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10
11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 REYNOLDS HARTWICH,
14 individually and on behalf of all others
15 similarly situated,

16 Plaintiff,

17 vs.

18 THE KROGER CO. and RALPHS
19 GROCERY COMPANY, a division of
20 the Kroger Company,

21 Defendants.

Case No. 8:20-cv-1253

CLASS ACTION COMPLAINT

1. **Violation of California Consumers Legal Remedies Act (“CLRA”); Cal. Civ. Code §§ 1750, et seq.**
2. **Violation of California’s False Advertising Laws (“FAL”); Cal. Bus. & Prof. Code §§ 17500, et seq.**
3. **Violation of California’s Unfair Competition Laws (“UCL”) Unlawful, Fraudulent & Unfair Business Practices; Cal. Bus. & Prof. Code §§ 17200, et seq.**
4. **Violation of The Magnuson-Moss Warranty Act; 15 U.S.C. §§ 2301 et seq.**
5. **Breach of Express Warranty**
6. **Unjust Enrichment**

DEMAND FOR JURY TRIAL

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NATURE OF THE CASE

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1. This is a putative class action on behalf of Plaintiff Reynolds Hartwich (“Plaintiff”), and all others similarly situated, against Defendants Ralphs Grocery Company and The Kroger Co. (collectively referred to as “Defendants” and separately referred to as “Ralphs” and “Kroger”).

2. Ralphs is one of the largest food retailers in Southern California. Ralphs operates over 400 stores throughout California. Ralphs markets, advertises, and sells various products, including, but not limited to pain reliever and fever reducers, to its customers.

3. Ralphs is a division of the Kroger Company, and sells a brand of pain reliever and fever reducer under the “Kroger®” label, including Infants’ Pain & Fever Acetaminophen - Kroger® (“Infants’ Products”) and Children’s Pain & Fever Acetaminophen - Kroger® (“Children’s Products”), two well-known brand-name Over The Counter (“OTC”) medications. The Infants’ Products and Children’s Products are collectively hereinafter referred to as the “Products.”

4. The Products are distributed by Kroger, which is one of the world’s largest food retailers. The Products are available for both online and in-store purchase at Ralphs store locations across the United States.

5. Acetaminophen, the active ingredient in the Products, can be dangerous, and perhaps even fatal, if taken in large doses. The potential risks associated with an acetaminophen overdose terrifies parents and caregivers and causes them to be extra careful when buying medicine for their children. Defendants exploit this fear by misleading consumers.

6. It is the manner in which Defendants market, price, and sell the Products in Ralphs store locations that forms the underlying basis for this action.

7. Defendants’ advertisements, marketing representations, and placement of the Products in Ralphs store locations are misleading, untrue, and likely to deceive reasonable consumers. Kroger purposely distributes and packages Infants’

1 Products with distinctive lettering of the word “infants” on the product’s front-
2 label, while packaging Children’s Products with distinctive lettering of the word
3 “Children’s” on the product’s front-label. Accordingly, Defendants distribute,
4 market, and sell the Products in a manner which deceives reasonable consumers
5 into thinking that infants cannot safely take Children’s Products.

6 8. Furthermore, despite the fact that the Products contain the same exact
7 amount of acetaminophen in the same dosage amounts, Defendants market and sell
8 Infants’ Products to consumers, such as Plaintiff, at a substantially higher price than
9 Children’s Products. In both Ralphs’ online and in-store locations, the Infants’
10 Products cost approximately three times as much per ounce than Children’s
11 Products for the same amount of medicine.

12 9. No reasonable consumer would pay approximately three times more
13 for Infants’ Products, as compared to Children’s Products, unless he or she was
14 deceived into thinking that infants cannot safely take Children’s Products.

15 **JURISDICTION AND VENUE**

16 10. This Court has original jurisdiction over this action under 28 U.S.C. §
17 1332(d)(2) (The Class Action Fairness Act) because there is minimal diversity and
18 the aggregate amount in controversy exceeds five million dollars (\$5,000,000.00),
19 exclusive of interest and costs.

20 11. Jurisdiction and venue are properly vested in this Court because
21 Plaintiff resides in California, and a substantial portion of the acts, events, and/or
22 failure to act giving rise to the claims alleged herein occurred in this judicial district.
23 Additionally, Ralphs has substantial business contacts with the State of California,
24 or otherwise avails itself of the markets within California, through promotion, sale,
25 marketing and distribution of the Products in California, to render the exercise of
26 jurisdiction by this Court proper and necessary. Furthermore, Ralphs can be brought
27 before this Court pursuant to California’s long-arm jurisdictional statute.

28 12. Furthermore, the Court has personal jurisdiction over Kroger because

1 Kroger has purposely availed itself of the benefits and privileges of conducting
2 business activities within California, specifically, by intentionally distributing,
3 marketing, and selling the Products in California. Kroger is registered to do business
4 in California under entity number C0692542.

5 13. Venue is proper in this judicial district pursuant to 28 U.S.C. §§
6 1391(b) - (d) because, *inter alia*, Ralphs resides in, and is subject to personal
7 jurisdiction in, this judicial district at the time that Plaintiff commenced this action
8 and because Defendants' contacts within this judicial district are significant and
9 sufficient to subject it to personal jurisdiction. Further, venue is appropriate in this
10 judicial district because a substantial part of the events or omissions giving rise to
11 Plaintiff's claims occurred in this judicial district.

