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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

SHELLI FRENCH, on behalf of herself and
all others similarly situated,

Plaintiff,

v.

NEUTROGENA CORPORATION,

Defendant.

Case No. 2:21-cv-5048

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiff Shelli French (“Plaintiff”) brings this action on behalf of herself and
2 all others similarly situated against Defendant Neutrogena Corporation
3 (“Neutrogena” or “Defendant”). Plaintiff makes the following allegations pursuant
4 to the investigation of her counsel and based upon information and belief, except
5 as to the allegations specifically pertaining to herself, which are based on personal
6 knowledge.

7 NATURE OF THE ACTION

8 1. This is a class action lawsuit regarding Defendant’s manufacturing,
9 distribution and sale of Neutrogena sunscreen products (the “Products”) that
10 contain dangerously high levels of benzene, a carcinogenic impurity that has been
11 linked to leukemia and other cancers.

12 2. The presence of benzene in the Products renders them adulterated and
13 misbranded. As a result, the Products are illegal to sell under federal law and
14 therefore worthless. *See* 21 U.S.C. § 331(a); *see also Debernardis v. IQ*
15 *Formulations, LLC*, 942 F.3d 1076, 1085 (11th Cir. 2019); *see also In re*
16 *Valsartan, Losartan, & Irbesartan Prod. Liab. Litig.*, 2021 WL 222776, at *16
17 (D.N.J. Jan. 22, 2021).

18 3. Benzene is a component of crude oil, gasoline, and cigarette smoke,
19 and is one of the elementary petrochemicals. The Department of Health and
20 Human Services has determined that benzene causes cancer in humans. Likewise,
21 the Food and Drug Administration (“FDA”) lists benzene as a “Class 1 solvent”
22 that “should not be employed in the manufacture of drug substances, excipients,
23 and drug products because of [its] unacceptable toxicity.” Benzene is associated
24 with blood cancers such as leukemia.¹ A study from 1939 on benzene stated that
25 “exposure over a long period of time to any concentration of benzene greater than

26 _____
27 ¹ National Cancer Institute, Cancer-Causing Substances, Benzene. [https://
28 www.cancer.gov/about-cancer/causes-prevention/risk/substances/benzene.](https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/benzene)

1 zero is not safe,”² which is a comment reiterated in a 2010 review of benzene
2 research specifically stating: “There is probably no safe level of exposure to
3 benzene, and all exposures constitute some risk in a linear, if not supralinear, and
4 additive fashion.”³

5 4. According to the American Cancer Society:

6 IARC classifies benzene as “carcinogenic to humans,” based
7 on sufficient evidence that benzene causes acute myeloid
8 leukemia (AML). IARC also notes that benzene exposure has
9 been linked with acute lymphocytic leukemia (ALL), chronic
10 lymphocytic leukemia (CLL), multiple myeloma, and non-
11 Hodgkin lymphoma.⁴

12 5. Moreover, “[d]irect exposure of the eyes, skin, or lungs to benzene
13 can cause tissue injury and irritation.”⁵

14 6. According to the National Institute for Occupational Safety and
15 Health, humans can become exposed to benzene through “inhalation, skin
16 absorption, ingestion, skin and/or eye contact.”⁶ Skin absorption is particularly
17 concerning as there have been multiple FDA studies showing that structurally
18 similar chemicals in sunscreen products are found in the blood at high levels after
19 application to exposed skin.

19 ² Hunter, F.T. (1939). Chronic Exposure to Benzene (Benzol). II. The Clinical
20 Effects. *Journal of Industrial Hygiene and Toxicology*. 1939 Vol.21 pp.331-54
(<https://www.cabdirect.org/cabdirect/abstract/19402700388>)

21 ³ Smith, Martyn T. (2010). Advances in Understanding Benzene Health Effects and
22 Susceptibility. *Annual Review of Public Health*. 2010 Vol. 31:133-148
23 (<https://www.annualreviews.org/doi/full/10.1146/annurev.publhealth.012809.103646>)

24 ⁴ American Cancer Society. Benzene and Cancer Risk (January 5, 2016)
(<https://www.cancer.org/cancer/cancer-causes/benzene.html>)

25 ⁵ Centers for Disease Control and Prevention, Facts About Benzene,
26 <https://emergency.cdc.gov/agent/benzene/basics/facts.asp>.

27 ⁶ National Institute for Occupational Safety and Health (NIOSH), Benzene,
28 <https://www.cdc.gov/niosh/npg/npgd0049.html>.

