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Fischer

12 **UNITED STATES DISTRICT COURT**
 13 **CENTRAL DISTRICT OF CALIFORNIA**
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15 PERRY MICHAEL FISCHER,
 individually and on behalf of all others
 16 similarly situated,
 17 Plaintiff,
 18 v.
 19 DIAGEO NORTH AMERICA, INC.,
 20 Defendant.
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CASE NO. 2:21-cv-7249

CLASS ACTION

COMPLAINT FOR DAMAGES:

1. Violation of California’s Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.*;
2. Violation of California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*;
3. Violation of California’s False Advertising Law, Cal. Bus. & Prof. Code § 17500;
4. Violation of North Carolina’s Unfair and Deceptive Trade Practice Act. N.C. Gen. Stat. §§75-1.1. *et seq.*;
5. Violation of Various State Breach of Express Warranty Statutes; and
6. Unjust Enrichment.

JURY TRIAL DEMANDED

1 Plaintiff Perry Michael Fischer (“Plaintiff”), on behalf of himself and all others
2 similarly situated, by and through his undersigned attorneys, brings this Class Action
3 Complaint against Diageo North America, Inc. (“Defendant”), based upon personal
4 knowledge as to himself and his own acts as alleged in Paragraphs 10-11, and as to
5 all other matters and Paragraphs upon information, investigation and belief of his
6 counsel.

7 **NATURE OF THE ACTION**

8 1. Plaintiff brings this consumer protection, false advertising class action
9 lawsuit against Defendant, based on Defendant’s misleading business practices with
10 respect to the marketing and sale of its Ron Zacapa 23 Centenario Rum (the
11 “Product”).

12 2. At all relevant times, Defendant marketed and sold the Product with a
13 bold “23” on the front of the packaging, which conveys to a reasonable consumer that
14 the rum contained in the Product has been aged for 23 years.

15 3. Plaintiff and other reasonable consumers have reasonably relied on
16 Defendant’s deceptive packaging in purchasing the Product, believing that the
17 Product was, in fact, aged for 23 years prior to bottling and sale, or, at a minimum,
18 would not contain rum aged less than 23 years.

19 4. The age of a rum is material to Plaintiff and class members and impacted
20 their purchasing decisions.

21 5. To the detriment of consumers, the rum contained in the Product has not
22 been aged for 23 years. Instead, it is a blend of rums aged between 6 and 23 years.
23 This material fact is not known to reasonable consumers at the point of purchase.

24 6. Plaintiff purchased the Product and paid a premium price based upon his
25 reliance on Defendant’s representation that the Product was aged for 23 years. Had
26 Plaintiff and Class members been aware that the Product has not been aged for 23
27 years, Plaintiff and Class members would not have purchased the Product or would
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1 have paid significantly less for the Product. Accordingly, Plaintiff and Class members
2 have been injured by Defendant’s deceptive business practices.

3 **JURISDICTION AND VENUE**

4 7. This Court has subject matter jurisdiction under the Class Action
5 Fairness Act, 28 U.S.C. §1332(d) in that: (1) this is a class action involving more than
6 100 class members; (2) the parties are minimally diverse, as members of the proposed
7 class are citizens of states different than Defendant’s home state; and (3) the amount
8 in controversy is in excess of \$5,000,000, exclusive of interests and costs.

9 8. This Court has personal jurisdiction over Defendant because Defendant
10 conducts and transacts substantial business in California and intentionally and
11 purposefully placed the Product into the stream of commerce within California.

12 9. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because a
13 substantial part of the events or omissions giving rise to Plaintiff’s claims occurred in
14 this District. Defendant marketed, advertised and sold the Product, and conducted
15 extensive business, within this District. Furthermore, Plaintiff purchased the Product
16 in this District.

17 **PARTIES**

18 **I. Plaintiff**

19 10. Plaintiff Perry Michael Fischer is a citizen of the State of Washington
20 and currently resides in Seattle, Washington. Plaintiff made several purchases of the
21 Product in California over the last four years, and specifically, he purchased the
22 Product in 2020 from the following retail establishments: Total Wine & More in
23 Redondo Beach, California, and BevMo! in Torrance, California. Plaintiff also
24 purchased the Product in 2016 from an ABC store in Raleigh, North Carolina. In
25 purchasing the Product, Plaintiff saw the front packaging of the Products.
26 Specifically, Plaintiff saw the number “23” and the phrase “Aged At A High Altitude
27 in Oak Barrels” on the front packaging. The number “23” on the front of the packaging
28 conveyed to Plaintiff that the Product was aged for 23 years prior to bottling and sale,

1 or, at a minimum, would not contain rum aged less than 23 years. Additionally, the
2 phrase “Aged At A High Altitude in Oak Barrels” confirmed for Plaintiff that the
3 Product is an aged rum. The age of the Product is material to Plaintiff as he reasonably
4 believes a rum with a higher age is of a higher quality. Had Plaintiff known that the
5 Product was not aged for 23 years, he would not have purchased the Product or would
6 have paid substantially less for it.

7 11. Despite being misled by Defendant, Plaintiff wishes to and is likely to
8 purchase the Product from Defendant in the future. Although Plaintiff regularly
9 purchases rum beverages, absent an injunction prohibiting the deceptive advertising
10 described herein, Plaintiff will be unable to rely with confidence on Defendant’s
11 packaging in the future. Furthermore, while Plaintiff currently believes the Product
12 does not contain rum aged for 23 years, he lacks personal knowledge as to
13 Defendant’s specific business practices, as he cannot determine whether the rum is
14 aged for 23 years. This leaves doubt in his mind as to the possibility that at some point
15 in the future Defendant’s Product could contain rum aged for 23 years. However,
16 Plaintiff would purchase the Product, as advertised, if it was, in fact, actually rum
17 aged 23 years. This uncertainty, coupled with his desire to purchase Defendant’s
18 Product, is an ongoing injury that can and would be rectified by an injunction
19 enjoining Defendant from making the misleading representations alleged herein. In
20 addition, other Class members will continue to purchase the Product, reasonably but
21 incorrectly, believing it contains rum aged for 23 years, when it does not.