12 **PARTIES**

13 14. At all relevant times, Plaintiff Reynolds Hartwich, has resided in
14 Newport Beach, California. Plaintiff has been purchasing the Infants' Products for
15 approximately four (4) years, and first purchased the Infants' Products at the Ralphs
16 store located at 380 E. 17th St., Costa Mesa, California 92627. Plaintiff is a mother
17 to two daughters. Plaintiff bought the Infants' Product for her eldest daughter when
18 she was between the ages of six (6) months and three (3) years old. Plaintiff has also
19 been purchasing the Infants' Product for her youngest daughter, who is now
20 eighteen (18) months old, since she was six (6) months old.

21 15. Plaintiff saw and relied upon the Infants' Products' packaging and
22 labeling.

23 16. Plaintiff purchased the Infants' Products because she believed that the
24 Infants' Products were specifically formulated and designed for infants based on the
25 marketing and labeling of the Infants' Products. Plaintiff believed that the Infants'
26 Products were different than the Children's Products. If Plaintiff knew that the
27 Infants' Products were nothing more than the Children's Products, she would not
28 have purchased the Infants' Products or paid a price premium for the Infants' Products.

1 17. Had Defendants not made the false, misleading, and deceptive
2 representation that the Infants' Products were formulated and designed for
3 "Infants," nor omitted the fact that the Infants' Products were nothing more than the
4 Children's Products with the word "Infants" prominently displayed, Plaintiff would
5 not have been willing to pay the premium for the Infants' Products, or she would not
6 have been willing to purchase the Infants' Products at all. Plaintiff purchased and
7 paid more for the Infants' Products than she would have if she had known the truth
8 about the Infants' Products. The Infants' Products that Plaintiff received were worth
9 less than the Infants' Products for which she paid. Plaintiff was injured in fact and
10 lost money as a result of the Defendants' deceptive conduct.

11 18. Plaintiff desires to purchase Infants' Products in the future and
12 regularly visits retail locations where such products are sold. If Plaintiff knew that
13 the Infants' Products' labels were truthful and non-misleading, she would continue
14 to purchase the Infants' Products in the future.

15 19. At present, however, Plaintiff cannot purchase the Infants' Products
16 because she remains unsure whether the labeling of the Products is, and will be,
17 truthful and non-misleading. If the Infants' Products were in fact different from the
18 Children's Products, or if it were disclosed that the Infants' Products were the same
19 as the Children's Products, Plaintiff would purchase the Products in the immediate
20 future, and she would be willing to pay a price premium if they were in fact
21 specially formulated for infants.

22 20. Ralphs is a corporation incorporated under the laws of Delaware and is
23 a "person" as defined in 33 U.S.C. § 1362(5) and 40 C.F.R. § 122.2.

24 21. Ralphs is, and at all times mentioned in this Complaint, a corporation
25 organized and existing under the laws of Delaware with its principal place of
26 business located at 1100 W. Artesia Blvd., Compton, California 90220. Ralphs is,
27 and at all times mentioned in this Complaint, a division of the Kroger Company (an
28 Ohio corporation) doing business and operating over 400 stores throughout

1 California. Ralphps can sue and be sued in this Court.

2 22. Kroger is incorporated in the state of Ohio and is a “person” as defined
3 in 33 U.S.C. § 1362(5) and 40 C.F.R. § 122.2.

4 23. Kroger is, and at all times mentioned in this Complaint, a corporation
5 organized, existing, and doing business under and by virtue of the laws of the State
6 of Ohio, with its office and principal place of business located at 1014 Vine Street,
7 Cincinnati, Ohio 45202. Kroger is registered to do business in California under
8 entity number C0692542. Kroger can sue and be sued in this Court.

9 **FACTUAL ALLEGATIONS**

10 24. Kroger distributes two different pediatric OTC painkillers—Infants’
11 Products and Children’s Products. The Products are available for both online and in-
12 store purchase at Ralphps store locations all across the United States.

13 25. Prior to the acts complained herein, liquid acetaminophen marketed for
14 “infants” was only available in 80 mg/0.8 mL or 80 mg/mL concentrations, while
15 liquid acetaminophen marketed for “children” was only available in 160 mg/5 mL
16 concentrations.

17 26. The difference in concentrations caused some consumers to accidentally provide
18 the wrong dosage of medicine to their children, thereby causing them to overdose.

19 27. Between 2000 and 2009, U.S. Food and Drug Administration (FDA)
20 received reports of twenty (20) children dying from acetaminophen toxicity, and at
21 least three (3) deaths were tied to mix-ups involving the two pediatric medicines.

22 28. On December 22, 2011, the FDA informed the public that liquid
23 acetaminophen marketed for infants would only be available in 160 mg/5 mL
24 concentration in order to prevent confusion and accidental acetaminophen toxicity.

25 29. Since then, the only differences in liquid acetaminophen marketed for infants
26 versus children has been the price and dosing instrument included with the product (*i.e.*,
27 Defendants’ Infants Products come with a syringe while the Children’s Products come with a
28 plastic cup).

1 30. The Products have the same 160 milligram concentration of
2 acetaminophen, are interchangeable and therefore suitable for infants and children,
3 adjusting the dosage based only on the weight and age of the child.

4 31. Defendants have been engaging in the unfair, unlawful, deceptive, and
5 fraudulent practice of manufacturing, marketing and selling the same product as two
6 unique medicines, such that parents and caregivers mistakenly believe that they
7 cannot purchase the significantly cheaper Children's Products for an infant.

