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10 *Counsel for Plaintiff and the Proposed Classes*

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13

14 TAMMY LA BARBERA,
15 individually and on behalf of all
16 others similarly situated,

17 Plaintiff,

18 v.

19 OLE MEXICAN FOODS, INC.,
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21 Defendant.
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) CASE NO.: 5:20-cv-02324-JGB (SPx)

) **FIRST AMENDED CLASS ACTION**
) **COMPLAINT**

) **JURY TRIAL DEMANDED**

1 Plaintiff Tammy La Barbera (“Plaintiff”) brings this Class Action Complaint
2 against Ole Mexican Foods, Inc. (“Defendant”), on behalf of herself and all others
3 similarly situated, and alleges upon information and belief, the following:

4 **NATURE OF THE ACTION**

5 1. Plaintiff brings this consumer protection and false advertising class
6 action lawsuit against Defendant regarding its misleading business practices with
7 respect to the sale of La Banderita tortilla products. The tortilla products at issue in
8 this case are La Banderita Burrito Grande, La Banderita Sabrosissimas Corn, La
9 Banderita Sabrosissimas Flour, and La Banderita Whole Wheat Fajita (the
10 “Products”).

11 2. Specifically, Defendant has marketed and sold these Products with
12 labeling, packaging, and advertising that leads consumers to believe that they are
13 made in Mexico, when in fact, they are not. To accomplish this, the Products use the
14 Mexican flag on the front and center of the package, Spanish phrases like “El Sabor
15 de Mexico!” (meaning “A taste of Mexico!”), and a logo that displays the Mexican
16 flag with the word “Authentic.”

17 3. Tortillas are a staple of Mexican cuisine and are considered to have
18 originated in Mexico.¹ The people of Mexico have a long history with tortillas and
19 are generally credited with having perfected the art of making them.

20 4. Because of this, consumers value tortilla products that are authentically
21 made in Mexico. Had Plaintiff and other consumers known that the Products were
22 not made in Mexico, they would not have purchased the Products or would have
23 paid significantly less for them. Therefore, Plaintiff and other consumers have
24 suffered an injury-in-fact as a result of Defendant’s deceptive practices.

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26
27 ¹ <http://www.latortillaoven.com/history/> (last visited November 21, 2022).

1 fraudulent practices, as described herein.

2 10. Despite being misled, Ms. La Barbera would likely purchase the
3 Products in the future if the Products were in fact made in Mexico. While Ms. La
4 Barbera currently believes the Products are not made in Mexico, she lacks personal
5 knowledge as to Defendant's specific business practices, leaving doubt in her mind
6 as to the possibility in the future that some of the Products could be made in Mexico.
7 This uncertainty, coupled with her desire to purchase the Products, and the fact that
8 she regularly visit stores which sell the Products, is an ongoing injury that can and
9 would be rectified by an injunction enjoining Defendant from making the false
10 and/or misleading representations alleged herein. In addition, Class members will
11 continue to purchase the Products, reasonably but incorrectly believing that they are
12 made in Mexico, absent an injunction.

13 11. Defendant Ole Mexican Foods, Inc. maintains its principal place of
14 business in Norcross, Georgia. Defendant sells a line of products under the brand
15 name La Banderita. The La Banderita products are available at grocery retailers in
16 California, and include products as tortillas, chorizo, chips, and salsas. Defendant,
17 directly and/or through its agents, is responsible for the manufacturing, packaging,
18 marketing, distribution, and sale of the Products in California.

19 **FACTUAL ALLEGATIONS**

20 12. Tortillas are a staple of Mexican cuisine. They are flat, thin, and
21 circular, similar to a thin flatbread. Typically, they are made from either corn or
22 flour, and used in a variety of ways.²

23 13. Tortillas are considered the national bread of Mexico and are
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25 ² See Hartley, *Alto A Brief History of the Tortilla*, February 16, 2018 available at
26 <https://althartley.com/a-brief-history-of-the-tortilla/#:~:text=According%20to%20legend%2C%20tortillas%20were,some%20sort%20of%20maize%20bread> (last
27 visited November 21, 2022).

