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20 *Attorneys for Plaintiff*  
21 *and the Proposed Classes*

22 **UNITED STATES DISTRICT COURT**  
23 **EASTERN DISTRICT OF NORTH CAROLINA**

24 DANIEL DUFFEY, individually and  
25 on behalf of all others similarly  
26 situated,

27 Plaintiff,

28 vs.

ARCADIA CONSUMER  
HEALTHCARE INC., a Delaware  
corporation,

Defendant.

Case No.: 5:25-cv-00652-M-RJ

**AMENDED CLASS ACTION**

**COMPLAINT**

**DEMAND FOR JURY TRIAL**

1 Plaintiff DANIEL DUFFEY, individually and on behalf of all others  
2 similarly situated, bring this action based upon personal knowledge, and as to all  
3 other matters upon information and belief, based upon, *inter alia*, the investigation  
4 of their attorneys.

### 5 NATURE OF THE ACTION

6 1. Defendant Arcadia Consumer Healthcare Inc. is a corporation  
7 headquartered in Bridgewater, New Jersey, that, among other things, manufactures  
8 and sells consumer healthcare products.

9 2. Defendant sells to retailers for resale certain healthcare products,  
10 including products for hair and scalp care, digestive health, vitamins, minerals, and  
11 supplements, first aid, oral care, cough and cold, and foot care.<sup>1</sup> Among Defendant's  
12 most successful products is its line of Fungi-Nail products sold in Pen, Ointment,  
13 and Liquid form (the "Fungi-Nail products"). Fungi-Nail products are sold by  
14 dozens of retailers throughout North Carolina and across the United States.

15 3. Many consumers, including Plaintiff, bought the Fungi-Nail products  
16 for the purpose of treating nail fungus, based on the product's name and other



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28 <sup>1</sup> Defendant categorizes the Fungi-Nail products in its "foot care" line of products, as do retailers. See <https://arcadiach.com/foot-care/> (last accessed Dec. 6, 2024).



11 advertising that suggests that the product is intended to treat, and effective at  
12 treating nail fungus.<sup>2</sup>

13 4. However, after buying the products based on the false impression that  
14 it “CURE[S] AND PREVENT[S]” “NAIL” “FUNGI” with “MAXIMUM  
15 STRENGTH” efficacy and applying it to their nails, consumers do not experience  
16 any improvement in their health as it relates to the presence of nail fungus.

17 5. Despite the name “Fungi-Nail,” which suggests that the products are  
18 intended to treat, and effective at treating nail fungus, the products contain fine print  
19 on a back label disclaimer indicating that the product is *not* meant to treat nail  
20 fungus, nor is it effective at doing so.<sup>3</sup>

21 6. Defendant was aware that many consumers do not read some of the  
22 products’ back label fine print that disclaims the name’s assertion and other front-  
23 label representations, and was aware its Fungi-Nail products have no ability to treat  
24 nail fungus, yet it proceeded to make those claims on the products’ front labels,  
25 creating the clear impression that such treatment is possible. The product labels are  
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27 <sup>2</sup> As the graphics make clear, the misleading representations are substantially similar on the packaging for the liquid,  
pen and spray.

28 <sup>3</sup> See, e.g., <https://funginail.com/faqs/why-does-the-fungi-nail-labeling-say-not-effective-on-nails-and-scalp-if-it-is-called-fungi-nail/> (last accessed Dec. 6, 2024).

1 therefore materially misleading by plainly giving the impression that they treat nail  
2 fungus. Hundreds of thousands of consumers have purchased these products with  
3 the false belief that they treat nail fungus. Because the Fungi-Nail products do not  
4 and cannot treat nail fungus, purchasing consumers have been misled.

5 7. As a result of Defendant’s deceptive and misleading practices, Plaintiff  
6 and the Class members were induced to purchase Fungi-Nail products that do not  
7 perform as advertised. Defendant has made millions of dollars in fraudulent sales  
8 to individuals who Defendant told were receiving a product that is capable of  
9 treating nail fungus. Defendant’s customers did not receive the benefit of their  
10 bargain because the Fungi-Nail products do not treat nail fungus.

