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14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16

17 CAMERON EIDMANN, individually and
 18 on behalf of all others situated;

19 Plaintiff,

20 vs.

21 WALGREEN CO. an Illinois Corporation,

22 Defendant.
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 27

Case No. 5:20-cv-04805

FIRST AMENDED CLASS ACTION
 COMPLAINT

1. Violations of the False and Misleading Advertising Law, Cal. Bus. & Prof. C. §§ 17500, et seq.
2. Violations of the Consumer Legal Remedies Act, Cal. Civ. C. §§ 1750, et seq.
3. Violations of Unfair Competition Law, 'Unfair' and 'Fraudulent' Prongs, Cal. Bus. & Prof. C. §§ 17200, et seq.
4. Violations of Unfair Competition Law, 'Unlawful' Prong, Cal. Bus. & Prof. C. §§ 17200, et seq.

1 Plaintiff Cameron Eidmann (“Plaintiff”), by his undersigned counsel, on behalf of himself
2 and all persons similarly situated who purchased Walgreens’ store brand Infants’ Pain & Fever
3 Acetaminophen, brings this First Amended Class Action Complaint against Defendant Walgreen
4 Co. (“Walgreens” or “Defendant”). Pursuant to Section III of the Court’s Standing Order, attached
5 hereto as Exhibit 1 is a red-line document showing the changes made to the previously filed
6 complaint. Plaintiff alleges the following upon information and belief, except for those allegations
7 that pertain to Plaintiff, which are based on Plaintiff’s personal knowledge:

8 **NATURE OF THE ACTION**

9 1. Defendant is one of the biggest drugstore chains in the United States, operating over
10 9,000 mostly freestanding Walgreens stores throughout the United States, many of which are in
11 California. Defendant’s websites also allow consumers to purchase general merchandise—including
12 over-the-counter drugs—online.

13 2. Defendant has a portfolio of approximately 20 store brands (privately labeled),
14 including the Walgreens’ brand line of over-the-counter pain reliever and fever reducers, including
15 Walgreens’ Infants’ Pain & Fever Acetaminophen (“Infants’ Product” or the “Product”).¹
16 Defendant positions this private label product as a “national brand equivalent,” selling it alongside
17 brand-name acetaminophen products, such as Infants’ Tylenol and Children’s Tylenol.
18 Additionally, the front of the Product’s outer packaging includes a banner at the top that states
19 “Compare to Infants’ Tylenol® active ingredient”).

20 3. Acetaminophen is a pain reliever and fever reducer for both children and adults.
21 Children, including infants, are often prescribed acetaminophen for pain and fever reduction.
22 Pediatricians routinely advise caregivers to administer over-the-counter acetaminophen to babies to
23 treat fever and pain (e.g. as discomfort resulting from the baby’s first shots and teething). Health
24 professionals advise caregivers of the dosage amount for children under the age of two, which is in
25 part based on the child’s weight.

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28 ¹ Although the formulation is identical across all products, Defendant sells multiple types and
flavors of the Infants’ Product. This action addresses all liquid versions of the Infants’ Product.

1 4. Giving a child too much acetaminophen can be dangerous and even fatal, a problem
2 that terrifies parents and causes them to be extra careful when buying medicine for their young
3 children and babies. The FDA warns parents and caregivers to “[b]e very careful when you’re giving
4 your infant acetaminophen.” Defendant’s packaging for its Infants’ Product exploits parents’ fear
5 of giving their children an improper (and possibly fatal) dosage or formulation. Defendant does this
6 by designing its packaging to mislead a parent into thinking that the Infants’ Product is specially-
7 formulated – or otherwise possesses some unique medicinal quality – to make it specifically
8 appropriate for infants as opposed to older children. The front of a box of the Infants’ Product
9 contains representations which are likely to deceive consumers into believing the Infants’ Product
10 is specially formulated for infants or otherwise unique for infants.

11 5. In reality, the Product is not unique or specially made for babies. Indeed, the medicine
12 contained in a bottle of Infants’ Product contains the same active ingredient and formulation (i.e.
13 160 mg per 4 mL of acetaminophen) that is contained in a bottle of Defendant’s Children’s Pain &
14 Fever Acetaminophen Oral Suspension (“Children’s Product”). Thus, there is no difference in the
15 medicine sold in the Infants’ Product and the Children’s Product. But Defendant does not disclose
16 this important information anywhere on the Infants’ Product packaging (though the front of the box
17 *does* explicitly compare the Product to name-brand Infants’ Tylenol®).

18 6. Defendant’s representations and omissions cause consumers to suffer economic
19 damage because they are not getting what they paid for—an acetaminophen product that has some
20 special medicinal property uniquely for infants. Moreover, a classwide damages or restitution model
21 can easily be formulated in this case because Defendant charges substantially more money for its
22 Infants’ Product—up to *four times* as much per ounce—than for its Children’s Product. Yet there
23 is no reason for this dramatic price premium, as both medicines are identical.

JURISDICTION AND VENUE

24 7. Plaintiff was a citizen of the State of California during all times relevant herein.

25 8. Venue is proper in this Court because a substantial part of the events and conduct
26 giving rise to the violations of law occurred in this county. This includes the transaction at issue—
27 Plaintiff’s purchase of the Product.
28

1 17. Prior to the acts complained of herein, acetaminophen for infants was only available
2 with a concentration of 80 mg/mL of acetaminophen, and acetaminophen for children was only
3 available with a concentration of 160 mg/5 mL of acetaminophen.

4 18. The different concentrations caused some consumers to accidentally provide the
5 wrong dosage of medicine to their children, causing them to overdose.

6 19. In 1995, a lawsuit in San Francisco County Superior Court brought to light a potential
7 for confusion between acetaminophen products marketed for use by infants versus children
8 stemming from the different concentrations.

9 20. Between 2000 and 2009 the FDA received reports of twenty (20) children dying from
10 acetaminophen toxicity, and at least three (3) deaths were tied directly to mix-ups involving the two
11 pediatric medicines.

12 21. In an industry-wide effort to prevent the ongoing confusion and additional accidental
13 acetaminophen toxicity, in 2011, manufacturers voluntarily changed the liquid acetaminophen
14 marketed for infants from 80 mg per 0.8mL or 80mg per 1mL to be the same concentration as the
15 liquid acetaminophen marketed for children – 160 mg per 5mL.

16 22. Since then, the only difference in acetaminophen products marketed for infants and
17 children (including Defendant’s Infants’ Product and Children’s Product) has been the price and the
18 plastic dosing instrument included with the product.²

19 23. Defendant’s Infants’ Product and Children’s Product have the same concentration of
20 acetaminophen, are thus interchangeable – equally suitable for infants and children.

21 24. Defendant’s store brand products—including Infants’ Product—have been marketed
22 as capable of delivering quality and value.

23 25. Since at least 2012 and at all relevant times herein, Defendant has been engaging in
24 the unfair, unlawful, and deceptive practice of manufacturing, marketing and selling its store brand
25 pediatric acetaminophen as two separate products (one marketed for use in infants and the other for
26 children), such that parents mistakenly believe they must purchase the more expensive Infants’
27 Product for their infants.

28 ² See fn. 1, *supra*.

1 26. The front of the box of the Infants' Product displays a drawing of a small child. The
2 outer packaging also includes the following statements, among others:

- 3 a. The name of the product: "Infants' Pain & Fever Acetaminophen"
4 b. "Compare to the active ingredient in Infants' Tylenol® Oral Suspension"

5 27. While the packaging compares Infants' Product to a name-brand counterpart (also
6 purportedly formulated exclusively and specifically for infants), it does not state that it is also the
7 same medicine contained in Children's Product. Instead, the representations and images create the
8 opposite effect. But the lack of difference in formulations between the Infants' Product and
9 Children's Product would be important information to consumers in deciding whether to buy
10 Infants' Product.

