

**LAW OFFICES OF RONALD A. MARRON**

RONALD A. MARRON (SBN 175650)

*ron@consumersadvocates.com*

MICHAEL T. HOUCHIN (SBN 305541)

*mike@consumersadvocates.com*

LILACH HALPERIN (SBN 323202)

*lilach@consumersadvocates.com*

651 Arroyo Drive

San Diego, California 92103

Telephone: (619) 696-9006

Facsimile: (619) 564-6665

*Attorneys for Plaintiff and the Proposed Class*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

JOSEPH DIGIACINTO, an individual, on behalf  
of himself, all others similarly situated, and the  
general public,

Plaintiff,

v.

Reckitt Benckiser, LLC, a Delaware limited  
liability company,

Defendant.

Case No.: 3:22-cv-4690

**CLASS ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

1 Plaintiff Joseph DiGiacinto (“Plaintiff”), on behalf of himself, all others similarly situated,  
2 and the general public, by and through his undersigned counsel, hereby sues Defendant Reckitt  
3 Benckiser, LLC (“Defendant”) and, upon information and belief and investigation of counsel,  
4 alleges as follows:

5 **I. INTRODUCTION**

6 1. Defendant makes, distributes, sells, and markets “Children’s Delsym Cough  
7 Relief.” Defendant sells two separate Delsym Cough Relief products: one advertised for adults,  
8 and one advertised for children. The Delsym product marketed for children has an image of a  
9 cartoon child and the word “children” written on the front label of the product, while the one  
10 marketed for adults does not contain an image of a child or the word “children” anywhere on the  
11 label.

12 2. These representations lead reasonable consumers to believe that the cough relief  
13 product advertised for adults is suitable only for adults and the cough relief product advertised for  
14 children is suitable for children. Based on this reasonable belief, consumers are willing to pay more  
15 for the children’s product. Reasonable consumers are willing to pay more for the Children’s  
16 Delsym Cough Relief product because they want a product that is specifically formulated for  
17 children and is guaranteed to be safe for children to consume.

18 3. The truth, however, is that the adult’s Delsym Cough Relief product has the exact  
19 same formula and ingredients as the Children’s Delsym Cough Relief product. Defendant puts the  
20 same cough syrup into two different products with different labels. Consumers are being deceived  
21 and overcharged.

22 4. Plaintiff read and relied upon Defendant’s advertising when purchasing the Product  
23 and was damaged as a result.

24 5. Plaintiff brings this action on behalf of himself and all other similarly situated  
25 consumers in the United States, alleging violations of the California Consumer Legal Remedies  
26 Act, Cal. Civ. Code §§ 1750 *et seq.* (“CLRA”), Unfair Competition Law, Cal. Bus. & Prof. Code  
27 §§ 17200 *et seq.* (“UCL”), and False Advertising Law, *id.* §§ 17500 *et seq.* (“FAL”). Plaintiff  
28 brings further causes of action for breach of express and implied warranties, negligent

1 misrepresentation, intentional misrepresentation/fraud, and quasi-contract/unjust enrichment.

2 6. Plaintiff seeks an order compelling Defendant to (a) cease marketing the Product  
3 using the misleading and unlawful tactics complained of herein, (b) destroy all misleading,  
4 deceptive, and unlawful materials, (c) conduct a corrective advertising campaign, (d) restore the  
5 amounts by which it has been unjustly enriched, and (e) pay restitution damages and punitive  
6 damages, as allowed by law

7 **II. JURISDICTION AND VENUE**

8 7. This Court has original jurisdiction under 28 U.S.C. § 1332(d)(2) (The Class Action  
9 Fairness Act) because the matter in controversy exceeds the sum or value of \$5,000,000 exclusive  
10 of interest and costs and because more than two-thirds of the members of the Class reside in states  
11 other than the state of which Defendant is a citizen.

12 8. The court has personal jurisdiction over Defendant. Defendant purposely availed  
13 itself to California because Defendant transacts, is registered to do business, and does business  
14 within this judicial district, and is committing the acts complained of below within this judicial  
15 district.

16 9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the injury in  
17 this case substantially occurred in this District. Defendant has intentionally availed itself of the  
18 laws and markets of this District through the promotion, marketing, distribution, and sale of the  
19 Product in this District, and is subject to personal jurisdiction in this District.

20 **III. PARTIES**

21 10. Defendant Reckitt Benckiser, LLC, is a Delaware limited liability company with  
22 its principal place of business at 399 Interpace Parkway, Parsippany, New Jersey 07054. Defendant  
23 is registered to do business in California as entity number 201126210215. Defendant makes,  
24 labels, distributes, sells, and markets the Delsym Cough Relief products throughout the United  
25 States and in California. Defendant is responsible for the making, labelling, distribution, selling,  
26 and marketing of the Delsym Cough Relief products throughout the applicable statute of  
27 limitations period.

28 11. Plaintiff Joseph DiGiacinto (“Plaintiff”) is a resident of California and has

1 purchased the Product for personal and household use and not for resale several times throughout  
2 the Class Period at a Walgreens store located at 7800 Old Redwood Hwy, Cotati, CA 94931 and  
3 a Walmart store located at 4625 Redwood Dr, Rohnert Park, CA 94928. Plaintiff's most recent  
4 purchase of the Product was in January of 2022. Plaintiff saw the misrepresentations made on the  
5 Product label prior to and at the time of purchase and understood them as representations and  
6 warranties that the Product marketed for children was worth a premium, as it was specially  
7 formulated for children and safe for children to consume. Plaintiff relied on the representations  
8 made on the Product's label in deciding to purchase the Product. These representations and  
9 warranties were part of his basis of the bargain, in that he would not have purchased the Product,  
10 or would only have been willing to purchase the Product at a lower price, had he known the  
11 representations were false. Plaintiff would consider purchasing the Product again if the advertising  
12 statements made on the Product labels were, in fact, truthful and represented in a manner as not to  
13 deceive consumers.