1 7. Defendant manufactures, markets, and sells a variety of Neutrogena
2 sunscreen products, including:

- 3 • Neutrogena Ultra Sheer Weightless Sunscreen Spray, SPF 100+
- 4 • Neutrogena Ultra Sheer Weightless Sunscreen Spray, SPF 70
- 5 • Neutrogena Beach Defense Oil-Free Body Sunscreen Spray-SPF 100
- 6 • Neutrogena Invisible Daily Defense Body Sunscreen Broad Spectrum
 SPF 60+
- 7 • Neutrogena Beach Defense Spray Body Sunscreen SPF 50

8 8. Skin cancer is the most common form of cancer in the United States.
9 About 4.3 million people are treated for basal cell cancer and squamous cell skin
10 cancer in this country every year.⁷

11 9. Accordingly, the FDA routinely evaluates sunscreen products to
12 ensure that they are safe and effective, and to ensure that the sunscreens adequately
13 protect consumers from skin cancer when used as directed.⁸

14 10. In fact, because sunscreen products make representations that they
15 help prevent sunburn and decrease the risks of cancer and early skin aging, such
16 products are classified as drugs by the FDA, which subjects them to certain safety
17 and effectiveness standards.

18 11. Thus, the presence of any known human carcinogen in consumer
19 products, like sunscreens, that are so regularly used by adults and children to
20 prevent skin cancer would be especially concerning and would affect a substantial
21 part of the population.

22 12. While investigating the carcinogenic potential of active ingredients in
23 sun care products, Valisure, an online pharmacy registered with the FDA, recently

24 ⁷ U.S. Food & Drug Administration, Tips to Stay Safe in the Sun: From Sunscreen
25 to Sunglasses, https://www.fda.gov/consumers/consumer-updates/tips-stay-safe-sun-sunscreen-sunglasses?gclid=CjwKCAjwwqaGBhBKEiwAMk-FtF7PGrWAQkn3pHjD_ssT9LepBnoPftmckwxKZKckHGVoQbjtFw4mrhoCQ2IQAvD_BwE.

26
27 ⁸ *Id.*

1 detected high levels of benzene, a known human carcinogen, in several brands and
 2 batches of sunscreen, which, as discussed above, are considered drug products by
 3 the FDA.⁹

4 13. Valisure tested Defendant’s Products listed below using a
 5 sophisticated gas chromatography flame ionization test modified to follow FDA
 6 guidance for impurities detection.¹⁰ All of Defendant’s listed products were found
 7 to contain quantities of benzene in excess of the “FDA concentration limit of 2
 8 parts per million (ppm).”¹¹

Brand Name	Type	Description	SPF	UPC	Lot	Exp.	Active Pharmaceutical Ingredient(s)	Benzene Avg ppm	% St Dev
Neutrogena	Spray	Ultra Sheer Weightless Sunscreen Spray, SPF 100+	100+	086800100416	04820E04	2022-01	Avobenzene 3%, Homosalate 15%, Octisalate 5%, Octocrylene 10%, Oxybenzone 6%	6.26 6.77*	7%
Neutrogena	Spray	Ultra Sheer Weightless Sunscreen Spray, SPF 70	70	086800100409	07020E01	2023-02	Avobenzene 3%, Homosalate 15%, Octisalate 5%, Octocrylene 4%, Oxybenzone 6%	5.96	7%
Neutrogena	Spray	Ultra Sheer Weightless Sunscreen Spray, SPF 70	70	086800100409	06920E01	2023-02	Avobenzene 3%, Homosalate 15%, Octisalate 5%, Octocrylene 4%, Oxybenzone 6%	5.76	5%
Neutrogena	Spray	Ultra Sheer Weightless Sunscreen Spray, SPF 70	70	086800100409	02320E01	2022-12	Avobenzene 3%, Homosalate 15%, Octisalate 5%, Octocrylene 4%, Oxybenzone 6%	5.30	2%
Neutrogena	Spray	Beach Defense Oil-Free Body Sunscreen Spray - SPF 100	100	086800101444	04721E02	2023-01	Avobenzene 3%, Homosalate 15%, Octisalate 5%, Octocrylene 10%, Oxybenzone 6%	5.20 5.59*	5%
Neutrogena	Spray	Invisible Daily Defense Body Sunscreen Broad Spectrum SPF 60+	60+	086800111542	04921E01	2024-01	Avobenzene 3%, Homosalate 10%, Octisalate 5%, Octocrylene 10%	4.65 5.27*	4%
Neutrogena	Spray	Ultra Sheer Weightless Sunscreen Spray, SPF 100+	100+	086800100416	03120E02	2021-12	Avobenzene 3%, Homosalate 15%, Octisalate 5%, Octocrylene 10%, Oxybenzone 6%	4.11 6.00**	15%
Neutrogena	Spray	Beach Defense Oil-Free Body Sunscreen Spray - SPF 100	100	086800101444	28020E01	2022-09	Avobenzene 3%, Homosalate 15%, Octisalate 5%, Octocrylene 10%, Oxybenzone 6%	4.01 4.00*	4%
Neutrogena	Spray	Beach Defense Spray Body Sunscreen SPF 50	50	086800112549	25520E01	2023-08	Avobenzene 3%, Homosalate 10%, Octisalate 5%, Octocrylene 10%	3.52 3.71*	3%
Neutrogena	Spray	Beach Defense Oil-Free Body Sunscreen Spray - SPF 100	100	086800101444	31420E04	2022-10	Avobenzene 3%, Homosalate 15%, Octisalate 5%, Octocrylene 10%, Oxybenzone 6%	3.08 2.64*	2%

