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

Ann Kenney, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

FRUIT OF THE EARTH, INC., CVS
PHARMACY, INC.,

Defendants.

Case No.: **'21CV1016 JLS MSB**

CLASS ACTION COMPLAINT

1. Violation of Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200, *et seq.*)
2. Violation of False Advertising Law (Cal. Bus. & Prof. Code §§ 17500, *et seq.*)
3. Violation of Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750, *et seq.*)
4. Breach of Warranty
5. Unjust Enrichment

JURY TRIAL DEMANDED

TABLE OF CONTENTS**Page No.**

COMPLAINT.....	1
NATURE OF THE ACTION.....	1
JURISDICTION.....	3
VENUE	3
PARTIES.....	4
A. Plaintiff.....	4
B. Defendants.....	5
FACTUAL ALLEGATIONS.....	6
A. Background	6
B. The Products' Misleading and Deceptive Labeling.....	9
C. Plaintiff and Reasonable Consumers Were Misled by the Products	12
D. The Products Are Substantially Similar.....	13
E. No Adequate Remedy at Law	14
CLASS ACTION ALLEGATIONS	18
COUNT ONE	
Violation of California Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200, et seq.).....	21
A. "Unfair" Prong.....	24
B. "Fraudulent" Prong.....	26
C. "Unlawful" Prong	27
COUNT TWO	
Violation of California False Advertising Law (Cal. Bus. & Prof. Code §§ 17500, et seq.).....	29
COUNT THREE	
Violation of California Consumers Legal Remedies Act Cal. Civ. Code §§ 1750, et seq.).....	31

1 COUNT FOUR

2 Breach of Express Warranty.....34

3 COUNT FIVE

4 Unjust Enrichment/Restitution36

5 PRAYER FOR RELIEF.....38

6 DEMAND FOR JURY TRIAL.....39

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COMPLAINT

1. **Plaintiff** Ann Kenney (“**Plaintiff**”), individually and on behalf of all others similarly situated, as more fully described herein (the “**Class**” and “**Class Members**”), brings this class action against Fruit of the Earth, Inc. and CVS Pharmacy, Inc. (“**Defendants**”), and alleges the following upon information and belief, unless otherwise expressly stated as based upon personal knowledge:

NATURE OF THE ACTION

2. **Synopsis.** To obtain an unfair competitive advantage in the billion-dollar sunscreen market, Defendants are exposing consumers to harmful chemical active ingredients hidden in their sunscreens by fraudulently passing them off as safe mineral active ingredients. Defendants have reaped many millions of dollars through this fraudulent scheme based on a calculated business decision to put profits over people. Specifically, Defendants falsely and misleadingly label certain of their Sunscreen Products as “Clear Zinc Sun Lotion” (hereinafter, “**Zinc Representation**,” “**False Advertising Claim**,” and/or “**Challenged Representation**”). Examples of the Challenged Representation are depicted below.





3. The Challenged Representation has misled reasonable consumers, including Plaintiff, into believing that the Products contain only zinc oxide (“zinc”) mineral active ingredients. However, contrary to the labeling, the Products do not contain only zinc mineral active ingredients (described in detail *infra*). Rather, the Products consist of ***nearly equal*** zinc mineral active ingredients and chemical active ingredients: specifically, 5% zinc mineral active ingredients and 4% chemical active ingredients (octocrylene). Through falsely, misleadingly, and deceptively labeling the Products, Defendants sought to take advantage of consumers’ desire for mineral

1 sunscreens, while reaping the financial benefits of using less desirable and less costly
 2 chemical active ingredients in the Products. Defendants have done so at the expense
 3 of unwitting consumers, as well as Defendants' lawfully acting competitors, over
 4 whom Defendants maintain an unfair competitive advantage.

5 4. **The Products.** The falsely labeled CVS Health products at issue are the
 6 CVS Health Clear Zinc Sun Lotion in 2.0 fluid oz. and the CVS Health Clear Zinc
 7 Lotion in 4.0 fluid oz. (the "**Products**").

8 5. **Primary Objective.** Plaintiff brings this action individually and on behalf
 9 of those similarly situated to represent a National Class and a California Subclass of
 10 consumers who purchased the Products (defined *infra*). Plaintiff seeks damages,
 11 restitution, and disgorgement of the Products' purchase price and Defendants' ill-
 12 gotten gains, as consistent with permissible law. Plaintiff further seeks injunctive
 13 relief to stop Defendants' unlawful labeling and advertising of the Products and to
 14 dispel the public's misconception caused by the Challenged Representation, as
 15 Plaintiff's primary litigation objective is to enjoin Defendants' unlawful labeling
 16 practices for the benefit of consumers, including the National Class and California
 17 Class.

18 **JURISDICTION**

19 6. This Court has original jurisdiction over this action pursuant to the Class
 20 Action Fairness Act of 2005, 28 U.S.C. § 1332(d), because the proposed Class
 21 consists of 100 or more members; the amount in controversy exceeds \$5,000,000,
 22 exclusive of costs and interest; and minimal diversity exists. This Court also has
 23 supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

24 **VENUE**

25 7. Venue is proper in this District under 28 U.S.C. § 1391 because a
 26 substantial part of the events and omissions giving rise to Plaintiff's claims occurred
 27 in this District. In addition, Plaintiff purchased the unlawful Products in this District,
 28 and Defendants have marketed, advertised, and sold the Products within this District.

PARTIES

A. Plaintiff

8. **Plaintiff Ann Kenney (“Plaintiff”).** The following is alleged based upon personal knowledge: (1) Plaintiff is a resident of San Diego, California. (2) Plaintiff purchased the CVS Health Clear Zinc Sun Lotion in 2.0 fluid oz. for approximately \$4.00 at a CVS store in Vista, California in the summer of 2019. (3) In making the purchase, Plaintiff relied on the Zinc Representation stated on the Product’s label. (4) At the time of purchase, Plaintiff did not know that this Representation was false, and she believed she was purchasing a sunscreen product with only zinc mineral active ingredients, and without any chemical active ingredients. (5) Plaintiff would not have purchased the Product had she known that the Product contained chemical active ingredients in addition to zinc mineral active ingredients. (6) Plaintiff continues to see the Products available for purchase and desires to purchase them again if the Zinc Representation were in fact true. (7) Plaintiff is, and continues to be, unable to rely on the truth of the Zinc Representation. (8) The Product purchased by Plaintiff is typical of the Products purchased by members of the Class.

9. **Plaintiff’s Future Harm.** If the Products indeed contained only zinc mineral active ingredients as labeled and advertised, Plaintiff would purchase the Products again in the future, despite the fact that the Products were once marred by false advertising or labeling. Therefore, Plaintiff would reasonably, but incorrectly, assume the Products were improved. In that regard, Plaintiff is an average consumer who is not sophisticated in the chemistry or formulations of mineral-based and chemical-based sunscreen products, such as the Products. Accordingly, Plaintiff is at risk of reasonably, but incorrectly, assuming that Defendants fixed the formulation of the Products such that Plaintiff may buy them again, believing they were no longer falsely advertised and labeled.

///

1 **B. Defendants**

2 10. **Defendant Fruit of the Earth, Inc. (“FOTE”)** is a company
3 headquartered in Texas, with its primary place of business in Grand Prairie, Texas,
4 and was doing business in the state of California during all relevant times. Directly
5 and through its agents, Defendant FOTE has substantial contacts with and receives
6 substantial benefits and income from and through the State of California. Defendant
7 FOTE is one of the owners, manufacturers, and/or distributors of the Products, and is
8 one of the companies that created and/or authorized the false, misleading, and
9 deceptive labeling of the Products. Defendant FOTE and its agents promoted,
10 marketed and sold the Products at issue in this jurisdiction and in this judicial district.
11 The unfair, unlawful, deceptive, and misleading False Advertising Claims on the
12 Products were prepared, authorized, ratified, and/or approved by Defendant FOTE
13 and its agents, and were disseminated throughout California and the nation by
14 Defendant FOTE and its agents to deceive and mislead consumers into purchasing
15 the Products.

16 11. **Defendant CVS Pharmacy, Inc (“CVS”)** is a company organized under
17 the laws of Rhode Island, with its principal place of business in Woonsocket, Rhode
18 Island, and was doing business in the state of California during all relevant times.
19 Directly and through its agents, Defendant CVS has substantial contacts with and
20 receives substantial benefits and income from and through the State of California.
21 Defendant CVS is one of the owners, manufacturers, and/or distributors of the
22 Products, and is one of the companies that created and/or authorized the false,
23 misleading, and deceptive labeling of the Products. Defendant CVS and its agents
24 promoted, marketed and sold the Products at issue in this jurisdiction and in this
25 judicial district. The unfair, unlawful, deceptive, and misleading False Advertising
26 Claims on the Products were prepared, authorized, ratified, and/or approved by
27 Defendant CVS and its agents, and were disseminated throughout California and the
28 nation by Defendant CVS and its agents to deceive and mislead consumers into

1 purchasing the Products.