11 28. Similarly, Defendant's Children's Product leads a reasonable consumer to believe that
12 it consists of medicine that is specific to children, as opposed to infants. The front of the box of the
13 Children's Product displays a parent holding a child appearing to be older than a toddler. The outer
14 packaging also includes the following statements, among others:

- 15 a. The name of the product, "Children's Pain & Fever Acetaminophen"
16 b. "Compare to the active ingredient in Children's Tylenol® Oral Suspension"

17 29. A consumer would not likely know it was possible or even safe to compare the Infants'
18 Product with the Children's Product, and such a comparison is not required for reasonable
19 consumers to be deceived by the packaging for the Infants' Product.

20 30. However, like the packaging of the Infants' Product, nowhere on the label of the
21 Children's Product does Defendant state that the formulation of the two medicines is entirely
22 identical.

23 31. Consumers are injured by Defendant's deceptive advertising on the Infants' Product
24 packaging. The Infant Product retails for approximately \$4.00 per ounce, while the Children's
25 Product for \$1.29 per ounce. Accordingly, the Infant Product can cost almost four times as much
26 per ounce than the Children's Product, despite being identical medicines. There is a similarly
27 significant price differential throughout the Class Period. There is a similar price differential
28 throughout the Class Period.

1 32. Defendant knows that consumers with the youngest of children, such as Plaintiff, are
2 typically more cautious about what medicine they give to their babies, especially when they are
3 giving their babies a product that can cause accidental deaths. Indeed, parenting resources express
4 the conventional understanding that infants should not, and *cannot*, tolerate medicines meant for
5 older children. For example, the popular parenting website “What to Expect” warns “**Always use
6 the infant formulations; never give your baby a medication intended for older kids or adults.**”³
7 This conventional understanding holds particularly true for parents when they are giving their infant
8 a medicine that has caused accidental deaths in the past.

9 33. Defendant’s deceptive and misleading advertising, marketing, packaging and sales
10 practices harness the fear of acetaminophen toxicity to trick consumers, including Plaintiff, into
11 purchasing and overpaying for Infant’s Product when Children’s Product would be just as safe and
12 effective at a fraction of the price.

13 34. Defendant knows these misrepresentations and omissions would be important to a
14 reasonable consumer in deciding whether or not to purchase Infants’ Product (as opposed to the
15 identically-formulated Children’s Product).

16 35. Defendant’s deceptive and misleading advertising, marketing, packaging and sales
17 practices harness the fear of acetaminophen toxicity to trick consumers, including Plaintiff, into
18 purchasing and overpaying for Infants’ Product when Children’s Product would be just as safe and
19 effective at a fraction of the price.

20 **Plaintiff’s Purchase of the Product**

21 36. When Plaintiff’s children were infants, Plaintiff and his wife would purchase infants’
22 acetaminophen, including Defendant’s Infants’ Product, to relieve the children’s fevers and for pain
23 associated with teething.

24 37. Throughout this period, Plaintiff would shop at a Walgreens pharmacy in San Jose,
25 California, where he would purchase Defendant’s Infants’ Product.

26 ³ Colleen de Bellefonds, “Children’s Medication Safety Tips and Guidelines.” What to Expect
27 (Jan. 22, 2019) (available at <https://www.whattoexpect.com/family/childrens-health-and-safety/medication-safety-guidelines-tips#:~:text=Always%20use%20the%20infant%20formulations,baby%20in%20a%20sitting%20position.>)
28 (emphasis added).

1 marketing for the Infant's Product that were designed to, and in fact did, mislead Plaintiff and Class
2 members into purchasing it.

3 46. Defendant made these material misrepresentations, omissions, and non-disclosures
4 for the express purpose of inducing Plaintiff and other reasonable consumers to purchase or
5 otherwise pay a price premium for Infant's Product based on the mistaken belief that Infant's
6 Products were specifically formulated for infants. Defendant profited by selling Infant's Products
7 to thousands or more of unsuspecting consumers.

8 **EQUITABLE RELIEF**

9 47. Plaintiff sets forth alternate claims for legal damages under the CLRA and equitable
10 relief (restitution and injunctive relief) under the FAL, UCL, and CLRA.

11 48. Plaintiff and the Class do not have an adequate remedy at law with respect to future
12 harm caused by Defendant's conduct as alleged herein.

13 49. Absent an equitable injunction enjoining Defendant's conduct alleged herein,
14 Plaintiff, Class members, and the public will be irreparably harmed and denied an
15 effective and complete remedy because they face a real and tangible threat of future
16 harm emanating from Defendant's ongoing conduct which cannot be remedied with
17 monetary damages.

18 Plaintiff does not know at this juncture whether Plaintiff's CLRA claim will survive through trial,
19 whether the Court will accept a model for legal damages for past harm that Plaintiff will proffer in
20 the future at the appropriate time, or whether the Court will find that any such damages model
21 adequately compensates Plaintiff's and the Class' past losses.

22 50. Moreover, Plaintiff continues to have use for OTC pain-relief products for children.
23 If the Court were to grant an injunction enjoining Defendant from making the misrepresentations
24 described above, then Plaintiff would want to purchase Infant's Product in the future. Without an
25 injunction, Plaintiff would be unable to trust Defendant's representations and would not purchase
26 Infant's Product.

27 **TOLLING**

28 **A. Discovery Rule Tolling**

1 action as a class action on behalf of the following class (the “Class”):

2 All persons who purchased Infants’ Product for personal use and not
3 for resale in the United States.

4 60. The following persons are excluded from the Class: Defendant, Defendant’s officers,
5 directors, agents, trustees, parents, children, corporations, trusts, representatives, employees,
6 successors, assigns, or other persons or entities related to or affiliated with Defendant and/or its
7 officers and/or directors, or any of them. Also excluded from the proposed Class and Sub-Class are
8 the Court, the Court’s immediate family and Court staff.

9 61. The members of the Class are so numerous that joinder of all members is
10 impracticable. On information and belief, there are in excess of a thousand members of the Class.
11 Discovery will reveal, through Defendant’s records, the approximate number of Class members.

12 62. Plaintiff’s claims are typical of the Class. Plaintiff, like all members of the Class, has
13 been subjected to Defendant’s deceptive and misleading marketing (including the packaging) for
14 Infants’ Product. The harm suffered by Plaintiff and the Class was and is caused by the same
15 misconduct by Defendant.

16 63. Plaintiff will fairly and adequately represent and protect the interests of the members
17 of the Class. Plaintiff has retained counsel highly experienced in complex consumer class action
18 litigation and intend to prosecute this action vigorously. Plaintiff is a member of both the Class
19 described herein and do not have interests antagonistic to, or in conflict with, the other members of
20 the Class.

21 64. A class action is superior to other available methods for the fair and efficient
22 adjudication of this controversy. Because the monetary damages suffered by individual Class
23 members are relatively small, the expense and burden of individual litigation make it impossible for
24 individual Class members to seek redress for the wrongful conduct asserted herein. If Class
25 treatment of these claims is not available, Defendant would likely continue its wrongful conduct,
26 will unjustly retain improperly obtained revenues, and/or otherwise escape liability for their
27 wrongdoing.

28 65. Common questions of law and fact exist as to all members of the Class, which

1 predominate over any questions that may affect individual Class members. Among the questions of
2 law and fact common to the Class are the following:

- 3 a. Whether Defendant's marketing, advertising, labeling, and packaging of Infants'
4 Product is likely to deceive reasonable consumers;
- 5 b. Whether Defendant's marketing, advertising, labeling, and packaging of Infants'
6 Product caused Plaintiff and the Class to suffer economic harm;
- 7 c. Whether Defendant violated California Business and Professions Code §§ 17200, *et*
8 *seq*;
- 9 d. Whether Defendant violated California Business and Professions Code §§ 17500, *et*
10 *seq*;
- 11 e. Whether Defendant's representations and omissions are material to reasonable
12 consumers; and,
- 13 f. Whether Plaintiff and the Class are entitled to restitution or damages and if so, the
14 appropriate measure.

15 66. Plaintiff knows of no difficulty which will be encountered in the management of this
16 litigation which would preclude its maintenance as a class action.

