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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

JENILE THAMES, individually and on behalf of
all others similarly situated,

Plaintiff,

v.

MARS INC.,

Defendant.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiff Jenile Thames (“Plaintiff”) brings this action on behalf of himself, and all others
2 similarly situated against Mars, Inc. (“Defendant”). Plaintiff makes the following allegations
3 pursuant to the investigation of his counsel and based upon information and belief, except as to the
4 allegations specifically pertaining to himself, which are based on personal knowledge.

5 **NATURE OF THE ACTION**

6 1. Plaintiff brings this Class action lawsuit on behalf of himself and similarly situated
7 consumers (“Class Members”) who purchased for personal, family, or household consumption,
8 Defendant’s candies sold under the brand name “Skittles” (the “Products”),¹ which are unfit for
9 human consumption because they contain titanium dioxide (“TiO2”), a known toxin. Defendant has
10 long known of the health problems posed by TiO2. In fact, in February 2016, Defendant publicly
11 committed to phasing out TiO2. But Defendant has flouted its own promise to consumers. More
12 than six years later, Defendant continues to sell the Products with TiO2, unbeknownst to reasonable
13 consumers who purchase the Products.

14 2. Interestingly, in its February 2016 press release, Defendant blew smoke, suggesting
15 that its planned phase out of TiO2 was called for simply because “consumers today are calling on
16 food manufacturers to use more natural ingredients in their products.” Incredibly, Defendant even
17 claimed that “[a]rtificial colors pose no known risks to human health or safety.” In doing so,
18 Defendant concealed from consumers material information it knew. Namely, that numerous of its
19 competitors and other food manufacturers had long removed the toxin from their product lines
20 because of scientific research showing that the toxin is unsafe for consumption.

21 3. Several nations have banned the harmful toxin. For example, in 2019, the toxin was
22 banned in France, where Defendant maintains offices and announced that it could and would comply
23 with France’s law.

24 4. In May 2021, the European Food Safety Authority (“EFSA”) released its report on
25 the health concerns associated with TiO2, determining that TiO2 could not be considered safe for
26 consumption. Professor Maged Younes, Chair of EFSA’s expert Panel on Food Additives and

27 ¹ This includes Skittles Original, Skittles Wild Berry, Sour Skittles, Tropical Skittles, and
28 Smoothies Skittles, among others.

1 Flavourings (“FAF”) underscored these findings, stating that: “Taking into account all available
 2 scientific studies and data, the Panel concluded that titanium dioxide can no longer be considered
 3 safe as a food additive. A critical element in reaching this conclusion is that we could not exclude
 4 genotoxicity concerns after consumption of titanium dioxide particles.”²

5 5. Building on EFSA’s research, the European Commission (“EC”) announced that it
 6 too would adopt a ban on the use of TiO₂ as a food additive. Under that plan, the ban would apply
 7 following a six-month transition period, and beginning summer 2022, the additive should no longer
 8 be added to food products. That plan was adopted unanimously by Member States.

9 6. Defendant—with offices in Netherland, Denmark, Ireland, Italy, Portugal, Germany,
 10 Norway, Czech Republic, Romania, Belgium Switzerland, Austria, Slovakia, Hungary, France,
 11 Greece, and Spain³—and with sales in each of those Member States was reminded of the scientific
 12 findings concerning TiO₂ and was required to comply with the EC’s ban.

13 7. Nonetheless, in the United States, Defendant maintains sales with TiO₂ as an additive,
 14 failing to inform consumers of the implications of consuming the toxin. Instead, Defendant relies
 15 on the ingredient list which is provided in miniscule print on the back of the Products, the reading of
 16 which is made even more challenging by the lack of contrast in color between the font and packaging,
 17 as set out below in a manner in which consumers would normally view the product in the store.



26 ² EFSA, “Titanium dioxide: E171 no longer considered safe when used as a food additive,” (May
 27 6, 2021), <https://www.efsa.europa.eu/en/news/titanium-dioxide-e171-no-longer-considered-safe-when-used-food-additive>.

28 ³ MARS, “Our Locations,” https://cze.mars.com/en/locations?language_content_entity=en.

1 result of Mars Inc.'s material misrepresentations and omissions, Mr. Thames suffered, and continues
2 to suffer, economic injuries.

