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A Limited Liability Partnership
Including Professional Corporations
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LILIA PERKINS, on behalf of herself
and all others similarly situated,

Plaintiff,

v.

PHILIPS ORAL HEALTHCARE, INC.,
a Washington Corporation; PHILIPS
ELECTRONICS NORTH AMERICA
CORPORATION, a Delaware
Corporation; and DOES 1 through 20,
inclusive.

Defendants.

CASE NO.: 12CV1414H (BGS)

CLASS ACTION

FIRST AMENDED COMPLAINT FOR:

1. **Breach of Express Warranty (Cal. Com. Code §2313)**
2. **Unlawful Business Practice in Violation of Bus. & Prof. Code §17200, et seq.**
3. **False and Misleading Advertising in Violation of Bus. & Prof. Code §17500, et seq.**
4. **Violation of the Consumer Legal Remedies Act (Civ. Code §1750 et seq.)**

DEMAND FOR JURY TRIAL

Lilia Perkins (“Plaintiff”), brings this Class Action against Philips Oral Healthcare, Inc. and Philips Electronics North America Corporation (collectively “Defendants”), on behalf of herself and all others similarly situated (the “Class”), and alleges as follows based upon information and belief and the investigation of her counsel:

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NATURE OF THE ACTION

1
2 1. This is a Class Action on behalf of individuals similarly situated within the State of
3 California for Breach of Express Warranty; California’s Unfair Competition Law, Business and
4 Professions Code § 17200, et seq. (“UCL”); California’s False Advertising Law, Business and
5 Professions Code § 17500, et seq. (“FAL”); and the Consumers Legal Remedies Act, Civil Code §
6 1750, et seq. (“CLRA”) as more fully defined herein, who purchased Philips Sonicare Airfloss. A
7 copy of the packaging and labels for the product are attached hereto as Exhibit 1.

8 2. In essence, Defendants have falsely advertised their product both on their packaging, on the
9 internet, on the website and in print and digital formats that their product is Floss and/or a
10 replacement for Floss. This can be seen even in the name of the product, which is the Philips
11 Sonicare AirFloss (“AirFloss”). Defendants have gone out of their way to establish that their
12 product makes the process of flossing ones teeth “easier”. Plaintiff, and any reasonable consumer,
13 is lead to believe that they can simply buy this product and use it in lieu of traditional string or tape
14 Floss.

15 3. However, AirFloss in not the same as traditional floss. Notably, the AirFloss product
16 cannot remove plaque that is in between the teeth the same way that traditional floss can. AirFloss
17 is simply an Oral Irrigator, which is known to be an adjunct to flossing. The AirFloss is inferior
18 and will not remove plaque, and the film that collects on teeth that attracts bacteria, from between
19 the teeth the same way that traditional Floss can.

20 4. In addition, Defendants did not do enough clinical testing to support their assertions that
21 their product is as effective as traditional string and tape Floss. Traditional string and tape Floss is
22 approved by the American Dental Association to effectively remove plaque from between teeth.
23 AirFloss simply cannot accomplish this in the same way that traditional Floss can. This fact is
24 contrary to representations made by Defendant.

FACTUAL ALLEGATIONS

25
26 5. Since at least 2011, Defendants have packaged, marketed, distributed and sold AirFloss as
27 either being “Floss”, a replacement for Floss to or better than Floss. In addition, Defendants have
28 failed to warn consumers that their product does not replace flossing, which is a recognized

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1 requirement for proper oral hygiene. The following representations appear on the packaging of the
2 product (Exhibit 1) as well as on the internet, including Defendants’ website, and in print
3 advertisements

- 4 A. “An Easier Way to Floss”;
- 5 B. “It’s probably the easiest way to floss in just 60 seconds”;
- 6 C. “Airfloss takes the hassle out of flossing so you can get a deep clean every day”; and
- 7 D. “**AirFloss**” (Presented on the package in a way that Air is bolder than the Floss)

8 6. The following representations were also made on the internet and in print media:

- 9 A. “Sonicare Airfloss Replaces Traditional Flossing With Micro Bursts of Water and
10 Air”; (*See* Exhibit 2).
- 11 B. Sonicare AirFloss is designed to make flossing easier, maximize plaque removal...”
- 12 C. “With Sonicare Airfloss, interdental cleaning has just been reinvented”;
- 13 D. “They’re calling it a game changer that will benefit virtually all their patients”;
- 14 E. “Sonicare AirFloss has been through meticulous clinical validation...”; and
- 15 F. "The reputation of the Sonicare brand is built on its research-based approach to
16 dental and oral care and AirFloss underwent the same rigorous clinical validation as
17 all Sonicare products".