### 11 THE PARTIES

12 8. Plaintiff Daniel Duffey (“Duffey”) is a North Carolina citizen residing  
13 in Goldsboro, North Carolina. In February and July or August 2025, Plaintiff  
14 Duffey purchased two one-ounce bottles of Maximum Strength Fungi-Nail Anti-  
15 Fungal Liquid from Walgreens located at 2606 E. Ash Street, at the corner of  
16 Berkeley Boulevard, Goldsboro, NC 27534, for approximately \$19.99 each. Since  
17 purchase, Plaintiff Duffey has regularly applied the product to his nails as directed,  
18 with no improvement to the nail fungus condition.

19 9. Plaintiff Duffey would not have purchased Defendant’s Fungi-Nail  
20 products if he knew that Fungi-Nail does not treat nail fungus.

21 10. Plaintiff now knows that Fungi-Nail, in its current formulation, does  
22 not treat nail fungus. Going forward, Plaintiff will frequently visit stores that sell  
23 Fungi-Nail products. Plaintiff, who suffered chronic nail fungus issues, are at risk  
24 of future deception with Fungi-Nail products, because in the future he may  
25 reasonably, but incorrectly, assume the products have been improved to treat nail  
26 fungus, and might purchase a falsely labeled Fungi-Nail product again.

27 11. Defendant Arcadia Consumer Healthcare Inc. (“Arcadia”) is a  
28 Delaware corporation with its principal offices located in Bridgewater, New Jersey.

1 Arcadia does substantial business, including selling its health products, in North  
2 Carolina, and in the Eastern District specifically.

### 3 JURISDICTION AND VENUE

4 12. This Court has jurisdiction over this class action pursuant to the Class  
5 Action Fairness Act, 28 U.S.C. § 1332(d)(2). Plaintiff, North Carolina citizen,  
6 brings this action on behalf of a proposed class of similarly situated individuals  
7 against Defendant, a corporation incorporated and with its principal place of  
8 business outside the State of North Carolina. The amount in controversy exceeds  
9 \$5,000,000, and the proposed class includes more than 100 members.

10 13. Venue is appropriate in the Eastern District under 28 U.S.C. § 1391  
11 because, among other things: (a) Plaintiff resides within the Eastern District; (b)  
12 Plaintiff purchased the product in the Eastern District; and (c) many of the acts and  
13 omissions that give rise to the claims for relief alleged in this action took place in  
14 the Eastern District.

### 15 FACTUAL ALLEGATIONS

16 14. Plaintiff is an individual who purchased Fungi-Nail products from  
17 Walgreens located at 2606 E. Ash Street, at the corner of Berkeley Boulevard,  
18 Goldsboro, NC 27534, for approximately \$19.99 each. When Plaintiff purchased  
19 the product, the product's name "Fungi-Nail" suggested that it is a healthcare  
20 product intended for the medical treatment of nail fungus. In addition, the front label  
21 reads in font marked by a bright red checkmark in a silver box "Kills Fungus"  
22 ("front label claim").

23 15. On some versions of the products' back labels in fine print stating:  
24 "For athlete's foot and ringworm, use daily for 4 weeks. For athlete's foot, pay  
25 special attention to spaces between toes. If condition persists longer, consult a  
26 doctor. **This product is not effective on the scalp or nails.** Supervise children in  
27 the use of this product." (Bold added) ("back label disclaimer"). Plaintiff did not  
28 read this disclaimer. Further, a reasonable consumer who read this language would

1 not understand it to negate the front-label promise—the name of the product  
2 “Fungi-Nail,” which suggests that the product is used to treat nail fungus. At most,  
3 if a reasonable consumer read the disclaimer language (most consumers, like  
4 Plaintiff, would not), they might understand the language to suggest that the  
5 disclaimer relates to *fingernails*, not toenails, given that the product is found in the  
6 foot care section.

7 16. Plaintiff read these statements on the product labels and relied on them  
8 when purchasing the products. Plaintiff believed that the claim “Kills Fungus” for  
9 a product named “Fungi-Nail” that the product kills all fungus, including, and  
10 especially, nail fungus, including toenail fungus.

11 17. The statement created a false impression. As Arcadia admits, the  
12 product does not kill nail fungus.

13 18. Plaintiff purchased product believing that it would kill nail fungus.  
14 They applied the product continuously over a period of several months with no  
15 improvement to the fungus on their toenails. Plaintiff received a product that was  
16 in fact proven to not kill nail fungus. Plaintiff did not get the product that was  
17 advertised.

