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11 **UNITED STATES DISTRICT COURT**
12 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

13 ETHEL WARREN, and CHRISTIAN
14 CAMPOS, individually and on behalf of all
15 others similarly situated,

16 Plaintiffs,

17 v.

18 I-HEALTH, INC.,

19 Defendant.

20 **Case No.**

21 **PLAINTIFFS' CLASS ACTION**
22 **COMPLAINT**

23 **JURY TRIAL DEMAND**

1 Plaintiffs, Ethel Warren and Christian Campos, file this Class Action Complaint
2 against Defendant, I-Health, Inc. (“Defendant” or “I-Health”), individually and on
3 behalf of all others similarly situated, and complain and allege upon personal
4 knowledge as to themselves and their own acts and experiences and, as to all other
5 matters, upon information and belief, including investigation conducted by their
6 attorneys:

7 NATURE OF THE ACTION

8 1. This is a civil class action brought individually by Plaintiffs on behalf of
9 consumers who purchased Defendant’s Culturelle Ultimate Balance for Antibiotics
10 products that are marketed, sold, and distributed by Defendant (“Products”).
11 Defendant markets, sells, and distributes the Products in capsules, for adults¹, and
12 chewables, for kids.²

13 2. Defendant’s Products are sold on its website, culturelle.com, as well as
14 third-party retailer websites, like amazon.com, and brick-and-mortar stores, like
15 Walmart. Based on the quantity and product variety, Defendant’s Products sell for
16 between \$19.99 and \$32.99.

17 3. As described more thoroughly below, the Products are mislabeled and
18 misrepresented to Plaintiffs and the proposed Class.

19 4. Specifically, the Products’ labels and marketing state that they “rebuild[]
20 bacterial balance lost to antibiotic use.”³

21 5. Defendant’s representations that the Products rebuild bacterial balance
22 lost to antibiotic use is false, misleading, and reasonably likely to deceive the public.

23
24 ¹ See [https://culturelle.com/products/ultimate-balance-probiotic-antibiotics-](https://culturelle.com/products/ultimate-balance-probiotic-antibiotics-capsules/?gclid=CjwKCAjwo9unBhBTEiwAipC115WmjAMXoHINNR-hsBLLVnhLdnLRZ51qf4tbIuQjTO1zvczlWfKvQRoCP2sQAvD_BwE&gclidsrc=a)
25 [capsules/?gclid=CjwKCAjwo9unBhBTEiwAipC115WmjAMXoHINNR-](https://culturelle.com/products/ultimate-balance-probiotic-antibiotics-capsules/?gclid=CjwKCAjwo9unBhBTEiwAipC115WmjAMXoHINNR-hsBLLVnhLdnLRZ51qf4tbIuQjTO1zvczlWfKvQRoCP2sQAvD_BwE&gclidsrc=a)
26 [hsBLLVnhLdnLRZ51qf4tbIuQjTO1zvczlWfKvQRoCP2sQAvD_BwE&gclidsrc=a](https://culturelle.com/products/ultimate-balance-probiotic-antibiotics-capsules/?gclid=CjwKCAjwo9unBhBTEiwAipC115WmjAMXoHINNR-hsBLLVnhLdnLRZ51qf4tbIuQjTO1zvczlWfKvQRoCP2sQAvD_BwE&gclidsrc=a)
27 [w.ds&variant=32315934179406](https://culturelle.com/products/ultimate-balance-probiotic-antibiotics-capsules/?gclid=CjwKCAjwo9unBhBTEiwAipC115WmjAMXoHINNR-hsBLLVnhLdnLRZ51qf4tbIuQjTO1zvczlWfKvQRoCP2sQAvD_BwE&gclidsrc=a) (last visited Sept. 5, 2023).

28 ² See [https://culturelle.com/collections/all/products/culturelle-kids-ultimate-](https://culturelle.com/collections/all/products/culturelle-kids-ultimate-balance-for-antibiotics?variant=32316053160014)
[balance-for-antibiotics?variant=32316053160014](https://culturelle.com/collections/all/products/culturelle-kids-ultimate-balance-for-antibiotics?variant=32316053160014) (last visited Sept. 5, 2023).

