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FILED/ENDORSED
Clerk of the Superior Court

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By D. HERTZ
DEPUTY CLERK

ASSIGNED TO
JUDGE ALESIA JONES to 12-31-23
FOR ALL PURPOSES
Judge Kahn 1-1-24
Following

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF SOLANO

11 DANIELLE SKARPNES, individually and on
12 behalf of all others similarly situated,

13 Plaintiffs,

14 v.

15 ELIXIR COSMETICS OPCO, LLC,

16 Defendants.

CASE NO. **CU23-04638**

CLASS ACTION

COMPLAINT FOR:

1. VIOLATION OF CAL. BUS. & PROF. § 17200, ET SEQ. (Unlawful, Unfair, and Fraudulent Prongs)
2. VIOLATION OF CAL. BUS. & PROF. § 17500, ET SEQ. (False and Misleading Advertising)
3. VIOLATION OF CAL. CIV. CODE § 1750, ET SEQ. (Consumers Legal Remedies Act)
4. UNJUST ENRICHMENT
5. BREACH OF WARRANTY

JURY TRIAL DEMANDED

1 Plaintiff Danielle Skarpnes (hereafter “Plaintiff”), individually and on behalf of all other
2 similarly situated purchasers (hereafter the “Class”) of the Babe Lash Essential, Lash Serum, Babe
3 Lash Eyelash Serum, Babe Amplifying Brow Serum and Babe Brow Serum (collectively hereafter the
4 “Product(s)”), brings this consumer class action against Elixir Cosmetics OPCO, LLC (hereafter
5 “Defendant”) and alleges as follows:

6 **JURISDICTION AND VENUE**

7 1. This Court has jurisdiction over all causes of action asserted herein pursuant to the
8 California Constitution, Article VI, § 10, as this case is a cause not given by statute to other trial
9 courts.

10 2. Defendant has sufficient minimum contacts with California, and/or otherwise has
11 intentionally availed itself of the markets in California through the manufacture, promotion, marketing, and
12 sale of their products in California. Moreover, Defendant, directly and through its agents, has substantial
13 contacts with and receive benefits and income from and through the State of California such that the
14 exercise of jurisdiction by this Court is permissible under traditional notions of fair play and substantial
15 justice.

16 3. Defendant made numerous misrepresentations and material omissions which had a
17 substantial effect in Solano County, including, but not limited to internet advertisements as well as sales in
18 retail stores located in Solano County. Additionally, Defendant received considerable compensation from
19 sales in Solano County.

20 4. Venue is proper in this Court as Plaintiff at all relevant times is and was a resident of
21 Solano County, California and Plaintiff’s purchase of the Products occurred in Solano County,
22 California.

23 5. Out-of-state participants can be brought before this Court pursuant to the provisions of
24 Code of Civil Procedure § 395.5.

25 **THE PARTIES**

26 6. Plaintiff is an individual residing in the State of California. Plaintiff purchased the
27 Babe Lash Essential Lash Serum from a Costco retail store located in Vacaville, California in 2023 for
28 \$43.99 plus tax, for personal use. In doing so, Plaintiff relied upon Defendant’s advertising,

1 packaging, labeling and other promotional materials, which were jointly prepared and approved by
2 Defendant and its agents and disseminated through advertising media, social media, Defendant's
3 website, and the internet, containing the misrepresentations, concealments alleged herein. Plaintiff
4 would not have purchased the Product, nor would she have paid the price that she did, had she known
5 that it contained a prostaglandin associated with a variety of side effects and health risks, and is sold in
6 California in violation of California's Sherman Food Drug and Cosmetic Law.

7 7. Defendant Elixir is a limited liability company with its principal place of business in
8 Texas. At times relevant to this Complaint, Defendant has advertised, marketed, and sold a variety of
9 cosmetic products, including the Products at issue, to consumers throughout the United States and the
10 State of California. Defendant has sold the Products directly to consumers via the Internet through its
11 own website, as well as third party retail stores throughout the United States, including in this County.

12 8. Defendant transacts or has transacted business in this County and throughout the United
13 States. Defendant, directly and through its agents, have substantial contacts with and receives
14 substantial benefits and income from and through the State of California and this County.

15 16 **FACTUAL ALLEGATIONS**

17 **Background**

18 9. Women have long strived to possess long, thick, and dark eyelashes. Prominent eyes
19 and eyelashes are often considered a sign of beauty and can be associated with increased levels of
20 attractiveness, confidence, and well-being.

