

**FITZGERALD JOSEPH LLP**

JACK FITZGERALD (SBN 257370)

*jack@fitzgeraldjoseph.com*

PAUL K. JOSEPH (SBN 287057)

*paul@fitzgeraldjoseph.com*

MELANIE PERSINGER (SBN 275423)

*melanie@fitzgeraldjoseph.com*

TREVOR M. FLYNN (SBN 253362)

*trevor@fitzgeraldjoseph.com*

CAROLINE S. EMHARDT (SBN 321222)

*caroline@fitzgeraldjoseph.com*

2341 Jefferson Street, Suite 200

San Diego, California 92110

Phone: (619) 215-1741

***Counsel for Plaintiff***

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

CRYSTAL RODRIGUEZ, on behalf of  
herself, all others similarly situated, and the  
general public,

Plaintiff,

v.

EQUAL EXCHANGE, INC.,

Defendant.

Case No: '23CV0055 BAS NLS

CLASS ACTION

**COMPLAINT FOR VIOLATIONS OF:**

**CAL. BUS. & PROF. CODE §§17200 *et seq.*;**

**CAL. BUS. & PROF. CODE §§17500 *et seq.*;**

**CAL. CIV. CODE §§ 1750 *et seq.*;**

**BREACH OF IMPLIED WARRANTIES ; and**

**UNJUST ENRICHMENT**

**DEMAND FOR JURY TRIAL**

Plaintiff Crystal Rodriguez, on behalf of herself, all others similarly situated, and the general public, by and through her undersigned counsel, hereby sues Equal Exchange, Inc. (“Equal Exchange”), and alleges the following upon her own knowledge, or where she lacks personal knowledge, upon information and belief, including the investigation of her counsel.

### **INTRODUCTION**

1. Equal Exchange markets and sells the Organic 80% Cacao Panama Extra Dark Chocolate bar [hereafter the “Product”]. Equal Exchange sells the Product throughout the United States, including in California.

2. A December 2022 report by Consumer Reports states that “[r]esearch has found that some dark chocolate bars contain cadmium and lead—two heavy metals linked to a host of health problems in children and adults,” in amounts such that “eating just an ounce a day would put an adult over a level that public health authorities and [Consumer Report’s] experts say may be harmful for at least one of those heavy metals.” Among those containing substantial levels of cadmium and lead is the Product, as pictured below.



3. As shown above, the Equal Exchange Product tested at 120% of California’s maximum allowable dose level (MADL) for cadmium and, while below California’s maximum allowable dose level for lead, as discussed in more detail below, there is no safe level of lead in food products.

1           4.     Lead and cadmium are heavy metals and their presence in food, alone or  
2 combined, poses a serious safety risk to consumers because they can cause cancer and serious  
3 and often irreversible damage to brain development, liver, kidneys, bones, and other serious  
4 health problems. As Consumer Reports noted, “both cadmium and lead pose serious health  
5 risks” and, with respect to lead specifically, “no amount of it is considered safe.”

6           5.     As described more fully below, consumers who purchased the Product were  
7 injured by Equal Exchange’s acts and omissions concerning the presence of lead and  
8 cadmium. No reasonable consumer would know, or have reason to know, that the Product  
9 contains heavy metals, including lead and cadmium. Worse, as companies across the industry  
10 have adopted methods to limit heavy metals in their dark chocolate products, Equal  
11 Exchange has stood idly by with a reckless disregard for its consumers’ health and well-  
12 being.

13           6.     Plaintiff brings this action against Equal Exchange on behalf of herself,  
14 similarly-situated Class Members, and the general public to enjoin Equal Exchange from  
15 deceptively marketing the Product, and to recover compensation for injured Class Members.

#### 16                           **JURISDICTION & VENUE**

17           7.     This Court has original jurisdiction over this action under 28 U.S.C. §  
18 1332(d)(2) (The Class Action Fairness Act) because the matter in controversy exceeds the  
19 sum or value of \$5,000,000, exclusive of interest and costs, and at least one member of the  
20 class of plaintiffs is a citizen of a State different from Equal Exchange. In addition, more  
21 than two-thirds of the members of the class reside in states other than the state in which  
22 Equal Exchange is a citizen and in which this case is filed, and therefore any exceptions to  
23 jurisdiction under 28 U.S.C. § 1332(d) do not apply.

24           8.     The Court has personal jurisdiction over Equal Exchange as a result of Equal  
25 Exchange’s substantial, continuous and systematic contacts with the State, and because  
26 Equal Exchange has purposely availed itself of the benefits and privileges of conducting  
27 business activities within the State, including by marketing, distributing, and selling the  
28

1 Product in California. Equal Exchange is also headquartered and has its principal place of  
2 business in California.

3 9. Venue is proper in this Southern District of California pursuant to 28 U.S.C. §  
4 1391(b) and (c), because Equal Exchange resides (*i.e.*, is subject to personal jurisdiction) in  
5 this district, and because a substantial part of the events or omissions giving rise to the claims  
6 occurred in this district.

