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

KAMILA HARKAVY, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

GODIVA CHOCOLATIER, INC.,

Defendant.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiff Kamila Harkavy, individually and on behalf of all others similarly situated, alleges
2 the following against Defendant Godiva Chocolatier, Inc., (“Godiva” or “Defendant”) on
3 information and belief, except that Plaintiff’s allegations as to their own actions are based on
4 personal knowledge.

5 **NATURE OF THE ACTION**

6 1. This action seeks to recover damages and injunctive relief for Defendant’s
7 continuing failure to disclose to consumers that certain the Godiva Signature Dark Chocolate 72%
8 Cacao bar (the “Product”) contains unsafe levels of lead.

9 2. Dark chocolate is often touted as being a healthier alternative to milk chocolate,
10 however, a December 2022 report by Consumer Reports revealed that certain dark chocolate bars,
11 including the Product, had high enough levels of lead and cadmium that “eating just an ounce a day
12 would put an adult over a level that public health authorities and [Consumer Reports’] experts say
13 may be harmful.”¹

14 3. Lead in food poses a significant safety risk to consumers because it can cause cancer
15 and often irreversible damage to brain development as well as other serious health problems.

16 4. As described more fully below, consumers who purchase the Product are injured by
17 Defendant’s acts and omissions concerning the presence (or risk) of lead. No reasonable consumer
18 would know, or have reason to know, that the Product contains (or risked containing) lead. Worse,
19 as companies across the industry have adopted methods to limit lead in their dark chocolates,
20 Defendant has stood idly by with a reckless disregard for its consumers’ health and well-being. As
21 such, Plaintiff seeks relief in this action individually and as a class action on behalf of all
22 purchasers of the Product.

23 **PARTIES**

24 5. Plaintiff Kamila Harkavy is a resident of California, and resides in the city of
25 Sausalito, California. Plaintiff Harkavy has purchased Defendant’s Product and has consumed the

26 _____
27 ¹ Kevin Loria, *lead and Cadmium Could be in Your Dark Chocolate*, CONSUMER REPORTS
28 (December 15, 2022), <https://www.consumerreports.org/health/food-safety/lead-and-cadmium-in-dark-chocolate-a8480295550/>.

1 Product numerous times during the class period. Typically, Plaintiff Harkavy has purchased the
2 Product from Cost Plus, Grocery Outlet, and Mollie Stones in and around Sausalito, California.
3 Plaintiff Harkavy believed she was purchasing quality and safe dark chocolate that did not contain
4 (or risk containing) lead. Had Defendant disclosed on the label that the Product contained (or
5 risked containing) unsafe toxic lead, Ms. Harkavy would have been aware of that fact and would
6 not have purchased the Product or would have paid less for it.

7 6. Ms. Harkavy continues to desire to purchase the Product from Defendant.
8 However, Ms. Harkavy is unable to determine if the Product is actually safe. Ms. Harkavy
9 understands that the composition of the Product may change over time. But as long as Defendant
10 continues to market its Product as safe, she will be unable to make informed decisions about
11 whether to purchase Defendant's Product and will be unable to evaluate the different prices
12 between Defendant's Product and competitor's Product. Ms. Harkavy is further likely to be
13 repeatedly misled by Defendant's conduct, unless and until Defendant is compelled to ensure that
14 the Product marketed, labeled, packaged and sold as safe dark chocolate is, in fact, safe to
15 consume.

16 7. Defendant Godiva Chocolatier, Inc., is a New Jersey corporation with its
17 headquarters in New York, New York. Defendant manufactures, markets, and sells dark chocolate,
18 including the Product, throughout California and the United States. During the relevant period,
19 Defendant controlled the manufacture, design, testing, packaging, labeling, marketing, advertising,
20 promotion, distribution, and sales of its Product. Defendant therefore had complete control over
21 how to label its Product as to their contents.

22 **JURISDICTION AND VENUE**

23 8. This Court has subject matter jurisdiction over this action pursuant to the Class
24 Action Fairness Act of 2005, Pub. L. No. 109-2 Stat. 4 ("CAFA"), which, *inter alia*, amends 28
25 U.S.C. § 1332, at new subsection (d), conferring federal jurisdiction over class actions where, as
26 here: (a) there are 100 or more members in the proposed classes; (b) some members of the
27 proposed classes have a different citizenship from Defendant; and (c) the claims of the proposed
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1 class members exceed the sum or value of five million dollars (\$5,000,000) in aggregate. *See* 28
2 U.S.C. § 1332(d)(2) and (6).