18 7. Contained within Airfloss’ Clinical Booklet, titled, The Science Behind Airfloss, an
19 introduction page regarding Philips Sonicare Airfloss by Dr. Joerg Strate, Vice President, Philips
20 Oral Healthcare Clinical & Scientific Affairs, which states, “**Sonicare AirFloss replaces**
21 **traditional flossing** with micro busts of water and air”.
22 [http://www.philips.ch/consumerfiles/pageitems/master/categorypages/Airflosser2011/assets/downl](http://www.philips.ch/consumerfiles/pageitems/master/categorypages/Airflosser2011/assets/downloads/11-9514_AirFloss_Clinical_Booklet_IDS.pdf)
23 [oads/11-9514_AirFloss_Clinical_Booklet_IDS.pdf](http://www.philips.ch/consumerfiles/pageitems/master/categorypages/Airflosser2011/assets/downloads/11-9514_AirFloss_Clinical_Booklet_IDS.pdf) (Emphasis Added) (Accessed 5/29/12). *See*
24 Exhibit 2.

25 8. Ironically, Paul Jessen, marketing manager for Sonicare Dental Professional issued a
26 statement in an interview by DrBicuspid.com, “The Sonicare AirFloss is **not** designed to replace
27 string floss”.

28

1 <http://www.drbcuspids.com/index.aspx?sec=sup&sub=hyg&pag=dis&ItemID=308744>. (Emphasis
2 Added) (Accessed 6/7/12)

3 9. Peer review journals have recognized that Floss is still the best solution and that there is no
4 clear evidence that AirFloss compares to dental floss. The Journal of Clinical Dentistry describes
5 AirFloss as “a hand-held rechargeable device that utilizes air under pressure to deliver micro
6 droplets of water and air to the interdental area. The small reservoir holds two teaspoons of
7 water.” Consumers are instructed by Defendant to fill the reservoir to capacity with lukewarm
8 water, followed by “...placing the guiding tip between the teeth from the facial aspect and
9 activating the device by pushing the activation button at the interdental space.” Sharma, Naresh,
10 “Comparison of Two Power Interdental Cleaning Devices on Plaque Removal”, Journal of Clinical
11 Dentistry, vol. 23, No. 1, 2012, page 18. However, according to that same article, “Dental floss is
12 the most recommended interdental cleaning device...”. *Id.* at 19. In addition, “To date, there are
13 no full studies published in peer-reviewed journals on the efficacy of the AF [AirFloss] in reducing
14 clinical parameters or how it performs in comparison to dental floss”. *Id.* at 20.

15 10. The AirFloss does not have the American Dental Association (“ADA”) Seal of Acceptance.
16 Dentists and consumers have long recognized the ADA Seal of Acceptance as an important
17 symbol of a dental product’s safety and effectiveness. For more than 125 years, the ADA has
18 sought to promote safety and effectiveness of dental products. The ADA Seal of Acceptance
19 program began in 1930. In 1984, President Ronald Reagan gave the Association a certificate of
20 commendation for the outstanding self-regulatory efforts of its Seal program. Americans
21 recognize the ADA Seal of Acceptance as the gold standard when it comes to evaluating the safety
22 and efficacy of dental products. American Dental Association, ADA Seal of Acceptance Program
23 & Products (2012), <http://www.ada.org/sealprogramproducts.aspx> (Accessed 5/29/12)

24 11. According to the ADA website, “Not every product qualifies for the Seal.” “There are
25 certain requirements that must be met”. One requirement in particular requires a company
26 “Conduct clinical trials as need in strict compliance with ADA guidelines and procedures”.
27 American Dental Association, ADA Seal: Frequently Asked Questions (2012),
28 <http://www.ada.org/adasealfaq.aspx#seal> (Accessed 5/29/12).

1 12. The ADA has defined what Floss is:

2 Floss is usually made from nylon filaments or plastic monofilaments. It may be
3 treated with flavoring agents, such as mint, to make flossing more pleasant. Floss
4 removes food trapped between the teeth and removes the film of bacteria that forms
5 there before it has a chance to harden into plaque. Toothbrush bristles alone cannot
clean effectively between these tight spaces. American Dental Association, *Seal*
Product Glossary, with a link at: <http://www.ada.org/5666.aspx>. (Accessed 6/7/12)

6 13. The AirFloss is not Floss at all, but rather an **oral irrigator**, which is not a substitute for
7 flossing. According to the American Dental Association, as published in The Journal of the
8 American Dental Association, JADA, Vol. 133, Page 1587, Nov. 2002, Oral Irrigators are defined
9 as, “These devices direct a stream of water to remove particles of food from around and between
10 the teeth. They may be helpful to people with braces or fixed partial dentures. They are useful for
11 cleaning hard-to-reach areas and may help reduce gingivitis. However, **using an oral irrigator is**

12 **not a substitute for brushing and flossing.**”
13 http://www.ada.org/sections/scienceAndResearch/pdfs/patient_20.pdf. (Emphasis
14 added)(Accessed 5/29/12)

15 14. Alan Carr, D.M.D., who is a consultant in the Division of Prosthodontics and a professor of
16 dentistry at the Mayo Clinic College of Medicine opines that: “Standard dental floss is generally
17 considered the most effective tool for cleaning the tight spaces between the teeth. You can also
18 use dental floss to scrape up and down the sides of each tooth”. “A water pick (oral irrigator) is a
19 device that aims a stream of water at your teeth. A water pick can help remove food particles from
20 your teeth and might help reduce bleeding and gum disease – but it isn’t generally considered a
21 substitute from brushing and flossing.” <http://www.mayoclinic.com/health/dental-floss/AN01782>
22 (Accessed 5/29/12).

