**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

NATALIA LA ROSA, PHOEBE CANEDA, CATHERINE TIPLING, PRUSHTI DAVE, ARLENE BERGUM, EMILY DEPOL, KEYA JOHNIGAN, BRIANNA MCKAY, AMIE ADAIR, STEPHANIE MORALES, and NICHELLE WHITE on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ABBOTT LABORATORIES, ALERE, PROCTER & GAMBLE MANUFACTURING COMPANY, SPD SWISS PRECISION DIAGNOSTICS GMBH, CHURCH & DWIGHT CO. INC., TARGET CORPORATION, CVS PHARMACY, INC., WALGREEN CO., and WALMART, INC.

Defendants.

Case No. 1:22-cv-5435-NRM-JRC

**CONSOLIDATED THIRD AMENDED CLASS ACTION COMPLAINT**

JURY TRIAL DEMANDED

Plaintiffs Natalia La Rosa, Phoebe Caneda, Catherine Tipling, Prushti Dave, Arlene Bergum, Emily DePol, Keya Johnigan, Brianna McKay, Amie Adair, Stephanie Morales and Nichelle White ("collectively "Plaintiffs"), by and through their undersigned attorneys, bring this class action complaint on behalf of themselves and all others similarly situated (the "New York Class" and the "California Class" as defined below), alleging facts related to their own purchases based on personal knowledge and all other facts based upon the investigation of counsel.

## PRELIMINARY STATEMENT

1. Defendants SPD Swiss Precision Diagnostics GmBH ("SPD"), Church & Dwight Co., Inc. ("Church & Dwight"), Target Corporation ("Target"), Walgreen Co. ("Walgreens"), CVS Pharmacy, Inc. ("CVS") and Walmart, Inc. ("Walmart") (collectively, "Defendants") produce, market, label and sell various ovulation test kits ("Defendants' Kits") in the states of New York and California, and throughout the United States.

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

3. However, Defendants' Kits do not test whether a woman is ovulating. Instead, these products only test Luteinizing Hormone ("LH") levels. LH is made by a person's pituitary gland and is present in varying levels for people of all genders. LH levels generally rise quickly just before ovulation in women, but LH levels can spike at varying times in the menstrual cycle for a variety of other reasons unrelated to ovulation. Defendants' Kits identify when a person has a spike in LH — not when ovulation will occur.

4. Defendants intentionally mislabel their Kits as ovulation test kits. Defendants know that their Kits test LH and not ovulation, but marketing their products as "LH Test Kits," where LH

may or may not predict ovulation, would be far less attractive to women seeking to get pregnant. False promises such as these allow Defendants to capitalize on reproductive anxiety and reap massive profits well in excess of $5,000,000 million dollars per year from unwitting consumers.

5. This action arises out of deceptive and otherwise improper business practices that Defendants engaged in with respect to the packaging of certain ovulation test kits, detailed below, which are packaged in boxes and regularly sold in major supermarkets, grocery stores, convenience stores, and pharmacies throughout the United States, as well as on Amazon.com and other online retailers. Defendants have been unjustly enriched by the practices alleged herein.

## JURISDICTION AND VENUE

6. This Court has original jurisdiction over the claims asserted herein individually and on behalf of the New York Class and the California Class pursuant to 28 U.S.C. §1332(d). Subject matter jurisdiction is proper because: (1) the amount in controversy in this class action exceeds five million dollars, exclusive of interest and costs; and (2) the named Plaintiffs and Defendants are citizens of different states. 28 U.S.C. §1332(d)(2)(A).

7. Venue is proper in this district pursuant to 28 U.S.C § 1391(a) because a substantial part of the events giving rise to Plaintiffs' claims occurred in this district, and Defendants are subject to personal jurisdiction in this district. Defendants marketed and sold the products at issue in this action within this judicial district and do business within this judicial district. Defendant Walmart has consented to personal jurisdiction for purposes of the Plaintiff Morales' claims against Walmart, asserted herein.

## PARTIES

### A. The New York Plaintiffs

8. Plaintiff Natalia La Rosa ("Plaintiff La Rosa") is a citizen of the state of New York and at all relevant times, has resided in Queens County, New York.

9. Between April 2021 and November 2021, Plaintiff La Rosa purchased, for her own use, SPD's ovulation test kits marketed and sold under its brand name Clearblue, in Queens County, New York. Plaintiff La Rosa 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 SPD's deceptive packaging, Plaintiff La Rosa was overcharged, did not receive the benefit of the bargain, and/or suffered out-of-pocket losses. Plaintiff La Rosa expects to continue to purchase SPD's ovulation test kits in the future.

10. Between April 2021 and November 2021, Plaintiff La Rosa purchased, for her own use, Church & Dwight's ovulation test kits, marketed and sold under its brand name First Response, in Queens County, New York. Plaintiff La Rosa 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 Church & Dwight Co.'s deceptive packaging, Plaintiff La Rosa was overcharged, did not receive the benefit of the bargain, and/or suffered out-of-pocket losses. Plaintiff La Rosa expects to continue to purchase Church & Dwight's ovulation test kits in the future.

11. Between April 2021 and November 2021, Plaintiff La Rosa purchased, for her own use, Target's ovulation test kits, marketed and sold under its trademark up & up, in Queens County, New York. Plaintiff La Rosa reasonably expected that these products would test, with an accuracy of 99%, 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 La Rosa was overcharged, did not receive the benefit of the bargain, and/or suffered out-of-pocket losses. Plaintiff La Rosa expects to continue to purchase Target's ovulation test kits in the future.