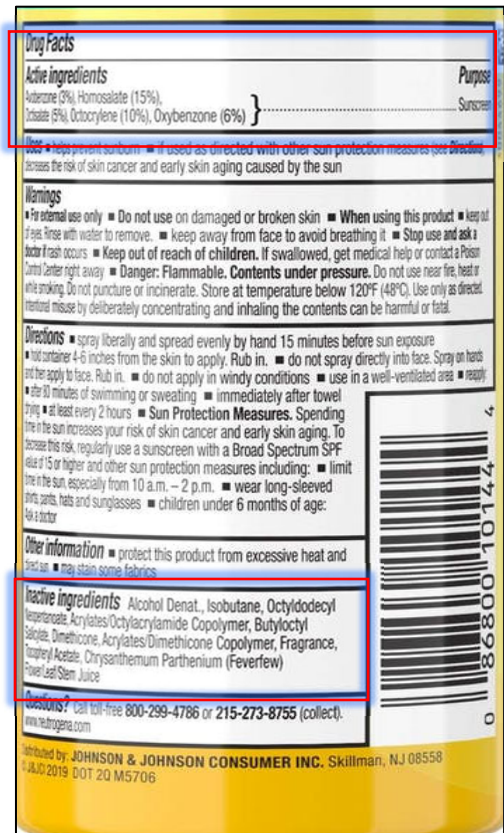
14. In fact, Defendant’s Products overall had the *highest levels of benzene* detected in the sunscreen products tested by Valisure.

⁹ Valisure, Valisure Citizen Petition on Benzene in Sunscreen and After-sun Care products, May 24, 2021, <https://www.valisure.com/blog/valisure-news/valisure-detects-benzene-in-sunscreen/>, at 1.

¹⁰ *Id.* at 1,7.

¹¹ *Id.* at 12.

1 15. Nevertheless, benzene is not one of the listed ingredients on the
 2 Products' labels. For example, the label for Defendant's Neutrogena Beach
 3 Defense Oil-Free Body Sunscreen Spray – SPF 100 does not indicate to consumers
 4 that the Product may contain benzene as an ingredient:



19 16. Due to the presence of phenyl groups (similar chemical structures to
 20 benzene) in the molecules of some sunscreen active ingredients, Valisure
 21 investigated the possibility of six sunscreen active ingredients (avobenzone,
 22 oxybenzone, octisalate, octinoxate, homosalate, and octocrylene) forming benzene
 23 from degradation by the aforementioned GC-MS analytical method through
 24 analysis of pure reference standards at concentrations relevant to typical sunscreen
 25 products. No substantive benzene was detected.¹²

26
 27 ¹² *Id.* at 7-8

1 17. Thus, the presence of benzene in Defendant’s Products appears to be
2 ***the result of contamination*** (*i.e.*, a manufacturing defect), rather than a design
3 effect.¹³

4 18. According to Valisure, because the presence of benzene is the result
5 of contamination, benzene is not unavoidable in the manufacture of sunscreens,
6 and therefore, any significant detection of benzene in such products “should be
7 deemed unacceptable.”¹⁴

8 19. Valisure further stated that “[s]unscreen products are typically used in
9 many times higher volume than standard drug products like tablets or capsules, so
10 even a relatively low concentration limit can result in very high total [benzene]
11 exposure.”¹⁵ Dr. Christopher Bunick, MD, PhD, and Associate Professor of
12 Dermatology at Yale University agreed, stating:

13 Considering that human skin has a large total surface area (~1.85
14 m²), and that ~28.5 g of sunscreen is needed per application to
15 properly cover that skin surface, it follows then that there is not a
16 safe level of benzene that can exist in sunscreen products. The total
17 mass of sunscreen required to cover and protect the human body, in
18 single daily application or repeated applications daily, means that
19 even benzene at 0.1 ppm in a sunscreen could expose people to
20 excessively high nanogram amounts of benzene.¹⁶

21 20. Defendant also knew or should have known about the carcinogenic
22 potential of benzene because it is classified as a Group 1 compound by the World
23 Health Organization and the International Agency for Research on Cancer, thereby
24 defining it as “carcinogenic to humans.”¹⁷

25 _____
26 ¹³ *Id.*

27 ¹⁴ *Id.* at 2.

28 ¹⁵ *Id.* at 16

¹⁶ *Id.* at 17

¹⁷ *Id.* at 1

1 21. As a result of the concerning findings, on May 25, 2021, Valisure
2 filed its citizen petition with the FDA asking the FDA to recall all batches of
3 Defendant’s Products that contained benzene on the basis that they are adulterated
4 under Section 501 of the Federal Drug and Cosmetics Act (“FDCA”) and
5 misbranded under Section 502 of the FDCA, in violation of 21 U.S.C. § 351 and
6 21 U.S.C. § 352, respectively.