14 **IV. NATURE OF THE ACTION**

15 **A. Defendant Makes, Markets, Distributes, and Sells Delsym Cough Relief Products**

16 12. Defendant sells a Children's Delsym Cough Relief product marketed for children  
17 and an adult's Delsym Cough Relief product that is marketed for adults.

18 13. The Delsym product marketed for children is labeled as "Children's Delsym Cough  
19 Relief." The children's product is labeled "Age 4+", "for Children", and contains a cartoon image  
20 of a child. The adult Delsym product is not marketed to children. True and correct copies of the  
21 front and top label of the children's Delsym Cough Relief product and the adult's Delsym Cough  
22 Relief product are shown below:

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1 14. The side labels of both the children’s and adult’s Delsym products contain an  
 2 identical dosing chart that includes dosing amounts for both children and adults. True and correct  
 3 copies of the side label of the children’s Delsym product and the adult’s Delsym product are shown  
 4 below:



23 15. The dosing instructions require children to consume less of the Product than adults.  
 24 A Delsym cough relief product purchased for children would therefore be consumed at a slower  
 25 rate than a Delsym cough relief product purchased for adults. For this reason, Defendant created  
 26 and marketed one Product as specially formulated for children and sold that Product at a premium.  
 27 However, both the active and inactive ingredients listed on the label of both the Children’s Delsym  
 28 product and adult Delsym product are identical in form and quantity.

1 16. A true and correct copy of the ingredient list for the children's Delsym product is  
 2 shown below:

**Ingredients**  
 Children's Delsym 12 Hour Cough Liquid, Grape 5oz

<b>Drug Facts</b>	
<b>Active ingredient (in each 5 mL)</b>	<b>Purpose</b>
Dextromethorphan polistirex equivalent to 30 mg dextromethorphan hydrobromide.....	Cough suppressant
<b>Uses</b> temporarily relieves	
<ul style="list-style-type: none"> <li>■ cough due to minor throat and bronchial irritation as may occur with the common cold or inhaled irritants</li> <li>■ the impulse to cough to help you get to sleep</li> </ul>	
<b>Warnings</b>	
<p><b>Do not use</b> if you are now taking a prescription monoamine oxidase inhibitor (MAOI) (certain drugs for depression, psychiatric, or emotional conditions, or Parkinson's disease), or for 2 weeks after stopping the MAOI drug. If you do not know if your prescription drug contains an MAOI, ask a doctor or pharmacist before taking this product.</p>	
<p><b>Ask a doctor before use if you have</b></p> <ul style="list-style-type: none"> <li>■ chronic cough that lasts such as occurs with smoking, asthma, or emphysema</li> <li>■ cough that occurs with too much phlegm (mucus)</li> </ul>	
<p><b>Stop use and ask a doctor</b> if cough lasts more than 7 days, comes back, or occurs with fever, rash, or headache that lasts. These could be signs of a serious condition.</p>	
<p><b>If pregnant or breast-feeding</b>, ask a health professional before use.  <b>Keep out of reach of children.</b> In case of overdose, get medical help or contact a Poison Control Center right away.</p>	
<b>Directions</b> ■ shake bottle well before use	
<ul style="list-style-type: none"> <li>■ measure only with dosing cup provided</li> <li>■ do not use dosing cup with other products</li> <li>■ dose as follows or as directed by a doctor</li> </ul>	
adults and children 12 years of age and over	10 mL every 12 hours, not to exceed 20 mL in 24 hours
children 6 to under 12 years of age	5 mL every 12 hours, not to exceed 10 mL in 24 hours
children 4 to under 6 years of age	2.5 mL every 12 hours, not to exceed 5 mL in 24 hours
children under 4 years of age	do not use
<b>Other information</b>	
■ store at 20°-25°C (68°-77°F)	■ each 5 mL contains: sodium 7 mg
	■ dosing cup provided
<b>Inactive ingredients</b> citric acid anhydrous, D&C red no. 33, edetate disodium, ethylcellulose, FD&C blue no. 1, flavor, high fructose corn syrup, methylparaben, partially hydrogenated vegetable oil (soybean, cottonseed), polyethylene glycol 3350, polysorbate 80, propylene glycol, propylparaben, purified water, sucrose, tragacanth, xanthan gum	
<b>Questions?</b> 1-866-682-4639	
You may also report side effects to this phone number.	

17. A true and correct copy of the ingredient list for the adult's Delsym product is shown below:

# Ingredients

## Delsym 12 Hour Cough Relief Liquid, Grape 5oz

**Drug Facts**

Active ingredient (in each 5 mL)	Purpose
Dextromethorphan polistirex equivalent to 30 mg dextromethorphan hydrobromide .....	Cough suppressant

**Uses** temporarily relieves

- cough due to minor throat and bronchial irritation as may occur with the common cold or inhaled irritants
- the impulse to cough to help you get to sleep

**Warnings**

**Do not use** if you are now taking a prescription monoamine oxidase inhibitor (MAOI) (certain drugs for depression, psychiatric, or emotional conditions, or Parkinson's disease), or for 2 weeks after stopping the MAOI drug. If you do not know if your prescription drug contains an MAOI, ask a doctor or pharmacist before taking this product.

**Ask a doctor before use if you have**

- chronic cough that lasts such as occurs with smoking, asthma, or emphysema
- cough that occurs with too much phlegm (mucus)

**Stop use and ask a doctor** if cough lasts more than 7 days, comes back, or occurs with fever, rash, or headache that lasts. These could be signs of a serious condition.

**If pregnant or breast-feeding**, ask a health professional before use. **Keep out of reach of children.** In case of overdose, get medical help or contact a Poison Control Center right away.