1 “increasing in popularity throughout the world,” with most of the tortillas in the
2 world being produced in Mexico.³

3 14. At all relevant times pertaining to this Complaint, the Products were
4 sold across California and the United States at grocery chains, and other retailers.

5 15. The packaging of the Products, regardless of size or variety (*e.g.* corn
6 tortillas, flour tortillas, etc.) all contain the same misleading representations
7 regarding the Mexican origin of the Products. Specifically, the Products all contain:

- 8 (a) the phrase “El Sabor de Mexico!” or “A Taste of Mexico!”;
9 (b) A Mexican flag on the front and center of the packaging; and
10 (c) the brand name “La Banderita” meaning “the flag”, which is a
11 reference to the Mexican flag displayed prominently on all the
12 Products (the foregoing representations are herein collectively
13 referred to as the “Mexican Representations”).

14 16. In addition, some of the Products contain a circular logo with the
15 Mexican flag and the word “Authentic.” Several of the Products also contain Spanish
16 words or phrases such as “Sabrosisimas” and “Tortillas de Maiz”.

17 17. The foregoing representations, taken in isolation and as a whole, create
18 the misleading impression that the Products are made in Mexico, when they are not.

19 18. Examples of the misleading packaging include, but are not limited to,
20 the following:
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25 ³ L.W. Rooney, *et al.*, *Grain-Based Products and Their Processing*,
26 [https://www.sciencedirect.com/topics/food-](https://www.sciencedirect.com/topics/food-science/tortilla#:~:text=Mexico%20accounts%20for%2042%25%20of,in%20Mexico%20and%20Central%20America)
27 [science/tortilla#:~:text=Mexico%20accounts%20for%2042%25%20of,in%20Mexico%20and%20Central%20America](https://www.sciencedirect.com/topics/food-science/tortilla#:~:text=Mexico%20accounts%20for%2042%25%20of,in%20Mexico%20and%20Central%20America). (last visited November 21, 2022).
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19. The Products’ labeling, packaging, and marketing are misleading to reasonable consumers, including Plaintiff and other Class members, and only serve the profit-maximizing interests of Defendant.

20. Defendant deceptively labeled and packaged the Products to target consumers who are interested in purchasing tortillas and other products from Mexico.

21. As the entity responsible for the development, manufacturing, packaging, advertising, distribution, and sale of the Products, Defendant knew or should have known that each of the Products falsely and deceptively misrepresents that the Products are made in Mexico.

22. Defendant knows, knew or should have known, that Plaintiff and other consumers did and would rely on the labeling, packaging, and advertising before purchasing the Products, and would reasonably believe that the Products were made in Mexico because of the Mexican Representations.

23. Because the Products are not made in Mexico as reasonably expected by Plaintiff and other consumers, Defendant’s marketing of the Products was and continues to be misleading and deceptive.

24. Each consumer has been exposed to the same or substantially similar deceptive practices because: (1) each Product contains the Mexican Representations; and (2) each Product is not made in Mexico.

25. Plaintiff and other consumers have paid an unlawful premium for the Products. Plaintiff and other consumers would have paid significantly less for the Products had they known that the Products were not made in Mexico. In the alternative, Plaintiff and other consumers would not have purchased the Products at all had they known that the Products were not made in Mexico. Therefore, Plaintiff and other consumers purchasing the Products suffered injury in fact and lost money as a result of Defendant’s false, unfair, and fraudulent practices, as described herein.

1 those elements in individual actions alleging the same claims.

2 33. **Numerosity**: The size of the Class is so large that joinder of all Class
3 members is impracticable. Due to the nature of Defendant's business, Plaintiff
4 believes there are thousands, if not hundreds of thousands, of Class members.

5 34. **Predominance of Common Questions of Law and Fact**: There are
6 questions of law and fact common to the Class. These questions predominate over
7 any questions affecting only individual Class members.

8 35. All Class members were exposed to Defendant's deceptive advertising
9 and marketing representations indicating that the Products were made in Mexico,
10 when in fact the Products were not made in Mexico.