### 7 **PARTIES**

8 10. Plaintiff Crystal Rodriguez is a resident of San Diego County, California.

9 11. Defendant Equal Exchange, Inc. is a Delaware corporation with its principal  
10 place of business in San Francisco, California.

### 11 **FACTS**

#### 12 **I. Lead and Cadmium are Toxic and are Present in the Equal Exchange Product** 13 **at Unsafe Levels**

14 12. California recognizes that certain chemicals and elements are “known to the  
15 state to cause cancer or reproductive toxicity . . . if in the opinion of the state's qualified  
16 experts it has been clearly shown through scientifically valid testing according to generally  
17 accepted principles to cause cancer or reproductive toxicity.” *See* Cal. Health & Safety Code  
18 § 25249.8(b). Cadmium, in the amount found in the Product, is on the list of chemicals  
19 known to cause cancer and/or reproductive harm.

20 13. The harmful effects of lead, in any amount, are well-documented, particularly  
21 on children. Exposure puts children at risk for lowered IQ, behavioral problems (such as  
22 attention deficit hyperactivity disorder (ADHD)), type 2 diabetes, and cancer, among other  
23 health issues. Heavy metals also pose risks to adults. Even modest amounts of heavy metals  
24 can increase the risk of cancer, cognitive and reproductive problems, and other adverse  
25 conditions. As such, it is important to limit exposure.

14. “No amount of lead is known to be safe.”<sup>1</sup> Exposure to lead may cause anemia, weakness, and kidney and brain damage.<sup>2</sup> Lead affects almost every organ and system in the body and accumulates over time, leading to severe health risks and toxicity, including inhibiting neurological function, anemia, kidney damage, seizures, and in extreme cases, coma and death.<sup>3</sup> Lead can also cross the fetal barrier during pregnancy, exposing the mother and developing fetus to serious risks, including reduced growth and premature birth.<sup>4</sup> Lead exposure is also harmful to adults as more than 90 percent of the total body burden of lead is accumulated in the bones, where it is stored.<sup>5</sup> Lead in bones may be released into the blood, re-exposing organ systems long after the original exposure.<sup>6</sup>

15. Cadmium, also a heavy metal, likewise poses a serious safety risk to consumers because it can cause cancer and is a known teratogen, an agent which causes malformation of an embryo. Exposure to cadmium can affect the kidneys, lungs and bones.<sup>7</sup> There may be no safe level of exposure to a carcinogen, so all contact should be reduced to the lowest possible level.<sup>8</sup> It is considered a class 1 carcinogen by the World Health Organization.<sup>9</sup> Even at low exposure, cadmium can cause nausea, vomiting, diarrhea and abdominal pain.

---

<sup>1</sup> See <https://www.npr.org/sections/thetwo-way/2016/08/13/489825051/lead-levels-below-epalimits-can-still-impact-your-health>

<sup>2</sup> <https://www.cdc.gov/niosh/topics/lead/health.html>

<sup>3</sup> *Id.*

<sup>4</sup> See <https://www.cdc.gov/nceh/lead/prevention/pregnant.htm>

<sup>5</sup> See State of New York Department of Health, “Lead Exposure in Adults: A Guide for Health Care Providers,” available online at <https://www.health.ny.gov/publications/2584.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> <https://www.betterhealth.vic.gov.au/health/healthyliving/cadmium>

<sup>8</sup> New Jersey Department of Health Fact Sheet (available online at <https://www.nj.gov/health/eoh/rtkweb/documents/fs/0305.pdf>)

<sup>9</sup> <https://www.unep.org/explore-topics/chemicals-waste/what-we-do/emerging-issues/lead-and-cadmium>

1 And, because cadmium builds up in the body, even at low dosage, repeated exposure can  
 2 cause liver and kidney damage, anemia and loss of smell. According to the Centers for  
 3 Disease Control, “exposure to low levels of cadmium in . . . food . . . over time may build up  
 4 cadmium in the kidneys and cause kidney disease and fragile bones” and is indisputably  
 5 “considered a cancer-causing agent.”<sup>10</sup>

6 16. It is undisputed that the Product contains lead and cadmium, and that Equal  
 7 Exchange has known as much for at least the last four years. In at least August 2018, Equal  
 8 Exchange (and several other manufacturers and distributors of dark chocolate products)  
 9 received notice that at least some of its dark chocolate products contained excessive  
 10 cadmium and lead, including by being provided with certificates of merit that independent  
 11 experts confirmed the presence of heavy metals. However, Equal Exchange failed to warn  
 12 consumers that consuming the Product exposes consumers to those chemicals.