**Directions** ■ **shake bottle well before use**

- measure only with dosing cup provided
- do not use dosing cup with other products
- dose as follows or as directed by a doctor

adults and children 12 years of age and over	10 mL every 12 hours, not to exceed 20 mL in 24 hours
children 6 to under 12 years of age	5 mL every 12 hours, not to exceed 10 mL in 24 hours
children 4 to under 6 years of age	2.5 mL every 12 hours, not to exceed 5 mL in 24 hours
children under 4 years of age	do not use

**Other information** ■ each 5 mL contains: sodium 7 mg

- store at 20-25°C (68-77°F)
- dosing cup provided

**Inactive ingredients** citric acid anhydrous, D&C red no. 33, edetate disodium, ethylcellulose, FD&C blue no. 1, flavor, high fructose corn syrup, methylparaben, partially hydrogenated vegetable oil (soybean, cottonseed), polyethylene glycol 3350, polysorbate 80, propylene glycol, propylparaben, purified water, sucrose, tragacanth, xanthan gum

**Questions? 1-866-682-4639**  
You may also report side effects to this phone number.



1 18. As shown above, both the children’s and the adult’s Delsym products contain the  
2 same amount of the same active and inactive ingredients.

3 19. Both the children’s and the adult’s Delsym products contain the following active  
4 ingredient: “Dextromethorphan polistirex equivalent to 30 mg dextromethorphan hydrobromide.”

5 20. Both the children’s and the adult’s Delsym products also contain the following  
6 inactive ingredients: “citric acid anhydrous, D&C red no. 33, edetate disodium, ethylcellulose,  
7 FD&C blue no. 1, flavor, high fructose corn syrup, methylparaben, partially hydrogenated  
8 vegetable oil (soybean, cottonseed), polyethylene glycol 3350, polysorbate 80, propylene glycol,  
9 propylparaben, purified water, sucrose, tragacanth, xantham gum.”

10 **B. The Delsym Cough Relief Product Label is Misleading to Reasonable Consumers**

11 21. Based on the different marketing and labeling on the front of the adults’ Delsym  
12 Cough Relief product and the labeling on the front of the Children’s Delsym Cough Relief  
13 product, reasonable consumers believe that there is something different about the adults’ Delsym  
14 Cough Relief product and the Children’s Delsym Cough Relief product that makes one better  
15 suited for children.

16 22. The pricing of the Children’s Delsym Cough Relief product reinforces this  
17 reasonable belief. Per ounce, the Children’s Delsym Cough Relief product costs almost a dollar  
18 more than the adult’s Delsym Cough Relief product. For example, Walgreens sells 3.0-ounce  
19 containers of the Children’s Delsym Cough Relief product for \$17.99, or \$6.00/oz.<sup>1</sup> Walgreens  
20 sells 3.0-ounce containers of the adult’s Delsym Cough Relief product for \$15.49, or \$5.16/oz.<sup>2</sup>

21 23. The same is true for other retailers: the Children’s Delsym Cough Relief product  
22 is charged at a premium compared to the adults’ Delsym Cough Relief product for the same flavor  
23 and amount of fluid ounces. For example, on Walmart.com, children’s grape-flavored Delsym  
24 Cough Relief sells for \$2.97/fl oz while adult’s grape-flavored Delsym Cough Relief sells for

25 \_\_\_\_\_  
26 <sup>1</sup> <https://www.walgreens.com/store/c/delsym-children's-cough-suppressant-liquid-grape/ID=prod6006709-product>

27 <sup>2</sup> <https://www.walgreens.com/store/c/delsym-adult-cough-suppressant-liquid-grape/ID=prod6006711-product>  
28

1 \$2.77/fl oz.<sup>3</sup> Both the children's and adult's grape-flavored Delsym Cough Relief product contain  
2 the same amount of the same active and inactive ingredients. The only difference is that one is  
3 labeled for children, and one is labeled for adults.

4 24. This difference in pricing further indicates to reasonable consumers that the  
5 Children's Delsym Cough Relief product is specially formulated for children and is safer for  
6 children, thus justifying the difference in price.

7 25. The truth, however, is that the Children's Delsym Cough Relief product is not  
8 specially formulated for children. The Children's Delsym Cough Relief product is identical to the  
9 adult's Delsym Cough Relief product. Yet, the adult Delsym Cough Relief product costs less than  
10 the Children's Delsym Cough Relief product. Defendant takes the same exact product and puts it  
11 in two different forms of packaging: one labeled for children, and one labeled for adults. Then,  
12 Defendant charges more for the product marketed for children. In short, Defendant tricks  
13 consumers into thinking they are buying cough relief product specially formulated for children,  
14 when in reality, consumers are just buying Defendant's cough relief product for adults in a different  
15 packaging marketed for children.

16 26. That Defendant is able to charge more for the Children's Delsym Cough Relief  
17 product when it is prominently labeled for children and includes a cartoon image of a child on the  
18 front label of the Product demonstrates that Defendant's labelling is misleading. Consumers buy  
19 the Children's Delsym Product based on the belief that it is specially formulated for children and  
20 is safer for children to consume. There is a reason that children have different medicine and are  
21 recommended to have different dosages of medicine than adults, and consumers that want to keep  
22 children safe rely on companies to not mislead them into paying more for products.

23 27. No reasonable consumer who understood that the Children's Delsym Cough Relief  
24 product was formulated identically to the adult's Delsym Cough Relief product would choose to  
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26 <sup>3</sup> Compare <https://www.walmart.com/ip/Children-s-Delsym-12-hour-Cough-Relief-Medicine-Powerful-Good-Hours-Suppressing-Liquid-1-Pediatrician-Recommended-Grape-Flavor-5-Fl-oz/14313115> and <https://www.walmart.com/ip/Delsym-Adult-12-hour-Cough-Relief-Medicine-Powerful-Good-Hours-Suppressing-Liquid-1-Pharmacist-Recommended-Grape-Flavor-5-Fl-Oz/14313114?athbdg=L1200>  
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1 pay more for it. The very fact that Defendant is able to sell the Children’s Delsym Cough Relief  
2 product for a higher price demonstrates that its labelling is misleading to consumers.