3 12. Mr. Thames remains interested in purchasing candies from Defendant that are safe
4 for consumption. However, Plaintiff is unable to determine if the Products are actually safe for
5 consumption. Plaintiff understands that the composition of the Products may change over time. But
6 as long as Defendant may market the Products as safe for consumption when the Products are not
7 safe consumption, then when presented with false or misleading information when shopping, he will
8 be unable to make informed decisions about whether to purchase Defendant's Products and will be
9 unable to evaluate the different prices between Defendant's Products and competitor's Products.
10 Plaintiff is further likely to be repeatedly misled by Defendant's conduct, unless and until Defendant
11 is compelled to ensure that Products marketed and labeled as safe for consumption, are, in fact, safe
12 for consumption.

13 13. Defendant Mars Inc. is a foreign corporation with its domestic headquarters located
14 at 9885 Elm Street, McLean, Virginia 22101. Relevant to Plaintiff's claim herein, Mars is a leading
15 manufacturer, packager, and distributor of, among other products, candy, and confectionery. Mars
16 Inc. has done business throughout California and the United States at all times during the Class
17 Period. At all relevant times, Mars Inc., has advertised, marketed, manufactured, distributed, and/or
18 sold candy and confectionery, including the Products at issue, to consumers in and throughout
19 California and the United States. At all relevant times, Mars Inc., formulated, directed, controlled,
20 had the authority to control, and/or participated in the acts and practices set fourth in this Complaint.

21 14. Plaintiffs reserve the right to amend this Complaint and add different products and
22 additional defendants, including without limitation and officer, director, employee, supplier, or
23 distributor of Defendant who has knowingly and willfully aided, abetted, and/or conspired in the
24 false and deceptive conduct alleged herein.

25 **JURISDICTION AND VENUE**

26 15. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A), as
27 amended by the Class Action Fairness Act of 2005 ("CAFA"), because this case is a class action
28 where the aggregate claims of all members of the proposed class are in excess of \$5,000,000.00,

1 exclusive of interest and costs, there are over 100 members of the putative class, and Plaintiffs, as
 2 well as most members of the proposed class, are citizens of different states than Defendant. This
 3 Court has personal jurisdiction over Defendant because it is licensed to do business in California,
 4 has designated an agent for services of process in California, and otherwise conducts substantial
 5 business in California.

6 16. This Court has personal jurisdiction over Defendant because Defendant conducts
 7 substantial business within California such that Defendant has significant, continuous, and pervasive
 8 contacts with the State of California.

9 17. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Defendant does
 10 substantial business in this District and a substantial part of the events giving rise to Plaintiff's claims
 11 took place within this District and Plaintiff saw and heard Defendant's advertisements in this District.

12 **FACTUAL ALLEGATIONS**

13 **A. Mars' Candy Skittles**

14 18. Skittles candy are manufactured, marketed, and sold by Mars Wrigley. The candy is
 15 well-known by its colorful array, which Mars has dubbed "the rainbow" for marketing purposes to
 16 great success. For example, Skittles was "America's favorite non-chocolate chewy candy in 2017,
 17 with sales in excess of \$185 million U.S. dollars."⁴

18 19. The color of Defendant's rainbow, however, is due to its use of TiO₂.

19 20. Significantly, Defendant need not rely on the use of TiO₂ to achieve this result.

20 21. Numerous of Defendant's competitors do not use TiO₂ in their Products and yet are
 21 able to maintain the colorful impression Defendant hopes to achieve with its Products.

22 22. For example, Swedish Fish Soft & Chewy Candy does not rely on TiO₂ and yet
 23 achieves a bright red color.

24 23. Likewise, Black Forest Gummy Bears does not rely on TiO₂ and still strikes an
 25 assortment of colors, including orange, red, yellow, and green.

26
 27 ⁴ Nils-Gerrit Wunsch, *Sales of Leading Non-Chocolate Chewy Candy Brands of the United States*
 28 *in 2017*, STATISTA (Nov. 25, 2020) available at <https://www.statista.com/statistics/190409/top-non-chocolate-chewy-candy-brands-in-the-united-states/> (last visited June 10, 2022).

24. Similarly, Sour Patch Kids does not make use of TiO₂ and accomplishes vivid colors like lime green, yellow, orange, and redberry.

