  
11 Defendant injured all members of the Classes through the uniform misconduct  
12 described herein; all members of the Classes were subject to Defendant's false,  
13 misleading, and unfair marketing practices and representations, including the false  
14 and misleading claim that Infant's Products were different from Children's Products  
15 warranting a premium price; and Plaintiff seeks the same relief as the members of  
16 the Classes.

17       54. Further, there are no defenses available to Defendant that are unique to  
18 Plaintiff.

19       55. **Adequacy of Representation:** Plaintiff is a fair and adequate  
20 representative of the Classes because Plaintiff's interests do not conflict with the  
21 interests of the members of the Classes. Plaintiff will prosecute this action  
22 vigorously and is highly motivated to seek redress against Defendant. Further,  
23 Plaintiff has selected competent counsel that is experienced in class action and other  
24 complex litigation. Plaintiff and her counsel are committed to prosecuting this action  
25 vigorously on behalf of the Classes and have the resources to do so.

26       56. **Superiority:** The class action mechanism is superior to other available  
27 means for the fair and efficient adjudication of this controversy for reasons  
28 including but not limited to the following:

- 1 a. The damages individual members of the Classes suffered are small  
2 compared to the burden and expense of individual prosecution of the  
3 complex and extensive litigation needed to address Defendant’s  
4 conduct.
- 5 b. It would be virtually impossible for the members of the Classes  
6 individually to redress effectively the wrongs done to them. Even if  
7 they could afford such individual litigation, the court system could not.  
8 Individualized litigation would unnecessarily increase the delay and  
9 expense to all parties and to the court system and presents a potential  
10 for inconsistent or contradictory rulings and judgments. By contrast, the  
11 class action device presents far fewer management difficulties, allows  
12 the hearing of claims which might otherwise go unaddressed because of  
13 the relative expense of bringing individual lawsuits, and provides the  
14 benefits of single adjudications, economies of scale, and  
15 comprehensive supervision by a single court.
- 16 c. The prosecution of separate actions by the individual members of the  
17 Classes would create a risk inconsistent or varying adjudications with  
18 respect to individual members of the Classes members, which would  
19 establish incompatible standards of conduct for Defendant.
- 20 d. The prosecution of separate actions by individual members of the  
21 Classes would create a risk of adjudications with respect to them that  
22 would, as a practical matter, be dispositive of the interests of other  
23 members of the Classes not parties to adjudications or that would  
24 substantively impair or impede their ability to protect their interests.

25 57. The claims of the Classes may be certified under Rule 23(b)(1), (b)(2)  
26 and/or (b)(3). The members of the Classes also seek declaratory and injunctive relief  
27 but also seek sizeable monetary relief.

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**FIRST CAUSE OF ACTION**

**Violation of Consumers Legal Remedies Act (CLRA)**

**Cal. Civ. Code §§ 1750, *et seq.***

**(On behalf of Plaintiff and the California Subclass)**

58. Plaintiff hereby incorporates paragraphs 1-57 as if fully set forth herein.

59. Plaintiff and the California Subclass have standing to pursue this claim as they have suffered injury in fact and lost money as a result of Defendant’s actions, as set forth herein.

60. At all times relevant hereto, Defendant was and is a “person,” as defined in Cal. Civ. Code § 1761(d).

61. At all times relevant hereto, Defendant’s Infant’s Products are a “good,” as defined in Cal. Civ. Code § 1761(d).

62. At all relevant times hereto, Plaintiff and the California Subclass’ purchases of Infant’s Products constitutes “transactions,” as defined in Cal. Civ. Code § 1761(e).

63. The following subsections of the CLRA prohibit the following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction is intended to result or which results in the sale or lease of goods or services to any consumer:

64. Cal. Civ. Code § 1770(a)(5): Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which they do not have;

65. Cal. Civ. Code § 1770(a)(9): Advertising goods or services with intent not to sell them as advertised; and,

66. Cal. Civ. Code § 1770(a)(16): Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.



1           67. Defendant has violated and continues to violate Cal. Civ. Code §  
2 1770(a)(5) by representing that Infant's Products have sponsorship, approval,  
3 characteristics, ingredients, benefits or quantities which they do not have.

4           68. Defendant has violated and continues to violate Cal. Civ. Code §  
5 1770(a)(9) by advertising Infant's Products with the intent not to sell them as  
6 advertised.

7           69. Defendant has violated and continues to violate Cal. Civ. Code §  
8 1770(a)(16) by representing Infant's Products have been supplied in accordance  
9 with previous representations when they have not.

