

1 William A. Delgado (Bar No. 222666)
2 wdelgado@willenken.com
3 Megan O'Neill (Bar No. 220147)
4 moneill@willenken.com
5 Justin T. Goodwin (Bar No. 278721)
6 jgoodwin@willenken.com
7 WILLENKEN WILSON LOH & DELGADO LLP
8 707 Wilshire Blvd., Suite 3850
9 Los Angeles, California 90017
10 Telephone: (213) 955-9240
11 Facsimile: (213) 955-9250

12 Attorneys for Defendants PHYSICIAN
13 LABORATORIES, INC., MDX LOGISTICS,
14 INC., CVS HEALTH CORP., COSTCO
15 WHOLESALE CORP., RITE AID CORP.,
16 THE KROGER CO., iHERB, INC., BED
17 BATH & BEYOND INC., VITACOST.COM,
18 INC., ALEX FAZELI, and MONROE
19 FAZELI

20 UNITED STATES DISTRICT COURT
21 CENTRAL DISTRICT OF CALIFORNIA

22 MELISSA RIVAS, on behalf of herself
23 and all others similarly situated,

24 Plaintiffs,

25 v.

26 PHYSICIAN LABORATORIES, INC.,
27 an Arizona corporation; MDX
28 LOGISTICS, a Michigan corporation;
SEBAPHARMA GmbH & CO. KG, a
corporation organized under the laws of
Germany; CVS HEALTH CORP., a
Delaware corporation; COSTCO
WHOLESALE CORPORATION, a
Washington corporation; RITE AID
CORPORATION, a Delaware
corporation; THE KROGER CO., a

Case No.: 8:18-cv-00729

**DEFENDANT COSTCO
WHOLESALE CORPORATION'S
NOTICE OF REMOVAL OF
CLASS ACTION**

[Removal from the Superior Court of
the State of California in and for the
County of Orange, Case No. 30-2018-
00979214-CU-BC-CXC]

1 Ohio corporation; iHERB, INC., a
2 California corporation; BED BATH &
3 BEYOND; a New York corporation;
4 VITACOST, a Delaware corporation;
5 ALEX FAZELI, an individual;
6 MONROE FAZELI, an individual; and
7 DOES 1 through 100,

Defendants.

1 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO PLAINTIFF
2 AND HER ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE THAT, pursuant to 28 U.S.C. §§ 1331, 1332,
4 1441, 1446 and 1453, Defendant Costco Wholesale Corporation (“Costco”)
5 removes the above-captioned action from the Superior Court of the State of
6 California for the County of Orange to the United States District Court for the
7 Central District of California on the basis of diversity jurisdiction under the Class
8 Action Fairness Act. In support of its Notice of Removal, Costco states:

9 1. On March 9, 2018, plaintiff Melissa Rivas (“Plaintiff”) filed a
10 Complaint in the Superior Court of the State of California for the County of
11 Orange, captioned *Rivas v. Physician Laboratories, Inc., et al.*, Case No. 30-2018-
12 00979214-CU-BC-CXC.

13 2. On April 3, 2018, Plaintiff served the Summons and Complaint on
14 Costco. Costco’s Notice of Removal is timely filed within 30 days of April 3,
15 2018.

16 3. True and correct copies of the Summons, Complaint, and Notice of
17 Court Order, in addition to all other “process, pleadings, and orders served upon”
18 Costco, *see* 28 U.S.C. § 1446(a), are attached as Exhibits A–S, respectively.

19 4. A copy of this Notice of Removal is being filed with the Clerk of the
20 Superior Court of the State of California for the County of Orange, and is being
21 served on counsel of record under 28 U.S.C. § 1446(d).

22 **Venue**

23 5. Venue is proper under 28 U.S.C. § 1441(a) because this Court is the
24 United States District Court for the district and division embracing the place where
25 the state court case was pending.

26 **Nature of the Removed Action**

27 6. Plaintiff alleges that Costco and the other defendants market and/or
28

1 sell skincare products that are manufactured by Defendant Sebapharma GmbH &
 2 Co. KG under the brand name “Sebamed” and contain materially false labeling
 3 representations relating to pH levels. *See* Complaint ¶¶ 1, 3, 5.

4 7. Plaintiff has asserted six causes of action: (1) violation of the
 5 Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code §1750 et seq.; (2)
 6 negligent misrepresentation; (3) violation of the False Advertising Law (“FAL”),
 7 Cal. Bus. & Prof. Code §17500 et seq.; (4) unlawful, fraudulent, and unfair
 8 business practices under the Unfair Competition Law (“UCL”), Cal. Bus. & Prof.
 9 Code §17200 et seq.; (5) breach of implied warranty; and (6) intentional
 10 misrepresentation. *See* Complaint ¶¶ 31–78.

11 8. Plaintiff seeks to litigate her claims on behalf of herself and a putative
 12 class: “[A]ll persons who, between 2014 and 2018, purchased Sebamed Products
 13 in California that were unlawfully represented, *inter alia*, as ‘*exactly 5.5—precisely*
 14 *the pH of healthy skin;*’ ‘*meticulously formulated to a pH balance of exactly 5.5;*’
 15 ‘*essential in maintaining your skin’s natural hydrolipid barrier against*
 16 *environmental stress;*’ and related fraudulent misrepresentations.” Complaint ¶ 26.

17 9. Plaintiff alleges that the putative class consists of “thousands of
 18 individuals.” Complaint ¶ 27.

19 10. Plaintiff has demanded relief that includes, but is not limited to, an
 20 order requiring Defendants to disgorge all moneys, revenues, and profits obtained
 21 by means of any wrongful act or practice and to restore all funds acquired by
 22 means of any act or practice declared by the Court to be unlawful, unfair,
 23 fraudulent, untrue or misleading, or a violation of the CLRA, FAL or UCL.
 24 Plaintiff also seeks to recover an award of attorneys’ fees and costs. *Id.*, Prayer for
 25 Relief ¶¶ 5, 7, 8.