3 9. This Court has specific jurisdiction over Defendant because the events giving rise to
4 this action occurred in California and Defendant markets and sells its Product in California and
5 avails itself of the privilege of conducting business in California to such an extent that suit was
6 foreseeable.

7 10. Venue is proper in this Court under 28 U.S.C. § 1391 because Defendant transacts
8 significant business within this District, at least one Plaintiff resides within this District, and a
9 substantial part of the events giving rise to Plaintiff’s claims took place within this District.

10 **FACTS COMMON TO ALL CAUSES OF ACTION**

11 **I. Lead is Toxic**

12 11. Lead is a heavy metal. As described more fully below, the harmful effects of lead
13 are well-documented, particularly on children. Exposure puts children at risk for lowered IQ,
14 behavioral problems (such as attention deficit hyperactivity disorder), type 2 diabetes, and cancer,
15 among other health issues. lead also pose risks to adults. Even modest amounts of lead can
16 increase the risk of cancer, cognitive and reproductive problems, and other adverse conditions. As
17 such, it is important to limit exposure.

18 12. “No amount of lead is known to be safe.”² Exposure to lead may cause anemia,
19 weakness, and kidney and brain damage.³ lead can affect almost every organ and system in the
20 body. lead accumulates in the body over time, and can lead to health risks and toxicity, including
21 inhibiting neurological function, anemia, kidney damage, seizures, and in extreme cases, coma and
22 death. lead can also cross the fetal barrier during pregnancy, exposing the mother and developing
23 fetus to serious risks, including reduced growth and premature birth. lead exposure is also harmful
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25 ² *See* <https://www.npr.org/sections/thetwo-way/2016/08/13/489825051/lead-levels-below-epa-limits-can-still-impact-your-health> (last accessed June 22, 2022).

26 ³ Centers for Disease Control and Prevention, “Health Problems Caused by lead,” *The National*
27 *Institute for Occupational Safety and Health (NIOSH)*,
28 <https://www.cdc.gov/niosh/topics/lead/health.html#:~:text=Exposure%20to%20high%20levels%20of,a%20developing%20baby's%20nervous%20system>. (last accessed June 22, 2022).

1 to adults as more than 90 percent of the total body burden of lead is accumulated in the bones,
2 where it is stored. lead in bones may be released into the blood, re-exposing organ systems long
3 after the original exposure.⁴

4 **II. Defendant's Product Contains Toxic Lead**

5 13. In December of 2022, Consumer Reports published a report titled "Lead and
6 Cadmium Could Be in Your Dark Chocolate." The report detailed the results of Consumer
7 Reports' testing of various dark chocolates for lead and cadmium. To determine the risk posed by
8 the chocolates in the test, Consumer Reports measured the chocolates with reference to California's
9 maximum allowable dose level (MADL) for lead (0.5 micrograms) and cadmium (4.1
10 micrograms).

11 14. Consumer Reports analyzed 28 different bars.

12 15. Consumer Reports determined that "[f]or 23 of the bars, eating just an ounce a day
13 would put an adult over a level that public health authorities and CR's experts say may be harmful
14 for at least one of those lead. Five of the bars were above those levels for both cadmium and lead."⁵

15 16. Godiva's "Excellence Dark Chocolate 70% Cocoa" bar was found to have lead
16 levels at 146% of the MADL.

17 17. With regard to the results, Tunde Akinleye, a food safety researcher at Consumer
18 Reports who led the project, remarked that "the danger is greatest for pregnant people and young
19 children because the metals can cause developmental problems ... but there are risks for people of
20 any age" because frequent exposure to lead can lead to nervous system problems, hypertension,
21 immune system suppression, kidney damage, and reproductive issues.⁶

22 18. While lead can be found in many food sources, the Godiva Product, *on its own*,
23 exposes consumers to 146% of the MADL for lead in a single one ounce serving.⁷

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26 ⁴ State of New York Department of Health, "lead Exposure in Adults: A Guide for Health Care
Providers," <https://www.health.ny.gov/publications/2584.pdf> (last accessed June 22, 2022).

27 ⁵ Loria, *supra* note 1.