8 32. Defendants mislead consumers by using deceptive marketing
9 techniques which obscure critical facts—that infants can safely take Children's
10 Products and that the Products are exactly the same—from consumers statewide.

11 33. Defendants deceive consumers so that they will buy the deceptively-
12 labeled Infants' Products for infants, which cost significantly more than Children's
13 Products, even though the Products contain the same exact amount of
14 acetaminophen in the same dosage amounts.

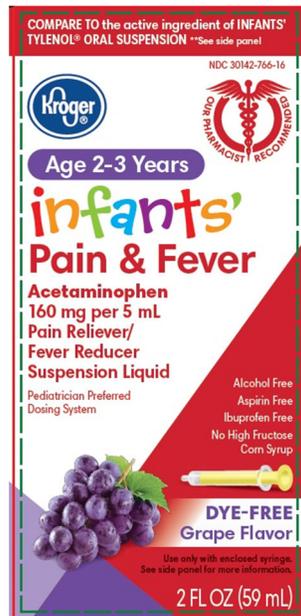
15 34. There are various conventions applied in sub-dividing the pediatric
16 population by age. The FDA classification¹ for infants and children is as follows:
17 infant (1 month to 2 years) and children (2 to 12 years).² Consumers may reasonably
18 believe that a product that is labeled and marketed for consumption by infants
19 should only be consumed by those between the ages of one (1) month to two (2)
20 years old.

21 35. Defendants distribute, market, and sell the Products in a manner that
22 deceives reasonable consumers into thinking that infants cannot safely take the
23 Children's Products.

24 ¹ Guidance for Industry – General Considerations for Pediatric Pharmacokinetic
25 Studies for Drugs and Biological products, Draft Guidance, US FDA, 10 November
26 1998.

27 ² <http://archives.who.int/eml/expcom/children/Items/PositionPaperAgeGroups.pdf>
28 (last visited July 10, 2020).

1 36. Specifically, Defendants distinguish the two products by calling one
2 “infants” and one “children’s” in distinctive lettering.



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13 37. Additionally, at the top of the Infants’ Products, Defendants
14 distinctively state “Compare to the active ingredient of Infants’ Tylenol® Oral
15 Suspension,” while the top of the Children’s Products states, “Compare to active
16 ingredient of Children’s Tylenol® Oral Suspension.” Through this wording,
17 Defendants attempt to deceive reasonable consumers into believing that the active
18 ingredient in Infant Tylenol® is *different* than the active ingredient in Children’s
19 Tylenol®, when they know that the active ingredient is the same, further inducing
20 reasonable consumers to purchase the more expensive Infants’ Products.

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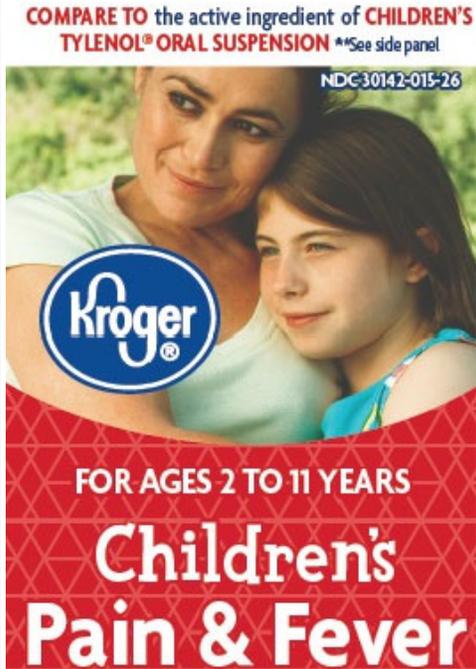
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38. Defendants further mislead consumers by placing “Ages 2-3” on the Infants’ Products. Despite the inclusion of an age range, reasonable consumers believe that a product specifically labeled “infants” is just that, for infants. And no reasonable consumer (as confirmed by FDA age classification, which confirms an infant is ages 1 month to 2 years) would believe that an “infant” is a 2 or 3 year old.

39. Furthermore, despite the fact that the Products contain the same exact amount of acetaminophen in the same dosage amounts, Defendants market and sell Infants’ Products to consumers, such as Plaintiff, at a substantially higher cost than the Children’s Products. In both Ralphs’ online and in-store locations, Infants’ Products cost approximately three times as much per ounce over Children’s Products for the same amount of medicine.

40. Defendants know that consumers, such as Plaintiff, are typically more cautious about what medicine they give to infants, especially when they are giving their infant a product that has caused accidental deaths in the past.

41. No reasonable consumer would be willing to pay more money—and certainly not three times as much per ounce—for Infants’ Products unless he or she had good reason to believe that Infants’ Products were different than Children’s

1 Products.

2 42. Indeed, Defendants' misrepresentations and omissions, as described
3 above, would be important to a reasonable consumer in deciding whether to
4 purchase Infants' Products.

5 **RULE 9(b) ALLEGATIONS**

6 43. Defendants made material misrepresentations and failed to adequately
7 disclose that the Products are the same. Except as identified herein, Plaintiff and
8 Class members are unaware, and therefore, unable to identify, the true names and
9 identities of those individuals at Defendants who are responsible for such material
10 misrepresentations and omissions.