22 **II. Defendant**

23 12. Defendant Diageo North America, Inc. is a Connecticut corporation and
24 maintains its headquarters in the State of New York. Defendant is responsible for the
25 marketing, distribution, and sale of the Product in the United States, including in this
26 District.

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FACTUAL BACKGROUND

I. Background

13. Defendant is the fifth largest spirits company in the world by revenue and directly and indirectly manufactures, advertises, distributes, and/or sells various alcohol beverages under some of the world’s most iconic alcoholic brand names.

14. Among the brands Defendant manufactures, advertises, distributes, and/or sells in the United States and within this District is the Product—Ron Zacapa 23 Centenario Rum, which is manufactured in Guatemala and imported to the U.S.

15. The Product is part of Defendant’s “Reserve” brands in North America. According to Defendant, the “Reserve brands are key to [its] success in North America, delivering growth through innovative production, inspiring design, exceptional liquids and memorable experiences.”¹

16. Rum is a distilled drink made from fermented sugarcane, sugar cane syrup, molasses, or other sugar cane by-products.²

17. In recent years, the sale of rum in the United States has increased significantly. For example, according to the Distilled Spirits Council of the United States, “[i]n 2019, 24.1 million 9-liter cases of rum were sold in the United States, generating over \$2.3 billion in revenue for distillers.”³

II. The Product’s Packaging Is Misleading to Reasonable Consumers

18. As depicted below, Defendant sells the Product with the number “23” prominently affixed on the front packaging.⁴ The front packaging also contains the phrase “Aged At A High Altitude in Oak Barrels.” *See below.*

¹ <https://www.diageo.com/en/our-business/where-we-operate/north-america/diageo-north-america/> (last visited September 9, 2021)

² 27 C.F.R. § 5.22(f).

³ <https://www.distilledspirits.org/rum/> (last visited September 9, 2021)

⁴ To be clear, Plaintiff is only challenging the **packaging** (i.e., the cylindrical container) holding the bottle, not the label affixed to the bottle itself.

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19. The prominent “23” on the front of the packaging conveys to reasonable consumers that the rum contained in the Product is aged for 23 years prior to bottling and sale. Additionally, the inclusion of the language “Aged At A High Altitude In Oak Barrels” confirms that the Product is an aged rum.

1 20. When reasonable consumers view the number “23” on the front of the
2 packaging, they believe this refers to the age of the rum contained in the Product.
3 Indeed, numbers displayed on the packaging of distilled spirits commonly indicate
4 how many years the product has been aged. For example, the packaging of
5 Glenfiddich Single Malt Scotch Whiskeys contains numbers such “12,” “14,” or “15”
6 because the products have been aged for that many years:



1 21. However, unbeknownst to Plaintiff and other reasonable consumers, the
2 rum in the Product is not 23 years aged, rather, it is a blend of rums aged between 6
3 to 23 years.

4 22. Defendant uses the solera aging and blending method to age the rum in
5 the Product.

6 23. “The concept of the solera method is based on stacking multiple layers
7 of aging barrels (called “*criaderas*”) on top of each other, with each layer
8 progressively topping up the next one down and blending with it year after year.”⁵

9 24. Based on the process described above, the Product contains rum with
10 different years of aging spanning from 6 years to 23 years old.

11 25. As a result, Defendant’s packaging of the Products is false and
12 misleading and only serves the profit maximizing interests of Defendant.

13 26. This truth is unknown to reasonable consumers and impacts Plaintiff and
14 reasonable consumers’ purchasing decisions.

15 27. The age of rum is material to Plaintiff and reasonable consumers as a
16 higher age signifies a higher quality rum. Reasonable consumers would not believe
17 that a rum which contains a blend of ages spanning from 6 years to 23 years is of the
18 same quality as a rum that is entirely aged for 23 years.

19 28. As a manufacturer, distributor, and/or seller of the Product, Defendant is
20 responsible for the accuracy of the information conveyed on the Product packaging.

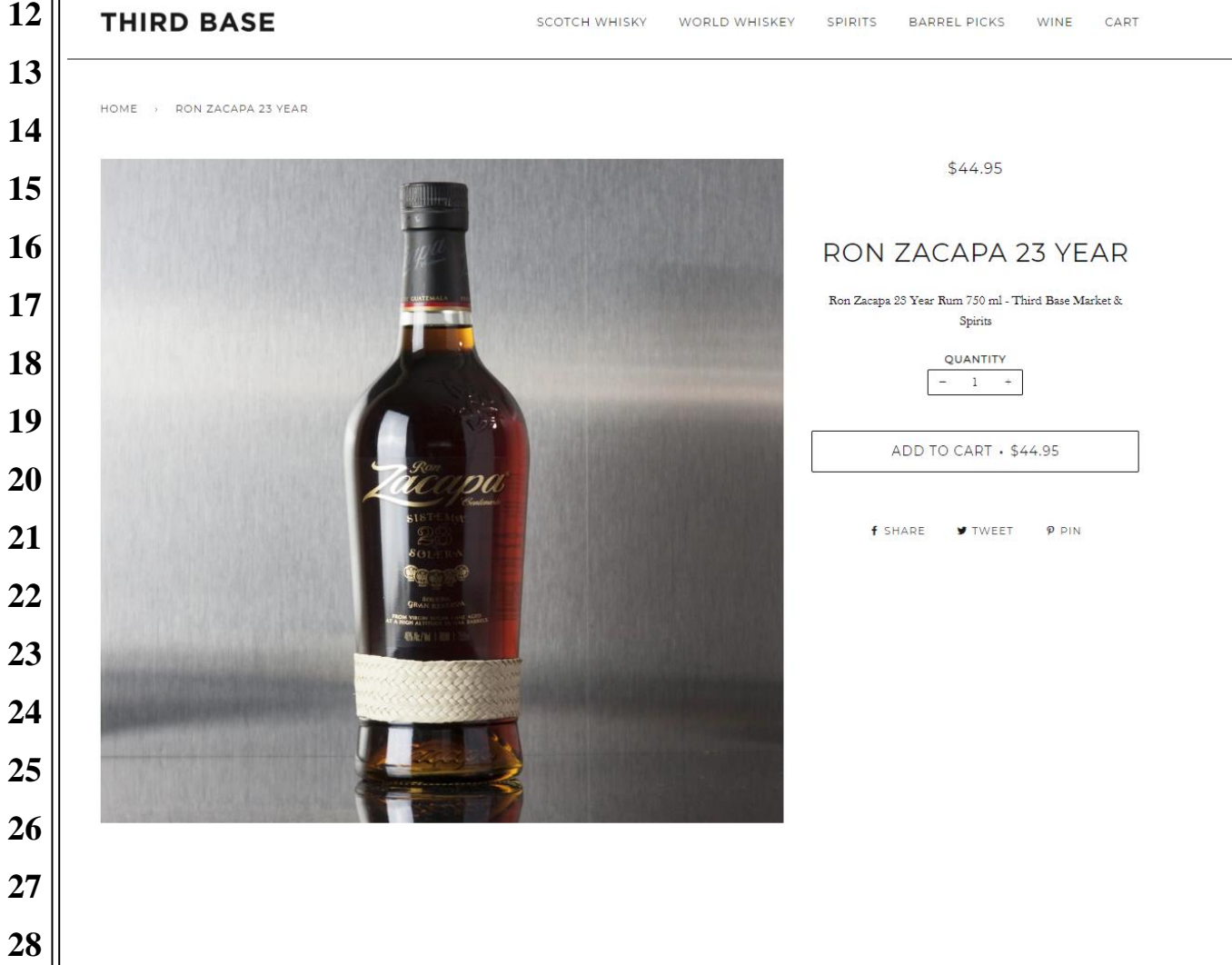
21 29. Defendant knew or, should have known that the Product’s packaging was
22 false or misleading.