17 67. The prosecution of separate actions by individual members of the Class would run the
18 risk of inconsistent or varying adjudications, which might establish incompatible standards of
19 conduct for the Defendant. Prosecution as a class action will eliminate the possibility of repetitious
20 litigation.

21 68. Class certification is appropriate under Federal Rule of Civil Procedure Rule
22 23(b)(2) because Defendant's actions are generally applicable to the Class as a whole, and Plaintiff
23 seeks equitable remedies with respect to the Class as a whole. Defendant has acted or refused to act
24 on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or
25 corresponding declaratory relief with respect to the Class as a whole.

26 69. Defendant has acted or refused to act on grounds generally applicable to the Class,
27 thereby making appropriate final injunctive relief or corresponding declaratory relief with respect
28 to the Class as a whole.

FIRST CAUSE OF ACTION

**Violations of False and Misleading Advertising Law (FAL)
California's False Advertising Law, Bus. & Prof. Code §§ 17500, *et seq.*
(on behalf of Plaintiff and the proposed Class)**

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70. Plaintiff hereby incorporates by reference each of the preceding allegations as if fully set forth herein.

71. In marketing, advertising, labeling, and packaging Infants' Product, Defendant made, and continues to make, misleading statements in order to induce consumers into purchasing Infants' Product on a false premise.

72. In marketing, advertising, labeling, and packaging Infants' Product, Defendant failed and continue to fail to make material disclosures, including a statement that Infants' Product is the same product as Children's Product.

73. Defendant is aware that the claims it makes about Infants' Product are deceptive, misleading, without basis, and unreasonable.

74. Defendant engaged in the deceptive conduct alleged above to induce the public to purchase the more expensive Infants' Product instead of Children's Product.

75. In marketing, advertising, labeling, and packaging Infant's Product described above, Defendant knew or should have known their statements regarding the uses and characteristics of Infants' Product were false and misleading.

76. Defendant's misrepresentations of the material facts detailed above constitute unfair and fraudulent business practices within *Cal. Bus. & Prof. C. § 17200*.

77. There were reasonably available alternatives to further Defendant's legitimate business interests, other than the conduct described herein.

78. All of the conduct alleged herein occurs and continues to occur in Defendant's business. Defendant's wrongful conduct is part of a course of conduct repeated on hundreds if not thousands of occasions every day.

79. Plaintiff was misled into purchasing Infants' Product by Defendant's deceptive conduct and misleading advertising as alleged above.

80. In addition, Defendant's use of the Product's packaging as advertising and marketing

1 have deceived and are likely to continue deceiving the consuming public, in violation of California
2 Business and Professions Code § 17500.

3 81. Plaintiff has suffered injury in fact and has lost money as a result of Defendant's
4 misrepresentations and omissions. Indeed, Plaintiff purchased Infants' Product because of
5 Defendant's misrepresentations that Infants' Product is specially formulated or uniquely suitable
6 for infants. Plaintiff would not have purchased Infants' Product if he had known that the advertising
7 and representations as described herein were false.

8 **SECOND CAUSE OF ACTION**
9 **Violations of Consumer Legal Remedies Act (CLRA)**
10 **California Civil Code §§ 1750, *et seq.***
11 **(On behalf of Plaintiff and the Class)**

12 82. Plaintiff hereby incorporates by reference each of the preceding allegations as if fully
13 set forth herein.

14 83. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact and
15 lost money as a result of Defendant's actions as set forth herein.

16 84. At all times relevant hereto, Defendant is a "person" as defined in Cal. Civ. C. §
17 1761(d).

18 85. At all times relevant hereto, Defendant's Infants' Product is a "good" as defined in
19 Cal. Civ. C. § 1761(d).

20 86. At all relevant times hereto, Plaintiff's purchases of Infants' Product constitute
21 "transactions" as defined in Cal. Civ. C. § 1761(e).

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

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

b. Cal. Civ. C. § 1770(a)(9): Advertising goods or services with intent not to sell them

1 as advertised; and,

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

4 88. Defendant has violated and continues to violate Cal. Civ. C. §1770(a)(5) by
5 representing that Infants' Product has sponsorship, approval, characteristics, ingredients, benefits
6 or quantities which it does not have.

7 89. Defendant has violated and continue to violate Cal. Civ. C. §1770(a)(9) by advertising
8 Infants' Product with the intent not to sell it as advertised.

9 90. Defendant has violated and continue to violate Cal. Civ. C. §1770(a)(16) by
10 representing Infants' Product has been supplied in accordance with previous representations when
11 it has not.

12 91. Defendant has violated and continue to violate Cal. Civ. C. § 1770(a)(5), (a)(9) and
13 (a)(16) by deceiving consumers into believing Infants' Product is specially formulated or otherwise
14 medicinally unique for infants, as described more fully above. Indeed, Plaintiff relied on Infants'
15 Product packaging before purchasing.

16 92. Defendant's misrepresentations and omissions were done with the intention of
17 deceiving Plaintiff and the Class and depriving them of their legal rights and money.

18 93. Defendant knew Infants' Product is not specially formulated or medicinally unique
19 for infants, that Children's Product is the same product as Infants' Product, and that Children's
20 Product is safe and suitable for infants as when given in the proper dosage amount.

21 94. Plaintiff is concurrently filing the declaration of venue required by Cal. Civ. C. §
22 1780(d).

23 95. The policies, acts, and practices hereto described were intended to result in the sale of
24 Infants' Product to the consuming public, particularly to cautious parents with sick babies who
25 needed medicine, and violated and continues to violate § 1770(a) (5) of the act by representing that
26 Infants' Product has characteristics, benefits, uses, or quantities which it does not have.

27 96. Defendant's actions as described herein were done with conscious disregard of
28 Plaintiff's rights and Defendant has acted wantonly and maliciously in its concealment of the same.

1 97. Defendant’s wrongful business practices constituted, and constitute, a continuing
2 course of conduct in violation of the CLRA since Defendant continues to make the same
3 misrepresentations and omit material information regarding Infants’ Product.

4 98. Pursuant to Cal. Civ. C. § 1780(a), Plaintiff currently seeks restitution and an order
5 enjoining Defendant from engaging in the methods, acts and practices alleged herein, and any other
6 relief deemed proper by the Court.

7 99. On or about March 10, 2020, Plaintiff sent Defendant notice advising Defendant that
8 it violated and continues to violate, Section 1770 of the CLRA (the “Notice”). The Notice complied
9 in all respects with Section 1782 of the CLRA. Plaintiff sent the Notice by Certified U.S. Mail,
10 return-receipt requested to Defendant at Defendant’s principal place of business and to its registered
11 agent in Sacramento, California. Plaintiff’s Notice advised Defendant that it must correct, repair,
12 replace or otherwise rectify its conduct alleged to be in violation of Section 1770. However,
13 Defendant failed to do so within thirty (30) days of receipt of this notice. Plaintiff therefore seeks
14 actual damages and punitive damages.

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16 **THIRD CAUSE OF ACTION**
17 **Violations of Unfair Competition Law (UCL)**
18 **‘Unfair’ and ‘Fraudulent’ Prongs**
19 ***Cal. Bus. & Prof. C. §§ 17200, et seq.***
20 **(On behalf of Plaintiff and the Class)**

21 100. Plaintiff hereby incorporates by reference each of the preceding allegations as if fully
22 set forth herein.

23 101. As alleged above, Plaintiff has standing to pursue this claim as he has suffered injury
24 in fact and lost money or property as a result of Defendant’s actions. Specifically, prior to the filing
25 of this action, Plaintiff purchased Infants’ Product for his own personal household use. In so doing,
26 Plaintiff relied on Defendant’s misrepresentations and omissions of material facts, as alleged in
27 detail above. Had Defendant disclosed on the packaging that Infants’ Product and Children’s
28 Product are identical, Plaintiff would not have purchased the more expensive Infants’ Product.