³ See notes 1 and 2, *supra*.

1 states of citizenship.

2 14. This Court has personal jurisdiction over Defendant in this matter
3 because Defendant transacts business and/or has agents within this District and has
4 intentionally availed itself of the laws and markets within this District.

5 15. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) and (c)
6 because a substantial part of the events or omissions giving rise to Plaintiffs' claims
7 occurred in this District and because Defendant transacts business and/or has agents within
8 this District and has intentionally availed itself of the laws and markets within this district.

9 **FACTUAL ALLEGATIONS**

10 16. At all relevant times, Defendant has marketed its Products in a consistent
11 and uniform manner. Defendant sells the Products in all 50 states through various
12 distributors and retailers across the United States.

13 17. A dietary supplement manufacturer such as Defendant may not explicitly
14 or implicitly claim that a dietary ingredient can, among other things, treat, cure,
15 mitigate, or prevent a disease or class of diseases. 21 U.S.C. § 343(r)(6).

16 18. Federal regulations govern dietary supplement labeling. Under 21 C.F.R.
17 § 101.93(f), dietary supplement labeling may, subject to various requirements,
18 “describe the role of a nutrient or dietary ingredient intended to affect the structure or
19 function in humans or that characterize the documented mechanism by which a
20 nutrient or dietary ingredient acts to maintain such structure or function, provided that
21 such statements are not disease claims under paragraph (g) of this section.” (emphasis
22 added). If a product bears a “disease claim” as defined in paragraph (g), then “the
23 product will be subject to regulation as a drug unless the claim is an authorized health
24 claim for which the product qualifies.” *Id.*

25 19. In turn, under 21 C.F.R. § 101.93(g), “disease claims” pertain to “damage
26 to an organ, part, structure, or system of the body such that it does not function
27 properly.”

1 20. Disease claims require prior approval by the FDA and may be made only
2 for products that are approved drug products or foods under separate legal provisions
3 that apply to claims called “health claims.”⁴

4 21. Defendant makes several illegal implied disease claims in violation of 21
5 C.F.R. § 101.93(g). These claims, viewed alone or in their totality, are deceptive and
6 violate federal regulations.

7 22. As noted above, Defendant represents on its packaging that the Products
8 “Rebuild[] Bacterial Balance Lost to Antibiotic Use,” explicitly or implicitly claiming
9 the Products are intended to be used as a drug to treat diseases like infections caused
10 by antibiotics.⁵

11 23. Other companies have been sent warning letters by the FDA for making
12 similar illegal implied disease claims such as:⁶

- 13 a. “Combats bad bacteria”;
- 14 b. “Reduces harmful bacteria with its prebiotic”;
- 15 c. “Reduces potentially harmful bacteria. Inhibits yeast growth”; and
- 16 d. “Sustain normal levels of intestinal bacteria post-antibiotic
17 treatment.”

18 24. When Defendant’s claims are viewed in their totality, they are either
19 explicitly or implicitly claiming to mitigate or prevent diseases.

20 25. These claims mislead consumers into believing they can use the Products
21 to self-diagnose and treat without the supervision of a licensed practitioner.

22 26. These claims are implied disease claims under 21 C.F.R. 101.93(g)(2),

23 ⁴ See [https://www.fda.gov/regulatory-information/search-fda-guidance-](https://www.fda.gov/regulatory-information/search-fda-guidance-documents/small-entity-compliance-guide-structurefunction-claims)
24 [documents/small-entity-compliance-guide-structurefunction-claims](https://www.fda.gov/regulatory-information/search-fda-guidance-documents/small-entity-compliance-guide-structurefunction-claims) (last visited
25 May 23, 2023).