11 44. Defendants made material misrepresentations regarding Infants'
12 Products. Specifically, Defendants marketed, priced and sold Infants' Products in a
13 manner to indicate to reasonable consumers that they are superior or somehow more
14 appropriate for infants than Children's Products to justify charging the inflated price
15 of Infants' Products. These representations were false and misleading because
16 Infants' Products are the same as Children's Products.

17 45. Defendants' advertising, in-store labeling, marketing, and placement of
18 the Products contained the material misrepresentations, omissions, and non-
19 disclosures continuously at every point of purchase and consumption throughout the
20 Class Period.

21 46. Defendants made numerous misrepresentations on the advertising, in-
22 store labeling, marketing, and pricing of Infants' Products that were designed to,
23 and, in fact, did, mislead Plaintiff and Class members into purchasing Infants'
24 Products.

25 47. Defendants made these material misrepresentations, omissions, and
26 non-disclosures for the express purpose of inducing Plaintiff and other reasonable
27 consumers to purchase or otherwise pay a price premium for Infants' Products based
28 on the belief that Infants' Products were specifically designed for infants and

1 different from the identical Children’s Products. Defendants profited by selling
2 Infants’ Products to thousands of unsuspecting consumers.

3 **CLASS ACTION ALLEGATIONS**

4 48. Plaintiff seeks to bring this action as a class action, under Federal Rule
5 of Civil Procedure 23, on behalf of herself and all others similarly situated.

6 49. Plaintiff seeks to represent the following class: All persons who
7 purchased Infants’ Products, at Ralphs’ store locations across the United States, for
8 personal use (the “Nationwide Class”).

9 50. Plaintiff also bring this suit as a class action on behalf of the following
10 subclass: All persons who purchased Infants’ Products, at Ralphs’ California store
11 locations, for personal use (the “California Subclass”).

12 51. The following persons are excluded from the Nationwide Class and
13 California Class (collectively, the “Classes”): Defendants, any entity in which
14 Defendants have a controlling interest or which have a controlling interest in
15 Defendants, and Defendants’ legal representatives, assigns and successors. Also
16 excluded are the judges to whom this case is assigned and any member of the
17 judge’s immediate family.

18 52. Plaintiff reserves the right to re-define the Classes prior to class
19 certification.

20 53. The Classes satisfy the numerosity, commonality, typicality, adequacy,
21 predominance, and superiority requirement of Federal Rule of Civil Procedure
22 23(a) and (b)(3).

23 54. **Numerosity:** The members of the Classes are so numerous that joinder
24 of all members of the Classes is impracticable. Although the precise number of
25 members of the Classes is unknown to Plaintiff at this time, on information and
26 belief, the proposed Classes contain thousands of purchasers of Infants’ Products
27 who have been damaged by Defendants’ conduct as alleged herein.

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1 **55. Existence and Predominance of Common Questions of Law and**

2 **Fact:** There are questions of law and fact common to the Classes. These questions
3 predominate over individual questions because Defendants’ actions complained of
4 herein were generally applicable to the Classes. These legal and factual questions
5 include, but are not limited to:

- 6 a. Whether Infants’ Products and Children’s Products are the same;
- 7 b. Whether Defendants knew or should have known that Infants’
8 Products and Children’s Products are the same;
- 9 c. Whether Defendants’ conduct and/or omissions in its marketing,
10 pricing and selling the Infants’ product in the manner discussed
11 herein indicated to members of the Classes that Infants’ Products
12 were superior or somehow more appropriate for infants than
13 Children’s Products;
- 14 d. Whether Defendants’ misrepresentations and omissions were
15 material to reasonable consumers;
- 16 e. Whether Defendants’ labeling, marketing, and the sale of
17 Infants’ Products constitutes false advertising;
- 18 f. Whether Defendants’ conduct injured Plaintiff and the Classes
19 and, if so, the extent of the damages; and
- 20 g. The appropriate remedies for Defendants’ conduct.

21 **56.** All questions as to the representations and publicly disseminated
22 advertisements and statements attributable to the Defendants at issue herein are
23 similarly common. A determination of Defendants’ knowledge regarding the
24 misleading and deceptive nature of the statements made in its website,
25 advertisements, and labels will be applicable to all members of the Classes. Further,
26 whether Defendants violated any applicable state laws and pursued the course of
27 conduct complained of herein, whether Defendants acted intentionally or recklessly
28 in engaging in the conduct described herein, and the extent of the appropriate

1 measure of injunctive and declaratory relief, damages and restitutionary relief are
2 common questions to the Classes.

3 57. **Typicality:** Plaintiff's claims are typical of the Classes because
4 Defendants injured all members of the Classes through the uniform misconduct
5 described herein; all members of the Classes were subject to Defendants' false,
6 misleading, and unfair marketing practices and representations, including the false
7 and misleading claim that Infants' Products were different from Children's Products
8 warranting a premium price; and Plaintiff seeks the same relief as the members of
9 the Classes.

10 58. Further, there are no defenses available to the Defendants that are
11 unique to Plaintiff.

12 59. **Adequacy of Representation:** Plaintiff is a fair and adequate
13 representative of the Classes because Plaintiff's interests do not conflict with the
14 interests of the members of the Classes. Plaintiff will prosecute this action
15 vigorously and is highly motivated to seek redress against the Defendants. Further,
16 Plaintiff has selected competent counsel that is experienced in class action and other
17 complex litigation. Plaintiff and her counsel are committed to prosecuting this action
18 vigorously on behalf of the Classes and have the resources to do so.