12. Between April 2021 and January 2022, Plaintiff La Rosa purchased, for her own use,

Walgreens' ovulation test kits in Queens County, New York. Plaintiff La Rosa reasonably expected that these products would test, with over 99% accuracy, whether she would ovulate in the next 24-48 hours, and not merely whether she was having an LH surge that may or may not be connected to ovulation. As a result of Walgreens' deceptive packaging, Plaintiff La Rosa was overcharged, did not receive the benefit of the bargain, and/or suffered out-of-pocket losses. Plaintiff La Rosa expects to continue to purchase Walgreens' ovulation test kits in the future.

13. Between April 2021 and November 2021, Plaintiff La Rosa purchased, for her own use, CVS's ovulation test kits in Queens County, New York. Plaintiff La Rosa 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 CVS's deceptive packaging, Plaintiff La Rosa was overcharged, did not receive the benefit of the bargain, and/or suffered out-of-pocket losses. Plaintiff La Rosa expects to continue to purchase CVS's ovulation test kits in the future.

14. Plaintiff Phoebe Caneda ("Plaintiff Caneda") is a citizen of the state of New York and at all relevant times, has resided in Queens County, New York.

15. Between late 2018 and 2020, Plaintiff Caneda purchased, for her own use, SPD's ovulation test kits that were marketed and sold under its brand name Clearblue, through Amazon.com, which shipped the products to Plaintiff Caneda at her residence in Queens County, New York. Plaintiff Caneda 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 SPD's deceptive packaging, Plaintiff Caneda was overcharged, did not receive the benefit of the bargain, and/or suffered out-of-pocket losses. Plaintiff Caneda expects to continue to purchase SPD's ovulation test kits in the future.

16. Between late 2018 and 2020, Plaintiff Caneda purchased, for her own use, Church &

Dwight's ovulation test kits, marketed and sold under its brand name First Response, in Queens County, New York. Plaintiff Caneda 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 Church & Dwight's deceptive packaging, Plaintiff Caneda was overcharged, did not receive the benefit of the bargain, and/or suffered out-of-pocket losses. Plaintiff Caneda expects to continue to purchase Church & Dwight's ovulation test kits in the future.

17. Plaintiff Catherine Tipling ("Plaintiff Tipling") is a citizen of the state of New York and at all relevant times, has resided in Cayuga County, New York.

18. Between April and May 2023, Plaintiff Tipling purchased, for her own use, Walmart's ovulation test kits that were marketed and sold under its brand name Equate. Plaintiff Tipling 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 Walmart's deceptive packaging, Plaintiff Tipling was overcharged, did not receive the benefit of the bargain, and/or suffered out-of-pocket losses. Plaintiff Tipling expects to continue to purchase Walmart's ovulation test kits in the future.

19. Plaintiff La Rosa, Plaintiff Caneda and Plaintiff Tipling are together the "New York Plaintiffs".

**B. The California Plaintiffs**

20. Plaintiff Prushti Dave ("Plaintiff Dave") is a citizen of the state of California and at all relevant times has resided in Alameda County, California.

21. Between December 2020 and January 2021, Plaintiff Dave purchased, for her own use, SPD's ovulation test kits marketed and sold under its 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 SPD's 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 SPD's kits, in the future.

22. Plaintiff Arlene Bergum ("Plaintiff Bergum") is a citizen of the state of California and at all relevant times has resided in San Diego County, California.

23. In or about April 2019 and December 2019 through January 2020, 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 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 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.

24. Plaintiff Emily DePol ("Plaintiff DePol") is a citizen of the state of California and at all relevant times has resided in Alameda County, California.

25. Between September and December 2020, Plaintiff DePol purchased, for her own use, Target's ovulation test kits, marketed and sold under its trademark up & up, in Sacramento County, California. Plaintiff DePol reasonably expected that these products would test, with an accuracy of 99%, 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 DePol was overcharged, did not receive the benefit of the bargain, and/or suffered out-of-

pocket losses. Plaintiff DePol expects to continue to purchase ovulation test kits, including Target's kits, in the future.

26. Plaintiff Keya Johnigan ("Plaintiff Johnigan") is a citizen of the state of California and at all relevant times has resided in Los Angeles County, California.

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

28. Plaintiff Brianna McKay ("Plaintiff McKay") is a citizen of the state of California and at all relevant times has resided in Los Angeles County, California.

29. In or about September 2021, Plaintiff McKay purchased, for her own use, Walgreens' ovulation test kits from a Walgreens store in Los Angeles County, California. Plaintiff McKay reasonably expected that these products would test, with over 99% accuracy, whether she would ovulate in the next 24-48 hours, and not merely whether she was having an LH surge that may or may not be connected to ovulation. As a result of Walgreens' 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 Walgreens' kits, in the future.

30. In or about November 2020, Plaintiff McKay purchased, for her own use, Church & Dwight's ovulation test kits, marketed and sold under its brand name First Response, in Los Angeles County, California. 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 Church & Dwight'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 Church & Dwight's kits, in the future.

31. In or about 2019, including between October and November 2019, Plaintiff McKay purchased, for her own use, SPD's ovulation test kits marketed and sold under its brand name Clearblue, from a Target location in Los Angeles County, California. 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 SPD'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 SPD's kits, in the future.

32. In or about 2020-2021, Plaintiff McKay purchased, for her own use, 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.

33. Plaintiff Amie Adair ("Plaintiff Adair") is a citizen of the state of California and at all relevant times has resided in Santa Barbara County, California.

