UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

SUSAN FITZL and SAMANTHA HORTON, on behalf of themselves and a class of all others similarly situated, Plaintiffs, v. AMAZON.COM, INC., Defendant.	Civil Action No. 2:22-cv-00544-TL **FIRST AMENDED CLASS ACTION COMPLAINT** **DEMAND FOR JURY TRIAL**

Plaintiffs Susan Fitzl and Samantha Horton (collectively, "Plaintiffs"), individually and on behalf of themselves and all others similarly situated, bring this class action lawsuit against Defendant Amazon.com, Inc. ("Amazon" or "Defendant") based upon personal knowledge as to themselves, the investigation of their counsel, and on information and belief as to all other matters.

INTRODUCTION

1. This is a class action lawsuit against Defendant regarding the manufacture, distribution, and sale of Amazon's Basic Care-branded "Non-Drowsy" over-the-counter cold and flu medicines that contain Dextromethorphan Hydrobromide ("the "Non-Drowsy Products").[1]

2. The Non-Drowsy Products state prominently on the front of their labels that they are "Non-Drowsy" and "Daytime" products.

[1] The Non-Drowsy Products include: Basic Care Vapor Ice Daytime and Nighttime Severe Cold and Flu Combo Pack, Basic Care Tussin CF Severe, Basic Care Daytime Severe Cold and Flu, Basic Care Cold and Flu Relief Multi-Symptom Daytime/Nighttime Combo Pack Softgels, Basic Care Daytime Cold and Flu, Basic Care Daytime Severe. Plaintiffs reserve the right to amend this list if further investigation and/or discovery reveals that the list should be amended.

3. By prominently labeling the products as "Non-Drowsy" and "Daytime," Defendant led Plaintiffs and other consumers to believe that the Non-Drowsy Products do not cause drowsiness, and that drowsiness is not a side effect of the products.

4. Defendant also led Plaintiffs and other consumers to believe that the Non-Drowsy Products are for use during the "Daytime" and intended to be used during waking hours.

5. However, one of the active ingredients in the Non-Drowsy Products is Dextromethorphan Hydrobromide ("DM HBr"). While the average consumer may not be aware, drowsiness is a documented side effect of DM HBr at dosages recommended by Defendant in respect to the Non-Drowsy Products. Authorities such as the National Library of Medicine and Mayo Clinic list drowsiness as a side effect of this ingredient.[2]

6. Plaintiffs and Class members purchased the Non-Drowsy Products with the expectation that the products would not cause drowsiness and that they were intended to be used during waking hours. Because Defendant sold products to consumers that cause drowsiness, Plaintiffs and the Classes were deprived of the benefit of their bargain.

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[2] Dextromethorphan: MedlinePlus Drug Information, National Library of Medicine, https://medlineplus.gov/druginfo/meds/a682492.html (last accessed March 23, 2022); *Mayo Clinic, Drugs and Supplements Dextromethorphan (Oral Route)*, https://www.mayoclinic.org/drugs-supplements/dextromethorphan-oral-route/side-effects/drg-20068661?p=1 (last accessed March 23, 2022).

7. Accordingly, Plaintiffs bring this action on behalf of themselves and the Class for equitable relief and to recover damages and restitution for: (i) breach of express warranty; (ii) violations of the Washington Consumer Protection Act, RCW § 19.86, *et seq.*; (iii) unjust enrichment; (iv) negligent misrepresentation; and (v) intentional misrepresentation.

PARTIES

8. Plaintiff Susan Fitzl is a resident and citizen of the state of Wisconsin. Plaintiff Fitzl purchased a Basic Care Vapor Ice Daytime and Nighttime Severe Cold and Flu combo pack from Amazon.com on January 26, 2022. When purchasing the Non-Drowsy Product, Plaintiff Fitzl reviewed the accompanying labels and disclosures, and understood them as representations and warranties by Defendant that the products would not cause drowsiness and could be used during the day. Plaintiff Fitzl relied on these representations and warranties in deciding to purchase the Non-Drowsy Product and these representations and warranties were part of the basis of the bargain in that she would not have purchased the Non-Drowsy Product if she had known that they would cause drowsiness. When Plaintiff Fitzl took the medication as directed by Defendant, Plaintiff Fitzl became unexpectedly drowsy. Plaintiff Fitzl was not on other medication that would have caused her drowsiness, and there was no other potential cause for this drowsiness, aside from the ingredients in the medication. Plaintiff Fitzl would purchase the Non-Drowsy Products again if they were actually "Non-Drowsy" (*i.e.*, if the product was sold as advertised). Plaintiff Fitzl, however, faces an imminent threat of harm because she will not be able to rely on the labels in the future, and thus will not be able to purchase the products.