7 22. Pursuant to 21 U.S.C. § 331(a) of the FDCA, the “introduction or
8 delivery for introduction into interstate commerce of any food, drug, device,
9 tobacco product, or cosmetic that is adulterated or misbranded” is categorically
10 prohibited.

11 23. Yet, as of the date of this filing, Defendant has not taken any action to
12 remove the Products from the market, and to this day dangerous sunscreen
13 products are continuing to be sold to unsuspecting consumers.

14 24. Defendant’s failure to control for benzene contamination and
15 continued sale of its adulterated products constitutes actionable fraud.

16 25. Plaintiff and the Class were injured by the full purchase price of the
17 Products because the Products are worthless, as they are adulterated and contain
18 harmful levels of benzene, and Defendant has failed to warn consumers of this fact.
19 Such illegally sold products are worthless and have no value. *See Debernardis v.*
20 *IQ Formulations, LLC*, 942 F.3d 1076, 1085 (11th Cir. 2019); *see also In re*
21 *Valsartan, Losartan, & Irbesartan Prod. Liab. Litig.*, 2021 WL 222776, at *16
22 (D.N.J. Jan. 22, 2021) (“This Court finds that contaminated drugs are economically
23 worthless at the point of sale by virtue of the dangerousness caused by their
24 contamination, regardless whether the sold VCDs actually achieved the medical
25 purpose of lowering blood pressure. Put differently, contaminated drugs, even if
26 medically efficacious for their purpose, cannot create a benefit of the bargain
27 because the contaminants, and their dangerous effects, were never bargained for.”).

1 Plaintiff and class members bargained for a sunscreen product free of contaminants
2 and dangerous substances, and were deprived the basis of their bargain when
3 Defendant sold them a sunscreen product containing the dangerous substance
4 benzene, which rendered the Products unmerchantable and unfit for use.

5 26. As the Products expose consumers to benzene well above the legal
6 limit, the Products are not fit for use by humans. Plaintiff is further entitled to
7 damages for the injury sustained in being exposed to high levels of acutely-toxic
8 benzene, damages related to Defendant's conduct, and injunctive relief.

9 27. In sum, Plaintiff seeks to recover damages because the Products are
10 adulterated, defective, worthless, and unfit for human use due to the presence of
11 benzene, a carcinogenic and toxic chemical impurity.

12 28. Plaintiff brings this action on behalf of herself and the Class for
13 equitable relief and to recover damages and restitution for: (i) breach of express
14 warranty; (ii) breach of implied warranty; (iii) violation of Florida's Deceptive and
15 Unfair Trade Practices Act ("FDUPTA"); (iv) fraudulent concealment; and
16 (v) unjust enrichment.

17 **PARTIES**

18 29. Plaintiff Shelli French is a resident of Hillsborough County, Florida.
19 Ms. French has purchased a bottle of Defendant's Neutrogena Beach Defense Oil
20 Free Body Sunscreen Spray SPF 100 approximately every three months for the
21 past five years. Ms. French made these purchases in-store at a Wal-Mart located at
22 1505 N. Dale Mabry Highway, Tampa, FL 33607. Ms. French's most recent
23 purchase was of a bottle of the Product that was part of a batch found by Valisure
24 to contain benzene in excess of the FDA limit. Specifically, the Product bears the
25 lot number 31420E04 with an expiration date of October 2022, which according to
26 the Valisure petition, contains an average benzene level of 3.08 ppm. When
27 purchasing the Product, Ms. French reviewed the accompanying labels and
28

1 disclosures, and understood them as representations and warranties by the
2 manufacturer, distributor, and pharmacy that the Product was properly
3 manufactured, free from defects, and safe for its intended use. Ms. French relied
4 on these representations and warranties in deciding to purchase the Product
5 manufactured by Defendant, and these representations and warranties were part of
6 the basis of the bargain, in that she would not have purchased the Product from
7 Defendant if she had known that it was not, in fact, properly manufactured and free
8 from defects.

9 30. Defendant Neutrogena Corp. is a Delaware corporation with its
10 headquarters at 5760 W 96th Street, Los Angeles, California 90045. As one of the
11 world's leading brands of skin care hair care and cosmetics, Neutrogena Corp.
12 distributes its products, including Neutrogena sunscreen products, throughout the
13 United States. Neutrogena Corp.'s line of sunscreen Products, including the
14 adulterated sunscreen purchased by Plaintiff and members of the putative class, are
15 available at retail stores throughout Florida and the United States.