21 10. Numerous options may improve the appearance of eyelashes. In fact, women spend
22 over a billion dollars a year on products that enhance the appearance of eyelashes. They coat them
23 with mascara to make them look thicker, glue on fake eyelashes and extensions, tint them with dye to
24 make them look darker, and even have hairs transplanted to their lids.

25 11. Since approximately 2007, the new craze in the eyelash industry has been eyelash
26 enhancing serums that claim to cause a user's eyelashes to grow longer, thicker, and darker.

27 12. The active ingredient contained in various eyelash enhancing serums was originally
28 discovered by mistake. Lumigan eye drops, used to treat glaucoma, contain the active ingredient

1 bimatoprost which is in a category of compounds known as prostamides. Prostamides are related to a
2 category of compounds known as prostaglandins (“PGs”). Eyelash growth was found to be an
3 unexpected, positive side effect of Lumigan, due to the PGs contained therein. However, adverse side
4 effects were also found to be associated with PGs. These adverse side effects include but are not
5 limited to: ocular irritation, conjunctival hyperemia, iris color change, eyelid pigmentation, redness,
6 macular edema, ocular inflammation, unwanted hair growth, eye pruritus, blurred vision and blindness.

7 13. The manufacturer of Lumigan, Allergan Inc., took the information regarding PGs and
8 its effectiveness to grow eyelashes and created Latisse, an eyelash enhancing serum containing
9 bimatoprost.

10 14. The Federal Food, Drug and Cosmetic Act (“FDCA”) defines drugs by their intended
11 use, as “articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease”
12 and “articles (other than food) intended to affect the structure or any function of the body of man or
13 other animals.” (FD&C Act, sec 201(g)(1)). Under the FDCA, drugs must either receive premarket
14 approval by FDA through the New Drug Application (NDA) process, or conform to a monograph for a
15 particular drug category (as established by the FDA’s Over-the-Counter Drug Review), before they go
16 on the market. California’s Health and Safety Code mirrors the FDCA.

17 15. Latisse is intended to affect the structure of the human body by elongating and
18 thickening eyelashes, and consequently, is considered a drug for purposes of the FDA. Accordingly,
19 Allergan needed to receive FDA approval in order to put Latisse on the market. Because there was no
20 monograph for eyelash serums, Allergan was required to receive premarket approval by the FDA
21 through the NDA process.

22 16. Following Allergan’s NDA process and based on Latisse’s documented safety record
23 and proof that bimatoprost .03% grows eyelashes when applied to eyelid skin, in December of 2008,
24 Latisse became the first (and to date remains the only) federally approved eyelash enhancing serum.

25 17. Latisse is not available over-the-counter and must be prescribed to customers through a
26 physician.

27 18. In addition to requiring a prescription after consultation with a physician, Allergan
28 warns of the risks of prostaglandins. The Latisse warnings and precautions advise of effects on:

1 intraocular pressure, iris pigmentation changes, lid pigmentation, hair growth outside the treatment
2 area, intraocular inflammation, and macular edema.

3 19. Since 2007, a variety of companies sought to capitalize on the market created by Latisse
4 by selling eyelash enhancing serums, also containing prostaglandin analogs. These companies attempt
5 to take advantage of the fact that Latisse is expensive, requires a doctor's prescription, and advises
6 consumers of potential significant side effects of using the product.

7 20. Thus, they market their products as purported "cosmetics" and not as "drugs", in an
8 attempt to circumvent the rigorous process required to seek regulatory approval. Further, these
9 companies sell the serums directly to customers and at retail without a prescription. The ease of
10 purchase for customers leads to greater sales for vendors and is a critical part to their success.

11 21. But, FDA has previously warned manufacturers marketing eyelash serums formulated
12 with ICP that these products violated the FDCA because they are unapproved new drugs and
13 misbranded drugs. FDA also noted the harmful side effects associated with prostaglandin analogs:
14 "[o]ther potential adverse events associated with prostaglandin analogs for ophthalmic use include
15 ocular irritation, hyperemia, iris color change, macular edema, ocular inflammation, and interference
16 with glaucoma therapy. In addition, prostaglandin analogs for ophthalmic use are currently classified
17 as Pregnancy Class C." See U.S. Food and Drug Administration Warning Letter to Lifetech
18 Resources, LLC, dated April 18, 2011.