9. Plaintiff Samantha Horton is a resident and citizen of the state of Ohio. Plaintiff Horton purchased a Basic Care Daytime Severe and Nighttime Severe Cold and Flu combo pack from Amazon.com on September 13, 2021. When purchasing the Non-Drowsy Product, Plaintiff Horton reviewed the accompanying labels and disclosures, and understood them as representations and warranties by Defendant that the products would not cause drowsiness and could be used during the day. Plaintiff Horton relied on these representations and warranties in deciding to purchase the Non-Drowsy Product and these representations and warranties were part of the basis of the bargain in that she would not have purchased the Non-Drowsy Product if she had known that they

would cause drowsiness. When Plaintiff Horton took the medication as directed by Defendant, Plaintiff Horton became unexpectedly drowsy. Plaintiff Horton was not on other medication that would have caused her drowsiness, and there was no other potential cause for this drowsiness, aside from the ingredients in the medication. Plaintiff Horton would purchase the Non-Drowsy Products again if they were actually "Non-Drowsy" (*i.e.*, if the product was sold as advertised). Plaintiff Horton, however, faces an imminent threat of harm because she will not be able to rely on the labels in the future, and thus will not be able to purchase the products.

10. Amazon is a Delaware corporation with its principal place of business and headquarters located at 410 Terry Avenue North, Seattle, Washington. Amazon was founded in 1994 in Bellevue, Washington by Jeff Bezos and is one of the largest retailers in the world. At all relevant times hereto, Defendant was engaged in manufacturing, marketing, distributing, and advertising Non-Drowsy Products throughout the United States. Defendant created and/or authorized the false and misleading advertising and labeling of the Non-Drowsy Products.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because there are more than 100 Class members; the aggregate amount in controversy exceeds $5,000,000.00, exclusive of interest, fees, and costs; and at least one Class member is a citizen of a state different from the Defendant.

12. This Court has personal jurisdiction over Defendant because Defendant is headquartered in Washington, regularly conducts business in this District, and has extensive contacts with this forum.

13. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Defendant is headquartered in this District, and Defendant transacts substantial business in this District.

FACTUAL ALLEGATIONS

A. Defendant Manufactures, Distributes, Markets, and Sells the Non-Drowsy Products

14. Defendant manufactures, distributes, markets, and sells the Non-Drowsy Products.

15. Each of the Non-Drowsy Products prominently state on its label that the product is

"Non-Drowsy" and some also include the representation that product is intended for "Daytime" use.

16. For example, below is an image of the Basic Care Tussin CF Severe's product label.

17. The Basic Care Daytime Cold & Flu product label includes the same representations, with the addition of the Daytime representation on its label.

18. The Non-Drowsy Products are also sold in combo packs with NightTime products. For example, below is an image of the Amazon Daytime Severe Cold & Flu combo pack which includes "Daytime" and "Nighttime" formulations.

19. The Nighttime product includes the representation that the product is for "Nighttime Relief" whereas the Daytime product includes "Non-Drowsy" and "Daytime Relief" representations.

20. Both the Daytime and Nighttime products contain DM HBr, the ingredient in the Non-Drowsy Products that causes drowsiness.

21. The "Non-Drowsy" and "Daytime" representations are materially the same across the Non-Drowsy Products.

22. Based on the prominent "Non-Drowsy" and "Daytime" representations included on the front of each product, a reasonable consumer would believe that the products do not cause drowsiness and that drowsiness is not a side effect of the product.