25. Nerds also achieves bright colors including blue, green, red, and orange without the use of TiO₂.

26. Indeed, even Defendant has colorful confectionary goods such as its M&Ms product line that do not rely on TiO₂.

B. Titanium Dioxide is Harmful to Human Health

27. In February 2016, Defendant alerted the public of its intention to remove TiO₂ from its confectionary products.

28. Following that announcement, Jaydee Hanson, Senior Policy Analyst at Center for Food Safety, stated that “We are pleased to see that MARS has taken a positive step toward eliminating toxic, unnecessary nanomaterials from its line of food products. We urge the company to speed up the removal of these additives, especially given the grave health concerns associated with titanium dioxide and other nanoparticles.”

29. Mr. Hanson further stated that “Studies have shown that the human health risks associated with ingesting nanoparticles of many common food additives far outweigh any utility for producers. There are plenty of non-toxic alternatives available and we urge MARS and others to commit to not using any engineered nanomaterials in human and animal food products.”

30. Defendant’s public statements built on efforts by other large food companies to remove TiO₂ from their products. In March 2015, for example, Dunkin Donuts announced that it would no longer use TiO₂.

31. The reason for eliminating titanium dioxide is simple: TiO₂—which is used in paints, coatings, adhesives, plastics, printing inks, and roofing materials—has demonstrated an ability to pass through biological membranes, circulate through the body, and enter cells. Research shows that the effects are serious, including DNA and chromosomal damage, organ damage, inflammation, brain damage, genital malformations, lesions in the liver and kidneys, and cell neurosis.

32. Titanium dioxide also builds up in the body’s intestinal tract. Ordinarily, the intestinal track serves to absorb nutrients for the body. However, titanium dioxide cannot be absorbed. When

1 this occurs, the body's M-Cells absorb these particles and bring them to the innate immune system.
2 Overtime, the titanium dioxide particles are incorporated by the innate immune system cells where
3 they will remain without being degraded or dissolved.

4 33. In 2019, the French government responded to these troubling findings by banning all
5 foods containing titanium dioxide. This ban took effect in January 2020.

6 34. At that time, Defendant's subsidiary, Mars Wrigley Confectionary France, confirmed
7 that it could and would comply with the law.

8 35. Later that year, in October 2020, the European Parliament removed titanium dioxide
9 from the list of food additives authorized by the European Union for human consumption. European
10 researchers studying titanium dioxide noted that the long half-lives of titanium dioxide nanoparticles
11 created the potential for the particles to accumulate inside human organs and tissue. European
12 researchers also determined that titanium dioxide nanoparticles could cause DNA strands to break,
13 leading to chromosomal damage.

14 **C. Defendant's Omissions Concerning TiO₂ is Actionable**

15 36. Despite its February 2016 commitment to U.S. consumers and its apparent
16 compliance with the laws of the European Commission, Defendant has endangered U.S. consumers,
17 exposing them to TiO₂, which Defendant knows carries significant health concerns. It also failed to
18 tell consumers that contrary to its earlier representations, it did not remove TiO₂.

19 37. As a result, Plaintiff and the Class were injured by the full purchase price of the
20 Products because the Products are worthless, as they are marketed as safe for human consumption
21 when they are not in fact safe for human consumption.

22 38. Plaintiff and Class Members bargained for products that are safe for consumption and
23 were deprived of the basis of their bargain when Defendant sold them Products in packaging
24 containing dangerous substances with serious health consequences.

25 39. No reasonable consumer would expect that the Products marketed as safe for human
26 consumption would pose a risk to their health, safety, and well-being, or that it would contain TiO₂,
27 which is linked to harmful health effects in humans. Accordingly, Plaintiff and Class Members
28 suffered economic injuries as a result of purchasing the Products.

1 40. As the Products expose consumers to a substance that pose a risk to consumers'
2 health, the Products are not fit for consumption by humans. Plaintiff and the Class are further entitled
3 to damages for the injury sustained in being exposed to TiO₂, damages related to Defendant's
4 conduct, and injunctive relief.

5 41. Moreover, because these facts relate to a critical safety-related deficiency in the
6 Products, Defendant was under a continuous duty to disclose to Plaintiff and Class Members the true
7 standard, quality, and grade of the Products and to disclose that the Products contained substances
8 known to have adverse health effects. Nonetheless, Defendant concealed and misrepresented this
9 information, as discussed herein.

10 42. Although Defendant is in the best position to know what content it placed on its
11 packaging during the relevant timeframe, and the knowledge that Defendant had regarding the
12 presence of TiO₂, and its failure to warn consumers that the Products contained TiO₂, to the extent
13 necessary, Plaintiff satisfies the requirements of Rule 9(b) by alleging the following facts with
14 particularity:

15 43. **WHO:** Defendant made material omissions of fact about the Products through its
16 labeling which shows that the Products are safe for human consumption. These representations
17 constitute omitted material information regarding harmful chemicals.