23 15. In addition, according to Johns Hopkins Medicine, “**Oral irrigators are *not* considered a**
24 **substitute for toothbrushing and flossing.** These devices may be effective around orthodontic
25 braces that retain food or in areas a toothbrush cannot reach. However, they do not remove plaque
26 that contains harmful bacteria”, Johns Hopkins Medicine Health Library, “Oral Health – Flossing”.
27 http://www.hopkinsmedicine.org/healthlibrary/conditions/adult/oral_health/flossing_85,P00879/.
28 (Emphasis added) (Accessed 5/29/12).

16. Perhaps the most damaging evidence that the AirFloss is not Floss and that defendant failed to advise consumers that they should still use traditional floss, is an admission by Defendant on their own website. On the Frequently Asked Questions portion of Defendants' website, The following Question appears: "Is Sonicare AirFloss designed to replace flossing". Defendants' response is: "While **Sonicare Airfloss has not been designed to directly replace floss** in all aspects (eg. Removal of large debris from in-between teeth) it is an excellent alternative for daily interproximal cleaning." http://www.p4c.philips.com/cgi-bin/dcbint/cpindex.pl?ctn=HX8111%2F02&dct=FAQ&faqview=1&new_tmpl=1&refdisplay=E10_AF_HOW%20FUNCTION_002&refnr=0087070&scy=US&slg=AEN, (Emphasis Added) (Accessed 6/7/12). See Exhibit 3.

17. By claiming their product replaces traditional floss, Defendant cultivated a belief that their product was floss and/or as effective as floss in an effort to promote the sale of this product, even though there was no clinical data supporting their wide-spread marketing campaign that AirFloss was a replacement and not an adjunct to traditional dental floss.

JURISDICTION AND VENUE

18. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§1332(a) and 1332(d). Jurisdiction under CAFA is met because: (1) the proposed number of putative class members exceeds 100; (2) at least one plaintiff and one defendant are from different states; and (3) the amount in controversy, including, but not limited to the aggregate amount of relief sought by absent class members, exclusive of interest and costs, exceeds \$5,000,000. Diversity jurisdiction exists as Plaintiff Lilia Perkins is a resident of California and more than two-thirds of the members of the proposed Class are citizens of states different than that of either and both defendants. This Court also has supplemental jurisdiction over Plaintiff's state statutory claims pursuant to 28 U.S.C. § 1367.

19. This Court has personal jurisdiction over Defendants because each is a corporation or individual with sufficient minimum contacts in California or otherwise intentionally avails itself of the laws of this State through its marketing and sales of products at issue in California as to render

1 the exercise of jurisdiction by this Court consistent with traditional notions of fair play and
2 substantial justice.

3 20. Venue is proper in this Court pursuant to *28 U.S.C. § 1391* because, as a corporation subject
4 to personal jurisdiction in this District, Defendants resides in this district and a substantial portion
5 of the events and conduct, giving rise to the violations complained of herein occurred in this
6 District.

7 THE PARTIES

8 21. Plaintiff Lilia Perkins is, and at all material times was, a resident of San Diego County,
9 California. During the time period relative to this action Plaintiff purchased a Philips Sonicare
10 AirFloss at Costco, for her personal use. Plaintiff was the recipient of Phillips's claim that the
11 product was "an easier way to floss" and that it "takes the hassle out of flossing" and other
12 representations and reasonably believed Defendant's representations. Plaintiff would not have
13 purchased the AirFloss, but for Defendant's misleading statements about their product being "an
14 easier way to floss" and that the product was a replacement for Floss. Plaintiff paid for a product
15 that flossed her teeth, but did not receive a product that was as effective as floss. Instead, Plaintiff
16 received a product that is an oral irrigator and not floss.

17 22. In bringing this action, as to the individual and Class claims, Plaintiff either directly or
18 indirectly relied upon, *inter alia*, the representations, advertising and other promotional materials
19 which were prepared and approved by this Defendants and their agents and disseminated on the
20 face of the packages and Defendant's documentation, and/or through local and national advertising
21 media, including Defendants' Internet websites, containing the alleged misrepresentations and/or
22 omissions.