102. Defendant’s conduct in marketing, advertising, labeling, and packaging Infants’
Product is likely to deceive reasonable consumers. Indeed, no reasonable consumer would be willing

1 to pay approximately 400% more for Infants' Product unless they had good reason to believe that
2 the Infant's Product was different than the Children's Product.

3 103. Defendant is aware that the claims it makes about Infants' Product are deceptive, false
4 and misleading. Defendant is also aware consumers, such as Plaintiff, with babies are typically more
5 cautious about what medicine to give their baby, especially when they are giving their baby a
6 product that in the past has caused accidental deaths.

7 104. The misrepresentations by Defendant make constitute unfair and fraudulent business
8 practice within the meaning of Cal. Bus. & Prof. C. §§ 17500, *et seq.*

9 105. Defendant's business practices, as alleged herein, are unfair because: (1) the injury to
10 the consumer is substantial—he was deceived into thinking Infants' was specially formulated or
11 unique for infants; (2) the injury is not outweighed by countervailing benefits to consumers or
12 competition, as there can be no benefit to consumers where they are required to pay nearly quadruple
13 the price for the same medicine; (3) consumers could not reasonably have avoided the injury because
14 Defendant intentionally misled the consuming public by means of its advertising, marketing and
15 labeling of Infants'.

16 106. Defendant's business practices are also unfair because their conduct in selling,
17 advertising, marketing and labeling Infants' offends established public policy and is immoral,
18 unethical, oppressive, unscrupulous or substantially injurious to consumers. Such public policy is
19 tethered to specific constitutional and statutory provisions, including California's consumer
20 protection statutes.

21 107. Defendant's wrongful business practices constitute a continuing course of conduct of
22 unfair competition since Defendant is marketing and selling Infants' Product in a manner likely to
23 deceive the public.

24 108. Defendant has peddled, and continue to peddle, its misrepresentations through a
25 national advertising campaign.

26 109. In addition, Defendant's use of the packaging to call attention to or give publicity to
27 the sale of goods or merchandise which are not as represented constitutes unfair competition, unfair,
28 deceptive, untrue or misleading advertising, and an unlawful business practice within the meaning

1 of Cal. Bus. & Prof. C. §§ 17200, *et seq.*

2 110. There were reasonably available alternatives to further Defendant’s legitimate
3 business interests, other than the conduct described above.

4 111. Plaintiff was misled into purchasing Infants’ Product by Defendant’s deceptive and
5 fraudulent conduct as alleged above.

6 112. Plaintiff was misled and, because the misrepresentations and omissions were uniform
7 and material, presumably believed Infants’ Product was specially formulated or unique for infants.

8 113. Pursuant to section 17203 of the UCL, Plaintiff seek an order of this Court enjoining
9 Defendant from engaging in the unfair and fraudulent business practices alleged herein in
10 connection with the sale of Infants’.

11 114. Additionally, Plaintiff seeks an order awarding Plaintiff and the Class restitution of
12 the money wrongfully acquired by Defendant by means of the unfair and fraudulent business
13 practices alleged herein.

14 **FOURTH CAUSE OF ACTION**
15 **Violations of Unfair Competition Law (UCL)**
16 **Unlawful Prong**
17 ***Cal. Bus. & Prof. C. §§ 17200, et seq.***
18 **(On behalf of Plaintiff and the Class)**

19 115. Plaintiff hereby incorporates by reference each of the preceding allegations as if fully
20 set forth herein.

21 116. Defendant’s actions, as alleged herein, constitute illegal and unlawful business
22 practices in violation of Cal. Bus. & Prof. C. §§ 17200, *et seq.*

23 117. Defendant is unlawfully labeling, selling, marketing and advertising Infants’ Product.
24 Indeed, Defendant’s violations of the FAL, CLRA and the UCL alleged above, constitute predicate
25 acts which violate the UCL’s “unlawful” prong.

26 118. Plaintiff was misled because Defendant’s misrepresentations and omissions,
27 described above, were uniform and material. Plaintiff reasonably relied on those misrepresentations
28 and material omissions, believing based thereon that Infants’ Product was specially formulated or

1 unique for infants. As a result of Defendant's misrepresentations and omissions, Plaintiff lost
2 money or property.

3 119. Pursuant to section 17203 of the UCL, Plaintiff seeks an order of this Court enjoining
4 Defendant from engaging in the unlawful business practices alleged herein in connection with the
5 sale of Infants' Product.

6 120. Additionally, Plaintiff seeks an order awarding Plaintiff and the Class restitution of
7 the money wrongfully acquired by Defendant by means of the unfair and fraudulent business
8 practices alleged herein.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff, on behalf of himself and on behalf of the members of the Class
11 defined herein, prays for judgment and relief on all Causes of Action as follows:

- 12 A. An order certifying that the action may be maintained as a Class Action and that
13 Plaintiff be appointed the Class Representative and his undersigned counsel as Class
14 Counsel;
- 15 B. An order enjoining Defendant from pursuing the policies, acts, and practices
16 complained of herein;
- 17 C. Pre-judgment interest from the date of filing this suit;
- 18 D. Restitution;
- 19 E. Damages;
- 20 F. Punitive damages;
- 21 G. Reasonable attorneys' fees;
- 22 H. Costs of this suit; and
- 23 I. Such other and further relief as the Court may deem necessary or appropriate.
- 24

25 **JURY DEMAND**

26 Plaintiff, individually and on behalf of the Class, by and through their undersigned
27 counsel, hereby request a trial by jury as to all issues so triable.

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December 15, 2020

Respectfully submitted,

/s/ Gillian L. Wade

Gillian L. Wade

Sara D. Avila

Andrew Whitman

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EXHIBIT 1

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12 *Attorneys for Plaintiff and the Class*
 13 (Additional counsel listed in signature block)

14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16

17 CAMERON EIDMANN, individually and
 18 on behalf of all others situated;

19 Plaintiff,

20 vs.

21 WALGREEN CO. an Illinois Corporation,

22 Defendant.
 23
 24
 25
 26
 27

Case No. 5:20-cv-04805

FIRST AMENDED CLASS ACTION
 COMPLAINT

1. Violations of the False and Misleading Advertising Law, Cal. Bus. & Prof. C. §§ 17500, et seq.
2. Violations of the Consumer Legal Remedies Act, Cal. Civ. C. §§ 1750, et seq.
3. Violations of Unfair Competition Law, ‘Unfair’ and ‘Fraudulent’ Prongs, Cal. Bus. & Prof. C. §§ 17200, et seq.
4. Violations of Unfair Competition Law, ‘Unlawful’ Prong, Cal. Bus. & Prof. C. §§ 17200, et seq.

1 Plaintiff Cameron Eidmann (“Plaintiff”), by his undersigned counsel, on behalf of himself
2 and all persons similarly situated who purchased Walgreens’ store brand Infants’ Pain & Fever
3 Acetaminophen, brings this First Amended Class Action Complaint against Defendant Walgreen
4 Co. (“Walgreens” or “Defendant”). Pursuant to Section III of the Court’s Standing Order, attached
5 hereto as Exhibit 1 is a red-line document showing the changes made to the previously filed
6 complaint. Plaintiff alleges the following upon information and belief, except for those allegations
7 that pertain to Plaintiff, which are based on Plaintiff’s personal knowledge:

8 **NATURE OF THE ACTION**

9 1. Defendant is one of the biggest drugstore chains in the United States, operating over
10 9,000 mostly freestanding Walgreens stores throughout the United States, many of which are in
11 California. Defendant’s websites also allow consumers to purchase general merchandise—including
12 over-the-counter drugs—online.

13 2. Defendant has a portfolio of approximately 20 store brands (privately labeled),
14 including the Walgreens’ brand line of over-the-counter pain reliever and fever reducers, including
15 Walgreens’ Infants’ Pain & Fever Acetaminophen (“Infants’ Product” or the “Product”).¹ Defendant
16 positions this private label product as a “national brand equivalent,” selling it alongside brand-name
17 acetaminophen products, such as Infants’ Tylenol and Children’s Tylenol. Additionally, the front
18 of the Product’s outer packaging includes a banner at the top that states “Compare to Infants’
19 Tylenol® active ingredient”).