26 11. As demonstrated below, this Court has jurisdiction over Plaintiff’s
 27 action, and it is properly removed to this Court.

**BASIS OF FEDERAL JURISDICTION UNDER
CLASS ACTION FAIRNESS ACT**

12. This action is removable to this Court because federal diversity jurisdiction under 28 U.S.C. § 1332 exists over Plaintiff's claims under the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005) ("CAFA"), codified in various sections of Title 28 of the United States Code, including 28 U.S.C. §§ 1332(d) & 1453.

13. Congress enacted CAFA to enlarge federal jurisdiction over proposed class actions. CAFA provides that a class action against a non-governmental entity may be removed to federal court if: (1) the aggregate amount in controversy exceeds \$5 million, exclusive of interest and costs; (2) any member of the proposed plaintiff class is a citizen of a state different from any defendant; and (3) the number of proposed class members is not less than 100. *See* 28 U.S.C. §§ 1332(d)(2), (d)(5), (d)(6) & 1453(b). As set forth below, all the requirements for removal are met here.

Amount-in-Controversy Requirement

14. CAFA's first requirement, that the aggregate amount in controversy exceeds \$5 million, exclusive of interest and costs, 28 U.S.C. § 1332(d)(2), is met here.

15. First, Plaintiff alleges that, on March 8, 2018, her counsel sent Defendants written notice that their conduct is in violation of the CLRA. Complaint ¶ 38. That notice, a copy of which is attached as Exhibit 1 to the Declaration of Alex Fazeli ("Fazeli Dec."), asserts that "Plaintiffs reasonably anticipate that consumers have incurred monetary damages in excess of \$50,000,000 from the fraudulent scheme." Plaintiff thus concedes that her claims

1 place more than \$5 million into controversy.¹

2 16. Second, Plaintiff seeks restitution on behalf of all putative class
3 members, alleging that they “have suffered economic harm by losing money as a
4 result of purchasing the Sebamed Products.” Complaint ¶ 50. Plaintiff also seeks
5 an order requiring Defendants to “disgorge or return all monies, revenues, and
6 profits obtained by means of any wrongful act or practice.” Complaint, Prayer for
7 Relief ¶¶ 5, 7.

8 17. Plaintiff alleges that Defendant Physician Laboratories, Inc. “markets,
9 sells, and distributes Sebamed Products” in California. Complaint ¶ 13. It is
10 Physician Laboratories, Inc.’s regular practice to maintain, in the ordinary course
11 of its business, records of sales of its various products to distributors, retailers, and
12 consumers where applicable. Fazeli Dec. ¶ 2.

13 18. Physician Laboratories, Inc.’s business records reflect that, from
14 March 9, 2014 to March 9, 2018, Physician Laboratories’ sales of Sebamed
15 products to customers at Costco Wholesale Corporation’s California stores alone
16 exceeded \$6 million.² Fazeli Dec. ¶ 3. Plaintiff seeks disgorgement of these
17 revenues, which represent just a fraction of the total sales made by the various
18 defendants within the putative class period. *See* Complaint ¶ 50, Prayer for Relief
19 ¶¶ 5, 7.

20 19. Third, Plaintiff seeks attorneys’ fees. Complaint 16. Attorneys’ fees
21 are counted in determining the amount in controversy for the purposes of
22 determining removal jurisdiction. *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150,

25 ¹ Nothing herein shall be construed as an admission by Defendants that Plaintiff
26 and the class are entitled to any relief requested.

27 ² Defendant considers the exact amount of revenue generated to be confidential.
28 As this is a public filing, Defendant is using conservative round numbers. If the
Court has a question regarding Defendant’s filing, Defendant is willing to
submit precise numbers under seal.

1 1156 (9th Cir. 1998); *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 700 (9th
2 Cir. 2007).

3 20. In the Ninth Circuit, a common estimate of attorneys' fees in a class
4 action is 25% of compensatory damages. *Molnar v. 1-800-Flowers.com, Inc.*,
5 2009 WL 481618, at *5 (C.D. Cal. Feb. 23, 2009) (citing *Staton v. Boeing Co.*, 327
6 F.3d 938, 967 (9th Cir. 2003)). Calculating attorneys' fees as 25% of the
7 restitution Plaintiff seeks with regard to Physician Laboratories, Inc.'s sales at
8 Costco stores alone yields \$1.5 million in fees. But the amount of attorneys' fees
9 put in controversy by Plaintiff's allegations significantly exceeds this figure, as
10 Plaintiff alleges that numerous other defendants also sold products that contained
11 false labeling. *See, e.g.*, Complaint ¶¶ 17–21. Indeed, calculating attorney's fees
12 as 25% of \$50 million—Plaintiff's damages estimate—yields \$12.5 million in fees.

13 21. Plaintiff also seeks both prohibitory and mandatory injunctive relief:
14 (a) "an order enjoining Defendants from misbranding Sebamed Products," (b) "an
15 order compelling Defendants to conduct a corrective advertising campaign to
16 inform the public that Sebamed Products are not 'meticulously formulated to a pH
17 balance of exactly 5.5,'" and (c) an order compelling Defendants to destroy all
18 misleading and deceptive advertising materials and profits. Complaint 15–16.
19 "The cost of . . . the injunction against defendant must be included when
20 determining the amount in controversy." *Lyon v. W.W. Grainger Inc.*, 2010 WL
21 1753194, at *2 (N.D. Cal. Apr. 29, 2010) (citing *In re Ford Motor Co.*, 264 F.3d
22 952, 959 (9th Cir. 2001)).