16 **JURISDICTION AND VENUE**

17 31. This Court has subject matter jurisdiction over this action pursuant to
18 28 U.S.C. § 1332(d)(2)(A), as modified by the Class Action Fairness Act of 2005,
19 because at least one member of the Class, as defined below, is a citizen of a
20 different state than Defendant, there are more than 100 members of the Class, and
21 the aggregate amount in controversy exceeds \$5,000,000 exclusive of interest and
22 costs.

23 32. This Court has personal jurisdiction over this action because
24 Defendant maintains its principal place of business in California, and therefore is
25 subject to general jurisdiction in the state of California.

26 33. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) because
27 Defendant resides in this District.
28

1 CLASS ACTION ALLEGATIONS

2 34. Plaintiff seeks to represent a class defined as all persons in the United
3 States who purchased the Products. Plaintiff also seeks to represent a subclass of
4 all Class members who purchased the Products in Florida (the “Subclass”)

5 35. The Class and Subclass shall collectively be referred to as the
6 “Classes.”

7 36. Subject to additional information obtained through further
8 investigation and discovery, the foregoing definitions of the Classes may be
9 expanded or narrowed by amendment to the complaint or narrowed at class
10 certification.

11 37. Specifically excluded from the Classes are Defendant, Defendant’s
12 officers, directors, agents, trustees, parents, children, corporations, trusts,
13 representatives, employees, principals, servants, partners, joint ventures, or entities
14 controlled by Defendant, and its heirs, successors, assigns, or other persons or
15 entities related to or affiliated with Defendant and/or Defendant’s officers and/or
16 directors, the judge assigned to this action, and any member of the judge’s
17 immediate family.

18 38. **Numerosity.** The members of the proposed Classes are
19 geographically dispersed throughout the United States and are so numerous that
20 individual joinder is impracticable. Upon information and belief, Plaintiff
21 reasonably estimates that there are hundreds of thousands of individuals that are
22 members of the proposed Classes. Although the precise number of proposed
23 members are unknown to Plaintiff, the true number of members of the Classes are
24 known by Defendant. Members of the Classes may be notified of the pendency of
25 this action by mail and/or publication through the distribution records of Defendant
26 and third-party retailers and vendors.

1 39. **Typicality.** The claims of the representative Plaintiff are typical of
2 the claims of the Classes in that the representative Plaintiff, like all members of the
3 Classes, purchased the Products, which were worthless due to the presence of
4 benzene, a harmful and carcinogenic chemical impurity. The representative
5 Plaintiff, like all members of the Classes, has been damaged by Defendant’s
6 misconduct in the very same way as the members of the Classes. Further, the
7 factual bases of Defendant’s misconduct are common to all members of the
8 Classes and represent a common thread of misconduct resulting in injury to all
9 members of the Classes.

10 40. **Existence and predominance of common questions of law and**
11 **fact.** Common questions of law and fact exist as to all members of the Classes and
12 predominate over any questions affecting only individual members of the Classes.
13 These common legal and factual questions include, but are not limited to, the
14 following:

- 15 (a) whether the Products manufactured by Defendant contain
16 dangerously high levels of benzene, thereby breaching the
17 express and implied warranties made by Defendant and
18 making the Products unfit for human use and therefore unfit
19 for its intended purpose;
- 20 (b) whether Defendant knew or should have known the Products
21 contained elevated levels of benzene prior to selling it,
22 thereby constituting fraud and/or fraudulent concealment;
- 23 (c) whether Defendant has unlawfully converted money from
24 Plaintiff and the Classes;
- 25 (d) whether Defendant is liable to Plaintiff and the Classes for
26 unjust enrichment;
- 27
- 28

- 1 (e) whether Defendant is liable to Plaintiff and the Classes for
- 2 fraudulent concealment;
- 3 (f) whether Plaintiff and the Classes have sustained monetary
- 4 loss and the proper measure of that loss;
- 5 (g) whether Plaintiff and the Classes are entitled to declaratory
- 6 and injunctive relief;
- 7 (h) whether Plaintiff and the Classes are entitled to restitution and
- 8 disgorgement from Defendant; and
- 9 (i) whether the marketing, advertising, packaging, labeling, and
- 10 other promotional materials for the Products are deceptive.

11 **41. Adequacy of Representation.** Plaintiff will fairly and adequately
12 protect the interests of the Classes. Plaintiff has retained counsel who are highly
13 experienced in complex consumer class action litigation, and Plaintiff intends to
14 vigorously prosecute this action on behalf of the Classes. Plaintiff has no interests
15 that are antagonistic to those of the Classes.

16 **42. Superiority.** A class action is superior to all other available means
17 for the fair and efficient adjudication of this controversy. The damages or other
18 financial detriment suffered by members of the Classes are relatively small
19 compared to the burden and expense of individual litigation of their claims against
20 Defendant. It would, thus, be virtually impossible for members of the Classes, on
21 an individual basis, to obtain effective redress for the wrongs committed against
22 them. Furthermore, even if members of the Classes could afford such
23 individualized litigation, the court system could not. Individualized litigation
24 would create the danger of inconsistent or contradictory judgments arising from the
25 same set of facts. Individualized litigation would also increase the delay and
26 expense to all parties and the court system from the issues raised by this action. By
27 contrast, the class action device provides the benefits of adjudication of these
28

1 issues in a single proceeding, economies of scale, and comprehensive supervision
2 by a single court, and presents no unusual management difficulties under the
3 circumstances.