34. Throughout 2019 and at least once in 2020, Plaintiff Adair purchased, for her own use, CVS's ovulation test kits in Santa Barbara County, California. Plaintiff Adair 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 CVS's deceptive packaging, Plaintiff Adair was overcharged, did not receive the benefit of the bargain, and/or suffered out-of-pocket losses. Plaintiff Adair expects to continue to purchase ovulation test kits, including CVS's kits, in the future.

35. Plaintiff Stephanie Morales ("Plaintiff Morales") is a citizen of the state of California and at all relevant times has resided in San Diego County, California.

36. Between 2016 and 2020, Plaintiff Morales purchased, for her own use, both Walmart's ovulation test kits, marketed and sold under their brand name Equate, and also SPD's ovulation test kits marketed and sold under its brand name Clearblue, in San Diego County, California. Plaintiff Morales 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 Walmart's and SPD's deceptive packaging, Plaintiff Morales was overcharged, did not receive the benefit of the bargain, and/or suffered out-of-pocket losses. Plaintiff Morales expects to continue to purchase ovulation test kits, including Walmart's and SPD's kits, in the future.

37. Plaintiff Nichelle White ("Plaintiff White") is a citizen of the state of California and at all relevant times has resided in Los Angeles County, California.

38. Between February 2021 and September 2021, Plaintiff White purchased, for her own use, all of the following: Church & Dwight's ovulation test kits, marketed and sold under its brand name First Response; CVS's ovulation test kits; and also, SPD's ovulation test kits marketed and sold under its brand name Clearblue, in Los Angeles County, California. Plaintiff White 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 Church & Dwight's, CVS's and SPD's deceptive packaging, Plaintiff White was overcharged, did not receive the benefit of the bargain, and/or suffered out-of-pocket losses. Plaintiff White expects to continue to purchase ovulation test kits, including Church & Dwight's, CVS's and SPD's kits, in the future.

39. Plaintiff Dave, Plaintiff Bergum, Plaintiff McKay, Plaintiff DePol, Plaintiff Johnigan, Plaintiff Adair, Plaintiff Morales, and Plaintiff White are collectively the "California Plaintiffs".

**C. Defendants**

40. Defendant SPD is an entity organized under the laws of Switzerland and is headquartered at 47 route de Saint Georges, 1213 Petit-Lancy, Geneva, Switzerland. SPD, through its subsidiaries and related entities, including Procter & Gamble Manufacturing Company ("Procter & Gamble"), Alere, and Abbott Laboratories ("Abbott"), manufactures, packages, advertises, markets, distributes, and/or sells ovulation test kit products in the United States using the brand name Clearblue. SPD is co-owned by Procter & Gamble and Abbott. SPD was formed as a joint venture between Alere and Procter & Gamble in 2007 and, following Abbott's purchase of Alere in 2017, Abbott assumed Alere's 50% participation in SPD in 2020. Procter & Gamble is an entity organized under the laws of Ohio and is headquartered at One Procter & Gamble Plaza, Cincinnati, Ohio 45202. Abbott is an entity organized under the laws of Illinois and is headquartered at 100 Abbott Park Road, Abbott Park, IL 60064. Abbott is the parent company and owner of Alere.

41. Defendant Church & Dwight is an entity organized under the laws of Delaware and is headquartered at 500 Charles Ewing Blvd., Ewing NJ 08628. Church & Dwight, through its subsidiaries and related entities, manufactures, packages, advertises, markets, distributes, and/or sells ovulation test kit products in the United States using the brand name First Response.

42. Defendant Target is an entity organized under the laws of Minnesota and is headquartered at 1000 Nicollet Mall, Minneapolis, MN 55403. Target, through its subsidiaries and

related entities, manufactures, packages, advertises, markets, distributes, and/or sells ovulation test kit products in the United States using its trademark up & up.

43. Defendant Walgreens is an entity organized under the laws of Delaware and is headquartered at 200 Wilmot Road, Deerfield, Illinois 60015. Walgreens Boots Alliance, Inc. is the parent company and owner of Walgreens, and trades on the public stock market under the ticker "WBA." Walgreens, through its subsidiaries and related entities, manufactures, packages, advertises, markets, distributes, and/or sells ovulation test kit products in the United States.

44. Defendant CVS is an entity organized under the laws of Rhode Island and is headquartered at 1 CVS Drive, Woonsocket, Rhode Island 02895. CVS Pharmacy, Inc. is a subsidiary of CVS Health Corporation, an entity that is also organized under the laws of Rhode Island and headquartered at 1 CVS Drive, Woonsocket, Rhode Island, 02895. CVS Health Corporation trades on the New York Stock Exchange under the ticker "CVS". CVS, through its subsidiaries and related entities, manufactures, packages, advertises, markets, distributes, and/or sells ovulation test kit products in the United States.

45. Defendant Walmart, Inc. ("Walmart") is an entity organized under the laws of Delaware and is headquartered at 702 S.W. 8th St., Bentonville, AK 72716. Walmart, Inc. stock trades on the New York Stock Exchange. Walmart, through its subsidiaries and related entities, manufactures, packages, advertises, markets, distributes, and/or sells ovulation test kit products in the United States.

## FACTUAL ALLEGATIONS

46. Defendants market and sell kits, which they misleadingly call "ovulation test kits," in rectangular boxes. By indicating that their ovulation test kits have 99% or greater accuracy at testing for and predicting ovulation, Defendants deceive consumers. According to Defendants, ""[T]here is

no product available to consumers that can directly test for ovulation . . . ."[1] The FDA has indicated that Defendants' Kits can only detect an LH surge, not ovulation, and the Kits are only about 90% accurate at doing that[2].