10           70. Defendant has violated and continues to violate Cal. Civ. Code §  
11 1770(a)(5), (a)(9) and (a)(16) by deceiving consumers into thinking that infants  
12 cannot safely take Children's Products, and that they must buy the more expensive  
13 Infant's Products, as described more fully above. Indeed, Plaintiff and the California  
14 Subclass relied on Infant's Products packaging and shelf placement prior to  
15 purchase. These representations and omissions were uniformly made and would be  
16 important to a reasonable consumer in deciding whether or not to purchase Infant's  
17 Products. No reasonable consumer would be willing to pay approximately three  
18 times as much per ounce more unless he or she had good reason to believe that  
19 Infant's Products were different than the Children's Products.

20           71. Defendant's misrepresentations and omissions were done with the  
21 intent to deceive Plaintiff and the California Subclass and to deprive them of their  
22 legal rights and money.

23           72. Defendant knew that Infant's Products were not uniquely for infants,  
24 that Children's Products and Infant's Products are the same product, and that  
25 Children's Products are safe and suitable for infants. Defendant deceptively  
26 advertised or intentionally omitted in Infant's Products packaging, online materials,  
27 and commercials.

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1           73. Plaintiff is concurrently filing the declaration of venue required by Cal.  
2 Civ. Code § 1780(d).

3           74. The policies, acts, and practices hereto described were intended to  
4 result in the sale of Infant's Products to the consuming public, particularly to  
5 cautious parents with sick infants who needed medicine, and violated and continue  
6 to violate Cal. Civ. Code § 1770(a)(5) by representing that Infant's Products have  
7 characteristics, benefits, uses, or quantities which they do not have.

8           75. Defendant's actions as described herein was done with conscious  
9 disregard of Plaintiff and the California Subclass' rights, and Defendant has acted  
10 wantonly and maliciously in its concealment of the same.

11           76. Defendant's wrongful business practices constituted, and constitute, a  
12 continuing course of conduct in violation of the CLRA as Defendant continues to  
13 make the same misrepresentations and omit material information regarding Infant's  
14 Products.

15           77. Pursuant to Cal. Civ. Code § 1780(a), Plaintiff and the California  
16 Subclass currently seek restitution and an order enjoining Defendant from engaging  
17 in the methods, acts and practices alleged herein, and any other relief deemed proper  
18 by the Court.

19           78. In accordance with Cal. Civ. Code § 1782, and prior to the filing of this  
20 Complaint, Plaintiff, on April 20, 2020, mailed a notice and demand letter by  
21 certified mail, return receipt requested, to Defendant. Plaintiff notified Defendant of  
22 its violations of § 1770, as described above, and demanded that Defendant correct  
23 the problems associated with the actions detailed above and give notice to all  
24 affected consumers of its intent to so act. Defendant received the notice and demand  
25 letter on April 24, 2020.

26           79. Because Defendant has failed to fully rectify or remedy the damages  
27 caused after waiting more than the statutorily required 30 days after it received both  
28 the notice and demand letters, Plaintiff and the California Subclass seek actual,

1 punitive, and statutory damages, restitution, attorneys' fees and costs, and any other  
2 relief this Court deems proper as a result of Defendant's CLRA violations.

3 **SECOND CAUSE OF ACTION**

4 **Violation of California's False Advertising Law (FAL)**

5 **Cal. Bus. & Prof. Code §§ 17500, *et seq.***

6 **(On behalf of Plaintiff and the Nationwide Class)**

7 80. Plaintiff hereby incorporates paragraphs 1-57 as if fully set forth herein.

8 81. In marketing, advertising and labeling Infant's Products, Defendant  
9 made, and continues to make, false and misleading statements in order to induce  
10 consumers into purchasing Infant's Products on a false premise.

11 82. In marketing, advertising and labeling Infant's Products, Defendant  
12 failed and continues to fail to make material disclosures, including a disclosure  
13 notifying consumers that Infant's Products is the same product as Children's  
14 Products.

15 83. Defendant is aware that the claims that it makes about Infant's Products  
16 are false, misleading, without basis, and unreasonable.

17 84. Defendant engaged in the deceptive conduct alleged above in order to  
18 induce the public to purchase the more expensive Infant's Products, instead of  
19 Children's Products.

20 85. In marketing, advertising and labeling Infant's Products described  
21 above, Defendant knew or should have known that its statements regarding the uses  
22 and characteristics of Infant's Products were false and misleading.