4 43. In the alternative, the Classes may be certified because:

- 5 (a) the prosecution of separate actions by individual members
6 of the Classes would create a risk of inconsistent or
7 varying adjudication with respect to individual members
8 of the Classes that would establish incompatible standards
9 of conduct for the Defendant;
- 10 (b) the prosecution of separate actions by individual members
11 of the Classes would create a risk of adjudications with
12 respect to them that would, as a practical matter, be
13 dispositive of the interests of other members of the Classes
14 not parties to the adjudications, or substantially impair or
15 impede their ability to protect their interests; and/or
- 16 (c) Defendant has acted or refused to act on grounds generally
17 applicable to the Classes as a whole, thereby making
18 appropriate final declaratory and/or injunctive relief with
19 respect to the members of the Class as a whole.

17 CAUSES OF ACTION

18 COUNT I

19 **Breach Of Express Warranty**

20 44. Plaintiff incorporates by reference and re-alleges each and every
21 allegation set forth above as though fully set forth herein.

22 45. Plaintiff brings this claim individually and behalf of the members of
23 the proposed Classes against Defendant.

24 46. In connection with the sale of the Products, Defendant, as the
25 designer, manufacturer, marketer, distributor, and/or seller issued written
26 warranties by representing that the Products were sunscreens that contained only
27 those active and inactive ingredients listed on the Products' labels. Those active
28

1 and inactive ingredients do not include benzene, a known human carcinogen
2 dangerous to humans. Defendants further expressly warrant that the Products are
3 sunscreens used for sun protection, rather than adulterated sunscreens containing
4 dangerous chemicals.

5 47. As a direct and proximate cause of Defendant’s breach of express
6 warranty, Plaintiff and the Class members have been injured and harmed because
7 they would not have purchased the Products on the same terms if they knew that
8 the Products contained benzene and are not generally recognized as safe.

9 48. On June 18, 2021, prior to filing this action, Defendant was served
10 with a pre-suit notice letter that complied in all respects with U.C.C. §§ 2-313 and
11 2-607. Plaintiff’s counsel sent Defendant a letter advising them that they breached
12 an express warranty and demanded that they cease and desist from such breaches
13 and make full restitution by refunding the monies received therefrom. A true and
14 correct copy of Plaintiff’s counsel’s letter is attached hereto as **Exhibit A**.

15 **COUNT II**
16 **Breach of Implied Warranty**

17 49. Plaintiff hereby incorporates by reference the allegations contained in
18 all preceding paragraphs of this complaint.

19 50. Plaintiff brings this claim individually and on behalf of the members
20 of the proposed Classes against Defendant.

21 51. This claim is brought under the laws of the state of California.

22 52. Defendant, as the designer, manufacturer, marketer, distributor, and/or
23 seller, impliedly warranted that the Products (i) would not contain elevated levels
24 of benzene and (ii) are generally recognized as safe for human use.

25 53. Defendant breached the warranty implied in the contract for the sale
26 of the defective Products because they could not pass without objection in the trade
27 under the contract description, the Products were not of fair or average quality
28

1 within the description, and the Products were unfit for their intended and ordinary
2 purpose because the Products manufactured, distributed, and sold by Defendant
3 were defective in that they contained elevated levels of carcinogenic and toxic
4 benzene, and as such are not generally recognized as safe for human use. As a
5 result, Plaintiff and members of the Classes did not receive the goods as impliedly
6 warranted by Defendant to be merchantable.

7 54. Plaintiff and members of the Classes purchased the Products in
8 reliance upon Defendant's skill and judgment and the implied warranties of fitness
9 for the purpose.

10 55. The Products were not altered by Plaintiff or members of the Classes.

11 56. The Products were defective when they left the exclusive control of
12 Defendant.

13 57. Defendant knew that the Products would be purchased and used
14 without additional testing by Plaintiff and members of the Classes.

15 58. The defective Products were defectively manufactured and unfit for
16 their intended purpose, and Plaintiff and members of the Classes did not receive
17 the goods as warranted.

18 59. As a direct and proximate cause of Defendant's breach of the implied
19 warranty, Plaintiff and members of the Classes have been injured and harmed
20 because: (a) they would not have purchased the Products on the same terms if they
21 knew that the Products contained harmful levels of benzene, and are not generally
22 recognized as safe for human use; and (b) the Products do not have the
23 characteristics, ingredients, uses, or benefits as promised by Defendant.

24 **COUNT III**

25 **Violation of FDUPTA, Fla. Sta. §§ 501.201-213**

26 60. Plaintiff hereby incorporates by reference the allegations contained in
27 all preceding paragraphs of this complaint.