28 ⁶ *Id.*

⁷ *Id.*

1 19. Chocolate is made from the cacao bean, which has two main components: cocoa
2 solids and cocoa butter. Together, these are called cacao or cocoa.

3 20. Dark chocolate, rather than milk chocolate, was the subject of these tests because
4 dark chocolate has a higher percentage of cacao, at least 65 percent cacao by weight, which is
5 where the lead lurks.

6 21. Lead gets into the dark chocolate because lead gets on the outer shell of cacao beans
7 after they are harvested as they are dried outside.

8 22. However, this does not mean that lead exposure is inevitable when consuming dark
9 chocolate. As Consumer Reports noted, five of the 28 chocolate bars tested were below the MADL
10 for both cadmium and lead, proving that “it’s possible for companies to make chocolate with lower
11 amounts of lead—and for consumers to find safer chocolate products that they enjoy.”⁸

12 23. Instead of adequately testing its Product like its competitors, Defendant chose to
13 ignore the health of the consuming public in pursuit of profit.

14 **III. The Presence (or Risk) of Toxic lead in Defendant’s Product Far Exceeds**
15 **Expectations of Reasonable Consumers**

16 24. According to Verified Market Research, the dark chocolate market was valued at
17 \$56.09 billion in 2021 and is expected to grow to \$114.62 billion by 2030.⁹ Indeed, “[g]rowing
18 health benefits associated with cocoa-rich dark chocolates, rising demand for premium dark
19 chocolates as gifts, players introducing more limited-edition seasonal chocolates, increasing online
20 sales, and expanding marketing initiatives are expected to drive the global Dark Chocolate Market
21 during the forecast period.”¹⁰

22 25. What’s more, up to 15% of consumers eat dark chocolate on a daily basis.¹¹

23 26. Given the negative effects of lead on child development and adult health, the

24 _____
25 ⁸ *Id.*

26 ⁹ *Dark Chocolate Market Size and Forecast*, VERIFIED MARKET RESEARCH (May 2022),
27 [https://www.verifiedmarketresearch.com/product/global-dark-chocolate-
28 market/#:~:text=Dark%20Chocolate%20Market%20was%20valued,8.28%25%20from%202022%
20to%202030](https://www.verifiedmarketresearch.com/product/global-dark-chocolate-market/#:~:text=Dark%20Chocolate%20Market%20was%20valued,8.28%25%20from%202022%20to%202030) (last accessed January 03, 2023).

¹¹ Loria, *supra* Note 1.

1 presence of these substances in dark chocolate is a material fact to reasonable consumers, including
2 Plaintiff and members of the Class.

3 27. This is not the first time that Defendant has been alerted to the fact that its dark
4 chocolate products contain unsafe levels of lead.

5 28. In 2014 Defendant's dark chocolate products were tested by a consumer advocacy
6 group and Defendant was informed that some of its dark chocolate products had dangerously high
7 levels of lead, a subject of concern for the group and for consumers at large.

8 29. As such, Defendant knows that the presence (or risk) of toxic lead in its Product is a
9 material fact to reasonable consumers, including Plaintiff and the Class members.

10 30. Food manufacturers (such as Defendant) hold a position of public trust. Consumers
11 believe that they would not sell the Product if it was contaminated with unsafe levels of lead.

12 31. Defendant knew that if the presence (or risk) of toxic lead in its Product was
13 disclosed to Plaintiff and the Class members, then Plaintiff and the Class members would be
14 unwilling to purchase it or would pay less for it.

15 32. In light of Defendant's knowledge that Plaintiff and the Class members would be
16 unwilling to purchase the Product or would pay less for the Product if they knew that it contained
17 (or risked containing) toxic lead, Defendant intentionally and knowingly concealed this fact from
18 Plaintiff and the Class members and did not disclose the presence (or risk) of lead on the label of
19 the Product.

20 33. Defendant knew or should have known that Plaintiff and the Class members would
21 rely upon the label of the Product and intended for them to do so, but failed to disclose the presence
22 (or risk) of lead.

23 34. Defendant knew or should have known that it owed consumers a duty of care to
24 adequately test for lead in the Product, which it failed to do.

25 35. Additionally, Defendant knew or should have been aware that a reasonable
26 consumer could consume a one ounce serving of the Product daily, leading to repeated exposure to
27 the lead at unsafe levels.