47. Since about 1989, Clearblue, which is owned by Abbott, Alere, Procter & Gamble, SPD, and their subsidiaries and related entities, has marketed and sold ovulation test kits ("Clearblue's Kits"). SPD proclaims that it developed the world's first one-step ovulation test kit. During the relevant timeframe, SPD marketed and sold at least five different ovulation test kits: i) Easy Ovulation Kit, ii) Advanced Digital Ovulation Test, iii) Digital Ovulation Predictor Kit, iv) Trying for a Baby Advanced Ovulation Kit, and v) Easy Luteinizing Hormone (LH) Kit. Each of Clearblue's Kits prominently bear the promise "99% Accurate" or "Over 99% Accurate" and are labeled as an "ovulation test" or ovulation kit." Clearblue's Kits also include such representations as "Identify your 2 Most Fertile Days." For example, below is a photo of one of Clearblue's Kits[3]:

[1] *See* Defendants' March 24, 2023 pre-motion conference letter (Dkt. No. 81 at p. 3).

[2] *See* https://www.fda.gov/medical-devices/home-use-tests/ovulation-urine-test

[3] This image is representative of Clearblue's packaging at the time that Plaintiffs purchased their Clearblue Kits. Around January 2022, SPD changed the packaging of its ovulation test kits.


48. Clearblue's website boasts that "over 20 million women choose to use Clearblue products every year." Accordingly, SPD makes well in excess of $5,000,000 every year on its fertility-related products, including its ovulation test kits.

49. 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.

50. 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 types of ovulation test kits under its brand name First Response: i) First Response Ovulation Plus Pregnancy Test, ii) First Response Advanced Digital Ovulation Test, and iii) First Response Easy Read Ovulation Test. Each of First Response's Kits prominently bear the promise "OVER 99% ACCURATE" and are labeled as an "ovulation test." First Response's Kits also make such representations as "GET PREGNANT SOONER!" and "PREDICTS

YOUR 2 MOST FERTILE DAYS." For example, below is a photo of one of Church & Dwight's Kits:


51. Church & Dwight claims that its home pregnancy and ovulation test kits, sold under its brand name First Response, are the number one selling brand in the United States.[4] Church & Dwight's consumer products marketing efforts are focused principally on its 13 "power brands." Its First Response home pregnancy and ovulation test kits are included in its "power brands." Church & Dwight's consumer products segment comprises the majority of its revenue; for instance, in 2020, Church & Dwight's consumer products segment comprised about 77% of its consolidated net sales.[5] Each year, Church & Dwight makes well in excess of $5,000,000 in profits from sales of First Response's Kits.

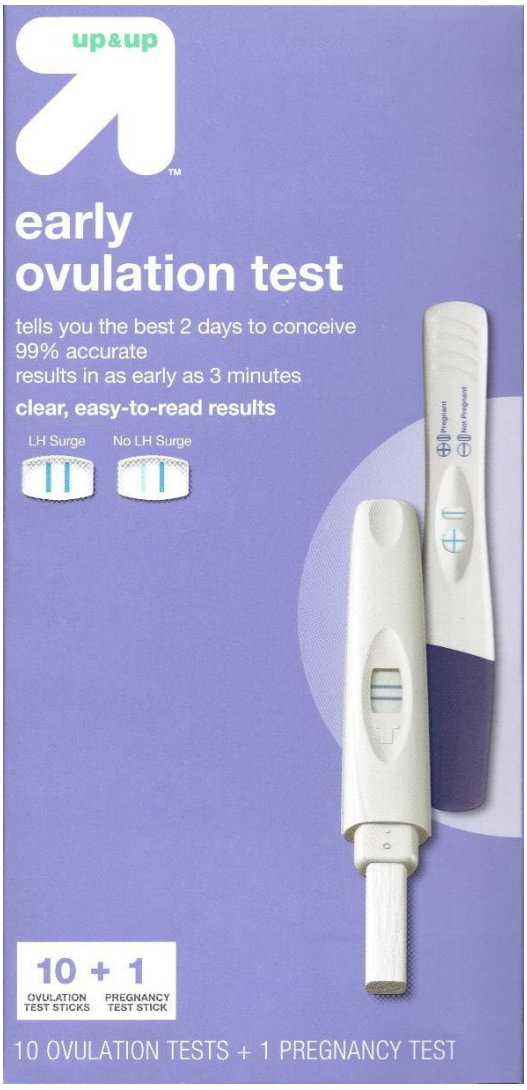
52. First Response's Kits are regularly sold across the United States in various pharmacies

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

[5] *Id.* at 39.

and major retailers, such as CVS and Walgreens, and online through Amazon and other retailers.

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




54. 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. There are 92

Target stores across the state of New York. Defendant Target makes well in excess of $5,000,000 in profits each year from sales of Target's Kits.

55. Since about 2004, Walgreens has marketed and sold ovulation test kits ("Walgreens' Kits"). During the relevant timeframe, Walgreens marketed and sold at least four different ovulation test kits: i) Ovulation + Pregnancy Kit, Digital Ovulation Predictor, ii) Daily Ovulation Predictor, and iii) One Step Ovulation Predictor. Each of Walgreens' 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' Kits:


56. Walgreens' Kits are regularly sold at Walgreens stores and through Walgreens' website, www.walgreens.com. Walgreens owns and operates over 9,000 stores in the United States. Of those,

Walgreens operates approximately 564 stores across the state of New York.

57. Since approximately 2006, CVS has marketed and sold ovulation test kits ("CVS's Kits"). During the relevant timeframe, CVS has marketed and sold at least three different ovulation test kits: i) One Step Ovulation Predictor, ii) Early Ovulation Kit, and iii) Daily Ovulation Testing Strips. Each of CVS's Kits prominently bear the promise "OVER 99% ACCURATE" and are labeled as an "ovulation test." For example, below is a photo of one of CVS's Kits:


58. CVS's Kits are regularly sold at CVS stores across the United States and directly to consumers through CVS's website, www.cvs.com. CVS has about 9,967 stores in the United States. There are 65 CVS stores in New York City.