23 22. Including the cost of injunctive relief to Defendants raises the amount
24 in controversy even higher. The value of an injunction in this case includes the
25 cost of revising labels, pulling challenged products from California shelves, and
26 destroying old packaging. *See Arens v. Popcorn, Indiana, LLC*, 2014 WL
27 2737412, at *2 (N.D. Cal. June 16, 2014). And it includes the cost to Defendants
28 of either developing new labels and advertising for Sebamed products or changing

1 the product formulation and reproducing the products. In addition, to ensure that
 2 Defendants comply with an injunction requiring them to cease using certain claims
 3 in California, Defendants would have to change their product labeling nationwide.
 4 Otherwise, distributors or other third parties could sell allegedly misbranded
 5 Products in California. And the cost of conducting a corrective advertising
 6 campaign also must be counted when establishing the amount in controversy. *See*
 7 *Tompkins v. Basic Research LLC*, 2008 WL 1808316, at *5 (E.D. Cal. Apr. 22,
 8 2008) (finding amount in controversy exceeded \$5 million through valuation of
 9 injunction, buy back of products currently on shelves, and corrective advertising).

10 23. Taken together, the amount in controversy in this action far exceeds
 11 \$5 million.

12 **Minimal Diversity of Citizenship**

13 24. CAFA's second requirement, that any one member of the proposed
 14 class be a citizen of a state different from any defendant, 28 U.S.C. § 1332(d)(2), is
 15 also met here.

16 25. Plaintiff alleges that she was a resident of Orange County, California,
 17 at the time of her purchases of Sebamed Products during the relevant class period.
 18 Complaint ¶ 10; *see also Dist. of Columbia v. Murphy*, 314 U.S. 441, 455 (1941)
 19 (while residence is not the equivalent of citizenship, residence is properly taken as
 20 domicile "until facts are adduced to the contrary").

21 26. Several of the defendants are citizens of states other than California.
 22 For example:

23 (a) Plaintiff alleges that Defendant Sebapharma GmbH & Co. KG
 24 is a "corporation organized under the laws of Germany." Complaint ¶ 15.

25 (b) Plaintiff alleges that Defendant Costco is a "corporation
 26 organized and existing under the laws of the State of Washington." Complaint
 27 ¶ 16.
 28

1 (c) Plaintiff alleges that Defendant Rite Aid is a “corporation
2 organized and existing under the laws of the State of Delaware.” Complaint ¶ 17.

3 (d) Plaintiff alleges that Defendant Bed Bath & Beyond is a
4 “corporation organized and existing under the laws of the State of Washington.”
5 Complaint ¶ 20.

6 (e) Plaintiff alleges that Defendant Vitacost is a “corporation
7 organized and existing under the laws of the State of New York.” Complaint ¶ 20.

8 27. Plaintiff brings this putative class action on behalf of “all persons
9 who, between 2014 and 2018, purchased Sebamed Products in California that were
10 unlawfully represented, inter alia, as ‘exactly 5.5 – precisely the pH of healthy
11 skin;’ ‘meticulously formulated to a pH balance of exactly 5.5;’ ‘essential in
12 maintaining your skin’s natural hydrolipid barrier against environmental stress;’
13 and related fraudulent misrepresentations.” Complaint, ¶ 26.

14 28. Accordingly, there is minimal diversity between at least one defendant
15 (e.g., Costco, a citizen of Washington; Rite Aid, a citizen of Delaware; Bed Bath &
16 Beyond, a citizen of Washington; and Vitacost, a citizen of New York) and the
17 named and unnamed members of the putative class (by definition, located in
18 California and most certainly not all citizens of Washington, Delaware, or New
19 York). *See* 28 U.S.C. § 1332(d)(2)(A).

20 **Proposed Class Size**

21 29. CAFA’s third requirement, that the proposed class contain at least 100
22 members, 28 U.S.C. § 1332(d)(5), is met here as well. Plaintiff alleges that the
23 putative class consists of “thousands of individuals.” Complaint ¶ 27. Plaintiff
24 thus alleges a potential class with at least 100 members.

25 ///

26 ///

27 ///

28 ///

Conclusion

30. For all the foregoing reasons, this action is properly removed to this Court under CAFA.

Respectfully submitted,

Dated: April 27, 2018

WILLENKEN WILSON LOH &
DELGADO LLP

By: /s/William A. Delgado

William A. Delgado

Attorneys for Defendants PHYSICIAN
LABORATORIES, INC., MDX
LOGISTICS, INC., CVS HEALTH
CORP., COSTCO WHOLESALE
CORP., RITE AID CORP., THE
KROGER CO., iHERB, INC., BED
BATH & BEYOND INC.,
VITACOST.COM, INC., ALEX
FAZELI, and MONROE FAZELI

EXHIBIT A

JEFFREY S. BENICE, ESQ., State Bar No. 81583
 BENICE LAW
A Professional Law Corporation
 3080 Bristol Street
 Sixth Floor, Suite 630
 Costa Mesa, California 92626
 Telephone No.: (714) 641-3600
 Facsimile No.: (714) 641-3604
 Website: www.JeffreyBenice.com
 E-Mail: JSB@JeffreyBenice.com

ELECTRONICALLY FILED
 Superior Court of California,
 County of Orange
03/09/2018 at 10:23:48 PM
 Clerk of the Superior Court
 By Sarah Loose, Deputy Clerk

Counsel for Plaintiff and the Proposed Class

SUPERIOR COURT OF CALIFORNIA
 CIVIL COMPLEX CENTER
FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

MELISSA RIVAS, on behalf of herself and
 all others similarly situated,

Plaintiff,

vs.

PHYSICIAN LABORATORIES, INC., an
 Arizona corporation; MDX LOGISTICS, a
 Michigan corporation; SEBAPharma
 GmbH & CO. KG, a corporation organized
 under the laws of Germany; CVS HEALTH
 CORP., a Delaware corporation; COSTCO
 WHOLESALE CORPORATION, a
 Washington corporation; RITE AID
 CORPORATION, a Delaware corporation;
 THE KROGER CO., a Ohio corporation;
 iHERB, INC. a California corporation; BED
 BATH & BEYOND; a New York
 corporation; VITACOST, a Delaware
 corporation; ALEX FAZELI, an individual;
 MONROE FAZELI, an individual; and DOES
 1 through 100,

Defendants.