1 36. As such, Defendant has a duty to disclose that consumption of the Product could
2 expose consumers to high levels of the toxic lead.

3 37. Defendant knew or should have known it could control the levels of lead in the
4 Product by properly monitoring the ingredients for lead and adjusting any cultivation practices to
5 reduce or eliminate the accumulation of lead on the cocoa beans, as other chocolate manufacturers
6 have done.

7 38. It is reasonable to assert that Defendant knew or should have known it could control
8 the levels of lead in its Product because there are other chocolate manufacturers who have been
9 able to produce dark chocolate with significantly less lead than Defendant's Product.

10 39. Prior to purchasing the Product, Plaintiff and the Class members were exposed to,
11 saw, read, and understood Defendant's labels, and relied upon them in purchasing the Product, but
12 Defendant failed to disclose the presence (or risk) of lead.

13 40. As a result of Defendant's concealment of the fact that the Product contained toxic
14 lead, Plaintiff and the Class members reasonably believed that Defendant's Product was free from
15 substances that would negatively affect children's development as well as their own health.

16 41. In reliance upon Defendant's labels that contained omissions, Plaintiff and the Class
17 members purchased Defendant's Product.

18 42. Had Plaintiff and the Class members known the truth—*i.e.*, that the Product
19 contained (or risked containing) toxic lead, rendering it unsafe for consumption by children and
20 adults—they would not have been willing to purchase it or would have paid less for it.

21 43. Therefore, as a direct and proximate result of Defendant's omissions concerning the
22 Product, Plaintiff and the Class members purchased the Product.

23 44. Plaintiff and the Class members were harmed in the form of the monies they paid
24 for the Product which they would not otherwise have paid had they known the truth about the
25 Product. Since the presence (or risk) of toxic lead in the Product renders it unsafe for human
26 consumption, the Product that Plaintiff and the Class members purchased was worthless or was
27 worth less than Plaintiff and the Class paid for it. What's more, there are other dark chocolate
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1 Product on the market which contain significantly lower levels of lead than Defendant's Product,
2 meaning that there are safer alternatives to Defendant's Product.

3 45. The Product's label is materially deceptive, false and misleading given Defendant's
4 omission about the presence (or risk) of lead as described above.

5 **FED. R. CIV. P. 9(b) ALLEGATIONS**

6 46. Rule 9(b) of the Federal Rules of Civil Procedure provides that "[i]n alleging fraud
7 or mistake, a party must state with particularity the circumstances constituting fraud or mistake."
8 To the extent necessary, as detailed in the paragraphs above and below, Plaintiff has satisfied the
9 requirements of Rule 9(b) by establishing the following elements with sufficient particularity.

10 47. **WHO**: Defendant made material omissions of fact in its packaging of the Product
11 by omitting the presence (or risk) of significant amounts of unsafe lead.

12 48. **WHAT**: Defendant's conduct was and continues to be fraudulent and deceptive
13 because it has the effect of deceiving consumers into believing that the Product does not contain (or
14 risk containing) significant amounts of lead. Defendant omitted from Plaintiff and Class members
15 that the Product contains (or risk containing) lead. Defendant knew or should have known this
16 information is material to all reasonable consumers and impacts consumers' purchasing decisions.
17 Yet, Defendant has omitted from the Product's labeling the fact that it contains (or risks
18 containing) lead.

19 49. **WHEN**: Defendant omitted from the Product's labeling the fact that the Product
20 contains (or risks containing) significant amounts of unsafe lead, continuously throughout the
21 applicable relevant periods, including at the point of sale.

22 50. **WHERE**: Defendant's omissions were made on the front labeling and packaging of
23 the Product and were thus viewed by every purchaser, including Plaintiff, at the point of sale in
24 every transaction. The Product is sold in brick-and-mortar stores and online stores nationwide.

25 51. **HOW**: Defendant omitted from the Product's labeling the fact that it contains (or
26 risks containing) lead. And as discussed in detail throughout this Complaint, Plaintiff and Class
27 members read and relied on Defendant's front-label omissions before purchasing the Product.
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1 52. **WHY:** Defendant omitted from the Product’s labeling the fact that it contains (or
2 risks containing) lead for the express purpose of inducing Plaintiff and Class members to purchase
3 the Product at a substantial price premium or more than they would have paid had they known the
4 truth about the Product. As such, Defendant profited by selling the Product to at least thousands of
5 consumers throughout the nation, including Plaintiff and the Class members.