11 36. Furthermore, common legal and factual questions include but are not
12 limited to:

- 13 a. whether Defendant engaged in the course of conduct alleged
14 herein;
- 15 b. whether Defendant's conduct is likely to deceive a reasonable
16 consumer;
- 17 c. whether Defendant's conduct constitutes an unfair or deceptive
18 act or practice;
- 19 d. whether Defendant violated the consumer protection statutes set
20 forth below;
- 21 e. whether Plaintiff and the Class members are entitled to actual,
22 statutory, or other forms of damages and other monetary relief;
23 and
- 24 f. whether Plaintiff and the Class members are entitled to equitable
25 relief, including but not limited to injunctive relief and equitable
26 restitution.

27 37. Defendant engaged in a common course of conduct in contravention of
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1 the laws Plaintiff seeks to enforce individually and on behalf of Class members.
2 Similar or identical statutory and common law violations, business practices, and
3 injuries are involved. Individual questions, if any, pale by comparison, in both
4 quality and quantity, to the numerous common questions that dominate this action.
5 Moreover, the common questions will yield common answers that will materially
6 advance the litigation.

7 38. **Typicality**: Plaintiff's claims are typical of the claims of the Class
8 members because Defendant injured all Class members through the uniform
9 misconduct described herein; all Class members were subject to Defendant's false,
10 misleading, and unfair advertising and marketing practices and representations,
11 including the false and misleading representations indicating that the Products were
12 made in Mexico when, in fact, they are not made in Mexico; and Plaintiff seeks the
13 same relief as Class members.

14 39. Furthermore, there are no defenses available to Defendant that are
15 unique to Plaintiff.

16 40. **Adequacy of Representation**: Plaintiff is a fair and adequate
17 representative of the Class because Plaintiff's interests do not conflict with the Class
18 members' interests.

19 41. Plaintiff has selected competent counsel that are experienced in class
20 action and other complex litigation.

21 42. Plaintiff will prosecute this action vigorously and is highly motivated
22 to seek redress against Defendant. Plaintiff and Plaintiff's counsel are committed to
23 prosecuting this action vigorously and have the resources to do so.

24 43. **Injunctive or Declaratory Relief**: The requirements for maintaining a
25 class action pursuant to Rule 23(b)(2) are met, as Defendant has acted or refused to
26 act on grounds generally applicable to the Class, thereby making final injunctive
27 relief or corresponding declaratory relief an appropriate remedy.

1 44. **Superiority**: The class action mechanism is superior to other available
2 means for the fair and efficient adjudication of this controversy for reasons including
3 but not limited to the following:

4 a. The damages individual Class members suffered are small
5 compared to the burden and expense of individual prosecution of
6 the complex and extensive litigation needed to address
7 Defendant’s conduct.

8 b. Further, it would be virtually impossible for Class members
9 individually to redress effectively the wrongs done to them. Even
10 if Class members themselves could afford such individual
11 litigation, the court system could not. Individualized litigation
12 would unnecessarily increase the delay and expense to all parties
13 and to the court system and presents a potential for inconsistent
14 or contradictory rulings and judgments. By contrast, the class
15 action device presents far fewer management difficulties, allows
16 the hearing of claims which might otherwise go unaddressed
17 because of the relative expense of bringing individual lawsuits,
18 and provides the benefits of single adjudication, economies of
19 scale, and comprehensive supervision by a single court.

20 c. The prosecution of separate actions by individual members of the
21 Class would create a risk of inconsistent or varying adjudications
22 with respect to individual Class members, which would establish
23 incompatible standards of conduct for Defendant.

24 d. The prosecution of separate actions by individual Class members
25 would create a risk of adjudications with respect to them that
26 would, as a practical matter, be dispositive of the interests of
27 other Class members not parties to the adjudications or that
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1 would substantively impair or impede their ability to protect their
2 interests.

3 45. **Notice:** Plaintiff’s counsel anticipate that notice to the proposed Class
4 will be effectuated through Court-approved notice dissemination methods, which
5 may include mail, Internet postings, and/or published notice.

