UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

STACY RANKIN, individually and on behalf of all others similarly situated,
119 Timberbrook Lane
Gaithersburg, MD 20878
(Montgomery County, MD)

Plaintiffs,

v.

HARRIS TEETER, LLC
701 Crestdale Road
Matthews, NC 28105;

HARRIS TEETER SUPERMARKETS, INC.
701 Crestdale Road
Matthews, NC 28105;

RECKITT BENCKISER LLC
399 Interpace Parkway
Parsippay NJ 07054;

KENVUE, INC.
199 Grandview Road
Sillman, NJ 08558;

MCNEIL CONSUMER HEALTHCARE
7050 Camp Hill Road
Ft. Washington, Pa. 19034;

PROCTER & GAMBLE COMPANY
1 Proctor and Gamble Plaza
Cincinnati, Ohio 45202;

FOUNDATION CONSUMER BRANDS, LLC
106 Isabella Street
Pittsburgh, Pa. 15212-5841;

Defendants.

Civil Action No. 23-2864

**CLASS ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL;**

Plaintiff Stacy Rankin ("Plaintiff"), individually and on behalf of all members of the public similarly situated, upon personal knowledge as to themselves and their own acts, and as to all other matters upon information and belief, based upon the investigation made by the undersigned attorneys, allege as follows:

## INTRODUCTION

1. Plaintiff seeks damages and equitable relief, individually and on behalf of all other Class members, for Defendants' sales of products to be taken orally containing phenylephrine, a compound that purportedly acts as a decongestant, but that Defendants have long known does no such thing. Defendants sold these phenylephrine-containing purported decongestants anyway, generating billions of dollars in sales in the last year alone.

2. Phenylephrine is one of two compounds found in nasal decongestants administered orally and offered for sale on store shelves. The other compound is pseudoephedrine. While pseudoephedrine is effective as a decongestant, purchasing pseudoephedrine is often inconvenient for a consumer: because pseudoephedrine has been used as an ingredient in illicit methamphetamine laboratories, products containing it are usually placed behind store counters or in locked cabinets, and purchasers are sometimes forced to leave personal information every time they purchase it or are otherwise limited in the number of pseudoephedrine-containing medications they can buy. Consumers are naturally attracted to a decongestant that could be purchased without intendant inconvenience.

3. By contrast, phenylephrine-containing products have no such restrictions and are not subject to a highly inconvenient buying process. Phenylephrine is found in many popular over-the-counter oral medications that purportedly act as decongestants—the "Decongestant

Products"—including such popular products produced by Defendants as Mucinex Sinus Max (Reckitt Benckiser), Sudafed PE (Kenvue[1]/McNeil Consumer Healthcare), Tylenol Cold & Flu Severe (Kenvue/McNeil); Benadryl Allergy Plus (Kenvue/McNeil); Theraflu (GlaxoSmithKline); Nyquil Severe Cold & Flu (Procter & Gamble Company); along with more generic Decongestant Products produced and sold by Defendant Harris Teeter, and stores such as Walgreens

4. Over $1.7 billion in sales of phenylephrine-containing purported decongestants were made in the United States across more than 250 products, accounting for approximately 80% of the market for over-the-counter decongestants. In 2022 approximately 241,559,923 bottles/packages of phenylephrine containing cold medications were sold in the U[1]SA.

5. Unknown to the public, but known to the manufacturers in this lucrative market, phenylephrine taken orally is ineffective. It provides no relief for congestion, and is no better than a placebo, like a sugar pill, as a decongestant when taken orally.

6. Since at least 2007, scientific studies using modern testing methodologies and rigors have, time and again, shown that phenylephrine taken orally is ineffective. However, rather than acknowledge the truth of these studies, manufacturers, like Defendants, have continued to market and sell their products with phenylephrine as effective decongestant medicine.

7. As one pharmacist who has led the examination of the efficacy of phenylephrine summarized it, "if you have a stuffy nose and you take this medicine, you will still have a stuffy nose."

8. This fact did not stand in the way of Defendants continuing to sell phenylephrine products and charging a premium price for those ineffective products.

[1] See FDA Briefing Document "Efficacy of Oral Phenylephrine as a Nasal Decongestant" Nonprescription Drug Advisory Committee Meeting 9/11/23 and 9/12/23 at Page 70.

9. Had Plaintiff, and other Class Members known that the phenylephrine-containing products were entirely ineffective as a nasal decongestant, she, and other class members would not have purchased them, or would have paid substantially less for them.

10. Accordingly, Plaintiff, on behalf of herself and all other purchasers of Defendants' phenylephrine products, seek to hold Defendants accountable for their deceptions, breaches of warranties, and violations of consumer protection statutes. Defendants have known that these products are ineffective for nasal congestion, yet they marketed and sold them anyway.