2 **FACTUAL ALLEGATIONS**

3 **A. Background**

4 12. **Background.** There are two types of sunscreen products: chemical-based
5 and mineral-based. Chemical-based sunscreens contain various synthetic, chemically
6 active ingredients, such as octisalate, octocrylene, and octinoxate, which protect the
7 skin by absorbing ultraviolet (“UV”) radiation and dissipating it as heat.¹ Conversely,
8 mineral-based sunscreens use mineral active ingredients, such as zinc oxide and/or
9 titanium dioxide, which cover the skin and act as a physical barrier, deflecting and
10 scattering UV radiation.² In recent years, consumers have become increasingly
11 concerned about using chemical-based sunscreens because chemical active
12 ingredients have been shown to have adverse health effects, including endocrine
13 disruption, skin irritation, allergic reactions, and causing the production of dangerous
14 free radicals.³ One reason for such deleterious consequences is that chemical active
15 ingredients in sunscreen can penetrate a person’s skin and enter the bloodstream.⁴

16 13. **The EWG.** The Environmental Working Group (“EWG”) is a nonprofit
17 organization that specializes in research and advocacy in a number of areas including
18 sunscreens and their ingredients. Regarding certain chemical active ingredients used

19
20 ¹ See Ruszkiewicz, et al., “Neurotoxic effect of active ingredients in sunscreen
21 products, a contemporary review,” *Toxicol Rep.* (May 2017),
22 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5615097/> (last visited on March 3,
23 2021); Baker, et. al., “Ultrafast photoprotective properties of the suncreening agent
24 octocrylene,” *Optics Express*, (2016),
25 <https://www.osapublishing.org/oe/fulltext.cfm?uri=oe-24-10-10700&id=340506>
26 (last visited on March 3, 2021). “Active” ingredients are those that produce the
27 desired or intended result. In the case of sunscreens, they are ingredients that protect
28 the skin from harmful UV radiation. *Id.*

² Ruszkiewicz, et al., “Neurotoxic effect of active ingredients in sunscreen products,
a contemporary review,” *Toxicol Rep.* (May 2017),
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5615097/> (last visited on March 3,
2021).

³ EWG’s Guide to Sunscreens, <https://www.ewg.org/sunscreen/report/the-trouble-with-sunscreen-chemicals/> (last visited on April 30, 2021).

⁴ *Id.*

1 in sunscreens, EWG reports:

2 Several common chemical filters appear to be endocrine
3 disruptors. Many studies in animals and cells have shown that
4 the chemicals affect reproduction and development by altering
5 reproductive and thyroid hormones, although the evidence is
6 mixed for some studies (Krause 2012). Animal studies report
7 lower sperm counts and sperm abnormalities after oxybenzone
8 and octinoxate exposure; delayed puberty after octinoxate
9 exposure; and altered estrous cycling for female mice exposed to
10 oxybenzone. Recently, Danish researchers reported that eight of
11 13 chemical sunscreen ingredients allowed in the U.S. affected
12 calcium signaling of male sperm cells in laboratory tests, which
13 the researchers suggest could reduce male fertility (Endocrine
14 Society 2016).⁵

15 According to the [FDA], “nearly all of these sunscreen active
16 ingredients...have limited or no data characterizing their
17 absorption.” In 2019 and 2020, FDA published two studies
18 showing that the ingredients oxybenzone, octinoxate, octisalate,
19 octocrylene, homosalate and avobenzone are all systemically
20 absorbed into the body after a single use (Matta 2019, Matta
21 2020). The FDA also found that the sunscreen ingredients could
22 be detected on the skin and in blood weeks after application
23 ended (Matta 2020).

24 These findings are troubling, because they show that sunscreen
25 chemicals are circulating in the blood, and the FDA has indicated
26 that the agency does not have enough information to determine
27 whether the chemicals are causing harm.⁶

28 14. **Hawaii Legislature.** In fact, state lawmakers in Hawaii recently banned
two chemical active sunscreen ingredients. In explaining its decision to ban those
ingredients, the Hawaii legislature stated:

Oxybenzone and octinoxate cause mortality in developing coral;
increase coral bleaching that indicates extreme stress, even at
temperatures below 87.8 degrees Fahrenheit; and cause genetic
damage to coral and other marine organisms. These chemicals
have also been shown to degrade corals’ resiliency and ability to
adjust to climate change factors and inhibit recruitment of new
corals. Furthermore, oxybenzone and octinoxate appear to
increase the probability of endocrine disruption. Scientific
studies show that both chemicals can induce feminization in
adult male fish and increase reproductive diseases in marine
invertebrate species (e.g., sea urchins), vertebrate species (e.g.,
fish such as wrasses, eels, and parrotfish), and mammals (in
species similar to the Hawaiian monk seal). The chemicals also
induce deformities in the embryonic development of fish, sea

⁵ *Id.*

⁶ *Id.*

urchins, coral, and shrimp and induce neurological behavioral changes in fish that threaten the continuity of fish populations. In addition, species that are listed on the federal Endangered Species Act and inhabit Hawaii's waters, including sea turtle species, marine mammals, and migratory birds, may be exposed to oxybenzone and octinoxate contamination.⁷

15. **Worldwide Bans.** In June 2019, the US Virgin Islands banned sunscreens containing octocrylene, oxybenzone, and octinoxate, with the ban effective beginning March 2020.⁸ In addition, Palau, Bonaire, and the nature reserve areas in Mexico have approved legislation for similar bans, and a similar ban is being discussed in Brazil and the EU.⁹

16. **FDA.** In addition, in February 2019, the U.S. Food and Drug Administration issued a proposed rule that would update regulatory requirements for most sunscreen products in the United States.¹⁰ In fashioning the proposed rule, the FDA determined that for 12 of the 16 currently marketed active ingredients in sunscreens, including octisalate, octocrylene, and octinoxate, there is insufficient safety data to make a positive GRASE [Generally Recognized As Safe and Effective] determination, which is a designation that the FDA gives a substance when qualified experts consider it generally safe for its intended use.¹¹ And all 12 of these questionable ingredients are *chemical* active ingredients.¹² The FDA further noted that “[a] number of these [chemical] active ingredients have also shown hormonal

⁷ “Hawaii Senate Bill 2571,” LegiScan, <https://legiscan.com/HI/text/SB2571/2018> (last visited on Feb 3, 2021).

⁸ Narla, et. al., “Sunscreen: FDA regulation, and environmental and health impact,” Royal Society of Chemistry, (November 22, 2019), <https://pubs.rsc.org/en/content/articlehtml/2019/pp/c9pp00366e> (last visited on Feb 3, 2021).

⁹ *Id.*

¹⁰ Federal Register, “Sunscreen Drug Products for Over-the-Counter Human Use,” (Feb 26, 2019), <https://www.federalregister.gov/documents/2019/02/26/2019-03019/sunscreen-drug-products-for-over-the-counter-human-use> (last visited on March 3, 2021); FDA, “FDA advances new proposed regulation to make sure that sunscreens are safe and effective,” (Feb 21, 2019), <https://www.fda.gov/news-events/press-announcements/fda-advances-new-proposed-regulation-make-sure-sunscreens-are-safe-and-effective> (last visited on March 3, 2021).

¹¹ *Id.*

¹² *Id.*

1 effects in mammalian assays (homosalate (Refs. 86 to 92)) and padimate O (64 FR
2 27666 at 27671) and in in vitro and in vivo assays (homosalate (Refs. 86 to 92),
3 octinoxate (Refs. 93 and 94), and octocrylene (Ref. 95)).”¹³

4 17. On the other hand, according to the FDA, the only two active ingredients
5 for which there exists sufficient information to make a positive GRASE determination
6 were zinc oxide and titanium dioxide—the only two active ingredients used in
7 sunscreens that are of mineral composition, rather than chemical composition.¹⁴

8 18. **Consumers’ Desire for Mineral Sunscreens.** Consequently, because of
9 concerns about chemical-based sunscreens, consumers have increasingly sought out
10 sunscreens that contain only mineral active ingredients, such as zinc, because they
11 reasonably believe that mineral sunscreens do not contain any chemical active
12 ingredients, such as octocrylene. As a result, sales of mineral-based sunscreens have
13 surged in recent years.

14 **B. The Products’ Misleading and Deceptive Labeling**

15 19. **Products.** As described *supra*, Defendants manufacture, market,
16 advertise, label, and sell the CVS Health Clear Zinc Sun Lotion in 2 fluid oz. and the
17 CVS Health Clear Zinc Lotion in 4 fluid oz.

18 20. **Challenged Representations on Products’ Front Labels.** Also as
19 described *supra*, Defendants falsely and misleadingly label the Products with the Zinc
20 Representation in an eye-catching large font. True and correct images of the Products
21 are as follows:

22 ///

23 ///

24 ///

26 ¹³ Federal Register, “Sunscreen Drug Products for Over-the-Counter Human Use,”
27 (Feb 26, 2019), <https://www.federalregister.gov/documents/2019/02/26/2019-03019/sunscreen-drug-products-for-over-the-counter-human-use> (last visited on
28 March 3, 2021).

¹⁴ *Id.*

CVS Health Clear Zinc Sun Lotion in 2 fluid oz.



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CVS Health Clear Zinc Lotion in 4 fluid oz.



21. **Consumers’ Reasonably Rely on the Zinc Representation.** Based on the Zinc Representation, reasonable consumers believe the Products only contain zinc mineral active ingredients. Put differently, reasonable consumers do not believe the Products contain any chemical active ingredients. This understanding is further reinforced by the fact that nearly all sunscreens on the market that are advertised as a “Zinc” sunscreen contain *only* zinc mineral active ingredients—including other sunscreens sold by Defendant CVS. *See* CVS Zinc Face Sheer Lotion.¹⁵ *See also* Neutrogena SheerZinc Sunscreen¹⁶; Kinship Probiotic Moisturizing Sunscreen Zinc Oxide¹⁷; Kokua Sun Care Hawaiian Natural Zinc Sunscreen¹⁸; and Ethical Zinc Natural Clear Zinc Sunscreen.¹⁹

22. **Active Ingredients Contained in the Products.** However, in spite of the labeling, the Products contain 5% zinc oxide and 4% octocrylene, a chemical active ingredient.

23. **True Zinc-Based Products.** Furthermore, true zinc sunscreens do not contain any chemical active ingredients. Therefore, by using cheaper chemical active ingredients in lieu of mineral active ingredients, on information and belief, Defendants reduced their manufacturing costs and increased their profits.

C. Plaintiff and Reasonable Consumers Were Misled by the Products

24. **Misrepresentations.** Labeling the Products with the Zinc Representations when they contain nearly the same percentage of chemical active ingredients is wholly misleading and deceptive.