23 86. Defendant's misrepresentations of the material facts detailed above  
24 constitute unfair and fraudulent business practices within Cal. Bus. & Prof. Code §  
25 17200.

26 87. Defendant had reasonably available alternatives to further its legitimate  
27 business interests, other than the conduct described herein.

28 88. All of the conduct alleged herein occurs and continues to occur in

1 Defendant's business. Defendant's wrongful conduct is part of a course of conduct  
2 repeated on hundreds, if not thousands, of occasions every day.

3 89. Plaintiff and the Nationwide Class were misled into purchasing Infant's  
4 Products by Defendant's deceptive conduct and misleading advertising as alleged  
5 above.

6 90. Plaintiff and the Nationwide Class were misled and, because the  
7 misrepresentations and omissions were uniform and material, presumably believed  
8 that Infant's Products has benefits which it does not; namely that it is more suitable  
9 and safer for infants than the Children's Products.

10 91. Additionally, Defendant's use of various forms of advertising and  
11 marketing have deceived and are likely to continue deceiving the consuming public,  
12 in violation of California Business and Professions Code § 17500.

13 92. As a result of Defendant's wrongful conduct, Plaintiff and the  
14 Nationwide Class have suffered injury in fact and have lost money. Indeed, Plaintiff  
15 and the Nationwide Class purchased Infant's Products because of Defendant's  
16 misrepresentations that Infant's Products are a more suitable and safer OTC  
17 medicine for infants than Children's Products. Plaintiff and the Nationwide Class  
18 would not have purchased Infant's Products if they had known that the advertising  
19 and representations as described herein were false.

20 **THIRD CAUSE OF ACTION**

21 **Violations of Unfair Competition Law (UCL)**

22 **Unlawful, Fraudulent & Unfair Business Practices**

23 **Cal. Bus. & Prof. Code §§ 17200, et seq.**

24 **(On behalf of Plaintiff and the Nationwide Class)**

25 93. Plaintiff hereby incorporates paragraphs 1-57 as if fully set forth herein.

26 94. As alleged above, Plaintiff and the Nationwide Class have standing to  
27 pursue this claim as they have suffered injury in fact and have lost money or  
28 property as a result of Defendant's actions. Specifically, prior to the filing of this

1 action, Plaintiff and the Nationwide Class purchased Infant’s Products for their own  
2 personal household use. In so doing, they relied on Defendant’s misrepresentations  
3 and omissions of material facts, as alleged in detail above. Had Defendant disclosed  
4 to Plaintiff and the Nationwide Class that Infant’s Products and Children’s Products  
5 are identical and that Children’s Products are in fact suitable and safe for infants,  
6 they would not have purchased the more expensive Infant’s Products.

7 95. Defendant’s misrepresentations and omissions of material fact as  
8 alleged herein constitute unlawful, unfair, and fraudulent business practices in that  
9 they deceived Plaintiff and the Nationwide Class into believing that the Infant’s  
10 Products are somehow specially formulated for infants and different from the less  
11 expensive Children’s Products.

12 96. Defendant is aware that the claims that it makes about Infant’s Products  
13 are deceptive, false and misleading. Defendant is also aware that consumers with  
14 infants, such as Plaintiff, tend to be more cautious about what medicine to give their  
15 baby, especially when they are giving their baby a product that has caused  
16 accidental deaths in the past.

17 97. Defendant’s actions as described herein constitute unfair competition  
18 within the meaning of California’s UCL, insofar as the UCL prohibits “any  
19 unlawful, unfair or fraudulent business act or practice” or “unfair, deceptive, untrue  
20 or misleading advertising.”

21 98. Defendant’s conduct constitutes an “unlawful” business practice within  
22 the meaning of the UCL because it violates the CLRA and FAL.

23 99. Defendant’s conduct constitutes an “unfair” business practice within  
24 the meaning of the UCL because it is immoral, unethical, oppressive, unscrupulous  
25 and/or substantially injurious to consumers. Plaintiff and the Nationwide Class were  
26 misled because Defendant’s misrepresentations and omissions, described above,  
27 were uniform and material. Plaintiff and the Nationwide Class reasonably relied on  
28 those misrepresentations and material omissions, believing based thereon that the

1 Products are not identical, and that Infant’s Products are in fact the only suitable  
2 OTC pain and fever reliever for infants. As a result of Defendant’s  
3 misrepresentations and omissions, Plaintiff and the Nationwide Class lost money or  
4 property.