CASE NO.: 30-2018-00979214-CU-BC-CXC

STATEWIDE CLASS ACTION

COMPLAINT FOR VIOLATIONS OF:

1. **VIOLATION OF THE CONSUMERS
 LEGAL REMEDIES ACT (CAL. CIV.
 CODE §§ 1750, ET SEQ.);**
2. **NEGLIGENT
 MISREPRESENTATION;**
3. **VIOLATION OF FALSE
 ADVERTISING LAW (CAL. BUS. &
 PROF. CODE §§ 17500, ET SEQ.);**
4. **UNLAWFUL, FRAUDULENT &
 UNFAIR BUSINESS PRACTICES
 (CAL. BUS. & PROF. §§ 17200, ET
 SEQ.);**
5. **BREACH OF IMPLIED WARRANTY;
 AND**
6. **INTENTIONAL
 MISREPRESENTATION.**

DEMAND FOR JURY TRIAL

Assigned: Judge Glenda Sanders
 Dept: CX101

Plaintiff Melissa Rivas (“*Plaintiff*”) and the Proposed Class (“*Class*”) allege the following causes of action against Defendants Physician Laboratories, Inc. (“*Physician*”), MDX Logistics (“*MDX*”), Alexander P. Fazeli (“*Fazeli*”), Monroe Fazeli (“*M. Fazeli*”) (collectively “*Physician*” unless individually identified); Sebapharma GmbH & Co. KG (“*Sebapharma*”), Costco Wholesale Corporation (“*Costco*”); Rite Aid (“*Rite Aid*”); The Kroger Co. (“*Kroger*”); iHerb, Inc. (“*iHerb*”); Bed Bath & Beyond (“*Bed Bath*”); and Vitacoast (“*Vitacoast*”) (collectively “*Defendant Retailers*” unless individually identified), and each of them, as follows.

1.

SUMMARY OF COMPLAINT

1. “*Sebamed*” is the brand name for a collection of skin care and related products (“*Sebamed Products*”) manufactured by Defendant Sebapharma, a German company, and exclusively distributed and sold in the United States by Defendant Physician and the Defendant Retailers. Defendants CVS, Costco, Rite Aid, Kroger, iHerb, Bed Bath and Vitacoast, and each of them, are retailers who, on information and belief, have sold millions of dollars of Sebamed products to consumers in California and throughout the United States since at least 2014 to the date of the filing of this Complaint (“*Class Period*”). Attached hereto as Exhibit “A” and incorporated herein by reference is a true copy of the “*Distribution Agreement*” between Sebapharma and Physician dated August 12, 2005 concerning Defendant Physician’s distribution of Sebamed Products in the United States. Examples of the vast array of Sebamed products distributed by Defendants Sebapharma and Physician and sold by the Defendant Retailers is attached hereto as Exhibit “B” and incorporated herein by reference.

2. Defendants Sebapharma and Physician, and each of them, market the Sebamed Products through extensive label and brand marketing specifically representing that all Sebamed skincare products have a “*pH balance of exactly 5.5.*” For example, Sebamed’s “*liquid face & body wash*” label sets forth the following representations:

“*SEBAMED liquid face & body wash - Dermatologist developed,*
this ultra-mild formulation is compatible with the most sensitive of skins.
Gently deep-cleans pores without causing dryness or irritation as
regular soap can. Fortified with a natural moisturizing complex of vitamins

and soothing allantoin, it rinses away completely for naturally healthier, smoother skin.

SEBAMED pH 5.5

THE SCIENCE BEHIND HEALTHY SKIN

*Every Sebamed product is meticulously formulated to a pH balance of exactly 5.5 - precisely the pH of healthy skin. This is essential in maintaining your skin's natural hydrolipid barrier against environmental stress. Any other pH level, such as found in soap may leave your skin open to break-down and deterioration. Discover what 150 clinical studies have already shown - pH 5.5 is vital for healthy skin.*¹ [Emphasis added.]

Every Sebamed skin product label further specifically states:

*"Sebapharma ... made in Germany distributed by Physician Laboratories
www.SebamedUSA.com".*

All Sebamed Products also represent on the front label directly above the word "med" that the product is "**pH 5.5 Ideal for healthy skin.**" These identical label and marketing representations appear on Sebamed Products marketed for use by babies and children. Attached hereto as Exhibit "C" and incorporated herein by reference are true copies of the labeling and marketing for "*Sebamed Baby Cream Extra Soft*" and "*Baby Bubble Bath with Pump.*"

3. In fact, Defendants Sebapharma's and Physician's labeling and marketing is materially false and fraudulent; the representation that "[e]very Sebamed product [is] meticulously formulated to a pH balance of exactly 5.5..." is knowingly false. Attached hereto as Exhibits "D" and "E" and incorporated herein by reference are lab results providing the following accurate pH testing for the identified Sebamed Products:

April 19, 2015

Product	Lot #	Measured pH
• Sebamed Hand & Nail Balm (tube 1)	2000500	6.27

¹Labeling on "*Sebamed liquid face & body wash for sensitive skin.*"

1 • Sebamed Hand & Nail Balm (tube 1) 20005005 6.26

2 July 24, 2017

3 • Sebamed Hand & Nail Balm 60010002 6.06

4 • Sebamed Moisturizing Body Lotion 60008022 5.67

5 • Sebamed Moisturizing Face Cream 60008056 6.02

6 • Sebamed Liquid Face & Body Wash 60008103 5.63

7 4. The lab results unequivocally demonstrate that Defendants Sebapharma's and
8 Physician's labeling and marketing representations are false and fraudulent; the Sebamed Products
9 are not "*exactly 5.5 pH*" as represented. On information and belief, Defendant Physician through its
10 principal, Defendant Fazeli, knowingly and intentionally authorized the false labeling and marketing
11 of Sebamed Products in California and throughout the United States to deceive the public into
12 believing the use of Sebamed Products will create "*healthy skin*" by having "*exactly*" a 5.5 PH.
13 Defendants' intent is to falsely and fraudulently deceive the consumers and to reap millions of
14 dollars in fraudulently procured funds. Defendant M. Fazeli knowingly aided and abetted Defendants
15 Physician and Fazeli in the fraudulent scheme.