13 17. Moreover, in December 2022, Consumer Reports [“CR”], a consumer  
 14 protection and advocacy organization dedicated to independent product testing, consumer-  
 15 oriented research, and investigative journalism, tested 28 different dark chocolate bars for  
 16 lead and cadmium. The results showed that the Equal Exchange Product contained about 1.2  
 17 times the Maximum Allowable Dose Level [“MADL”] for cadmium, and about 0.23 mcg of  
 18 lead per ounce. The MADL standards are set by the California Office of Environmental  
 19 Health Hazard Assessment [“OEHHA”].

20 18. Notably, the lead is getting into the Equal Exchange Product *after* harvesting.  
 21 As Consumer Reports notes, “lead seems to get into cacao after beans are harvested. The  
 22 researchers found that the metal was typically on the outer shell of the cocoa bean, not in the  
 23 bean itself. Moreover, lead levels were low soon after beans were picked and removed from  
 24 pods but increased as beans dried in the sun for days. During that time, lead-filled dust and  
 25 dirt accumulated on the beans.” Thus, on information and belief, Equal Exchange itself is  
 26 responsible for lead being present in the Product.

27  
 28 <sup>10</sup> <https://tinyurl.com/y4f2kku7>

**II. Reasonable Consumers Do Not Expect Heavy Metals in the Equal Exchange Product; Equal Exchange Nevertheless Failed to Disclose the Presence of Lead or Cadmium in the Product**

19. The global dark chocolate market has witnessed significant growth in recent years and is expected to continue growing into 2023.<sup>11</sup>

20. The growth of dark chocolate sales is premised, in part, on reasonable consumers' belief that dark chocolate is actually *healthier* than other food choices, and especially healthier than other confectionaries and milk chocolates. "The pervasive health and wellness trend continues to influence dark chocolate market, with manufacturers incorporating organic ingredients and natural sweeteners. The preference for dark chocolate over milk chocolates on accounts its health benefits continues to remain intact," especially as demand for healthy products, generally, increases.<sup>12</sup> Thus, the safety and health effects of the Product are material facts to reasonable consumers.

21. Given the negative effects of toxic lead and cadmium on human development, especially in embryos and children, and on adult health, the presence of toxic heavy metals in the Product is a material fact to reasonable consumers, including Plaintiff and members of the Class.

22. A food company like Equal Exchange, which prides itself on environmental improvement, human health, and sustainability, has earned significant public trust that its foods are safe and fit for regular consumption. Reasonable consumers believe that Equal Exchange would not sell products that are unsafe.

23. Equal Exchange knew that if the presence of toxic heavy metals in its Product was disclosed to Plaintiff and the Class members, they would be unwilling to purchase the Product or would pay less for them.

<sup>11</sup> <https://www.persistencemarketresearch.com/market-research/dark-chocolate-market.asp>

<sup>12</sup> *Id.*



1           24. In light of Equal Exchange's knowledge that Plaintiff and the Class members  
2 would be unwilling to purchase the Product or would pay less for the Product if they knew  
3 that the Product contained toxic heavy metals, Equal Exchange intentionally and knowingly  
4 concealed this fact from Plaintiff and the Class Members and did not disclose the presence  
5 of lead or cadmium on the label of the Product.

6           25. Equal Exchange knew or should have known that Plaintiff and the Class  
7 members would rely upon the packaging of the Product and intended for them to do so but  
8 failed to disclose the presence of lead or cadmium.

9           26. Equal Exchange knew or should have known that it owed consumers a duty of  
10 care to adequately test for lead, cadmium, and other heavy metals, particularly considering  
11 that it was provided notice of independent expert testing of the Product. Had Equal Exchange  
12 done so, it would have known that its Product contained significant levels of lead and  
13 cadmium. Alternatively, Equal Exchange *did* know that its Product contained significant  
14 levels of heavy metals and purposely hid that fact from consumers.

15           27. Additionally, Equal Exchange knew or should have been aware that a  
16 reasonable consumer would consume the Product regularly, and possibly multiple Products  
17 daily, leading to repeated exposure to both lead and cadmium, which each independently  
18 accumulate in the body and its systems over time.

19           28. Equal Exchange knew or should have known it could control the levels of lead  
20 and cadmium in the Product by properly monitoring for heavy metal presence, sourcing  
21 ingredients with less heavy metals, or none at all, adjusting its formulation to reduce or  
22 eliminate heavy metals, or improve its manufacturing process to eliminate introduction of  
23 lead caused by Equal Exchange itself.