18 44. **WHAT:** Defendant's conduct here was, and continues to be, fraudulent because it
19 omitted and concealed that the Products contain a substance—TiO₂—that is widely known to have
20 significant health repercussions. Thus, Defendant's conduct deceived Plaintiff and Class Members
21 into believing that the Products are safe for human consumption when they are not. Defendant knew
22 or should have known that this information is material to reasonable consumers, including Plaintiff
23 and Class Members in making their purchasing decisions, yet they continued to pervasively market
24 the Product in this manner in the U.S. market.

25 45. **WHEN:** Defendant made material omissions during the putative class periods,
26 including prior to and at the time Plaintiff and Class Members purchased the Products, despite its
27 knowledge that the Products' packaging contained TiO₂, a harmful substance with known adverse
28 health effects.

46. **WHERE:** Defendant's marketing message was uniform and pervasive, carried through material omissions on the labeling of the Product's packaging, website, and through marketing materials.

47. **HOW:** Defendant made material omissions of fact regarding the Products, including the presence of TiO₂ in the Products.

48. **WHY:** Defendant made the material omissions detailed herein for the express purpose of inducing Plaintiff, Class Members, and all reasonable consumers to purchase and/or pay for the Products, the effect of which was that Defendant profited by selling the Products to hundreds of thousands of consumers.

49. **INJURY:** Plaintiff and Class Members purchased, paid a premium (up to the full-price), or otherwise paid more for the Products when they otherwise would not have absent Defendant's omissions.

CLASS ALLEGATIONS

50. ***Class Definition.*** Plaintiffs bring this action on behalf of a class of similarly situated individuals, defined as all persons in the United States who, within the applicable statute of limitations period, up to and including the date of final judgement in this action, purchased any of Defendant's Products at issue (the "Class")

(a) ***California Subclass.*** Plaintiff Jenile Thames also seeks to represent a subclass of all Class members who within the applicable statutes of limitations period, up to and including the date of final judgement in this action, purchased any of the Products at issue in California (the "California Subclass").

51. Excluded from the Class and Subclasses are persons who made such purchase for purpose of resale, Defendant and any entities in which Defendant has a controlling interest, Defendant's agents and employees, the judge to whom this action is assigned, and members of the judge's staff, and the judge's immediate family.

52. Plaintiff reserves the right to amend the definition of the Class and Subclass if discovery or further investigation reveals that the Class or Subclass should be expanded or otherwise modified.

1 53. **Numerosity.** Members of the Class and Subclass are so numerous that their
2 individual joinder herein is impracticable. On information and belief, members of the Class and
3 Subclass number in the millions. The precise number of Class members and their identities are
4 unknown to Plaintiff at this time but may be determined through discovery. Class members may be
5 notified of the pendency of this action by mail and/or publications through the distribution records
6 of Defendant and third-party retailers and vendors.

7 54. **Commonality and Predominance.** Common questions of law and fact exist as to all
8 Class members and predominate over questions affecting only individual Class members. Common
9 legal and factual questions include but are not limited to: whether Defendant warranted the Products
10 as “Safe for Human Consumption”; whether the Products contain Titanium Dioxide; whether
11 Defendant breached these warranties; and whether Defendant committed the statutory and common
12 law violations alleged against them herein by doing so.

13 55. **Typicality.** The claims of the named Plaintiff is typical of the claims of the Class
14 in that Plaintiffs purchased one of Defendant’s Products in reliance on the presentations and
15 warranties described above and suffered a loss as a result of that purchase.

16 56. **Adequacy.** Plaintiff is an adequate representative of the Class and respective
17 Subclass because his interest does not conflict with the interests of the Class and Subclass members
18 he seeks to represent, he has retained competent counsel experienced in prosecuting class actions,
19 and they intend to prosecute this action vigorously. The interests of the Class and Subclass members
20 will be fairly and adequately protected by Plaintiffs and their counsel.

21 57. **Superiority.** The class mechanism is superior to other available means for the fair
22 and efficient adjudication of the claims of Class members. Each individual Class members may lack
23 the resources to undergo the burden and expense of individual prosecution of the complex and
24 extensive litigation necessary to establish Defendant’s liability. Individualized litigation increases
25 the delay and expense of all parties and multiplies the burden on the judicial system presented by the
26 complex legal and factual issues of the case. Individualized litigation also presents a potential for
27 inconsistent or contradictory judgments. In contrast, the class action device presents far fewer
28 management difficulties and provides the benefits of single adjudication, economy of scale, and

comprehensive supervision by a single court on the issue of Defendant's liability. Class treatment of the liability issue will ensure that all claims and claimants are before this Court for consistent adjudication of liability issues.

