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20 THE UNITED STATES DISTRICT COURT
21 FOR THE NORTHERN DISTRICT OF CALIFORNIA

22 PRUSHTI DAVE, ARLENE BERGUM,
23 EMILY DEPOL, KEYA JOHNIGAN,
24 and BRIANNA MCKAY, on behalf of
25 themselves and all others similarly
26 situated,

27 Plaintiffs,

28 v.

29 ABBOTT LABORATORIES,
30 ALERE, PROCTER & GAMBLE
31 MANUFACTURING COMPANY, SPD
32 SWISS PRECISION DIAGNOSTICS
33 GMBH, CHURCH & DWIGHT CO.,
34 INC., TARGET CORPORATION, and
35 WALGREEN CO.,

Defendants.

Case No. 3:22-cv-5191

COMPLAINT FOR VIOLATIONS
OF CALIFORNIA'S CONSUMERS
LEGAL REMEDIES ACT, CAL.
CIV. CODE §§ 1750-1785, UNFAIR
COMPETITION LAW, CAL. BUS. &
PROF. CODE §17200, AND FALSE
ADVERTISING LAW, CAL. BUS. &
PROF. CODE § 17500, ET SEQ.

CLASS ACTION

DEMAND FOR JURY TRIAL

1 Plaintiffs Prushti Dave, Arlene Bergum, Emily DePol, Keya Johnigan, and
2 Brianna Mckay (collectively “Plaintiffs”), by and through their undersigned
3 attorneys, bring this class action complaint on behalf of themselves and all others
4 similarly situated as defined below (the “Class”), alleging facts related to their own
5 purchases based on personal knowledge and all other facts based upon the
6 investigation of counsel.

7 **PRELIMINARY STATEMENT**

8 1. Defendants Abbott Laboratories (“Abbott”), Alere (“Alere”), Procter
9 & Gamble Manufacturing Company (“Procter & Gamble”), SPD Swiss Precision
10 Diagnostics GmbH (“SPD”), Church & Dwight Co., Inc. (“Church & Dwight”),
11 Target Corporation (“Target”), and Walgreen Co. (“Walgreens”) (collectively,
12 “Defendants”) produce, market, label and sell various ovulation test kits (the
13 “Ovulation Test Kits” or “Defendants’ Kits”) in the state of California and
14 throughout the United States.

15 2. Millions of people buy and rely upon the Ovulation Test Kits for
16 family planning purposes. Defendants’ Kits are advertised as being able to tell
17 women with 99% or greater accuracy when they will ovulate, and thus when they
18 are the most fertile and most likely to be able to become pregnant.

19 3. However, the Ovulation Test Kits do not predict ovulation with 99%
20 or greater accuracy. The Kits merely test levels of Luteinizing Hormone (“LH”),
21 which may or may not indicate ovulation will occur. LH is made by a person’s
22 pituitary gland and is present in varying levels for people of all genders. LH levels
23 generally rise quickly just before ovulation in women, but LH levels can spike at
24 varying times in the menstrual cycle for a variety of other reasons unrelated to
25 ovulation. Defendants’ Kits identify when a person has a spike in LH—not when
26 ovulation will occur.

27 4. Defendants intentionally mislabel their Kits as ovulation test kits.
28

1 Defendants know that their Kits test LH and not ovulation, but marketing their
2 products as “Luteinizing Hormone Test Kits,” which may or may not predict
3 ovulation, would be far less attractive to women seeking to get pregnant. False
4 promises such as these allow Defendants to capitalize on reproductive anxiety and
5 reap massive profits, well in excess of \$5,000,000 each year from unwitting
6 consumers.

7 5. This action arises out of deceptive and otherwise improper business
8 practices that Defendants engaged in with respect to the packaging of certain
9 ovulation test kits, detailed below, which are packaged in boxes and regularly sold
10 in major supermarkets, grocery stores, convenience stores, and pharmacies
11 throughout the United States, as well as on Amazon and other online retailers.

12 **JURISDICTION AND VENUE**

13 6. Diversity subject matter jurisdiction exists over this class action
14 pursuant to the Class Action Fairness Act of 2005, conferring federal jurisdiction
15 over class actions involving: (a) 100 or more members in the proposed class; (b)
16 where at least some members of the proposed class have different citizenship from
17 some defendants; and (c) where the claims of the proposed class members exceed
18 the sum or value of five million dollars (\$5,000,000) in the aggregate. 28 U.S.C.
19 § 1332(d)(2) and (6).

20 7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a) because
21 a substantial part of the events giving rise to Plaintiffs’ claims occurred in this
22 district, and Defendants are subject to personal jurisdiction in this district.
23 Defendants marketed and sold the products at issue in this action within this judicial
24 district and do business within this judicial district.

PARTIES

A. Plaintiffs

8. Plaintiff Prushti Dave is a citizen of the state of California and at all relevant times has resided in Alameda County.

9. Between December 2020 and January 2021, Plaintiff Dave purchased, for her own use, Procter & Gamble's, Abbott's, Alere's, and SPD's (collectively, the "Clearblue Defendants") ovulation test kits marketed and sold under their brand name Clearblue, in Alameda County, California. Plaintiff Dave reasonably expected that these products would test, with over 99% accuracy, whether she would ovulate in the next 24-36 hours, and not merely whether she was having an LH surge that may or may not be connected to ovulation. As a result of the Clearblue Defendants' deceptive packaging, Plaintiff Dave was overcharged, did not receive the benefit of the bargain, and/or suffered out-of-pocket losses. Plaintiff Dave expects to continue to purchase ovulation test kits, including the Clearblue Defendants' kits, in the future.

10. Plaintiff Arlene Bergum is a citizen of the state of California and at all relevant times has resided in San Diego County.