### 18 CLASS ACTION ALLEGATIONS

19 19. Plaintiff brings this action on her own behalf and pursuant to Federal  
20 Rule of Civil Procedure 23. Plaintiff intends to seek certification of two classes  
21 defined as follows (collectively “the Classes” or “the Class members”):

22 The North Carolina Class: All persons residing in the State of North  
23 Carolina who purchased the Fungi-Nail products during the period  
24 beginning four years from the date of the filing of the original  
25 Complaint to the date of class certification.

26 The Nationwide Class: All persons residing in the United States who  
27 purchased the Fungi-Nail products during the period beginning four  
28 years from the date of the filing of the original Complaint to the date  
of class certification.

1  
2 20. Excluded from the Classes are: (a) Defendant, including any entity in  
3 which the Defendant has a controlling interest, is a parent or a subsidiary of, or  
4 which is controlled by Defendant; (b) the officers, directors, and legal  
5 representatives of Defendant; and (c) the judge and the court personnel in this case  
6 as well as any members of their immediate families. Plaintiff reserves the right to  
7 amend the definition of the Class(es) if discovery, further investigation and/or  
8 rulings by the Court dictate that it should be modified.

9 21. *Numerosity*. The members of the Classes are so numerous that the  
10 joinder of all Class members is impractical. While the exact number of Class  
11 members is unknown to Plaintiff at this time, given the amount of Defendant's  
12 Fungi-Nail products sold in North Carolina, it stands to reason that the number of  
13 Class members is at least in the thousands. Class members are readily identifiable  
14 from information and records in Defendant's possession, custody, or control, such  
15 as account information and sales records.

16 22. *Commonality and Predominance*. There are questions of law and fact  
17 common to Class members, which predominate over any questions affecting only  
18 individual Class members. These common questions of law and fact include,  
19 without limitation:

- 20 a. Whether Defendant's products contain the name "Fungi-Nail" and  
21 whether the products' labels' contain the claim "Kills Fungus";  
22 b. Whether Defendant's product labeling created the impression among  
23 their customers that their product would kill nail fungus;  
24 c. Whether a reasonable person would have read the statements "Fungi-  
25 Nail" and "Kills Fungus" and any accompanying language to mean  
26 that the products had been scientifically proven to kill nail fungus;  
27 d. Whether the "ANTI-FUNGAL" product kills nail fungus;  
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- 1 e. Whether it has been scientifically proven that the product kills nail
- 2 fungus;
- 3 f. Whether Defendant knew or should have known that it had not been
- 4 scientifically proven that the product fails to kill nail fungus;
- 5 g. Whether Defendant knew or should have known that the products do
- 6 not kill nail fungus;
- 7 h. The nature of the relief, including equitable relief, to which Plaintiff
- 8 and Class members are entitled; and
- 9 i. Whether Plaintiff and Class members are entitled to damages, and/or
- 10 injunctive relief.

11 23. *Typicality*. Plaintiff’s claims are typical of those of other Class  
12 members because Plaintiff, like the other Class members, purchased “Fungi-Nail”  
13 products that claimed, “Kills Fungus,” but would not in fact kill nail fungus.

14 24. *Adequacy of Representation*. Plaintiff will fairly and adequately  
15 represent and protect the interests of the Class members. Plaintiff has retained  
16 competent counsel experienced in litigation of class actions, including consumer  
17 class actions, and Plaintiff intends to prosecute this action vigorously. Plaintiff and  
18 Class members have a unified and non-conflicting interest in pursuing the same  
19 claims and obtaining the same relief. Therefore, all Class members will be fairly  
20 and adequately represented by Plaintiff and his counsel.

21 25. *Superiority of Class Action*. A class action is superior to other available  
22 methods for the fair and efficient adjudication of the claims alleged in this action.  
23 The adjudication of this controversy through a class action will avoid the possibility  
24 of inconsistent and potentially conflicting adjudications of the asserted claims.  
25 There will be no difficulty in the management of this action as a class action, and  
26 the disposition of the claims of the Class members in a single action will provide  
27 substantial benefits to all parties and to the Court. Damages for any individual Class  
28 member are likely insufficient to justify the cost of individual litigation so that, in

1 the absence of class treatment, Defendant’s violations of law inflicting substantial  
2 damages in the aggregate would go un-remedied.