23 30. Defendant intended for consumers to rely upon its representations and
24 omissions concerning the Product’s true age. Defendant knows, knew or should have
25 known that Plaintiff and other consumers did and would rely on the packaging of the
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28 ⁵ <https://rumsocialclub.com/solera-aging-method/> (last visited September 9, 2021)

1 Product in purchasing it, and would reasonably believe that the Product was aged for
2 23 years, or, at a minimum, would not contain rum aged less than 23 years.

3 31. Indeed, it would be reasonable for consumers to rely—as Plaintiff did—
4 upon Defendant’s representations and omissions concerning the age of the rum in the
5 Product and reasonably believe the Product is aged for 23 years, or, at a minimum,
6 would not contain rum aged less than 23 years. Defendant’s misleading marketing
7 campaign is so pervasive and convincing that even liquor retailers and bars are being
8 deceived by the age representations, making an average consumer’s belief about the
9 Product even more reasonable. See, e.g.,
10 https://thirdbasemarketandspirits.com/products/ron_zacapa_23_year:
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1 32. Through the use of misleading representations and omissions, Defendant
2 commands a price Plaintiff and the Class would not have paid had they been fully
3 informed. Indeed, the Product is priced significantly higher than non-aged rums or
4 rums that have been aged for less years. *Compare, e.g.*, Ron Zacapa 23-year rum
5 (\$45.99)⁶ with Bacardi Superior rum (not aged) (\$8.99),⁷ Plantation Grande Reserve
6 Rum 5 year (\$19.99)⁸ and El Dorado 8 year old aged rum (\$20.99)⁹.

7 33. By use of misleading packaging claims and omissions, Defendant
8 created increased market demand for the Product and increased its market share
9 relative to what its demand and share would have been had it marketed and packaged
10 the Product truthfully.

11 34. Plaintiff and the Class lost money as a result of Defendant's
12 misrepresentations and omissions in that they did not receive what they reasonably
13 believed they were paying for based upon the misrepresentations and omissions on
14 the Product's packaging. Plaintiff and the Class detrimentally altered their position
15 and suffered damages as a result of Defendant's misrepresentations and omissions.

16 35. If Plaintiff had been aware that the rum in the Product was not entirely
17 aged for 23 years, Plaintiff would have purchased a different product or paid
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20 ⁶ [https://www.totalwine.com/spirits/rum/aged-rum/ron-zacapa-23-centenario-](https://www.totalwine.com/spirits/rum/aged-rum/ron-zacapa-23-centenario-rum/p/15593750?s=102&igrules=true)
21 [rum/p/15593750?s=102&igrules=true](https://www.totalwine.com/spirits/rum/aged-rum/ron-zacapa-23-centenario-rum/p/15593750?s=102&igrules=true) (last visited September 9, 2021)

22 ⁷ [https://www.totalwine.com/spirits/rum/silver-rum/bacardi-](https://www.totalwine.com/spirits/rum/silver-rum/bacardi-superior/p/3636750?glia=true&s=1106&&pid=cpc:Core+Catalog+-+Shopping%2BUS%2BCALI%2BENG%2BSPART::google::&gclid=CjwKCAjwx8iIBhBwEiw)
23 [superior/p/3636750?glia=true&s=1106&&pid=cpc:Core+Catalog+-](https://www.totalwine.com/spirits/rum/silver-rum/bacardi-superior/p/3636750?glia=true&s=1106&&pid=cpc:Core+Catalog+-+Shopping%2BUS%2BCALI%2BENG%2BSPART::google::&gclid=CjwKCAjwx8iIBhBwEiw)
24 [+Shopping%2BUS%2BCALI%2BENG%2BSPART::google::&gclid=CjwKCAjwx](https://www.totalwine.com/spirits/rum/silver-rum/bacardi-superior/p/3636750?glia=true&s=1106&&pid=cpc:Core+Catalog+-+Shopping%2BUS%2BCALI%2BENG%2BSPART::google::&gclid=CjwKCAjwx8iIBhBwEiw)
24 [8iIBhBwEiw](https://www.totalwine.com/spirits/rum/silver-rum/bacardi-superior/p/3636750?glia=true&s=1106&&pid=cpc:Core+Catalog+-+Shopping%2BUS%2BCALI%2BENG%2BSPART::google::&gclid=CjwKCAjwx8iIBhBwEiw) (last visited September 9, 2021)

25 ⁸ [https://www.totalwine.com/spirits/rum/aged-rum/plantation-grande-reserve-rum-5-](https://www.totalwine.com/spirits/rum/aged-rum/plantation-grande-reserve-rum-5-yr/p/98735750?s=1106&igrules=true)
26 [yr/p/98735750?s=1106&igrules=true](https://www.totalwine.com/spirits/rum/aged-rum/plantation-grande-reserve-rum-5-yr/p/98735750?s=1106&igrules=true) (last visited September 9, 2021)

27 ⁹ <https://www.totalwine.com/spirits/rum/aged-rum/el-dorado-8-yr-rum/p/144529750>
28 (last visited September 9, 2021)

1 significantly less for the Product, or in the alternative, not purchased the Product at
2 all.