16 5. Defendants SebaPharma's and Physician's fraudulent and unlawful labeling of
17 Sebamed Products is part of a ongoing scheme and fraudulent advertising campaign perpetrated on
18 the public, aimed at convincing consumers, through material false labeling and advertising, *inter*
19 *alia*, that Sebamed Products are "*exactly*" pH 5.5 and "*vital for healthy skin.*" The Defendant
20 Retailers at all times alleged herein fully endorsed the Sebamed Products as labeled and marketed;
21 and provided Defendant Sebapharma and Physician with special in store marketing promotions and
22 advertising to enhance the sale of the fraudulent Sebamed Products to unknowing consumers.

23 6. Defendants Sebapharma and Physician's fraudulent marketing campaign has been
24 continuous through multiple forums, and disseminated through all forms of media including print;
25 web; television advertisements; in-store appearances; social media; Defendants' websites; and
26 multiple third party vendors including the Defendant Retailers. By representing that Sebamed
27 Products are "*Dermatologist Developed*" Defendants seek to falsely imply a medical endorsement
28 for their misrepresentations that Sebamed Products are "*meticulously formulated to a pH balance of*

1 *exactly 5.5."* Defendants Sebapharma and Physician falsely represent: "*Discover what 150 clinical*
 2 *studies have already shown - pH 5.5 is vital for healthy skin."*

3 7. Plaintiff Rivas purchased one or more Sebamed Products during the applicable
 4 statutory periods for the claims set forth herein from Defendants Costco and Rite Aid in reliance on
 5 Defendant SebaPharma's and Physician's false representations and promises, *inter alia*, that
 6 Sebamed Products are meticulously formulated to a pH balance of "*exactly 5.5*"; and that a pH
 7 balance of 5.5 "*is essential in maintaining the skin's natural hydrolipid barrier against*
 8 *environmental stress.*" Plaintiff Rivas reasonably relied upon Defendants' fraudulent and misleading
 9 labeling, packaging, and marketing in her decision to purchase the Sebamed Products. Were it not
 10 for Defendants' fraudulent labeling, packaging, and marketing, Plaintiff Rivas would not have
 11 purchased the Sebamed Products or paid as much for the Sebamed Products.

12 8. By consistently and systematically labeling and marketing Sebamed Products, *inter*
 13 *alia*, as "*exactly pH 5.5*" and "*essential in maintaining your skin's natural hydrolipid barrier against*
 14 *environmental stress,*" Defendants and each of them intended that all members of the California
 15 consumer public purchasing Sebamed products would be exposed to these fraudulent marketing
 16 claims.

17 9. Having become aware of the true nature of Defendants Sebapharma's and Physician's
 18 fraudulent tactics complained of herein, Plaintiff seeks, on behalf of herself and others similarly
 19 situated, the remedies prayed for herein: for an order compelling Defendants, and each of them, to:
 20 (a) cease marketing Sebamed Products using the fraudulent marketing and labeling tactics
 21 complained of herein; (b) conduct a corrective advertising campaign; (c) restore the amount by
 22 which Defendants were unjustly enriched; (d) pay damages and attorneys' fees and costs; and (e)
 23 destroy all misleading and deceptive materials and products.

24 2.

25 PRELIMINARY ALLEGATIONS

26 A. Parties.

27 10. Plaintiff Rivas is an individual, who at the time of her purchases of Sebamed
 28 Products during the Class Period, was a resident of Orange County, California.

11. Defendant Fazeli is an individual, and is and was, at all times alleged herein, a resident of Orange County, California. Defendant Fazeli is the controlling principal of Defendants Physician and MDX. Defendant Fazeli authorized and directed the wrongful conduct alleged herein.

12. Defendant M. Fazeli is an individual, and is and was, at all times alleged herein, a resident of Orange County, California. Defendant Fazeli is the principal of Defendant MDX. Defendant Fazeli aided and abetted Defendant Fazeli and Defendant Physician and the other Defendants; and authorized and directed the wrongful conduct alleged herein.

13. Defendant Physician, is and was at all times alleged herein, a corporation organized and existing under the laws of the State of Arizona, with its principal place of business in Orange County, California, marketing, selling, and distributing Sebamed Products in the State of California and throughout the United States.

14. Defendant MDX, is and was at all times alleged herein, a corporation organized and existing under the laws of the State of Michigan, with its principal place of business in Orange County, California marketing Sebamed Products in the State of California and throughout the United States.

15. Defendant SEBAPHARMA, is and was at all times alleged herein a corporation organized under the laws of Germany, manufacturing, and distributing Sebamed Products in the State of California and throughout the United States.

16. Defendant Costco, is and was at all times alleged herein, a corporation organized and existing under the laws of the State of Washington, marketing and selling Sebamed Products in the State of California and throughout the United States.

17. Defendant Rite Aid is and was at all times alleged herein, a corporation organized and existing under the laws of the State of Delaware, marketing and selling Sebamed Products in the State of California and throughout the United States.

18. Defendant iHerb is and was at all times alleged herein, a corporation organized and existing under the laws of the State of California, marketing and selling Sebamed Products in the state of California and throughout the United States.

20. Defendant Bed Bath is and was at all times alleged herein, a corporation organized

1 and existing under the laws of the State of Washington marketing and selling Sebamed Products in
2 the State of California and throughout the United States.