58. Defendant has acted or failed to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class and Subclass as a whole.

59. Without a class action, Defendant will continue a course of action that will result in further damages to Plaintiff and members of the Class and Subclass and will likely retain the benefits of its wrongdoing.

60. Based on the foregoing allegations, Plaintiff's claims for relief include those set forth below.

COUNT I
Violation of California's Unfair Competition Law,
Cal. Bus. & Prof. Code §§ 17200, *et seq.*

61. Plaintiff realleges and reincorporates by reference all paragraphs alleged above.

62. Plaintiff brings this claim individually and on behalf of the Class against Defendant.

63. California Business and Professions Code § 17200 prohibits "any unlawful, unfair, or fraudulent business act or practice." For the reasons discussed above, Defendant has engaged in unlawful, unfair, and fraudulent business acts or practices in violation of California Business & Professions Code § 17200.

64. By committing the acts and practices alleged herein, Defendant has violated California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200-17210, as to the Class, by engaging in unlawful, fraudulent, and unfair conduct.

65. Defendant has violated the UCL's proscription against engaging in **Unlawful Business Practices** as a result of its violations of the CLRA, Cal. Civ. Code § 1770(a)(5), (a)(7), and (a)(9) as alleged below, violations of California's Song-Beverly Act, and violations of California's False Advertising Law, in addition to breaches of warranty and violations of common law.

66. As more fully described above, Defendant's misleading marketing, advertising, packaging, and labeling of the Product is likely to deceive reasonable consumers. In addition,

1 Defendant has committed unlawful business practices by, inter alia, making the omissions of material
2 facts, as set forth more fully herein, and violating the common law.

3 67. Plaintiff and the Class Members reserve the right to allege other violations of law
4 which constitute other unlawful business acts or practices.

5 68. Defendant has also violated the UCL's proscription against engaging in **Unfair**
6 **Business Practices**. Defendant's acts, omissions, misrepresentations, practices and non-disclosures
7 as alleged herein also constitute "unfair" business acts and practices within the meaning of Business
8 & Professions Code § 17200 *et seq.* in that its conduct is substantially injurious to consumers, offends
9 public policy, and is immoral, unethical, oppressive, and unscrupulous as the gravity of the conduct
10 outweighs any alleged benefits attributable to such conduct.

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

13 70. Defendant has further violated the UCL's proscription against engaging in
14 **Fraudulent Business Practices**. Defendant's claims, nondisclosures and misleading statements
15 with respect to the Product, as more fully set forth above, were false, misleading and/or likely to
16 deceive the consuming public within the meaning of Business & Professions Code § 17200.

17 71. Plaintiff and the other Class Members suffered a substantial injury by virtue of buying
18 the Products that they would not have purchased absent Defendant's unlawful, fraudulent, and unfair
19 marketing, advertising, packaging, and omission about the defective nature of the Products.

20 72. There is no benefit to consumers or competition from deceptively marketing and
21 omitting material facts about the true nature of the Products.

22 73. Plaintiff and the other Class Members had no way of reasonably knowing that the
23 Products they purchased were not as marketed, advertised, packaged, or labeled. Thus, they could
24 not have reasonably avoided the injury each of them suffered.

25 74. The gravity of the consequences of Defendant's conduct as described outweighs any
26 justification, motive, or reason therefore, particularly considering the available legal alternatives
27 which exist in the marketplace, and such conduct is immoral, unethical, unscrupulous, offends
28 established public policy, or is substantially injurious to Plaintiff and the other Class Members.

75. Pursuant to California Business and Professional Code § 17203, Plaintiff and the Class seek an order of this Court that includes, but is not limited to, an order requiring Defendant to (a) provide restitution to Plaintiff and the other Class Members; (b) disgorge all revenues obtained as a result of violations of the UCL; and (c) pay Plaintiff's and Class members' attorneys' fees and costs.

76. Here, equitable relief is appropriate because Plaintiff may lack an adequate remedy at law, if, for instance damages resulting from his purchase of the Products is determined to be an amount less than the premium price of the Product. Without compensation for the full premium price of the Products, Plaintiff would be left without the parity in purchasing power to which he is entitled.