24           29. Prior to purchasing the Product, Plaintiff and the Class members were exposed  
25 to, saw, read, and understood the labels of the Product, and relied upon the same in  
26 purchasing the Product, but Equal Exchange failed to disclose the presence of heavy metals.  
27  
28



30. As a result of Equal Exchange's concealment of the fact that the Product contained toxic heavy metals, including lead and cadmium, Plaintiff and the Class members reasonably believed the Product were free from substances that would negatively affect children's development as well as their own health.

31. Plaintiff and the Class members purchased the Equal Exchange Product in reliance upon Equal Exchange's labels that contained omissions.

32. Had Plaintiff and the Class members known that the Product contained toxic heavy metals, rendering them unsafe for consumption, they would not have been willing to purchase the Product or would have paid less for them.

33. Therefore, as a direct and proximate result of Equal Exchange's omissions concerning the Product, Plaintiff and the Class Members purchased the Product and paid more than they were worth.

34. Plaintiff and the Class members were harmed in the form of the monies they paid for the Product which they would not otherwise have paid had they known the truth about the Product. Since the presence of toxic heavy metals, including lead and cadmium, in the Product renders them unsafe for human consumption, the Product that Plaintiff and the Class members purchased are worthless, or at a minimum are worth less than Plaintiff and the Class paid for them.

### **III. The Product's Labeling Violates California and Federal Food Labeling Law**

35. The Product's labeling violates California Health and Safety Code §§ 109875, *et. seq.* (the "Sherman Law"), which has expressly adopted the federal food labeling requirements as its own. *See, e.g., id.* § 110100; *id.* § 110670 ("Any food is misbranded if its labeling does not conform with the requirements for nutrition labeling as set forth in Section 403(r) (21 U.S.C. Sec. 343(r)) of the federal act and the regulation adopted pursuant thereto."). Specifically, Equal Exchange "fail[ed] to reveal facts that are material in light of other representations made or suggested by the statement[s], word[s], design[s], device[s], or any combination thereof," in violation of 21 C.F.R. § 1.21(a)(1). Such facts include the

1 detrimental health consequences of consuming the Product given that they contain lead and  
2 cadmium, which is unsafe in any amount. In addition, such facts include the detrimental  
3 health consequences of consuming the Product, including inhibiting neurological function,  
4 anemia, kidney damage, seizures, and in extreme cases, coma and death, which are all  
5 material to a consumer choosing a food product.

#### 6 **IV. Plaintiff's Purchase, Reliance, And Injury**

7 36. Ms. Rodriguez regularly purchased the Equal Exchange Product during the  
8 Class Period, often making her purchases from Whole Foods and Sprouts stores in San  
9 Diego, including at least the Whole Foods at 8825 Villa La Jolla San Diego, California and  
10 Sprouts locations at 3015 Clairemont Dr. and 3358 Governor Dr., in San Diego, California.

11 37. When purchasing the Product, Plaintiff was seeking a chocolate bar she  
12 believed to be healthier than other confectionaries, by virtue of its higher cocoa (and thus  
13 lesser sugar) content. Moreover, Plaintiff would have avoided any food she knew contained  
14 toxic ingredients, especially heavy metals like lead and cadmium. She would also have  
15 avoided purchasing any food she knew could increase her risk of inhibited neurological  
16 function, anemia, kidney damage, seizures, coma, or death.

17 38. Plaintiff acted reasonably in purchasing the Product, whose label did not  
18 disclose the presence of lead or cadmium, or the attendant health risks in consuming the  
19 Product.

20 39. By omitting that its Product contains lead or cadmium, Equal Exchange was  
21 able to gain a greater share of the snack market, specifically the confectionary and dark  
22 chocolate market, than it would have otherwise and to increase the size of the market.

23 40. Plaintiff paid more for the Product, and would only have been willing to pay  
24 less, or unwilling to purchase it at all, absent Equal Exchange's omissions regarding the lead  
25 and cadmium content described herein.

1           41. Plaintiff would not have purchased the Product if she had known that it was  
2 misbranded pursuant to California and FDA regulations, or that it contained toxic lead or  
3 cadmium in the amounts found in the Product.

4           42. For these reasons, the Product was worth less than what Plaintiff and the Class  
5 Members paid.

6           43. Plaintiff and the Class lost money as a result of Equal Exchange's omissions  
7 and unfair practices in that they did not receive what they paid for when purchasing the  
8 Product.

9           44. Plaintiff still wishes to purchase snack foods, including dark chocolate, and  
10 continues to see Equal Exchange dark chocolate products at the stores she regularly shops.  
11 She would purchase Equal Exchange dark chocolate bars in the future if, because of an  
12 injunction requiring Equal Exchange to disclose lead or cadmium when present, she could  
13 be assured by the absence of a disclosure that the Product no longer contained lead or  
14 cadmium. But unless Equal Exchange is enjoined in the manner Plaintiff requests, she may  
15 not be able to reasonably determine whether the lead or cadmium in the Product has been  
16 addressed, or whether Equal Exchange is continuing to omit its presence.