19
20 **Defendant's Advertising and Marketing of the Products is False and Deceptive**

21 22. With the expansion of social media platforms, digital marketing channels have lowered
22 barriers to entry into the beauty and personal care market, enabling the creation of digitally native,
23 "direct-to-consumer" cosmetics brands, like Defendant's "Babe Original" brand¹. These brands have
24 disrupted the high-margin cosmetics industry that has long been dominated by large, billion-dollar
25

26 _____
27 ¹ Defendant originally marketed the Products under the brand "Babe Lash", however, in or about
28 2020, transitioned to "Babe Original" as its blanket brand for the Products. The formulations of the
products (and intended uses as described below) remained.

1 corporations.

2 23. Compared with traditional paid, media-intensive campaigns, and costly brick-and-
3 mortar distribution models, “direct-to-consumer” brands rely heavily on social media, requiring only a
4 modest investment to create the appearance of an authentic consumer campaign that can be highly
5 targeted to specific groups consumers and loyal online follower of the brands.

6 24. The internet enables digital brands to operate “asset light” by accessing consumers
7 directly via online stores and outsourcing product development and manufacturing. In other words,
8 each online post, comment, “like”, and “retweet”, performs the function of traditional advertising.

9 25. Defendant is a digital brand which seeks to drive direct to consumer and retailer sales of
10 its products-- cosmetics, primarily intended to be used on eyelashes and eyebrows.

11 26. Defendant’s flagship products are its eyelash and eyebrow “serums”. Defendant
12 markets the Products in order to take advantage of the public’s desire for longer, thicker eyelashes and
13 eyebrows, without the hassle, costs, and risks associated with drug products like Latisse.

14 27. With respect to the eyelash serums, Defendant advertises:

- 15 “Longer-looking lashes are just a few weeks away. This lash-enhancing serum is
16 full of ultra nourishing and performance-based ingredients like biotin and amino
17 acids that give you longer-looking lashes with consistent nightly application.”
- 18 “The Babe Lash Essential Serum promotes the appearance of length, and the
19 Enhancing Conditioner helps your lashes look thicker, fuller, and darker, all
20 without needing lash extensions, falsies, or mascara.”
- 21 “Benefits: The Essential Serum is full of powerful performance-based
22 ingredients, like panthenol, and biotin, that nourish your natural lashes and help
23 in reducing the appearance of damage from those environmental factors. Plus,
24 it’s oil-free, making it safe to use with eyelash extensions and has been known
25 to help extend the longevity of lash extensions.”

26 28. Defendant also uses “before and after” pictures to demonstrate longer, thicker, and
27 fuller eyelashes after several weeks of application.

28 29. Defendant also claims that the eyelash serums are “clinically tested” and provide results

1 in as little as four weeks, but optimal results will be achieved in 6-12 weeks.

2 30. Defendant indicates that the eyelash products should be applied at night as follows:
3 “Dip the Essential Serum brush into the product and close one eye. Swipe the product directly to your
4 top lash line on clean, dry skin, as though you were applying eyeliner. Switch to the other eye. One dip
5 of the brush into the serum is enough for both eyes. The Essential Serum should be applied each
6 evening on clean, dry skin. Once satisfied with your results, continue to apply the product 2-3 times
7 per week to maintain lashes. Babe Lash recommends evaluating results after 12 weeks of use.”

8 31. With respect to the brow serums, Defendant claims that:

- 9 “Get brows that look thicker and bolder with this castor oil, vitamin, and antioxidant-
10 infused serum. Ideal for brows that are thin, over-plucked, or just need a little WOW.
11 Protects against excess fallout caused by environmental stressors like makeup removal
12 and styling products.”
- 13 “For thicker-looking brows.”
- 14 “See results in as little as 6 weeks.”

15 32. Like the eyelash serums, Defendant also uses “before and after” pictures to demonstrate
16 that the brow serums provide longer, thicker, and darker eyebrows.

17 33. Defendant provides that the brow serum should be applied as follows: “Apply brow
18 serum once daily to clean, dry eyebrows. Ensure no residue, such as from oil-based makeup removers,
19 remains on your brow. Use short strokes to apply serum. Follow the natural shape of your brow,
20 focusing on thin, sparse, or over-plucked areas. One dip of the wand is enough for one brow. Allow 1
21 to 2 minutes for the serum to dry. Use once daily for a full four months.”

22 34. The eyelash products retail for between \$29.00 - \$89.00, while the eyebrow serum
23 products retail for \$29.00 - \$49.00, depending on size.

24 35. Defendant has sold tens of thousands of units of the Products in California and
25 throughout the United States.