3 **C. Plaintiff’s Purchases, Reliance, and Injury**

4 28. Plaintiff Joseph DiGiacinto purchased the Children’s Delsym Cough Relief product  
5 several times throughout the class period at a Walgreens store located at 7800 Old Redwood Hwy,  
6 Cotati, CA 94931 and at a Walmart store located at 4625 Redwood Dr, Rohnert Park, CA 94928  
7 in reliance on the Product’s claims that the Product was formulated specifically for children.  
8 Plaintiff’s most recent purchase was in or around January of 2022 and the cost of the Product was  
9 approximately \$14.00.

10 29. When deciding to purchase the Product, Plaintiff read and relied on the  
11 advertisement that the Children’s Delsym Cough Relief product was “for children,” as well as the  
12 additional children-specific representations, which appear directly on the front label of the  
13 Product’s label and packaging.

14 30. Based on these representations, Plaintiff believed that the Product was specially  
15 formulated for children and bought it specifically for this reason.

16 31. Plaintiff would not have purchased this Product if Plaintiff had known that the  
17 Product was, in fact, identical to Delsym Cough Relief product marketed for adults, which costs  
18 less than the Children’s Delsym Cough Relief product. Plaintiff paid a premium for this Product  
19 due to the misleading labelling on the Product’s packaging. Had Plaintiff known the truth, Plaintiff  
20 could have purchased the same Product for less per ounce than Plaintiff paid.

21 32. The representations on the Product’s label were and are false and misleading, and  
22 had the capacity, tendency, and likelihood to confuse or confound Plaintiff and other consumers  
23 acting reasonably (including the putative Class) because, as described in detail herein, the Product  
24 is identical to the Delsym product marketed to adults and is not specially formulated for children.

25 33. Plaintiff acted reasonably in relying on the challenged claims that Defendant  
26 intentionally placed on the Product’s label and packaging with the intent to induce average  
27 consumers into purchasing it.

28 34. Plaintiff first discovered Defendant’s unlawful acts described herein in August of

1 2022 when he learned that the children’s Product was identical to the adult’s Product, despite the  
2 children’s Product costing more.

3 35. Plaintiff, in the exercise of reasonable diligence, could not have discovered earlier  
4 Defendant’s unlawful acts described herein because the violations were known to Defendant, and  
5 not to him throughout the Class Period defined herein.

6 36. The children’s Product costs more than the adult Product without misleading  
7 labeling, and would have cost less absent the false and misleading statements.

8 37. Plaintiff paid more for the Product, and would only have been willing to pay less,  
9 or unwilling to purchase it at all, absent the false and misleading labeling statements complained  
10 of herein.

11 38. For these reasons, the Product was worth less than what Plaintiff paid for it.

12 39. Plaintiff would like to, and would consider, purchasing the Product again when he  
13 can do so with the assurance that the Product’s label is truthful and consistent with the Product’s  
14 ingredients.

15 40. Plaintiff will be unable to rely on the Product’s advertising or labeling in the future,  
16 and so will not purchase the Product again although he would like to.

17 41. Plaintiff lost money as a result of Defendant’s deceptive claims and practices in  
18 that he did not receive what he paid for when purchasing the Product.

19 42. Plaintiff detrimentally altered his position and suffered damages in an amount equal  
20 to the premium he paid for the Product.

21 43. The senior officers and directors of Defendant allowed the Product to be sold with  
22 full knowledge or reckless disregard that the challenged claims are fraudulent, unlawful, and  
23 misleading.

24 **V. CLASS ACTION ALLEGATIONS**

25 44. Pursuant to Federal Rule of Civil Procedure 23, Plaintiff seeks certification of the  
26 following Classes (or alternative Classes or Subclasses), for the time period from when the Delsym  
27 Cough Relief product first entered into the stream of commerce until the present (“Class Period”),  
28 as defined as follows:

1           **The Nationwide Class is defined as follows:**

2           All U.S. citizens who purchased the Product in their respective state of  
3           citizenship for personal and household use and not for resale during the  
4           Class Period.

5           **The California Subclass is defined as follows:**

6           All California citizens who purchased the Product in California for personal  
7           and household use and not for resale during the Class Period.

8           45.     The Classes and Subclasses described in this complaint will jointly be referred to  
9           as the “Class” or the “Classes” unless otherwise stated, and the proposed members of the Classes  
10           and Subclasses will jointly be referred to as “Class Members.”

11           46.     Plaintiff and the Class reserve their right to amend or modify the Class definitions  
12           with greater specificity or further division into subclasses or limitation to particular issues as  
13           discovery and the orders of this Court warrant.

14           47.     Excluded from the Class are governmental entities, Defendant, any entity in which  
15           Defendant has a controlling interest, Defendant’s employees, officers, directors, legal  
16           representatives, heirs, successors and wholly or partly owned subsidiaries or affiliated companies,  
17           including all parent companies, and their employees; and the judicial officers, their immediate  
18           family members and court staff assigned to this case.

19           48.     The members in the proposed Class are so numerous that individual joinder of all  
20           members is impracticable. Due to the nature of the trade and commerce involved, however,  
21           Plaintiff believes the total number of Class members is at least in the hundreds and members of  
22           the Classes are numerous. While the exact number and identities of the Class members are  
23           unknown at this time, such information can be ascertained through appropriate investigation and  
24           discovery. The disposition of the claims of the Class members in a single class action will provide  
25           substantial benefits to all parties and to the Court.

26           49.     Pursuant to Rule 23(b)(2), Defendant has acted or refused to act on grounds  
27           generally applicable to the Classes, thereby making final injunctive relief or corresponding  
28           declaratory relief and damages as to the Product appropriate with respect to the Classes as a whole.