17           45. Plaintiff's substantive right to a marketplace free of fraud, where she is entitled  
18 to rely with confidence on representations such as those made by Equal Exchange, continues  
19 to be violated every time Plaintiff is exposed to the Product's labels.

20           46. Plaintiff's legal remedies are inadequate to prevent these future injuries.

21                           **CLASS ACTION ALLEGATIONS**

22           47. While reserving the right to redefine or amend the class definition prior to or as  
23 part of a motion seeking class certification, pursuant to Federal Rule of Civil Procedure 23,  
24 Plaintiff seeks to represent a class of all persons in the United States, or alternatively in  
25 California, who, at any time from four years preceding the date of the filing of this Complaint  
26 to the time a class is notified (the "Class Period"), purchased, for personal or household use,  
27 and not for resale or distribution, the Equal Exchange Product (the "Class").  
28

1        48. The members in the proposed Class are so numerous that individual joinder of  
 2 all members is impracticable, and the disposition of the claims of all Class Members in a  
 3 single action will provide substantial benefits to the parties and Court.

4        49. Questions of law and fact common to Plaintiff and the Class include:

- 5            a. whether the omissions on the Product labels with respect to lead content
- 6                    is material, or likely to be material, to a reasonable consumer;
- 7            b. whether the omissions on the Product labels with respect to cadmium
- 8                    content is material, or likely to be material, to a reasonable consumer;
- 9            c. whether the omissions regarding lead content was reasonably likely to
- 10                    deceive a reasonable consumer;
- 11            d. whether the omissions regarding cadmium content was reasonably likely
- 12                    to deceive a reasonable consumer;
- 13            e. whether Equal Exchange's conduct violates public policy;
- 14            f. whether Equal Exchange's conduct violates state or federal food statutes
- 15                    or regulations;
- 16            g. whether Equal Exchange made and breached warranties;
- 17            h. the proper amount of damages, including punitive damages;
- 18            i. the proper amount of restitution;
- 19            j. the proper scope of injunctive relief; and
- 20            k. the proper amount of attorneys' fees.

21        50. These common questions of law and fact predominate over questions that affect  
 22 only individual Class Members.

23        51. Plaintiff's claims are typical of Class Members' claims because they are based  
 24 on the same underlying facts, events, and circumstances relating to Equal Exchange's  
 25 conduct. Specifically, all Class Members, including Plaintiff, were subjected to the same  
 26 misleading and deceptive conduct when they purchased the Product and suffered economic  
 27 injury because the Product is misrepresented. Absent Equal Exchange's business practice of  
 28

1 deceptively and unlawfully labeling the Product by omitting material information regarding  
2 its toxic lead and cadmium content, Plaintiff and Class Members would not have purchased  
3 the Product or would have paid less for it.

4 52. Plaintiff will fairly and adequately represent and protect the interests of the  
5 Class, has no interests incompatible with the interests of the Class, and has retained counsel  
6 competent and experienced in class action litigation, and specifically in litigation involving  
7 the false and misleading advertising of foods and beverages.

8 53. Class treatment is superior to other options for resolution of the controversy  
9 because the relief sought for each Class Member is small, such that, absent representative  
10 litigation, it would be infeasible for Class Members to redress the wrongs done to them.

11 54. Equal Exchange has acted on grounds applicable to the Class, thereby making  
12 appropriate final injunctive and declaratory relief concerning the Class as a whole.

13 55. As a result of the foregoing, class treatment is appropriate under Fed. R. Civ. P.  
14 23(a), 23(b)(2), and 23(b)(3).

## 15 **CAUSES OF ACTION**

### 16 **FIRST CAUSE OF ACTION**

#### 17 **Violations of the Unfair Competition Law**

#### 18 **Cal. Bus. & Prof. Code §§ 17200 *et seq.***

19 56. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint  
20 as if set forth fully herein.

21 57. The UCL prohibits any “unlawful, unfair or fraudulent business act or  
22 practice.” Cal. Bus. & Prof. Code § 17200.

23 58. Under California Business & Professions Code §17200, any business act or  
24 practice that is likely to deceive members of the public constitutes a fraudulent business act  
25 or practice.

26 59. The acts, omissions, misrepresentations, practices, and non-disclosures of as  
27 alleged herein constitute business acts and practices.

**Fraudulent**

60. A statement or practice is fraudulent under the UCL if it is likely to deceive a significant portion of the public, applying an objective reasonable consumer test.

61. As set forth herein, Equal Exchange's omissions regarding the toxic lead and cadmium content of the Product is likely to deceive reasonable consumers and the public.