20 3. Acetaminophen is a pain reliever and fever reducer for both children and adults.
21 Children, including infants, are often prescribed acetaminophen for pain and fever reduction.
22 Pediatricians routinely advise caregivers to administer over-the-counter acetaminophen to babies to
23 treat fever and pain (e.g. as discomfort resulting from the baby’s first shots and teething). Health
24 professionals advise caregivers of the dosage amount for children under the age of two, which is in
25 part based on the child’s weight.

26
27
28 ¹ Although the formulation is identical across all products, Defendant sells multiple types and
flavors of the Infants’ Product. This action addresses all liquid versions of the Infants’ Product.

1 ~~3.4.~~ Giving a child too much acetaminophen can be dangerous and even fatal, a problem
 2 that terrifies parents and causes them to be extra careful when buying medicine for their young
 3 children and babies. The FDA warns parents and caregivers to “[b]e very careful when you’re giving
 4 your infant acetaminophen.” Defendant’s packaging for its Infants’ Product exploits parents’ fear
 5 of giving their children an improper (and possibly fatal) dosage or formulation. Defendant does this
 6 by designing its packaging to mislead a parent into thinking that the Infants’ Product is specially-
 7 formulated – or otherwise possesses some unique medicinal quality – to make it specifically
 8 appropriate for infants as opposed to older children. The front of a box of the Infants’ Product
 9 contains representations which are likely to deceive consumers into believing the Infants’ Product
 10 is specially formulated for infants or otherwise unique for infants.

11 ~~5.~~ In reality, the Product is not unique or specially made for babies. Indeed, the medicine
 12 contained in a bottle of Infants’ Product contains the same active ingredient and formulation (i.e.
 13 160 mg per 4 mL of acetaminophen) that is contained in a bottle of Defendant’s Children’s Pain &
 14 Fever Acetaminophen Oral Suspension (“Children’s Product”). Thus, there is no difference in the
 15 medicine sold in the Infants’ Product and the Children’s Product. But Defendant does not disclose
 16 this important information anywhere on the Infants’ Product packaging (though the front of the box
 17 *does* explicitly compare the Product to name-brand Infants’ Tylenol®).

18 ~~4.6.~~ This omission Defendant’s representations and omissions cause ~~s~~-consumers to suffer
 19 economic damage because they are not getting what they paid for—an acetaminophen product that
 20 has some special medicinal property uniquely for infants. Moreover, a classwide damages or
 21 restitution model can easily be formulated in this case because Defendant charges substantially more
 22 money for its Infants’ Product—up to *four times* as much per ounce—than for its Children’s
 23 Product. Yet there is no reason for this dramatic price ~~increase~~premium, as both medicines are
 24 identical.

JURISDICTION AND VENUE

25
 26 ~~5.7.~~ Plaintiff ~~and all members of the proposed Subclass are or werewas a~~ citizens of the
 27 State of California during all times relevant herein.

1 13-16. Pediatricians routinely advise parents and caregivers to administer acetaminophen to
2 babies to treat fever and relieve pain. Health professionals advise caregivers of the dosage amount
3 for children under the age of two, which is in part based on the child's weight.

4 14-17. Prior to the acts complained of herein, acetaminophen for infants was only available
5 with a concentration of 80 mg/mL of acetaminophen, and acetaminophen for children was only
6 available with a concentration of 160 mg/5 mL of acetaminophen.

7 15-18. The different concentrations caused some consumers to accidentally provide the
8 wrong dosage of medicine to their children, causing them to overdose.

9 16-19. In 1995, a lawsuit in San Francisco County Superior Court brought to light a potential
10 for confusion between acetaminophen products marketed for use by infants versus children
11 stemming from the different concentrations.

12 17-20. Between 2000 and 2009 the FDA received reports of twenty (20) children dying from
13 acetaminophen toxicity, and at least three (3) deaths were tied directly to mix-ups involving the two
14 pediatric medicines.

15 18-21. In an industry-wide effort to prevent the ongoing confusion and additional accidental
16 acetaminophen toxicity, in 2011, manufacturers voluntarily changed the liquid acetaminophen
17 marketed for infants from 80 mg per 0.8mL or 80mg per 1mL to be the same concentration as the
18 liquid acetaminophen marketed for children – 160 mg per 5mL.

19 19-22. Since then, the only difference in acetaminophen products marketed for infants and
20 children (including Defendant's Infants' Product and Children's Product) has been the price and the
21 plastic dosing instrument included with the product.²

22 20-23. Defendant's Infants' Product and Children's Product have the same concentration of
23 acetaminophen, are thus interchangeable – equally suitable for infants and children.

24 21-24. Defendant's store brand products—including Infants' Product—have been marketed
25 as capable of delivering quality and value.

26 22-25. Since ~~before the beginning of the Class Period~~ at least 2012 and at all relevant times
27 herein, Defendant has been engaging in the unfair, unlawful, and deceptive practice of

28 ² See fn. 1, *supra*.

1 manufacturing, marketing and selling its store brand pediatric acetaminophen as two separate
2 products (one marketed for use in infants and the other for children), such that parents mistakenly
3 believe they must purchase the more expensive Infants' Product for their infants.

4 ~~23-26.~~ The front of the box of the Infants' Product displays a drawing of a small child. The
5 outer packaging also includes the following statements, among others:

- 6 a. The name of the product: "Infants' Pain & Fever Acetaminophen"
7 b. "Compare to the active ingredient in Infants' Tylenol® Oral Suspension"

8 ~~24-27.~~ While the packaging compares Infants' Product to a name-brand counterpart (also
9 purportedly formulated exclusively and specifically for infants), it does not state that it is also the
10 same medicine contained in Children's Product. Instead, the representations and images create the
11 opposite effect. But the lack of difference in formulations between the Infants' Product and
12 Children's Product would be important information to consumers in deciding whether to buy
13 Infants' Product.

14 ~~25-28.~~ Similarly, Defendant's Children's Product leads a reasonable consumer to believe that
15 it consists of medicine that is specific to children, as opposed to infants. The front of the box of the
16 Children's Product displays a parent holding a child appearing to be older than a toddler. The outer
17 packaging also includes the following statements, among others:

- 18 a. The name of the product, "Children's Pain & Fever Acetaminophen"
19 b. "Compare to the active ingredient in Children's Tylenol® Oral Suspension"

20 ~~29.~~ A consumer would not likely know it was possible or even safe to compare the Infants'
21 Product with the Children's Product, and such a comparison is not required for reasonable
22 consumers to be deceived by the packaging for the Infants' Product.

23 ~~30.~~ However, ~~like~~ the packaging of the Infants' Product, nowhere on the label of the
24 Children's Product does Defendant state that the formulation of the two medicines is entirely
25 identical.

26 ~~26.~~ —

27 ~~27-31.~~ Consumers are injured by Defendant's deceptive advertising on the Infants' Product
28 packaging. T~~Despite this fact,~~ the Infant Product retails for approximately \$4.00 per ounce, while

1 the Children's Product ~~retails~~ for \$1.29 per ounce. Accordingly, the Infant Product can cost almost
 2 four times as much per ounce than the Children's Product, despite being identical medicines. There
 3 is a similarly significant price differential throughout the Class Period. There is a similar price
 4 differential throughout the Class Period.

5 32. Defendant knows that consumers with the youngest of children, such as Plaintiff, are
 6 typically more cautious about what medicine they give to their babies, especially when they are
 7 giving their babies a product that can cause accidental deaths. Indeed, parenting resources express
 8 the conventional understanding that infants should not, and cannot, tolerate medicines meant for
 9 older children. For example, the popular parenting website "What to Expect" warns "Always use
 10 the infant formulations; never give your baby a medication intended for older kids or adults."³
 11 This conventional understanding holds particularly true for parents when they are giving their infant
 12 a medicine that has caused accidental deaths in the past.