3 36. Plaintiff and members of the Class were exposed to and justifiably relied
4 upon the same material misrepresentations and omissions made on the Product's
5 packaging, as (1) all of the Product packaging contains the same number "23" and the
6 statement "Aged At A High Altitude in Oak Barrels," and (2) every Product is not
7 aged for 23 years.

8 **III. Federal Regulations Confirm Plaintiff and Class Members Were** 9 **Reasonably Misled**

10 37. The Alcohol and Tobacco Tax and Trade Bureau ("TTB"), a bureau
11 under the Department of the Treasury, has set basic mandatory labeling requirements
12 for companies like Defendant to adhere to when labeling distilled spirits with
13 statements of age.

14 38. TTB defines age as it relates to "aged" rum as "the period during which,
15 after distillation and before bottling, distilled spirits have been stored in oak
16 containers."¹⁰

17 39. According to federal regulation, "Age may, but need not, be stated on
18 labels of *rums*, brandies, and agave spirits[.]" See 27 C.F.R. § 5.40(b) (emphasis
19 added).

20 40. However, if a company chooses to make an age statement on rum, the
21 regulation requires that the age statement "shall be substantially as follows: ' __ years
22 old'; the blank to be filled in with the *age of the youngest* distilled spirits in the
23 product." *Id.* (emphasis added).¹¹

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25 ¹⁰ https://www.ttb.gov/images/pdfs/spirits_bam/chapter8.pdf (last visited September
26 9, 2021)

27 ¹¹ While this provision pertains to "labels" of distilled products, 27 C.F.R. § 5.41(a)
28 states that the prohibitions in § 5.40 apply equally to any "covering, carton, or other
container of the bottle used for sale at retail."

1 41. Moreover, the TTB has issued a Beverage Alcohol Manual (“BAM”) for
2 distilled spirits, which provides an explanation of the labeling requirements of
3 distilled spirits. Chapter 8 of the BAM provides further guidance on using statements
4 of age on the labels of distilled spirits.

5 42. Of note, Chapter 8 explains that when using a statement of age, it must
6 appear as one of the following options:

7 a. “___ YEARS OLD” (Fill in blank with specific age *or age of*
8 *youngest distilled spirits in blend*) (emphasis added);

9 b. “AGED ___ YEARS” (Fill in blank with specific age *or age of*
10 *youngest distilled spirits in blend*) (emphasis added); **or**

11 c. “___% _____ YEARS OLD” OR “___% _____
12 AGED ___ YEARS” (This option applies to mixtures or blends, e.g., a
13 mixture or blend of two or more rums of different ages. Fill in first blank
14 with the percent of the finished product on a proof gallon basis
15 contributed by each listed distilled spirits [listed percentages must total
16 100%]; the second blank with the class/type of each distilled spirits; the
third blank with the specific age of each distilled spirits).

17 43. Moreover, federal regulation provides that age of rum “may be
18 understated but shall not be overstated.” 27 C.F.R. § 5.40(e)(1).

19 44. While this action is not seeking to enforce the TTB regulations, the TTB
20 regulations certainly demonstrate that Plaintiff and Class members were reasonably
21 deceived by Defendant’s packaging, which overpromise the Product is entirely aged
22 for 23 years, which is false and misleading.

23 **TOLLING OF THE STATUTE OF LIMITATIONS**

24 **I. Fraudulent Concealment**

25 45. All applicable statutes of limitation have been tolled by Defendant’s
26 knowing, active, and ongoing fraudulent concealment and denial of the facts alleged
27 herein at all times relevant to this action.

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1 46. Since putting the Product on the market, Defendant knew that the
2 Product was not, in fact, aged 23 years prior to bottling and sale.

3 47. Despite knowing the truth about the age of the rum in the Product,
4 Defendant concealed the nature of the quality of the Product from Plaintiff and the
5 class members. Defendant did not adequately disclose that the Product, in fact,
6 contained a blend of rum aged from 6 to 23 years.

7 48. Any applicable statutes of limitation have, therefore, been tolled by
8 Defendant's knowledge, active concealment, and denial of the facts alleged herein,
9 which behavior remains ongoing.

10 **II. Discovery Rule**

11 49. Plaintiff and the other Class members did not immediately discover—
12 and could not have discovered through the exercise of reasonable diligence—the full
13 and complete nature of the misrepresentations on Defendant's packaging regarding
14 the age of the rum.

15 50. Within the period of any applicable statutes of limitation, Plaintiff and
16 the other Class members could not have discovered, through the exercise of
17 reasonable diligence, that Defendant was—and still is—concealing the age of the rum.

18 51. Any applicable statutes of limitation have, therefore, been tolled by
19 operation of the discovery rule.

20 **III. Estoppel**

21 52. Defendant was under a continuous duty to disclose to Plaintiff and the
22 other Class members the true character, quality, and nature of the rum in the Product.

23 53. Defendant actively concealed the Product's true character, quality, and
24 nature and knowingly misrepresented—or omitted—facts about the Product's age—
25 a material fact to consumers.

26 54. Plaintiff and the other Class members reasonably relied upon
27 Defendant's misrepresentations and/or active concealment of these facts.

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1 55. Based on the foregoing, Defendant is estopped from relying on any
2 statutes of limitation in defense of this action.

3 **CLASS DEFINITION AND ALLEGATIONS**

4 56. Plaintiff brings this matter on behalf of himself and those similarly
5 situated. Defendant's misconduct is detailed at length in this Complaint. Defendant's
6 customers were uniformly impacted by and exposed to Defendant's misconduct.
7 Plaintiff can prove the elements of his claims on a class-wide basis using the same
8 evidence as individual Class members would use to prove those elements in individual
9 actions alleging the same claims. Accordingly, this Complaint is uniquely situated for
10 class-wide resolution.