B. <u>Defendant's False and Misleading Advertising Campaign</u>

23. One of the active ingredients in the Non-Drowsy Products is DM HBr.

24. Drowsiness is a well-documented side effect of DM HBr.

25. For example, the Mayo Clinic and the National Library of Medicine list drowsiness as a side-effect of the ingredient.[3]

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[3] *Dextromethorphan: MedlinePlus Drug Information, National Library of Medicine*, https://medlineplus.gov/druginfo/meds/a682492.html (last accessed March 23, 2022); *Mayo Clinic, Drugs and Supplements Dextromethorphan (Oral Route)*, https://www.mayoclinic.org/drugs-supplements/dextromethorphan-oral-route/side-effects/drg-

26. Manufacturers and distributors know that DM HBr causes drowsiness as their safety data sheets ("SDS") explicitly state that DM HBr causes and may cause drowsiness.

27. According to Pfizer's safety datasheet for their Robitussin cough medicine. "Common adverse reactions associated with the clinical use of dextromethorphan hydrobromide include, drowsiness, dizziness, and nausea and vomiting."[4]

28. Santa Cruz Biotechnology Inc lists acute health effects on their SDS following the consumption of DM HBr such as "Drowsiness, dizziness, excitation, mental confusion and gastro-intestinal disturbances have been described following dextromethorphan. Administration."[5]

29. Peer-reviewed studies have also confirmed that drowsiness is a side effect of DM HBr at the recommended dosages. For example, one study found that "[s]omnolence is a common side effect of centrally acting antitussive drugs" like DM HBr, and that 10.4% of users of products containing DM HBr develop drowsiness within three days of starting treatment with DM HBr cough medicine. [6, 7] The "cases of intense somnolence" were "related only to dextromethorphan" and not to the other drug studied. And the patients in this clinical study were given an even smaller dosage of DM HBr (15 mg three times a day) than the recommended dose found in Non- Drowsy products.[8]

30. In other words, sedation is a well-known adverse event of this ingredient.[9]

20068661?p=1 (last accessed March 23, 2022).
10 Dextromethorphan: MedlinePlus Drug Information, National Library of Medicine, https://medlineplus.gov/druginfo/meds/a682492.html (last accessed March 23, 2022).

[4] *Pfizer, Safety Data Sheet*, https://imgcdn.mckesson.com/CumulusWeb/Click_and_learn/SDS_9PFIZ_ROBITUSSIN_DM_SYRP_ADLT_COUGH_CHEST_HONEY_4OZ.pdf (last accessed March 23, 2022).

[5] Dextromethorphan Hydrobromide, Material Safety Data Sheet, https://datasheets.scbt.com/sc-204716.pdf (last accessed March 23, 2022).

[6] E. Catena and L. Daffonchio, "Efficacy and Tolerability of Levodropropizine in Adult Patients with Non-productive Cough, Comparison with Dextromethorphan," 10 Pulmonary Pharmacology & Therapeutics 89-96 (1997).

[7] The study reports this side effect as "somnolence." Somnolence means "the quality or state of being drowsy." Merriam Webster Dictionary, https://www.merriamwebster.com/dictionary/somnolence

[8] For example, Amazon Non-Drowsy Daytime Cold & Flu Softgels contain 10mg of DM HBr per softgel and the recommended dosage is 2 softgels (20mg of DM HBr) every 4 hours. https://www.amazon.com/dp/B07JKZBDKY/ref=emc_b_5_i (last accessed July 28, 2022).

[9] *See* Martin, E., Narjoz, C., Decleves, X., Labat, L., Lambert, C., Loriot, M. A., ... & Pickering, G. (2019). Dextromethorphan analgesia in a human experimental model of hyperalgesia. *Anesthesiology*, *131*(2), 356-368; *see also* Siu, A. and Drachtman, R. (2007), Dextromethorphan: A Review of N-methyl-d-aspartate Receptor Antagonist in the Management of Pain. CNS Drug Reviews, 13: 96-106. https://doi.org/10.1111/j.1527-3458.2007.00006.x ("DM is used

31. In fact, the Federal Aviation Administration prohibits pilots from flying after taking medicines that contain dextromethorphan. The document titled, "What Over-the-Counter (OTC) medications can I take and still be safe to fly" lists DayQuil as a "No Go" product because it contains dextromethorphan.[10] The Non-Drowsy Products and DayQuil both contain this ingredient. Specifically, the Non-Drowsy Products are compared to DayQuil on the front panel of the product labels.