25. **Material.** The Zinc Representation was and is material to reasonable

¹⁵ *See* <https://www.cvs.com/shop/cvs-health-spf-50-zinc-face-sheer-lotion-2-oz-prodid-230303>.

¹⁶ *See* <https://www.neutrogena.com/products/sun/sheer-zinc-dry-touch-sunscreen-broad-spectrum-spf-50/6811080XX.html>.

¹⁷ *See* <https://lovekinship.com/products/self-reflect-zinc-oxide-mineral-sunscreen>.

¹⁸ *See* <https://www.kokuasuncare.com/collections/shop/products/kokua-sun-care-hawaiian-natural-zinc-sunscreen-spf-50-80-min-water-resistance-3-oz>.

¹⁹ *See* <https://ethicalzinc.com/products/ethical-zinc-spf50-natural-clear-zinc-sunscreen>.

1 consumers, including Plaintiff, in making the decision to purchase the Products.

2 26. **Reliance.** Plaintiff and reasonable consumers relied on the Zinc
3 Representation in deciding to purchase the Products.

4 27. **Consumers Lack Knowledge of Falsity.** At the time Plaintiff purchased
5 the Products, Plaintiff did not know, and had no reason to know, that the Products'
6 labeling and advertising were false, misleading, deceptive, and unlawful as set forth
7 herein.

8 28. **Misrepresentation/Omission.** The Zinc Representation materially
9 misrepresented that the Products contain only zinc mineral active ingredients, and no
10 chemical active ingredients.

11 29. **Defendants' Knowledge.** Defendants knew, or should have known, that
12 the Zinc Representation was false, misleading, deceptive, and unlawful, at the time
13 that it advertised the Products using the Zinc Representations, and Defendants
14 intentionally and deliberately used the Zinc Representations on the Products' labeling,
15 packaging, and advertising to cause Plaintiff and similarly situated consumers to buy
16 the Products.

17 30. **Detriment.** Plaintiff and similarly situated consumers would not have
18 purchased the Products if they had known the truth. Accordingly, based on
19 Defendants' material misrepresentations and omissions, reasonable consumers,
20 including Plaintiff, purchased the Products to their detriment.

21 **D. The Products Are Substantially Similar**

22 31. As described herein, Plaintiff purchased CVS Health Clear Zinc Sun
23 Lotion in 2.0 fluid oz. ("**Purchased Product**"). The additional Product, CVS Health
24 Clear Zinc Lotion in 4.0 fluid oz. ("**Unpurchased Product**"), is substantially similar
25 to the Purchased Product.

26 a. **Defendants.** All Products are manufactured, sold, marketed,
27 advertised, labeled, and packaged by Defendants.

28 b. **Brand.** All Products are sold under the CVS Health brand name.

- c. **Marketing Demographics.** All Products are marketed directly to consumers for personal use.
- d. **Purpose.** All Products are sunscreens.
- e. **Misrepresentations.** All Products contain the exact same Zinc Representation. In addition, all Products prominently display the exact same Zinc Representation on the front label, in the same prominent coloring and font.
- f. **Packaging.** All Products are packaged in similar packaging using a similar color scheme.
- g. **Other Representations.** All Products contain substantially the same additional claims on the Products' packaging and labeling, including the same representation regarding "Broad Spectrum SPF 50 Sunscreen," "UVA/UVB protection," "Water resistant (80 minutes)," "Goes on clear, non-greasy formula," and "Ideal for ears, nose & face."
- h. **Key Ingredients.** All Products contain the same percentage of zinc active ingredients and the same percentage of chemical active ingredients.
- i. **Misleading Effect.** The misleading effect of the Products' labels is the same for all Products.

E. No Adequate Remedy at Law

32. **No Adequate Remedy at Law.** Plaintiff and members of the Class are entitled to equitable relief as no adequate remedy at law exists.

- a. **Broader Statutes of Limitations.** The statutes of limitations for the causes of action pled herein vary. The limitations period is four years for claims brought under the UCL, which is one year longer than the statutes of limitations under the FAL and CLRA. In addition, the statutes of limitations vary for certain states' laws for breach of

warranty and unjust enrichment/restitution, between approximately 2 to 6 years. Thus, California Subclass members who purchased the Products more than 3 years prior to the filing of the complaint will be barred from recovery if equitable relief were not permitted under the UCL. Similarly, Nationwide Class members who purchased the Products prior to the furthest reach-back under the statute of limitations for breach of warranty, will be barred from recovery if equitable relief were not permitted for restitution/unjust enrichment.

b. **Broader Scope of Conduct.** In addition, the scope of actionable misconduct under the unfair prong of the UCL is broader than the other causes of action asserted herein. It includes, for example, Defendants' overall unfair marketing scheme to promote and brand the Products with the Challenged Representations, across a multitude of media platforms, including the Products' labels and packaging, over a long period of time, in order to gain an unfair advantage over competitor products and to take advantage of consumers' desire for products that comport with the Challenged Representations. The UCL also creates a cause of action for violations of law (such as statutory or regulatory requirements related to representations and omissions made on the type of products at issue). Thus, Plaintiff and Class members may be entitled to restitution under the UCL, while not entitled to damages under other causes of action asserted herein (e.g., the FAL requires actual or constructive knowledge of the falsity; the CLRA is limited to certain types of plaintiffs (an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes) and other statutorily enumerated conduct). Similarly, unjust enrichment/restitution is broader than breach of warranty. For example, in some states, breach of warranty may

1 require privity of contract or pre-lawsuit notice, which are not
2 typically required to establish unjust enrichment/restitution. Thus,
3 Plaintiff and Class members may be entitled to recover under unjust
4 enrichment/restitution, while not entitled to damages under breach of
5 warranty, because they purchased the products from third-party
6 retailers or provide adequate pre-lawsuit notice prior to the
7 commencement of this action.

8 **c. Injunctive Relief to Cease Misconduct and Dispel Misperception.**

9 Injunctive relief is appropriate on behalf of Plaintiff and members of
10 the Class because Defendants continue to misrepresent the Products
11 with the Challenged Representations. Injunctive relief is necessary to
12 prevent Defendants from continuing to engage in the unfair,
13 fraudulent, and/or unlawful conduct described herein and to prevent
14 future harm—none of which can be achieved through available legal
15 remedies (such as monetary damages to compensate past harm).
16 Further, injunctive relief, in the form of affirmative disclosures is
17 necessary to dispel the public misperception about the Products that
18 has resulted from years of Defendants’ unfair, fraudulent, and
19 unlawful marketing efforts. Such disclosures would include, but are
20 not limited to, publicly disseminated statements that the Products
21 Challenged Representations are not true and providing accurate
22 information about the Products’ true nature; and/or requiring
23 prominent qualifications and/or disclaimers on the Products’ front
24 label concerning the Products’ true nature. An injunction requiring
25 affirmative disclosures to dispel the public’s misperception, and
26 prevent the ongoing deception and repeat purchases based thereon, is
27 also not available through a legal remedy (such as monetary damages).
28 In addition, Plaintiff is unable at present to accurately quantify the

damages caused by Defendants' future harm, rendering injunctive relief all the more necessary. For example, because the court has not yet certified any class, the following remains unknown: the scope of the class, the identities of its members, their respective purchasing practices, prices of future Product sales, and quantities of future Product sales.

- d. **Public Injunction.** Further, because a "public injunction" is available under the UCL, damages will not adequately "benefit the general public" in a manner equivalent to an injunction.
- e. **California vs. Nationwide Class Claims.** Violation of the UCL, FAL, and CLRA are claims asserted on behalf of Plaintiff and the California Subclass against non-California Defendants, while breach of warranty and unjust enrichment/restitution are asserted on behalf of Plaintiff and the Nationwide Class. Dismissal of farther-reaching claims would bar recovery for non-California members of the Class.
- f. **Discovery Ongoing.** In addition, discovery—which has not yet been provided and/or completed—may reveal that the claims providing legal remedies are inadequate. At this time, forcing an election of remedies at the initial pleadings stage, in the absence of completed discovery regarding class certification and merits, is premature and likely to lead to subsequent, potentially belated, and hotly contested motions to amend the pleadings to add equitable remedies based on a lengthy historical recount of discovery and analysis of voluminous exhibits, transcripts, discovery responses, document productions, etc., as well as related motions to seal confidential information contained therein.

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CLASS ACTION ALLEGATIONS

33. **Class Definition.** Plaintiff brings this action as a class action pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3) on behalf of herself and all others similarly situated, and as members of the Classes defined as follows:

All residents of the United States who, within the applicable statute of limitations periods, purchased the Products (“**Nationwide Class**”); and

All residents of California who, within four years prior to the filing of this Complaint, purchased the Products (“**California Subclass**”).

(“Nationwide Class” and “California Subclass,” collectively, “**Class**”).

34. **Class Definitions Exclusions.** Excluded from the Class are: (i) Defendants, their assigns, successors, and legal representatives; (ii) any entities in which Defendants have controlling interests; (iii) federal, state, and/or local governments, including, but not limited to, their departments, agencies, divisions, bureaus, boards, sections, groups, counsels, and/or subdivisions; and (iv) any judicial officer presiding over this matter and person within the third degree of consanguinity to such judicial officer.

35. **Reservation of Rights to Amend the Class Definition.** Plaintiff reserves the right to amend or otherwise alter the class definitions presented to the Court at the appropriate time in response to facts learned through discovery, legal arguments advanced by Defendants, or otherwise.

36. **Numerosity:** Members of the Class are so numerous that joinder of all members is impracticable. Upon information and belief, the Nationwide Class consists of tens of thousands of purchasers (if not more) dispersed throughout the United States, and the California Subclass likewise consists of thousands of purchasers (if not more) dispersed throughout the State of California. Accordingly, it would be impracticable to join all members of the Class before the Court.