59. Since at least 2009, Defendant Walmart has marketed and sold ovulation test kits under

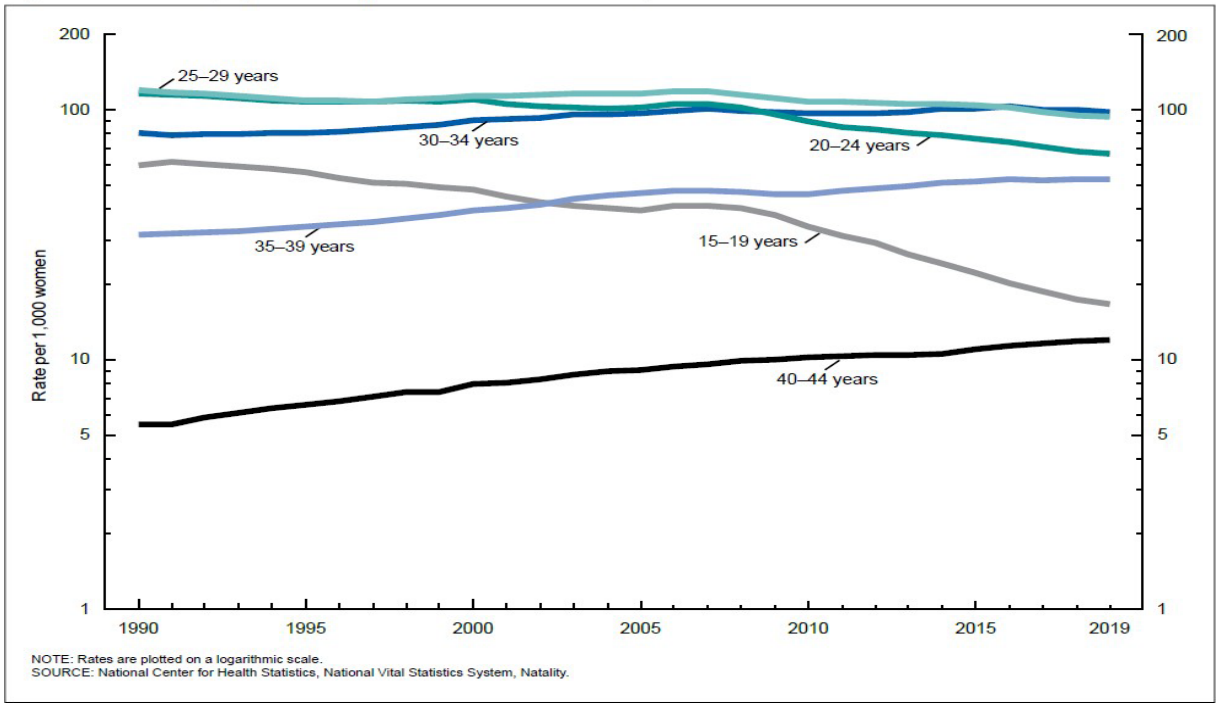
its private label, trademarked brand "Equate" ("Walmart's Kits"). During the relevant timeframe, Walmart marketed and sold ovulation test kits under the Equate trademark, including the Equate One Step Ovulation Predictor Test Kit and the Equate Early Ovulation Test. Each of Walmart's Kits prominently bear the promise "99% accurate" and are labeled as an "ovulation test." For example, below is a photo of one of Walmart's Kits:


60. Walmart's Kits are regularly sold at Walmart stores and through Walmart's website, Walmart.com. Walmart owns and operates approximately 3,500 stores in the United States, including more than 275 stores in California, and more than 95 stores in New York. Walmart makes well in excess of $5,000,000 in profits each year from sales of Walmart's Kits.

61. 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).[6]

62. 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")

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

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

## 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

64. 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

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

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) |

Source: Special tabulation by NCHS

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

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

67. Defendants' Kits detect a rise in urinary LH levels. Over-the-counter LH tests like Defendants' Kits, designed for home use by the consumer, can be useful aids to help predict ovulation. When ovulation takes place, it is generally preceded by a surge in LH levels 24 to 36 hours beforehand. Other useful methods for timing intercourse include calendaring, measuring cervical mucus, and other hormone tests such as pregnanediol 3-glucuronide. However, neither LH tests nor any of these methods are able to identify, with 99% accuracy, if a woman is, or soon will be, ovulating. Currently, the only method to predict ovulation with a high degree of accuracy is a transvaginal ultrasound, an invasive procedure performed in a clinical setting, which allows the doctor to actually view the egg growing and preparing to detach. An LH test merely provides a "hint" at when ovulation will occur. Monitoring basal body temperature is another method that may provide clues about when ovulation

will occur. But a thermometer, which is 99% accurate at indicating body temperature, could not be marketed as a "99% accurate ovulation test kit."

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

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

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

71. Therefore, a positive LH test does not predict, with 99% accuracy, that a woman will ovulate within the next 24 to 36 or 24 to 48 hours, as claimed in Defendants' marketing. While some of Defendants' Kits may have included an asterisk next to "99% ACCURATE," any attempt at a disclaimer was hidden in small text on a different part of the box or on a pamphlet inside the box. The

additional information provided in the small text, such as "*at detecting LH levels," would also not be understandable to a reasonable consumer, and certainly would not override the large, plain message on the front of the box that these are "OVULATION TESTS" with "99% ACCURACY."