77. Injunctive relief is also appropriate, and indeed necessary, to require Defendant to provide full and accurate disclosures regarding the Products so that Plaintiff and Class members can reasonably rely on Defendant's representations as well of those of Defendant's competitors who may then have an incentive to follow Defendant's deceptive practices, further misleading consumers.

78. Restitution and/or injunctive relief may also be more certain, prompt, and efficient than other legal remedies requested herein. The return of the full premium price, and an injunction requiring either (1) adequate disclosure of TiO₂ in the Product and its effects; or (2) the removal of such chemicals from the Product packaging, will ensure that Plaintiff is in the same place he would have been in had Defendant's wrongful conduct not occurred, i.e., the position to make an informed decision about the purchase of the Products absent omissions with the full purchase price at his disposal.

COUNT II

Violation of California's Consumers Legal Remedies Act ("CLRA"), California Civil Code § 1750, *et seq.*

79. Plaintiff realleges and reincorporates by reference all paragraphs alleged above.

80. Plaintiff brings this claim individually and on behalf of the Class against Defendant

81. Civil Code § 1770(a)(5) prohibits "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not

1 have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she
2 does not have.”

3 82. Civil § 1770(a)(7) prohibits “[r]epresenting that goods or services are of a particular
4 standard, quality, or grade, or that goods are of a particular style or model, if they are of another.”

5 83. Civil § 1770(a)(9) prohibits “advertising goods or services with intent not to sell them
6 as advertised.”

7 84. Defendant violated Civil Code § 1770(a)(5), (a)(7), and (a)(9) by holding out the
8 Product as safe for human consumption, when in fact the Product is not safe, dangerous, and useless.

9 85. The Products are not safe because they contain TiO₂, a harmful toxin with known
10 adverse health effects.

11 86. Defendant has exclusive or superior knowledge of the Product’s composition and the
12 associated health concerns, which was not known to Plaintiff or Class Members.

13 87. Plaintiff and Class Members have suffered harm as a result of these violations of the
14 CLRA because they have incurred charges and/or paid monies for the Product that they otherwise
15 would not have incurred or paid, and were unknowingly exposed to a significant and substantial
16 health risk.

17 88. On April 13, 2022, prior to the filing of this Complaint, Plaintiff’s counsel sent
18 Defendant a CLRA notice letter, which complies in all respects with California Civil Code § 1782(a).
19 The letter was sent via certified mail, return receipt requested, advising Defendant that it was in
20 violation of the CLRA and demanding that it cease and desist from such violations and make full
21 restitution by refunding the monies received therefrom. The letter stated that it was sent on behalf
22 of all other similarly situated purchasers. Defendant refused to correct its practices. Accordingly,
23 Plaintiff, individually, and on behalf of the proposed Class, seeks, in addition to injunctive relief,
24 monetary damages from Defendant as permitted by Civil Code § 1782(d) for Defendant’s violations
25 of the CLRA.

26 89. Here, equitable relief is appropriate because Plaintiff may lack an adequate remedy at
27 law, if, for instance damages resulting from his purchase of the Products is determined to be an
28 amount less than the premium price of the Products. Without compensation for the full premium

1 price of the Products, Plaintiff would be left without the parity in purchasing power to which he is
2 entitled.

3 90. Injunctive relief is also appropriate, and indeed necessary, to require Defendant to
4 provide full and accurate disclosures regarding the Products so that Plaintiff and Class members can
5 reasonably rely on Defendant's representations as well of those of Defendant's competitors who may
6 then have an incentive to follow Defendant's deceptive practices, further misleading consumers.

7 91. Restitution and/or injunctive relief may also be more certain, prompt, and efficient
8 than other legal remedies requested herein. The return of the full premium price, and an injunction
9 requiring either (1) adequate disclosure of TiO₂ in the Products and its effects; or (2) the removal of
10 such chemicals from the Products', will ensure that Plaintiff is in the same place he would have been
11 in had Defendant's wrongful conduct not occurred, i.e., the position to make an informed decision
12 about the purchase of the Products absent omissions with the full purchase price at his disposal.

13 **COUNT III**

14 **Breach of Implied Warranty Under the Song-Beverly Act, Cal. Civ. Code § 1790, *et seq.* and California Commercial Code § 2314**

15 92. Plaintiff realleges and reincorporates by reference all paragraphs alleged above.