11. In or about April 2019, Plaintiff Bergum purchased, for her own use, Church & Dwight's ovulation test kits, marketed and sold under its brand name First Response, in San Diego County, California, from a Target retail store. Plaintiff Bergum reasonably expected that this product would test, with over 99% accuracy, whether she would ovulate in the next 24-36 hours, and not merely whether she was having an LH surge that may or may not be connected to ovulation. As a result of Church & Dwight's deceptive packaging, Plaintiff Bergum was overcharged, did not receive the benefit of the bargain, and/or suffered out-of-pocket losses. Plaintiff Bergum expects to continue to purchase ovulation test kits, including Church & Dwight's, in the future.

1 12. Plaintiff Emily DePol is a citizen of the state of California and at all
2 relevant times has resided in Alameda County.

3 13. Between September and December 2020, Plaintiff DePol purchased,
4 for her own use, Target's ovulation test kits, marketed and sold under its trademark
5 up & up, in Sacramento County, California. Plaintiff DePol reasonably expected
6 that these products would test, with an accuracy of 99%, whether she would ovulate
7 in the next 24-36 hours, and not merely whether she was having an LH surge that
8 may or may not be connected to ovulation. As a result of Target's deceptive
9 packaging, Plaintiff DePol was overcharged, did not receive the benefit of the
10 bargain, and/or suffered out-of-pocket losses. Plaintiff DePol expects to continue
11 to purchase ovulation test kits, including Target's kits, in the future.

12 14. Plaintiff Keya Johnigan is a citizen of the state of California and at all
13 relevant times has resided in Los Angeles County.

14 15. In or about March 2021, Plaintiff Johnigan purchased, for her own use,
15 Walgreens's ovulation test kits in Los Angeles County, California. Plaintiff
16 Johnigan reasonably expected that these products would test, with over 99%
17 accuracy, whether she would ovulate in the next 24-48 hours, and not merely
18 whether she was having an LH surge that may or may not be connected to ovulation.
19 As a result of Walgreens's deceptive packaging, Plaintiff Johnigan was
20 overcharged, did not receive the benefit of the bargain, and/or suffered out-of-
21 pocket losses. Plaintiff Johnigan expects to continue to purchase ovulation test kits,
22 including Walgreens' kits, in the future.

23 16. Plaintiff Brianna McKay is a citizen of the state of California and at
24 all relevant times has resided in Los Angeles County.

25 17. In or about September 2021, Plaintiff McKay purchased, for her own
26 use, Walgreens's ovulation test kits from a Walgreens store in Los Angeles County,
27 California. Plaintiff McKay reasonably expected that these products would test,
28

1 with over 99% accuracy, whether she would ovulate in the next 24-48 hours, and
2 not merely whether she was having an LH surge that may or may not be connected
3 to ovulation. As a result of Walgreens's deceptive packaging, Plaintiff McKay was
4 overcharged, did not receive the benefit of the bargain, and/or suffered out-of-
5 pocket losses. Plaintiff McKay expects to continue to purchase ovulation test kits,
6 including Walgreens's kits, in the future.

7 18. In or about November 2020, Plaintiff McKay purchased, for her own
8 use, Church & Dwight's ovulation test kits, marketed and sold under its brand name
9 First Response, in Los Angeles County, California. Plaintiff McKay reasonably
10 expected that these products would test, with over 99% accuracy, whether she
11 would ovulate in the next 24-36 hours, and not merely whether she was having an
12 LH surge that may or may not be connected to ovulation. As a result of Church &
13 Dwight's deceptive packaging, Plaintiff McKay was overcharged, did not receive
14 the benefit of the bargain, and/or suffered out-of-pocket losses. Plaintiff McKay
15 expects to continue to purchase ovulation test kits, including Church & Dwight's
16 kits, in the future.

17 19. In or about 2019, Plaintiff McKay purchased, for her own use, the
18 Clearblue Defendants' ovulation test kits marketed and sold under their brand name
19 Clearblue Easy, from a Target location in Los Angeles County, California. Plaintiff
20 McKay reasonably expected that these products would test, with over 99%
21 accuracy, whether she would ovulate in the next 24-36 hours, and not merely
22 whether she was having an LH surge that may or may not be connected to ovulation.
23 As a result of the Clearblue Defendants' deceptive packaging, Plaintiff McKay was
24 overcharged, did not receive the benefit of the bargain, and/or suffered out-of-
25 pocket losses. Plaintiff McKay expects to continue to purchase ovulation test kits,
26 including the Clearblue Defendants' kits, in the future.

27 20. In or about 2020-2021, Plaintiff McKay purchased, for her own use,
28

Target's up & up ovulation test kits from a Target location in Los Angeles County, California, and from Target's online store. Plaintiff McKay reasonably expected that these products would test, with over 99% accuracy, whether she would ovulate in the next 24-36 hours, and not merely whether she was having an LH surge that may or may not be connected to ovulation. As a result of Target's deceptive packaging, Plaintiff McKay was overcharged, did not receive the benefit of the bargain, and/or suffered out-of-pocket losses. Plaintiff McKay expects to continue to purchase ovulation test kits, including Target's kits, in the future.

B. Defendants

21. Defendant Abbott Laboratories ("Abbott") is an entity organized under the laws of Illinois and is headquartered at 100 Abbott Park Road, Abbott Park, IL 60064. Defendant Abbott is the parent company and owner of defendant Alere. Alere and Procter & Gamble are co-owners of SPD Swiss Precision Diagnostics GmbH, which owns Clearblue. Abbott and Alere, through their subsidiaries and related entities, including Procter & Gamble, manufacture, package, advertise, market, distribute, and/or sell ovulation test kit products in the United States using the brand name Clearblue.

22. Defendant Procter & Gamble Manufacturing Company ("Procter & Gamble") is an entity organized under the laws of Ohio and is headquartered at One Procter & Gamble Plaza, Cincinnati, Ohio 45202. Defendants Procter & Gamble and Alere are co-owners of SPD Swiss Precision Diagnostics GmbH, which owns Clearblue. Procter & Gamble, through its subsidiaries and related entities, including Abbott and Alere, manufactures, packages, advertises, markets, distributes, and/or sells ovulation test kit products in the United States using the brand name Clearblue.