1 In particular, Defendant has failed to disclose the true nature of the Product being marketed as  
2 described herein.

3 50. There is a well-defined community of interest in the questions of law and fact  
4 involved, affecting the Plaintiff and the Classes and these common questions of fact and law  
5 include, but are not limited to, the following:

- 6 a. Whether Defendant breached any express warranties made to Plaintiff and the  
7 Class;
- 8 b. Whether Defendant breached any implied warranties made to Plaintiff and the  
9 Class;
- 10 c. Whether Defendant engaged, and continues to engage, in unfair or deceptive acts  
11 and practices in connection with the marketing, advertising, and sales of the  
12 Product;
- 13 d. Whether Defendant violated other consumer protection statutes, false advertising  
14 statutes, or state deceptive business practices statutes;
- 15 e. Whether Defendant's conduct violates public policy; whether Defendant's conduct  
16 violates state and federal food statutes or regulations; whether the Product is  
17 misbranded;
- 18 f. The proper amount of restitution, damages, and punitive damages;
- 19 g. The proper injunctive relief, including a corrective advertising campaign; and  
20 h. The proper amount of attorneys' fees.

21 51. These common questions of law and fact predominate over questions that affect  
22 only individual Class Members.

23 52. Plaintiff's claims are typical of Class Members' claims because they are based on  
24 the same underlying facts, events, and circumstances relating to Defendant's conduct. Specifically,  
25 all Class Members, including Plaintiff, were subjected to the same misleading and deceptive  
26 conduct when they purchased the Product, and suffered economic injury because the Product was  
27 and still is misrepresented. Absent Defendant's business practice of deceptively and unlawfully  
28 labeling the Product, Plaintiff and Class Members would not have purchased the Product, or would

1 have paid less for it.

2 53. Plaintiff will fairly and adequately represent and protect the interests of the Classes,  
3 has no interests incompatible with the interests of the Classes, and has retained counsel with  
4 substantial experience in handling complex consumer class action litigation. Plaintiff and his  
5 counsel are committed to vigorously prosecuting this action on behalf of the Classes and have the  
6 financial resources to do so.

7 54. Plaintiff and the members of the Classes suffered, and will continue to suffer harm  
8 as a result of Defendant's unlawful and wrongful conduct. A class action is superior to other  
9 available methods for the fair and efficient adjudication of the present controversy. Individual  
10 joinder of all members of the Classes is impracticable. Even if individual Class members had the  
11 resources to pursue individual litigation, it would be unduly burdensome to the courts in which the  
12 individual litigation would proceed. Individual litigation magnifies the delay and expense to all  
13 parties in the court system of resolving the controversies engendered by Defendant's common  
14 course of conduct. The class action device allows a single court to provide the benefits of unitary  
15 adjudication, judicial economy, and the fair and efficient handling of all Class members' claims in  
16 a single forum. The conduct of this action as a class action conserves the resources of the parties  
17 and of the judicial system and protects the rights of the class members. Furthermore, for many, if  
18 not most, a class action is the only feasible mechanism that allows an opportunity for legal redress  
19 and justice.

20 55. Adjudication of individual Class members' claims with respect to Defendant  
21 would, as a practical matter, be dispositive of the interests of other members not parties to the  
22 adjudication, and could substantially impair or impede the ability of other class members to protect  
23 their interests.

24 56. Defendant has acted on grounds applicable to the Class, thereby making appropriate  
25 final public injunctive and declaratory relief concerning the Class as a whole.

26 57. As a result of the foregoing, class treatment is appropriate under Fed. R. Civ. P.  
27 23(b)(2) and 23(b)(3).

28 //

1 **CAUSES OF ACTION**

2 **FIRST CAUSE OF ACTION**

3 **Violations of the Unfair Competition Law,**

4 **Cal. Bus. & Prof. Code §§ 17200 *et seq.***

5 ***(on behalf of the California Class)***

6 58. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if  
7 set forth in full herein.

8 59. California’s Unfair Competition Law, Business and Professions Code §17200 (the  
9 “UCL”) prohibits any “unfair, deceptive, untrue or misleading advertising.” For the reasons  
10 discussed above, Defendant has engaged in unfair, deceptive, untrue and misleading advertising,  
11 and continues to engage in such business conduct, in violation of the UCL.

12 60. California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200,  
13 *et seq.*, proscribes acts of unfair competition, including “any unlawful, unfair or fraudulent  
14 business act or practice and unfair, deceptive, untrue or misleading advertising.”

15 **Fraudulent**

16 61. A statement or practice is “fraudulent” under the UCL if it is likely to mislead or  
17 deceive the public, applying an objective reasonable consumer test.

18 62. As set forth herein, Defendant’s claims relating to the Product are likely to mislead  
19 reasonable consumers to believe the Product is specially formulated for children and is worth a  
20 premium.

21 63. Defendant’s conduct caused and continues to cause substantial injury to Plaintiff  
22 and the other Class members. Plaintiff has suffered injury in fact as a result of Defendant’s unfair  
23 conduct. Defendant has thus engaged in unlawful, unfair and fraudulent business acts and  
24 practices and false advertising, entitling Plaintiff and the Class to public injunctive relief against  
25 Defendant, as set forth in the Prayer for Relief.

26 64. Pursuant to Business and Professions Code § 17203, Plaintiff and the Class seek an  
27 order requiring Defendant to immediately cease such acts of unlawful, unfair and fraudulent  
28 business practices and requiring Defendant to engage in a corrective advertising campaign.



1 65. Plaintiff also seeks an order for the disgorgement and restitution of the premium  
2 received from the sale of the Products the Class Members purchased, which was unjustly acquired  
3 through acts of unlawful, unfair, and/or fraudulent competition, and attorneys’ fees and costs.