26 36. Although Defendant promotes ingredients like castor oil, antioxidants, panthenol and
27 biotin, Defendant fails to advise consumers of material information that the Products contain a
28 synthetic prostaglandin analog and active ingredient, isopropyl cloprostenate (“ICP”). In addition,

1 Defendant fails to adequately disclose (in a clear and prominent manner) the existence and severity of
2 potential side effects of ICP and synthetic prostaglandin analogues.

3 37. As described above, prostaglandin analogues, like ICP, are chemicals manufactured to
4 be biologically equivalent to the lipid compound prostaglandin. They are powerful chemicals that are
5 used as topical prescription drugs in the medical treatment and management of glaucoma to reduce
6 elevated intraocular pressure. Prostaglandin analogs come with the risk of severe side effects,
7 including eye color change, darkening of eyelid skin, droopy eyelids, sunken eyes, stinging, eye
8 redness, and itching. These side effects are associated with all drugs in the class, including ICP.

9 38. Many users of the Products have gone online to report a variety of side effects from use
10 of the Products, for instance:

11 “I wake up only to realize my eyes were nearly swollen shut, crusty, painful, all-
12 around disgusting. Still being oblivious, I didn’t think it was anything other than
13 seasonal allergies (it was the day before Christmas give me a break ok). Once I
14 could see, I noticed that aside from the PAIN, my eyeballs were bloodshot, and my
15 eyelids and all surrounding areas were a red/purplish color, swollen”
16 <https://savingsserendipity.com/?p=115>

17 “So I used babe lash for a few weeks. At first it seemed like it was working then
18 came disaster. My lashes started falling out I couldn’t wear makeup for a good
19 month while my lashes started growing back”
20 https://www.reddit.com/r/FabFitFun/comments/ld9v0d/babe_lash_warning/

21 “Used Babe Lash... it fed me and my eyes up lol. It felt fine when I applied it, no
22 burning or anything! But woke up the next morning and the skin all around my eyes
23 was red and massively irritated, think I will stick with my near-invisible, hard-to-
24 curl blonde lashes lol.”
25 https://www.reddit.com/r/FabFitFun/comments/ld9v0d/babe_lash_warning/

26 39. FDA has previously warned companies that: “Isopropyl cloprostenate is a synthetic
27 prostaglandin analog in the same class of compounds as the active ingredients in FDA-approved drugs
28 indicated to lower intraocular pressure in glaucoma patients (e.g., (b)(6) (bimatoprost ophthalmic

1 solution), (b)(6) (travoprost ophthalmic solution) and to treat hypotrichosis of the eyelashes (e.g.,
2 (b)(6) (bimatoprost ophthalmic solution)). Prostaglandin analogs are well known to have an effect on
3 the structure or function of the body. The presence of the prostaglandin analog, isopropyl
4 cloprostenate, along with appearance claims such as ‘enhance the appearance of your lashes and
5 brows,’ ‘fuller healthier-looking lashes,’ and ‘fuller healthier-looking brows’ indicate that your
6 products are intended to affect the structure or function of the body. Accordingly, [these products] are
7 drugs as defined by section 201 (g)(1)(C) of the Act (21 U.S.C. § 321(g)(I)(C)).” See U.S. Food and
8 Drug Administration Warning Letter to Lifetech Resources, LLC, dated April 18, 2011.

9 **The Products Are Sold In Violation of the California Sherman Law**

10 40. Defendant has marketed, labeled, and sold unapproved drugs in violation of California’s
11 Sherman Food, Drug, and Cosmetic Law, Cal. Health & Safety Code § 109875 et seq. (“Sherman
12 Law”) and federal law.

13 41. Under California’s Sherman law, a product is a “drug” if it is intended to “affect” “any
14 function” of the “human body”. Cal. Health & Safety Code § 109925(c). Federal law is identical. See,
15 e.g., 21 U.S.C. § 321(g)(1)(C). “The drug definition is to be given a liberal interpretation in light of the
16 remedial purposes of the legislation.” *National Nutritional Foods Ass’n v. Mathews*, 557 F.2d 325, 336
17 (2d Cir.1977) (citing *United States v. An Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784, 792, 798
18 (1968).

19 42. A product’s “intended use” is not determined by the seller’s subjective explanations.
20 Rather, it is determined by the seller’s objective intent as “derived or inferred from labeling,
21 promotional material, advertising, or any other relevant source.” *Allergan, Inc. v. Athena Cosmetics,*
22 *Inc., supra* at 1357 citing *United States v. Storage Spaces Designated Nos. “8” & “49”,* 777 F.2d
23 1363, 1366 (9th Cir. 1985).