19 60. **Superiority:** The class action mechanism is superior to other available
20 means for the fair and efficient adjudication of this controversy for reasons
21 including but not limited to the following:

22 a. The damages individual members of the Classes suffered are
23 small compared to the burden and expense of individual
24 prosecution of the complex and extensive litigation needed to
25 address the Defendants' conduct.

26 b. It would be virtually impossible for the members of the Classes
27 individually to redress effectively the wrongs done to them. Even
28 if they could afford such individual litigation, the court system

1 could not. Individualized litigation would unnecessarily increase
2 the delay and expense to all parties and to the court system and
3 presents a potential for inconsistent or contradictory rulings and
4 judgments. By contrast, the class action device presents far fewer
5 management difficulties, allows the hearing of claims which
6 might otherwise go unaddressed because of the relative expense
7 of bringing individual lawsuits, and provides the benefits of
8 single adjudications, economies of scale, and comprehensive
9 supervision by a single court.

10 c. The prosecution of separate actions by the individual members of
11 the Classes would create a risk inconsistent or varying
12 adjudications with respect to individual members of the Classes
13 members, which would establish incompatible standards of
14 conduct for the Defendants.

15 d. The prosecution of separate actions by individual members of the
16 Classes would create a risk of adjudications with respect to them
17 that would, as a practical matter, be dispositive of the interests of
18 other members of the Classes not parties to adjudications or that
19 would substantively impair or impede their ability to protect their
20 interests.

21 61. The claims of the Classes may be certified under Rule 23(b)(1), (b)(2)
22 and/or (b)(3). The members of the Classes also seek declaratory and injunctive relief
23 but also seek sizeable monetary relief.

24 **FIRST CAUSE OF ACTION**

25 **Violation of Consumers Legal Remedies Act (CLRA)**

26 **Cal. Civ. Code §§ 1750, *et seq.***

27 **(Against Defendants on behalf of Plaintiff and the California Subclass)**

28 62. Plaintiff hereby incorporates paragraphs 1-61 as if fully set forth herein.

1 63. Plaintiff and the California Subclass have standing to pursue this claim
2 as they have suffered injury in fact and lost money as a result of Defendants’
3 actions, as set forth herein.

4 64. At all times relevant hereto, Defendants were and are “person(s),” as
5 defined in Cal. Civ. Code § 1761(d).

6 65. At all times relevant hereto, Defendants’ Infants’ Products are a
7 “good,” as defined in Cal. Civ. Code § 1761(d).

8 66. At all relevant times hereto, Plaintiff and the California Subclass
9 members’ purchases of Infants’ Products constitute “transactions,” as defined in Cal.
10 Civ. Code § 1761(e).

11 67. The following subsections of the CLRA prohibit the following unfair
12 methods of competition and unfair or deceptive acts or practices undertaken by any
13 person in a transaction which is intended to result or which results in the sale or
14 lease of goods or services to any consumer:

15 68. Cal. Civ. Code § 1770(a)(5): Representing that goods or services have
16 sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities
17 which they do not have or that a person has a sponsorship, approval, status,
18 affiliation, or connection which they do not have;

19 69. Cal. Civ. Code § 1770(a)(9): Advertising goods or services with intent
20 not to sell them as advertised; and,

21 70. Cal. Civ. Code § 1770(a)(16): Representing that the subject of a
22 transaction has been supplied in accordance with a previous representation when it
23 has not.

24 71. Defendants have violated and continue to violate Cal. Civ. Code §
25 1770(a)(5) by representing that Infants’ Products have sponsorship, approval,
26 characteristics, ingredients, benefits or quantities which they do not have.

27 72. Defendants have violated and continue to violate Cal. Civ. Code §
28 1770(a)(9) by advertising Infants’ Products with the intent not to sell them as

1 advertised.

2 73. Defendants have violated and continue to violate Cal. Civ. Code §
3 1770(a)(16) by representing Infants' Products have been supplied in accordance
4 with previous representations when they have not.

5 74. Defendants have violated and continue to violate Cal. Civ. Code §§
6 1770(a)(5), (a)(9) and (a)(16) by deceiving consumers into thinking that infants
7 cannot safely take Children's Products, and that they must buy the more expensive
8 Infants' Products, as described more fully above. Indeed, Plaintiff and the California
9 Subclass members relied on Infants' Products packaging prior to purchase. These
10 representations and omissions were uniformly made and would be important to a
11 reasonable consumer in deciding whether or not to purchase Infants' Products. No
12 reasonable consumer would be willing to pay approximately three times as much per
13 ounce more unless he or she had good reason to believe that Infants' Products were
14 different than the Children's Products.

15 75. Defendants' misrepresentations and omissions were done with the
16 intent to deceive Plaintiff and the California Subclass members and to deprive them
17 of their legal rights and money.

18 76. Defendants knew that Infants' Products were not uniquely for infants,
19 that Children's Products and Infants' Products are the same product, and that
20 Children's Products are safe and suitable for infants. Defendants deceptively
21 advertised or intentionally omitted in Infants' Products packaging, online materials,
22 and commercials.

23 77. Plaintiff is concurrently filing the declaration of venue required by Cal.
24 Civ. Code § 1780(d).