4 **Unlawful**

5 66. The acts alleged herein are “unlawful” under the UCL in that they violate at least  
6 the following laws:

7 a. By knowingly and intentionally concealing from Plaintiff and the other Class  
8 members that the Product was not specially formulated for children while obtaining a premium  
9 from Plaintiff and the Classes;

10 b. By misrepresenting the nature of the Product as being specially formulated for  
11 children and worth a premium;

12 c. By engaging in the conduct giving rise to the claims asserted in this complaint;

13 d. By violating California Civil Code §§ 1709-1711 by making affirmative  
14 misrepresentations about the Product;

15 e. By violating California Civil Code §§ 1709-1711 by suppressing material  
16 information about the Product;

17 f. By violating the California Commercial Code for breaches of express and implied  
18 warranties.

19 g. By violating California’s Sherman Act, Cal. Health & Safety Code § 110390, which  
20 prohibits drug and cosmetics labelling that is “false or misleading in any particular”;

21 h. By violating the False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.*;  
22 and

23 i. By violating the Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*

24 67. Such conduct is ongoing and continues to this date.

25 68. Plaintiff and the Class reserve the right to allege other violations of law, which  
26 constitute other unlawful business acts or practices.

27 **Unfair**

28 69. Defendant’s acts, omissions, misrepresentations, practices and nondisclosures as

1 alleged herein also constitute “unfair” business acts and practices within the meaning of the UCL  
2 in that its conduct is substantially injurious to consumers, offends public policy, and is immoral,  
3 unethical, oppressive, and unscrupulous as the gravity of the conduct outweighs any alleged  
4 benefits attributable to such conduct. In the alternative, Defendant’s business conduct as described  
5 herein violates relevant laws designed to protect consumers and business from unfair competition  
6 in the marketplace. Such conduct is ongoing and continues to date.

7 70. Defendant’s conduct with respect to the labeling, advertising, and sale of the  
8 Product was and is also unfair because it violates public policy as declared by specific  
9 constitutional, statutory or regulatory provisions, including but not limited to the Consumers Legal  
10 Remedies Act, the False Advertising Law, and portions of the California Sherman Food, Drug,  
11 and Cosmetic Law.

12 71. Defendant’s conduct with respect to the labeling, advertising, and sale of the  
13 Product was and is also unfair because the consumer injury was substantial, not outweighed by  
14 benefits to consumers or competition, and not one consumers themselves could reasonably have  
15 avoided.

16 72. Defendant profited from its sale of the falsely, deceptively, and unlawfully  
17 advertised and packaged Product to unwary consumers.

18 73. Plaintiff and Class Members are likely to continue to be damaged by Defendant’s  
19 deceptive trade practices, because Defendant continues to disseminate misleading information on  
20 the Product’s packaging. Thus, public injunctive relief enjoining Defendant’s deceptive practices  
21 is proper.

22 74. There were reasonably available alternatives to further Defendant’s legitimate  
23 business interests, other than the conduct described herein.

24 75. Classwide reliance can be inferred because Defendant’s misrepresentations were  
25 material, *i.e.*, a reasonable consumer would consider them important in deciding whether to buy  
26 the Children’s Delsym Cough Relief product.

27 76. Defendant’s misrepresentations were a substantial factor and proximate cause in  
28 causing damages and losses to Plaintiff and Class members.

1 77. Plaintiff and the Classes were injured as a direct and proximate result of  
2 Defendant's conduct because (a) they would not have purchased the Children's Delsym Cough  
3 Relief product if they had known the truth and (b) they overpaid for the Product because the  
4 Products is sold at a price premium due to the misrepresentations.

5 **SECOND CAUSE OF ACTION**

6 **Violations of the False Advertising Law,**

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

8 ***(on behalf of the California Class)***

9 78. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if  
10 set forth in full herein.

11 79. The FAL provides that "[i]t is unlawful for any person, firm, corporation or  
12 association, or any employee thereof with intent directly or indirectly to dispose of real or personal  
13 property or to perform services" to disseminate any statement "which is untrue or misleading, and  
14 which is known, or which by the exercise of reasonable care should be known, to be untrue or  
15 misleading." Cal. Bus. & Prof. Code § 17500.

16 80. It is also unlawful under the FAL to disseminate statements concerning property or  
17 services that are "untrue or misleading, and which is known, or which by the exercise of reasonable  
18 care should be known, to be untrue or misleading." *Id.*

19 81. As alleged herein, Defendant falsely advertised the Children's Delsym Cough  
20 Relief product by falsely representing that the Product was specifically formulated for children  
21 and safer for consumption by children, when in fact the Product is identical to the adult's Delsym  
22 Cough Relief product.

23 82. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as  
24 a result of Defendant's actions as set forth herein. Specifically, prior to the filing of this action,  
25 Plaintiff purchased the Product in reliance on Defendant's false and misleading labeling claims  
26 that the Product, among other things, was specially formulated for children and worth a premium.

27 83. Defendant's business practices as alleged herein constitute deceptive, untrue, and  
28 misleading advertising pursuant to the FAL because Defendant has advertised the Product in a

1 manner that is untrue and misleading, which Defendant knew or reasonably should have known,  
2 and omitted material information from its advertising.

3 84. Defendant profited from its sale of the falsely and deceptively advertised Product  
4 to unwary consumers.

5 85. As a result, Plaintiff, the Class, and the general public are entitled to public  
6 injunctive and equitable relief, restitution, and an order for the disgorgement of the funds by which  
7 Defendant was unjustly enriched.

8 86. Pursuant to Cal. Bus. & Prof. Code § 17535, Plaintiff, on behalf of himself and the  
9 Class, seeks an order enjoining Defendant from continuing to engage in deceptive business  
10 practices, false advertising, and any other act prohibited by law, including those set forth in this  
11 Complaint.

12 **THIRD CAUSE OF ACTION**

13 **Violations of the Consumer Legal Remedies Act,**

14 **Cal. Civ. Code §§ 1750 *et seq.***

15 ***(on behalf of the California Class)***

16 87. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if  
17 set forth in full herein.

18 88. The CLRA prohibits deceptive practices in connection with the conduct of a  
19 business that provides goods, property, or services primarily for personal, family, or household  
20 purposes.