16 93. Plaintiff brings this claim individually and on behalf of the Class against Defendant.

17 94. Under the Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1790. *et seq.*, and
18 California Commercial Code § 2314, every sale of consumer goods in the State of California is
19 accompanied by both a manufacturer's and retailer seller's implied warranty that the goods are
20 merchantable, as defined in that Act. In addition, every sale of consumer goods in California is
21 accompanied by both a manufacturer's and retail seller's implied warranty of fitness when the
22 manufacturer or retailer has reason to know that the goods as represented have a particular purpose
23 and that the buyer is relying on the manufacturer's or retailer's skill or judgment to furnish suitable
24 goods consistent with that represented purpose.

25 95. The Products at issue here are "consumer goods" within the meaning of Cal. Civ.
26 Code § 1791(a).

1 96. Plaintiff and the Class Members who purchased the Products are “retail buyers”
2 within the meaning of Cal. Civ. Code § 1791.

3 97. Defendant is in the business of manufacturing, assembling, and/or producing the
4 Product and/or selling the Product to retail buyers, and therefore are a “manufacturer” and “seller”
5 within the meaning of Cal. Civ. Code § 1791.

6 98. Defendant impliedly warranted to retailer buyers that the Products were merchantable
7 in that they would: (a) pass without objection in the trade or industry under the contract description,
8 and (b) were fit for the ordinary purposes for which the Products are used. For a consumer good to
9 be “merchantable” under the Act, it must satisfy both of these elements. Defendant breached these
10 implied warranties because the Products were unsafe for human consumption. Therefore, the
11 Products would not pass without objection in the trade or industry and were not fit for the ordinary
12 purpose for which they are used.

13 99. Plaintiff and Class Members purchased the Products in reliance upon Defendant’s
14 skill and judgment in properly packaging and labeling the Products.

15 100. The Products were not altered by Plaintiff or the Class Members.

16 101. The Products were defective at the time of sale when they were in the exclusive
17 control of Defendant. The issue as described in this complaint was latent in the product and not
18 reasonably discoverable at the time of sale.

19 102. Defendant knew that the Products would be purchased and consumed without
20 additional testing by Plaintiff and Class Members.

21 103. As a direct and proximate cause of Defendant’s breach of the implied warranty,
22 Plaintiff and Class Members have been injured and harmed because they would not have purchased
23 the Products if they knew the truth about the Products, namely, that they were unfit for use and posed
24 a significant safety risk.

25 104. Plaintiff and the Class seek compensatory damages, attorneys’ fees, costs, and any
26 other just and proper relief available under law.

27 ///

28 ///

COUNT IV
**(Violation of California's False Advertising Law,
Cal. Bus. & Prof. Code § 17500, *et seq.*)**

105. Plaintiff realleges and reincorporates by reference all paragraphs alleged above.

106. Plaintiff brings this claim individually and on behalf of Class against Defendant.

107. Defendant's acts and practices, as described herein, have deceived and/or are likely to continue to deceive Class Members and the public. As described above, and throughout this Complaint, Defendant misrepresented the Products as safe for human consumption, in fact, the Products were not safe.

108. By its actions, Defendant disseminated uniform advertising regarding the Products to and across California. The advertising was, by its very nature, unfair, deceptive, untrue, and misleading within the meaning of Cal. Bus. & Prof. Code § 17500, *et seq.* Such advertisements were intended to and likely did deceive the consuming public for the reasons detailed herein.

109. The above-described false, misleading, and deceptive advertising Defendant disseminated continues to have a likelihood to deceive in that Defendant failed to disclose that the Products contain substances that pose a significant risk to the health and well-being of Plaintiff and the Class Members.

110. Defendant continues to misrepresent to consumers that the Products are safe for consumption. However, as described, that is not the case.

111. In making and disseminating these statements, Defendant knew, or should have known, its advertisements were untrue and misleading in violation of California law. Plaintiff and other Class Members based their purchasing decisions on Defendant's omitted material facts. The revenue attributable to the Products sold in those false and misleading advertisements likely amounts to tens of millions of dollars. Plaintiff and Class Members were injured in fact and lost money and property as a result.

112. The misrepresentations and non-disclosures by Defendant of the material facts described and detailed herein constitute false and misleading advertising and, therefore, constitutes a violation of Cal. Bus. & Prof. Code § 17500, *et seq.*

113. As a result of Defendant's wrongful conduct, Plaintiff and Class Members lost money in an amount to be proven at trial. Plaintiff and Class Members are therefore entitled to restitution as appropriate for this cause of action.