1 **37. Common Questions Predominate:** There are numerous and substantial
 2 questions of law or fact common to all members of the Class that predominate over
 3 any individual issues. Included within the common questions of law or fact are:

- 4 a. Whether Defendants engaged in unlawful, unfair or deceptive business
 5 practices by advertising and selling the Products;
- 6 b. Whether Defendants' conduct of advertising and selling the Products as
 7 containing only zinc active ingredients when they do not constitutes an
 8 unfair method of competition, or unfair or deceptive act or practice, in
 9 violation of Civil Code section 1750, *et seq.*;
- 10 c. Whether Defendants used deceptive representations in connection with
 11 the sale of the Products in violation of Civil Code section 1750, *et seq.*;
- 12 d. Whether Defendants represented that the Products have characteristics or
 13 quantities that they do not have in violation of Civil Code section 1750,
 14 *et seq.*;
- 15 e. Whether Defendants advertised the Products with intent not to sell them
 16 as advertised in violation of Civil Code section 1750, *et seq.*;
- 17 f. Whether Defendants' labeling and advertising of the Products are untrue
 18 or misleading in violation of Business and Professions Code section
 19 17500, *et seq.*;
- 20 g. Whether Defendants knew or by the exercise of reasonable care should
 21 have known their labeling and advertising was and is untrue or misleading
 22 in violation of Business and Professions Code section 17500, *et seq.*;
- 23 h. Whether Defendants' conduct is an unfair business practice within the
 24 meaning of Business and Professions Code section 17200, *et seq.*;
- 25 i. Whether Defendants' conduct is a fraudulent business practice within the
 26 meaning of Business and Professions Code section 17200, *et seq.*;
- 27 j. Whether Defendants' conduct is an unlawful business practice within the
 28 meaning of Business and Professions Code section 17200, *et seq.*;
- k. Whether Plaintiff and the Class paid more money for the Products than
 they actually received;
- l. How much more money Plaintiff and the Class paid for the Products than
 they actually received;
- m. Whether Defendants' conduct constitutes breach of express warranty;
- n. Whether Plaintiff and the Class are entitled to injunctive relief; and
- o. Whether Defendants were unjustly enriched by their unlawful conduct.

1 38. **Typicality:** Plaintiff's claims are typical of the claims of the Class
 2 Members she seeks to represent because Plaintiff, like the Class Members, purchased
 3 Defendants' misleading and deceptive Products. Defendants' unlawful, unfair and/or
 4 fraudulent actions concern the same business practices described herein irrespective
 5 of where they occurred or were experienced. Plaintiff and the Class sustained similar
 6 injuries arising out of Defendants' conduct. Plaintiff's and Class Members' claims
 7 arise from the same practices and course of conduct and are based on the same legal
 8 theories.

9 39. **Adequacy:** Plaintiff is an adequate representative of the Class she seeks
 10 to represent because her interests do not conflict with the interests of the Class
 11 Members Plaintiff seeks to represent. Plaintiff will fairly and adequately protect Class
 12 Members' interests and has retained counsel experienced and competent in the
 13 prosecution of complex class actions, including complex questions that arise in
 14 consumer protection litigation.

15 40. **Superiority and Substantial Benefit:** A class action is superior to other
 16 methods for the fair and efficient adjudication of this controversy, since individual
 17 joinder of all members of the Class is impracticable and no other group method of
 18 adjudication of all claims asserted herein is more efficient and manageable for at least
 19 the following reasons:

- 20 a. The claims presented in this case predominate over any questions of law
 21 or fact, if any exist at all, affecting any individual member of the Class;
- 22 b. Absent a Class, the members of the Class will continue to suffer damage
 23 and Defendants' unlawful conduct will continue without remedy while
 24 Defendants profit from and enjoy their ill-gotten gains;
- 25 c. Given the size of individual Class Members' claims, few, if any, Class
 26 Members could afford to or would seek legal redress individually for the
 27 wrongs Defendants committed against them, and absent Class Members
 28 have no substantial interest in individually controlling the prosecution of
 individual actions;
- d. When the liability of Defendants has been adjudicated, claims of all
 members of the Class can be administered efficiently and/or determined
 uniformly by the Court; and

e. This action presents no difficulty that would impede its management by the Court as a class action, which is the best available means by which Plaintiff and Class Members can seek redress for the harm caused to them by Defendants.

41. **Inconsistent Rulings.** Because Plaintiff seeks relief for all members of the Class, the prosecution of separate actions by individual members would create a risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for Defendants.

42. **Injunctive/Equitable Relief.** The prerequisites to maintaining a class action for injunctive or equitable relief pursuant to Fed. R. Civ. P. 23(b)(2) are met as Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole.

43. **Manageability.** Plaintiff and Plaintiff's counsel are unaware of any difficulties that are likely to be encountered in the management of this action that would preclude its maintenance as a class action.

COUNT ONE

Violation of California Unfair Competition Law

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

(On Behalf of the California Subclass)

44. **Incorporation by Reference.** Plaintiff re-alleges and incorporates by reference all allegations contained in this complaint, as though fully set forth herein.

45. **California Subclass.** This cause of action is brought pursuant to Business and Professions Code Section 17200, *et seq.*, on behalf of Plaintiff and a California Subclass who purchased the Products within the applicable statute of limitations.

46. **The UCL.** California Business & Professions Code, sections 17200, *et seq.* (the "UCL") prohibits unfair competition and provides, in pertinent part, that "unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising."

47. **False Advertising Claims.** Defendants, in their advertising and

packaging of the Products, made false and misleading statements and fraudulent omissions regarding the quality and characteristics of the Products—specifically, the Zinc Representation—despite the fact the Products contain chemical active ingredients. Such claims and omissions appear on the label and packaging of the Products, which are sold at retail stores, point-of-purchase displays, as well as Defendants’ official websites.

48. Defendants’ Deliberately False and Fraudulent Marketing Scheme.

Defendants do not have any reasonable basis for the claims about the Products made in Defendants’ advertising and on Defendants’ packaging or labeling because the Products contain chemical active ingredients. Defendants knew and know that the Products are not true zinc sunscreens, though Defendants intentionally advertised and marketed the Products to deceive reasonable consumers into believing that Products contain only zinc active ingredients.

49. False Advertising Claims Cause Purchase of Products.

Defendants’ labeling and advertising of the Products led to, and continues to lead to, reasonable consumers, including Plaintiff, believing that the Products are composed entirely of zinc active ingredients.

50. Injury in Fact.

Plaintiff and the California Subclass have suffered injury in fact and have lost money or property as a result of and in reliance upon Defendants’ False Advertising Claims—namely Plaintiff and the California Subclass lost the purchase price for the Products they bought from the Defendants.

51. Conduct Violates the UCL.

Defendants’ conduct, as alleged herein, constitutes unfair, unlawful, and fraudulent business practices pursuant to The UCL. The UCL prohibits unfair competition and provides, in pertinent part, that “unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising.” Cal. Bus & Prof. Code § 17200. In addition, Defendants’ use of various forms of advertising media to advertise, call attention to, or give publicity to the sale of goods or merchandise that

are not as represented in any manner constitutes unfair competition, unfair, deceptive, untrue or misleading advertising, and an unlawful business practice within the meaning of Business and Professions Code Sections 17200 and 17531, which advertisements have deceived and are likely to deceive the consuming public, in violation of Business and Professions Code Section 17200.

52. No Reasonably Available Alternatives/Legitimate Business Interests.

Defendants failed to avail themselves of reasonably available, lawful alternatives to further their legitimate business interests.

53. Business Practice.

All of the conduct alleged herein occurred and continues to occur in Defendants' business. Defendants' wrongful conduct is part of a pattern, practice and/or generalized course of conduct, which will continue on a daily basis until Defendants voluntarily alter their conduct or they are otherwise ordered to do so.

54. Injunction.

Pursuant to Business and Professions Code Sections 17203 and 17535, Plaintiff and the members of the California Subclass seek an order of this Court enjoining Defendants from continuing to engage, use, or employ their practice of labeling and advertising the sale and use of the Products. Likewise, Plaintiff and the members of the California Subclass seek an order requiring Defendants to disclose such misrepresentations, and to preclude Defendants' failure to disclose the existence and significance of said misrepresentations.

62. Causation/Damages.

As a direct and proximate result of Defendants' misconduct in violation of the UCL, Plaintiff and members of the California Subclass were harmed in the amount of the purchase price they paid for the Products. Further, Plaintiff and members of the Class have suffered and continue to suffer economic losses and other damages including, but not limited to, the amounts paid for the Products, and any interest that would have accrued on those monies, in an amount to be proven at trial. Accordingly, Plaintiff seeks a monetary award for violation of the UCL in damages, restitution, and/or disgorgement of ill-gotten gains to compensate

1 Plaintiff and the California Subclass for said monies, as well as injunctive relief to
2 enjoin Defendants' misconduct to prevent ongoing and future harm that will result.

3 **55. Punitive Damages.** Plaintiff seeks punitive damages pursuant to this
4 cause of action for violation of the UCL on behalf of Plaintiff and the applicable class.
5 Defendants' unfair, fraudulent, and unlawful conduct described herein constitutes
6 malicious, oppressive, and/or fraudulent conduct warranting an award of punitive
7 damages as permitted by law. Defendants' misconduct is malicious as Defendants
8 acted with the intent to cause Plaintiff and consumers to pay for Products that they
9 were not, in fact, receiving. Defendants' willfully and knowingly disregarded the
10 rights of Plaintiff and consumers as Defendants were, at all times, aware of the
11 probable dangerous consequences of their conduct and deliberately failed to
12 avoid misleading consumers, including Plaintiff. Defendants' misconduct is
13 oppressive as, at all relevant times, said conduct was so vile, base, and/or
14 contemptible that reasonable people would look down upon it and/or
15 otherwise would despise such corporate misconduct. Said misconduct subjected
16 Plaintiff and consumers to cruel and unjust hardship in knowing disregard of their
17 rights. Defendants' misconduct is fraudulent as Defendants intentionally
18 misrepresented and/or concealed material facts with the intent to deceive Plaintiff and
19 consumers. The wrongful conduct constituting malice, oppression, and/or fraud was
20 committed, authorized, adopted, approved, and/or ratified by officers, directors,
21 and/or managing agents of Defendants.