21 89. Defendant's false and misleading labeling and other policies, acts, and practices  
22 were designed to, and did, induce the purchase and use of the Product for personal, family, or  
23 household purposes by Plaintiff and Class Members, and violated and continue to violate the  
24 following sections of the CLRA:

25 a. § 1770(a)(5): representing that goods have characteristics, uses, or benefits which  
26 they do not have; and

27 b. § 1770(a)(7): representing that goods are of a particular standard, quality, or grade  
28 if they are of another.

1 90. Defendant profited from the sale of the falsely, deceptively, and unlawfully  
2 advertised Product to unwary consumers.

3 91. Defendant's wrongful business practices constituted, and constitute, a continuing  
4 course of conduct in violation of the CLRA.

5 92. Pursuant to § 1782 of the CLRA, Plaintiff will notify Defendant in writing of the  
6 particular violations of §1770 of the CLRA and demand that Defendant rectify the actions  
7 described above by providing monetary relief, agreeing to be bound by its legal obligations, and  
8 giving notice to all affected customers of its intent to do so. Plaintiff will send this notice by  
9 certified mail, return receipt requested, to Defendant's principal place of business, and if  
10 Defendant does not comply within 30 days, Plaintiff will amend this complaint accordingly. Until  
11 such time, this Complaint seeks only injunctive relief for Defendant's violations of the CLRA and  
12 not damages under §§ 1770 and 1782.

13 **FOURTH CAUSE OF ACTION**

14 **Breach of Express Warranties,**

15 **Cal. Com. Code § 2313(1)**

16 ***(on behalf of all Classes)***

17 93. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if  
18 set forth in full herein.

19 94. Through the Product's label and advertising, Defendant made affirmations of fact  
20 or promises, or description of goods, described above, which were "part of the basis of the  
21 bargain," in that Plaintiff and the Class purchased the Product in reasonable reliance on those  
22 statements. Cal. Com. Code § 2313(1).

23 95. The foregoing representations were material and were a substantial factor in  
24 causing the harm suffered by Plaintiff and the Class because they concerned alleged valuation of  
25 the Product regarding its suitability for children.

26 96. These representations had an influence on consumers' decisions in purchasing the  
27 Product.

28 97. Defendant made the above representations to induce Plaintiff and the members of

1 Class to purchase the Product. Plaintiff and the Class members relied on the representations when  
2 purchasing Defendant's product.

3 98. Defendant breached the express warranties by selling a Product that was marketed  
4 as specially formulated for children and sold at a premium, when in fact, the Product was identical  
5 to the adult's Delsym Cough Relief product.

6 99. That breach actually and proximately caused injury in the form of the price  
7 premium that Plaintiff and Class members paid for the Product.

8 **FIFTH CAUSE OF ACTION**

9 **Breach of Implied Warranties,**

10 **Cal. Com. Code § 2314**

11 ***(on behalf of all Classes)***

12 100. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if  
13 set forth in full herein.

14 101. Defendant, through its acts and omissions set forth herein, in the sale, marketing,  
15 and promotion of the Product, made representations to Plaintiff and the Class that, among other  
16 things, the Product was specially formulated for children and worth a premium.

17 102. Plaintiff and the Class bought the Product manufactured, advertised, and sold by  
18 Defendant, as described herein.

19 103. Defendant is a merchant with respect to the goods of this kind which were sold to  
20 Plaintiff and the Class, and there was, in the sale to Plaintiff and other consumers, an implied  
21 warranty that those goods were merchantable.

22 104. However, Defendant breached that implied warranty in that the Product was not  
23 specially formulated for children, and instead, was identical to the adult's Delsym Cough Relief  
24 product.

25 105. As an actual and proximate result of Defendant's conduct, Plaintiff and the Class  
26 did not receive goods as impliedly warranted by Defendant to be merchantable in that it did not  
27 conform to promises and affirmations made on the container or label of the goods.

28 106. Plaintiff and Class have sustained damages as a proximate result of the foregoing

1 breach of implied warranty in the amount of the Product's price premium.

2 **SIXTH CAUSE OF ACTION**

3 **Negligent Misrepresentation**

4 *(on behalf of all Classes)*

5 107. Plaintiff and the Class Members re-allege and incorporate by reference each and  
6 every allegation set forth above, and further allege as follows:

7 108. Defendant had a duty to disclose to Plaintiff and Class Members correct  
8 information as to the quality and characteristics of the Product because Defendant was in a superior  
9 position than Plaintiff and Class Members such that reliance by Plaintiff and Class Members was  
10 justified. Defendant possessed the skills and expertise to know the type of information that would  
11 influence a consumer's purchasing decision.

12 109. During the applicable Class period, Defendant negligently or carelessly  
13 misrepresented, omitted, and concealed from consumers material facts regarding the quality and  
14 characteristics of the Product, including that the Product was specially formulated for children and  
15 worth a premium.

16 110. Defendant made such false and misleading statements and omissions with the intent  
17 to induce Plaintiff and Class Members to purchase the Product at a premium price.

18 111. Defendant was careless in ascertaining the truth of its representations in that it knew  
19 or should have known that Plaintiff and Class Members would be overpaying for a product that  
20 was identical to a lower-priced product.

21 112. Plaintiff and the Class Members were unaware of the falsity in Defendant's  
22 misrepresentations and omissions and, as a result, justifiably relied on them when making the  
23 decision to purchase the Product.

24 113. Plaintiff and the Class Members would not have purchased the Product or paid as  
25 much for the Product if the true facts had been known.

26 **SEVENTH CAUSE OF ACTION**

27 **Intentional Misrepresentation/Fraud**

28 *(on behalf of all Classes)*

1 114. Plaintiff and the Class Members re-allege and incorporate by reference each and  
2 every allegation set forth above, and further allege as follows:

3 115. Defendant had a duty to disclose to Plaintiff and Class Members correct  
4 information as to the quality and characteristics of the Product because Defendant was in a superior  
5 position than Plaintiff and Class Members such that reliance by Plaintiff and Class Members was  
6 justified. Defendant possessed the skills and expertise to know the type of information that would  
7 influence a consumer's purchasing decision.