72. As a result of Defendants' misleading and deceptive marketing of "ovulation test kits," Plaintiffs, the New York Class and the California Class purchased Defendants' Kits with the expectation that they were testing whether a woman is, or is about to be, ovulating, with an accuracy of 99% or more.

73. Plaintiffs, the New York Class and the California Class have been damaged by Defendants' misleading and deceptive practices.

## CLASS ACTION ALLEGATIONS

### THE NEW YORK CLASS

74. The New York Plaintiffs bring this action as a class action against all Defendants pursuant to Federal Rule of Civil Procedure 23 on behalf of themselves and the New York Class, defined as follows:

> All persons who purchased Defendants' Kits within the state of New York for purposes other than resale. Excluded from the New York Class are Defendants; the officers, directors or employees of Defendants; any entity in which Defendants have a controlling interest; and any affiliate, legal representative, heir or assign of Defendants. Also excluded are the judge to whom this case is assigned and any member of the judge's immediate family.

75. The New York Class is sufficiently numerous because Defendants' Kits are sold in thousands of stores, both in retail locations and online, and thousands of people have purchased them during the relevant period. As a result, joinder of all New York Class members is impractical.

76. There are questions of law and fact common to the New York Class and these questions

predominate over questions affecting only individual New York Class members. Common legal and factual questions include, but are not limited to:

- Whether Defendants labeled, packaged, marketed, advertised, and/or sold products using false, misleading, and/or deceptive packaging and labeling;
- Whether Defendants' actions constitute violations of misbranding laws in New York;
- Whether Defendants' actions constitute deceptive and unfair practices and/or violations of consumer protection laws in New York;
- Whether Defendants omitted and/or misrepresented material facts in connection with the labeling, packaging, marketing, advertising, and/or selling of ovulation test kits;
- Whether Defendants' labeling, packaging, marketing, advertising, and/or selling of products constituted an unfair, unlawful, or fraudulent practice;
- Whether the members of the New York Class have sustained damages as a result of Defendants' wrongful conduct;
- Whether Defendants were unjustly enriched;
- The appropriate measure of damages and/or other relief; and
- Whether Defendants should be enjoined from continuing their unlawful practices.

77. The New York Plaintiffs will fairly and adequately represent the New York Class and have retained counsel experienced and competent in the prosecution of consumer and class action litigation. The New York Plaintiffs have no interests antagonistic to those of other members of the New York Class. The New York Plaintiffs are committed to the vigorous prosecution of this action and have retained counsel experienced in litigation of this nature to represent them. The New York Plaintiffs anticipate no difficulty in the management of this litigation as a class action.

78. The New York Plaintiffs' claims are typical of the claims of the members of the New York Class as all members of the New York Class are similarly affected by Defendants' wrongful

conduct.

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

THE CALIFORNIA CLASS

80. The California Plaintiffs bring this action as a class action against all Defendants pursuant to Federal Rule of Civil Procedure 23 on behalf of themselves and the California Class defined as follows:

> All persons who purchased Defendants' Ovulation Test Kits within the state of California for purposes other than resale. Excluded from the California Class are Defendants; the officers, directors or employees of Defendants; any entity in which the Defendants have a controlling interest; and any affiliate, legal representative, heir or assign of Defendants. Also excluded are the judge to whom this case is assigned and any member of the judge's immediate family.

81. The California Class is sufficiently numerous because Defendants' Kits are sold in thousands of stores, both in retail locations and online, and thousands of people have purchased them during the relevant period. As a result, joinder of all California Class members is impractical.

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

- Whether Defendants labeled, packaged, marketed, advertised, and/or sold products

using false, misleading, and/or deceptive packaging and labeling;

- Whether Defendants' actions constitute violations of misbranding laws in California;
- Whether Defendants' actions constitute deceptive and unfair practices and/or violations of consumer protection laws in California;
- Whether Defendants omitted and/or misrepresented material facts in connection with the labeling, packaging, marketing, advertising, and/or selling of Ovulation Test Kits;
- Whether Defendants' labeling, packaging, marketing, advertising, and/or selling of products constituted an unfair, unlawful, or fraudulent practice;
- Whether the members of the California Class have sustained damages as a result of Defendants' wrongful conduct;
- Whether Defendants were unjustly enriched;
- The appropriate measure of damages and/or other relief; and
- Whether Defendants should be enjoined from continuing their unlawful practices.

83. The California Plaintiffs will fairly and adequately represent the California Class and have retained counsel experienced and competent in the prosecution of consumer and class action litigation. The California Plaintiffs have no interests antagonistic to those of other members of the California Class. The California Plaintiffs are committed to the vigorous prosecution of this action and have retained counsel experienced in litigation of this nature to represent them. The California Plaintiffs anticipate no difficulty in the management of this litigation as a class action.

84. The California Plaintiffs' claims are typical of the claims of the members of the California Class as all members of the California Class are similarly affected by Defendants' wrongful conduct.

85. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Because of the amount of the individual California Class members' claims relative to the complexity of the litigation and the financial resources of the Defendants, few, if

any, members of the California Class would seek legal redress individually for the wrongs complained of here. Absent a class action, California Class members will continue to suffer damages and Defendants' misconduct will proceed without remedy.

## CAUSES OF ACTION

### COUNT I
### VIOLATIONS OF NEW YORK GBL §§ 349 and 350
### (AGAINST ALL DEFENDANTS)

86. The New York Plaintiffs, on behalf of themselves and the New York Class, incorporate by reference and reallege each and every allegation set forth above, as though fully set forth herein. The Defendants violated N.Y. Gen. Bus. Law § 349 by engaging in unfair, misleading, deceptive, and/or unlawful acts and practices.