24 43. The “intended use” of eyelash serums, like the Products, has been extensively litigated
25 in California. Namely, the district court in the *Allergan/Athena Cosmetics* line of cases identified
26 several factors that are to be considered in making the determination of the “intended use” of various
27 eyelash serums (and in turn, were “drugs” under the California Health & Safety Code and federal law),
28 including: the product name, formulation, marketing, marketing structure, advertising claims,

1 formulation, method of application, time needed to work, pricing, and reports of consumers' use of the
2 Product, among others. *See, e.g., Allergan, Inc. v. Athena Cosmetics, Inc.*, 8:07-cv-01316-JVS-RNB,
3 Dkt. No. 711 (C.D. Cal. July 19, 2012). These facts are "all considered in light of prevalent claims
4 about making one's lashes 'look' or 'appear' longer, fuller, and more beautiful; statements
5 championing the replacement of extensions and false eyelashes; and statements about combining use
6 with mascara." *Id.* at pp. 14-15 (emphasis added).

7 44. Here, as described above, the Products' advertising history, formulation, clinical testing,
8 pricing, before and after pictures, time to provide results, use of ICP, method of application, and
9 pricing (ranging between \$966.67 and \$684.62 per fl oz, depending on size), among other things,
10 demonstrate that Defendants' objective intent is to affect the structure or function of the human body
11 with respect to eyelash and eyebrow growth and, accordingly, the Products are unapproved and
12 misbranded drugs under the California Sherman law (and identical federal law).

13 CLASS ACTION ALLEGATIONS

14 45. Class Definition: Plaintiff brings this class action on behalf of herself, and as a class
15 action on behalf of the following putative class (the "Class"):

16 All persons in the United States or its territories who purchased any Elixir Product for
17 personal, family, household, or professional purposes between June 1, 2019 and the date
18 of the entry of an order granting preliminary approval to the Settlement Agreement
19 excluding (a) any individuals who have pending litigation against Elixir; (b) any
20 Settlement Class Members who file a timely request for exclusion; (c) any officers,
21 directors, or employees, or immediate family members of the officers, directors, or
22 employees, of Elixir or any entity in which Elixir has a controlling interest; (d) any
23 person who has acted as a consultant of Elixir; (e) any legal counsel or employee of legal
24 counsel for Elixir; (f) any federal, state, or local government entities; and (g) any judicial
25 officers presiding over the Action and the members of their immediate family and
26 judicial staff.

27 Plaintiff reserves the right to amend the Class definition if further investigation and discovery
28 indicates that the Class definitions should be narrowed, expanded, or otherwise modified.

29 46. Numerosity and Ascertainability: Plaintiff does not know the exact number of members
30 of the putative classes. Plaintiff is informed and believes that the total number of Class members is at
31 least in the many tens of thousands, and that members of the Class are numerous and geographically
32 dispersed throughout the United States and California. While the exact number and identities of the

1 Class members are unknown at this time, such information can be ascertained through appropriate
2 investigation and discovery, including Defendants' records, either manually or through computerized
3 searches.

4 47. Typicality and Adequacy: Plaintiff's claims are typical of those of the proposed Class,
5 and Plaintiff will fairly and adequately represent and protect the interests of the proposed Class.
6 Plaintiff does not have any interests that are antagonistic to those of the proposed Class. Plaintiff has
7 retained counsel competent and experienced in the prosecution of this type of litigation.

8 48. Commonality: The questions of law and fact common to the Class members, some of
9 which are set out below, predominate over any questions affecting only individual Class members:

- 10 a. whether Defendants claimed that the Products may cause or assist in eyelash growth;
- 11 b. whether the surrounding facts and circumstances demonstrate that the intended use of
12 the Products is to cause or assist in eyelash and eyebrow growth;
- 13 c. whether the Products contain ICP;
- 14 d. whether Defendant's advertising and labeling, along with the concealment of certain
15 information regarding Defendant's Products, is material to consumers;
- 16 e. whether Defendant's advertising and marketing claims set forth above are unlawful,
17 untrue, or are misleading, or reasonably likely to deceive;
- 18 f. whether Defendant's conduct is fraudulent and/or violates public policy;
- 19 g. whether Defendant engaged in unfair, unlawful and/or fraudulent business practices in
20 marketing and distributing the Products;
- 21 h. whether Defendant made express and/or implied warranties for the Products;
- 22 i. whether the Products are adulterated and/or misbranded under the California Health &
23 Safety Code and identical federal law;
- 24 j. whether Defendant knew or should have known that the representations were false;
- 25 k. whether Defendant engaged in false advertising with respect to the Products;
- 26 l. whether Defendant knowingly concealed or misrepresented material facts for the
27 purpose of inducing consumers into spending money on the Products;
- 28