1 61. Plaintiff brings this claim individually and on behalf of the members
2 of the proposed Subclass against Defendant.

3 62. This claim is brought under the laws of the state of Florida.

4 63. The Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”)
5 renders unlawful unfair methods of competition, unconscionable acts or practice,
6 and unfair or deceptive acts or practices in the conduct of any trade or commerce.
7 Fla. Stat. § 501.204.

8 64. Among other purposes, FDUTPA is intended “[t]o protect the
9 consuming public and legitimate business enterprises from those who engage in
10 unfair methods of competition, or unconscionable, deceptive, or unfair acts or
11 practices in the conduct of any trade or commerce.” Fla. Stat. § 501.202.

12 65. FDUTPA can be violated in two ways, both of which are relevant to
13 this case. First, Defendant has committed a “traditional” violation of FDUTPA by
14 engaging in unfair and/or deceptive acts and practices which caused injury to
15 Plaintiff and members of the Classes. Second, Defendant has committed a *per se*
16 violation of FDUTPA predicated on a violation of the FDCA. Specifically, by
17 selling an adulterated product which is *per se* illegal in violation of 21 U.S.C. §
18 351 and 21 U.S.C. § 352 of the FDCA, designed to protect consumers from
19 harmful and dangerous drugs, Defendant has violated FDUTPA. Fla. Stat. Ann. §
20 501.203(3)(c) (explaining that a FDUTPA violation may be based on “[a]ny law,
21 statute, rule, regulation, or ordinance which proscribes unfair methods of
22 competition, or unfair, deceptive, or unconscionable acts or practices.”); *State*
23 *Farm Mut. Auto. Ins. Co. v. Performance Orthopaedics & Neurosurgery, LLC*, 315
24 F. Supp. 3d 1291 (S.D. Fla. 2018) (violations of state statutes could serve as
25 statutory predicates for *per se* FDUTPA violations where the statutes proscribed
26 the conduct that FDUTPA was designed to protect against even though they did
27 not explicitly reference FDUTPA or use the terms “unfair or deceptive”).
28

1 66. While FDUPA does not define “deceptive” or “unfair,” Florida
2 courts have looked to the Federal Trade Commission’s interpretations for
3 guidance. “[D]eception occurs if there is a representation, omission, or practice
4 that is likely to mislead the consumer acting reasonably in the circumstances, to the
5 consumer’s detriment.” *Lombardo v. Johnson & Johnson Consumer Companies,*
6 *Inc.*, 124 F. Supp. 3d 1283, 1287 (S.D. Fla. 2015) (internal quotation marks and
7 citation omitted). Courts define a “deceptive trade practice” as any act or practice
8 that has the tendency or capacity to deceive consumers. *Fed. Trade Comm'n v.*
9 *Partners In Health Care Ass'n, Inc.*, 189 F. Supp. 3d 1356, 1367 (S.D. Fla. 2016).
10 Courts define an “unfair trade practice” as any act or practice that “offends
11 established public policy and one that is immoral, unethical, oppressive,
12 unscrupulous or substantially injurious to consumers.” *Kenneth F. Hackett &*
13 *Assocs., Inc. v. GE Capital Info. Tech. Sols., Inc.*, 744 F. Supp. 2d 1305, 1312
14 (S.D. Fla. 2010).

15 67. Defendant engaged, and continues to engage, in conduct that is likely
16 to deceive members of the public. This conduct includes representing in their
17 labels that their sunscreen Products contain only the ingredients listed in the label,
18 which is untrue, and failing to make any mention that the certain sunscreen
19 Products are adulterated with benzene, a known human carcinogen.

20 68. As alleged herein, Plaintiff has suffered injury in fact and lost money
21 as a result of Defendant’s conduct because she purchased sunscreen Products from
22 Defendant in reliance on Defendant’s representation that the ingredients in their
23 sunscreen Products were safe and effective and were not adulterated with benzene.

24 69. As alleged herein, Defendant’s actions are deceptive and in clear
25 violation of FDUTPA, entitling Plaintiff and the Subclass to damages and relief
26 under Fla. Stat. §§ 501.201-213.
27
28

1 70. By committing the acts alleged above, Defendant engaged in
2 unconscionable, deceptive, or unfair acts or practices, which constitute unfair
3 competition within the meaning of FDUTPA.

4 71. Defendant’s conduct is substantially injurious to consumers.
5 Consumers are purchasing and, as instructed in the label, “spray[ing] liberally”
6 Defendant’s sunscreen Products without knowledge that there is a risk the
7 sunscreen Products may be adulterated with a human carcinogen. This conduct has
8 caused, and continues to cause, substantial injury to consumers because consumers
9 would not have paid for sunscreens potentially adulterated with benzene but for
10 Defendant’s false labeling, advertising, and promotion. Thus, Plaintiff and the
11 putative Subclass have been “aggrieved” (*i.e.*, lost money) as required for
12 FDUTPA standing, and such an injury is not outweighed by any countervailing
13 benefits to consumers or competition.