**Unlawful**

62. As set forth herein, Equal Exchange's omissions are "unlawful" under the UCL in that they violate at least the following laws:

- The False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.*;
- The Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*;
- The Song-Beverly Act, Cal. Civ. Code, §§ 1790 *et seq.*;
- The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.*; and
- The California Sherman Food, Drug, and Cosmetic Law, Cal. Health & Safety Code §§ 110100 *et seq.*

63. By violating these laws, Defendant has engaged in unlawful business acts and practices, which constitute unfair competition within the meaning of Business & Professions Code § 17200.

**Unfair**

64. Equal Exchange's conduct with respect to the labeling, advertising, and sale of the Product was unfair because Equal Exchange's conduct was immoral, unethical, unscrupulous, or substantially injurious to consumers, and the utility of its conduct, if any, does not outweigh the gravity of the harm to its victims.

65. Equal Exchange's conduct with respect to the labeling, advertising, and sale of the Product was also unfair because it violates public policy as declared by specific constitutional, statutory or regulatory provisions, including but not necessarily limited to the False Advertising Law, portions of the Federal Food, Drug, and Cosmetic Act, the Song Beverly Act, and portions of the California Sherman Food, Drug, and Cosmetic Law.

1           66. Equal Exchange's conduct with respect to the labeling, advertising, and sale of  
2 the Product was and is also unfair because the consumer injury was substantial, not  
3 outweighed by benefits to consumers or competition, and not one consumers themselves  
4 could reasonably have avoided. Specifically, the increase in profits obtained by Equal  
5 Exchange through the misleading labeling does not outweigh the harm to Class Members  
6 who were deceived into purchasing the Product unaware that it contains toxic lead or  
7 cadmium and is of the type that can increase the risk of poor health. Consumers could not  
8 have reasonably avoided the harm because this would have required that they conduct their  
9 own research into the lead and/or cadmium content of the Product, which could only feasibly  
10 be revealed by laboratory testing, which is not a reasonable expectation. Further, the harm  
11 could have easily been avoided by Equal Exchange as it would have cost them only  
12 minimally to place a warning on the label that the Product contain toxic lead and cadmium.  
13 Alternatively, Equal Exchange could have done more to ensure heavy metals, including lead  
14 and cadmium, were not in the Product.

15           67. Equal Exchange profited from the sale of the falsely, deceptively, and  
16 unlawfully advertised the Equal Exchange Product to unwary consumers.

17           68. Plaintiff and Class Members are likely to continue to be damaged by Equal  
18 Exchange's deceptive trade practices, because Equal Exchange continues to disseminate  
19 misleading information. Thus, injunctive relief enjoining Equal Exchange's deceptive  
20 practices is proper.

21           69. Equal Exchange's conduct caused and continues to cause substantial injury to  
22 Plaintiff and other Class Members. Plaintiff has suffered injury in fact as a result of Equal  
23 Exchange's unlawful conduct.

24           70. In accordance with Bus. & Prof. Code § 17203, Plaintiff seeks an order  
25 enjoining Equal Exchange from continuing to conduct business through unlawful, unfair,  
26 and/or fraudulent acts and practices.



71. Plaintiff and the Class also seek an order for the restitution of all monies from the sale of the Product, which were unjustly acquired through acts of unlawful competition.

72. Because Plaintiff's claims under the "unfair" prong of the UCL sweep more broadly than their claims under the FAL, CLRA, or UCL's "fraudulent" prong, Plaintiff's legal remedies are inadequate to fully compensate Plaintiff for all of Equal Exchange's challenged behavior.

## SECOND CAUSE OF ACTION

### Violations of the False Advertising Law

#### Cal. Bus. & Prof. Code §§ 17500 *et seq.*

73. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if set forth fully herein.

74. California's False Advertising Law prohibits any statement in connection with the sale of goods "which is untrue or misleading." Cal. Bus. & Prof. Code § 17500.

75. As set forth herein, the Plaintiff purchased a Product based on the label, which constituted advertising and which omitted the presence of toxic lead and cadmium in the Product.

76. Plaintiff and the Class Members paid money for the Equal Exchange Product. However, they did not obtain the full value or any value of the Product due to Equal Exchange's omissions regarding the nature of the Product. Accordingly, Plaintiff and the Class Members suffered an injury in fact and lost money or property as a direct result of Equal Exchange's omissions.

77. Equal Exchange's conduct is ongoing and continuing, such that prospective injunctive relief is necessary, especially given Plaintiff's desire to purchase the Product in the future and hope to rely on Equal Exchange's marketing and packaging.

78. Plaintiff and members of the Class are entitled to injunctive and equitable relief, and restitution in the amount they spent on the Product.