3 21. Defendant Vitacoast is and was at all times alleged herein, a corporation organized
4 and existing under the laws of the State of New York, marketing and selling Sebamed Products in
5 the State of California and throughout the United States.

6 22. The true names and capacities, whether individual, corporate, associate, or otherwise
7 of the Defendants named herein as Does 1 through 100, inclusive, and each of them, are unknown to
8 Plaintiff who therefore sues those Defendants by such fictitious names. Plaintiff will seek leave to
9 amend this Complaint to allege the true names and capacities of the fictitiously named Defendants
10 when and if the same have been ascertained. Plaintiff is informed and believes, and based thereon
11 alleges, that each Defendant named as a Doe herein participated in and was responsible in some
12 manner for the events, acts, representations, concealments, omissions and happenings described in
13 this Complaint, and legally caused the injuries and the damages proximately resulting therefrom to
14 Plaintiff as alleged herein.

15 23. Plaintiff is informed and believes that at all times alleged herein, each of the
16 Defendants was the agent, principal, co-conspirator, affiliate, representative, and/or partner of each
17 of the remaining Defendants, and in doing the acts hereinafter alleged, was acting within the scope of
18 such relationship and with the permission, consent and/or ratification of his or its co-defendants.

19 24. To the extent any individual Defendant is and was conducting business through a
20 corporation, partnership, limited liability company, or other entity, such individual Defendant
21 remains personally liable for any and all fraudulent and wrongful conduct carried on through the use
22 of the entity, to further any unlawful acts

23 **3.**

24 **CLASS ACTION ALLEGATIONS**

25 25. Plaintiff brings this action as a representative or class action under Section 382 of the
26 Code of Civil Procedure.

27 26. The persons similarly situated or class members consists of all persons who, between
28 2014 and 2018, purchased Sebamed Products in California that were unlawfully represented, *inter*

1 *alia*, as “*exactly 5.5 - precisely the pH of healthy skin*,” “*meticulously formulated to a pH balance of*
2 *exactly 5.5*,” “*essential in maintaining your skin’s natural hydrolipid barrier against environmental*
3 *stress*,” and related fraudulent misrepresentations.

4 27. The persons similarly situated or in the class are so numerous, consisting of
5 thousands of individuals, that the joinder of all such persons is impracticable and that the disposition
6 of their claims in a representative or class action rather than in individual actions will benefit the
7 parties and the Court.

8 28. There is a well-defined community of interest in the questions of law and fact
9 involving the persons similarly situated and/or the Class. Such common questions of law and fact
10 include: whether Defendants have offered or sold Sebamed Products that were misrepresented as to
11 being “*exactly 5.5 pH - precisely the pH of healthy skin*”; the benefit from using Sebamed Products;
12 the medical endorsement of Sebamed Products in “*150 clinical studies*”; whether Plaintiffs are
13 entitled to equitable relief and what type of relief as a result of the Defendants’ unlawful conduct;
14 and restitution and damages. These questions are of common or general interest to many people and
15 predominate over questions that affect only individual persons similarly situated or class members.
16 Proof of a common or single state of facts will establish the right of each person similarly situated or
17 each class member to the relief demanded. The claims of the Plaintiff are typical of those sought to
18 be represented and Plaintiff will fairly and adequately represent their interests.

19 29. There is no plain, speedy, or adequate remedy other than by maintenance of this
20 representative or class action because Plaintiff is informed and believes that the damage to Plaintiff
21 and each prospective Class Plaintiff is relatively small, making it economically unfeasible to pursue
22 remedies other than through a representative or class action. Consequently, there would be a failure
23 of justice but for the maintenance of the present action.

24 30. The prosecution of individual remedies by persons similarly situated or class
25 members would tend to establish inconsistent standards of conduct for the Defendants and to result
26 in the impairment of Plaintiffs’ rights and the disposition of their interests through actions to which
27 they were not parties.

28 ///

4.

FIRST CAUSE OF ACTION

[Violations of the Consumers Legal Remedies Act (“CLRA”)]

Cal. Civ. Code §§ 1750, et seq., Against all Defendants]

31. Plaintiff realleges paragraphs 1 through 30, inclusive.

32. Plaintiff and each proposed Class member is a “*consumer*,” as that term is defined in Cal. Civ. Code § 1761(a).

33. The Sebamed products are “*goods*,” as that term is defined in Cal. Civ. Code § 1761(a).

34. Defendants, and each of them, are a “*person*,” as that term is defined in Cal. Civ. Code § 1761(c).

35. Plaintiff’s and each proposed Class Member’s purchase of the Sebamed Products constituted a “*transaction*,” as that term is defined in Cal. Civ. Code § 1761(e).

36. Defendants’ conduct alleged herein violated the following provisions of the CLRA:

- a. Civil Code § 1770(a)(5), by representing that the Sebamed Products have characteristics, ingredients, uses, and benefits which they do not have;
- b. Civil Code § 1770(a)(7), by representing that the Sebamed Products are of a particular standard, quality, or grade, when they were of another;
- c. Civil Code § 1770(a)(9), by advertising goods with intent not to sell them as advertised;
- d. Civil Code § 1770(a)(16), by representing that the Sebamed Products have been supplied in accordance with previous representations when they have not.

37. As a direct and proximate result of these violations, Plaintiff and the Class have been harmed, and that harm will continue unless Defendant and each of them are enjoined from representing that the Sebamed Products are, *inter alia*, “*meticulously formulated to a pH balance of exactly 5.5...*”

38. On March 8, 2018, counsel for the Plaintiff and the proposed Class provided

Defendants written notice (via Certified Mail, Return Receipt requested) that their conduct is in violation of the CLRA. Thus, pursuant to California Civil Code § 1782, Plaintiff intends to amend this Complaint to bring a claim for actual damages after the passing of the statutory notice period.