## PARTIES

11. Plaintiff, and proposed Class Representative, Stacy Rankin is a resident of Gaithersburg, Maryland. She has made numerous purchases of over the counter decongestants containing phenylephrine in the State of Maryland in reliance on Defendants false claims that such medications were effective to treat nasal congestion. Her purchases of such products include, but are not limited to the following: (1) In approximately 2019 Plaintiff Rankin purchased Harris Teeter brand "Pressure & Pain PE & Cold," This product is manufactured and sold by Defendant Harris Teeter, LLC and/or Defendant Harris Teeter Supermarkets, Inc. (2) Also in approximately 2019 Plaintiff purchased and consumed Tylenol Cold + Flu Severe. This product is manufactured and distributed by Defendant Johnson & Johnson Consumer, Inc. and/or McNeil Consumer Healthcare. (3) On or about April 1, 2020 Plaintiff Rankin purchased Dayquil and Sudafed PE. (4) On or about April 2, 2020 she purchased Mucinex Sinux Max, (5) On or about April 28, 2020 she purchased Sudafed PE and Mucinex Sinus Max, (6) On or about April 26, 2021 she purchased Dayquil, Sudafed PE and Mucinex Sinus Max (7) On or about January 3, 2022 she purchased Dayquil Sudafed and Mucinex Sinus Max. (8) In 2022 Plaintiff Rankin purchased Mucinex Sinus -Max in Maryland. This product is manufactured and sold by Defendant Reckitt Benckiser, LLC. (9) In approximately 2022 Plaintiff Rankin purchased Childrens Dimetapp Multi Symptom

Cold & Flu in Maryland. This product is manufactured and marketed by Foundation Consumer Brands, LLC.

12. In making the above referenced purchases Plaintiff relied upon the representations of the Defendants, through their advertising, that the products were effective in treating nasal congestion. None of these medications were effective in relieving nasal congestion. All purchases were made in Maryland.

13. Defendant Kenvue Inc. is an American consumer health company, and formerly the consumer healthcare division of Johnson & Johnson. Kenvue is headquartered in Skillman, New Jersey. It wholly owns Defendant McNeil Consumer Healthcare. On information and belief, all assets and liabilities associated with the Decongestant Products that had been manufactured, marketed, and/or sold by Johnson & Johnson are now owned by Defendant Kenvue including Sudafed, Sudafed PE and Tylenol Cold & Flu products.[2]

14. Defendant McNeil Consumer Healthcare is wholly owned by Defendant Kenvue, with headquarters in Fort Washington, Pennsylvania. McNeil manufactures and markets numerous Decongestant Products, including but not limited to Sudafed, and Tylenol Cold & Flu Severe, both of which are purported decongestants containing phenylephrine.

[2] Kenvue is a company, founded in February 2022, that prior to a spin-off had served as the Consumer Healthcare division of Johnson & Johnson. On information and belief, all assets and liabilities associated with the Decongestant Products that had been manufactured, marketed, and/or sold by Johnson & Johnson are now owned by Kenvue.

15. Defendants Harris Teeter, LLC and Harris Teeter Supermarkets, Inc. are North Carolina Corporations with its their principal place of business at 701 Crestdale Road, Matthews, NC 28105. Harris Teeter manufactures and sells generic versions of purported decongestants containing phenylephrine under a Harris Teeter brand, including Harris Teeter Pressure & Pain PE & Cold that Plaintiff Rankin purchased.

16. Defendant Proctor & Gamble Company is an American multinational consumer goods corporation headquartered in Cincinnati, Ohio. Among other Decongestant Products, Proctor & Gamble manufactures, markets and distributes Dayquil and Nyquil, including Dayquil that Plaintiff purchased that contained phenylephrine.

17. Defendant Foundation Consumer Brands, LLC is a Delaware LLC with its principal place of business located at 106 Isabella Street, Pittsburgh, Pa. 15212-5841 Foundation Consumer Brands, LLC owns the Children's Dimetapp brand, and manufactures, distributes and markets Children's Dimetapp throughout the United States.

## JURISDICTION & VENUE

18. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), because at least one Class member is of diverse citizenship from one defendant, there are more than 100 Class members nationwide, and the aggregate amount in controversy exceeds $5,000,000. This Court also has supplemental jurisdiction over the state law claims because those claims are integrally related to the federal claims and form part of the same case and controversy under 28 U.S.C. § 1367.

19. This Court has personal jurisdiction over Defendants by virtue of their transacting

and doing business in this District. Defendants have each purposefully availed themselves of the benefits and protections of the District of Maryland by continuously and systematical

conducting substantial business in Maryland. Each of the Defendants markets and distributes its products in Maryland.