11 57. Pursuant to Rule 23 of the Federal Rules of Civil Procedure (the "Rules"
12 or "Rule"), Plaintiff seeks to represent the following class:

13 All residents of the United States who purchased the Product for
14 personal, family, or household use and not for resale within the
15 applicable statute of limitation, until the date notice is disseminated
("Nationwide Class").

16 58. Additionally, as further described herein, Plaintiff brings claims based
17 upon state consumer protection laws on behalf of the following subclasses:

18 All residents of the [a given state or states] who purchased the Product for
19 personal use and not for resale within the applicable statute of limitation, until
20 the date notice is disseminated ("Multistate Class").

21 All residents of California who purchased the Product for personal, family, or
22 household use and not for resale within the applicable statute of limitation, until
23 the date notice is disseminated ("California Class").

24 All residents of North Carolina who purchased the Product for personal, family,
25 or household use and not for resale within the applicable statute of limitation,
until the date notice is disseminated ("North Carolina Class").

26 59. The Nationwide Class, Multistate Class, California Class and North
27 Carolina Class are referred to collectively as the "Class" or "Classes."
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1 60. Plaintiff reserves the right to amend the Class definitions if discovery or
2 further investigation reveals that any Class should be expanded or narrowed, divided
3 into additional subclasses under Rule 23(c)(5), or modified in any other way.

4 61. The following people are excluded from the Classes: (1) any Judge or
5 Magistrate presiding over this action and the members of their family; (2) Defendant,
6 Defendant's subsidiaries, parents, successors, predecessors, and any entity in which
7 the Defendant or its parents have a controlling interest and their current employees,
8 officers and directors; (3) persons who properly execute and file a timely request for
9 exclusion from the Class; (4) persons whose claims in this matter have been finally
10 adjudicated on the merits or otherwise released; (5) Plaintiff's counsel and
11 Defendant's counsel; and (6) the legal representatives, successors, and assigns of any
12 such excluded persons.

13 62. This action is properly brought and should be maintained as a class action
14 under Rule 23(a), satisfying the class action prerequisites of numerosity,
15 commonality, typicality, and adequacy because:

16 63. **Numerosity**: Members of each Class are so numerous and
17 geographically dispersed that individual joinder of all Class members is
18 impracticable. The precise number of Class members is unknown to Plaintiff but is
19 likely to be ascertained by the Defendant's records. At a minimum, there likely are
20 tens of thousands of Class members.

21 64. **Commonality**: There are questions of law and fact common to the
22 proposed class(es). Common questions of law and fact include, without limitations:

- 23 a. whether Defendant engaged in the conduct alleged herein;
24 b. whether Defendant's course of conduct alleged herein violates the
25 statutes and other laws that are pled in this Complaint;
26 c. whether Defendant intended for consumers to rely upon its
27 representations and omissions;
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- 1 d. whether reasonable consumers would rely upon Defendant's
- 2 representations and omissions and believe the Product is aged 23 years;
- 3 e. whether Defendant had a duty to disclose the material omissions
- 4 concerning the age of the Product;
- 5 f. whether Defendant knew or should have known its representations and
- 6 omissions were false or misleading;
- 7 g. whether Defendant was unjustly enriched by retaining monies from the
- 8 sale of the Product;
- 9 h. whether certification of each Class is appropriate under Rule 23;
- 10 i. whether Plaintiff and the members of each Class are entitled to
- 11 declaratory, equitable, or injunctive relief, and/or other relief, and the
- 12 scope of such relief; and
- 13 j. the amount and nature of the relief to be awarded to the Plaintiff and the
- 14 Class, including whether Plaintiff and the Class are entitled to punitive
- 15 damages.

16 65. **Typicality**: Plaintiff's claims are typical of the other Class members
17 because Plaintiff, as well as Class members, paid for Defendant's Product at retail.
18 Plaintiff and the members of the Classes relied on the representations and omissions
19 made by the Defendant prior to purchasing the Product. Plaintiff and the members of
20 each Class paid for Defendant's Product at retail and would not have purchased it (or
21 would have paid substantially less for it) had they known that the Defendant's
22 representations were untrue and/or had they possessed the information Defendant
23 omitted from the Product package.

24 66. **Adequacy**: Plaintiff is an adequate Class representative because his
25 interests do not conflict with the interests of the Classes he seeks to represent; his
26 claims are common to all members of the Classes and he has a strong interest in
27 vindicating his and all other Class members' rights. Plaintiff has retained counsel
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1 competent and experienced in complex class action litigation and they intend to
2 vigorously prosecute this action through judgment and appeal, if necessary.

3 67. **Predominance:** Pursuant to Rule 23(b)(3), the common issues of law
4 and fact identified in this Complaint predominate over any other questions affecting
5 only individual members of the Classes. Class issues fully predominate over any
6 individual issue because no inquiry into individual conduct is necessary; all that is
7 required is a narrow focus on Defendant's misconduct detailed at length in this
8 Complaint.

9 68. **Superiority:** A class action is superior to all other available methods for
10 the fair and efficient adjudication of this litigation because individual litigation of
11 each claim is impractical. It would be unduly burdensome to have individual litigation
12 of hundreds of thousands of individual claims in separate lawsuits, every one of which
13 would present the issues presented in the Complaint/lawsuit. Further, because of the
14 damages suffered by any individual Class member may be relatively modest in
15 relation to the cost of litigation, the expense and burden of individual litigation make
16 it difficult, if not impossible. Furthermore, many of the Class members may be
17 unaware that claims exist against the Defendant.

18 69. **Declaratory and Injunctive Relief:** Pursuant to Rule 23(b)(2),
19 declaratory and injunctive relief is appropriate in this matter. Defendant has acted or
20 refused to act on grounds generally applicable to Plaintiff and the other Class
21 members, thereby making appropriate final injunctive relief and declaratory relief, as
22 described below, with respect to the Class members as a whole. Unless a class-wide
23 injunction is issued, Defendant will continue to, or allow its resellers to, advertise,
24 market, promote, and sell the Product in an unlawful and misleading manner, as
25 described throughout this Complaint, and members of the Classes will continue to be
26 misled, harmed, and denied their rights under the law.