32. The Non-Drowsy Products do not qualify the voluntary deceptive statements "Non-Drowsy" and "Daytime" with a disclaimer or qualification anywhere on the packaging; in other words, they do not disclose anywhere on the packaging that even though the Non-Drowsy Products affirmatively claim to be "Non-Drowsy" and "Daytime," they actually do or can cause drowsiness, or that drowsiness is a side effect. Accordingly, there is nothing on the packaging that could possibly cure or ameliorate the deception caused by the affirmative "Non-Drowsy" and "Daytime" representations.[11]

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clinically in the form of salt, dextromethorphan hydrobromide…The majority of DM's adverse effects occur at the level of the CNS. Neurologic toxicity associated with DM includes dystonia, fatigue, drowsiness, and dizziness".).

[10] *Federal Aviation Administration, What Over-the-Counter (OTC) medications can I take and still be safe to fly* https://www.faa.gov/licenses_certificates/medical_certification/media/OTCMedicationsforPilots.pdf (last accessed March 23, 2022).

[11] To be clear, Plaintiffs do not contend that Defendant has a duty to warn that its products cause drowsiness in the absence of any affirmative misrepresentation; they contend that it is deceptive to affirmatively label the Non-Drowsy Products "Non-Drowsy" and "Daytime."

33. As such, Defendant's advertising campaign is false and misleading.

34. The Food and Drug Administration ("FDA") prohibits labeling drugs with "false or misleading" statements. 21 C.F.R. § 201.6. It is misleading to label a product "Non-Drowsy" when it does cause drowsiness, or if drowsiness is a known side effect of one of its active ingredients.

35. This case is about Defendant's affirmative "Non-Drowsy" representation on the Non-Drowsy Product labels. No FDA regulation allows antitussives containing DM HBr to be labelled "Non-Drowsy" and the FDA has never considered whether this claim is false and misleading (nor would the FDA ever approve such a claim, because it is in fact false and misleading).

36. Based on the fact that Defendant labelled the Non-Drowsy Products as "Non-Drowsy," a reasonable consumer would expect that those products do not cause drowsiness. Similarly, a reasonable consumer would expect that drowsiness is not a side effect of the products (much less a common side effect). Indeed, according to Consumer Reports, "'Non-drowsy' is code for antihistamines and other medications that don't make you sleepy."[12] This is the plain meaning of "non-drowsy," which means "not causing or accompanied by drowsiness."

37. While the Federal Regulations relating to the labelling of antitussive drug products do not require products with DM HBr to include an affirmative "drowsiness" warning, *see generally*, 21 C.F.R. § 341.74, Defendant could have simply omitted the false and misleading "Non-Drowsy" representations from its product labels.

38. Other drug makers do not falsely claim that products that include DM HBr are "non-drowsy." For example, Coricidin is a cold symptom relief product for people with high blood pressure. Coricidin is manufactured, sold, and advertised by Bayer. This product contains DM HBr and omits false representations by not labeling the product as "Non-Drowsy."

[12] How to read over the counter (OTC) drug labels, Consumer Reports, https://www.consumerreports.org/cro/2014/04/how-to-read-over-the-counter-druglabels/index.htm

39. Or, if Defendant wanted to differentiate its Daytime products from its Nighttime products, it could have indicated on the product label that the Daytime products would cause *less* drowsiness than the Nighttime products. For example, the below Dramamine product is advertised as a "less drowsy" formula.

40. Whether or not an over-the-counter drug causes drowsiness is material to a reasonable customer. In certain situations, consumers prefer over-the-counter drugs that will not make them drowsy to products that may make them drowsy. For example, all else equal, a reasonable consumer would prefer to take a drug that does not cause drowsiness to one that does cause drowsiness during the day (or any periods of time when they plan to be awake). As a second example, if a consumer is planning to engage in activities that require them to be alert (like work), or during which they would prefer to be alert, that consumer would prefer to take a drug that does not cause drowsiness to one that does. Indeed, in many situations, taking a drug that does or can cause drowsiness can be dangerous. For example, taking a drug that causes drowsiness while driving is dangerous.