20. Venue is proper pursuant to 28 U.S.C. § 1391(a) & (b) because a substantial part of the events or omissions giving rise to the claims occurred in this District. Defendants maintain key business operations in this district, and market and sell their products, including Decongestant Products, in this District.

## FACTUAL ALLEGATIONS

***The Market for Decongestants***

21. The market for products that purportedly relieve nasal congestion is worth over $2 billion annually and includes over 250 products.

22. The two leading ingredients used to provide relief from nasal congestion are phenylephrine and pseudoephedrine. These active ingredients are sold as the only active ingredient in some products, and as one of the active ingredients in multi-symptom products.

23. Pseudoephedrine-based products *are* useful as decongestants. However, due to the misuse of pseudoephedrine as a base for the production of illegal methamphetamines, since 2006 federal law has made products containing pseudoephedrine, while available "over the counter" in the sense that they can, for the most part, be bought without a doctor's prescription, inconvenient to buy. The products are usually behind a pharmacy counter in locked containers, consumers are limited in the amount that they can purchase, and purchasers are often required to provide personal identification and other information to track the amount of the substance being purchased.

24. Accordingly, the best-selling products in the decongestant market have been those that use phenylephrine, which account for approximately 75% of the market for over-the-counter decongestants. In the last year alone, nearly $1.8 billion of phenylephrine-based purported decongestants were sold. By comparison, approximately $541,544,251 of Pseudoephedrine based decongestants were sold.

***The Truth About Phenylephrine***

25. The problem—until recently unknown to the public, but well-known to Defendants—is that phenylephrine does not work when taken orally. While sold as a decongestant, it provides no better relief from decongestion than a placebo.

26. Scientists have long reported that phenylephrine is ineffective. As Leslie Hendeles PharmD and Randy Hatton PharmD succinctly stated in the Journal of Allergy and Clinical Immunology in May 2006, "Phenylephrine…is unlikely to provide relief of nasal congestion. It has poor oral bioavailability because of extensive first-pass metabolism in the gut and liver…Moreover, in a randomized, double blind, placebo-controlled, crossover study of 3 oral decongestants in 20 patients with chronic nasal stuffiness, phenylephrine was no more effective than placebo in reducing nasal airway resistance."[2]

27. Scientific studies using modern testing methodologies (using good clinical practices) and rigors have, time and again, shown that phenylephrine is ineffective since then. On September 11 and September 12, 2023, the FDA held a non-prescription Drug Advisory Committee Meeting to discuss the efficacy of oral phenylephrine as a nasal decongestant. The

[2] Leslie Handeles PharmD and Randy Hatton, Pharm D, *Oral phenylephrine: An ineffective replacement for pseudoephedrine?*, 118 J. Allergy and Clinical Immunology 1 (May 1, 2006), *citing* Bickerman HA. Physiologic and pharmacologic studies on nasal airway resistance Presented at a conference sponsored by the Scientific Development Committee of the Proprietary Association. Washington, DC. December 8, 1971, available at https://www.jacionline.org/article/S0091-6749(06)00633-6/fulltext#bib5

Advisory Committee explained that multiple studies have shown phenylephrine to be no better than a placebo, and called into question the reliability of prior studies that had been relied upon by the FDA when it initially determined that these products were effective.

28. For example, the committee described a study conducted by Johnson and Johnson from 2017 to 2018 to evaluate an oral phenylephrine product (Defendant Kenvue was until this year part of Johnson & Johnson). As explained by the panel, the trial "suggest[ed] no beneficial effect [of phenylephrine] when compared with placebo."[3]

29. This was hardly surprising. In 2015, Meltzer et al. conducted a dose-response study relating to the treatment of nasal congestion. The study subjects were given various combinations of commercially available oral phenylephrine tablets and a placebo. The "commercially available" tablet was reported in an editorial published in the same journal as the study to have been Johnson and Johnson's (now Kenvue's) Sudafed PE.[4] The results of the study were unequivocal. As the authors put it, "we failed to identify a dose for [phenylephrine]…that was significantly more effective than placebo in relieving nasal congestion…"[5]

30. Nevertheless, Johnson & Johnson—and now freshly spun-off Kenvue—through its subsidiary Defendant McNeil continue to manufacture and sell its phenylephrine products.

31. Defendants, as manufacturers of the phenylephrine-based products, were each aware of the studies suggesting that phenylephrine is ineffective as a nasal decongestant.

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[3] *See* NDAC Briefing Document: Oral Phenylephrine in the CCABA Monograph at 52, available at https://www.fda.gov/media/171915/download

[4] Hatton and Hendeles, Over the Counter Oral Phenylephrine: A Placebo for Nasal Congesion, J. Allergy Clin. Immunol Prac (Sept/Oct. 2015).