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CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

VIOLATION OF CALIFORNIA’S CONSUMERS LEGAL REMEDIES ACT

Cal. Civ. Code §§ 1750, *et seq.*

(On Behalf of the Nationwide Class, or in the Alternative, the California Class)

70. Plaintiff realleges and incorporates Paragraphs 1-69.

71. Plaintiff brings this claim individually and on behalf of the Nationwide Class, or in the alternative, the California Class.

72. Defendant’s conduct constitutes violations under the California’s Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* (“CLRA”).

73. Defendant’s conduct falls within the meaning of this statute because it caused transactions to occur resulting in the sale or lease of goods or services to consumers – namely, the sale of the Product. The Product is considered to be “goods” within the meaning of the statute under Civil Code 1761(a).

74. Plaintiff and members of the Nationwide Class, or in the alternative, the California Class, are “Consumers” pursuant to the statute.

75. Defendant violated the CLRA by way of the following provisions:

a. Representing that the Product has “characteristics” (i.e. is aged 23 years) which it does not have, in violation of Cal. Civ. Code § 1770(a)(5);

b. Representing that the Product is of a “particular standard, quality, or grade” (i.e. is aged 23 years) when it is not, in violation of Cal. Civ. Code § 1770(a)(7); and

c. Advertising the Product with the “intent not to sell [it] as advertised” in violation of Cal. Civ. Code § 1770(a)(9);

76. Defendant is aware that its representations regarding the age of the Product is false and misleading.

77. Due to Defendant’s conduct, Plaintiff and members of the Nationwide Class, or in the alternative, the California Class, suffered ascertainable economic injury.

1 78. Pursuant to the provisions of Cal. Civ. Code § 1782(a), on June 15, 2021,
2 Plaintiff sent Defendant notice via certified mail, return receipt requested, providing
3 notice to Defendant of its alleged violations of the CLRA, and demanding that
4 Defendant correct such violations. The notice letter also provided Defendant the
5 opportunity to correct its business practices. Defendant received the notice letter on
6 June 16, 2021. Because Defendant has not remedied or cured its violations within 30
7 days of receipt, Plaintiff is bringing this claim for actual damages under the CLRA.

8 79. Accordingly, Plaintiff seeks damages, injunctive relief, reasonable
9 attorneys’ fees and costs, and all other available relief as pled in this Complaint.

10 **SECOND CLAIM FOR RELIEF**
11 **VIOLATION OF CALIFORNIA’S UNFAIR COMPETITION LAW (“UCL”)**
12 **Cal. Bus. & Prof. Code §§ 17200, et seq.**
13 ***(On Behalf of the Nationwide Class, or in the Alternative, the California Class)***

14 80. Plaintiff realleges and incorporates Paragraphs 1-69.

15 81. Plaintiff brings this claim individually and on behalf of the Nationwide
16 Class, or in the alternative, the California Class.

17 82. Plaintiff and Defendant are “persons” within the meaning of the UCL.
18 Cal. Bus. & Prof. Code § 17201.

19 83. The UCL defines unfair competition to include any “unlawful, unfair or
20 fraudulent business act or practice,” as well as any “unfair, deceptive, untrue or
21 misleading advertising.” Cal. Bus. Prof. Code § 17200.

22 84. In the course of conducting business, Defendant engaged in “unlawful”
23 business practices by violating 27 C.F.R. §§ 5.40(b) & 5.41(a), Cal. Civ. Code § 1770,
24 Cal. Bus. & Prof. Code § 17500, and other laws as explained herein.

25 85. As a result of Defendant’s unlawful business acts and practices,
26 Defendant has and continues to unlawfully obtain money from Plaintiff, and members
27 of the California Class.
28

1 86. Defendant’s foregoing business practices are also considered to be
2 “unfair” under the UCL, which states that unfair acts are acts where the reasons,
3 justifications and motivations of Defendant are outweighed by the harm to Plaintiff(s).

4 87. A business practice is also considered to be “unfair” if the conduct
5 alleged is immoral, unethical, oppressive, or substantially injurious to consumers; as
6 well as if the conduct alleged causes an injury which is not outweighed by any benefits
7 to other consumers or to competition, and that the injury is of the type that the
8 consumer could not have avoided. Defendant’s conduct is “unfair” pursuant to the
9 UCL under each of the three tests described in these paragraphs.

10 88. Defendant’s behavior constitutes unfair business practices under
11 California law.

12 89. Defendant’s retention of Plaintiff’s and Class members’ payments for the
13 Product outweighs the economic harm that said retention imposes on consumers. The
14 only party that benefits is Defendant. Defendant’s sale of the Product with the
15 misrepresentations discussed herein are immoral, unethical, oppressive, and
16 substantially injures consumers.

17 90. Plaintiff and members of the Class had no way of knowing that the rum
18 in Defendant’s Product is not entirely aged for 23 years or contains rum aged less than
19 23 years. As Defendant continues to unfairly retain Plaintiff’s and members of the
20 Class’ payments for the Product, this conduct continues to be unfair under California
21 law. This is exactly the type of unscrupulous and inexcusable business practice that
22 the UCL was enacted to address.

23 91. Defendant’s representations are also “fraudulent” under the UCL
24 because they have the effect of deceiving consumers into believing that the Product
25 contains rum that is aged for a minimum of 23 years, when it does not. These
26 representations, Defendant’s corresponding omissions, and Defendant’s other related
27 actions and conduct were false, misleading, and likely to deceive the consuming
28 public.

1 92. Defendant knew, or should have known, its material misrepresentations
2 and omissions would be likely to deceive and harm the consuming public and result
3 in consumers making payments to Defendant under the false impression about the
4 Product.

5 93. As a result of Defendant’s conduct, Plaintiff and Class members have
6 suffered injury-in-fact by paying more for the Product than they would have. Plaintiff
7 requests that the Court issue sufficient equitable relief to restore them and Class
8 members to the position they would have been had Defendant not engaged in unfair
9 business practices. Plaintiff seeks all other available relief as pled in this Complaint.

10 **THIRD CLAIM FOR RELIEF**
11 **VIOLATION OF CALIFORNIA’S FALSE ADVERTISING LAW**
12 **Cal. Bus. & Prof. Code § 17500**
13 ***(On Behalf of the Nationwide Class, or in the alternative, the California Class)***

14 94. Plaintiff realleges and incorporates Paragraphs 1-69.