3 26. Class certification is also appropriate because Defendant has acted or  
4 refused to act on grounds generally applicable to the Class members, such that final  
5 injunctive relief or corresponding declaratory relief is appropriate as to the Class as  
6 a whole.

7 **FIRST CAUSE OF ACTION**

8 **(Fraud)**

9 **(North Carolina Class and Nationwide Class)**

10 27. Plaintiff repeats and incorporates herein by reference each and every  
11 allegation above if set forth fully herein.

12 28. Defendant made affirmative statements on the Product’s front label  
13 and in uniform marketing, including “Kills Fungus,” together with the product  
14 name “Fungi-Nail.” These statements conveyed that the Product kills nail and  
15 toenail fungus. These are the “Challenged Representations.”

16 29. The Challenged Representations were false. The Product is not capable  
17 of killing nail fungus as represented.

18 30. When making the Challenged Representations, Defendant knew they  
19 were false or acted with reckless disregard for the truth, intending to induce  
20 consumers to purchase at the price charged. Defendant possessed and reviewed  
21 information showing the Product is not effective against nail fungus, including  
22 internal testing and development records, ingredient specifications that do not  
23 achieve fungicidal activity in the nail plate, regulatory materials governing  
24 permissible antifungal claims, and consumer complaint data regarding lack of effect  
25 on nail fungus.

26 31. Defendant also committed fraud by omission. Having chosen to speak  
27 about antifungal performance on the front label, Defendant had a duty to disclose  
28 material facts needed to make those statements not misleading. Defendant failed to

1 disclose, clearly and conspicuously and at the point of sale, that the Product does  
2 not kill nail fungus. Defendant possessed superior and exclusive knowledge of this  
3 material fact that was not reasonably available to consumers and intended that  
4 consumers, including Plaintiff Duffey, rely on the misleading half-truth.

5 32. Defendant intended that consumers, including Plaintiff Duffey, rely on  
6 the Challenged Representations and omissions to purchase the Product and to pay  
7 the price charged.

8 33. Particulars of the fraud, what. The Challenged Representations include  
9 the front-label statement “Kills Fungus,” the “Fungi-Nail” name, and substantially  
10 similar uniform claims that conveyed nail fungus efficacy. The omitted fact is that  
11 the Product does not kill nail fungus and does not treat onychomycosis.

12 34. Particulars of the fraud, when. The Challenged Representations and  
13 omissions occurred during the class period. For Plaintiff Duffey, they occurred in  
14 February and July or August 2025.

15 35. Particulars of the fraud, where. The Challenged Representations  
16 appeared on the Product’s front label and at the point of sale in North Carolina,  
17 including at Walgreens located at 2606 E. Ash Street, at the corner of Berkeley  
18 Boulevard, Goldsboro, NC 27534.

19 36. How the statements and omissions were fraudulent. The statements  
20 communicated nail fungus efficacy that the Product does not possess. Any contrary  
21 information, if present, was not clear and conspicuous on the front label and did not  
22 cure the overall message at the point of purchase. Defendant knew these facts and  
23 remained silent about them to induce purchases.

24 37. Plaintiff Duffey saw and read the front-label “Kills Fungus” statement  
25 and the “Fungi-Nail” name before purchasing 2 Fungi-Nail 1 ounce liquid for about  
26 \$19.99 each in February and July or August 2025 from Walgreens located at 2606  
27 E. Ash Street, at the corner of Berkeley Boulevard, Goldsboro, NC 27534. 2025.  
28 She relied on the Challenged Representations and the absence of a clear disclosure

1 that the Product does not kill nail fungus on the front-label. She would not have  
2 purchased the Product, or would have paid less, had the truth been disclosed.

3 38. Plaintiff Duffey’s reliance was reasonable. The Challenged  
4 Representations appeared on the front label as factual performance claims. No clear  
5 front-label qualification corrected the misleading message.

6 39. As a direct and proximate result of Defendant’s fraud, Plaintiff Duffey  
7 suffered damages. She paid a price premium over the Product’s true value and paid  
8 money for a Product that lacked the represented ability to kill nail fungus.

9 40. Plaintiff Duffey seeks rescission or a reduction of the price, together  
10 with damages measured by the difference between the price paid and the value  
11 received, and any other loss proximately caused by the fraud.