6 **FIRST CLAIM FOR RELIEF**
7 **Violation of California’s Consumers Legal Remedies Act (“CLRA”)**
8 **California Civil Code §§ 1750, *et seq.***
9 ***(for the California Consumer Subclass)***

9 46. Plaintiff realleges Paragraphs 1-45 above as if fully set forth herein.

10 47. Plaintiff brings this claim individually and on behalf of the members of
11 the proposed California Consumer Subclass against Defendant.

12 48. Each Product is a “good” within the meaning of Cal. Civ. Code
13 § 1761(a), and the purchase of such Products by Plaintiff and members of the
14 California Consumer Subclass constitute “transactions” within the meaning of Cal.
15 Civ. Code § 1761(e).

16 49. Cal. Civ. Code § 1770(a)(2) prohibits “misrepresenting the source,
17 sponsorship, approval, or certification of goods or services.” By marketing the
18 Products with their current labels, packaging, and advertisements, Defendant has
19 represented and continues to represent that the source of the Products is Mexico,
20 when it is not. Therefore, Defendant has violated section 1770(a)(2) of the CLRA.

21 50. Cal. Civ. Code § 1770(a)(4) prohibits “using deceptive representations
22 or designations of geographical origin in connection with goods or services.” By
23 marketing the Products with their current labels, packaging, and advertisements,
24 Defendant has used deceptive representations and designations of the Products’
25 geographical origin (Mexico). Therefore, Defendant has violated section 1770(a)(4)
26 of the CLRA.

27 51. Cal. Civ. Code § 1770(a)(5) prohibits “[r]epresenting that goods or
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1 services have sponsorship, approval, characteristics, ingredients, uses, benefits, or
2 quantities which they do not have. . . .” By marketing the Products with their current
3 labels, packaging, and advertisements, Defendant has represented and continues to
4 represent that the Products have characteristics (that they are made in Mexico) when
5 they do not have such characteristics. Therefore, Defendant has violated section
6 1770(a)(5) of the CLRA.

7 52. Cal. Civ. Code § 1770(a)(7) prohibits “[r]espresenting that goods or
8 services are of a particular standard, quality, or grade, or that goods are of a particular
9 style or model, if they are of another.” By marketing the Products with their current
10 labels, packaging, and advertisements, Defendant has represented and continues to
11 represent that the Products are of a particular style (that they are made in Mexico)
12 when they are of another (they are not made in Mexico). Therefore, Defendant has
13 violated section 1770(a)(7) of the CLRA.

14 53. Cal. Civ. Code § 1770(a)(9) prohibits “[a]dvertising goods or services
15 with intent not to sell them as advertised.” By labeling, packaging, and marketing
16 the Products with references to Mexico so that a reasonable consumer would believe
17 that the Products are made in Mexico, and then intentionally not selling Products
18 made in Mexico, Defendant has violated section 1770(a)(9) of the CLRA.

19 54. At all relevant times, Defendant has known or reasonably should have
20 known that the Products are not made in Mexico, and that Plaintiff and other
21 members of the California Consumer Subclass would reasonably and justifiably rely
22 on the labeling in purchasing the Products.

23 55. Plaintiff and members of the California Consumer Subclass have
24 reasonably and justifiably relied on Defendant’s misleading, and fraudulent conduct
25 when purchasing the Product. Moreover, based on the very materiality of
26 Defendant’s fraudulent and misleading conduct, reliance on such conduct as a
27 material reason for the decision to purchase the Products may be presumed or
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1 inferred for Plaintiff and members of California Consumer Subclass.

2 56. Plaintiff and members of the California Consumer Subclass have
3 suffered and continue to suffer injuries caused by Defendant because they would not
4 have purchased the Products or would have paid significantly less for the Products
5 had they known that Defendant's conduct was misleading and fraudulent.

6 57. Under Cal. Civ. Code § 1780(a), Plaintiff and members of the
7 California Consumer Subclass are seeking injunctive relief pursuant to the CLRA,
8 preventing Defendant from further wrongful acts and unfair and unlawful business
9 practices, as well as restitution, disgorgement of profits, and any other relief this
10 Court deems proper.