87. The New York Plaintiffs and the members of the New York Class are "persons" within the meaning of N.Y. Gen. Bus. Law § 349(h). The New York Plaintiffs and the members of the New York Class are consumers.

88. N.Y. Gen. Bus. Law § 349(a) makes unlawful deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in New York State. The Defendants engaged in business, trade, or commerce, or in the furnishing of service in New York within the meaning of GBL §§ 349(a) and 350.

89. The Defendants' conduct complained of herein consisted of deceptive acts and practices in the form of misrepresentations and omissions during conduct of business in New York in violation of N.Y. Gen. Bus. Law § 349(a) as alleged herein, including, but not limited to, the marketing and sale of the Defendants' Kits in misleading packages that falsely represented the nature, quality, and accuracy of the product.

90. Defendants' conduct complained of herein consisted of violation of GBL § 350 which declares unlawful "[f]alse advertising in the conduct of any business, trade or commerce." Defendants'

advertising of their Kits, as described above and throughout, is "false advertising" under GBL § 350-a.

91. The Defendants knew or should have known that their practices, as discussed herein, were misleading and likely to deceive and mislead the New York Plaintiffs and the New York Class.

92. The New York Plaintiffs and the New York Class have been injured as a result of Defendants' violations of N.Y. Gen. Bus. Law §§ 349(a) and 350.

93. Defendants willfully, with disregard and/or maliciously violated GBL §§ 349 and 350.

94. The Defendants' deceptive and misleading acts and practices have directly, foreseeably, and proximately caused damages and injury to the New York Plaintiffs and the New York Class.

95. The New York Plaintiffs are entitled to pursue claims against Defendants under N.Y. Gen. Bus. Law §§ 349(h) and 350-e to redress the Defendants' violations of N.Y. Gen. Bus. Law §§ 349(a) and 350.

COUNT II
UNJUST ENRICHMENT
(AGAINST ALL DEFENDANTS)

96. The New York Plaintiffs, on behalf of themselves and the New York Class, incorporate by reference and reallege each and every allegation set forth above, as though fully set forth herein.

97. As a result of the Defendants' deceptive, fraudulent, and misleading labeling, packaging, advertising, marketing, and selling of the Defendants' Kits, the Defendants were enriched, at the expense of the New York Plaintiffs and all others similarly situated, through the payment of the purchase prices for the Defendants' Kits, and, on information and belief, revenue from licensing and other sources related to the Defendants' Kits.

98. Under the circumstances, it would be against equity and good conscience to permit the Defendants to retain the ill-gotten benefits that they received from the New York Plaintiffs, and all others similarly situated, in light of the fact that the actual tests, which were purchased by the New

York Plaintiffs and the New York Class, were not what the Defendants purported them to be by their labeling and packaging. Thus, it would be unjust or inequitable for the Defendants to retain the benefit without restitution to the New York Plaintiffs, and all others similarly situated.

COUNT III
VIOLATION OF CALIFORNIA CONSUMERS LEGAL REMEDIES ACT—
CAL. CIV. CODE § 1750, *ET SEQ*.
(AGAINST ALL DEFENDANTS)

99. The California Plaintiffs, on behalf of themselves and the California Class, incorporate by reference and reallege each and every allegation set forth above, as though fully set forth herein.

100. Defendants falsely and misleadingly represented their Ovulation Test Kits, in violation of California's Consumers Legal Remedies Act ("CLRA"), California Civil Code section 1750, *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.

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

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

103. Prior to filing this action, the California Plaintiffs, on their own behalf and on behalf of the California Class, provided the required notice to Defendants in compliance with California Civil Code section 1782(a). On February 24, 2022, Plaintiff Bergum sent a letter to Church & Dwight via certified mail, and to which Church & Dwight did not undertake any corrective actions. On February

24, 2022, Plaintiff McKay sent letters via certified mail to SPD, Target, Church & Dwight, and Walgreens, to which the defendants did not respond or did not undertake any corrective actions. On February 24, 2022, Plaintiff DePol sent a letter via certified mail to Target, to which Target did not respond or did not undertake any corrective actions. On February 24, 2022, Plaintiff Johnigan sent a letter via certified mail to Walgreens, to which Walgreens did not respond or did not undertake any corrective actions. On February 24, 2022, Plaintiff Dave sent a letter via certified mail to SPD, to which SPD did not respond or did not undertake any corrective actions. On December 20, 2022, Plaintiff Adair sent a letter via certified mail to CVS, to which CVS did not respond or did not undertake any corrective actions. On December 20, 2022 Plaintiff Morales sent a letter via certified mail to Walmart, to which Walmart did not undertake any corrective actions. Accordingly, pursuant to California Civil Code section 1780(a)(3), the California Plaintiffs, on behalf of themselves and all other members of the California Class, seek compensatory damages, punitive damages, and restitution of any ill-gotten gains due to Defendants' acts and practices.

104. The California Plaintiffs' CLRA venue declaration is attached to this Complaint as Exhibit A, consistent with California Civil Code section 1780(d). The attached venue declaration was filed on September 12, 2022 as an exhibit to the initial complaint in the action *Dave et al. v. Abbott Laboratories et al*., (the "Dave Action") United States District Court for the Northern District of California Case No. 3:22-cv-05191. On December 13, 2022, pursuant to the joint motions of the parties in the Dave Action, the N.D. California Court transferred the Dave Action to the United States District Court for the Eastern District of New York. On January 27, 2023, this Court ordered that the Dave Action be consolidated with the present case.