[5] Meltzer *et al.*, *Oral Phenylephrine HCI for Nasal Congestion in Seasonal Allergic Rhinitis: A randomized, Open-label, Placebo-controlled Study*, 3 J. Allergy Clin. Immunol Pract 6 (Sept/Oct 2015). Available at https://www.jaci-inpractice.org/action/showPdf?pii=S2213-2198%2815%2900252-4

32. As one pharmacist who has led the examination of the efficacy of phenylephrine summarized it, "if you have a stuffy nose and you take this medicine, you will still have a stuffy nose."

## TOLLING OF ALL APPLICABLE STATUTES OF LIMITATIONS

***Discovery Rule Tolling***

33. Plaintiff and the other Class members had no way of knowing about Defendants' deception concerning their Decongestant Products. As consumers, they reasonably believed that the products offered for sale as decongestants were capable of acting as decongestants.

34. Within the time period of any applicable statutes of limitations, Plaintiffs and the other Class members could not have discovered through the exercise of reasonable diligence that Defendants' Decongestant Products were ineffective.

35. Plaintiff and the other Class members did not discover and did not know facts that would have caused a reasonable person to suspect that Defendants did not report information within their knowledge about the ineffectiveness of their Decongestant Products; nor would a reasonable and diligent investigation have disclosed that Defendants had concealed such information about the products' efficacy, which was only known by Plaintiffs and the other Class members after the FDA decision in September 2023.

36. For these reasons, all applicable statutes of limitations have been tolled by operation of the discovery rule for the claims asserted herein.

***Fraudulent Concealment Tolling***

37. All applicable statutes of limitation have also been tolled by Defendants' knowing and active fraudulent concealment and denial of the facts alleged herein throughout the time-period relevant to this action.

38. Rather than disclose the truth about their Decongestant Products, Defendants falsely represented these products as ones that would relieve congestion.

***Estoppel***

39. Defendants were under a continuous duty to disclose to Plaintiffs and the other Class members the true character, quality, and nature of their Decongestant Products.

40. Defendants knowingly, affirmatively, and actively concealed the true nature, quality, and character of their Decongestant Products.

41. Based on the foregoing, Defendants are estopped from relying on any statutes of limitations in defense of this action.

## CLASS ALLEGATIONS

42. Plaintiffs bring this action pursuant to Rules 23(a), 23(b)(2), 23(b)(3), and 23(c)(4) of the Federal Rules of Civil Procedure on behalf of themselves and all others similarly situated.

43. Plaintiffs seek to represent the following Classes:

- All persons who purchased an oral nasal decongestant containing phenylephrine manufactured or distributed by Defendant Harris Teeter, LLC and/or Harris Teeter Supermarkets, Inc. in the United States (The Harris Teeter Nationwide Class.)
- All persons who purchased an oral nasal decongestant containing phenylephrine manufactured or distributed by Defendant Harris Teeter, LLC and/or Harris Teeter Supermarkets, Inc. in the State of Maryland (The Maryland Harris Teeter Class.)

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- All persons who purchased an oral nasal decongestant containing phenylephrine manufactured or distributed by Defendant Johnson & Johnson Consumer, Inc and/or McNeil Consumer Healthcare in the United States (The Johnson & Johnson Nationwide Class).
- All persons who purchased an oral nasal decongestant containing phenylephrine manufactured or distributed by Defendant Johnson & Johnson Consumer, Inc and/or McNeil Consumer Healthcare in the State of Maryland. (The Johnson & Johnson Maryland Class).

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- All persons who purchased an oral nasal decongestant containing phenylephrine manufactured or distributed by Defendant Reckitt Benckiser, LLC in the United States (The Reckitt Benckiser Nationwide Class).

- All persons who purchased an oral nasal decongestant containing phenylephrine manufactured or distributed by Defendant Reckitt Benckiser in the State of Maryland. (The Reckitt Benckiser Maryland Class).

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- All persons who purchased an oral nasal decongestant containing phenylephrine manufactured or distributed by Defendants McNeill Consumer Healthcare/Kenvue in the United States (The McNeill/Kenvue Nationwide Class).
- All persons who purchased an oral nasal decongestant containing phenylephrine manufactured or distributed by Defendant McNeill Consumer Healthcare/Kenvue in the State of Maryland. (The McNeill/KenvueMaryland Class).

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- All persons who purchased an oral nasal decongestant containing phenylephrine manufactured or distributed by Defendants Foundation Consumer Brands, LLC the United States (The Foundation Nationwide Class).
- All persons who purchased an oral nasal decongestant containing phenylephrine manufactured or distributed by Defendant Foundation Consumer Brands, LLC in the State of Maryland. (The Foundation Maryland Class).