22 **A. "Unfair" Prong**

23 **56. Unfair Standard.** Under the UCL, a challenged activity is "unfair" when
24 "any injury it causes outweighs any benefits provided to consumers and the injury is
25 one that the consumers themselves could not reasonably avoid." *Camacho v. Auto*
26 *Club of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006).

27 **57. Injury.** Defendants' action of mislabeling the Products with the Zinc
28 Representation does not confer any benefit to consumers; rather, doing so causes

injuries to consumers, who do not receive products commensurate with their reasonable expectations, overpay for the Products, and receive Products of lesser standards than what they reasonably expected to receive. Consumers cannot avoid any of the injuries caused by Defendants’ deceptive labeling and advertising of the Products. Accordingly, the injuries caused by Defendants’ deceptive labeling and advertising outweigh any benefits.

58. **Balancing Test.** Some courts conduct a balancing test to decide if a challenged activity amounts to unfair conduct under California Business and Professions Code Section 17200. They “weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.” *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012).

59. **No Utility.** Here, Defendants’ conduct of labeling the Products with the Zinc Representation when the Products contain chemical active ingredients has no utility and financially harms purchasers. Thus, the utility of Defendants’ conduct is vastly outweighed by the gravity of harm.

60. **Legislative Declared Policy.** Some courts require that “unfairness must be tethered to some legislative declared policy or proof of some actual or threatened impact on competition.” *Lozano v. AT&T Wireless Servs. Inc.*, 504 F. 3d 718, 735 (9th Cir. 2007).

61. **Unfair Conduct.** Defendants’ labeling and advertising of the Products, as alleged herein, is false, deceptive, misleading, and unreasonable, and constitutes unfair conduct. Defendants knew or should have known of their unfair conduct. Defendants’ misrepresentations constitute an unfair business practice within the meaning of California Business and Professions Code Section 17200.

62. **Reasonably Available Alternatives.** There existed reasonably available alternatives to further Defendants’ legitimate business interests, other than the conduct described herein. Defendants could have refrained from labeling the Products with the Zinc Representation.

63. **Defendants' Wrongful Conduct.** All of the conduct alleged herein occurs and continues to occur in Defendants' business. Defendants' wrongful conduct is part of a pattern or generalized course of conduct repeated on thousands of occasions daily.

64. **Injunction.** Pursuant to Business and Professions Code Sections 17203, Plaintiff and the California Subclass seek an order of this Court enjoining Defendants from continuing to engage, use, or employ their practices of labeling the Products with the Zinc Representation.

65. **Causation/Damages.** Plaintiff and the California Subclass have suffered injury in fact and have lost money as a result of Defendants' unfair conduct. Plaintiff and the California Subclass paid an unwarranted premium for these Products. Specifically, Plaintiff and the California Subclass paid for Products that contain chemical active ingredients. Plaintiff and the California Subclass would not have purchased the Products, or would have paid substantially less for the Products, if they had known that the Products' advertising and labeling were deceptive. Accordingly, Plaintiff seeks damages, restitution and/or disgorgement of ill-gotten gains pursuant to the UCL.

B. "Fraudulent" Prong

66. **Fraud Standard.** The UCL considers conduct fraudulent (and prohibits said conduct) if it is likely to deceive members of the public. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992).

67. **Fraudulent & Material Challenged Representations.** Defendants used the Zinc Representation with the intent to sell the Products to consumers, including Plaintiff and the California Subclass. The Challenged Representation is false and Defendants knew or should have known of its falsity. The Challenged Representation is likely to deceive consumers into purchasing the Products because they are material to the average, ordinary, and reasonable consumer.

68. **Fraudulent Business Practice.** As alleged herein, the misrepresentations

1 by Defendants constitute a fraudulent business practice in violation of California
2 Business & Professions Code Section 17200.

3 69. **Reasonable and Detrimental Reliance.** Plaintiff and the California
4 Subclass reasonably and detrimentally relied on the material and false Challenged
5 Representations to their detriment in that they purchased the Products.

6 70. **Reasonably Available Alternatives.** Defendants had reasonably
7 available alternatives to further their legitimate business interests, other than the
8 conduct described herein. Defendants could have refrained from labeling the
9 Products with the Zinc Representation.

10 71. **Business Practice.** All of the conduct alleged herein occurs and continues
11 to occur in Defendants' business. Defendants' wrongful conduct is part of a pattern
12 or generalized course of conduct.

13 72. **Injunction.** Pursuant to Business and Professions Code Sections 17203,
14 Plaintiff and the California Subclass seek an order of this Court enjoining Defendants
15 from continuing to engage, use, or employ their practice of labeling the Products with
16 the Zinc Representation.

17 73. **Causation/Damages.** Plaintiff and the California Subclass have suffered
18 injury in fact and have lost money as a result of Defendants' fraudulent conduct.
19 Plaintiff paid an unwarranted premium for the Products. Specifically, Plaintiff and
20 the California Subclass paid for products that they believed contained only zinc active
21 ingredients, when, in fact, the Products also contained chemical active ingredients.
22 Plaintiff and the California Subclass would not have purchased the Products if they
23 had known the truth. Accordingly, Plaintiff seeks damages, restitution, and/or
24 disgorgement of ill-gotten gains pursuant to the UCL.

25 C. "Unlawful" Prong

26 74. **Unlawful Standard.** The UCL identifies violations of other laws as
27 "unlawful practices that the unfair competition law makes independently actionable."
28 *Velazquez v. GMAC Mortg. Corp.*, 605 F. Supp. 2d 1049, 1068 (C.D. Cal. 2008).

1 **75. Violations of CLRA and FAL.** Defendants' labeling of the Products, as
 2 alleged herein, violates California Civil Code sections 1750, *et seq.* (the **CLRA**) and
 3 California Business and Professions Code sections 17500, *et seq.* (the **FAL**) as set
 4 forth below in the sections regarding those causes of action.

5 **76. Additional Violations.** Defendants' conduct in making the
 6 representations described herein constitutes a knowing failure to adopt policies in
 7 accordance with and/or adherence to applicable laws, as set forth herein, all of which
 8 are binding upon and burdensome to their competitors. This conduct engenders an
 9 unfair competitive advantage for Defendants, thereby constituting an unfair,
 10 fraudulent and/or unlawful business practice under California Business & Professions
 11 Code sections 17200-17208. Additionally, Defendants' misrepresentations of
 12 material facts, as set forth herein, violate California Civil Code sections 1572, 1573,
 13 1709, 1710, 1711, and 1770, as well as the common law.

14 **77. Unlawful Conduct.** Defendants' packaging, labeling, and advertising of
 15 the Products, as alleged herein, are false, deceptive, misleading, and unreasonable,
 16 and constitute unlawful conduct. Defendants knew or should have known of their
 17 unlawful conduct.

18 **78. Reasonably Available Alternatives.** Defendants had reasonably
 19 available alternatives to further their legitimate business interests, other than the
 20 conduct described herein. Defendants could have refrained from labeling the
 21 Products with the Zinc Representation.

22 **79. Business Practice.** All of the conduct alleged herein occurs and continues
 23 to occur in Defendants' business. Defendants' wrongful conduct is part of a pattern
 24 or generalized course of conduct.

25 **80. Injunction.** Pursuant to Business and Professions Code Section 17203,
 26 Plaintiff and the California Subclass seek an order of this Court enjoining Defendants
 27 from continuing to engage, use, or employ their practice of false and deceptive
 28 advertising of the Products.

COUNT TWO

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

85. **Knowledge.** In making and disseminating the representations alleged herein, Defendants knew or should have known that the representations were untrue

1 or misleading, and acted in violation of § 17500.

2 86. **Intent to sell.** Defendants' Challenged Representations were specifically
3 designed to induce reasonable consumers, like Plaintiff and the California Subclass,
4 to purchase the Products.

5 87. **Causation/Damages.** As a direct and proximate result of Defendants'
6 misconduct in violation of the FAL, Plaintiff and members of the California Subclass
7 were harmed in the amount of the purchase price they paid for the Products. Further,
8 Plaintiff and members of the Class have suffered and continue to suffer economic
9 losses and other damages including, but not limited to, the amounts paid for the
10 Products, and any interest that would have accrued on those monies, in an amount to
11 be proven at trial. Accordingly, Plaintiff seeks a monetary award for violation of the
12 FAL in damages, restitution, and/or disgorgement of ill-gotten gains to compensate
13 Plaintiff and the California Subclass for said monies, as well as injunctive relief to
14 enjoin Defendants' misconduct to prevent ongoing and future harm that will result.

15 88. **Punitive Damages.** Defendants' unfair, fraudulent, and unlawful conduct
16 described herein constitutes malicious, oppressive, and/or fraudulent conduct
17 warranting an award of punitive damages as permitted by
18 law. Defendants' misconduct is malicious as Defendants acted with the intent to
19 cause Plaintiff and consumers to pay for Products that they were not, in fact,
20 receiving. Defendants willfully and knowingly disregarded the rights of Plaintiff and
21 consumers as Defendants were aware of the probable dangerous consequences
22 of their conduct and deliberately failed to avoid misleading consumers, including
23 Plaintiff. Defendants' misconduct is oppressive as, at all relevant times, said conduct
24 was so vile, base, and/or contemptible that reasonable people would look down upon
25 it and/or otherwise would despise such corporate misconduct. Said misconduct
26 subjected Plaintiff and consumers to cruel and unjust hardship in knowing disregard
27 of their rights. Defendants' misconduct is fraudulent as Defendants, at all relevant
28 times, intentionally misrepresented and/or concealed material facts with the intent to

1 deceive Plaintiff and consumers. The wrongful conduct constituting malice,
 2 oppression, and/or fraud was committed, authorized, adopted, approved, and/or
 3 ratified by officers, directors, and/or managing agents of Defendants.