6 **CLASS ACTION ALLEGATIONS**

7 53. Plaintiff brings this action individually and on behalf of all other persons similarly
8 situated pursuant to Federal Rule of Civil Procedure 23. The class definition(s) may depend on the
9 information obtained throughout discovery. Notwithstanding, at this time, Plaintiff brings this
10 action and seek certification of the following proposed classes (collectively, the Classes):

11 **Class:** All persons within the United States who purchased the
12 Product from the beginning of any applicable limitations period
through the date of judgment.

13 54. Plaintiff Harkavy also bring this action on behalf of the following Subclass:

14 **California Subclass:** All persons who purchased the Product in
15 the State of California from the beginning of any applicable
limitations period through the date of judgment.

16 55. Excluded from the proposed Classes are the Defendant, and any entities in which
17 the Defendant has controlling interest, the Defendant’s agents, employees and its legal
18 representatives, any Judge to whom this action is assigned and any member of such Judge’s staff
19 and immediate family, and all resellers of the Product.

20 56. Plaintiff reserves the right to amend the definition of the Classes if discovery or
21 further investigation reveals that the Classes should be expanded or otherwise modified.

22 57. Plaintiff further reserves the right to amend the above class definition as appropriate
23 after further investigation and discovery, including by seeking to certify a narrower multi-state
24 class (or classes) in lieu of a nationwide class if appropriate.

25 58. **Numerosity – Federal Rule of Civil Procedure 23(a)(1).** At this time, Plaintiff
26 does not know the exact number of members of the Classes; however, given the nature of the
27 claims and the number of retail stores in the United States selling the Product, Plaintiff believes
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1 that the Class members are so numerous that joinder of all members is impracticable. While the
2 exact number of Class members remains unknown at this time, upon information and belief, there
3 are thousands, if not hundreds of thousands, of putative Class members. Moreover, the number of
4 members of the Classes may be ascertained from Defendant's books and records. Class members
5 may be notified of the pendency of this action by mail and/or electronic mail or other appropriate
6 digital means, which can be supplemented if deemed necessary or appropriate by the Court with
7 published notice.

8 **59. Predominance of Common Questions of Law and Fact – Federal Rule of Civil**
9 **Procedure 23(a)(2) and 23(b)(3).** There is a well-defined community of interest in the questions
10 of law and fact involved in this case. Questions of law and fact common to the members of the
11 Classes that predominate over questions that may affect individual Class members include:

- 12 a. whether the Product contains toxic lead;
- 13 b. whether Defendant's conduct is unethical, oppressive, unscrupulous, and/or
14 substantially injurious to consumers;
- 15 c. whether the amount of lead in the Product is material to a reasonable consumer;
- 16 d. whether Defendant had a duty to disclose that its Product had lead;
- 17 e. whether Plaintiff and members of the Classes are entitled to injunctive and other
18 equitable relief;
- 19 f. whether Defendant failed to disclose material facts concerning the Product;
- 20 g. whether Defendant's conduct was unfair and/or deceptive;
- 21 h. whether Defendant has been unjustly enriched as a result of the unlawful,
22 fraudulent, and unfair conduct alleged in this Complaint such that it would be
23 inequitable for Defendant to retain the benefits conferred upon Defendant by
24 Plaintiff and the Class members;
- 25 i. whether Defendant violated California consumer protection and deceptive practice
26 statutes and are entitled to restitution and/or damages under such state statutes; and
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1 j. whether Plaintiff and the Class members have sustained damages with respect to the
2 common-law claims asserted, and if so, the proper measure of their damages.

3 60. **Typicality – Federal Rule of Civil Procedure 23(a)(3).** Plaintiff’s claims are
4 typical of those of the Class members because Plaintiff, like other Class members, purchased, in a
5 typical consumer setting, the Product and Plaintiff sustained damages from Defendant’s wrongful
6 conduct.

7 61. **Adequacy – Federal Rule of Civil Procedure 23(a)(4).** Plaintiff will fairly and
8 adequately protect the interests of the Class members and have retained counsel that is experienced
9 in litigating complex class actions. Plaintiff has no interests which conflict with those of the
10 Classes.