13 28-33. Defendant's deceptive and misleading advertising, marketing, packaging and sales
 14 practices harness the fear of acetaminophen toxicity to trick consumers, including Plaintiff, into
 15 purchasing and overpaying for Infant's Product when Children's Product would be just as safe and
 16 effective at a fraction of the price.

17 29-34. Defendant knows these misrepresentations and omissions would be important to a
 18 reasonable consumer in deciding whether or not to purchase Infants' Product (as opposed to the
 19 identically-formulated Children's Product).

20 30-35. Defendant's deceptive and misleading advertising, marketing, packaging and sales
 21 practices harness the fear of acetaminophen toxicity to trick consumers, including Plaintiff, into
 22 purchasing and overpaying for Infants' Product when Children's Product would be just as safe and
 23 effective at a fraction of the price.

24 **Plaintiff's Purchase of the Product**

25 34-36. When Plaintiff's children were infants, Plaintiff and his wife would purchase infants'

26 ³ Colleen de Bellefonds, "Children's Medication Safety Tips and Guidelines." What to Expect
 27 (Jan. 22, 2019) (available at <https://www.whattoexpect.com/family/childrens-health-and-safety/medication-safety-guidelines-tips#:~:text=Always%20use%20the%20infant%20formulations,baby%20in%20a%20sitting%20position.>)
 28 (emphasis added).

1 acetaminophen, including Defendant's Infants' Product, to relieve the children's fevers and for pain
2 associated with teething.

3 32-37. Throughout this period, Plaintiff would shop at a Walgreens pharmacy in San Jose,
4 California, where he would purchase Defendant's Infants' Product.

5 33-38. Plaintiff saw that Defendant's Infants' Product was marketed for babies, and believed
6 it to be specifically formulated for babies such as his children (and pharmacologically or otherwise
7 distinct from Defendant's Children's Product or any other children's acetaminophen product).

8 34-39. Plaintiff accordingly purchased Infants' Product from Defendant, instead of
9 Defendant's Children's Product.

10 40. Throughout Plaintiff's children's infancies, Plaintiff and/or his wife made several
11 purchases of Infants' Product at their Walgreens pharmacy.

12 **RULE 9(b)**

13 41. Defendant made—and continue to makes—material misrepresentations and failed—
14 and continues to fail—to adequately disclose that the Infant's Product contains the same medicine
15 contained in the Children's Product. Although Defendant discloses the Product is comparable to
16 brand-name Infants' Tylenol, it does not state it is comparable to its own Children's Product.

17 42. Except as identified herein, Plaintiff is unaware, and therefore, unable to identify, the
18 true names and identities of those individuals employed by, or acting on behalf of, Defendant who
19 are responsible for such material misrepresentations and omissions.

20 43. Defendant made—and continues to make—material misrepresentations regarding the
21 Infant's Product. Specifically, at all times relevant to this action, Defendant has labeled, marketed,
22 and sold the Infant's Product in a manner that indicates to reasonable consumers that it is specially
23 formulated for infants or is an acetaminophen product that has some special medicinal property
24 uniquely for infants. These representations (including the name of the Product, the statement
25 comparing the Product to Infants' Tylenol, and the imagery on the packaging) are misleading
26 because the medicine in the Infant's Product is not unique or specially made for infants. In fact, it
27 is the same as the Children's Product. Defendant then charges an inflated price (price premium) for
28 the Infant's Product as compared to the identical Children's Product.

1 injunction, Plaintiff would be unable to trust Defendant's representations and would not purchase
2 Infant's Product.

3 50.

4 TOLLING

5 **A. Discovery Rule Tolling**

6 ~~36.51.~~ Class Members had no way of knowing about Defendant's deceptive practices with
7 respect to the marketing of its Infants' Product and Children's Product. Defendant's marketing of
8 the respective products makes clear that it tried to hide the true facts that there is no pharmacological
9 difference between the two products despite the pronounced price markup for its Infants' Product.

10 ~~37.52.~~ Within the period of any applicable statutes of limitation, Plaintiff and the other Class
11 Members could not have discovered through the exercise of reasonable diligence that Defendant
12 was hiding its true practices.

13 ~~38.53.~~ All applicable statutes of limitation have been tolled by operation of the discovery
14 rule.

15 **B. Fraudulent Concealment Tolling**

16 ~~39.54.~~ All applicable statutes of limitation have also been tolled by Defendant's knowing
17 and active fraudulent concealment and denial of the facts alleged herein throughout the period
18 relevant to this action.

19 ~~40.55.~~ Instead of disclosing its true practices, Defendant falsely represented that there was a
20 meaningful difference between its Infants' Product and Children's Product, and that the former
21 should be used by infants while the latter should be used by children.

22 **C. Estoppel**

23 ~~41.56.~~ Defendant was under a continuous duty to disclose to Plaintiff and the other Class
24 Members the true character, quality, and nature of its acetaminophen products, including Infants'
25 Product and Children's Product.

26 ~~42.57.~~ Defendant knowingly, affirmatively, and actively concealed true facts from
27 consumers.
28

1 43-58.Based on the foregoing, Defendant is estopped from relying on any statutes of
 2 limitations in defense of this action.

3 **CLASS ALLEGATIONS**

4 44-59.Plaintiff brings this action as a class action on his own behalf and on behalf of all
 5 others similarly situated under Federal Rule of Civil Procedure Rule 23, for declaratory judgment,
 6 damages, restitution, injunctive relief, costs and attorneys’ fees. Plaintiff seeks certification of this
 7 action as a class action on behalf of the following class (the “Class”):

8 All persons who purchased Infants’ Product for personal use and not
 9 for resale in the United States.

10 ~~45. Plaintiff also bring this suit as a class action on behalf of the following subclass~~
 11 ~~(“California State Subclass”):~~

12 ~~All persons, in the State of California, who purchased Infants’~~
 13 ~~Product for personal use and not for resale in California.~~

14 46-60.The following persons are excluded from the Class ~~and Subclass~~: Defendant,
 15 Defendant’s officers, directors, agents, trustees, parents, children, corporations, trusts,
 16 representatives, employees, successors, assigns, or other persons or entities related to or affiliated
 17 with Defendant and/or its officers and/or directors, or any of them. Also excluded from the proposed
 18 Class and Sub-Class are the Court, the Court’s immediate family and Court staff.

19 47-61.The members of the Class ~~and Subclass~~ are so numerous that joinder of all members
 20 is impracticable. On information and belief, there are in excess of a thousand members of the Class.
 21 Discovery will reveal, through Defendant’s records, the approximate number of Class ~~and Subclass~~
 22 members.

23 48-62.Plaintiff’s claims are typical of the Class ~~and the Subclass~~. Plaintiff, like all members
 24 of the Class, has been subjected to Defendant’s deceptive and misleading marketing (including the
 25 packaging) for Infants’ Product. The harm suffered by Plaintiff and the Class was and is caused by
 26 the same misconduct by Defendant.

27 49-63.Plaintiff will fairly and adequately represent and protect the interests of the members
 28 of the Class ~~and Subclass~~. Plaintiff has retained counsel highly experienced in complex consumer

1 class action litigation and intend to prosecute this action vigorously. Plaintiff is a member of both
2 the Class ~~and Subclass~~ described herein and do not have interests antagonistic to, or in conflict with,
3 the other members of the Class ~~and Subclass~~.

4 ~~50-64~~. A class action is superior to other available methods for the fair and efficient
5 adjudication of this controversy. Because the monetary damages suffered by individual Class
6 members are relatively small, the expense and burden of individual litigation make it impossible for
7 individual Class members to seek redress for the wrongful conduct asserted herein. If Class
8 treatment of these claims is not available, Defendant would likely continue its wrongful conduct,
9 will unjustly retain improperly obtained revenues, and/or otherwise escape liability for their
10 wrongdoing.