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- All persons who purchased an oral nasal decongestant containing phenylephrine manufactured or distributed by Defendant Proctor & Gamble Company in the United States (The Proctor & Gamble Nationwide Class).
- All persons who purchased an oral nasal decongestant containing phenylephrine manufactured or distributed by Defendant Proctor & Gamble Company in the State of Maryland. (The Proctor and Gamble Maryland Class).

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44. Excluded from the Classes are the Defendants, and any of the Defendants' members, affiliates, parents, subsidiaries, officers, directors, employees, successors, or assigns; the judicial officers to whom this case is assigned, and their immediate family members; and Court staff assigned to this case. Plaintiff reserves the right to modify or amend the Class definition, as appropriate, during the course of this litigation and as indicated through discovery.

45. Also excluded from the class are any individuals who claim bodily injury as a result of consuming nasal decongestants containing phenylephrine

46. This action has been brought and may properly be maintained on behalf of the Classes proposed herein under the criteria of Rule 23 of the Federal Rules of Civil Procedure.

47. Plaintiffs reserve the right before the Court to determine whether certification of other classes or subclasses are appropriate.

48. Certification of Plaintiffs' claims for classwide treatment is appropriate because Plaintiffs can prove the elements of their claims using the same evidence as would be used to prove those elements in individual actions alleging the same claims.

49. *Numerosity*: Rule 23(a)(1): The members of the Classes are so numerous and geographically dispersed that individual joinder of all Class Members is impracticable. Plaintiffs are informed and believe that there are hundreds of thousands of members of the Classes based on

the size of the market for decongestant products and Defendants' share of that market, but the precise number of Class members is unknown to Plaintiffs.

50. *Commonality and Predominance*: Rule 23(a)(2) and (b)(3): This action involves common questions of law and fact which predominate over any questions affecting individual Class members, including, without limitation:

a. When Defendants knew that phenylephrine was ineffective as a decongestant;

b. Whether Defendants sold Decongestant Products as effective;

c. What measures Defendants took to conceal the true nature of their Decongestant Products;

d. Defendants' duty to disclose the true nature of their Decongestant Products;

e. Whether Plaintiffs and the other Class members overpaid for Defendants' Decongestant Products; and

f. Whether Plaintiffs and the other Class members are entitled to equitable and injunctive relief.

51. *Typicality*: Rule 23(a)(3): Plaintiffs' claims are typical of the other Class Members' claims because, among other things, all Class members were comparably injured through Defendants' wrongful conduct as described above. Plaintiffs suffered damages as a direct proximate result of the same wrongful practices in which Defendants engaged.

52. *Adequacy*: Rule 23(a)(4): Plainti is an adequate Class Representative because her interests do not conflict with the interests of the other members of the Classes she seeks to represent; Plaintiff has retained counsel competent and experienced in complex class action litigation; and Plaintiff intends to prosecute this action vigorously. Plaintiffs and their counsel will fairly and adequately protect the Class's interests.

53. *Declaratory Relief*: Federal Rule of Civil Procedure 23(b)(2): Defendants have acted or refused to act on grounds generally applicable to Plaintiffs and the other members of the Classes, thereby making declaratory relief appropriate, with respect to each Class as a whole.

54. *Superiority*: Federal Rule of Civil Procedure 23(b)(3): A class action is superior to any other available means for the fair and efficient adjudication of this controversy and no unusual difficulties are likely to be encountered in managing this class action. The damages or other financial detriment suffered by Plaintiff and the other Class members are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendants, so it would be impracticable for the members of the Classes to individually seek redress for Defendants' wrongful conduct. Even if Class members could afford individual litigation, such litigation creates a potential for inconsistent or contradictory judgments. It increases the delay and expense to all parties and the court system. By contrast, a class action is suited and intended to manage such difficulties and provide the benefits of uniform and common adjudication, economy of scale, and comprehensive supervision.

## CHOICE OF LAW

55. Because Plaintiffs bring this Complaint in Maryland, Maryland's choice of law regime governs the state law allegations in this Complaint. Under Maryland's choice of law rules, Maryland law applies to all Class members' claims, regardless of their state of residence or state of purchase, as there is no conflict between Maryland's law and the laws of other states with an interest in the outcome of this litigation.

## CLAIMS FOR RELIEF

### COUNT ONE
### MARYLAND CONSUMER PROTECTION ACT, MD Code Commercial Law Article Title 13, §13-408
### (All Defendants)

56. Plaintiffs repeat and re-allege the allegations contained in Paragraphs 1-54, as if

fully set forth herein.

57. Plaintiffs bring this claim on behalf of the Nationwide Classes or, in the alternative, the State Classes (the "Class," for purposes of this Count).

58. At all relevant times, Defendants were each a "person," as defined by Maryland's Consumer Protection Act.

59. At all relevant times, the Decongestant Products at issue constituted "merchandise," as defined by Maryland's Consumer Protection Act. See Maryland Code COML§ 13-101 (f).