41. Because Defendant makes and sells the Non-Drowsy Products, Defendant researched the known and common side effects of DM HBr. This is diligence that a large company like Defendant would do when selling a drug. As a result, Defendant knew that DM HBr causes drowsiness. Furthermore, Defendant controls its labeling, knowingly put on the "Non-Drowsy" representations, and knows the plain meaning of "Non-Drowsy." Finally, it is standard practice in the industry to test labeling with consumers, and Defendant's testing would confirm that "Non-Drowsy" is misleading. For these reasons, Defendant knew that its labeling was false and misleading, or was reckless or willfully blind to this fact. And as alleged above, Defendant intended that consumers would rely on the "Non-Drowsy" labeling, so that consumers would purchase more products and pay a price premium.

42. Defendant's false statements increased the demand for its Non-Drowsy Products and allowed Defendant to charge a price premium. As explained above, consumers specifically value the "Non-Drowsy" claim because consumers demand cough medicine that will not make them drowsy (e.g., during the day, at work or while driving). As a result, Defendant was able to charge more for these products than it would have been able to had the labeling been truthful. Accordingly, as a direct result of Defendant's false statements, Defendant was able to charge a price premium for these products. As purchasers, Plaintiffs and each class member paid this price premium and sustained economic injury.

43. For example, a bottle of "Non-Drowsy" Basic Care Severe Daytime Cold and Flu Relief is currently priced at $7.56 (for 12 ounces) on Amazon.com. This price is artificially inflated by the misleading "Non-Drowsy" claim. If this misleading claim were removed, demand would drop, which in turn would reduce the market price. This price premium can be quantified (i.e., a dollar figure measured) using expert economic analysis of data that includes, among other things, sales and pricing information uniquely within the possession of Defendant.

44. In addition, because the Non-Drowsy Products actually do cause drowsiness, Plaintiffs and each class member did not get what they paid for: a cough medicine that does not cause drowsiness. Instead, they received something that is worth less: a cough medicine that does cause drowsiness. Plaintiffs and each class member sustained an economic injury for this additional reason, i.e., they received something worth less than the price they paid for it.

45. Moreover, the Non-Drowsy Products are sold specifically for use in situations where it is not acceptable for consumers to become drowsy (e.g., while driving, working, or supervising children). As a result, the products that Plaintiffs and each class member did receive in exchange for the price they paid—Non-Drowsy Products that cause drowsiness—were not suitable for, and were thus worthless for, their intended purpose. The economic injury Plaintiffs and each class member sustained consists of the entire purchase price of the products, because what they received was worthless for its intended use.

46. Defendant intended that consumers would rely on the "Non-Drowsy" and "Daytime" labeling so that consumers would purchase more products, pay a price premium, and buy them as alternatives to its Nighttime products. The product labels do not warn consumers that even though the products are labelled "Non-Drowsy" and "Daytime," contrary to those representations, the products cause drowsiness, may cause drowsiness, or you may get drowsy from the usage of such products thereby creating an unreasonable risk of harm as a result of the affirmative deceptive "Non-Drowsy" and "Daytime" statements, which are not qualified anywhere on the packaging.

C. Consumers Have Been Harmed By Defendant's False Representations

47. Defendant knew, or should have known, that Defendant's "Non-Drowsy Products" are misbranded because they contain DM HBr which causes drowsiness in consumers.

48. Defendant knew, or should have known that products misrepresented material facts concerning the "Non-Drowsy" and "Daytime" representations when in fact the products contained an ingredient that causes drowsiness.

49. Defendant knew, or should have known the representations and statements through it's labeling prescribes dangerous uses.

50. Plaintiffs would not have purchased the Non-Drowsy Products, or would have paid less for them, had the Non-Drowsy Products been truthfully and accurately labeled.

CLASS ACTION ALLEGATIONS

51. Plaintiffs bring this action pursuant to Rule 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure, individually and on behalf of the following Classes:

> All persons who purchased one or more of Defendant's Non-Drowsy Products in the United States for personal/household use within any applicable limitations period (the "Nationwide Class").

52. Plaintiff Fitzl brings this action individually and on behalf of the following Wisconsin subclass:

> All persons who purchased one or more of Defendant's Non-Drowsy Products in the state of Wisconsin for personal/household use within any applicable limitations (the "Wisconsin Subclass").