- 1 m. whether Defendant's representations, concealments and non-disclosures concerning the
2 Products are likely to deceive the consumer;
- 3 n. whether Defendant's representations, concealments and non-disclosures concerning the
4 Products violate the CLRA, FAL, UCL, and/or the common law;
- 5 o. whether Defendants should be permanently enjoined from making the claims at issue;
6 and
- 7 p. whether Plaintiff and the Class are entitled to restitution and damages.

8 49. Predominance and Superiority: Common questions, some of which are set out above,
9 predominate over any questions affecting only individual Class members. A class action is the
10 superior method for the fair and just adjudication of this controversy. The expense and burden of
11 individual suits makes it impossible and impracticable for members of the proposed Class to prosecute
12 their claims individually and multiplies the burden on the judicial system presented by the complex
13 legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent
14 or contradictory judgments. In contrast, the class action device presents far fewer management
15 difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive
16 supervision by a single court on the issue of Defendants' liability. Class treatment of the liability issues
17 will ensure that all claims and claimants are before this Court for consistent adjudication of the liability
18 issues.

19 50. Manageability: The trial and litigation of Plaintiff's and the proposed Class's claims are
20 manageable. Defendants have acted and refused to act on grounds generally applicable to the Class,
21 making appropriate final injunctive relief and declaratory relief with respect to the Class as a whole.

22 51. Notice: If necessary, notice of this action may be affected to the proposed Class through
23 publication in a manner authorized in the California Rules of Court, Civil Code, and/or the Federal
24 Rules of Civil Procedure. Also, Class members may be notified of the pendency of this action by mail
25 and/or email, through the distribution records of Defendant, third party retailers, and vendors.

26
27 **FIRST CAUSE OF ACTION**

28 **VIOLATION OF UNFAIR COMPETITION LAW
(CAL. BUS. & PROF. CODE § 17200, *et seq.*)**

1 alleged herein also constitute “unfair” business acts and practices within the meaning of Business &
2 Professions Code § 17200 *et seq.* in that its conduct is substantially injurious to consumers, offends
3 public policy, and is immoral, unethical, oppressive, and unscrupulous as the gravity of the conduct
4 outweighs any alleged benefits attributable to such conduct.

5 61. There were reasonably available alternatives to further Defendants’ legitimate business
6 interests, other than the conduct described herein.

7 62. **Fraudulent Business Practices:** California Business & Professions Code § 17200 also
8 prohibits any “fraudulent business act or practice.”

9 63. Defendant’s claims, nondisclosures and misleading statements with respect to the
10 Products, as more fully set forth above, were false, misleading and/or likely to deceive the consuming
11 public within the meaning of Business & Professions Code § 17200.

12 64. Defendant’s conduct caused substantial injury to Plaintiff and the other Class members.
13 Plaintiff has suffered injury in fact and has lost money as a result of Defendants’ unfair conduct.

14 65. Pursuant to section 17203 of the California Business & Professions Code, Plaintiff and
15 the Class seek an order of this court enjoining Defendant from continuing to engage in unlawful,
16 unfair, or deceptive business practices and any other act prohibited by law, including, but not limited
17 to: (a) selling, marketing, or advertising the Products with false representations set forth above; (b)
18 engaging in any of the illegal, fraudulent, misleading, unlawful, unfair and/or deceptive conduct
19 described herein; and (c) engaging in any other conduct found by the Court to be illegal, fraudulent,
20 misleading, unlawful, unfair and/or deceptive conduct.

21 66. In addition, Plaintiff requests that this Court enter such orders or judgments as may be
22 necessary to restore to any person in interest any money which may have been acquired by means of
23 such illegal practices as provided in Business & Professions Code § 17203, and for such other relief as
24 set forth below.

25 67. Plaintiff engaged counsel to prosecute this action and is entitled to recover costs and
26 reasonable attorney’s fees according to proof at trial.