23 23. Defendant Philips Oral Healthcare, Inc. is a Washington corporation with its headquarters in
24 Bothell, Washington. Philips Oral Healthcare, Inc. manufactures, markets, distributes and sells the
25 Philips Sonicare AirFloss. Defendant actively markets, distributes and sells the AirFloss in this
26 District..

27 24. Defendant Philips Electronics North America Corporation (PENAC) is a Delaware
28 corporation that is licensed to do business in California and has its headquarters domiciled in

1 Massachusetts. PENAC is the parent corporation of Philips Oral Healthcare, Inc. and at all times
2 ratified conduct by and through its subsidiary.

3 25. At all times mentioned in this complaint, each Defendant was the agent servant and/or
4 employee of each and every co- defendants, and in doing the things mentioned herein, were acting
5 within the scope and course of their agency, employment, and/or authority as such agents and
6 employees with the consent of their co- defendants; further each Defendant was a managing agent
7 of each and every other Defendant and ratified, confirmed and consented to each and every act
8 alleged herein; further each and every co- defendant had advance knowledge of the action of each
9 and every Defendant and failed to take action to prevent those acts. The corporate Defendants,
10 and each of them, are, and at all times mentioned herein were, the alter egos of each and every
11 other Defendant.

12 26. All Defendants are engaged in the same or similar business and have the same or similar
13 corporate officers, members, and/or managers.

14 27. The true names and capacities of the Defendants sued in this Complaint as Does 1-20,
15 inclusive, are currently unknown to Plaintiff, who therefore sues such Defendants by this fictitious
16 name. The Defendants designated herein as Does are legally responsible in some manner for the
17 unlawful acts referred to herein. Plaintiff will seek leave of the Court to amend this complaint to
18 reflect the true names and capacities of the Defendants designated herein as Does 1-20 when such
19 identities become known.

20 28. At all relevant times, Defendants and Does 1-20, inclusive, have failed to and continue to
21 fail to make the general public aware that their products is not floss and is not as effective as floss.

CLASS ACTION ALLEGATIONS

22
23
24 29. Plaintiff brings this action of behalf of herself and all others similarly situated within the
25 State of California or all other states as the Court may deem appropriate. The proposed Class is
26 both ascertainable and shares a well-defined community of interest in the questions of law and fact
27 as further detailed below. Plaintiff seeks to represent a Class composed of and defined as follows:
28 “All persons in California who purchased a Philips Sonicare Airfloss”. Plaintiff reserves the right

1 to amend or modify the Class description with greater specificity or further division into
2 subclasses or limitation to particular issues.

3 30. Plaintiff brings this Class pursuant to Federal Rule of Civil Procedure 23(a), and 23(b)(1),
4 23(b)(2) and 23(b)(3).

5 31. Excluded from the Class are judges to whom this action is assigned and any members of
6 their immediate families.

7 32. This action has been brought and may properly be maintained as a class action because
8 there is a well-defined community of interest in the litigation and the proposed Class is easily
9 ascertainable.

10 **A. Numerosity**

11 33. The potential members of the Class as defined are so numerous that joinder of all the
12 members of the Class is impracticable. While the precise number of Class Members has not been
13 determined at this time and the facts on which to calculate that number are presently within the
14 control of other entities.

15 34. California Class members are readily ascertainable. Upon information and belief, Plaintiff
16 alleges Defendants would have adequate records to ascertain how many people in California have
17 been affected by their label claims. Another means available for identifying Class members would
18 be based on a proposed Class announcement and initial discovery from Defendants.

19 **B. Commonality**

20 35. Common questions of law or fact, which will generate common answers, exist as to all
21 members of the Class. These questions predominate over the questions affecting only individual
22 Class members. These common legal or factual questions, include:

- 23 A. Whether Defendants labeled its product as “AirFloss”;
- 24 B. Whether Defendants advertised their product as being “An Easier Way to Floss”;
- 25 C. Whether Defendants admit that their product does not actually replace flossing;
- 26 D. Whether Defendants’ labeling is and was likely to deceive Class members or the
27 general public;
- 28 E. Whether Defendants’ representations are unfair or unlawful; and

1 F. The appropriate measure of damages, restitutionary disgorgement and/or restitution.

2 **C. Typicality**

3 36. The claims of the named plaintiff are typical of the claims of the Class. The Class plaintiff
4 has no interests adverse to the interests of the other members of the Class alleged herein. Plaintiff
5 and all members of the Class sustained damages arising out of and caused by Defendant's common
6 course of conduct in violation of laws and regulations that have the force and effect of law and
7 statutes as alleged above. These facts are typical among the proposed Class. Further, these facts
8 are essential in proving the claims alleged in this complaint against Defendant.