60. At all relevant times, Defendants' sales and/or distribution of the Decongestant Products at issue met the definition of "sale" set forth by Maryland Code COML §13-101(i)

61. MD COML §13-303 provides that a person may not engage in any unfair, abusive, or deceptive trade practice as defined in this subtitle or as further defined by the Division in (1) The sale, lease rental loan or bailment of any consumer goods, consumer realty, or consumer services (2) The offer for sale, lease, rental , loan, or bailment of consumer goods, consumer realty, or consumer services. As alleged herein, Defendants sold Decongestant Products to Plaintiff and to each other Class Member as products that provide relief for nasal congestion. Yet Defendants also knew that phenylephrine is ineffective when consumed orally.

62. Defendants therefore engaged in practices that are unconscionable, deceptive, unfair, abusive, and fraudulent and that are based on false pretenses and the knowing concealment, suppression, or omission of material fact with the intent that others rely upon such concealment, suppression or omission in their manufacturing, selling, and distribution of their Decongestant Products. Defendants therefore violated the Maryland Consumer Protection Act.

63. Plaintiff Rankin, and other class members relied upon Defendant's false statements, and other unfair and deceptive trade practices in making their decision(s) to purchase purported nasal decongestants containing Phenylephrine.

64. As a direct and proximate result of Defendants' improper conduct, and the other members of the Class have suffered damages and ascertainable losses of moneys, by paying more for Decongestant Products than they would have, and/or by purchasing Decongestant Products that they would not have purchased, in amounts to be determined at trial.

65. Maryland has numerous contacts with the conduct alleged herein and a strong interest in applying the Maryland Consumer Protection Act to that conduct. Defendants are found, do business, or transact business within this district. Defendants' improper conduct set forth herein occurred in this district or was conceived of and executed from this district in whole or in part.

66. As such, Maryland's contacts to this litigation make it a desirable forum for this litigation and Maryland's interest in applying the Maryland Consumer Protection Act in this litigation outweighs any interests other states or their laws may have.

**COUNT TWO**
**BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY**
**(All Defendants)**

67. Plaintiffs repeat and reallege the allegations contained in Paragraphs 1-66, as if fully set forth herein.

68. Plaintiffs bring this claim on behalf of the Nationwide Classes or, in the alternative, the State Classes (the "Class," for purposes of this Count).

69. At all times relevant all fifty States and the District of Columbia and Puerto Rico have codified and adopted the provisions of the Uniform Commercial Code governing the implied warranty of merchantability and fitness for ordinary purpose.[6]

70. Defendants were at all times a "merchant" within the meaning of Article 2 of the U.C.C., as codified under applicable law.

71. The Decongestant Products are and were "goods" within the meaning of Article 2 of the U.C.C., as codified under applicable law.

[6] *See e.g.*, Ala. Code § 7-2-314; Alaska Stat. § 45.02.314; Ariz. Rev. Stat. Ann. § 47-2314; Ark. Code. Ann. § 4-2-314; Cal. Com. Code § 2314; Colo. Rev. Stat. § 4-2-314; Conn. Gen. Stat. Ann. § 42a-2-314; 6 Del. Code. § 2-314; D.C. Code. § 28:2-314; Fla. Stat. Ann. § 672.314; Ga. Code. Ann. § 11-2-314; Haw. Rev. Stat. § 490:2-314; Idaho Code § 28-2-314; 810 Ill. Comp. Stat. Ann. 5/2-314; Kan. Stat. Ann. § 84- 2-314; Ky. Rev. Stat. Ann. § 355.2-314; La. Civ. Code Ann. Art. § 2520; 11 Me. Rev. Stat. Ann. § 2-314; Md. Code. Ann. § 2-314; Mass. Gen. Law Ch. 106 § 2-314; Mich. Comp. Laws Ann. § 440.2314; Minn. Stat. Ann. § 336.2-314; Miss. Code Ann. § 75-2-314; Mo. Rev. Stat. § 400.2- 314; Mont. Code Ann. § 30-2-314; Nev. Rev. Stat. U.C.C. § 104.2314; N.H. Rev. Ann. § 382- A:2-314; N.J. Stat. Ann. § 12A:2-314; N.M. Stat. Ann. § 55-2-314; N.Y. U.C.C. Law § 2-314; N.C. Gen. Stat. Ann. § 25-2-314; N.D. Stat. § 41-02-314; Ohio Rev. Code Ann. § 1302.27; Okla. Stat. tit. 12A § 2-314; Or. Rev. Stat. § 72.3140; 13 Pa. C.S. § 2314; P.R. Laws. Ann. Tit. 31, § 3841, et seq.; R.I. Gen. Laws § 6A-2-314; S.C. Code Ann. § 36-2-314; S.D. Stat. § 57A-2-314; Tenn. Code Ann. § 47-2-314; Tex. Bus. & Com. Code Ann. § 2-314; Utah Code Ann. § 70A-2-314; Va. Code § 8.2-314; Vt. Stat. Ann. 9A § 2-314; W. Va. Code § 46-2-314; Wash. Rev. Code § 62A 2-314; Wis. Stat. Ann. § 402.314 and Wyo. Stat. § 34.1-2-314.