27 **SECOND CAUSE OF ACTION**

28 **FALSE AND MISLEADING ADVERTISING
(CAL. BUS. & PROF. CODE § 17500, *et seq.*)**

1 68. Plaintiff incorporates by this reference the allegations contained in the preceding
2 paragraphs as if fully set forth herein.

3 69. Plaintiff brings this claim individually and on behalf of the proposed Class against
4 Defendants.

5 70. As alleged herein, Plaintiff has standing to pursue this claim as Plaintiff has suffered
6 injury in fact and has lost money or property as a result of Defendant's actions. Specifically, Plaintiff
7 purchased the Products for her own personal use. In so doing, Plaintiff relied upon the representations
8 referenced above. Plaintiff would not have purchased the Product, nor would she have paid the price
9 that she did, had she known that it contained a prostaglandin associated with a variety of side effects
10 and health risks, and is sold in California in violation of California's Sherman Food Drug and
11 Cosmetic Law as an unlawful drug.

12 71. Defendant violated Business & Professions Code § 17500 by publicly disseminating
13 false and misleading advertisements regarding the Products.

14 72. Defendant's false and misleading advertisements were disseminated to increase the
15 sales of the Products.

16 73. Defendant knew or should have known that their advertisements for the Products were
17 false and misleading and that those advertisements would induce consumers to purchase the Products.
18 Such advertisements have deceived and are likely to deceive the consuming public, in violation of
19 Business & Professions Code § 17500.

20 74. Furthermore, Defendant publicly disseminated the false and misleading advertisements
21 as part of a plan or scheme and with the intent to sell unproven and ineffective products.

22 75. Plaintiff and the members of the Class have suffered harm as a result of these violations
23 of the FAL because they have incurred charges and/or paid monies for the Products that they otherwise
24 would not have incurred or paid.

25 76. Defendant are aware, or by the exercise of reasonable care should have been aware, that
26 the representations were untrue or misleading and that such conduct is in violation of the current
27 injunction.
28

1 77. Plaintiff and the members of the Class have suffered injury in fact and have lost money
2 as a result of Defendant's false representations and false advertising.

3 78. Pursuant to Business & Professions Code § 17535, Plaintiff and the members of the
4 putative Class seek an order of this Court enjoining Defendant from continuing to engage, use, or
5 employ their practice of advertising the Products.

6 79. Likewise, Plaintiff and the members of the putative Class seek an order requiring
7 Defendant to disclose such misrepresentations, and additionally request an order awarding Plaintiff and
8 other members of the putative class restitution of the money wrongfully acquired by Defendants by
9 means of responsibility attached to Defendants' failure to disclose the existence and significance of
10 said misrepresentations.

11 **THIRD CAUSE OF ACTION**

12 **VIOLATION OF CALIFORNIA LEGAL REMEDIES ACT**
13 **(CAL. CIV. CODE § 1750 et seq.)**

14 79. Plaintiff incorporates by this reference the allegations contained in the preceding
15 paragraphs as if fully set forth herein.

16 80. Plaintiff brings this claim individually and on behalf of the proposed Class against
17 Defendants.

18 80. Plaintiff is a consumer as defined by California Civil Code § 1761(d). The Products are
19 a goods within the meaning of the Act. Specifically, prior to the filing of this action, as alleged herein,
20 Plaintiff purchased the Products for her own personal use. In so doing, Plaintiff relied upon the
21 representations referenced above. Plaintiff would not have purchased the Product, nor would she have
22 paid the price that she did, had she known that it contained a prostaglandin associated with a variety of
23 side effects and health risks, and is sold in California in violation of California's Sherman Food Drug
24 and Cosmetic Law as an unlawful drug.

25 81. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact and has
26 lost money or property as a result of Defendants' actions as set forth herein.

27 82. Plaintiff has concurrently filed the declaration of venue required by Civil Code
28 §1780(d) with this complaint.

1 83. Defendants have violated and continue to violate the CLRA by engaging in the
2 following practices proscribed by California Civil Code §1770(a) in transactions with Plaintiff and the
3 Class which were intended to result in, and did result in, the sale of the Products:

4 §1770(a) (5) Representing that [The Product(s) have] ... characteristics, ... uses [or]
5 benefits ... which [it does] not have

6 §1770(a) (7) Representing that [the Product(s) are] of a particular standard, quality or
7 grade ... if [it is] of another.

8 1770(a) (9)) “Advertising goods...with intent not to sell them as advertised”.

9 84. Defendants violated the CLRA by representing through its advertisements. Packaging,
10 and labeling of the Products as described above, when they knew, or should have known, that the
11 representations and advertisements were false and misleading.