11 ~~51-65~~. Common questions of law and fact exist as to all members of the Class, which
12 predominate over any questions that may affect individual Class members. Among the questions of
13 law and fact common to the Class are the following:

- 14 a. Whether Defendant's marketing, advertising, labeling, and packaging of Infants'
15 Product is likely to deceive reasonable consumers;
- 16 b. Whether Defendant's marketing, advertising, labeling, and packaging of Infants'
17 Product caused Plaintiff and the Class to suffer economic harm;
- 18 c. Whether Defendant violated California Business and Professions Code §§ 17200, *et*
19 *seq*;
- 20 d. Whether Defendant violated California Business and Professions Code §§ 17500, *et*
21 *seq*;
- 22 e. Whether Defendant's representations and omissions are material to reasonable
23 consumers; and,
- 24 f. Whether Plaintiff and the Class are entitled to restitution or damages and if so, the
25 appropriate measure.

26 ~~52-66~~. Plaintiff knows of no difficulty which will be encountered in the management of this
27 litigation which would preclude its maintenance as a class action.

28 ~~53-67~~. The prosecution of separate actions by individual members of the Class would run the

1 risk of inconsistent or varying adjudications, which might establish incompatible standards of
2 conduct for the Defendant. Prosecution as a class action will eliminate the possibility of repetitious
3 litigation.

4 68. Class certification is appropriate under Federal Rule of Civil Procedure Rule
5 23(b)(2) because Defendant's actions are generally applicable to the Class as a whole, and Plaintiff
6 seeks equitable remedies with respect to the Class as a whole. Defendant has acted or refused to act
7 on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or
8 corresponding declaratory relief with respect to the Class as a whole.

9 69. Defendant has acted or refused to act on grounds generally applicable to the Class,
10 thereby making appropriate final injunctive relief or corresponding declaratory relief with respect
11 to the Class as a whole.

12 54.

13 **FIRST CAUSE OF ACTION**
14 **Violations of False and Misleading Advertising Law (FAL)**
15 **California's False Advertising Law, Bus. & Prof. Code §§ 17500, *et seq.***
16 **(on behalf of Plaintiff and the proposed Class)**

17 55:70. Plaintiff hereby incorporates by reference each of the preceding allegations as if fully
18 set forth herein.

19 56:71. In marketing, advertising, labeling, and packaging Infants' Product, Defendant made,
20 and continues to make, misleading statements in order to induce consumers into purchasing Infants'
21 Product on a false premise.

22 57:72. In marketing, advertising, labeling, and packaging Infants' Product, Defendant failed
23 and continue to fail to make material disclosures, including a statement that Infants' Product is the
24 same product as Children's Product.

25 58:73. Defendant is aware that the claims it makes about Infants' Product are deceptive,
26 misleading, without basis, and unreasonable.

27 59:74. Defendant engaged in the deceptive conduct alleged above to induce the public to
28 purchase the more expensive Infants' Product instead of Children's Product.

1 ~~60.75.~~ In marketing, advertising, labeling, and packaging Infant's Product described above,
2 Defendant knew or should have known their statements regarding the uses and characteristics of
3 Infants' Product were false and misleading.

4 ~~61.76.~~ Defendant's misrepresentations of the material facts detailed above constitute unfair
5 and fraudulent business practices within *Cal. Bus. & Prof. C.* § 17200.

6 ~~62.77.~~ There were reasonably available alternatives to further Defendant's legitimate
7 business interests, other than the conduct described herein.

8 ~~63.78.~~ All of the conduct alleged herein occurs and continues to occur in Defendant's
9 business. Defendant's wrongful conduct is part of a course of conduct repeated on hundreds if not
10 thousands of occasions every day.

11 ~~64.79.~~ Plaintiff was misled into purchasing Infants' Product by Defendant's deceptive
12 conduct and misleading advertising as alleged above.

13 ~~65.80.~~ In addition, Defendant's use of the Product's packaging as advertising and marketing
14 have deceived and are likely to continue deceiving the consuming public, in violation of California
15 Business and Professions Code § 17500.

16 ~~66.81.~~ Plaintiff has suffered injury in fact and has lost money as a result of Defendant's
17 misrepresentations and omissions. Indeed, Plaintiff purchased Infants' Product because of
18 Defendant's misrepresentations that Infants' Product is specially formulated or uniquely suitable
19 for infants. Plaintiff would not have purchased Infants' Product if he had known that the advertising
20 and representations as described herein were false.

21 **SECOND CAUSE OF ACTION**
22 **Violations of Consumer Legal Remedies Act (CLRA)**
23 **California Civil Code §§ 1750, *et seq.***
(On behalf of Plaintiff and the ~~California~~ CSubelass)

24 ~~67.82.~~ Plaintiff hereby incorporates by reference each of the preceding allegations as if fully
25 set forth herein.

26 ~~68.83.~~ Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact and
27 lost money as a result of Defendant's actions as set forth herein.

28 ~~69.84.~~ At all times relevant hereto, Defendant is a "person" as defined in Cal. Civ. C. §

1 1761(d).

2 70:85. At all times relevant hereto, Defendant’s Infants’ Product is a “good” as defined in
3 Cal. Civ. C. § 1761(d).

4 71:86. At all relevant times hereto, Plaintiff’s purchases of Infants’ Product constitute
5 “transactions” as defined in Cal. Civ. C. § 1761(e).

6 72:87. The following subsections of the CLRA prohibit the following unfair methods of
7 competition and unfair or deceptive acts or practices undertaken by any person in a transaction is
8 intended to result or which results in the sale or lease of goods or services to any consumer:

- 9 a. Cal. Civ. C. § 1770(a)(5): Representing that goods or services have sponsorship,
10 approval, characteristics, ingredients, uses, benefits, or quantities which they do not
11 have or that a person has a sponsorship, approval, status, affiliation, or connection
12 which they do not have;
- 13 b. Cal. Civ. C. § 1770(a)(9): Advertising goods or services with intent not to sell them
14 as advertised; and,
- 15 c. Cal. Civ. C. § 1770(a)(16): Representing that the subject of a transaction has been
16 supplied in accordance with a previous representation when it has not.

17 73:88. Defendant has violated and continues to violate Cal. Civ. C. §1770(a)(5) by
18 representing that Infants’ Product has sponsorship, approval, characteristics, ingredients, benefits
19 or quantities which it does not have.

20 74:89. Defendant has violated and continue to violate Cal. Civ. C. §1770(a)(9) by advertising
21 Infants’ Product with the intent not to sell it as advertised.

22 75:90. Defendant has violated and continue to violate Cal. Civ. C. §1770(a)(16) by
23 representing Infants’ Product has been supplied in accordance with previous representations when
24 it has not.

25 76:91. Defendant has violated and continue to violate Cal. Civ. C. § 1770(a)(5), (a)(9) and
26 (a)(16) by deceiving consumers into believing Infants’ Product is specially formulated or otherwise
27 medicinally unique for infants, as described more fully above. Indeed, Plaintiff relied on Infants’
28 Product packaging before purchasing.

1 77-92. Defendant's misrepresentations and omissions were done with the intention of
2 deceiving Plaintiffs and the Class and depriving them of their legal rights and money.

3 78-93. Defendant knew Infants' Product is not specially formulated or medicinally unique
4 for infants, that Children's Product is the same product as Infants' Product, and that Children's
5 Product is safe and suitable for infants as when given in the proper dosage amount.

6 79-94. Plaintiff is concurrently filing the declaration of venue required by Cal. Civ. C. §
7 1780(d).

8 80-95. The policies, acts, and practices hereto described were intended to result in the sale of
9 Infants' Product to the consuming public, particularly to cautious parents with sick babies who
10 needed medicine, and violated and continues to violate § 1770(a) (5) of the act by representing that
11 Infants' Product has characteristics, benefits, uses, or quantities which it does not have.

12 81-96. Defendant's actions as described herein were done with conscious disregard of
13 Plaintiff's rights and Defendant has acted wantonly and maliciously in its concealment of the same.