4 **COUNT THREE**

5 **Violation of California Consumers Legal Remedies Act**

6 **(Cal. Civ. Code §§ 1750, *et seq.*)**

7 **(*On Behalf of the California Subclass*)**

8 89. **Incorporation by Reference.** Plaintiff re-alleges and incorporates by
 9 reference all allegations contained in this complaint, as though fully set forth herein.

10 90. **California Subclass.** Plaintiff brings this claim individually and on
 11 behalf of the California Subclass who purchased the Products within the applicable
 12 statute of limitations.

13 64. **CLRA Standard.** Plaintiff brings this action pursuant to California
 14 Consumers Legal Remedies Act (codified at Cal. Civ. Code §§ 1750, *et seq.*
 15 (“**CLRA**”). The CLRA provides that “unfair methods of competition and unfair or
 16 deceptive acts or practices undertaken by any person in a transaction intended to result
 17 or which results in the sale or lease of goods or services to any consumer are
 18 unlawful.”

19 91. **Goods/Services.** The Products are “goods,” as defined by the CLRA in
 20 California Civil Code §1761(a).

21 92. **Defendants.** Defendants are “people,” as defined by the CLRA in
 22 California Civil Code §1761(c).

23 93. **Consumers.** Plaintiff and members of the California Subclass are
 24 “consumers,” as defined by the CLRA in California Civil Code §1761(d).

25 94. **Transactions.** The purchase of the Products by Plaintiff and members of
 26 the California Subclass are “transactions” as defined by the CLRA under California
 27 Civil Code section 1761(e).

28 95. **Violations of the CLRA.** Defendants violated the following sections of

1 the CLRA by selling the Products to Plaintiff and the California Subclass through the
2 false, misleading, deceptive, and fraudulent Challenged Representations:

- 3 a. Section 1770(a)(5) by representing that the Products have
4 “characteristics, . . . uses [or] benefits . . . which [they] do not have”.
- 5 b. Section 1770(a)(7) by representing that the Products “are of a
6 particular standard, quality, or grade . . . [when] they are of another”.
- 7 c. Section 1770(a)(9) by advertising the Products “with [the] intent not
8 to sell them as advertised”.

9 96. **Knowledge.** Defendants’ uniform and material representations and
10 omissions regarding the Products were likely to deceive, and Defendants knew or
11 should have known that their representations and omissions were untrue and
12 misleading.

13 97. **Malicious.** Moreover, Defendants’ conduct is malicious, fraudulent, and
14 wanton in that Defendants intentionally misled and withheld material information
15 from consumers to increase the sale of the Products.

16 98. **Plaintiff Could Not Have Avoided Injury.** Plaintiff and members of the
17 California Subclass could not have reasonably avoided such injury. Plaintiff and
18 members of the California Subclass were unaware of the existence of the facts that
19 Defendants suppressed and failed to disclose; and Plaintiff and members of the
20 California Subclass would not have purchased the Products and/or would have
21 purchased them on different terms had they known the truth.

22 99. **Causation/Reliance/Materiality.** Plaintiff and the California Subclass
23 suffered harm as a result of Defendants’ violations of the CLRA because they relied
24 on the Challenged Representations in deciding to purchase the Products. The
25 Challenged Representations were a substantial factor. The Challenged
26 Representations were material because a reasonable consumer would consider them
27 important in deciding whether to purchase the Products.

28 100. **Punitive Damages.** Defendants’ unfair, fraudulent, and unlawful conduct

described herein constitutes malicious, oppressive, and/or fraudulent conduct warranting an award of punitive damages as permitted by law. Defendants' misconduct is malicious as Defendants acted with the intent to cause Plaintiff and a nation of consumers to pay for Products that they were not, in fact, receiving. Defendants willfully and knowingly disregarded the rights of Plaintiff and a nation of consumers as Defendants were, at all times, aware of the probable dangerous consequences of their conduct and deliberately failed to avoid misleading consumers, including Plaintiff. Defendants' misconduct is oppressive as, at all relevant times, said conduct was so vile, base, and/or contemptible that reasonable people would look down upon it and/or otherwise would despise such corporate misconduct. Said misconduct subjected Plaintiff and a nation of consumers to cruel and unjust hardship in knowing disregard of their rights. Defendants' misconduct is fraudulent as Defendants, at all relevant times, intentionally misrepresented and/or concealed material facts with the intent to deceive Plaintiff and a nation of consumers. The wrongful conduct constituting malice, oppression, and/or fraud was committed, authorized, adopted, approved, and/or ratified by officers, directors, and/or managing agents of Defendants.

101. **Section 1782 – Prelitigation Demand/Notice.** More than thirty days prior to the filing of this complaint, on March 24, 2020, Plaintiff's counsel, acting on behalf of Plaintiff and members of the Class, mailed a notice via U.S. certified mail to Defendants regarding their violations of the California Consumers Legal Remedies Act, pursuant to California Civil Code section 1782, which was delivered to Defendants on or about March 30, 2021. *See Exhibit 1* (CLRA Demand). The form, content, and delivery of the notice attached hereto as **Exhibit 1** satisfy subsections (1) and (2) of section 1782(a). The notice of violations and demand for remedial action, as of the filing of this complaint, did not result in adequate correction, repair, replacement, and/or other remedy by Defendants, including all remedial action set forth in **Exhibit 1** and as set forth under section 1782(c).

102. **Causation/Damages.** As a direct and proximate result of Defendants' misconduct in violation of the CLRA, Plaintiff and members of the California Subclass were harmed in the amount of the purchase price they paid for the Products. Further, Plaintiff and members of the Class have suffered and continue to suffer economic losses and other damages including, but not limited to, the amounts paid for the Products, and any interest that would have accrued on those monies, in an amount to be proven at trial. Accordingly, Plaintiff seeks a monetary award for violation of this Act in the form of damages, restitution, disgorgement of ill-gotten gains to compensate Plaintiff and the California Subclass for said monies.

103. **Injunction.** Given that Defendants' conduct violated California Civil Code section 1780, Plaintiff and members of the California Subclass are entitled to seek and seek injunctive relief to put an end to Defendants' violations of the CLRA. Plaintiff has no adequate remedy at law. Without equitable relief, Defendants' unfair and deceptive practices will continue to harm Plaintiff and the Class.

COUNT FOUR

Breach of Express Warranty

(On Behalf of the Nationwide Class and California Subclass)

104. **Incorporation by Reference.** Plaintiff re-alleges and incorporates by reference all allegations contained in this complaint, as though fully set forth herein.

105. **Nationwide Class & California Subclass.** Plaintiff brings this claim individually and on behalf of the Nationwide Class and California Subclass (the Class) who purchased the Products within the applicable statute of limitations.

106. **Express Warranty.** By advertising and selling the Products at issue, Defendants made promises and affirmations of fact on the Products' packaging and labeling, and through their marketing and advertising, as described herein. This labeling and advertising constitute express warranties and became part of the basis of the bargain between Plaintiff and members of the Class and Defendants. Defendants purport, through the Products' labeling and advertising, to create express warranties

1 that the Products are, among other things, true zinc sunscreens (that is, the Products
2 contain only zinc active ingredients and do not contain chemical active ingredients).

3 107. **Breach of Warranty.** Despite Defendants' express warranties about the
4 nature of the Products, the Products contain chemical active ingredients, and are
5 therefore not true zinc sunscreens. Thus, the Products are not what Defendants
6 represented them to be. Accordingly, Defendants breached express warranties about
7 the Products and their qualities because the Products do not conform to Defendants'
8 affirmations and promises.

9 108. **Causation/Damages.** As a direct and proximate result of Defendants'
10 breach of express warranty, Plaintiff and members of the Class were harmed in the
11 amount of the purchase price they paid for the Products. Further, Plaintiff and
12 members of the Class have suffered and continue to suffer economic losses and other
13 damages including, but not limited to, the amounts paid for the Products, and any
14 interest that would have accrued on those monies, in an amount to be proven at trial.
15 Accordingly, Plaintiff seeks a monetary award for breach of express warranty of
16 damages, restitution, and/or disgorgement of ill-gotten gains to compensate Plaintiff
17 and the Class for said monies, as well as injunctive relief to
18 enjoin Defendants' misconduct to prevent ongoing and future harm that will result.

19 109. **Punitive Damages.** Plaintiff seeks punitive damages pursuant to this
20 cause of action for breach of express warranty on behalf of Plaintiff and the applicable
21 class. Defendants' unfair, fraudulent, and unlawful conduct described herein
22 constitutes malicious, oppressive, and/or fraudulent conduct warranting an award of
23 punitive damages as permitted by law. Defendants' misconduct is malicious as
24 Defendants acted with the intent to cause Plaintiff and consumers to pay for Products
25 that they were not, in fact, receiving. Defendants willfully and knowingly
26 disregarded the rights of Plaintiff and consumers as Defendants were aware of the
27 probable dangerous consequences of their conduct and deliberately failed to avoid
28 misleading consumers, including Plaintiff. Defendants' misconduct is oppressive as,

at all relevant times, said conduct was so vile, base, and/or contemptible that reasonable people would look down upon it and/or otherwise would despise such corporate misconduct. Said misconduct subjected Plaintiff and consumers to cruel and unjust hardship in knowing disregard of their rights. Defendants' misconduct is fraudulent as Defendants, at all relevant times, intentionally misrepresented and/or concealed material facts with the intent to deceive Plaintiff and consumers. The wrongful conduct constituting malice, oppression, and/or fraud was committed, authorized, adopted, approved, and/or ratified by officers, directors, and/or managing agents of Defendants.