9 **D. Adequacy of Representation**

10 37. Plaintiff will fairly and adequately represent and protect the interests of the members of the
11 Class. The Class Representative can adequately represent the Class because her claim is both
12 typical of the Class, and the issues are based on facts that are common between the Class
13 representative and the proposed Class. Moreover, the representative has suffered all of the
14 potential injuries and damages that might arise out of the conduct complained of herein. As such,
15 the representative can adequately represent the Class because she will bring all potential legal
16 actions and remedies that would be available to individual members of the Class. Plaintiff has
17 retained attorneys that are competent and experienced in litigating large class actions to represent
18 her interests and that of the Class. Plaintiff and her counsel have the necessary financial resources
19 to adequately and vigorously litigate this Class Action, and Plaintiff and counsel are aware of the
20 fiduciary responsibilities to the Class Members and are determined to diligently discharge those
21 duties by vigorously seeking the maximum possible recovery for the Class.

22 **E. Superiority of Class Action**

23 38. In addition to what has been mentioned above, a Class Action is a superior method for
24 resolving the claims herein alleged. The remedy to resolve the common Class issues regarding the
25 AirFloss would be to refund money paid for the product. Individually, this is not a significant
26 amount, and would be likely limited to a small claims action by individual Plaintiffs. Such actions
27 are inconceivable, as the costs associated with proving a prima-facie case would likely exceed the
28 obtainable recovery.

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1 39. Important public interests will be served by addressing the matter as a Class Action. The
2 adjudication of individual litigation claims would result in a great expenditure of court and public
3 resources. However, treating the claims as a Class Action will result in a significant savings of
4 these costs. Class Action treatment will allow those similarly situated persons to litigate their
5 claims in the manner that is most efficient and economical for the parties and the judicial system.

6 40. Also, there is a substantial likelihood of inconsistent verdicts, which would frustrate the
7 resolution of these legal issues for Defendants, forcing them to comply with inconsistent legal
8 standards. Moreover, there is no assurance individual claims will prevent the continued deceptive
9 practices alleged herein. This would frustrate the purpose of California consumer protection laws
10 and health and safety regulations. Considering the actual size of the Class, estimated to be in the
11 tens of thousands, and the importance of the issues presented to the State of California (enforcing
12 consumer protections and the health and safety of citizens within the state), a Class Action is the
13 desired method for resolving this matter. Moreover, with such common questions of fact, the
14 Court is in a superior position to fashion a remedy that would uniformly apply to each, or nearly
15 all, Class members.

16 41. Finally, failure to certify a Class would literally make it impossible for a great many of the
17 Class members to seek relief, as the costs of litigation would far exceed the remedy available. For
18 those who do seek judicial relief, there is a strong likelihood that separate courts would lead to
19 inconsistent verdicts; working a substantial prejudice on Defendants, especially, as in this case,
20 where equitable relief is being sought. As such, a Class Action presents fewer management
21 difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive
22 supervision by a single court.

23 42. Plaintiff is unaware of any difficulties that are likely to be encountered in the management
24 of this action that would preclude its maintenance as a Class Action.

25 ////
26 ////
27 ////
28 ////

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FIRST CAUSE OF ACTION
Breach of Express Warranty
Cal. Com. Code § 2313
(Against all Defendants)

1
2
3
4 43. Plaintiff incorporates by reference each and every preceding paragraph as though fully set
5 forth herein. Plaintiff brings this cause of action on behalf of herself and the Class. This claim is
6 brought in the alternative to the First Cause of Action under state law.

7 44. Defendants made express warranties to Plaintiff and members of the Class that the products
8 they were purchasing was: 1) “An Easier Way to Floss”; 2) “It’s probably the easiest way to floss
9 in just 60 seconds”; 3) “Airfloss takes the hassle out of flossing so you can get a deep clean every
10 day”.

11 45. These express warranties made to Plaintiff and Class appears on every package of the
12 AirFloss products and was also reinforced by appearing in numerous other forms of advertising
13 commissioned by Defendants. These promises regarding the nature of the products marketed by
14 Defendants, specifically relate to the goods being purchased and became the basis of the bargain.

15 46. Plaintiff and the Class purchased the AirFloss in the belief that they conformed to the
16 express warranties that were made on the AirFloss’ packaging.

17 47. Defendants breached the express warranties made to Plaintiff and members of the Class by
18 failing to supply goods that conformed to the warranties they made. As a result, Plaintiff and the
19 members of the Class suffered injury and deserve to be compensated for the damages they
20 suffered. Defendants knew of, and caused, the AirFloss to state on the product labels that the
21 AirFloss is a product that is synonymous with traditional floss. These statements created an
22 implied warranty of merchantability under state law in connection with the sales of the AirFloss to
23 Plaintiff and the Class. As such, Defendants were obligated under an implied warranty of
24 merchantability, and, accordingly, Defendants are “warrantors” as that term is defined at 15 U.S.C.
25 § 2301(5).