23. Defendant SPD Swiss Precision Diagnostics GmbH ("SPD") is an entity organized under the laws of Switzerland and is headquartered at 47 route de

1 Saint Georges, 1213 Petit-Lancy, Geneva, Switzerland. SPD is co-owned by
 2 Procter & Gamble and Alere. SPD, through its subsidiaries and related entities,
 3 including Procter & Gamble, Alere, and Abbott, manufactures, packages,
 4 advertises, markets, distributes, and/or sells ovulation test kit products in the United
 5 States using the brand name Clearblue. Defendants Abbott, Alere, Procter &
 6 Gamble and SPD are collectively referred to as the “Clearblue Defendants.”

7 24. Defendant Church & Dwight Co., Inc. (“Church & Dwight”) is an
 8 entity organized under the laws of Delaware and is headquartered at 500 Charles
 9 Ewing Blvd., Ewing NJ 08628. Church & Dwight, through its subsidiaries and
 10 related entities, manufactures, packages, advertises, markets, distributes, and/or
 11 sells ovulation test kit products in the United States using the brand name First
 12 Response.

13 25. Defendant Target Corporation (“Target”) is an entity organized under
 14 the laws of Minnesota and is headquartered at 1000 Nicollet Mall, Minneapolis,
 15 MN 55403. Target, through its subsidiaries and related entities, manufactures,
 16 packages, advertises, markets, distributes, and/or sells ovulation test kit products in
 17 the United States using its trademark up & up.

18 26. Defendant Walgreen Co. (“Walgreens”) is an entity organized under
 19 the laws of Delaware and is headquartered at 200 Wilmot Road, Deerfield, Illinois
 20 60015. Walgreens Boots Alliance, Inc. is the parent company and owner of
 21 Walgreens, and trades on the public stock market under the ticker “WBA.”
 22 Walgreens, through its subsidiaries and related entities, manufactures, packages,
 23 advertises, markets, distributes, and/or sells ovulation test kit products in the United
 24 States.

25 **LEGAL BACKGROUND**

26 27. California’s Legal Remedies Act (“CLRA”), California Civil Code
 27 sections 1750-1785, *et seq.*, declares it unlawful for any person to undertake unfair
 28

1 methods of competition and unfair or deceptive acts or practices in a transaction
2 intended to result or which does result in the sale or lease of goods or services to
3 any consumer.

4 28. California's Unfair Competition Law ("UCL"), California Business &
5 Professions Code section 17200, *et seq.*, prohibits businesses from engaging in "any
6 unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue
7 or misleading advertising" in addition to any act in violation of California Business
8 & Professions Code section 17500, *et seq.*, as alleged below.

9 29. The UCL allows for any person to pursue representative claims or
10 relief on behalf of others if the claimant meets the standing requirements of
11 California Business & Professions Code section 17204 and California Code of Civil
12 Procedure section 382. Cal. Bus. & Prof. Code § 17203.

13 30. Plaintiffs have standing under California Business & Professions Code
14 section 17204, which provides that actions for relief pursuant to the UCL shall be
15 prosecuted exclusively in a court of competent jurisdiction by, *inter alia*, any person
16 who has suffered injury in fact and has lost money or property as a result of the
17 unfair competition.

18 31. California's False Advertising Law ("FAL"), California Business &
19 Professions Code section 17500, *et seq.*, declares it unlawful for any person to
20 disseminate before the public any statement concerning personal property that the
21 person knows, or through the exercise of reasonable care should know, to be untrue
22 or misleading, with intent to dispose of that property or to induce the public to enter
23 into any obligation relating thereto; or to disseminate such untrue or misleading
24 statements as part of a plan or scheme with the intent not to sell the property as
25 advertised.

26 32. Pursuant to California Business & Professions Code section 17535,
27 any person, corporation, firm, partnership, or any other association or organization
28

1 that violates the FAL may be enjoined by any court of competent jurisdiction.
 2 Actions for injunctive relief under the FAL may be prosecuted by any person who
 3 has suffered injury in fact and has lost money or property as a result of a violation
 4 of the FAL, and the court may make such orders or judgments which may be
 5 necessary to restore to any person in interest any money or property which may
 6 have been acquired by means declared to be unlawful by the FAL.

7 **FACTUAL ALLEGATIONS**

8 33. Defendants market and sell kits, which they misleadingly call
 9 “ovulation test kits,” in rectangular boxes. By indicating that their ovulation test
 10 kits have 99% or greater accuracy at testing for and predicting ovulation,
 11 Defendants deceive consumers.

12 34. Since about 1989, Clearblue, which is owned by the Clearblue
 13 Defendants and their subsidiaries and related entities, has marketed and sold
 14 ovulation test kits (“Clearblue’s Kits”). Clearblue proclaims that it developed the
 15 world’s first one-step ovulation test kit. During the relevant timeframe, the
 16 Clearblue Defendants marketed and sold at least five different ovulation test kits: i)
 17 Easy Ovulation Kit, ii) Advanced Digital Ovulation Test, iii) Digital Ovulation
 18 Predictor Kit, iv) Trying for a Baby Advanced Ovulation Kit, and v) Easy
 19 Luteinizing Hormone (LH) Kit. Each of Clearblue’s Kits prominently bear the
 20 promise “99% Accurate” or “Over 99% Accurate” and are labeled as an “ovulation
 21 test” or “ovulation kit.” Clearblue’s Kits also include such representations as
 22 “Identify your 2 Most Fertile Days.” For example, below is a photo of one of
 23 Clearblue’s Kits¹:

24
 25
 26
 27 ¹ This image is representative of Clearblue’s packaging at the time that Plaintiffs purchased
 28 their Clearblue Kits. Around January 2022, the Clearblue Defendants changed the packaging of
 their ovulation test kits.



35. Clearblue’s website boasts that “over 20 million women choose to use Clearblue products every year.” Accordingly, the Clearblue Defendants make well in excess of \$5,000,00 every year on their fertility-related products, including their ovulation test kits.