11 62. **Insufficiency of Separate Actions – Federal Rule of Civil Procedure 23(b)(1).**
12 Absent a class action, Plaintiff and members of the Classes will continue to suffer the harm
13 described herein, for which they would have no remedy. Even if separate actions could be brought
14 by individual consumers, the resulting multiplicity of lawsuits would cause undue burden and
15 expense for both the Court and the litigants, as well as create a risk of inconsistent rulings and
16 adjudications that might be dispositive of the interests of similarly situated consumers,
17 substantially impeding their ability to protect their interests, while establishing incompatible
18 standards of conduct for Defendant.

19 63. **Declaratory and Injunctive Relief – Federal Rule of Civil Procedure 23(b)(2).**
20 Defendant has acted or refused to act on grounds generally applicable to Plaintiff and the other
21 members of the Classes, thereby making appropriate final injunctive relief and declaratory relief, as
22 described below, with respect to the members of the Classes as a whole. In particular, Plaintiff
23 seeks to certify the Classes to enjoin Defendant from selling or otherwise distributing the Product
24 until such time that Defendant can demonstrate to the Court’s satisfaction that the Product are
25 accurately labeled. The prerequisites to maintaining a class action for equitable relief are met as
26 Defendant has acted or refused to act on grounds generally applicable to the Classes, thereby
27 making appropriate equitable relief with respect to the Classes as a whole.
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1 64. **Superiority – Federal Rule of Civil Procedure 23(b)(3).** A class action is superior
2 to any other available methods for the fair and efficient adjudication of the present controversy for
3 at least the following reasons:

- 4 a. The damages suffered by each individual members of the putative Classes do not
5 justify the burden and expense of individual prosecution of the complex and
6 extensive litigation necessitated by Defendant’s conduct;
- 7 b. Even if individual members of the Classes had the resources to pursue individual
8 litigation, it would be unduly burdensome to the courts in which the individual
9 litigation would proceed;
- 10 c. The claims presented in this case predominate over any questions of law or fact
11 affecting individual members of the Classes;
- 12 d. Individual joinder of all members of the Classes is impracticable;
- 13 e. Absent a Class, Plaintiff and members of the putative Classes will continue to suffer
14 harm as a result of Defendant’s unlawful conduct; and
- 15 f. This action presents no difficulty that would impede its management by the Court as
16 a class action, which is the best available means by which Plaintiff and members of
17 the putative Classes can seek redress for the harm caused by Defendant.
- 18 g. In the alternative, the Classes may be certified for the following reasons:
- 19 i. The prosecution of separate actions by individual members of the Classes
20 would create a risk of inconsistent or varying adjudication with respect to
21 individual members of the Classes, which would establish incompatible
22 standards of conduct for Defendant;
- 23 ii. Adjudications of claims of the individual members of the Classes against
24 Defendant would, as a practical matter, be dispositive of the interests of
25 other members of the putative Classes who are not parties to the
26 adjudication and may substantially impair or impede the ability of other
27 putative Class members to protect their interests; and
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iii. Defendant has acted or refused to act on grounds generally applicable to the members of the putative Classes, thereby making appropriate final and injunctive relief with respect to the putative Classes as a whole.

CAUSES OF ACTION

FIRST COUNT
Unjust Enrichment

65. Plaintiff incorporates by reference the foregoing paragraphs of this Complaint as if fully stated herein.

66. Plaintiff brings this claim individually and on behalf of the members of the Classes against Defendant under the laws of California.

67. Plaintiff and the Class members conferred a benefit on Defendant in the form of the gross revenues Defendant derived from the money they paid to Defendant.

68. Defendant had an appreciation or knowledge of the benefit conferred on it by Plaintiff and the Class members.

69. Defendant has been unjustly enriched in retaining the revenues derived from Plaintiff and the Class members' purchases of the Product, which retention of such revenues under these circumstances is unjust and inequitable because Defendant omitted that the Product contained (or risked containing) lead. This caused injuries to Plaintiff and members of the Classes because they would not have purchased the Product or would have paid less for it if the true facts concerning the Product had been known.

70. Defendant accepted and retained the benefit in the amount of the gross revenues it derived from sales of the Product to Plaintiff and the Class members.

71. Defendant has thereby profited by retaining the benefit under circumstances which would make it unjust for Defendant to retain the benefit.