15 95. Plaintiff brings this claim individually and on behalf of the Nationwide
16 Class, or in the alternative, the California Class.

17 96. Defendant violated California’s False Advertising Law, Cal. Bus. & Prof.
18 Code § 17500 (“FAL”), by publicly disseminating misleading and false
19 advertisements for the Product through packaging stating that the rum is aged 23
20 years.

21 97. Defendant’s false and misleading advertisements were made in order to
22 prop up and increase sales of the Product.

23 98. Plaintiff and members of the proposed Classes would not have bought
24 the Product, or would have paid considerably less for it, had they known that any or
25 all of these misrepresentations were false.

26 99. Pursuant to Business & Professions Code § 17500, Plaintiff and
27 members of the Class seek an order of this Court permanently enjoining Defendant
28 from continuing to publicly disseminate misleading and false advertisements as

1 alleged herein. Plaintiff and Class Members also seek an order requiring Defendant
2 to: (a) make full restitution for all monies wrongfully obtained; and (b) disgorge all
3 ill-gotten revenues and/or profits. Plaintiff seeks all other available relief as pled in
4 this Complaint.

5 **FOURTH CLAIM FOR RELIEF**
6 **VIOLATION OF NORTH CAROLINA UNFAIR AND DECEPTIVE TRADE**
7 **PRACTICES ACT**

8 **N.C. Gen. Stat. §§ 75-1.1, et seq.**

9 ***(On Behalf of the Nationwide Class, or in the Alternative, the North Carolina Class)***

10 100. Plaintiff realleges and incorporates Paragraph 1-69.

11 101. Plaintiff brings this claim individually and on behalf of the Nationwide
12 Class, or in the alternative, the North Carolina Class.

13 102. North Carolina’s Unfair and Deceptive Trade Practices
14 Act, (“NCUDTPA”), prohibits “[u]nfair methods of competition in or affecting
15 commerce, and unfair or deceptive acts or practices in or affecting commerce[.]” N.C.
16 Gen Stat. § 75-1.1(a).

17 103. Defendant engaged in “commerce” within the meaning of the
18 NCUDTPA, N.C. Gen Stat. § 75-1.1(b).

19 104. Defendant participated in unfair methods of competition in or affecting
20 commerce, and unfair or deceptive acts or practices in or affecting commerce, with
21 respect to the sale and advertisement of the Product purchased by Plaintiff and the
22 North Carolina Class, in violation of N.C. Gen. Stat. § 75-1.1(a), including by making
23 false representations or concealing the true age of the Product.

24 105. Defendant’s unfair or deceptive acts or practices detailed throughout this
25 Complaint were reasonably and intentionally calculated to deceive Plaintiff and Class
26 members and in fact deceived Plaintiff and Class members into purchasing the
27 Product believing the Product was aged for 23 years, or at a minimum, not aged less
28 than 23 years.

1 106. By failing to disclose the true age of the Product, Defendant knowingly
2 and intentionally concealed material facts to Plaintiff and Class members.

3 107. Plaintiff and Class members relied on Defendant’s representations in that
4 they would not have purchased or paid significantly less for the Product.

5 108. As a direct and proximate result of Defendant’s unfair or deceptive acts
6 or practices, Plaintiff and Class members have suffered and will continue to suffer
7 actual damages.

8 109. N.C. Gen. Stat. § 75-16 provides a private right of action for any person
9 injured “by reason of any act or thing done by any other person, firm or corporation
10 [.]”

11 110. Plaintiff and Class members seek actual damages against Defendants in
12 an amount to be determined at trial and statutory, treble, and/or punitive damages
13 under NCUOTPA, as well as an order enjoining Defendant’s unfair, unlawful, and/or
14 deceptive practices and awarding costs, attorneys’ fees and restitution, disgorgement
15 of funds, and any other just and proper relief available under N.C. Gen. Stat. § 75-16.

16 **FIFTH CLAIM FOR RELIEF**
17 **VIOLATIONS OF VARIOUS STATE BREACH OF EXPRESS WARRANTY**
18 **STATUTES**

19 *(On behalf of the Multistate Class or in the alternative, the California Class and*
20 *the North Carolina Class)*

21 111. Plaintiff realleges and incorporates Paragraph 1-68.

22 112. Plaintiff brings this claim for breach of express warranty in violation of
23 the laws of the Multistate Class, or in the alternative, the California Class and North
24 Carolina Class, all of which are consistent with one another.

25 113. The various state laws cited below, upon which this Count is premised,
26 are consistent with one another and with the laws of California and North Carolina,
27 both procedurally and substantively.

28 114. Plaintiff and the members of the Classes formed a contract with
Defendant at the time they purchased the Product. As part of that contract, Defendant

1 represented on the Product’s labeling and packaging through use of the number “23”
2 on the front of the packaging, that the rum in the Product has been aged for 23 years,
3 or at a minimum, does not contain rum aged less than 23 years.

4 115. This representation constitutes an express warranty and became part of
5 the basis of the bargain between Plaintiff and members of the Classes, on the one
6 hand, and Defendant, on the other.

7 116. Defendant made the age representation to induce Plaintiff and members
8 of the Classes to purchase the Product, and Plaintiff and the Class members relied on
9 the representations in purchasing the Product.

10 117. All conditions precedent to Defendant’s liability under the above-
11 referenced contract have been performed by Plaintiff and Class members.

12 118. Express warranties by a seller of consumer goods are created when an
13 affirmation of fact or promise is made by the seller to the buyer, which relates to the
14 goods and becomes the basis of the bargain. Such warranties can also be created based
15 upon descriptions of the goods which are made as part of the basis of the bargain that
16 the goods shall conform to the description.

17 119. Defendant breached the express warranties about the Product because,
18 as alleged above, the Product is not aged for a minimum of 23 years.