36. Clearblue’s Kits are regularly sold across the United States in various pharmacies and major retailers, such as CVS and Walgreens, and online through Amazon and other retailers.

37. Since about 2011, Church & Dwight has marketed and sold ovulation test kits under the brand name First Response (“First Response’s Kits”). During the relevant timeframe, Church & Dwight marketed and sold at least three ovulation

1 test kits under its brand name First Response: i) First Response Ovulation Plus
 2 Pregnancy Test, ii) First Response Advanced Digital Ovulation Test, and iii) First
 3 Response Easy Read Ovulation Test. Each of First Response's Kits prominently
 4 bear the promise "OVER 99% ACCURATE" and are labeled as an "ovulation test."
 5 First Response's Kits also make such representations as "GET PREGNANT
 6 SOONER!" and "PREDICTS YOUR 2 MOST FERTILE DAYS." For example,
 7 below is a photo of one of Church & Dwight's Kits:



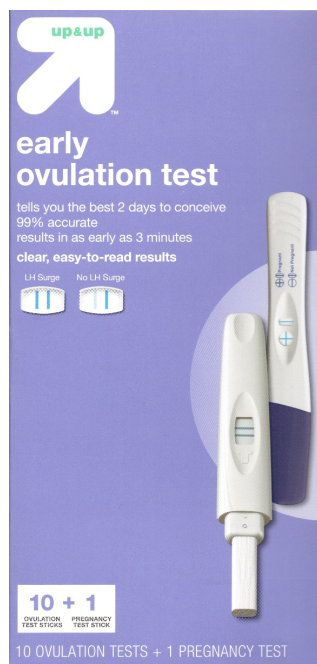
23 38. Church & Dwight claims that its home pregnancy and ovulation test
 24 kits, sold under its brand name First Response, are the number one selling brand in
 25 the United States.² Church & Dwight's consumer products marketing efforts are

26
 27 ² Church & Dwight's Form 10-K filed with the SEC for fiscal year ended December 31, 2020 at
 28 p. 6 (https://www.sec.gov/ix?doc=/Archives/edgar/data/313927/000156459021006669/chd-10k_20201231.htm) (last visited on Mar. 30, 2022).

1 focused principally on its 13 “power brands.” Its First Response home pregnancy
 2 and ovulation test kits are included in its “power brands.” Church & Dwight’s
 3 consumer products segment comprises the majority of its revenue; for instance, in
 4 2020, Church & Dwight’s consumer products segment comprised about 77% of its
 5 consolidated net sales. Each year Church & Dwight makes well in excess of
 6 \$5,000,000 in profits from sales of First Response’s Kits.

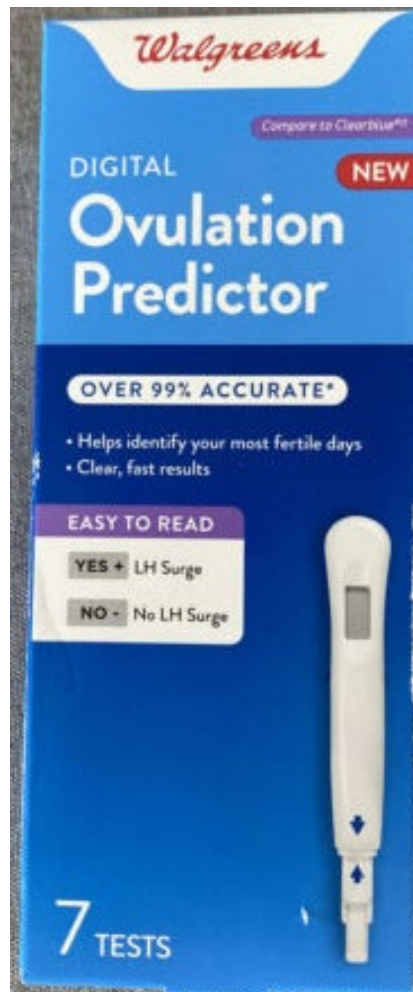
7 39. First Response’s Kits are regularly sold across the United States in
 8 various pharmacies and major retailers, such as CVS and Walgreens, and online
 9 through Amazon and other retailers.

10 40. Since at least 2009, Defendant Target has marketed and sold ovulation
 11 test kits under its trademark up & up (“Target’s Kits”). During the relevant
 12 timeframe, Target marketed and sold at least two ovulation test kits under the up &
 13 up trademark, including the Ovulation + Pregnancy Test Combo Pack and Early
 14 Luteinizing Hormone (“LH”) Test. Each of Target’s Kits prominently bear the
 15 promise “99% accurate” and are labeled as an “ovulation test.” Target’s Kits also
 16 make representations such as “tells you the best 2 days to conceive.” For example,
 17 below is a photo of one of Target’s Kits:



41. Target's Kits are regularly sold at Target stores and through Target's website, target.com. Target owns and operates approximately 2,000 stores in the United States, including 309 stores in California, the most of any state. Target makes well in excess of \$5,000,000 in profits each year from sales of Target's Kits.

42. Since about 2004, Defendant Walgreens has marketed and sold ovulation test kits ("Walgreens's Kits"). During the relevant timeframe, Walgreens marketed and sold at least four different ovulation test kits: Ovulation + Pregnancy Kit, Digital Ovulation Predictor, Daily Ovulation Predictor, and One Step Ovulation Predictor. Each of Walgreens's Kits prominently bear the promise "OVER 99% ACCURATE" and are labeled as an "ovulation predictor" or "ovulation test." For example, below is a photo of one of Walgreens's Kits:

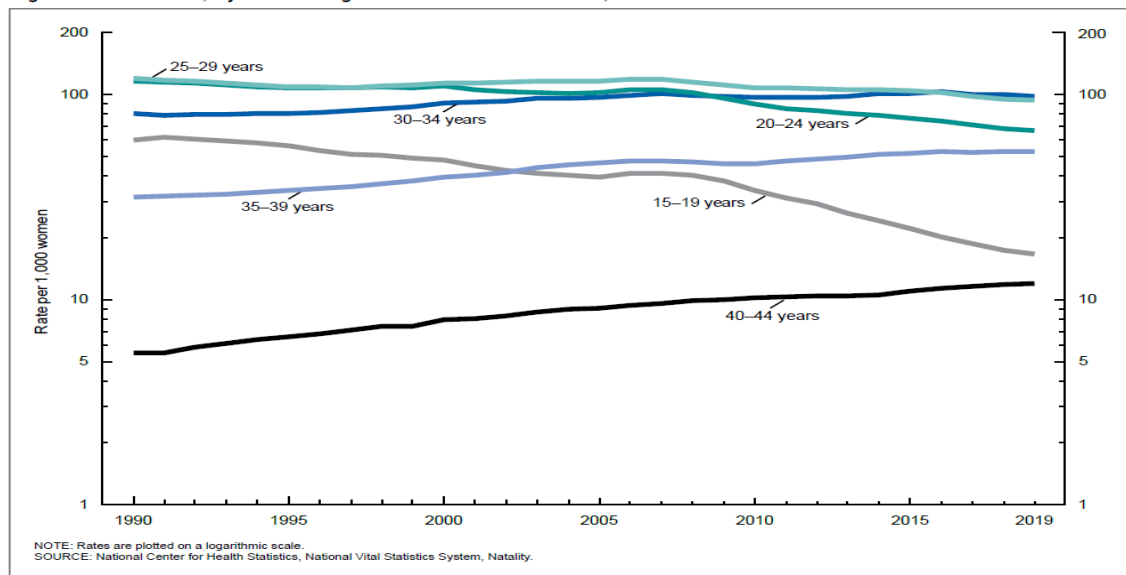


43. Walgreens's Kits are regularly sold at Walgreens stores and through Walgreens's website, walgreens.com. Walgreens owns and operates over 9,000 stores in the United States, including approximately 586 stores across the state of California.

44. In the United States, there are approximately 64.5 million women in the age range 15-44. Just over 21 million of those women are 35-44. According to the National Center for Health Statistics, the provisional number of births for the United States in 2020 was 3,605,201, down 4% from the number in 2019 (3,747,540).³

45. Over the past few decades, the proportion of women bearing children later in life has increased significantly. The birth rate for women in the age ranges 30-34, 35-39, and 40-44 has grown steadily since 1990, and the age range with the most births in 2019 was 30-34:

Figure 3. Birth rates, by selected age of mother: United States, 1990–2019



National Vital Statistics Reports, Vol 70, No.2, Births: Final Data for 2019, March 23, 2021 ("2019 Birth Report").

³ See NVSS, Vital Statistics Rapid Release, Division of Vital Statistics, National Center for Health Statistics, May 2021, p.2 ("2020 Provisional Birth Report").

46. A woman's fertility declines as she ages. Women above the age of 30 are more likely to have trouble getting pregnant:

Infertility

Percentage of married women 15-49 years of age who are infertile (i.e., who are not surgically sterile, and have had at least 12 consecutive months of unprotected sexual intercourse without becoming pregnant), by parity and age:

	2015-2019	
	0 births	1 or more births
	Percent (SE)	
Total 15-49 years	19.4 (1.92)	6.0 (0.64)
15-29 years	12.6 (3.01)	5.1 (1.16)
30-39 years	22.1 (3.33)	5.7 (0.88)
40-49 years	26.8 (4.50)	6.5 (1.13)

Source: Special tabulation by NCHS

(https://www.cdc.gov/nchs/nsfg/key_statistics/i-keystat.htm#infertilityservices).

47. As of 2015, an estimated 7.3 million women had received some form of infertility service:

Infertility services

	2002 ¹ Percent, Number	2006-2010 ² Percent, Number	2011-2015 ³ Percent (SE), Number
Percentage and number of women 15-44 years of age who have ever received any infertility services	11.9% (7.3 million)	11.9% (7.4 million)	12.0% (0.51), 7.3 million

Percentage of women 15-44 years of age who have ever received infertility services, by type of service:

	2002 ¹	2006-2010 ³	2011-2015 ³
Advice	6.1%	6.5%	6.3% (0.38)
Medical help to prevent miscarriage	5.5%	4.9%	5.4% (0.34)
Tests on woman or man	4.8%	5.1%	5.2% (0.36)
Ovulation drugs	3.8%	4.0%	4.2% (0.32)
Artificial insemination	1.1%	1.2%	1.4% (0.19)

(https://www.cdc.gov/nchs/nsfg/key_statistics/i.htm#infertilityservices).

48. Women over 30, who now make up the majority of childbearing women in the United States, are more likely to need fertility assistance, including

1 ovulation testing:

2 Percentage of women 15-49 years of age who have ever received any infertility service, by parity and age:

	2015-2019	
	0 births	1 or more births
	Percent (SE)	
Total 15-49 years	6.4 (0.53)	16.6 (0.87)
15-29 years	2.7 (0.40)	11.5 (1.49)
30-39 years	13.6 (1.89)	15.5 (1.13)
40-49 years	21.8 (2.89)	20.0 (1.54)

3 Source: Special tabulation by NCHS

4 (https://www.cdc.gov/nchs/nsfg/key_statistics/i-keystat.htm#infertilityservices).

5 49. In order to become pregnant, a couple must have intercourse within the
6 window of time approximately between five days before and a few hours after
7 ovulation. The highest probability of conception occurs when a couple has
8 intercourse one or two days prior to ovulation. Therefore, especially for those
9 couples who are having trouble getting pregnant, it is highly beneficial to be able to
10 prospectively predict what day ovulation will occur each cycle.