72. Plaintiff and the Class members are, therefore, entitled to restitution in the form of the revenues derived from Defendant's sale of the Product.

1 73. As a direct and proximate result of Defendant’s actions, Plaintiff and Class
2 members have suffered in an amount to be proven at trial.

3 74. Here, equitable relief is appropriate because Plaintiff may lack an adequate remedy
4 at law if, for instance, damages resulting from their purchase of the Product is determined to be an
5 amount less than the premium price of the Product. Without compensation for the full premium
6 price of the Product, Plaintiff would be left without the parity in purchasing power to which they are
7 entitled.

8 75. Injunctive relief is also appropriate, and indeed necessary, to require Defendant to
9 provide full and accurate disclosures regarding the Product so that Plaintiff and Class members can
10 reasonably rely on Defendant’s packaging as well as those of Defendant’s competitors who may
11 then have an incentive to follow Defendant’s deceptive practices, further misleading consumers.

12 76. Restitution may also be more certain, prompt, and efficient than other legal
13 remedies requested herein. The return of the full premium price will ensure that Plaintiff is in the
14 same place they would have been in had Defendant’s wrongful conduct not occurred, i.e., in the
15 position to make an informed decision about the purchase of the Product absent omissions with the
16 full purchase price at their disposal.

SECOND COUNT

Violation of California’s Unfair Competition Law (“UCL”) Cal. Bus. & Prof. Code § 17200 *et seq.*,

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18
19 77. Plaintiff incorporates by reference the foregoing paragraphs of this Complaint as if
20 fully stated herein.

21 78. Plaintiff brings this claim individually and on behalf of the California Subclass
22 members.

23 79. The UCL broadly prohibits acts of “unfair competition,” including any “unlawful,
24 unfair or fraudulent business act or practice” and “unfair, deceptive, untrue or misleading
25 advertising.” Cal. Bus. & Prof. Code § 17200.

26 80. Defendant’s acts, as described above, constitute unlawful, unfair, and fraudulent
27 business practices pursuant to California Business & Professions Code §§ 17200, *et seq.* This
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1 conduct includes but is not limited to its failure to disclose that the Product contains (or risks
2 containing) lead.

3 81. Defendant has violated the UCL's proscription against engaging in **Fraudulent**
4 **Business Practices**. After reviewing the packaging for the Product, Plaintiff purchased the Product
5 in reliance on Defendant's omissions. Plaintiff would not have purchased the Product at all or
6 would have paid less for it if they had known of Defendant's omissions regarding that the Product
7 contained (or risked containing) lead. Plaintiff and the California Subclass members have all paid
8 money for the Product. However, Plaintiff and the California Subclass members did not obtain the
9 full value or any value of the advertised Product due to Defendant's omissions regarding the lead.
10 Accordingly, Plaintiff and the California Subclass members have suffered injury in fact and lost
11 money or property as a direct result of Defendant's omissions.

12 82. Defendant has also violated the UCL's proscription against engaging in **Unlawful**
13 **Business Practices** by, *inter alia*, making omissions of material facts, as set forth more fully herein,
14 and violating Cal. Civ. Code § 1750 *et seq.* Plaintiff purchased the Product in reliance on
15 Defendant's omissions as to the toxic lead contained therein (or the risk of same). Plaintiff would
16 not have purchased the Product at all or would have paid less for it had they known of Defendant's
17 omissions. Plaintiff and the California Subclass members paid money for the Product. However,
18 Plaintiff and the California Subclass members did not obtain the full value, or any value, of the
19 advertised Product due to Defendant's omissions regarding the Product. Accordingly, Plaintiff and
20 the California Subclass members have suffered injury in fact and lost money or property as a direct
21 result of Defendant's omissions.

22 83. Defendant has further violated the UCL's proscription against engaging in **Unfair**
23 **Business Practices**. Under Business & Professions Code §17200, any business act or practice that
24 is unethical, oppressive, unscrupulous, and/or substantially injurious to consumers, or that violates
25 a legislatively declared policy, constitutes an unfair business act or practice.

1 84. Defendant has engaged, and continues to engage, in conduct which is immoral,
2 unethical, oppressive, unscrupulous, and/or substantially injurious to consumers. This conduct
3 includes its failure to disclose that the Product contains (or risks containing) lead.