53. Plaintiff Horton brings this action individually and on behalf of the following Ohio subclass:

> All persons who purchased one or more of Defendant's Non-Drowsy Products in the state of Ohio for personal/household use within any applicable limitations (the "Ohio Subclass").

54. Excluded from the Class and Subclass are: (1) any Judge or Magistrate presiding over this action and any members of their families; (2) Defendant, Defendant's subsidiaries, parents, successors, predecessors, and any entities in which Defendant or its parents and any entities in which Defendant has a controlling interest and its current or former employees, officers, and directors; and (3) individuals who allege personal bodily injury resulting from the use of Affected Products.

55. Numerosity (Rule 23(a)(1)): The exact number of members of the Class is unknown

and currently unavailable to Plaintiffs, but joinder of individual members herein is impractical. The Class is likely comprised of thousands of consumers. The precise number of Class members, and their addresses, is unknown to Plaintiffs at this time, but can be ascertained from Defendant's records and/or retailer records. The members of the Class may be notified of the pendency of this action by mail or email, Internet postings and/or publications, and supplemented (if deemed necessary or appropriate by the Court) by published notice.

56. Predominant Common Questions (Rule 23(a)(2) and (b)(3)): The Class's claims present common questions of law and fact, and those questions predominate over any questions that may affect individual Class members. The common and legal questions include, but are not limited to, the following:

a. Whether the Non-Drowsy Products cause drowsiness;

b. Whether Defendant's labelling of the Non-Drowsy Products as "Non-Drowsy" and "Daytime" is false, misleading, and/or deceptive;

c. Whether Defendant violated the state consumer protection statutes alleged herein;

d. Whether Defendant breached its express warranties;

e. Whether Defendant was unjustly enriched; and

f. The nature of relief, including damages and equitable relief, to which Plaintiffs and members of the Class are entitled.

57. Typicality of Claims (Rule 23(a)(3)): Plaintiffs' claims are typical of the claims of the Class because Plaintiffs, like all other Class Members, purchased the Non-Drowsy Products, suffered damages as a result of that purchase, and seek the same relief as the proposed Class Members.

58. Adequacy of Representation (Rule 23(a)(4)): Plaintiffs adequately represent the Class because their interests do not conflict with the interests of the members of the Class, and they have retained counsel competent and experienced in complex class action and consumer litigation. Plaintiffs and their counsel will fairly and adequately protect the interest of the members of the Class.

59. Superiority (Rule 23(b)(3)): A class action is superior to other available means of adjudication for this controversy. It would be impracticable for members of the Class to individually litigate their own claims against Defendant because the damages suffered by Plaintiffs and the members of the Class are relatively small compared to the cost of individually litigating their claims. Individual litigation would create the potential for inconsistent judgments and delay and expenses to the court system. A class action provides an efficient means for adjudication with fewer management difficulties and comprehensive supervision by a single court.

60. Declaratory Relief (Fed. R. Civ. P. 23(b)(1) and (2)): In the alternative, this action may properly be maintained as a class action because the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudication with respect to individual Class members, which would establish incompatible standards of conduct for the Defendant; or the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of other members of the Class not parties to the adjudications, or substantially impair or impede their ability to protect their interests; or Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the Class as a whole.

CAUSES OF ACTION

COUNT I

BREACH OF EXPRESS WARRANTY
(on behalf of Plaintiffs and the Nationwide Class (or alternatively, the Wisconsin and Ohio Subclasses))

61. Plaintiffs hereby incorporate all other paragraphs of this Complaint and restate them as if fully set forth herein.

62. Defendant marketed and sold its Non-Drowsy Products in the stream of commerce with the intent that its Non-Drowsy Products would be purchased by Plaintiffs and the Classes.

63. In connection with the sale of the Non-Drowsy Products, Defendant, as the designer, manufacturer, marketer, distributor, and/or seller issued written warranties by representing that the Non-Drowsy Products were "Non-Drowsy" and were "Daytime" products. These were affirmations

of fact about the products (i.e., a description of the effects) and a promise relating to the goods.

64. In fact, the Non-Drowsy Products do not conform to the above referenced representations because, as alleged in detail above, they cause drowsiness. Thus, the warranty was breached.

65. As a direct and proximate cause of Defendant's breach of express warranty, Plaintiffs and the Class members have been injured and harmed because (1) they would not have purchased the products had they known that the Non-Drowsy Products cause drowsiness; or (2) they overpaid for the Non-Drowsy Products because they are sold at a premium due to the warranties.