26 48. Plaintiff and the members of the Class paid money for the AirFloss. However, Plaintiff and
27 the members of the Class did not obtain the full value of the advertised products. If Plaintiff and
28 other members of the Class had known of the true nature of the product, they would not have

1 purchased the AirFloss product, and/or would not have been willing to pay the premium price
 2 associated with a product that flossed ones teeth more easily. Accordingly, Plaintiff and members
 3 of the Class have suffered injury in fact and lost money or property as a result of Defendants'
 4 wrongful conduct.

5 49. Plaintiff attempted to return her product to Defendants in a letter written on May 4, 2012.
 6 She has not received satisfaction.

7 50. Plaintiff and the Class are therefore entitled to recover damages, punitive damages,
 8 equitable relief such as restitution and disgorgement of profits, and declaratory and injunctive
 9 relief.

10 **SECOND CAUSE OF ACTION**
 11 **Unlawful, unfair and Fraudulent Business Acts and Practices in**
 12 **Violation of California's Unfair Competition Law**
 13 ***Bus. & Prof. Code §17200, et. seq.***
 14 **(Against all Defendants)**

15 51. Plaintiff incorporates by reference each and every preceding paragraph as though fully set
 16 forth herein.

17 52. Plaintiff asserts this cause of action on behalf of herself individually, and on behalf of the
 18 Class.

19 53. Plaintiff is a person as defined by California's Unfair Competition Act.

20 54. Defendants designed, marketed and/or sell, and continue to market and sell the AirFloss in
 21 California, including through the internet and through a distribution network that includes major
 22 retail outlets such as, Costco and Walmart. Each of the defendants have purposefully availed
 23 themselves of the California market with respect to AirFloss by putting the AirFloss into the
 24 stream of national commerce.

25 55. Plaintiff became aware of the AirFloss though defendants' label claims and promotional
 26 activities undertaken and directed to California consumers. On the basis of these factors, plaintiff
 27 purchased the AirFloss for money at a San Diego Costco store.

28 56. Defendants have engaged in "unlawful" conduct because their conduct violates the
 following strict-liability California statutes:

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1 A. California Health and Safety Code Section 110390: It is unlawful for any person to
2 disseminate any false advertisement of any food, drug, device or cosmetic. An
3 advertisement is false if it is false or misleading in any particular.

4 B. California Health and Safety Code Section 110395: "It is unlawful for any person to
5 manufacture, sell, deliver, hold, or offer for sale any food, drug, device, or cosmetic
6 that is falsely advertised".

7 57. The AirFloss' labels and advertisements are false and misleading in that their content claims
8 of being a floss, are misstated or misleading because the product is an oral irrigator, not floss, and
9 because the Mayo Clinic and the ADA all say that Oral Irrigators are not as effective as Floss.
10 Defendants have affirmatively represented that their product is the same or better than floss on
11 both their label and in the advertisements. The following representations appear on the packaging
12 (Exhibit 1) of the product as well as on the internet and in print advertisements

- 13 A. "An Easier Way to Floss";
- 14 B. "It's probably the easiest way to floss in just 60 seconds";
- 15 C. "Airfloss takes the hassle out of flossing so you can get a deep clean every day";
- 16 D. "AirFloss" (Presented on the package in a way that Air is bolder than the Floss)

17 58. The following representations were also made on the internet and in print media:

- 18 A. "Sonicare Airfloss Replaces Traditional Flossing With Micro Bursts of Water and
19 Air"; (Exhibit 2)
- 20 B. Sonicare AirFloss is designed to make flossing easier, maximize plaque removal..."
- 21 C. "With Sonicare Airfloss, interdental cleaning has just been reinvented";
- 22 D. "They're calling it a game changer that will benefit virtually all their patients"; and
- 23 E. "Sonicare AirFloss has been through meticulous clinical validation..."
- 24 F. "The reputation of the Sonicare brand is built on its research-based approach to
25 dental and oral care and AirFloss underwent the same rigorous clinical validation as
26 all Sonicare products"

27 59. In addition, Defendants have failed to include a disclaimer that their product does not
28 provide the same level of hygiene as flossing and have failed to advise consumers that they still

1 need to floss their teeth. The nature of their misrepresentation can be found on Defendants' own
2 website where they admit that their product is **not a replacement for floss**. See Exhibit 3. Since,
3 defendants have violated the above statutes, their conduct violates California's labeling laws and,
4 hence the California's Unfair Competition Law.

5 60. Defendant's conduct is further "unfair", "deceptive" and "untrue or misleading" because
6 Defendant advertises their products as floss even though the product is not as shown through
7 definitions provided by the ADA, other clinical reports, and admissions by the Defendant on their
8 website.