14 82-97. Defendant's wrongful business practices constituted, and constitute, a continuing
15 course of conduct in violation of the CLRA since Defendant continues to make the same
16 misrepresentations and omit material information regarding Infants' Product.

17 83-98. Pursuant to Cal. Civ. C. § 1780(a), Plaintiff currently seeks restitution and an order
18 enjoining Defendant from engaging in the methods, acts and practices alleged herein, and any other
19 relief deemed proper by the Court.

20 84-99. On or about March 10, 2020, Plaintiff sent Defendant notice advising Defendant that
21 it violated and continues to violate, Section 1770 of the CLRA (the "Notice"). The Notice complied
22 in all respects with Section 1782 of the CLRA. Plaintiff sent the Notice by Certified U.S. Mail,
23 return-receipt requested to Defendant at Defendant's principal place of business and to its registered
24 agent in Sacramento, California. Plaintiff's Notice advised Defendant that it must correct, repair,
25 replace or otherwise rectify its conduct alleged to be in violation of Section 1770. However,
26 Defendant failed to do so within thirty (30) days of receipt of this notice. Plaintiff therefore seeks
27 actual damages and punitive damages.
28

THIRD CAUSE OF ACTION
Violations of Unfair Competition Law (UCL)
‘Unfair’ and ‘Fraudulent’ Prongs
Cal. Bus. & Prof. C. §§ 17200, et seq.
(On behalf of Plaintiffs and the Class)

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4 85.100. Plaintiff hereby incorporates by reference each of the preceding allegations as if fully
5 set forth herein.

6 86.101. As alleged above, Plaintiff has standing to pursue this claim as he has suffered injury
7 in fact and lost money or property as a result of Defendant’s actions. Specifically, prior to the filing
8 of this action, Plaintiff purchased Infants’ Product for his own personal household use. In so doing,
9 Plaintiff relied on Defendant’s misrepresentations and omissions of material facts, as alleged in
10 detail above. Had Defendant disclosed on the packaging that Infants’ Product and Children’s
11 Product are identical, Plaintiff would not have purchased the more expensive Infants’ Product.

12 87.102. Defendant’s conduct in marketing, advertising, labeling, and packaging Infants’
13 Product is likely to deceive reasonable consumers. Indeed, no reasonable consumer would be willing
14 to pay approximately 400% more for Infants’ Product unless they had good reason to believe that
15 the Infant’s Product was different than the Children’s Product.

16 88.103. Defendant is aware that the claims it makes about Infants’ Product are deceptive, false
17 and misleading. Defendant is also aware consumers, such as Plaintiff, with babies are typically more
18 cautious about what medicine to give their baby, especially when they are giving their baby a
19 product that in the past has caused accidental deaths.

20 89.104. The misrepresentations by Defendant make constitute unfair and fraudulent business
21 practice within the meaning of Cal. Bus. & Prof. C. §§ 17500, *et seq.*

22 90.105. Defendant’s business practices, as alleged herein, are unfair because: (1) the injury to
23 the consumer is substantial—he was deceived into thinking Infants’ was specially formulated or
24 unique for infants; (2) the injury is not outweighed by countervailing benefits to consumers or
25 competition, as there can be no benefit to consumers where they are required to pay nearly quadruple
26 the price for the same medicine; (3) consumers could not reasonably have avoided the injury because
27 Defendant intentionally misled the consuming public by means of its advertising, marketing and
28 labeling of Infants’.

1 91:106. Defendant's business practices are also unfair because their conduct in selling,
2 advertising, marketing and labeling Infants' offends established public policy and is immoral,
3 unethical, oppressive, unscrupulous or substantially injurious to consumers. Such public policy is
4 tethered to specific constitutional and statutory provisions, including California's consumer
5 protection statutes.

6 92:107. Defendant's wrongful business practices constitute a continuing course of conduct of
7 unfair competition since Defendant is marketing and selling Infants' Product in a manner likely to
8 deceive the public.

9 93:108. Defendant has peddled, and continue to peddle, its misrepresentations through a
10 national advertising campaign.

11 94:109. In addition, Defendant's use of the packaging to call attention to or give publicity to
12 the sale of goods or merchandise which are not as represented constitutes unfair competition, unfair,
13 deceptive, untrue or misleading advertising, and an unlawful business practice within the meaning
14 of Cal. Bus. & Prof. C. §§ 17200, *et seq.*

15 95:110. There were reasonably available alternatives to further Defendant's legitimate
16 business interests, other than the conduct described above.

17 96:111. Plaintiff was misled into purchasing Infants' Product by Defendant's deceptive and
18 fraudulent conduct as alleged above.

19 97:112. Plaintiff was misled and, because the misrepresentations and omissions were uniform
20 and material, presumably believed Infants' Product was specially formulated or unique for infants.

21 98:113. Pursuant to section 17203 of the UCL, Plaintiff seek an order of this Court enjoining
22 Defendant from engaging in the unfair and fraudulent business practices alleged herein in
23 connection with the sale of Infants'.

24 99:114. Additionally, Plaintiff seeks an order awarding Plaintiff and the Class restitution of
25 the money wrongfully acquired by Defendant by means of the unfair and fraudulent business
26 practices alleged herein.

27 **FOURTH CAUSE OF ACTION**
28 **Violations of Unfair Competition Law (UCL)**

Unlawful Prong
Cal. Bus. & Prof. C. §§ 17200, et seq.
(On behalf of Plaintiffs and the Class)

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3 ~~+00:115.~~ Plaintiff hereby incorporates by reference each of the preceding allegations as if fully
4 set forth herein.

5 ~~+01:116.~~ Defendant's actions, as alleged herein, constitute illegal and unlawful business
6 practices in violation of Cal. Bus. & Prof. C. §§ 17200, et seq.

7 ~~+02:117.~~ Defendant is unlawfully labeling, selling, marketing and advertising Infants' Product.
8 Indeed, Defendant's violations of the FAL, CLRA and the UCL alleged above, constitute predicate
9 acts which violate the UCL's "unlawful" prong.

10 ~~+03:118.~~ Plaintiff was misled because Defendant's misrepresentations and omissions,
11 described above, were uniform and material. Plaintiff reasonably relied on those misrepresentations
12 and material omissions, believing based thereon that Infants' Product was specially formulated or
13 unique for infants. As a result of Defendant's misrepresentations and omissions, Plaintiff lost
14 money or property.

15 ~~+04:119.~~ Pursuant to section 17203 of the UCL, Plaintiff seeks an order of this Court enjoining
16 Defendant from engaging in the unlawful business practices alleged herein in connection with the
17 sale of Infants' Product.

18 ~~+05:120.~~ Additionally, Plaintiff seeks an order awarding Plaintiff and the Class restitution of
19 the money wrongfully acquired by Defendant by means of the unfair and fraudulent business
20 practices alleged herein.

PRAYER FOR RELIEF

21
22 WHEREFORE, Plaintiff, on behalf of himself and on behalf of the members of the Class
23 defined herein, prays for judgment and relief on all Causes of Action as follows:

- 24 A. An order certifying that the action may be maintained as a Class Action and that
25 Plaintiff be appointed the Class Representative and his undersigned counsel as Class
26 Counsel;
- 27 B. An order enjoining Defendant from pursuing the policies, acts, and practices
28 complained of herein;

- 1 C. Pre-judgment interest from the date of filing this suit;
- 2 D. Restitution;
- 3 E. Damages;
- 4 F. Punitive damages;
- 5 G. Reasonable attorneys' fees;
- 6 H. Costs of this suit; and
- 7 I. Such other and further relief as the Court may deem necessary or appropriate.

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10 **JURY DEMAND**

11 Plaintiff, individually and on behalf of the Class, by and through their undersigned
12 counsel, hereby request a trial by jury as to all issues so triable.

13
14

~~July 17~~ December 15, 2020

Respectfully submitted,

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/s/ Gillian L. Wade
Gillian L. Wade
Sara D. Avila
Andrew Whitman
**MILSTEIN JACKSON FAIRCHILD & WADE,
LLP**

20
21

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