11 50. Defendants' Kits detect a rise in urinary LH levels. Over-the-counter
12 LH tests like Defendants' Kits, designed for home use by the consumer, can be
13 useful aids to help predict ovulation. When ovulation takes place, it is generally
14 preceded by a surge in LH levels 24–36 hours beforehand. Other useful methods
15 for timing intercourse include calendaring, measuring cervical mucus, and other
16 hormone tests such as pregnanediol 3-glucuronide. However, neither LH tests nor
17 any of these methods are able to identify, with 99% accuracy, if a woman is, or soon
18 will be, ovulating. Currently the only method to predict ovulation with a high
19 degree of accuracy is a transvaginal ultrasound, an invasive procedure performed in
20 a clinical setting, which allows the doctor to actually view the egg growing and
21 preparing to detach. An LH test, even if it is 99% accurate in identifying LH, merely
22 provides a "hint" at when ovulation will occur. Fever may be an indicator of viral

1 infection. But a thermometer, even if it was 99% accurate at indicating body
2 temperature, could not be lawfully marketed as a “99% accurate viral infection
3 test.”

4 51. Defendants’ Kits are not 99% accurate at predicting ovulation because
5 the LH surge the tests detect is not always tied to the actual event of ovulation in a
6 given menstrual cycle. LH surges may happen at other times in a woman’s cycle.
7 Many variables—including BMI, age, time from contraceptive use, sports activity,
8 and smoking—affect the natural logarithm of urinary LH levels from days 7 to 20
9 of the cycle. If a test detects a different LH surge, not the surge that precedes actual
10 ovulation, it will falsely predict the timing of ovulation for that cycle. The user of
11 the test will then unknowingly miss the actual ovulation that takes place in that
12 cycle, and the test will provide none of the fertility benefits for which it is marketed.

13 52. Furthermore, many women do not have regular cycles. LH tests
14 should be conducted at a specific time in the menstrual cycle, usually three to five
15 days prior to expected ovulation. During irregular cycles, LH tests may be negative,
16 falsely indicating that no ovulation occurred in that cycle. The common occurrence
17 of irregular cycles thus further lower the chances that Defendants’ Kits will
18 accurately predict ovulation.

19 53. Many women trying to get pregnant also have variations in their
20 reproductive systems that make an LH surge not predictive of ovulation. For
21 example, more than 10% of menstrual cycles of fertile women exhibit a condition
22 known as “Luteinized Unruptured Follicle Syndrome.” When this occurs, there is
23 a normal LH surge and menstruation, but no egg is released. LH surge has also
24 been detected in many women who are infertile.

25 54. Therefore, a positive LH test does not predict, with 99% accuracy, that
26 a woman will ovulate within the next 24–36 or 24–48 hours, as claimed in
27 Defendants’ marketing. While some of Defendants’ Kits may have included an
28

1 asterisk next to “99% ACCURATE,” any attempt at a disclaimer was hidden in
 2 small text on a different part of the box or on a pamphlet inside the box. The
 3 additional information provided in the small text, such as “*at detecting LH levels,”
 4 would also not be understandable to a reasonable consumer, and certainly would
 5 not override the large, plain message on the front of the box that these were
 6 “OVULATION TESTS” with “99% ACCURACY.”

7 55. As a result of Defendants’ misleading and deceptive marketing of
 8 “ovulation test kits,” Plaintiffs and the Class purchased Defendants’ Kits with the
 9 expectation that they were testing whether a woman is, or is about to be, ovulating,
 10 with an accuracy of 99%.

11 56. Plaintiffs and the Class have been damaged by Defendants’ misleading
 12 and deceptive practices.

13 **CLASS ACTION ALLEGATIONS**

14 57. Plaintiffs bring this action as a class action pursuant to Federal Rule of
 15 Civil Procedure 23 on behalf of themselves and the Class defined as follows:

16 All persons who purchased Defendants’ Ovulation Test Kits within the
 17 state of California for purposes other than resale.

18 Excluded from the Class are Defendants; the officers, directors or
 19 employees of Defendants; any entity in which the Defendants have a
 20 controlling interest; and any affiliate, legal representative, heir or assign of
 21 Defendants. Also excluded are the judge to whom this case is assigned and
 22 any member of the judge’s immediate family.

23
 24 58. The Class is sufficiently numerous because Defendants’ Kits are sold
 25 in thousands of stores, both in retail locations and online, and thousands of people
 26 have purchased them during the relevant period. As a result, joinder of all Class
 27 members is impractical.

1 59. There are questions of law and fact common to the Class and these
 2 questions predominate over questions affecting only individual Class members.
 3 Common legal and factual questions include, but are not limited to:

- 4 • Whether Defendants labeled, packaged, marketed, advertised, and/or
 5 sold products using false, misleading, and/or deceptive packaging
 6 and labeling;
- 7 • Whether Defendants' actions constitute violations of misbranding
 8 laws in California;
- 9 • Whether Defendants' actions constitute deceptive and unfair
 10 practices and/or violations of consumer protection laws in California;
- 11 • Whether Defendants omitted and/or misrepresented material facts in
 12 connection with the labeling, packaging, marketing, advertising,
 13 and/or selling of Ovulation Test Kits;
- 14 • Whether Defendants' labeling, packaging, marketing, advertising,
 15 and/or selling of products constituted an unfair, unlawful, or
 16 fraudulent practice;
- 17 • Whether the members of the Class have sustained damages as a result
 18 of Defendants' wrongful conduct;
- 19 • Whether Defendants were unjustly enriched;
- 20 • The appropriate measure of damages and/or other relief; and
- 21 • Whether Defendants should be enjoined from continuing their
 22 unlawful practices.

23 60. Plaintiffs will fairly and adequately represent the Class and have
 24 retained counsel experienced and competent in the prosecution of consumer and
 25 class action litigation. Plaintiffs have no interests antagonistic to those of other
 26 members of the Class. Plaintiffs are committed to the vigorous prosecution of this
 27 action and has retained counsel experienced in litigation of this nature to represent
 28

1 them. Plaintiffs anticipate no difficulty in the management of this litigation as a
2 class action.

3 61. Plaintiffs' claims are typical of the claims of the members of the Class
4 as all members of the Class are similarly affected by Defendants' wrongful conduct.