25 78. The policies, acts, and practices hereto described were intended to
26 result in the sale of Infants' Products to the consuming public, particularly to
27 cautious parents with sick infants who needed medicine, and violated and continue
28 to violate Cal. Civ. Code § 1770(a)(5) by representing that Infants' Products have

1 characteristics, benefits, uses, or quantities which they do not have.

2 79. Defendants' actions as described herein were done with conscious
3 disregard of Plaintiff and the California Subclass' rights, and Defendants have acted
4 wantonly and maliciously in its concealment of the same.

5 80. Defendants' wrongful business practices constituted, and constitute, a
6 continuing course of conduct in violation of the CLRA as Defendants continue to
7 make the same misrepresentations and omit material information regarding Infants'
8 Products.

9 81. Pursuant to Cal. Civ. Code § 1780(a), Plaintiff and the California
10 Subclass seek restitution and an order enjoining Defendants from engaging in the
11 methods, acts and practices alleged herein, and any other relief deemed proper by
12 the Court.

13 82. In accordance with Cal. Civ. Code § 1782, and prior to the filing of this
14 Complaint, Plaintiff, on May 18, 2020, mailed a notice and demand letter by
15 certified mail, with return receipt requested, to Ralphs. Plaintiff notified Ralphs of
16 its violations of § 1770, as described above, and demanded that Ralphs correct the
17 problems associated with the actions detailed above and give notice to all affected
18 consumers of its intent to so act. Ralphs received the notice and demand letter on
19 May 22, 2020.

20 83. Because Ralphs has failed to fully rectify or remedy the damages
21 caused after waiting more than the statutorily required 30 days after it received both
22 the notice and demand letters, Plaintiff and the California Subclass seek actual,
23 punitive, and statutory damages, restitution, attorneys' fees and costs, and any other
24 relief this Court deems proper as a result of Ralphs' CLRA violations.

25 84. Pursuant to Cal. Civ. Code § 1782, Plaintiff will notify Kroger in
26 writing by certified mail of its violations of § 1770 described above and demand that
27 it correct the problems associated with the actions detailed above and give notice to
28 all affected consumers of Kroger's intent to so act. If Kroger does not agree to

1 rectify the problems identified and give notice to all affected consumers within 30
2 days of the date of written notice, Plaintiff will amend this Complaint to seek actual,
3 punitive, and statutory damages, restitution, attorneys' fees and costs, and any other
4 relief this Court deems proper as a result of Kroger's CLRA violations.

5 **SECOND CAUSE OF ACTION**

6 **Violation of California's False Advertising Law (FAL)**

7 **Cal. Bus. & Prof. Code §§ 17500, *et seq.***

8 **(Against Defendants on behalf of Plaintiff and the Nationwide Class)**

9 85. Plaintiff hereby incorporates paragraphs 1-61 as if fully set forth herein.

10 86. In marketing, advertising and labeling Infants' Products, Defendants
11 made, and continue to make, false and misleading statements in order to induce
12 consumers into purchasing Infants' Products on a false premise.

13 87. In marketing, advertising and labeling Infants' Products, Defendants
14 failed and continue to fail to make material disclosures, including a disclosure
15 notifying consumers that Infants' Products is the same product as Children's
16 Products.

17 88. Defendants are aware that the claims that they make about Infants'
18 Products are false, misleading, without basis, and unreasonable.

19 89. Defendants engaged in the deceptive conduct alleged above in order to
20 induce the public to purchase the more expensive Infants' Products instead of
21 Children's Products.

22 90. In marketing, advertising and labeling Infants' Products described
23 above, Defendants knew or should have known that their statements regarding the
24 uses and characteristics of Infants' Products were false and misleading.

25 91. Defendants' misrepresentations of the material facts detailed above
26 constitute unfair and fraudulent business practices within Cal. Bus. & Prof. Code §
27 17200.

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1 92. Defendants had reasonably available alternatives to further their
2 legitimate business interests, other than the conduct described herein.

3 93. All of the conduct alleged herein occurs and continues to occur in the
4 Defendants' respective business. Defendants' wrongful conduct is part of a course
5 of conduct repeated on hundreds, if not thousands, of occasions every day.

6 94. Plaintiff and the Nationwide Class were misled into purchasing Infants'
7 Products by Defendants' deceptive conduct and misleading advertising as alleged
8 above.

9 95. Plaintiff and the Nationwide Class were misled and, because the
10 misrepresentations and omissions were uniform and material, presumably believed
11 that Infants' Products has benefits which it does not; namely that it is more suitable
12 and safer for infants than the Children's Products.

13 96. Additionally, Defendants' use of various forms of advertising and
14 marketing have deceived and are likely to continue deceiving the consuming public,
15 in violation of California Business and Professions Code § 17500.

16 97. As a result of Defendants' wrongful conduct, Plaintiff and the
17 Nationwide Class have suffered injury in fact and have lost money. Indeed, Plaintiff
18 and the Nationwide Class purchased Infants' Products because of Defendants'
19 misrepresentations that Infants' Products are a more suitable and safer OTC
20 medicine for infants than Children's Products. Plaintiff and the Nationwide Class
21 would not have purchased Infants' Products if they had known that the advertising
22 and representations as described herein were false.

23 **THIRD CAUSE OF ACTION**

24 **Violations of Unfair Competition Law (UCL)**

25 **Unlawful, Fraudulent & Unfair Business Practices**

26 **Cal. Bus. & Prof. Code §§ 17200, *et seq.***

27 **(Against Defendants on behalf of Plaintiff and the Nationwide Class)**

28 98. Plaintiff hereby incorporates paragraphs 1-61 as if fully set forth herein.