COUNT FIVE

Unjust Enrichment/Restitution

(On Behalf of the Nationwide Class and California Subclass)

110. **Incorporation by Reference.** Plaintiff re-alleges and incorporates by reference all allegations contained in this complaint, as though fully set forth herein.

111. **Nationwide Class.** Plaintiff brings this claim individually and on behalf of the Nationwide Class and California Subclass (the Class) who purchased the Products within the applicable statute of limitations.

112. **Plaintiff/Class Conferred a Benefit.** By purchasing the Products, Plaintiff and members of the Class conferred a benefit on Defendants in the form of the purchase price of the Products.

113. **Defendants' Knowledge of Conferred Benefit.** Defendants had knowledge of such benefit and Defendants appreciated the benefit because, were consumers not to purchase the Products, Defendants would not generate revenue from the sales of the Products.

114. **Defendants' Unjust Receipt Through Deception.** Defendants' knowing acceptance and retention of the benefit is inequitable and unjust because the benefit was obtained by Defendants' fraudulent, misleading, and deceptive representations and omissions.

1 **115. Causation/Damages.** As a direct and proximate result of Defendants’
2 unjust enrichment, Plaintiff and members of the Class were harmed in the amount of
3 the purchase price they paid for the Products. Further, Plaintiff and members of the
4 Class have suffered and continue to suffer economic losses and other damages
5 including, but not limited to, the amounts paid for the Products, and any interest that
6 would have accrued on those monies, in an amount to be proven at trial. Accordingly,
7 Plaintiff seeks a monetary award for unjust enrichment in damages, restitution, and/or
8 disgorgement of ill-gotten gains to compensate Plaintiff and the Class for said monies,
9 as well as injunctive relief to enjoin Defendants’ misconduct to prevent ongoing and
10 future harm that will result.

11 **116. Punitive Damages.** Plaintiff seeks punitive damages pursuant to this
12 cause of action for unjust enrichment on behalf of Plaintiff and the applicable class.
13 Defendants’ unfair, fraudulent, and unlawful conduct described herein constitutes
14 malicious, oppressive, and/or fraudulent conduct warranting an award of punitive
15 damages as permitted by law. Defendants’ misconduct is malicious as Defendants
16 acted with the intent to cause Plaintiff and consumers to pay for Products that they
17 were not, in fact, receiving. Defendants willfully and knowingly disregarded the
18 rights of Plaintiff and consumers as Defendants were aware of the probable dangerous
19 consequences of their conduct and deliberately failed to avoid misleading consumers,
20 including Plaintiff. Defendants’ misconduct is oppressive as, at all relevant times,
21 said conduct was so vile, base, and/or contemptible that reasonable people would look
22 down upon it and/or otherwise would despise such corporate misconduct. Said
23 misconduct subjected Plaintiff and consumers to cruel and unjust hardship in knowing
24 disregard of their rights. Defendants’ misconduct is fraudulent as Defendants, at all
25 relevant times, intentionally misrepresented and/or concealed material facts with the
26 intent to deceive Plaintiff and consumers. The wrongful conduct constituting malice,
27 oppression, and/or fraud was committed, authorized, adopted, approved, and/or
28 ratified by officers, directors, and/or managing agents of Defendants.

PRAYER FOR RELIEF

117. WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, prays for judgment against Defendants as follows:

- a. **Certification:** For an order certifying this action as a class action, appointing Plaintiff as the Class Representative, and appointing Plaintiff's Counsel as Class Counsel;
- b. **Declaratory Relief:** For an order declaring that Defendants' conduct violates the statutes and laws referenced herein;
- c. **Injunction:** For an order requiring Defendants to immediately cease and desist from selling the unlawful Products in violation of law; enjoining Defendants from continuing to market, advertise, distribute, and sell the Products in the unlawful manner described herein; requiring Defendants to engage in an affirmative advertising campaign to dispel the public misperception of the Products resulting from Defendants' unlawful conduct; and requiring all further and just corrective action;
- d. **Damages/Restitution/Disgorgement:** For an order awarding monetary compensation in the form of damages, restitution, and/or disgorgement to Plaintiff and the Class;
- e. **Punitive Damages:** For an order awarding punitive damages;
- f. **Attorneys' Fees & Costs:** For an order awarding attorneys' fees and costs;
- g. **Pre/Post-Judgment Interest:** For an order awarding pre-judgment and post-judgment interest; and
- h. **All Just & Proper Relief:** For such other and further relief as the Court deems just and proper.

Dated: May 27, 2021

Respectfully submitted,

CLARKSON LAW FIRM

By:

/s/ Katherine Bruce
 RYAN J. CLARKSON
 SHIREEN M. CLARKSON
 KATHERINE BRUCE

MOON LAW APC

By:

/s/ Christopher D. Moon
 CHRISTOPHER D. MOON
 KEVIN O. MOON

Attorneys for Plaintiff(s)

DEMAND FOR JURY TRIAL

Plaintiff(s) hereby demand(s) a trial by jury on all issues and causes of action so triable.

Dated: May 27, 2021

Respectfully submitted,

CLARKSON LAW FIRM

By:

/s/ Katherine Bruce

RYAN J. CLARKSON

SHIREEN M. CLARKSON

KATHERINE BRUCE

MOON LAW APC

By:

/s/ Christopher D. Moon

CHRISTOPHER D. MOON

KEVIN O. MOON

Attorneys for Plaintiff(s)

CLARKSON LAW FIRM, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Ann Kenney

(b) County of Residence of First Listed Plaintiff San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Katherine Bruce, Clarkson Law Firm, P.C., 9255 Sunset
Blvd., Suite 804, Los Angeles, CA (213) 788-4050

DEFENDANTS

Fruit of the Earth, Inc.; and CVS Pharmacy, Inc.

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

'21CV1016 JLS MSB**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract fth <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 INTELLECTUAL PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 898 Other Statutory Actions fth <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Class Action Fairness Act, 28 U.S.C. § 1332(d)

Brief description of cause:

Violations of Unfair Competition Law, False Advertising Law, Consumers Legal Remedies Act, Breach of Warranty, Unjust Enrichment

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE

SIGNATURE OF ATTORNEY OF RECORD

05/27/2021

/s/ Katherine Bruce

FOR OFFICE USE ONLY

RECEIPT # _____

AMOUNT _____

APPLYING IFP _____

JUDGE _____

MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
 - (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
- Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
- PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

Exhibit 1

Ann Kenney v. Fruit of the Earth, Inc

Class Action Complaint

CLRA Demand Letter dated March 24, 2020



Experience. Integrity. Justice.

Celine Cohan, Esq.
Senior Associate Attorney

Clarkson Law Firm, P.C.
9255 Sunset Ave., Ste. 804
Los Angeles, CA 90069
(213) 788-4050 (Main)
(213) 788-4041 (Direct)
(213) 788-4070 (Fax)
(855) 876-1300 (Toll-Free)
www.clarksonlawfirm.com
ccohan@clarksonlawfirm.com

March 24, 2020

VIA U.S. CERTIFIED MAIL RETURN RECEIPT REQUESTED

CVS Pharmacy, Inc.
Attn: Carol A. Denale, President
1 CVS Dr.
Woonsocket, RI 02895

CT Corporation System
Re: CVS Pharmacy, Inc.
450 Veterans Memorial Pkwy., Ste. 7A
East Providence, RI 02914

Re: CVS Clear Zinc Lotion California Litigation

To Whom It May Concern:

On behalf of Ms. Ann Kenney (“Plaintiff”) and all others similarly situated,¹ this letter is to notify CVS Pharmacy, Inc. (“Defendant”) that it has violated the California Consumers Legal Remedies Act (“CLRA”) by employing or committing methods, acts, or practices declared unlawful by California Civil Code Section 1770. Pursuant to California Civil Code Section 1782(a), after thirty (30) days from the date of this notice, Plaintiff shall initiate an action against Defendant in the United States Central District Court, for injunctive relief and restitution damages. *See* Cal. Civ. Code § 1782(a)-(b). Further, this letter establishes a limited time period during which informal settlement of Plaintiff and the Class’ claims may be accomplished. *Outboard Marine Corp v. Sup. Ct.*, 52 Cal. App. 3d 30, 41 (1975).

The unlawful acts committed by Defendant, in violation of the CLRA, include deceptive labeling and advertising of the CVS Health Clear Zinc Lotion Broad Spectrum SPF 50 Sunscreen (the “Product”).² Defendant prominently labels the Product as a “Clear Zinc Lotion.” In reality,

¹ Plaintiff serves this notice on behalf of all persons who purchased the Product for personal use and not for resale in the United States (the “Class”) or in the alternative California (the “California Subclass”) within the last four (4) years or since the date of the Product’s launch, whichever time period is shorter (the “Class Period”).

² Plaintiff shall include, and hereby puts Defendant on notice, of similar violations with respect to other similar products. California courts have ruled that standing to pursue claims involving “substantially similar” products exist in circumstances such as these, i.e., similarity in products,

March 24, 2020

Page 2 of 6

the Product contains a chemical active ingredient, namely Octocrylene, and does not deliver the benefits associated with wholly mineral-based sunscreens. Defendant makes false, deceptive, and misleading claims and promises, and omits information material to consumers' purchasing decisions regarding the Product in a pervasive statewide and nationwide marketing scheme.

The Product does not live up to the false and misleading claims made by Defendant. Accordingly, Defendant's actions violate Sections 1770(a)(5), (7), and (9) of the CLRA, as well as California Business and Professions Code Sections 17200, *et seq.* and 17500, *et seq.*, commonly known as the Unfair Competition Law ("UCL") and False Advertising Law ("FAL"). As a direct and proximate result of Defendant's violations of the CLRA, UCL, and FAL, Plaintiff and members of the proposed Class purchased the Product, which they otherwise would not have purchased but for Defendant's fraudulent representations and omissions, and are therefore, entitled to restitution in an amount to be determined at trial.