1        79. Here, equitable relief is appropriate because Plaintiff may lack an adequate  
2 remedy at law if, for instance, damages resulting from her purchase of the Product is  
3 determined to be an amount less than the premium price of the Product. Without  
4 compensation for the full premium price of the Product, Plaintiff would be left without the  
5 parity in purchasing power to which they are entitled.

6        80. Injunctive relief is also appropriate, and indeed necessary, to require Equal  
7 Exchange to provide full and accurate disclosures regarding the Product so that Plaintiff and  
8 Class members can reasonably rely on the Product's packaging as well as those of Equal  
9 Exchange's competitors who may then have an incentive to follow Equal Exchange's  
10 deceptive practices, further misleading consumers.

11        81. Restitution and/or injunctive relief may also be more certain, prompt, and  
12 efficient than other legal remedies requested herein. The return of the full price or full  
13 premium price, and an injunction requiring either (1) adequate disclosures of the existence  
14 of toxic lead and cadmium in the Product or (2) the removal of lead and cadmium from the  
15 Product, will ensure that Plaintiff and other Class Members are in the same place they would  
16 have been in had Equal Exchange's wrongful conduct not occurred, *i.e.*, in the position to  
17 make an informed decision about the purchase of the Product absent omissions.

18        82. Because the Court has broad discretion to award restitution under the FAL and  
19 could, when assessing restitution under the FAL, apply a standard different than that applied  
20 to assessing damages under the CLRA or commercial code (for Plaintiff's breach of warranty  
21 claims), and restitution is not limited to returning to Plaintiff and class members monies in  
22 which they have an interest, but more broadly serves to deter the offender and others from  
23 future violations, the legal remedies available under the CLRA and commercial code are  
24 more limited than the equitable remedies available under the FAL, and are therefore  
25 inadequate.

26  
27  
28

**THIRD CAUSE OF ACTION**

**Violations of the Consumers Legal Remedies Act**

**Cal. Civ. Code §§ 1750 *et seq.***

83. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if set forth fully herein.

84. The CLRA prohibits deceptive practices in connection with the conduct of a business that provides goods, property, or services primarily for personal, family, or household purposes.

85. Equal Exchange's false and misleading labeling and other policies, acts, and practices were designed to, and did, induce the purchase and use of the Equal Exchange Product for personal, family, or household purposes by Plaintiff and Class Members, and violated and continue to violate the following sections of the CLRA:

- a. § 1770(a)(5): representing that goods have characteristics, uses, or benefits which they do not have;
- b. § 1770(a)(7): representing that goods are of a particular standard, quality, or grade if they are of another;
- c. § 1770(a)(9): advertising goods with intent not to sell them as advertised; and

86. Equal Exchange profited from the sale of the falsely, deceptively, and unlawfully advertised Product to unwary consumers.

87. Equal Exchange's wrongful business practices constituted, and constitute, a continuing course of conduct in violation of the CLRA.

88. Plaintiff and the Class have suffered harm and seek only injunctive relief and restitution, at this time.

89. In compliance with Cal. Civ. Code § 1780(d), an affidavit of venue is filed concurrently herewith.

**FOURTH CAUSE OF ACTION**

**Breach of Implied Warranty Under the Song-Beverly Act**

**Cal. Civ. Code §§ 1790 *et seq.***

90. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if set forth in full herein.

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

92. The Product is a "consumer good" within the meaning of Cal. Civ. Code § 1791(a).

93. Plaintiff and the Class Members who purchased one or more of the Equal Exchange Product are "retail buyers" within the meaning of Cal. Civ. Code § 1791.

94. Equal Exchange is in the business of manufacturing, assembling, producing and/or selling the Product to retail buyers, and therefore is a "manufacturer" and "seller" within the meaning of Cal. Civ. Code § 1791.

95. Equal Exchange impliedly warranted to retail buyers that the Product was merchantable in that it (a) would pass without objection in the trade or industry under the contract description, and (b) was fit for the ordinary purposes for which the Product is used. For a consumer good to be "merchantable" under the Act, it must satisfy both of these elements. Equal Exchange breached these implied warranties because the Product was unsafe in that it contained toxic lead and cadmium. Therefore, the Product would not pass

1 without objection in the trade or industry and was not fit for the ordinary purpose for which  
2 it is used, which is consumption by consumers, including children.

3 96. Plaintiff and the Class purchased the Product in reliance upon Equal Exchange's  
4 skill and judgment in properly packaging and labeling the Product.

5 97. The Product was not altered by Plaintiff or other Class Members.

6 98. Equal Exchange knew that the Product would be purchased and used without  
7 additional testing by Plaintiff and the Class.