1 99. As alleged above, Plaintiff and the Nationwide Class have standing to
2 pursue this claim as they have suffered injury in fact and have lost money or
3 property as a result of Defendants' actions. Specifically, prior to the filing of this
4 action, Plaintiff and the Nationwide Class purchased Infants' Products for their own
5 personal household use. In so doing, they relied on Defendants' misrepresentations
6 and omissions of material facts, as alleged in detail above. Had Defendants
7 disclosed to Plaintiff and the Nationwide Class that Infants' Products and Children's
8 Products are identical and that Children's Products are in fact suitable and safe for
9 infants, Plaintiff and the Nationwide Class would not have purchased the more
10 expensive Infants' Products.

11 100. Defendants' misrepresentations and omissions of material fact as
12 alleged herein constitute unlawful, unfair, and fraudulent business practices in that
13 they deceived Plaintiff and the Nationwide Class into believing that the Infants'
14 Products are somehow specially formulated for infants and different from the less
15 expensive Children's Products.

16 101. Defendants are aware that the claims that they make about Infants'
17 Products are deceptive, false and misleading. Defendants are also aware that
18 consumers with infants, such as Plaintiff, tend to be more cautious about what
19 medicine to give their infant, especially when they are giving an infant a product
20 that has caused accidental deaths in the past.

21 102. Defendants' actions as described herein constitute unfair competition
22 within the meaning of California's UCL, insofar as the UCL prohibits "any
23 unlawful, unfair or fraudulent business act or practice" or "unfair, deceptive, untrue
24 or misleading advertising."

25 103. Defendants' conduct constitutes an "unlawful" business practice within
26 the meaning of the UCL because it violates the CLRA and FAL.

27 104. Defendants' conduct constitutes an "unfair" business practice within
28 the meaning of the UCL because it is immoral, unethical, oppressive, unscrupulous

1 and/or substantially injurious to consumers. Plaintiff and the Nationwide Class were
2 misled because Defendants’ misrepresentations and omissions, described above,
3 were uniform and material. Plaintiff and the Nationwide Class reasonably relied on
4 those misrepresentations and material omissions, believing based thereon that the
5 Products are not identical, and that Infants’ Products are in fact the only suitable
6 OTC pain and fever reliever for infants. As a result of Defendants’
7 misrepresentations and omissions, Plaintiff and the Nationwide Class lost money or
8 property.

9 105. Plaintiff and the Nationwide Class were misled and, because the
10 misrepresentations and omissions were uniform and material, presumably believed
11 that the Products are not identical, and that Infants’ Products are in fact the only
12 suitable OTC pain and fever reliever for infants.

13 106. Defendants’ conduct constitutes a “fraudulent” business practice within
14 the meaning of the UCL insofar as Defendants’ misrepresentations and omissions
15 regarding the formulation of the Infants’ Products are likely to deceive members of
16 the public.

17 107. As a direct and proximate result of Defendants’ wrongful business
18 practices in violation of the UCL, Plaintiff and the Nationwide Class have suffered
19 injury-in-fact and lost money or property as a result of purchasing the Infants’
20 Products. Plaintiff and the Nationwide Class members would not have purchased or
21 paid as much for the Infants’ Products had they known they were identical to the
22 less expensive Children’s Products.

23 108. Defendants’ wrongful business practices constitute a continuing course
24 of conduct of unfair competition since Defendants are labeling, marketing, and
25 selling the Infants’ Products in a manner likely to deceive the public.

26 109. Pursuant to section 17203 of the UCL, Plaintiff and the Class members
27 seek an order of this Court enjoining Defendants from engaging in the unfair and
28

1 fraudulent business practices alleged herein, in connection with the sale of the
2 Products.

3 110. Additionally, Plaintiff and the Nationwide Class seek an order
4 awarding restitution of the money wrongfully acquired by Defendants by means of
5 the unfair and fraudulent business practices alleged herein.

6 **FOURTH CAUSE OF ACTION**

7 **Violation of The Magnuson-Moss Warranty Act**

8 **15 U.S.C. §§ 2301, *et seq.***

9 **(Against Ralphs on behalf of Plaintiff and the Nationwide Class)**

10 111. Plaintiff hereby incorporates paragraphs 1-61 as if fully set forth herein.

11 112. Plaintiff brings this cause of action against Ralphs on behalf of herself
12 and on behalf of the Nationwide Class. Upon certification, the Class will consist of
13 more than 100 named plaintiffs.

14 113. The Magnuson-Moss Warranty Act provides a federal remedy for
15 consumers who have been damaged by the failure of a supplier or warrantor to
16 comply with any obligation under a written warranty or implied warranty, or other
17 various obligations established under the Magnuson-Moss Warranty Act, 15 U.S.C.
18 §§ 2301 *et seq.*

19 114. The Infants' Products are "consumer products" within the meaning of
20 the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(1).

21 115. Plaintiff and the Nationwide Class are "consumers" within the meaning
22 of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(3).

23 116. Ralphs is the "supplier" and "warrantor" of the Infants' Products within
24 the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301(4) &
25 2301(5).

26 117. Ralphs represented in writing that the Infants' Products were
27 manufactured or designed for infants by prominently displaying the word "infants"
28 on the front-label packaging and the product information and price tags displayed

1 next to Infants' Products on the store shelves.