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

106. The California Plaintiffs and other members of the California Class are "consumers," as the term is defined by California Civil Code section 1761(d), because they bought the Ovulation Test Kits for personal, family, or household purposes.

107. The California Plaintiffs and other members of the California Class have engaged in "transactions," as that term is defined by California Civil Code section 1761(e).

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

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

110. As a direct and proximate result of Defendants' violations, the California Plaintiffs, and the California Class, suffered injury in fact because they purchased the Ovulation Test Kits with the reliance that the product was, *inter alia*, 99% accurate, or over 99% accurate, at predicting ovulation.

111. The California Plaintiffs seek an order enjoining the acts and practices described above, restitution of property, and any other relief that the Court deems proper.

112. The California Plaintiffs, and the California Class, additionally seek damages, restitution, punitive damages, attorneys' fees and costs, and any other relief under section 1780(a) of the CLRA pursuant to Civil Code section 1782(d), due to Defendants' failure to rectify or agree to adequately rectify their violations as detailed above.

COUNT IV
VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW—
CALIFORNIA BUSINESS AND PROFESSIONS CODE § 17200, *ET SEQ.*
(AGAINST ALL DEFENDANTS)

113. The California Plaintiffs, on behalf of themselves and the California Class, incorporate by reference and reallege each and every allegation set forth above, as though fully set forth herein.

114. Defendants engaged in unlawful, unfair, and/or fraudulent conduct under California's Unfair Competition Law ("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.

115. Defendants' conduct is unlawful as alleged herein, including, but not limited to, their 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.

116. 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 the California 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.

117. 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, the California Plaintiffs, and the California Class, suffered injury in fact because they purchased Defendants' Kits with the reliance that the products were "99% ACCURATE."

118. The California Plaintiffs seek (a) injunctive relief in the form of an order requiring

Defendants to cease the acts of unfair competition alleged herein and to correct their advertising, promotion, and marketing campaigns or reformulate their products in ways that meet consumer expectations; (b) the payment of the California Plaintiffs' attorneys' fees and costs pursuant to, *inter alia*, California Code of Civil Procedure section 1021.5; and (c) interest at the highest rate allowable by law. The California Plaintiffs also seek restitution for themselves and the California Class.

COUNT V
VIOLATION OF CALIFORNIA FALSE ADVERTISING LAW—
CALIFORNIA BUSINESS & PROFESSIONS CODE § 17500, ET SEQ.
(AGAINST ALL DEFENDANTS)

119. The California Plaintiffs, on behalf of themselves and the California Class, incorporate by reference and reallege each and every allegation as set forth above, as though fully set forth herein.

120. Defendants publicly disseminated untrue or misleading advertising, or intended not to sell the Ovulation Test Kits as advertised, in violation of California's False Advertising Law ("FAL"), California Business & Professions Code section 17500, *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.

121. As a direct and proximate result of Defendants' violations, the California Plaintiffs, and the California Class, suffered injury in fact because they purchased Defendants' Ovulation Test Kits with the reliance that the products were, *inter alia*, 99% accurate, or more than 99% accurate, at predicting ovulation.

122. The California Plaintiffs seek (a) injunctive relief in the form of an order requiring Defendants to cease the acts of unfair competition alleged here and to correct their advertising, promotion, and marketing campaigns or reformulate their products in ways that meet consumer expectations; (b) the payment of the California Plaintiffs' attorneys' fees and costs pursuant to, *inter alia*, California Code of Civil Procedure section 1021.5; and (c) interest at the highest rate allowable

by law. The California Plaintiffs also seek restitution for themselves and the California Class.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray for relief and judgment against Defendants as follows:

(A) An Order pursuant to Rule 23 of the Federal Rules of Civil Procedure certifying the New York Class, naming the New York Plaintiffs as representatives of the New York Class, and appointing Plaintiffs' attorneys as Class Counsel to represent members of the New York Class;

(B) An Order pursuant to Rule 23 of the Federal Rules of Civil Procedure certifying the California Class, naming the California Plaintiffs as representatives of the California Class, and appointing Plaintiffs' attorneys as Class Counsel to represent members of the California Class;

(C) An Order declaring that Defendants' conduct violates the statutes referenced herein and constitutes unjust enrichment;

(D) An Order finding in favor of Plaintiffs, members of the New York Class and members of the California Class;

(E) Statutory damages and/or attorneys' fees pursuant to N.Y. Gen. Bus. Law §§ 349(h) and 350-e;

(F) Compensatory and punitive damages in amounts to be determined by the Court and/or jury;

(G) An Order of restitution and all other forms of equitable monetary relief;

(H) Injunctive relief to repackage and/or relabel Defendants' Kits as LH Test Kits as pleaded or as the Court may deem proper;

(I) Injunctive relief to require Defendants to inform past purchasers of the inaccuracy of the 99% accuracy claim, which is warranted both for purchasers who have not yet used the tests they purchased, and also purchasers who have used the tests but were necessarily misled about the

significance of the test results;

(J) An Order awarding Plaintiffs, members of the New York Class and members of the California Class their reasonable attorneys' fees and expenses and costs of suit, including but not limited to:

i) Attorneys' fees and litigation costs to Plaintiffs pursuant to California Code of Civil Procedure section 1021.5 and the common law private attorneys general doctrine;

ii) Pre- and post-judgment interest on any amounts awarded and,

(K) Such other and further relief as the Court deems just and proper.

**JURY DEMAND**

Plaintiffs demand a trial by jury on all causes of action so triable.

Dated: August 7, 2023

Respectfully submitted,

**GLANCY PRONGAY & MURRAY LLP**

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