11 58. Pursuant to Cal. Civ. Code § 1782, on August 20, 2020, counsel mailed
12 a notice and demand letter by certified mail, with return receipt requested, to
13 Defendant. Defendant received the notice and demand letter on August 25, 2020 (in
14 Los Angeles, California) and on August 31, 2020 (in Norcross, Georgia). The CLRA
15 letter to Defendant that provided notice of Defendant's violation of the CLRA
16 demanded Defendant correct, repair, replace, or otherwise rectify the unlawful,
17 unfair, false, and deceptive practices complained of herein. The letter also stated that
18 if Defendant refused to do so, Plaintiff would file a complaint seeking damages in
19 accordance with the CLRA. Defendant failed to comply with the letter.

20 59. Because Defendant has failed to fully rectify or remedy the damages
21 caused after waiting more than the statutorily required 30 days after it received both
22 the notice and demand letters, Plaintiff timely filed his complaint against Defendant.

23 **SECOND CLAIM**

24 **Violation of California's False Advertising Law**
25 **CAL. BUS. & PROF. CODE § 17500 *et seq.***
26 ***(for the California Subclass)***

27 60. Plaintiff realleges Paragraphs 1-45 above as if fully set forth herein.

28 61. Plaintiff brings this claim on behalf of the California Subclass for

1 violation of California’s False Advertising Law, CAL. BUS. & PROF. CODE § 17500
2 *et seq.* (the “FAL”).

3 62. The FAL prohibits advertising “which is untrue or misleading, and
4 which is known, or which by the exercise of reasonable care should be known, to be
5 untrue or misleading.” CAL. BUS. & PROF. CODE § 17500.

6 63. As detailed above, Defendant’s marketing and sale of the Products to
7 Plaintiff and other members of the California Subclass is likely to deceive a
8 reasonable consumer because Defendant’s representations are likely to lead a
9 reasonable consumer to believe the Products are made in Mexico, when in fact the
10 Products are not made in Mexico.

11 64. In reliance of Defendant’s false and misleading representations
12 indicating the Products are made in Mexico, Plaintiff and the other members of the
13 California Subclass purchased the Products. Moreover, based on the very materiality
14 of Defendant’s fraudulent and misleading conduct, reliance on such conduct as a
15 material reason for the decision to purchase the Products may be presumed or
16 inferred for Plaintiff and the members of the California Subclass.

17 65. Defendant knew or should have known that its labeling and marketing
18 of the Products is likely to deceive a reasonable consumer.

19 66. Plaintiff requests that this Court cause Defendant to restore this
20 fraudulently obtained money to Plaintiff and members of the California Subclass, to
21 disgorge the profits Defendant made on these transactions, and to enjoin Defendant
22 from violating the FAL or violating it in the same fashion in the future as discussed
23 herein. Otherwise, Plaintiff and members of the California Subclass may be
24 irreparably harmed and/or denied an effective and complete remedy if such an order
25 is not granted.

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THIRD CLAIM
Violation of California’s Unfair Competition Law
CAL. BUS. & PROF. CODE § 17200 *et seq.*
(for the California Subclass)

67. Plaintiff realleges Paragraphs 1-45 above as if fully set forth herein.

68. Plaintiff brings this claim against Defendant on behalf of the California Subclass for violation of the “unlawful,” “unfair,” and “fraudulent” prongs of California’s Unfair Competition Law, CAL. BUS. & PROF. CODE § 17500 *et seq.* (the “UCL”).

69. The circumstances giving rise to the allegations of Plaintiff and the members of the California Subclass include Defendant’s corporate policies regarding the marketing, sale, and provision of the Products.

70. The UCL prohibits “unfair competition,” which it defines to “mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the FAL].” CAL. BUS. & PROF. CODE § 17200.

71. Under the UCL, a business act or practice is “unlawful” if it violates any established state or federal law.

72. As detailed herein, Defendant’s acts, misrepresentations, omissions, and practices violate the FAL and the CLRA. On account of each of these violations of law, Defendant has also violated the “unlawful” prong of the UCL.

73. As a result of Defendant’s unlawful business acts and practices, Defendant has and continues to unlawfully obtain money from Plaintiff and members of the California Subclass.