2 118. These statements were made in connection with the sale of the Infants'
3 Products and relate to the nature of the Infants' Products and affirm and promise that
4 the Infants' Products are as represented and, as such, are "written warranties" within
5 the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(6)(A).

6 119. As alleged herein, Ralphs breached the written warranty by selling
7 consumers Infants' Products that were nothing more than Children's Products with
8 the word "infants" prominently displayed.

9 120. The Infants' Products do not conform to Ralphs' written warranty and
10 therefore violate the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*
11 Consequently, Plaintiff and the Nationwide Class have suffered injury and are
12 entitled to damages in an amount to be proven at trial.

13 121. On May 18, 2020, Plaintiff, on behalf of herself and the Nationwide
14 Class mailed a pre-litigation letter by certified mail, with return receipt requested, to
15 Ralphs notifying that the conduct, as alleged herein, violated the Magnuson-Moss
16 Warranty Act.

17 **FIFTH CAUSE OF ACTION**

18 **Breach of Express Warranty**

19 **(Against Ralphs on behalf of Plaintiff and the Nationwide Class)**

20 122. Plaintiff hereby incorporates paragraphs 1-61 as if fully set forth herein.

21 123. As part of each contract for the sale of Infants' Products, Ralphs
22 represented that the Infants' Products were manufactured or designed for infants by
23 prominently displaying the word "infants" on the front-label packaging and the
24 product information and price tags display next to Infants' Products on the store
25 shelves.

26 124. Ralphs' representations that represented to consumers that the Infants'
27 Products were manufactured, developed, and designed to be used for infants
28 constituted express warranties and became part of the basis of the bargain between

1 Plaintiff and the Nationwide Class, on the one hand, and Ralphs, on the other.

2 125. Ralphs represented that Infants' Products were manufactured,
3 developed, and designed to be used for infants to induce Plaintiff and the
4 Nationwide Class to purchase Infants' Products, and pay more for them than they
5 otherwise would have had they known the truth.

6 126. Plaintiff and the Nationwide Class relied on Ralphs' representations
7 that Infants' Products were manufactured, developed, and designed to be used for
8 infants, when it knew that the Children's Products were the same product, yet sold at
9 a significantly lower cost.

10 127. Plaintiff and the Nationwide Class have performed all conditions
11 precedent to Ralphs' liability under the above-referenced contracts when they
12 purchased the Infants' Products for their ordinary purposes.

13 128. Ralphs breached its express warranties about Infants' Products because
14 they were nothing more than Children's Products with the word "infants"
15 prominently displayed.

16 129. As a result of Ralphs' breach of express warranties, Plaintiff and the
17 Nationwide Class were damaged in the amount of the purchase price or the premium
18 they paid for the Infants' Products, together with interest thereon from the date of
19 purchase, in an aggregate amount that Plaintiff will prove at trial.

20 130. On May 18, 2020, a reasonable time after they knew or should have
21 known of such breach, Plaintiff, on behalf of herself and the Nationwide Class, sent
22 a notice letter to Ralphs which provided notice of Ralphs' breach and demanded that
23 Ralphs correct, repair, replace, or otherwise rectify the breach complained of herein.
24 The letter also stated that if Ralphs refused to do so, a complaint would be filed.
25 Ralphs failed to comply with the letter.

26 131. Plaintiff and the Nationwide Class seek actual damages and punitive
27 damages for Ralphs' breach of warranty, in an amount to be proven at trial.

28 132. On May 18, 2020, Plaintiff, on behalf of herself and the Nationwide

1 Class mailed a pre-litigation letter by certified mail, with return receipt requested, to
2 Ralphs notifying that the conduct, as alleged herein, breached the express warranty.

3 **SIXTH CAUSE OF ACTION**

4 **Unjust Enrichment**

5 **(Against Defendants On behalf of Plaintiff and the Nationwide Class)**

6 133. Plaintiff hereby incorporates paragraphs 1-61 as if fully set forth herein.

7 134. Plaintiff, on behalf of herself and on behalf of the Nationwide Class,
8 brings a common law cause of action for unjust enrichment.

9 135. Defendants' conduct violated, *inter alia*, state and federal law by
10 manufacturing, advertising, marketing, and selling Infants' Products while
11 misrepresenting and omitting material facts.

12 136. Defendants' unlawful conduct as described in this Complaint allowed
13 Defendants to knowingly realize substantial revenues from selling Infants' Products
14 at the expense of, and to the detriment or impoverishment of, Plaintiff and the
15 Nationwide Class, and to Defendants' benefit and enrichment. Defendants have
16 thereby violated fundamental principles of justice, equity, and good conscience.

17 137. Plaintiff and the Nationwide Class conferred significant financial
18 benefits and paid substantial compensation to Defendants for Infants' Products,
19 which were not as Defendants represented them to be.

20 138. Under California's common law principles of unjust enrichment, it is
21 inequitable for Defendants to retain the benefits conferred by Plaintiff's and the
22 Nationwide Class' overpayments.

23 139. Plaintiff and the Nationwide Class seek disgorgement of all profits
24 resulting from such overpayments and establishment of a constructive trust from
25 which Plaintiff and the Nationwide Class may seek restitution.

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DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all issues so triable.

DATED: July 14, 2020

PEARSON, SIMON & WARSHAW, LLP

By: /s/ Daniel L. Warshaw

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