39. Plaintiff seeks an award of attorneys' fees pursuant to, *inter alia*, Cal. Civ. Code § 1780(e) and Cal. Civ. Proc. § 1021.5.

5.

SECOND CAUSE OF ACTION

[Negligent Misrepresentation Against all Defendants]

40. Plaintiff realleges paragraphs 1 through 39, inclusive.

41. During the Class Period, Defendants represented to consumers through the labeling, packaging, and marketing of the Sebamed Products, *inter alia*, that the products were "*meticulously formulated to a pH balance of exactly 5.5...*" Defendants made these representations knowing that such claims would be material to a reasonable consumer's purchasing decision.

42. Defendants' representations that the Sebamed Products were "*meticulously formulated o a pH balance of exactly 5.5...*" were false because the Sebamed Products, in fact, are not "*exactly 5.5 pH.*"

43. Defendants' material misrepresentations concerning the health benefits, characteristics, composition, and quality of the Sebamed Products were false and made without reasonable grounds for believing them to be true.

44. Defendants made material misrepresentations concerning the health benefits, characteristics, composition, and quality of the Sebamed Products with the intent to induce Plaintiff and the Class to purchase the Sebamed Products.

45. Plaintiff and the Class reasonably and materially relied on Defendants' material misrepresentations in choosing to purchase the Sebamed Products.

46. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff and the Class have incurred damages in an amount to be proven at trial.

///

///

6.

THIRD CAUSE OF ACTION

[Violations of the California False Advertising Law,

Bus. & Prof. Code §§ 17500 et seq. Against all Defendants]

47. Plaintiff realleges paragraphs 1 through 46, inclusive.

48. Defendants' actions as described herein constitute unfair competition within the meaning of the False Advertising Law ("FAL") insofar as Defendants have disseminated untrue and/or misleading representations in connection with the sale of the Sebamed Products.

49. Defendants have engaged in and continue to engage in false advertising in violation of Cal. Bus & Prof. Code §§ 17500, *et seq.*, by making the untrue and/or misleading representations concerning the health benefits, characteristics, composition, and quality of the Sebamed Products alleged above, without having any reasonable basis for doing so. Plaintiff is informed and believes and thereon alleges that Defendants have intentionally falsely labeled and advertised the Sebamed Products as, *inter alia*, "*meticulously formulated to a pH balance of exactly 5.5...*" Reasonable consumers purchased the Sebamed Products upon the belief that they were "*meticulously formulated to a pH balance of exactly 5.5...*" and Defendants' related misrepresentations.

50. As a direct and proximate result of Defendants' violation of the FAL, Plaintiff and the Class have suffered injury in fact and have suffered economic harm by losing money as a result of purchasing the Sebamed Products.

51. Defendants' wrongful business practice constitutes a continuing course of conduct of false advertising; Defendants are continuously marketing and selling the Sebamed Products in a manner likely to deceive the public. Plaintiff and the Class seek an order of this Court enjoining Defendants from continuing to engage in unlawful and unfair business practices and any other act prohibited by law, including those set forth in this Complaint.

52. As a direct and proximate result of the Defendants' wrongful conduct, as set forth herein, Defendants have received money that properly belongs to Plaintiff and the Class. Therefore, Plaintiff and the Class request restitution of these amounts according to proof at trial.

53. Plaintiff should further be awarded attorneys' fees pursuant to, *inter alia*, Cal. Code.

1 Civ. Proc. § 1021.5.

2 7.

3 **FOURTH CAUSE OF ACTION**

4 **[Unlawful, Fraudulent, and Unfair Business Practices**

5 **Cal. Bus. & Prof. §§ 177200 et seq. Against all Defendants]**

6 54. Plaintiff realleges paragraphs 1 through 53, inclusive.

7 55. Defendants' actions as described herein constitute unfair competition within the
8 meaning of California's Unfair Competition Law ("UCL"), insofar as the UCL prohibits "*any*
9 *unlawful, unfair or fraudulent business act or practice*" or "*unfair, deceptive, untrue or misleading*
10 *advertising.*"

11 56. Defendants misrepresentations and omissions of material fact as alleged herein
12 constitute unlawful, unfair and fraudulent business practices in that they deceived Plaintiff and the
13 Class into believing, *inter alia*, that the Sebamed Products were "*meticulously formulated to a pH*
14 *balance of exactly 5.5...*"

15 57. Defendants conduct constitutes an "*unlawful*" business practice within the meaning
16 of the UCL because it violates the CLRA and FAL.

17 58. Defendants' conduct further constitutes an "*unfair*" business practice within the
18 meaning of the UCL because it is immoral, unethical, oppressive, unscrupulous an/or substantially
19 injurious to consumers. Reasonable consumers purchased Sebamed Products believing the truth of
20 Defendants' representations concerning their composition. These consumers were not aware, and
21 could not have reasonably been aware, that the Sebamed Products were falsely labeled and marketed,
22 *inter alia*, as "*meticulously formulated to a pH balance of exactly 5.5...*" Defendants' conduct in
23 falsely labeling and marketing the Sebamed Products and selling them as such has no utility or
24 countervailing benefit and consumers could not have reasonably avoided their injury.

25 59. Defendants' conduct constitutes a "*fraudulent*" business practice within the
26 meaning of the UCL insofar as Defendants' misrepresentations and omissions regarding the health
27 benefits, characteristics, composition, and quality of the Sebamed Products were and are likely to
28 deceive members of the public.

60. As a direct and proximate result of Defendants' wrongful business practices in violation of the UCL, Plaintiff and Class members have suffered injury in fact and lost money or property as a result of purchasing the Sebamed Products. Plaintiff and Class members would not have purchased nor paid as much for the Sebamed Products had they known the truth about Defendants' false claims.