5 62. A class action is superior to other available methods for the fair and
6 efficient adjudication of the controversy. Because of the amount of the individual
7 Class members' claims relative to the complexity of the litigation and the financial
8 resources of the Defendants, few, if any, members of the Class would seek legal
9 redress individually for the wrongs complained of here. Absent a class action, Class
10 members will continue to suffer damages and Defendants' misconduct will proceed
11 without remedy.

12 **CAUSES OF ACTION**

13 **FIRST CLAIM FOR RELIEF**

14 **(VIOLATION OF CALIFORNIA CONSUMER LEGAL** 15 **REMEDIES ACT—CAL. CIV. CODE § 1750, *ET SEQ.*)**

16 63. The allegations made in all preceding paragraphs are re-alleged and
17 incorporated by reference herein.

18 64. Defendants falsely and misleadingly represented their Ovulation Test
19 Kits, in violation of the California CLRA, California Civil Code section 1750, *et*
20 *seq.*, including, but not limited to, by marketing and advertising their Ovulation Test
21 Kits as "99% ACCURATE," when in fact, Defendants knew, or in the exercise of
22 reasonable care should have known, that the Kits merely test urinary LH levels,
23 which do not predict actual ovulation with anything approaching 99% accuracy.

24 65. California Civil Code section 1780(a) allows any consumer who
25 suffers any damage as a result of the use or employment by any person of a method,
26 act, or practice declared to be unlawful by section 1770 to bring an action against
27 that person to recover or obtain actual damages, injunctive relief, restitution of
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1 property, punitive damages, and any other relief that the court deems proper.

2 66. Pursuant to California Civil Code section 1752, the provisions of the
3 CLRA are not exclusive, and the remedies provided therein are in addition to any
4 other procedures or remedies for any violation or conduct provided for in any other
5 law.

6 67. Prior to filing this action, Plaintiffs, on their own behalf and on behalf
7 of the Class, provided the required notice to Defendants in compliance with
8 California Civil Code section 1782(a). On February 24, 2022, Plaintiff Bergum
9 sent a letter to Church & Dwight via certified mail, and received no response. On
10 February 24, 2022, Plaintiff McKay sent letters via certified mail to the Clearblue
11 Defendants, Target, Church & Dwight, and Walgreens, to which the defendants did
12 not respond. On February 24, 2022, Plaintiff DePol sent a letter via certified mail
13 to Target, to which Target did not respond. On February 24, 2022, Plaintiff
14 Johnigan sent a letter via certified mail to Walgreens, to which Walgreens did not
15 respond. On February 24, 2022, Plaintiff Dave sent letters via certified mail to the
16 Clearblue Defendants, to which the Clearblue Defendants did not respond.
17 Accordingly, pursuant to California Civil Code section 1780(a)(3), Plaintiffs, on
18 behalf of themselves and all other members of the Class, seek compensatory
19 damages, punitive damages, and restitution of any ill-gotten gains due to
20 Defendants' acts and practices.

21 68. Plaintiffs' CLRA venue declaration is attached to this Complaint as
22 Exhibit A, consistent with California Civil Code section 1780(d).

23 69. Defendants are "persons" within the meaning of California Civil Code
24 sections 1761(c) and 1770, and provide "goods or services" within the meaning of
25 California Civil Code sections 1761(b) and 1770.

26 70. Plaintiffs and other members of the Class are "consumers," as the term
27 is defined by California Civil Code section 1761(d), because they bought the
28

1 Ovulation Test Kits for personal, family, or household purposes.

2 71. Plaintiffs and other members of the Class have engaged in
3 “transactions,” as that term is defined by California Civil Code section 1761(e).

4 72. The conduct alleged in this Complaint constitutes unfair methods of
5 competition and unfair and deceptive acts and practices for the purpose of the
6 CLRA, and the conduct was undertaken by Defendants in transactions intended to
7 result in, and which did result in, the sale of goods to consumers.

8 73. By marketing and selling their Ovulation Test Kits as “99%
9 ACCURATE,” among other acts as alleged herein, Defendants violated California
10 Civil Code section 1770(a)(2)-(9) including, but not necessarily limited to, by
11 representing that goods or services have sponsorship, approval, characteristics,
12 ingredients, uses, benefits, or quantities that they do not have; representing that
13 goods or services are of a particular standard, quality, or grade, or that goods are of
14 a particular style or model; and advertising goods or services with intent not to sell
15 them as advertised.

16 74. As a direct and proximate result of Defendants’ violations, Plaintiffs
17 suffered injury in fact because they purchased the Ovulation Test Kits with the
18 reliance that the product was, *inter alia*, 99% accurate, or over 99% accurate, at
19 predicting ovulation.

20 75. Plaintiffs seek an order enjoining the acts and practices described
21 above, restitution of property, and any other relief that the Court deems proper.

22 76. Plaintiffs additionally seeks damages, restitution, punitive damages,
23 attorneys’ fees and costs, and any other relief under section 1780(a) of the CLRA
24 pursuant to Civil Code section 1782(d), due to Defendants’ failure to rectify or
25 agree to adequately rectify their violations as detailed above.

SECOND CLAIM FOR RELIEF
(VIOLATION OF CALIFORNIA UNFAIR COMPETITION
LAW—CALIFORNIA BUSINESS AND PROFESSIONS
CODE § 17200, ET SEQ.)

77. The allegations made in all preceding paragraphs are re-alleged and incorporated by reference herein.

78. Defendants engaged in unlawful, unfair, and/or fraudulent conduct under the California UCL, California Business & Professions Code section 17200, *et seq.*, including, but not limited to, by marketing and advertising their Ovulation Test Kits as “99% ACCURATE,” when in fact, Defendants knew, or in the exercise of reasonable care should have known, that the Kits merely test urinary LH levels, which do not predict actual ovulation with anything approaching 99% accuracy.

79. Defendants’ conduct is unlawful as alleged herein, including, but not limited to, its violation of California’s CLRA, FAL, and California Business & Professions Code section 17500, *et seq.*, described more fully in the Third Claim for Relief below.