5 100. Plaintiff and the Nationwide Class were misled and, because the  
6 misrepresentations and omissions were uniform and material, presumably believed  
7 that the Products are not identical, and that Infant’s Products are in fact the only  
8 suitable OTC pain and fever reliever for infants.

9 101. Defendant’s conduct constitutes a “fraudulent” business practice within  
10 the meaning of the UCL insofar as Defendant’s misrepresentations and omissions  
11 regarding the formulation of the Infant’s Products are likely to deceive members of  
12 the public.

13 102. As a direct and proximate result of Defendant’s wrongful business  
14 practices in violation of the UCL, Plaintiff and the Nationwide Class have suffered  
15 injury-in-fact and lost money or property as a result of purchasing the Infant’s  
16 Products. Plaintiff and the Nationwide Class members would not have purchased or  
17 paid as much for the Infant’s Products had they known they were identical to the  
18 less expensive Children’s Products.

19 103. Defendant’s wrongful business practices constitute a continuing course  
20 of conduct of unfair competition since Defendant is labeling, marketing, and selling  
21 the Infant’s Products in a manner likely to deceive the public.

22 104. Pursuant to section 17203 of the UCL, Plaintiff and the Nationwide  
23 Class seek an order of this Court enjoining Defendant from engaging in the unfair  
24 and fraudulent business practices alleged herein, in connection with the sale of the  
25 Products.

26 105. Additionally, Plaintiff and the Nationwide Class seek an order  
27 awarding restitution of the money wrongfully acquired by Defendant by means of  
28 the unfair and fraudulent business practices alleged herein.



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**FOURTH CAUSE OF ACTION**

**Violation of The Magnuson-Moss Warranty Act**

**15 U.S.C. §§ 2301 *et seq.***

**(On behalf of Plaintiff and the Nationwide Class)**

106. Plaintiff hereby incorporates paragraphs 1-57 as if fully set forth herein.

107. Plaintiff brings this cause of action on behalf of herself and on behalf of the Nationwide Class. Upon certification, the Class will consist of more than 100 named plaintiffs.

108. The Magnuson-Moss Warranty Act provides a federal remedy for consumers who have been damaged by the failure of a supplier or warrantor to comply with any obligation under a written warranty or implied warranty, or other various obligations established under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*

109. The Infant’s Products are “consumer products” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(1).

110. Plaintiff and the Nationwide Class members are “consumers” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(3).

111. Defendant is the “supplier” and “warrantor” of the Infant’s Products within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301(4) & 2301(5).

112. Defendant represented in writing that the Infant’s Products were manufactured or designed for infants by prominently displaying the word “infant’s” on the front-label packaging and the product information and price tags display next to Infant’s Products on the store shelves.

113. These statements were made in connection with the sale of the Infant’s Products and relate to the nature of the Infant’s Products and affirm and promise that the Infant’s Products are as represented and, as such, are “written warranties” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(6)(A).

1 114. As alleged herein, Defendant breached the written warranty by selling  
2 consumers Infant’s Products that were nothing more than Children’s Products with  
3 the word “infant’s” prominently displayed.

4 115. The Infant’s Products do not conform to Defendant’s written warranty  
5 and therefore violate the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*  
6 Consequently, Plaintiff and the Nationwide Class have suffered injury and are  
7 entitled to damages in an amount to be proven at trial.

8 116. On April 20, 2020, mailed a pre-litigation letter by certified mail, with  
9 return receipt requested, to Defendant notifying that the conduct, as alleged herein,  
10 violated the Magnuson-Moss Warranty Act.

11 **FIFTH CAUSE OF ACTION**

12 **Breach of Express Warranty**

13 **(On behalf of Plaintiff and the Nationwide Class)**

14 117. Plaintiff hereby incorporates paragraphs 1-57 as if fully set forth herein.

15 118. As part of each contract for the sale of Infant’s Products, Defendant  
16 represented that the Infant’s Products were manufactured or designed for infants by  
17 prominently displaying the word “infant’s” on the front-label packaging and the  
18 product information and price tags display next to Infant’s Products on the store  
19 shelves.

20 119. Defendant’s representations that represented to consumers that the  
21 Infant’s Products were manufactured, developed, and designed to be used for infants  
22 constituted express warranties and became part of the basis of the bargain between  
23 Plaintiff and the Nationwide Class, on the one hand, and Defendant, on the other.

24 120. Defendant represented that Infant’s Products were manufactured,  
25 developed, and designed to be used for infants to induce Plaintiff and the  
26 Nationwide Class to purchase Infant’s Products, and pay more for them than they  
27 otherwise would have had they known the truth.