12 41. Plaintiff Duffey also seeks punitive damages for Defendant’s willful  
13 and wanton misconduct, along with pre- and post-judgment interest and costs, and  
14 all further relief the Court deems just and proper.

15 **SECOND CAUSE OF ACTION**  
16 **(Fraudulent Concealment and Omission)**

17 42. Plaintiff repeats and incorporates herein by reference each and every  
18 allegation above if set forth fully herein.

19 43. Defendant made affirmative statements on the Product’s front label  
20 and in uniform marketing, including “Kills Fungus,” together with the product  
21 name “Fungi-Nail.” These statements conveyed that the Product kills nail and  
22 toenail fungus. These are the “Challenged Representations.”

23 44. Defendant omitted and concealed material facts necessary to make the  
24 Challenged Representations not misleading. The omitted facts include that the  
25 Product does not kill nail fungus and does not treat onychomycosis.

26 45. A duty to speak arose because Defendant chose to speak about  
27 antifungal performance and created a half-truth that would mislead without full  
28 disclosure. A duty to speak also arose because Defendant possessed superior

1 knowledge of material facts not readily available to consumers and knew that  
2 consumers, including Plaintiff, were acting on the basis of mistaken knowledge  
3 created by the front label.

4 46. Defendant knew the omitted facts or acted with reckless disregard for  
5 the truth and intentionally concealed those facts to obtain an unjust advantage and  
6 to cause consumers to purchase the Product at the price charged.

7 47. Defendant intended that consumers, including Plaintiff, rely on the  
8 misleading half-truth created by the Challenged Representations and the omission  
9 of contrary information.

10 48. Defendant made and approved the Challenged Representations and  
11 withheld the omitted facts.

12 49. The front-label statement “v,” the “Fungi-Nail” name, and  
13 substantially similar claims conveyed nail fungus efficacy. The omitted facts are  
14 that the Product does not kill nail fungus and is ineffective for onychomycosis.

15 50. Defendant made these statement during the class period, including  
16 Plaintiff’s purchase in February and July or August 2025.

17 51. The statements were on the Product’s principal display panel and at  
18 the point of sale in North Carolina, including at Walgreens located at 2606 E. Ash  
19 Street, at the corner of Berkeley Boulevard, Goldsboro, NC 27534.

20 52. The front label communicated nail fungus efficacy that the Product  
21 does not possess. Any contrary information, if present, was not clear and  
22 conspicuous at the point of purchase and did not correct the overall message.  
23 Defendant’s silence about the omitted facts rendered the label misleading.

24 53. Plaintiff saw and read the front-label “Kills Fungus” statement and the  
25 “Fungi-Nail” name before purchasing 2 Fungi-Nail 1 ounce liquid for about \$19.99  
26 each in February and July or August 2025 from Walgreens located at 2606 E. Ash  
27 Street, at the corner of Berkeley Boulevard, Goldsboro, NC 27534. Plaintiff was  
28 not given a clear disclosure of the omitted facts. Plaintiff relied on the omission and

1 the misleading half-truth and would not have purchased, or would have paid less,  
2 had the truth been disclosed.

3 54. Plaintiff's reliance was justifiable because the challenged claim  
4 appeared on the front label as a factual performance statement and there was no  
5 clear front-label qualification that corrected it.

6 55. As a direct and proximate result of Defendant's fraudulent  
7 concealment and omission, Plaintiff suffered damages, including a price premium  
8 and other out-of-pocket losses measured by the difference between the price paid  
9 and the value of the Product without the represented attribute.

10 56. Plaintiff seeks rescission or price reduction, compensatory damages,  
11 punitive damages for willful and wanton misconduct, pre- and post-judgment  
12 interest, costs, and all further relief the Court deems just and proper.

13 **THIRD CAUSE OF ACTION**

14 **(Negligent Misrepresentation (pled in alternative to fraud))**

15 **(North Carolina Class)**

16 57. Plaintiff repeats and incorporates herein by reference each and every  
17 allegation above if set forth fully herein.

18 58. Defendant had a duty to use reasonable care in communicating  
19 information about the Product's performance and efficacy to consumers. A special  
20 relationship existed for purposes of this claim because Defendant, in the course of  
21 its business, possessed and communicated superior knowledge about the Product's  
22 efficacy directly to consumers through uniform labeling and point-of-sale  
23 marketing with the intent that consumers rely on it, and Plaintiff was a known and  
24 intended end-user of that information. Defendant's peculiar knowledge of  
25 nonpublic facts about nail-fungus efficacy and consumers' inability to verify those  
26 facts before purchase further supports this duty.