61. Defendants' wrongful business practices constitute a continuing course of conduct of unfair competition; Defendants are labeling, marketing, and selling the Sebamed Products in a manner likely to deceive the public.

62. Pursuant to the California Business & Professional Code § 17203, Plaintiff and the Class seek an order of this Court enjoining Defendants from continuing to engage in unlawful, unfair, and fraudulent business practices and any other act prohibited by law, including those set forth in this Complaint. Plaintiff and the Class also seek an order requiring Defendants to make full restitution of all moneys wrongfully obtained from Plaintiffs and the Class.

63. Plaintiff should further be awarded attorneys' fees pursuant to, *inter alia*, Cal. Code Civ. Proc. § 1021.5.

8.

FIFTH CAUSE OF ACTION

[Breach of Implied Warranty, California Commercial Code § 2314 *et seq.*

Against all Defendants]

64. Plaintiff realleges paragraphs 1 through 63, inclusive.

65. California Commercial Code § 2314(1) provides that "*a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.*" Cal. Com. Code § 2314(1).

66. California Commercial Code § 2314(2) provides that "*[g]oods to be merchantable must be at least such as... (e)[a]re adequately contained, packaged, and labeled as the agreement may require.*" Cal. Comn. Code § 2314(2)(e).

67. Defendants are "*merchants*" with respect to the sale of Sebamed Products. Therefore, a warranty of merchantability is implied in every contract for sale of the Sebamed Products to

1 California consumers.

2 68. By falsely marketing and labeling the Sebamed Products as alleged herein Defendants
3 have not performed as promised. Plaintiff and the Class did not receive the “*goods*” - the Sebamed
4 Products - as impliedly warranted by Defendants to be merchantable.

5 69. Therefore, the Sebamed Products are not merchantable under California law and
6 Defendants, and each of them, have breached their implied warranty of merchantability in regard to
7 the Sebamed Products.

8 70. If Plaintiff and the Class had known that the Sebamed Products were falsely labeled
9 and marketed, they would not have purchased the Sebamed Products; or would not have been
10 willing to pay the premium price associated with Sebamed Products having “*exactly 5.5 pH*”.
11 Therefore, as a direct and/or indirect result of Defendants’ breach, Plaintiff and the Class have
12 suffered injury and deserve to recover all damages afforded under the law.

13 9.

14 **SIXTH CAUSE OF ACTION**

15 **[Intentional Misrepresentation Against all Defendants]**

16 71. Plaintiff realleges paragraphs 1 through 70, inclusive

17 72. Defendants have labeled, packaged, and marketed Sebamed Products in a manner
18 representing that “[*e*]very Sebamed Product is meticulously formulated to a pH balance of exactly
19 5.5 pH...”; is “*vital for healthy skin*”; and related misrepresentations. In fact, Sebamed Products are
20 not a “*pH balance of exactly 5.5...*”. Therefore, Defendants have made fraudulent misrepresentations
21 as to the Sebamed Products to the consumers in California and throughout the United States.

22 73. Defendants’ misrepresentations regarding the Sebamed Products are material to a
23 reasonable consumer because they relate to the quality and specifications of Sebamed Products
24 received by consumers. A reasonable consumer would attach importance to such representations and
25 would be induced to act thereon in making purchase decisions.

26 74. At all relevant times when such misrepresentations were made, Defendants knew that
27 the representations were misleading, or have acted recklessly in making the representations, without
28 regard to the truth.

75. Defendants intended and intend that Plaintiff and others consumers rely on the labeling, packaging and marketing of Sebamed Products' packaging, as evidenced by Defendants' intentional and fraudulent labeling and marketing of Sebamed Products as "*exactly 5.5 pH*" when such products are not "*exactly 5.5 pH*."

76. Plaintiff and members of the Class have reasonably and justifiably relied on Defendants' intentional misrepresentations when purchasing Sebamed Products, and had the true facts been known, would not have purchased Sebamed Products or would not have purchased them at the prices at which they were offered.

77. Therefore, as a direct and proximate result of Defendants' intentional misrepresentations, Plaintiffs of the Class have suffered economic losses and other general and specific damages, including but not limited to the amounts paid for the Products, and any interest that would have accrued on those monies, all in an amount to be proven at trial.

78. Defendants' conduct is malicious, fraudulent and oppressive, carried out with the wrongful intention of inflicting substantial financial damage upon Plaintiff and the Class. As a consequence of Defendants' wrongful conduct, Plaintiff and the Class are entitled to an award of punitive damages within the discretion of the jury.

10.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself, all others similarly situated, and the general public, pray for judgment and relief against Defendants, and each of them, as follows:

1. Declaring this action to be a proper class action;
2. An Order enjoining Defendants from misbranding Sebamed Products in violation of California law;
3. An order enjoining Defendants from marketing Sebamed Products in any manner deemed to be false or misleading;
4. An order compelling Defendants to conduct a corrective advertising campaign to inform the public that Sebamed Products are not “*meticulously formulated to a pH balance of exactly 5.5...*”;

5. An order requiring Defendants to disgorge or return all monies, revenues, and profits obtained by means of any wrongful act or practice;
6. An order compelling Defendants to destroy all misleading and deceptive advertising materials and products;
7. An order requiring Defendants to pay restitution to restore all funds acquired by means of any act or practice declared by this Court to be an unlawful, unfair, or fraudulent business act or practice, untrue or misleading advertising, or a violation of the UCL, FAL or CLRA, plus pre-and post judgment interest thereon;
8. Costs, expenses, and reasonable attorneys' fees;
9. For an award of punitive damages; and
10. Any other and further relief the Court deems necessary, just, or proper.


15.

JURY DEMAND

Plaintiff demands a trial by jury on all causes of action so triable.

Dated: March 9, 2018

Respectfully Submitted,



Jeffrey S. Benice
Attorney 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: [Class Action Alleges Sebamed Products' pH Balance Claims Not Exactly True](#)