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1 121. Plaintiff and the Nationwide Class relied on Defendant’s  
2 representations that Infant’s Products were manufactured, developed, and designed  
3 to be used for infants, when it knew that the Children’s Products were the same  
4 product, yet sold at a significantly lower cost.

5 122. Plaintiff and the Nationwide Class have performed all conditions  
6 precedent to Defendant’s liability under the above-referenced contracts when they  
7 purchased the Infant’s Products for their ordinary purposes.

8 123. Defendant breached its express warranties about Infant’s Products  
9 because they were nothing more than Children’s Products with the word “infant’s”  
10 prominently displayed.

11 124. As a result of Defendant’s breach of express warranties, Plaintiff and  
12 the Nationwide Class were damaged in the amount of the purchase price or the  
13 premium they paid for the Infant’s Products, together with interest thereon from the  
14 date of purchase, in an aggregate amount that Plaintiff will prove at trial.

15 125. On April 20, 2020, a reasonable time after they knew or should have  
16 known of such breach, Plaintiff, on behalf of herself and the other members of the  
17 Nationwide Class, sent a notice letter to Defendant which provided notice of  
18 Defendant’s breach and demanded that Defendant correct, repair, replace, or  
19 otherwise rectify the breach complained of herein. Defendant received the letter on  
20 April 24, 2020. The letter also stated that if Defendant refused to do so, a complaint  
21 would be filed seeking damages. Defendant failed to comply with the letter.

22 126. Plaintiff and the Nationwide Class seek actual damages and punitive  
23 damages for Defendant’s breach of warranty, in an amount to be proven at trial.

24 127. On April 20, 2020, mailed a pre-litigation letter by certified mail, with  
25 return receipt requested, to Defendant notifying that the conduct, as alleged herein,  
26 breached the express warranty.

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**SIXTH CAUSE OF ACTION**

**Unjust Enrichment**

**(On behalf of Plaintiff and the Nationwide Class)**

128. Plaintiff hereby incorporates paragraphs 1-57 as if fully set forth herein.

129. Plaintiff, on behalf of herself and on behalf of the Nationwide Class, brings a common law cause of action for unjust enrichment.

130. Defendant’s conduct violated, *inter alia*, state and federal law by manufacturing, advertising, marketing, and selling Infant’s Products while misrepresenting and omitting material facts.

131. Defendant’s unlawful conduct as described in this Complaint allowed Defendant to knowingly realize substantial revenues from selling Infant’s Products at the expense of, and to the detriment or impoverishment of, Plaintiff and the Nationwide Class, and to Defendant’s benefit and enrichment. Defendant has thereby violated fundamental principles of justice, equity, and good conscience.

132. Plaintiff and the Nationwide Class conferred significant financial benefits and paid substantial compensation to Defendant for Infant’s Products, which were not as Defendant represented them to be.

133. Under California’s common law principles of unjust enrichment, it is inequitable for Defendant to retain the benefits conferred by Plaintiff’s and the Nationwide Class’ overpayments.

134. Plaintiff and the Nationwide Class seek disgorgement of all profits resulting from such overpayments and establishment of a constructive trust from which Plaintiff and the Nationwide Class may seek restitution.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff, on behalf of herself and the Classes, prays for judgment as follows:

- (a) Certifying that the action may be maintained as a Class Action and that Plaintiff be appointed the Class Representative and its counsel as Class

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Counsel;

- (b) Declaring that Defendant is financially responsible for notifying the members of the Class of the pendency of this suit;
- (c) Declaring that Defendant has committed the violations of law alleged herein;
- (d) Providing for any and all injunctive relief the Court deems appropriate;
- (e) Awarding statutory damages in the maximum amount for which the law provides;
- (f) Awarding monetary damages, including but not limited to any compensatory, incidental, or consequential damages in an amount that the Court or jury will determine, in accordance with applicable law;
- (g) Providing for any and all equitable monetary relief the Court deems appropriate;
- (h) Awarding Plaintiff’s reasonable costs and expenses of suit, including attorneys’ fees;
- (i) Awarding pre- and post-judgment interest to the extent the law allows; and
- (j) For such further relief as this Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury on all issues so triable.

DATED: June 30, 2020

**PEARSON, SIMON & WARSHAW, LLP**

By:           /s/ Daniel L. Warshaw          

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*\*Pro Hac Vice Forthcoming*