9 61. Incorporating the preceding paragraphs from the "unlawful" analysis, it is easy to see the
10 Defendants have engaged in behavior that violates the law and their conduct threatens and harms
11 competition because they are advertising a product as floss, or better than floss, when the AirFloss
12 is not actually floss.

13 62. Further, Defendant is able to command a higher price for their product as a result of their
14 representation on their packaging and advertisements. Defendant's conduct of advertising on their
15 packaging on the internet, their website, and print media that their product is "Floss", that it
16 "replaces traditional flossing" (Exhibit 2) and representing that it a quick and effective way to
17 floss, is an "unfair" business practice because the representations are demonstrably and admittedly
18 (Exhibit 3) false.

19 63. Defendant's conduct is not only unlawful, but offends public policy in regards to
20 advertising practices and relevant laws. Defendant's conduct is unethical because they are
21 advertising that their product has a certain trait when it does not. This conduct causes substantial
22 injury to consumers because consumers are paying in excess of \$100 for a product (Sonicare
23 AirFloss) that represents that it flosses one's teeth, when it does not, and a product that does floss
24 teeth costs less than \$5 (namely string floss).

25 64. Defendant's conduct was "fraudulent" within the meaning of B&P 17200, since members of
26 the public were likely to be deceived by the advertising. Indeed plaintiff is a person likely to be
27 deceived because she is not a dentist and has no special knowledge of dentistry. Plaintiff was
28 misled by defendant's representations that the product was "floss", that it "replaces traditional

1 floss” and the product proves an “easier way to floss” because the product was labeled and
2 advertised as such. Defendants knew that their representations were false when they put these
3 misrepresentations on their packaging, on the internet and in print media, but did it any way. Their
4 knowledge of the falsity of their statements is evidenced in a buried section of their Frequently
5 Asked Questions on their website. *See Exhibit.3.*

6 65. The acts, practices, and misrepresentations described above, and defendants’ dissemination
7 of deceptive and misleading advertising and marketing materials in connection therewith in
8 California, constitute unlawful, unfair and fraudulent business acts and practices and untrue and
9 misleading advertising within the meaning of *California Business & Professions Code § 17200, et.*
10 *seq.*

11 66. Under California Business & Professions Code Section 17203, Class plaintiff, on behalf of
12 herself, the class of persons she represents, and the general public, seek an order of this Court
13 permanently enjoining defendants from continuing to sell the bars without explicitly disclosing the
14 true contents on the labels and otherwise complying with California’s labeling laws. On the same
15 basis, Class plaintiff seeks restitution of any monies wrongfully acquired or retained by defendants
16 and disgorgement of their ill-gotten gains obtained by means of their unfair practices.

17 **THIRD CAUSE OF ACTION**

18 **Unlawful, unfair and Fraudulent Business Acts and Practices in**
19 **Violation of California’s Unfair Competition Law**
20 ***Bus. & Prof. Code §17500, et. seq.***
21 **(Against all Defendants)**

22 67. Plaintiff incorporates by reference each and every preceding paragraph as though fully set
23 forth herein.

24 68. Plaintiff asserts this cause of action on behalf of herself individually, and on behalf of the
25 Class.

26 69. *California Business & Professions Code § 17500* prohibits various deceptive practices in
27 connection with the dissemination in any manner of representations for the purpose of inducing, or
28 which are likely to induce, directly or indirectly, customers to purchase products, including the
product at issue.

70. Defendants knew that their representations were false when they put these misrepresentations on the AirFloss packaging, on the internet, including defendants' website and in print media, but did it anyway. Their knowledge of the falsity of their statements is evidenced in a buried section of their Frequently Asked Questions on their website. *See* Exhibit 3. Further, Defendant failed to inform Plaintiff and the Class that their product was not a substitute for flossing. Such a disclaimer was required to properly inform the consumers of the true efficacy of their product for proper oral hygiene. However, including such a disclaimer would have undermined Defendants' AirFloss, which was intentionally marketed as a replacement for traditional dental floss. In order to increase sales, defendants have fraudulently induced customers to buy their product.

71. The defendants' acts, practices, misrepresentations and omissions alleged herein were intended to, and did, induce the consuming public, including plaintiff, to purchase the products in California, and violated and continue to violate *Business & Professions Code* § 17500.

72. As a result of the foregoing, plaintiff and the other members of the Class to which this cause of action applies and the general public are entitled to injunctive and equitable relief, restitution, and an order requiring disgorgement of defendants' ill-gotten gains, as described above.