66. On April 13, 2022, prior to filing this action, Defendant was served with a pre-suit notice letter pursuant to U.C.C. § 2-607.

COUNT II

VIOLATION OF THE WASHINGTON CONSUMER PROTECTION ACT
(RCW § 19.86, *et seq.*)
(on behalf of Plaintiffs and the Nationwide Class)

67. Plaintiffs hereby incorporate all other paragraphs of this Complaint and restate them as if fully set forth herein.

68. Defendant's foregoing unfair and deceptive acts and practices were and are committed in its course of trade or commerce, directed at consumers, affect the public interest, and injured Plaintiffs and the Nationwide Class.

69. Defendant made representations to the public by offering its Non-Drowsy Products through its various retail streams that the products were "Non-Drowsy" and meant for "Daytime" use.

70. Defendant's representations about the "Non-Drowsy" and "Daytime" characteristics of its products were untrue, deceptive, or misleading as the products contained an ingredient which is known to cause drowsiness.

71. Defendant's representations were likely to deceive, and did deceive, Plaintiffs and reasonable consumers.

72. Defendant knew or should have known, through the exercise of reasonable care that

the statements were untrue, deceptive, and misleading.

73. Defendant's misrepresentations were a substantial factor and proximate cause in causing damages and losses to Plaintiffs.

74. Plaintiffs and Nationwide Class members suffered damages when they purchased the Non-Drowsy Products. Defendant's deceptive and/or unfair practices caused actual damages to Plaintiffs and the Nationwide Subclass members who were unaware that the Non-Drowsy Products cause drowsiness, notwithstanding Defendant's representations at the time of purchase.

75. Defendant's foregoing deceptive acts and practices were likely to deceive, and did deceive, consumers acting reasonably under the circumstances.

76. Consumers, including Plaintiffs and Nationwide Class members would not have purchased the Non-Drowsy Products had they known that the products cause drowsiness.

77. As a direct and proximate result of Defendant's deceptive acts and practices, Plaintiffs and Nationwide Class members have been damaged as alleged herein, and are entitled to recover actual damages and/or treble damages to the extent permitted by law, including class action rules, in an amount to be proven at trial.

78. In addition, Plaintiffs and Nationwide class members seek equitable and injunctive relief against Defendant on terms that the Court considers reasonable, and reasonable attorneys' fees and costs. Defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce, in violation of Wash. Rev. Code Ann. § 19.86.020, as described herein.

79. Defendant's Conditions of Use state that "By using any Amazon Service, you agree that applicable federal law, and the laws of the state of Washington, without regard to principles of conflict of laws, will govern these Conditions of Use and any dispute of any sort that might arise between you and Amazon."

80. Therefore, Plaintiffs bring this claim on behalf of themselves and the Nationwide class.

COUNT III

UNJUST ENRICHMENT
(on behalf of the Plaintiffs and the Nationwide Class)

81. Plaintiffs hereby incorporate all other paragraphs of this Complaint and restate them as if fully set forth herein.

82. Plaintiffs and Class members conferred benefits upon Defendant. Plaintiffs and Class members paid money for Defendant's Non-Drowsy Products that they would not have paid, had they known that the products cause drowsiness.

83. Defendant has unjustly retained the benefits conferred upon by Plaintiffs and Class members.

84. Defendant retained those benefits under circumstances that make it inequitable for Defendant to retain such benefits. Specifically, Defendant retained those benefits even though Defendant's Non-Drowsy Products cause drowsiness. If Plaintiffs and Class members had known the true nature of Defendant's Non-Drowsy Products, they would not have purchased the products. Plaintiffs and Class members are therefore entitled to disgorgement and/or restitution as prayed for hereunder.

85. Because Defendant's retention of the non-gratuitous benefits conferred on it by Plaintiffs and members of the Class is unjust and inequitable, Defendant must pay restitution to Plaintiffs and members of the Class for its unjust enrichment, as ordered by the Court.

86. This claim for monetary equitable relief is appropriate. Plaintiffs cannot know at this juncture whether legal damages – as opposed to equitable restitution – will be modeled in a form that would be adopted by the Court or, in other words, whether a model for legal damages will be viable and adequately compensate Plaintiffs.