80. Defendants’ conduct is unfair in that it offends established public policy and/or is immoral, unethical, oppressive, unscrupulous, and/or substantially injurious to Plaintiffs and California consumers. The harm to Plaintiffs arising from Defendants’ conduct outweighs any legitimate benefit derived from the conduct. Defendants’ conduct undermines and violates the stated spirit and policies underlying the FAL and other legal regulations as alleged herein.

81. Defendants’ advertising actions and practices with regard to the Ovulation Test Kits constitute “fraudulent” business practices in violation of the UCL because, among other things, they are likely to deceive reasonable consumers. As a direct and proximate result of Defendants’ violations, Plaintiffs suffered injury in fact because they purchased Defendants’ Kits with the reliance that the products

1 were “99% ACCURATE.”

2 82. Plaintiffs seek (a) injunctive relief in the form of an order requiring
3 Defendants to cease the acts of unfair competition alleged herein and to correct their
4 advertising, promotion, and marketing campaigns or reformulate their products in
5 ways that meet consumer expectations; (b) the payment of Plaintiffs’ attorneys’ fees
6 and costs pursuant to, *inter alia*, California Code of Civil Procedure section 1021.5;
7 and (c) interest at the highest rate allowable by law. Plaintiffs also seek restitution
8 for themselves and the Class.

9 **THIRD CLAIM FOR RELIEF**

10 **(VIOLATION OF CALIFORNIA FALSE ADVERTISING**
11 **LAW—CALIFORNIA BUSINESS & PROFESSIONS CODE**
12 **§ 17500, ET SEQ.)**

13 83. The allegations made in all preceding paragraphs are re-alleged and
14 incorporated by reference herein.

15 84. Defendants publicly disseminated untrue or misleading advertising, or
16 intended not to sell the Ovulation Test Kits as advertised, in violation of the
17 California FAL, California Business & Professions Code section 17500, *et seq.*,
18 including, but not limited to, by marketing and advertising their Ovulation Test Kits
19 as “99% ACCURATE,” when in fact, Defendants knew, or in the exercise of
20 reasonable care should have known, that the Kits merely test urinary LH levels,
21 which do not predict actual ovulation with anything approaching 99% accuracy.

22 85. As a direct and proximate result of Defendants’ violations, Plaintiffs
23 suffered injury in fact because they purchased Defendants’ Ovulation Test Kits with
24 the reliance that the product was, *inter alia*, 99% accurate, or more than 99%
25 accurate, at predicting ovulation.

26 86. Plaintiffs seek (a) injunctive relief in the form of an order requiring
27 Defendants to cease the acts of unfair competition alleged here and to correct their
28

1 advertising, promotion, and marketing campaigns or reformulate their products in
 2 ways that meet consumer expectations; (b) the payment of Plaintiffs' attorneys' fees
 3 and costs pursuant to, *inter alia*, California Code of Civil Procedure section 1021.5;
 4 and (c) interest at the highest rate allowable by law. Plaintiffs also seek restitution
 5 for themselves and the Class.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiffs respectfully request that the Court enter judgment
 8 in their favor and in favor of the Class and against Defendants, as follows:

- 9 A. Certify the Class pursuant to Rule 23 of the Federal Rules of Civil
 10 Procedure and name Plaintiffs as representatives of the Class, and
 11 further appoint Plaintiffs' attorneys as Class Counsel to represent
 12 members of the Class;
- 13 B. Declare that Defendants violated the CLRA, UCL and FAL;
- 14 C. Order an award of injunctive relief as permitted by law or equity,
 15 including enjoining Defendants from continuing the unlawful practices
 16 as set forth herein, and ordering Defendants to engage in a corrective
 17 advertising campaign or reformulate their products in ways that meet
 18 consumer expectations.
- 19 D. Order Defendants to pay restitution to Plaintiffs and the Class;
- 20 E. Award to Plaintiffs and the Class compensatory, exemplary, and
 21 statutory damages, including interest, in an amount to be proven at
 22 trial;
- 23 F. Order Defendants to pay attorneys' fees and litigation costs to
 24 Plaintiffs pursuant to California Code of Civil Procedure section
 25 1021.5 and the common-law private-attorney-general doctrine;
- 26 G. Order Defendants to pay both pre- and post-judgment interest on any
 27 amounts awarded; and
 28

1 H. Order such other and further relief as may be just and proper.

2 **JURY DEMAND**

3 Plaintiffs demand a trial by jury of all claims in this Complaint so triable.

4
5 Respectfully submitted,

6 DATED: September 12, 2022

UMBERG ZIPSER LLP

7
8 By: /s/ Mark A. Finkelstein

9 Mark A. Finkelstein

10 Brent S. Colasurdo

11 GLANCY PRONGAY & MURRAY LLP

12 Peter A. Binkow

13 Jonathan M. Rotter

Natalie S. Pang

14 Counsel for Plaintiffs and the Putative
15 Class

EXHIBIT A

1 I, Mark A. Finkelstein, hereby declare as follows:

2 1. I am an attorney licensed to practice law in the State of California and
3 am a partner in the law firm Umberg Zipser LLP, counsel for Plaintiffs in this
4 action. I have personal knowledge of the matters stated herein and, if called upon
5 to do so, I could and would competently testify thereto.

6 2. Pursuant to California Civil Code section 1780(d), this Declaration is
7 submitted in support of Plaintiffs' selection of venue for the trial of this action.

8 3. This is a putative class action. As alleged in the Complaint, Plaintiff
9 Prushti Dave resides within this judicial district, in Alameda County, and
10 purchased ovulation test kits in Alameda County. Additionally, as alleged in the
11 Complaint, Defendants marketed and sold the products at issue in this action
12 within this judicial district and do business within this judicial district.

13 I declare under penalty of perjury under the laws of the United States of
14 America that the forgoing is true and correct. Executed this 9th day of September,
15 2022 in Laguna Niguel, California.
16

17
18 s/ Mark A. Finkelstein

19 Mark A. Finkelstein
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