72. Defendants were obligated to provide Plaintiff and the other Class members Decongestant Products that were of merchantable quality, were reasonably fit for the purpose for which they were sold, and conformed to the standards of the trade.

73. Defendants impliedly warranted that those drugs were of merchantable quality and fit for that purpose.

74. Defendants breached their implied warranties, because their Decongestant Products were not of merchantable quality or fit for their ordinary purpose.

75. Defendants' breaches of implied warranties were a direct and proximate cause of Plaintiffs' and the other Class members' damages.

**COUNT THREE**
**FRAUD BY OMISSION OR CONCEALMENT**
**(All Defendants)**

76. Plaintiff repeats and realleges the allegations contained in Paragraphs 1-75, as if fully set forth herein.

77. Plaintiffs bring this claim on behalf of the Nationwide Classes or, in the alternative, the State Classes (the "Class," for purposes of this Count).

78. Defendants intentionally and knowingly falsely concealed, suppressed and/or omitted material facts including as to the standard, quality or grade of the Decongestant Products. Due to their fraudulent conduct, Plaintiff and the other Class members have suffered actual damages.

79. Defendants knew that phenylephrine is ineffective at safe dosages when consumed orally.

80. Defendants were obligated to inform Plaintiff and the other members of the Class of the effectiveness of phenylephrine due to their exclusive and superior knowledge of the

Decongestant Products. Plaintiff and other Class members also expressly reposed a trust and confidence in Defendants because the nature of their dealings as a healthcare entity and with Plaintiffs and other members of the Class as their consumers.

81. Plaintiff and the other Class members would not have purchased the Decongestant Products but for Defendants' omissions and concealment of material facts regarding the nature and quality of the Decongestant Products and existence of the Decongestant Products, or would have paid less for the Decongestant Products.

82. Defendants knew their concealment and suppression of material facts was false and misleading and knew the effect of concealing those material facts.

83. Defendants acted with malice, oppression, and fraud.

84. Plaintiff and the other Class members reasonably relied on Defendants' knowing, affirmative, and active false concealment and omissions. As a direct and proximate result of Defendants' omissions and active concealment of material facts regarding the Decongestant Products, Plaintiff and the other Class members have suffered actual damages in an amount to be determined at trial.

## COUNT FOUR
## UNJUST ENRICHMENT
## (all Defendants)

85. Plaintiffs repeat and reallege the allegations contained in Paragraphs 1-84, as if fully set forth herein.

86. Plaintiffs brings this claim on behalf of the nationwide Class or, in the alternative, the State Classes (the "Class," for purposes of this Count).

87. There are no material differences in the elements of the unjust enrichment cause of action in the various states. In all states, the focus of an unjust enrichment claim is whether the

defendant was unjustly enriched. At the core of each state's law are two fundamental elements – the defendant received a benefit from the plaintiff and it would be inequitable for the defendant to retain that benefit without compensating the plaintiff. The focus of the inquiry is the same in each state. Since there is no material conflict relating to the elements of unjust enrichment between the different jurisdictions from which class members will be drawn, New Jersey law applies to those claims.

88. Defendants' efforts include, but are not limited to, providing misleading advertising and coupons to entice Plaintiffs and the other Class members to purchase Decongestant Products.

89. It would be inequitable for Defendants to insulate themselves from liability on this unjust enrichment claim by asserting that retail sales by their retailers cuts off any relationship between the Plaintiffs and the Classes and Defendants because Plaintiffs and the other Class members cannot seek a remedy directly from Defendants' retailers based on Defendants' sale of the Decongestant Products.

90. Plaintiffs and all other Class members conferred a benefit on Defendants by purchasing Decongestant Products.

91. Defendants have been unjustly enriched in retaining the revenues derived from Class members' purchases of Decongestant Products, which retention under these circumstances is unjust and inequitable because Defendants misrepresented that Decongestant Products were effective for providing congestion relief when in fact they were not, which caused injuries to Plaintiffs and all Class members because they paid a price premium due to Defendants' deception.

92. Because Defendants' retention of the non-gratuitous benefit conferred on it by Plaintiffs and all Class members is unjust and inequitable, Defendants must pay restitution to Plaintiffs and the Class members for their unjust enrichment, as ordered by the Court.