19 120. In addition to breaching California’s warranty law (Cal. Com. Code §
20 2313) and North Carolina’s warranty law (N.C. Gen. Stat. § 25-2-313), Defendant
21 also breached the following state warranty laws: Alaska Stat. § 45.02.313; A.R.S. §
22 47-2313; A.C.A. § 4-2-313; Colo. Rev. Stat. § 4-2-313; Conn. Gen. Stat. § 42a-2-313;
23 6 Del. C. § 2-313; D.C. Code § 28:2-313; Fla. Stat. Ann. § 672.313; O.C.G.A. § 11-
24 2-313; HRS § 490:2-313; I. C. § 28-2-313; 810 ILCS 5/2-313; Ind. Code § 26-1-2-
25 313; K.S.A. § 84-2-313; KRS § 355.2-313; 11 M.R.S. § 2-313; Mass. Gen. Laws Ann.
26 ch. 106 § 2-313; Minn. Stat. § 336.2-313; Miss. Code Ann. § 75-2-313; R.S. Mo. §
27 400.2-313; Mont. Code Anno. § 30-2-313; Neb. Rev. Stat. § 2-313; Nev. Rev. Stat.
28 Ann. § 104.2313; RSA 382-A:2-313; N.J. Stat. Ann. § 12A:2-313; N.M. Stat. Ann. §

1 55-2-313; N.Y. U.C.C. Law § 2-313; N.D. Cent. Code § 41-02-30; ORC Ann. §
2 1302.26; 12A Okl. St. § 2-313; Or. Rev. Stat. § 72-3130; 13 Pa.C.S. § 2313; R.I. Gen.
3 Laws section 6A-2-313; S.C. Code Ann. § 36-2-313; S.D. Codified Laws, § 57A-2-
4 313; Tenn. Code Ann. § 47-2-313; Tex. Bus. & Com. Code § 2.313; Utah Code Ann.
5 § 70A-2-313; 9A V.S.A. § 2-313; Va. Code Ann. § 59.1-504.2; Wash. Rev. Code
6 Ann. § 62A.2-313; W. Va. Code § 46-2-313; Wyo. Stat. § 34.1-2-313.

7 121. As a result of Defendant's breaches of express warranty, Plaintiff and
8 the Class members were damaged in the amount of the premium price they paid for
9 the Product, in amounts to be proven at trial.

10 122. On June 15, 2021, Plaintiff, on behalf of himself and Class members sent
11 a notice and demand letter to Defendant providing notice of Defendant's breach and
12 demanded that Defendant correct, repair, replace, or otherwise rectify the breach
13 complained of herein. Defendant received the notice and demand letter on June 16,
14 2021.

15 **SIXTH CLAIM FOR RELIEF**
16 **IN THE ALTERNATIVE, UNJUST ENRICHMENT**
17 *(On behalf of the Nationwide Class, or in the alternative, the California Class and*
18 *the North Carolina Class)*

18 123. Plaintiff realleges and incorporates Paragraphs 1-69.

19 124. To the extent the Court finds that Plaintiff and the members of the
20 Classes did not form a contract with Defendant at the time they purchased the Product,
21 Plaintiff brings this claim for unjust enrichment in the alternative, individually and on
22 behalf of the Nationwide Class, or in the alternative, the California Class and the
23 North Carolina Class.

24 125. Plaintiff and Class members purchased Defendant's Product and paid a
25 premium for the Product. The Product misrepresented or omitted the true age of the
26 Product, which commanded a price premium.

27 126. Defendant had knowledge of such benefit and obtained the benefit by its
28 misrepresentations and omissions because those misrepresentations and omissions

1 induced reasonable consumers to purchase the Product they would not otherwise have
2 purchased or purchased at the advertised price.

3 127. Defendant appreciated this benefit and knowingly accepted it at the
4 expense of, and to the detriment of, Plaintiff and Class members. Defendant currently
5 retains this benefit.

6 128. Defendant's acceptance and retention of the benefits is inequitable and
7 unjust because the benefit was obtained by Defendant's misconduct detailed at length
8 in this Complaint.

9 129. Equity cannot in good conscience permit Defendant to be economically
10 enriched for such action at the expense of Plaintiff and Class members, and therefore
11 restitution and/or disgorgement of such economic enrichment is required.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiff, individually and on behalf of other members of the
14 proposed Class(es), respectfully requests that the Court enter judgment in Plaintiff's
15 favor and against Defendant as follows:

- 16 a. Declaring that this action is a proper class action, certifying the Classes
17 as requested herein, designating Plaintiff as Class Representative and
18 appointing the undersigned counsel as Class Counsel;
- 19 b. a declaration or declaratory judgment that Defendant's conduct has
20 violated and continues to violate the statutes cited herein;
- 21 c. an order enjoining Defendant to refrain from the acts and practices cited
22 herein and to undertake an immediate public information campaign to
23 inform members of the Classes as to its prior practices;
- 24 d. an order requiring imposition of a constructive trust and and/or
25 disgorgement of Defendant's ill-gotten gains and to pay restitution to
26 Plaintiff and members of the Classes to restore all funds acquired by
27 means of any act or practice declared by this Court to be an unlawful,
28 fraudulent or unfair business act or practice;

- 1 e. an award of damages, including all available statutory and punitive
- 2 damages, pursuant to the statutes and the causes of action pled herein;
- 3 f. distribution of any monies recovered on behalf of members of the Class
- 4 via fluid recovery or *cy pres* recovery where necessary and applicable,
- 5 to prevent Defendant from retaining the benefit of its wrongful conduct;
- 6 g. an award of all recoverable costs and expenses, including reasonable fees
- 7 for Plaintiff’s attorneys; and
- 8 h. an award of pre- and post-judgment interest to Plaintiff and members
- 9 each of the Classes if applicable; and, ordering further relief as this Court
- 10 deems just and proper.

11 **JURY DEMAND**

12 Plaintiff and members of the Class demand a jury trial on all issues so triable.

13
14 DATED: September 9, 2021

Respectfully submitted,

15 *s/Benjamin Heikali*

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28 *Classes*

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* *Pro Hac Vice* Forthcoming

CLRA Venue Declaration Pursuant to California Civil Code Section 1780(d)

I, Perry Michael Fischer, declare as follows:

1. I am the named Plaintiff in this action and a citizen of the State of Washington. I have personal knowledge of the facts stated herein and, if called as a witness, I could testify competently thereto.

2. This Class Action Complaint is filed in the proper place of trial because I purchased the challenged Product in this District.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, executed on
9/8/2021 | 4:32 PM PDT
_____, in Seattle, Washington.

DocuSigned by:
Perry Michael Fischer
AZCE340CCE8F427

Perry Michael Fischer