27 59. Defendant made the "Kills Fungus" representation without reasonable  
28 care or competence to verify its truth. Defendant should have known the statement

1 was false or misleading based on information available to it, including testing,  
2 ingredient specifications that do not achieve fungicidal activity in the nail plate,  
3 regulatory materials, and complaint data.

4 60. Defendant supplied false information in the course of its business for  
5 the guidance of consumers in purchasing decisions, failed to exercise reasonable  
6 care in obtaining or communicating the information, and Plaintiff justifiably relied  
7 to his detriment.

8 61. Defendant intended or expected consumers, including Plaintiff, to rely  
9 on the representation in deciding whether to purchase and how much to pay.

10 62. Plaintiff saw the statement at Walgreens located at 2606 E. Ash Street,  
11 at the corner of Berkeley Boulevard, Goldsboro, NC 27534., relied on it, and  
12 purchased the Products for about \$19.99 each.

13 63. Plaintiff suffered pecuniary loss as a direct and proximate result,  
14 including a price premium and out-of-pocket loss.

15 64. Plaintiff seeks damages and all other relief allowed.

16 **FOURTH CAUSE OF ACTION**

17 **(Unfair and Deceptive Trade Practices; N.C. Gen. Stat. § 75-1.1, relief under**  
18 **§§ 75-16 and 75-16.1)**

19 65. Plaintiff repeats and incorporates herein by reference each and every  
20 allegation above if set forth fully herein.

21 66. Defendant engaged in unfair and deceptive acts in or affecting  
22 commerce in North Carolina by labeling and advertising the Product with the  
23 uniform front-label statement “Kills Fungus” together with “Fungi-Nail,” which  
24 was likely to mislead reasonable consumers and did mislead Plaintiff.

25 67. The Product is not capable of killing nail fungus as represented, which  
26 made the labeling false or misleading and deceptive.

27 68. Plaintiff purchased 2 Fungi-Nail 1 ounce liquid products in February  
28 and July or August 2025 saw the front label, and would not have purchased, or

1 would have paid less, had the truth been disclosed.

2 69. Plaintiff suffered actual injury in the form of a price premium and out-  
3 of-pocket loss measured by the difference between the price paid and the value  
4 received without the represented attribute.

5 70. A violation of § 75-1.1 entitles Plaintiff to recover actual damages  
6 trebled under § 75-16, together with reasonable attorneys' fees under § 75-16.1  
7 where the statutory standard is met. Plaintiff seeks injunctive relief that halts the  
8 deceptive labeling.

9 **FIFTH CAUSE OF ACTION**

10 **(Breach of Express Warranty; N.C. Gen. Stat. § 25-2-313)**

11 **(North Carolina Class)**

12 71. Plaintiff repeats and incorporates herein by reference each and every  
13 allegation above if set forth fully herein.

14 72. Defendant made affirmations of fact and promises on the label and in  
15 marketing that "Kills Fungus," together with "Fungi-Nail." These statements  
16 became part of the basis of the bargain.

17 73. The Product did not conform to the affirmations of fact, because it is  
18 not capable of killing nail fungus.

19 74. Plaintiff purchased 2 Fungi-Nail 1 ounce liquid for about \$19.99 each  
20 in February and July or August 2025 from Walgreens located at 2606 E. Ash Street,  
21 at the corner of Berkeley Boulevard, Goldsboro, NC 27534. in reliance on the  
22 express warranty.

23 75. Notice. Plaintiff provided, or Defendant otherwise received,  
24 reasonable notice of breach within a reasonable time after discovery, including  
25 through pre-suit communications and through service of this complaint, and  
26 Defendant had a fair opportunity to cure but failed to do so.

27 76. Any attempt to disclaim or limit the express warranty is ineffective  
28 because it conflicts with specific affirmations on the principal display panel and is

1 not clear and conspicuous.

2 77. Plaintiff seeks damages measured by the difference between the value  
3 of the goods as warranted and the value as received, incidental or consequential  
4 damages where allowed, and pre- and post-judgment interest and costs.