COUNT IV

NEGLIGENT MISREPRESENTATION
(on behalf of the Plaintiffs and the Nationwide Class or, alternatively, the Wisconsin and Ohio Subclasses)

87. Plaintiffs hereby incorporate all other paragraphs of this Complaint and restate them as if fully set forth herein.

88. Plaintiffs bring this claim against Defendant on behalf of themselves and the proposed Class.

89. Defendant has made material misrepresentations of fact concerning the nature of,

and ingredients in, the Non-Drowsy Products to Plaintiffs and the Class.

90. Defendant has and had no reasonable basis for believing that their misrepresentations were true.

91. Defendant knew, or should have known, that Plaintiffs and the members of the Class would rely on the false representations about the nature of, and ingredients in, the Non-Drowsy Products.

92. Defendant's false representations about the ingredients of the Non-Drowsy Products are objectively material to reasonable consumers, and therefore reliance upon such representations may be presumed as a matter of law.

93. Plaintiffs and members of the Class have read and reasonably relied to their detriment on Defendant's false and misleading representations, which caused them to purchase the Non-Drowsy Products.

94. As a proximate result of Defendant's negligent misrepresentations, Plaintiffs and each member of the Class has been damaged in the amount of the purchase price of the Non-Drowsy Products and any consequential damages resulting from their purchases, including sales tax.

COUNT V

INTENTIONAL MISREPRESENTATION
(on behalf of the Plaintiffs and the Nationwide Class or, alternatively, the Wisconsin and Ohio Subclasses)

95. Plaintiffs hereby incorporate all other paragraphs of this Complaint and restate them as if fully set forth herein.

96. Defendant has intentionally made material misrepresentations of fact concerning the nature of, and ingredients in, the Non-Drowsy Products to Plaintiffs and the Class.

97. Defendant knew that the intentional misrepresentations herein were false at the time they were made.

98. Defendant intended that Plaintiffs and members of the Class would rely on the false representations and purchase Defendant's Non-Drowsy Products.

99. Defendant's false representations are objectively material to reasonable consumers and therefore reliance upon such representations may be presumed as a matter of law.

100. Plaintiffs and members of the Class reasonably relied to their detriment on Defendant's intentional misrepresentations.

101. Defendant's intentional misrepresentations were a substantial factor in causing Plaintiffs and members of the Class to purchase the Non-Drowsy Products.

102. Defendant has acted with malice by engaging in conduct that was and is intended to cause injury to Plaintiffs and the members of the Class.

103. Defendant has committed fraud through their intentional misrepresentations, deceit, and/or concealment of material facts known to Defendant with the intent to cause injury to the purchasers of the Non-Drowsy Products.

104. As a proximate result of Defendant's intentional misrepresentations, Plaintiffs and the members of the Class suffered an ascertainable loss and are entitled to relief and compensatory and punitive damages, in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and the proposed Classes, pray for relief and judgment against Defendant as follows:

a. Certifying the Classes pursuant to Rule 23 of the Federal Rules of Civil Procedure, appointing Plaintiffs as representatives of the Class, and designating Plaintiffs' counsel as Class Counsel;

b. Awarding Plaintiffs and the Classes compensatory damages, in an amount exceeding $5,000,000, to be determined by proof;

c. Awarding Plaintiffs and the Classes appropriate relief, including but not limited to

actual damages;

d. For declaratory and equitable relief, including restitution and disgorgement;

e. For an order enjoining Defendant from continuing to engage in the wrongful acts and practices alleged herein;

f. Awarding Plaintiffs and the Classes the costs of prosecuting this action, including expert witness fees;

g. Awarding Plaintiffs and the Classes reasonable attorneys' fees and costs as allowable by law;

h. Awarding pre-judgment and post-judgment interest;

i. For punitive damages; and

j. Granting any other relief as this Court may deem just and proper.

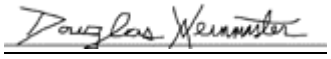
JURY TRIAL DEMANDED

Plaintiffs hereby demand a trial by jury of all claims so triable.

Dated: August 5, 2022

Respectfully submitted,

PHILLIPS LAW FIRM



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