114. Plaintiff and Class Members seek all monetary and non-monetary relief allowed by law, including restitution of all profits stemming from Defendant's unfair, unlawful, and fraudulent business practices; declaratory relief; reasonable attorneys' fees and costs under California Code of Civil Procedure § 1021.5; injunctive relief; and other appropriate equitable relief.

115. Here, equitable relief is appropriate because Plaintiff may lack an adequate remedy at law, if, for instance damages resulting from his purchase of the Products is determined to be an amount less than the premium price of the Products. Without compensation for the full premium price of the Products, Plaintiff would be left without the parity in purchasing power to which he is entitled.

116. Injunctive relief is also appropriate, and indeed necessary, to require Defendant to provide full and accurate disclosures regarding the Products so that Plaintiff and Class members can reasonably rely on Defendant's representations as well of those of Defendant's competitors who may then have an incentive to follow Defendant's deceptive practices, further misleading consumers.

117. Restitution and/or injunctive relief may also be more certain, prompt, and efficient than other legal remedies requested herein. The return of the full premium price, and an injunction requiring either (1) adequate disclosure of the TiO₂ in the Products and its effects; or (2) the removal of such chemicals from the Products, will ensure that Plaintiff is in the same place he would have been in had Defendant's wrongful conduct not occurred, i.e., the position to make an informed decision about the purchase of the Products absent omissions and misrepresentations with the full purchase price at his disposal.

COUNT V
Fraud

118. Plaintiff realleges and reincorporates by reference all paragraphs alleged above.

119. Plaintiff brings this claim individually and on behalf of the Class.

1 Defendant's omissions as to the Products and had no way of knowing that Defendant's omissions
2 were misleading.

3 144. Although Defendant had a duty to ensure the safety, completeness, and accuracy of
4 the information regarding the Product, it did not fulfill these duties.

5 145. Defendant omitted or concealed material facts partly to pad and protect its profits, as
6 it saw that profits and sales of the Products were essential for its continued growth and to maintain
7 and grow its reputation as a premier designer and vendor of the Products. Such benefits came at the
8 expense of Plaintiff and Class Members.

9 146. Plaintiff and Class Members were unaware of these material omissions, and they
10 would not have acted as they did had they known the truth. Plaintiff's and class members' actions
11 were justified given Defendant's omissions. Defendant was in the exclusive / superior control of
12 material facts, and such facts were not widely known to the public.

13 147. Due to Defendant's misrepresentations, Plaintiff and Class Members sustained injury
14 due to the purchase of the Products that did not live up to its advertised representations. Plaintiff and
15 Class Members are entitled to recover full refunds for the Products they purchased due to
16 Defendant's omissions.

17 148. Defendant's acts were done maliciously, oppressively, deliberately, and with intent
18 to defraud, and in reckless disregard of Plaintiff, and Class Members' rights and well-being, and in
19 part to enrich itself at the expense of consumers. Defendant's acts were done to gain commercial
20 advantage over competitors, and to drive consumers away from consideration of competing products.
21 Defendant's conduct warrants an assessment of punitive damages in an amount sufficient to deter
22 such conduct in the future.

23 **COUNT VIII**

24 **Quasi-Contract / Unjust Enrichment**

25 149. Plaintiff realleges and reincorporates by reference all paragraphs alleged above.

26 150. Plaintiff brings this claim individually and on behalf of the Class.

27 151. To the extent required by law, this cause of action is alleged in the alternative to legal
28 claims, as permitted under Fed. R. Civ. P. 8.

- 1
- 2 (d) For compensatory, statutory, and punitive damages in amounts to be
- 3 determined by the Court and/or jury;
- 4
- 5 (e) For prejudgment interest on all amounts awarded;
- 6
- 7 (f) For an order of restitution and all other forms of equitable monetary relief;
- 8
- 9 (g) For injunctive relief as pleaded or as the Court may deem proper;
- 10
- 11 (h) For an order awarding Plaintiff and the Class their reasonable attorneys' fees
- 12 and expenses and costs of suit.

13 **JURY TRIAL DEMANDED**

14 Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff demands a trial by jury of any and

15 all issues in this action so triable of right.

16 Dated: July 14, 2022

17 **BURSOR & FISHER, P.A.**

18 By: /s/ L. Timothy Fisher

19 L. Timothy Fisher

20 L. Timothy Fisher (State Bar No. 191626)

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