What follows is a recitation of: (1) Defendant's false, misleading, and deceptive advertising claims; (2) the basis of Plaintiff's claims; and (3) Plaintiff's demand for relief.

I. DEFENDANT'S FALSE, DECEPTIVE, AND/OR MISLEADING ADVERTISING

Defendant deceptively labels the Product as a "Clear Zinc Lotion" "Broad Spectrum SPF 50 Sunscreen," providing UVA and UVB protection that "goes on clear." A true and correct image of the Product's front label is shown below.³

///

///

///

///

claims, and injury to consumers. *See, e.g., Werdebaugh v. Blue Diamond Growers*, 2013 U.S. Dist. LEXIS 144178 (N.D. Cal. Oct. 2, 2013) (finding standing for purchase of chocolate almond milk to pursue claims related to unpurchased products of flavored almonds, 16 other varieties of almond milk, and but chips); *Colucci v. ZonePerfect Nutrition Co.*, 2012 U.S. Dist. LEXIS 183050 (N.D. Cal. Dec. 28, 2012) ("more than enough similarity" between purchased nutrition bar and 19 others not purchased); *Astiana v. Dreyer's Grand Ice Cream, Inc.*, 2012 U.S. Dist. LEXIS 101371 unpurchased ice cream because "Plaintiffs are challenging the same basic mislabeling practice across different product flavors"; *Koh v. S.C. Johnson & Son, Inc.*, 2010 U.S. Dist. LEXIS 654 (N.D. Cal. Jan 6, 2010) (allowing plaintiff to sue for purchased product (Shout) and unpurchased product (Windex) because the challenged representation on the labels was the same on both products; also recognizing that "there is no bright line rule that different product lines cannot be covered by a single class.")

³ Photo is taken from Defendant's website, <https://www.cvs.com/shop/cvs-health-clear-zinc-broad-spectrum-sun-lotion-spf-50-2-oz-prodid-1017005> (last visited Feb. 18, 2020). The Product is also sold in a 4 oz. bottle (not pictured).

March 24, 2020

Page 3 of 6



The net impression of Defendant's label and advertising is that the Product is a mineral-based (as opposed to chemical based) sunscreen whose active ingredient is Zinc. In actuality, Defendant's Product contains a chemical active ingredient, Octocrylene 4%.

II. THE BASIS OF PLAINTIFF'S CLAIMS

There are two types of sunscreen products: chemical-based and mineral-based. Chemical-based sunscreens contain various synthetic active chemical ingredients, such as octocrylene, which protect the skin by absorbing UV radiation and dissipating it as heat.⁴ Conversely, mineral-based sunscreens use active mineral ingredients (zinc oxide and/or titanium dioxide), which deflect or scatter UV rays.

In recent years, consumers have become increasingly concerned about using chemical-based sunscreens because the active chemical ingredients have been shown to have adverse health effects, including endocrine disruption, allergic reactions, causing the production of dangerous free radicals, bioaccumulation in human skin, skin irritation, and interference with secular signaling.⁵

The front label of the Product prominently states "Clear Zinc" sunscreen. Based on the "Clear Zinc" representation, reasonable consumers, including Plaintiff, believe the Product contains only active mineral ingredients. Put differently, reasonable consumers do not believe the Product contains any active synthetic chemical ingredients. This understanding is further

⁴ "Active" ingredients are those that produce the desired or intended result. In the case of sunscreens, they are the ingredients that protect the skin from harmful UV rays.

⁵ "Octocrylene" *Environmental Working Group*.

<https://www.ewg.org/skindeep/ingredients/704206-OCTOCRYLENE> (last visited on March 24, 2020)

March 24, 2020

Page 4 of 6

reinforced by the fact that *virtually all* sunscreens on the market that are advertised as “zinc” sunscreens contain only active mineral ingredients. However, the Product contains Octocrylene 4%, which is a chemical sunscreen active ingredient. If Plaintiff and consumers knew that the Product contained a chemical active ingredient, and was not exclusively a zinc sunscreen, they would not have purchased the Product.

Defendant’s labeling, advertising, marketing, and packaging of the Product as “Clear Zinc Lotion” sunscreen is false, misleading, and deceptive. Defendant represents the Product as a mineral-based sunscreen with zinc; however, the Product contains the active chemical ingredient octocrylene. As a result, consumers are consistently misled into paying for the Product for its advertised benefits and characteristics when, in fact, no such benefits can be obtained, given the high concentration of the harmful ingredient octocrylene.

Plaintiff purchased the Product in reliance upon the advertising claims discussed herein and would not have purchased the Product if she had known that the advertising as described was false, misleading, and deceptive.

Defendant, in connection with its advertising and marketing of the Product, is in violation of the California Civil Code sections 1770(a)(5), (7), and (9), respectively, by representing that the Product: (1) has characteristics, ingredients, uses, benefits, and quantities which it does not have; (2) is of a particular standard, quality, or grade, or is of a particular style, when it is of another; and (3) advertising the goods with intent not to sell them as advertised.

III. PLAINTIFF’S DEMAND FOR RELIEF

Demand is hereby made that Defendant agrees, within 30 days of this Notice, to do and complete the following:

- (1) Remove all false and misleading claims from the labels and packaging of the Product;
- (2) Remove all references in the advertising to any and all false and misleading claims;
- (3) Produce business records identifying the number of units of Product which have been distributed for sale in the State of California; and
- (4) Identify all known members of the Plaintiff Class and notify them of the contents of this statutory notice letter, and to the extent there exists any unknown members of the Plaintiff Class, notify said unknown members in a form and manner consistent with California’s due process requirements.

Finally, we request that you provide a consumer fund in an amount sufficient to provide Ms. Kenney and the Plaintiff Class a refund of all of Defendant’s ill-gotten gains in connection with the advertising and sale of the Product.

March 24, 2020

Page 5 of 6

This proposal would be subject to our review, as counsel to Plaintiff and the Plaintiff Class, of financial information detailing all sales made to California consumers during the Class Period. We also request that Defendant provide for all costs, attorney fees, and claims administration costs.

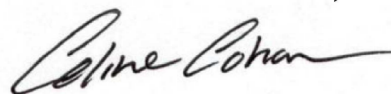
Litigation Hold Notice: This letter also serves as a demand that you preserve and maintain all of the following records, including but not limited to, all electronically stored information (“ESI”), records, and data, pending resolution of this matter, in accordance with state and federal law:

- (1) All internal manuals, written policies, directives, memoranda, correspondence, emails, ESI, and other records of communication concerning the Product’s sales, marketing, and advertising within the last four (4) years;
- (2) All internal manuals, written policies, directives, memoranda, correspondence, emails, ESI, and other records of communication concerning the Product within the last four (4) years;
- (3) All advertising, marketing, and other promotional materials and ESI disseminated in the State of California within the last four (4) years;
- (4) All materials disseminated to consumers, including all communications by email and other correspondence, including ESI, that discuss or concern the Product within the last four (4) years;
- (5) All documents, including ESI, concerning consumer or employee complaints from all sources in connection with the Product within the last four (4) years;
- (6) All documents, including ESI, concerning Product returns within the last four (4) years; and
- (7) All business records, including ESI, evidencing the number of units of Product sold in California within the last four (4) years.

If you wish to discuss this matter prior to Ms. Kenney initiating formal litigation, then please contact me at (213) 788-4050. If we do not hear from you on or before April 23, 2020, then we, on behalf of Plaintiff and the proposed Plaintiff Class, will file our Complaint forthwith.

Thank you for your attention to this matter.

CLARKSON LAW FIRM, P.C.

A handwritten signature in black ink, appearing to read "Celine Cohan", written in a cursive style.

Celine Cohan, Esq.

March 24, 2020

Page 6 of 6

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

CVS Pharmacy Inc.
 Attn: Carol A. Denale
 President | CVS Dr
 Woonsocket RI 02895



9590 9402 3147 7166 2187 67

2. Article Number (Transfer from service label)

7018 3090 0000 5072 9397

PS Form 3811, July 2015 PSN 7530-02-000-9053

COMPLETE THIS SECTION ON DELIVERY**A. Signature****X***Carol A. Denale*

- ☒ Agent
☐ Addressee

B. Received by (Printed Name)*Carol A. Denale***C. Date of Delivery**

MAR 30 2020

- D. Is delivery address different from item 1?** ☐ Yes
 If YES, enter delivery address below: ☐ No

3. Service Type

- | | |
|--|---|
| <input type="checkbox"/> Adult Signature | <input type="checkbox"/> Priority Mail Express® |
| <input type="checkbox"/> Adult Signature Restricted Delivery | <input type="checkbox"/> Registered Mail™ |
| <input checked="" type="checkbox"/> Certified Mail® | <input type="checkbox"/> Registered Mail Restricted Delivery |
| <input type="checkbox"/> Certified Mail Restricted Delivery | <input type="checkbox"/> Return Receipt for Merchandise |
| <input type="checkbox"/> Collect on Delivery | <input type="checkbox"/> Signature Confirmation™ |
| <input type="checkbox"/> Collect on Delivery Restricted Delivery | <input type="checkbox"/> Signature Confirmation Restricted Delivery |

Restricted Delivery

Domestic Return Receipt

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

CT Corporation System
 Re: CVS Pharmacy Inc.
 450 Vetem Memorial Burysk7A
 East Providence RI 02914



9590 9402 3147 7166 2187 74

2. Article Number (Transfer from service label)

7018 3090 0000 5072 9656

PS Form 3811, July 2015 PSN 7530-02-000-9053

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

ES C-19

☒ Agent☐ Addressee

B. Received by (Printed Name)

A. Melino

C. Date of Delivery

3/7/20

D. Is delivery address different from item 1?

☐ Yes

If YES, enter delivery address below:

☐ No

3. Service Type

- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☒ Certified Mail®
- ☐ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail

- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☐ Return Receipt for Merchandise
- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

All Restricted Delivery

Domestic Return Receipt