74. Under the UCL, a business act or practice is “unfair” if the defendant’s conduct is substantially injurious to consumers, offends public policy, and is immoral, unethical, oppressive, and unscrupulous, as the benefits for committing such acts or practices are outweighed by the gravity of the harm to the alleged

1 victims.

2 75. Defendant’s conduct was and continues to be of no benefit to
3 purchasers of the Products, as it is misleading, unfair, unlawful, and is injurious to
4 consumers who purchased the Products and were deceived by Defendant’s
5 misrepresentations. Deceiving consumers about the geographical origin of the
6 Products is of no benefit to consumers. Therefore, Defendant’s conduct was and
7 continues to be “unfair.”

8 76. As a result of Defendant’s unfair business acts and practices, Defendant
9 has and continues to unlawfully obtain money from Plaintiff and members of the
10 California Subclass.

11 77. Second, Defendant committed “unlawful,” “unfair,” and/or
12 “fraudulent” business acts or practices by, among other things, engaging in conduct
13 Defendant knew or should have known would be likely to and did deceive reasonable
14 consumers, including Plaintiff and the members of the California Subclass. By
15 relying on Defendant’s false and misleading representations indicating the Products
16 were made in Mexico, Plaintiff and the other members of the California Subclass
17 purchased the Products. Moreover, based on the very materiality of Defendant’s
18 fraudulent and misleading conduct, reliance on such conduct as a material reason for
19 the decision to purchase the Products may be presumed or inferred for Plaintiff and
20 the members of the California Subclass.

21 78. Defendant knew or should have known that its labeling and marketing
22 of the Products would likely deceive a reasonable consumer.

23 79. Plaintiff requests that this Court cause Defendant to restore this
24 unlawfully, unfairly, and fraudulently obtained money to Plaintiff, and members of
25 the California Subclass, to disgorge the profits Defendant made on these
26 transactions, and to enjoin Defendant from violating the UCL or violating it in the
27 same fashion in the future as discussed herein. Otherwise, Plaintiff, and members of
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1 the California Subclass, may be irreparably harmed and/or denied an effective and
2 complete remedy if such an order is not granted.

3 **FOURTH CLAIM FOR RELIEF**
4 **Breach of Implied Warranty**
5 **California Commercial Code § 2314**
6 ***(for the California Subclass)***

7 80. Plaintiff realleges Paragraphs 1-45 above as if fully set forth herein.

8 81. Plaintiff brings this claim individually and on behalf of the members of
9 the proposed California Subclass.

10 82. California’s implied warranty of merchantability statute provides that
11 “a warranty that the goods shall be merchantable is implied in a contract for their
12 sale if the seller is a merchant with respect to goods of that kind.” Cal. Com.
13 Code § 2314(1).

14 83. California’s implied warranty of merchantability statute also provides
15 that “[g]oods to be merchantable must be at least such as . . . (f) [c]onform to the
16 promises or affirmations of fact made on the container or label if any.” Cal. Com.
17 Code § 2314(2)(f).

18 84. Defendant is a merchant with respect to the sale of the Products.
19 Therefore, a warranty of merchantability is implied in every contract for sale of the
20 Products to California consumers.

21 85. By advertising the Products with their current packaging, Defendant
22 made an implied promise that the Products are made in Mexico. The Products have
23 not “conformed to the promises...made on the container or label” because they are
24 not made in Mexico. Plaintiff, as well as consumers, did not receive the goods as
25 impliedly warranted by Defendant to be merchantable.

26 86. Therefore, the Products are not merchantable under California law and
27 Defendant has breached its implied warranty of merchantability in regard to the
28 Products.

1 J. awarding pre- and post-judgment interest to the extent the law allows;
2 and providing such further relief as this Court may deem just and proper.

3
4 **DEMAND FOR JURY TRIAL**

5 Plaintiff hereby demands a trial by jury on all claims so triable.

6
7 Dated: January 10, 2023

FARUQI & FARUQI, LLP

8 /s/ Lisa Omoto

9 Lisa Omoto (SBN: 303830)

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