14 72. Indeed, no benefit to consumers or competition results from
15 Defendant’s conduct. Since consumers reasonably rely on Defendant’s
16 representation of the ingredients contained in their Products’ labels and injury
17 resulted from ordinary use of the Products, consumers could not have reasonably
18 avoided such injury.

19 73. Further, Defendant’s conduct is ongoing and continuing, such that
20 prospective injunctive relief is necessary. Plaintiff is a long-time user of
21 Defendant’s sunscreen Products, and she desires to purchase Defendant’s Products
22 in the future if she can be assured that the Products are unadulterated and meet the
23 advertising claims.

24 74. Accordingly, Defendant is liable to Plaintiff and the Subclass for
25 damages in amounts to be proven at trial, including attorneys’ fees and costs.
26
27
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COUNT IV
Fraudulent Concealment

1
2
3 75. Plaintiff hereby incorporates by reference the allegations contained in
4 all preceding paragraphs of this complaint

5 76. Plaintiff brings this claim individually and on behalf of the members
6 of the proposed Classes against Defendant.

7 77. This claim is brought under the laws of the state of California.

8 78. Defendant had a duty to disclose material facts to Plaintiff and the
9 Classes given their relationship as contracting parties and intended users of the
10 Products. Defendant also had a duty to disclose material facts to Plaintiff and the
11 Classes, namely that it was in fact manufacturing, distributing, and selling harmful
12 products unfit for human use, because Defendant had superior knowledge such that
13 the transactions without the disclosure were rendered inherently unfair.

14 79. Defendant possessed knowledge of these material facts. Since at least
15 mid-2020, numerous recalls put Defendant on notice that adulterated and
16 misbranded products were being investigated for contamination with carcinogens,
17 including benzene. Further, benzene is not unavoidable in the manufacture of
18 sunscreens.

19 80. During this time, Plaintiff and members of the Classes were using the
20 Products without knowing they contained dangerous levels of benzene.

21 81. Defendant failed to discharge its duty to disclose these materials facts.

22 82. In so failing to disclose these material facts to Plaintiff and the
23 Classes, Defendant intended to hide from Plaintiff and the Classes that they were
24 purchasing and consuming the Products with harmful defects that was unfit for
25 human use, and thus acted with scienter and/or an intent to defraud.

26 83. Plaintiff and the Classes reasonably relied on Defendant's failure to
27 disclose insofar as they would not have purchased the defective Products
28

1 manufactured sold by Defendant had they known they contained unsafe levels of
2 benzene.

3 84. As a direct and proximate cause of Defendant’s fraudulent
4 concealment, Plaintiff and the Classes suffered damages in the amount of monies
5 paid for the defective Products.

6 85. As a result of Defendant’s willful and malicious conduct, punitive
7 damages are warranted.

8 **COUNT V**
9 **Unjust Enrichment**

10 86. Plaintiff hereby incorporates by reference the allegations contained in
11 all preceding paragraphs of this complaint.

12 87. Plaintiff brings this claim individually and on behalf of the members
13 of the proposes Classes against Defendant.

14 88. This claim is brought under the laws of the state of California.

15 89. Plaintiff and the Classes conferred a benefit on Defendant in the form
16 of monies paid to purchase Defendant’s defective and worthless Products.

17 90. Defendant voluntarily accepted and retained this benefit.

18 91. Because this benefit was obtained unlawfully, namely by selling and
19 accepting compensation for products unfit for human use, it would be unjust and
20 inequitable for Defendant to retain the benefit without paying the value thereof.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, Plaintiff respectfully requests, individually and on behalf of
23 the alleged Classes, that the Court enter judgment in their favor and against
24 Defendant as follows:

- 25 (a) For an order certifying the Classes under Rule 23 of the
26 Federal Rules of Civil Procedure and naming Plaintiff as
27 the representative for the Classes and Plaintiff’s attorneys
28 as Class Counsel;

- (b) For an order declaring the Defendant’s conduct violates the causes of action referenced herein;
- (c) For an order finding in favor of Plaintiff and the Classes on all counts asserted herein;
- (d) For compensatory, statutory, and punitive damages in amounts to be determined by the Court and/or jury;
- (e) For prejudgment interest on all amounts awarded;
- (f) For an order of restitution and all other forms of equitable monetary relief;
- (g) For injunctive relief as pleaded or as the Court may deem proper; and
- (h) For an order awarding Plaintiff and the Classes their reasonable attorneys’ fees and expenses and costs of suit.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff demands a trial by jury of any and all issues in this action so triable as of right.

Dated: June 21, 2021

Respectfully Submitted,

BURSOR & FISHER, P.A.

By: /s/ L. Timothy Fisher
L. Timothy Fisher

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