8 99. As a direct and proximate cause of Equal Exchange's breach of the implied  
9 warranty, Plaintiff and the Class have been injured and harmed because they would not have  
10 purchased the Product or would have paid less for the Product if they knew the truth about  
11 the Product, namely, that it contained toxic lead and cadmium.

## 12 **FIFTH CAUSE OF ACTION**

### 13 **Breach of Implied Warranty of Merchantability, Cal. Com. Code § 2314**

14 100. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint  
15 as if set forth in full herein.

16 101. As set forth herein, Equal Exchange manufactured and sold the Product, and  
17 prior to the time the Product were purchased by Plaintiff and other Class Members, impliedly  
18 warranted that the Product was of merchantable quality and fit for its ordinary use,  
19 consumption by consumers, including children.

20 102. Equal Exchange is a merchant with respect to the goods of this kind which were  
21 sold to Plaintiff and the Class, and there were, in the sale to Plaintiff and the Class, implied  
22 warranties that those goods were merchantable.

23 103. Equal Exchange impliedly warranted to retail buyers that the Product was  
24 merchantable in that it (a) would pass without objection in the trade or industry under the  
25 contract description, and (b) was fit for the ordinary purposes for which the Product is used.  
26 Defendant breached this implied warranty because the Product was unsafe in that it contained  
27 toxic lead and cadmium. Therefore, the Product would not pass without objection in the trade  
28

1 or industry and was not fit for the ordinary purpose for which it is used, which is consumption  
2 by consumers, including children.

3 104. Equal Exchange was on notice of this breach as it was aware of the lead and  
4 cadmium in the Product, including based on receiving notice in at least 2019.

5 105. As a direct and proximate cause of Defendant's breach of the implied warranty,  
6 Plaintiff and the Class members have been injured and harmed because they would not have  
7 purchased the Product or would have paid less for it if they knew the truth about the Product,  
8 namely, that it contained lead and cadmium.

9 106. As a result, Plaintiff seeks actual damages, including, without limitation,  
10 expectation damages.

## 11 **SIXTH CAUSE OF ACTION**

### 12 **Unjust Enrichment**

13 107. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint  
14 as if set forth in full herein.

15 108. Equal Exchange's financial benefits resulting from its unlawful and inequitable  
16 conduct are economically traceable to Plaintiff's and Class Members' purchases of the  
17 Product, and the economic benefits conferred on Equal Exchange are a direct and proximate  
18 result of its unlawful and inequitable conduct.

19 109. It would be inequitable, unconscionable, and unjust for Equal Exchange to be  
20 permitted to retain these economic benefits because the benefits were procured as a direct  
21 and proximate result of its wrongful conduct.

22 110. As a result, Plaintiff and Class Members are entitled to equitable relief including  
23 restitution and/or disgorgement of all revenues, earnings, profits, compensation and benefits  
24 which may have been obtained by Equal Exchange as a result of such business practices.  
25  
26  
27  
28

**PRAYER FOR RELIEF**

111. Wherefore, Plaintiff, on behalf of herself, all others similarly situated, and the general public, prays for judgment against Equal Exchange as to each and every cause of action, and the following remedies:

a. An Order declaring this action to be a proper class action, appointing Plaintiff as Class Representative, and appointing Plaintiff's undersigned counsel as Class Counsel;

b. An Order requiring Equal Exchange to bear the cost of Class Notice;

c. An Order compelling Equal Exchange to destroy all misleading and deceptive advertising materials and product labels, and to recall all offending Products;

d. An Order requiring Equal Exchange to disgorge all monies, revenues, and profits obtained by means of any wrongful act or practice;

e. An Order requiring Equal Exchange to pay restitution to restore all funds acquired by means of any act or practice declared by this Court to be an unlawful, unfair, or fraudulent business act or practice, or untrue or misleading advertising, plus pre-and post-judgment interest thereon;

f. An Order requiring Equal Exchange to pay compensatory damages and punitive damages as permitted by law;

g. An award of attorneys' fees and costs; and

h. Any other and further relief that Court deems necessary, just, or proper.

**JURY DEMAND**

112. Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: January 11, 2023

/s/ Trevor Flynn

**FITZGERALD JOSEPH LLP**

JACK FITZGERALD

*jack@fitzgeraldjoseph.com*

PAUL K. JOSEPH



1 *paul@fitzgeraldjoseph.com*  
2 MELANIE PERSINGER  
3 *melanie@fitzgeraldjoseph.com*  
4 TREVOR M. FLYNN  
5 *trevor@fitzgeraldjoseph.com*  
6 CAROLINE S. EMHARDT  
7 *caroline@fitzgeraldjoseph.com*  
8 2341 Jefferson Street, Suite 200  
9 San Diego, California 92110  
10 Phone: (619) 215-1741  
11 ***Counsel for Plaintiff***  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28