**COUNT V: BREACH OF IMPLIED WARRANTY OF FITNESS**

93. Plaintiff incorporates Paragraphs 1-92 by reference as though fully set forth herein.

94. Defendants sales of drugs containing phenylephrine were to be used to provide sinus/nasal condition relief in the context of getting relief from sinus pressure. Thus Defendants sales of such drugs were of a particular purpose.

95. Defendants knew or should have known of Plaintiff's reason, and particular purpose, for purchasing the nasal decongestants. In fact Defendants went to great lengths to advertise the product as a nasal decongestant to the Plaintiff(s). Defendant knew of this particular purpose as Defendants produced, marketed, sold and advertised the medications as providing/granting sinus/nasal relief.

96. Defendants knew that Plaintiff(s) relied on this promise of particularity that the nasal decongestants worked to alleviate symptoms of nasal decongestion, as Defendant was aware of the assertions put forth regarding specificity and Plaintiff's required reliance on such a product.

97. Plaintiff relied on Defendants skill, judgment and capability to provide such a specific product.

98. Due to Defendants conduct, Plaintiff was damaged by Defendant in that Plaintiff has been deprived of her benefit of the bargain and loss of purchase price.

99. Plaintiff and the Class seek damages, attorney fees, costs and any other just and proper relief available under the laws.

## NOTICE TO ATTORNEY GENERAL

100. A copy of the complaint filed in this action was mailed to the Attorney General of the State of Maryland within 10 days of filing.

## REQUEST FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the other Class members, respectfully request that the Court enter judgement in their favor and against Defendants, as follows:

A. Certification of the proposed Class with Plaintiff as class representative

B. Appointment of Plaintiffs' counsel as Class Counsel;

C. Injunctive relief, including, but not limited to:

a. Requiring Defendants to make full disclosure of their knowledge of the efficacy of their Decongestant Products;

b. Disgorgement of their profits from the sales of their Decongestant Products;

c. An Order requiring that Defendants cease and desist from marketing and selling the products at issue.

d. Damages, including punitive damages, costs, and disgorgement in an amount to be determined at trial;

e. An order requiring Defendants to pay both pre- and post-judgment interest on all amounts awarded;

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

g. Such other further relief as may be appropriate.

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**DEMAND FOR JURY TRIAL**

Plaintiffs demand a jury trial for all claims so triable.

Dated: October 23, 2023

Respectfully submitted,

*/s/ Kevin Goldberg*
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Counsel for Plaintiff and
Proposed Class

***Counsel for Plaintiff and the Proposed Class***

JS 44 (Rev. 04/21)

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

## I. (a) PLAINTIFFS

Stacy Rankin

**(b)** County of Residence of First Listed Plaintiff ____ Montgomery
*(EXCEPT IN U.S. PLAINTIFF CASES)*

**(c)** Attorneys *(Firm Name, Address, and Telephone Number)* See Attached
Kevin Goldberg, Goldberg Law LLC, 401 Salk Circle, Gaithersburg MD 20878

## DEFENDANTS

Harris Teeter LLC

County of Residence of First Listed Defendant Matthews, North Carolina
*(IN U.S. PLAINTIFF CASES ONLY)*

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

## II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

## III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

*(For Diversity Cases Only)*

| | PTF | DEF | | PTF | DEF |
|---|---|---|---|---|---|
| Citizen of This State | ☒ 1 | ☐ 1 | Incorporated *or* Principal Place of Business In This State | ☐ 4 | ☐ 4 |
| Citizen of Another State | ☐ 2 | ☒ 2 | Incorporated *and* Principal Place of Business In Another State | ☐ 5 | ☐ 5 |
| Citizen or Subject of a Foreign Country | ☐ 3 | ☐ 3 | Foreign Nation | ☐ 6 | ☐ 6 |

## IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

**CONTRACT**
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☒ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

**REAL PROPERTY**
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

**TORTS**

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

**CIVIL RIGHTS**
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

**PRISONER PETITIONS**

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

**FORFEITURE/PENALTY**
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

**LABOR**
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

**IMMIGRATION**
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

**BANKRUPTCY**
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

**INTELLECTUAL PROPERTY RIGHTS**
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

**SOCIAL SECURITY**
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

**FEDERAL TAX SUITS**
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

**OTHER STATUTES**
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

## V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*: 28 USC 1332 US Civil Statute

Brief description of cause: Consumer Class Action

## VII. REQUESTED IN COMPLAINT:

☑ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

**DEMAND $** monetary damages and injunctive relief

CHECK YES only if demanded in complaint:
**JURY DEMAND:** ☑ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

*(See instructions):* JUDGE _____ DOCKET NUMBER _____

DATE 10/23/23

SIGNATURE OF ATTORNEY OF RECORD

**FOR OFFICE USE ONLY**

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

# ATTACHMENT

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