4 85. Defendant's conduct is substantially injurious to consumers. Such conduct has
5 caused, and continues to cause, substantial injury to consumers because consumers would not have
6 purchased the Product at all or would have paid less for them but for Defendant's omissions
7 regarding the presence (or risk) of lead in the Product. Such injury is not outweighed by any
8 countervailing benefits to consumers or competition. Indeed, no benefit to consumers or
9 competition results from Defendant's conduct. Since consumers reasonably rely on Defendant's
10 labels, and thus also its omissions, consumers could not have reasonably avoided such injury.
11 *Davis v. Ford Motor Credit Co.*, 179 Cal. App. 4th 581, 597-98 (2009); *see also Drum v. San*
12 *Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247, 257 (2010) (outlining the third test based on
13 the definition of "unfair" in Section 5 of the FTC Act).

14 86. There were reasonably available alternatives to further Defendant's legitimate
15 business interests, other than the conduct described herein.

16 87. Pursuant to California Business and Professional Code § 17203, Plaintiff and the
17 California Subclass members seek an order of this Court that includes, but is not limited to, an order
18 requiring Defendant to (a) provide restitution to Plaintiff and the other California Subclass
19 members; (b) disgorge all revenues obtained as a result of violations of the UCL; and (c) pay
20 Plaintiff and the California Subclass members' attorneys' fees and costs.

21 88. Here, equitable relief is appropriate because Plaintiff may lack an adequate remedy
22 at law if, for instance, damages resulting from their purchase of the Product is determined to be an
23 amount less than the premium price of the Product. Without compensation for the full premium
24 price of the Product, Plaintiff would be left without the parity in purchasing power to which they are
25 entitled.

26 89. Injunctive relief is also appropriate, and indeed necessary, to require Defendant to
27 provide full and accurate disclosures regarding the Product so that Plaintiff and California Subclass
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1 members can reasonably rely on Defendant's packaging as well as those of Defendant's competitors
2 who may then have an incentive to follow Defendant's deceptive practices, further misleading
3 consumers.

4 90. Restitution and/or injunctive relief may also be more certain, prompt, and efficient
5 than other legal remedies requested herein. The return of the full premium price, and an injunction
6 requiring either (1) adequate disclosures of the existence of lead in the Product; or (2) the removal
7 of such lead from the Product, will ensure that Plaintiff is in the same place they would have been in
8 had Defendant's wrongful conduct not occurred, i.e., in the position to make an informed decision
9 about the purchase of the Product absent omissions with the full purchase price at their disposal.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff respectfully requests that the Court grant Plaintiff and all members
12 of the proposed Classes the following relief against Defendant:

- 13 a. That the Court certify the Classes under Rule 23 of the Federal Rules of Civil
14 Procedure and appoint Plaintiff as Class Representatives and their attorneys as Class
15 Counsel to represent the members of the Classes;
- 16 b. That the Court declare that Defendant's conduct violates the statutes referenced
17 herein;
- 18 c. That the Court preliminarily and permanently enjoin Defendant from conducting
19 business through the unlawful, unfair, or fraudulent business acts or practices,
20 untrue, and misleading labeling and marketing and other violations of law described
21 in this Complaint;
- 22 d. That the Court order preliminary and injunctive relief requiring Defendant to
23 disclose that the Product contains lead;
- 24 e. That the Court order Defendant to implement whatever measures are necessary to
25 remedy the unlawful, unfair, or fraudulent business acts or practices, untrue and
26 misleading advertising, and other violations of law described in this Complaint;
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- 1 f. That the Court order Defendant to notify each and every individual who purchased
2 the Product of the pendency of the claims in this action to give such individuals an
3 opportunity to obtain restitution from Defendant;
- 4 g. For an award of compensatory damages, the amount of which is to be determined at
5 trial;
- 6 h. For punitive damages;
- 7 i. That the Court grant Plaintiff's reasonable attorneys' fees and costs of suit pursuant
8 to California Code of Civil Procedure §1021.5, California Civil Code §1780(d), the
9 common fund doctrine, and/or any other appropriate legal theory; and
- 10 j. That the Court grant such other and further relief as may be just and proper.

11 **DEMAND FOR JURY TRIAL**

12 Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff demands a trial by jury of any
13 and all issues in this action so triable of right.

14
15 Dated: January 10, 2023

BURSOR & FISHER, P.A.

16 By: /s/ L. Timothy Fisher

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