FOURTH CAUSE OF ACTION

Violation Of The Consumers Legal Remedies Act *Cal. Civ. Code* §§ 1750, *et Seq.* (Against All Defendants)

73. Plaintiff incorporates by reference each and every preceding paragraph as though fully set forth herein.

74. Plaintiff has standing to pursue this cause of action because Plaintiff has suffered injury in fact and has lost money as a result of Defendants' actions as set forth herein. Specifically, Plaintiff purchased the AirFloss in reliance on Defendants' packaging and marketing claims with respect to character and quality of the AirFloss. Plaintiff purchased the AirFloss in reliance on the preceding claims and representations regarding the Product but they were not of the quality and standard advertised by Defendants. The AirFloss does not replace floss, is not floss and therefore, not "easier way to floss"

1 75. Defendants have engaged in and continues to engage in business practices in violation of
2 California Civil Code §§ 1750, et seq. (the “Consumers Legal Remedies Act”) by making false
3 and unsubstantiated representations concerning the character and quality of the AirFloss as defined
4 above. These business practices are misleading and/or likely to mislead consumers and should be
5 enjoined.

6 76. Defendants have engaged in deceptive acts or practices intended to result in the sale of the
7 AirFloss in violation of Civil Code § 1770. Defendant knew and/or should have known that their
8 representations of fact concerning the character and quality of the AirFloss were material and
9 likely to mislead the public. Defendant affirmatively misrepresented that the AirFloss were of a
10 certain standard and quality with certain benefits which they did not have.

11 77. Defendants’ conduct alleged herein violates the Consumers Legal Remedies Act, including
12 but not limited to, the following provisions: (1) using deceptive representations in connection with
13 goods or services in violation of Civil Code § 1770(a)(4); (2) representing that goods or services
14 have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do
15 not have in violation of Civil Code § 1770(a)(5); and/or (3) advertising goods or services with
16 intent not to sell them as advertised in violation of Civil Code § 1770(a)(9). As a direct and
17 proximate result of Defendant’s conduct, as set forth herein, Defendant has received ill-gotten
18 gains and/or profits, including but not limited to, money. Therefore, Defendant has been unjustly
19 enriched.

20 78. There is no other adequate remedy at law, and Plaintiff and Class members will suffer
21 irreparable harm unless Defendant’s conduct is enjoined.

22 79. Plaintiff mailed to Defendant, by certified mail, return receipt requested, the written notice
23 required by Civil Code Section 1782(a) on April 16, 2012. Then, on May 4, 2012 Plaintiff’s
24 counsel mailed a copy of the CLRA letter to the place of purchase in California, which was
25 Costco. The letter was mailed with instructions for Costco to deliver the letter to Defendants. A
26 copy of these letters is attached hereto as Exhibit 4. The declaration of venue required by Civil
27 Code § 1780(d) is attached hereto as Exhibit 5.
28

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1 80. Defendants’ wrongful business practices constituted, and constitute, a continuing course of
2 conduct in violation of the Consumer Legal Remedies Act since Defendants are still representing
3 that their AirFloss Products have characteristics, uses, benefits, and qualities which are false and
4 misleading, and have injured Plaintiff and the Class.

5 81. Plaintiff and the Class seek:

- 6 A. an order of this court enjoining Defendant from continuing to engage in unlawful,
7 unfair, or deceptive business practices and any other act prohibited by law, including
8 those set forth in the complaint, pursuant to California Civil Code Section
9 1780(a)(2);
- 10 B. actual damages pursuant to Civil Code Section 1780(a)(1);
- 11 C. punitive damages pursuant to California Civil Code Section 1780(a)(4) due to the
12 fraudulent, malicious, and willful nature of Defendant’s conduct;
- 13 D. statutory damages of no less than \$1,000 per Class member pursuant to California
14 Civil Code Section 1780(a)(1);
- 15 E. restitution pursuant to Civil Code Section 1780(a)(3); and
- 16 F. any other equitable or legal relief that the Court deems proper pursuant to California
17 Civil Code Section 1780(a)(5).

18 **RELIEF REQUESTED**

19 WHEREFORE, Class Plaintiff, respectfully requests that this Court enter judgment as
20 follows:

- 21 1. An order certifying this case as a Class Action and appointing Plaintiff and her counsel to
22 represent the Class;
- 23 2. An award of damages and punitive damages to plaintiff and the other Class members;
- 24 3. Statutory Damages of no less than \$1,000 per Class member;
- 25 4. An award of restitution for all money paid by Class members as a result of defendants’
26 unfair business practices and untrue and misleading advertising;
- 27 5. An order enjoining defendants from continuing to market the bars in California;
- 28 6. Awarding pre- and post-judgment interest;

- 1 7. Awarding reasonable attorney fees, expenses, and costs; and,
- 2 8. Providing such other and further relief as this Court may deem just and proper.

JURY DEMAND

3
4 Plaintiff and the Class demand a trial by jury.

5
6 Dated: September 20, 2012

HIDEN, ROTT & OERTLE, LLP

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8
9 By: S/MICHAEL IAN ROTT

10 Michael Ian Rott, Esq.
11 Eric M. Overholt, Esq.
12 *Attorneys for Plaintiff, on behalf of herself*
13 *and all others similarly situated.*
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