5  
6 **SIXTH CAUSE OF ACTION**

7 **(Breach of Implied Warranty of Merchantability;**

8 **N.C. Gen. Stat. § 25-2-314)**

9 **(North Carolina Class)**

10 78. Plaintiff repeats and incorporates herein by reference each and every  
11 allegation above if set forth fully herein.

12 79. Defendant is a merchant with respect to goods of this kind. An implied  
13 warranty of merchantability arose that the goods would be fit for the ordinary  
14 purposes for which such goods are used and would pass without objection in the  
15 trade.

16 80. The Product was not merchantable at the time of sale because it did  
17 not perform as an over-the-counter antifungal that kills nail fungus and did not  
18 conform to affirmations on the label and container.

19 81. Plaintiff purchased 2 Fungi-Nail 1 ounce liquid for about \$19.99 each  
20 in February and July or August 2025 from Walgreens located at 2606 E. Ash Street,  
21 at the corner of Berkeley Boulevard, Goldsboro, NC 27534.

22 82. To the extent privity is required for economic loss on implied warranty  
23 against the manufacturer, Plaintiff alleges third-party beneficiary status and a  
24 direct-to-consumer labeling and warranty scheme intended to form the basis of the  
25 bargain with the ultimate purchaser. Plaintiff reserves the right to add the retail  
26 seller upon amendment.

27 83. This claim is asserted in the alternative against the manufacturer.  
28 Plaintiff alleges vertical privity through a direct-to-consumer warranty and labeling

1 scheme intended to form the basis of the bargain with end-users, and as a third-  
2 party beneficiary of the contracts between Defendant and its authorized retailers.  
3 To the extent the Court finds privity lacking for purely economic loss, Plaintiff  
4 reserves the right to pursue this claim against the retail seller upon amendment.

5 84. Plaintiff provided, or Defendant otherwise received, reasonable notice  
6 of breach within a reasonable time after discovery and failed to cure.

7 85. Plaintiff seeks damages and incidental or consequential damages as  
8 provided by statute, with pre- and post-judgment interest and costs.

9 **SEVENTH CAUSE OF ACTION**

10 **(Unjust Enrichment; Pled in the alternative)**

11 **(North Carolina Class)**

12 86. Plaintiff repeats and incorporates herein by reference each and every  
13 allegation above if set forth fully herein.

14 87. Plaintiff conferred a direct monetary benefit on Defendant by paying  
15 about \$10 for the 1-ounce Product.

16 88. Defendant appreciated and retained that benefit.

17 89. It would be inequitable for Defendant to retain the benefit because the  
18 Product did not possess the represented performance attribute and the price included  
19 a premium attributable to the “Kills Fungus” claim.

20 90. Plaintiff lacks an adequate remedy at law to the extent legal remedies  
21 do not fully restore the benefit unjustly retained.

22 91. Plaintiff seeks restitution and disgorgement equal to the amount  
23 unjustly retained, with interest and costs.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff, individually and on behalf of the Class, pray for  
26 relief as follows:

27 (1) For compensatory damages in an amount to be proven at trial;

28 (2) For restitutionary damages in an amount to be proven at trial;

- 1 (3) Disgorgement of all monies by which Defendant was unjustly enriched
- 2 through the sale of the mislabeled Product;
- 3 (4) Treble damages where available under N.C. Gen. Stat. § 75-16;
- 4 (5) For affirmative injunctive relief mandating that Defendant remove the false
- 5 advertisements from their product and product packaging;
- 6 (6) For costs of suit and litigation expenses;
- 7 (7) Reasonable attorneys' fees as allowed by § 75-16.1
- 8 (8) The establishment of a constructive trust or common fund for the benefit of
- 9 the Class, as the Court finds appropriate;
- 10 (9) Pre- and post-judgment interest, costs, and any further equitable relief the
- 11 Court deems just and proper;
- 12 (10) For Punitive damages to the extent allowed for the common-law fraud
- 13 counts;
- 14 (11) For such other and further relief as this Court may deem just and
- 15 proper.

16 **DEMAND FOR JURY TRIAL**

17 Plaintiff, on behalf of themselves and all others similarly situated, hereby

18 demands a jury trial for all claims so triable.

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20 Dated: January 5, 2026

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23 *[SIGNATURE TO FOLLOW]*

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/s/ Daquan Blyther

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