8 116. During the applicable Class period, Defendant intentionally misrepresented,  
9 omitted, and concealed from consumers material facts regarding the quality and characteristics of  
10 the Product, including that the Product was specially formulated for children, safer to consume for  
11 children, and worth a premium. These representations were material and were uniformly made.

12 117. As noted in detail above, these representations were false and misleading, as the  
13 Children's Delsym Cough Relief product is identical to the adult's Delsym Cough Relief product.  
14 Defendant made these misrepresentations with actual knowledge of their falsity and/or made them  
15 with fraudulent intent.

16 118. Defendant made such false and misleading statements and omissions with the intent  
17 to induce Plaintiff and Class Members to purchase the Product at a premium price, deprive Plaintiff  
18 and Class Members of property or otherwise causing injury, and thus, Defendant has committed  
19 fraud.

20 119. Defendant's deceptive or fraudulent intent is evidenced by motive and opportunity.  
21 Defendant knew that children required a smaller dose of the Product than adults and that Delsym  
22 cough syrup purchased for children would be purchased at a slower rate than Delsym cough syrup  
23 purchased for adults. For that reason, Defendant offered a Product that was marketed and  
24 advertised as specially formulated for children so Defendant could sell that Product at a premium  
25 and realize greater profits irrespective of whether consumers intended to purchase Delsym  
26 products for children or adults. Defendant knew that consumers would place trust and confidence  
27 in its Product's claims and rely thereon in their purchase of the Product. In addition to Defendant's  
28 knowledge that the Product was not specially formulated for children and was not worth a



1 premium, Defendant expressly represented that the Children’s product was safer to consume for  
2 children and superior to the adult’s Delsym product when purchasing for children, and generated  
3 great profit by instilling confidence in its consumer base that its claims were credible.

4 120. Plaintiff and the Class Members were unaware of the falsity in Defendant’s  
5 misrepresentations and omissions and, as a result, justifiably relied on them when making the  
6 decision to purchase the Product.

7 121. As a proximate result of Defendant’s intentional misrepresentations, Plaintiff and  
8 the Class were induced to purchase the Product at a premium.

9 122. Plaintiff and the Class Members would not have purchased the Product or paid as  
10 much for the Product if the true facts had been known.

11 123. As a result of their reliance, Plaintiff and Class Members were injured in an amount  
12 to be proven at trial, including, but not limited to, their lost benefit of the bargain and overpayment  
13 at the time of purchase.

14 124. Defendant’s conduct was knowing, intentional, with malice, demonstrated a  
15 complete lack of care, and was in reckless disregard for the rights of Plaintiff and Class Members.  
16 Plaintiff and Class Members are therefore entitled to an award of punitive damages.

17 **EIGHTH CAUSE OF ACTION**

18 **Quasi-Contract/ Unjust Enrichment**

19 ***(on behalf of all Classes)***

20 125. Plaintiff and the Class Members re-allege and incorporate by reference each and  
21 every allegation set forth above, and further allege as follows:

22 126. As alleged in detail above, Defendant’s false and misleading labelling caused  
23 Plaintiff and the Class to purchase the Children’s Delsym Cough Relief product at a premium.

24 127. In this way, Defendant received a direct and unjust benefit, at Plaintiff and the  
25 Class’s expense.

26 128. It would be unjust and inequitable for Defendant to retain the above-mentioned  
27 benefits. For example, Defendant was only able to charge a premium for the Children’s Delsym  
28 product by intentionally withholding information from Plaintiff, or otherwise misrepresenting the

1 Product's qualities.

2 129. Plaintiff and the Class seek restitution.

3 **VI. PRAYER FOR RELIEF**

4 130. Wherefore, Plaintiff, on behalf of himself, all others similarly situated, and the  
5 general public, prays for judgment against Defendant as to each and every cause of action,  
6 including:

- 7 a. An order certifying this action as a class action pursuant to Federal Rules of Civil  
8 Procedure 23(b)(1), 23(b)(2), and/or 23(b)(3);
- 9 b. An order maintaining this action as a class action and/or an order maintaining a  
10 particular issue class action pursuant to Federal Rule of Civil Procedure 23(c)(4);
- 11 c. An order requiring Defendant to bear the costs of class notice;
- 12 d. An order appointing Plaintiff as the class representative and the Law Offices of  
13 Ronald A. Marron as Class Counsel;
- 14 e. An order compelling Defendant to conduct a corrective advertising campaign;
- 15 f. An order compelling Defendant to destroy all misleading and deceptive advertising  
16 materials and product labels, and to recall all offending Products;
- 17 g. An order awarding disgorgement of Defendant's profits that were obtained from its  
18 ill-gotten gains in connection with its sales of the Product to Plaintiff and the class  
19 members;
- 20 h. An order awarding restitution in the amount of the price premium paid by the class  
21 members for the Product;
- 22 i. An award for punitive damages;
- 23 j. An award of attorneys' fees and costs; and
- 24 k. An order providing for all other such further relief as may be just and proper.

25 **JURY DEMAND**

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

27

28

1 Dated: August 16, 2022

Respectfully Submitted,

2  
3 /s/ Ronald A. Marron

Ronald A. Marron

4 **LAW OFFICES OF RONALD A. MARRON**

5 RONALD A. MARRON

*ron@consumersadvocates.com*

6 MICHAEL T. HOUCHIN

*mike@consumersadvocates.com*

7 LILACH HALPERIN

*lilach@consumersadvocates.com*

8 651 Arroyo Drive

9 San Diego, California 92103

10 Telephone: (619) 696-9006

11 Facsimile: (619) 564-6665

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

# ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Despite Costing More, Children's Delsym Cough Medicine Is the Same As Adult Variety, Class Action Claims](#)

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