12 85. Plaintiff and the members of the putative Class have each been directly and proximately
13 injured by the conduct of Defendants, and such injury includes payment for units of the Products they
14 purchased.

15 86. Defendants’ wrongful business practices constituted, and constitute, a continuing course
16 of conduct in violation of the CLRA. Pursuant to Civil Code § 1782(d), plaintiff and the Class seek a
17 Court order enjoining the above-described wrongful acts and practices of Defendants along with any
18 other conduct found by the Court to be illegal, fraudulent, misleading, unlawful, unfair and/or
19 deceptive conduct.

20 87. Plaintiff engaged counsel to prosecute this action and is entitled to recover costs and
21 reasonable attorney’s fees according to proof at trial.

22 **FOURTH CAUSE OF ACTION**

23 **UNJUST ENRICHMENT**

24 88. Plaintiff incorporates by this reference the allegations contained in the preceding
25 paragraphs as if fully set forth herein.

26 89. Plaintiff brings this claim individually and on behalf of the proposed Class against
27 Defendants.

28 90. Plaintiff and members of the Class conferred a monetary benefit on Defendants.

1 Defendants received and retained money by selling the Products to Plaintiff and the Class.

2 91. This information was collected from Plaintiff and the Class without authorization and
3 through deceptive business practices.

4 92. Under principles of equity and good conscience, Defendants should not be permitted to
5 retain the money obtained by selling the Products to Plaintiff and members of the Class, which
6 Defendant has unjustly obtained as a result of their unlawful and deceitful actions.

7 93. Accordingly, Plaintiff and the Class seek full disgorgement and restitution of any
8 money Defendant has retained as a result of the unlawful and/or wrongful conduct alleged herein.

9
10 **FIFTH CAUSE OF ACTION**

11 **BREACH OF WARRANTY**

12 94. Plaintiff incorporates by this reference the allegations contained in the preceding
13 paragraphs as if fully set forth herein.

14 95. Plaintiffs incorporate by this reference the allegations contained in the preceding
15 paragraphs as if fully set forth herein.

16 96. Plaintiffs bring this claim individually and on behalf of the proposed Class against
17 Defendant.

18 97. Defendant, as the manufacturer, marketer, distributor, and/or seller, expressly warranted
19 that the Products are intended and are safe to use as described above.

20 98. Defendant's express and implied warranties, and its affirmations of fact and promises
21 made to Plaintiff and Class members regarding the Products became part of the basis of the bargain
22 between Defendant and Plaintiff and the Class, thereby creating express and implied warranties that
23 the Products would conform to those affirmations of fact, representations, promises, and descriptions.

24 99. The Products do not conform to those warranties because the representations are false
25 or misleading.

26 100. As a direct and proximate cause of Defendant's breach of warranties, Plaintiff and Class
27 members have been injured and harmed because: (a) they would not have purchased the Products on
28 the same terms if they knew the truth about the Products; (b) they paid a substantial price premium

1 based on Defendant's warranties; and (c) the Products do not have the characteristics, uses, or benefits
2 as promised.

3 101. Plaintiffs mailed a pre-suit notice letter to Defendant consistent with Cal. Com. Code §
4 2607(3)(a) and U.C.C. 2-607(3)(A). The letter was sent on behalf of Plaintiff and all other persons
5 similarly situated.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiff, on behalf of herself and as representative of all other persons
8 similarly situated, prays for judgment against Defendant, as follows:

9 1. An order certifying that the action may be maintained as a Class Action;

10 2. An order permanently enjoining Defendant from pursuing the policies, acts, and
11 practices complained of herein;

12 3. An order requiring Defendant to pay restitution and all other forms of equitable
13 monetary relief;

14 4. An order requiring Defendant to pay compensatory, statutory, and punitive damages in
15 amounts to be determined by the Court and/or jury;

16 5. For pre-judgment interest from the date of filing this suit;

17 6. For reasonable attorneys' fees;

18 7. Costs of this suit; and,

19 8. Such other and further relief as the Court may deem necessary and appropriate.

20
21 DATED: October 10, 2023

FARNESE P.C.

22 By: 

23 Peter J. Farnese

24 Attorneys for Plaintiff


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26 **DEMAND FOR JURY TRIAL**

27 Plaintiff hereby demands a jury trial on all issues so triable.
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DATED: October 10, 2023

FARNESE P.C.

By: 
Peter J. Farnese

Attorneys for Plaintiff