26 ⁵ Indeed, the FDA has approved only one bacteria drug to date, Vowst, to prevent
27 certain recurrent infections caused by antibiotics. See [https://www.fda.gov/news-](https://www.fda.gov/news-events/press-announcements/fda-approves-first-orally-administered-fecal-microbiota-product-prevention-recurrence-clostridioides)
28 [events/press-announcements/fda-approves-first-orally-administered-fecal-](https://www.fda.gov/news-events/press-announcements/fda-approves-first-orally-administered-fecal-microbiota-product-prevention-recurrence-clostridioides)
microbiota-product-prevention-recurrence-clostridioides (last visited Sept. 5, 2023).

⁶ [https://www.fda.gov/inspections-compliance-enforcement-and-criminal-](https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/great-healthworks-inc-611686-06232021)
investigations/warning-letters/great-healthworks-inc-611686-06232021 (last
visited Aug. 16, 2023).

1 and therefore the Products are misbranded under 21 U.S.C. 343(r)(6).

2 27. Also, under the Dietary Supplement Health and Education Act (the
3 “DSHEA”), Defendant’s Products are illegal to sell. Defendant’s uniform
4 representations on its packaging and in its marketing unlawfully conveys to consumers
5 that its Products will treat diseases such as infections caused by antibiotics.

6 28. Defendant’s representations are false and misleading to a reasonable
7 consumer.

8 29. Plaintiffs and Class members relied on Defendant’s misrepresentations
9 and misstatements regarding the Products. When Plaintiffs and Class members
10 purchased Defendant’s Products, they did not know, and had no reason to know, that
11 Defendant’s Products were misbranded, especially at the point of purchase, and thus
12 unlawful to sell as set forth herein.

13 30. Plaintiffs and Class members would not have purchased the Products had
14 they known the Products were unlawfully being marketed to mitigate, prevent, or treat
15 certain diseases.

16 31. As a result of Defendant’s deceptive marketing, Plaintiffs and other
17 consumers suffered injury in fact and lost money or property.

18 32. Plaintiffs and other consumers will continue to suffer injury as a result of
19 Defendant’s ongoing misrepresentations.

20 33. Defendant’s false, deceptive, and misleading label statements violate 21
21 U.S.C. § 343(a)(1) and statutes adopted by many states deeming food misbranded
22 when “its labeling is false or misleading in any particular.”

23 34. Defendant’s false, deceptive, and misleading label statements are
24 unlawful under State Unfair and Deceptive Acts and Practices Statutes and/or
25 Consumer Protection Acts, which prohibit unfair, deceptive, or unconscionable acts
26 in the conduct of trade or commerce.

27 35. The California Sherman Law explicitly incorporates by reference “[a]ll
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1 food labeling regulations and any amendments to those regulations adopted pursuant
2 to the FDCA,” as the food labeling regulations of Cal. Health & Saf. Code, § 110100,
3 subd. (a). Thus, a violation of federal food labeling laws is an independent violation
4 of California law and actionable as such pursuant to the UCL’s unlawful prong.

5 **FACTUAL ALLEGATIONS SPECIFIC TO PLAINTIFFS**

6 ***Plaintiff Ethel Warren***

7 36. Plaintiff Warren purchased the Products for her personal use on various
8 occasions within the applicable statute of limitations, but as recently as December,
9 2022 on www.amazon.com (the “Amazon Website”) and at a Walmart near her home
10 in Stockton, California.

11 37. Although the Products were more expensive than other choices she
12 viewed, Plaintiff Warren chose to pay the premium price based upon the various
13 claims and promises made by Defendant.

14 38. Prior to and at the time of her purchase of the Products, Plaintiff Warren
15 was exposed to, saw, and relied upon Defendant’s materially misleading
16 misrepresentations on the Products’ label and online which, viewed in their totality,
17 implicitly or explicitly claim to mitigate and prevent disease.

18 39. Defendant did not receive FDA approval for such disease claims.

19 40. Defendant’s claims, alone or in tandem, are deceptive and violate federal
20 regulations, as alleged below.

21 41. Plaintiff Warren’s decision to buy the Products was directly impacted and
22 caused by the Defendant’s materially misleading representations, as set forth above.

23 42. Had Plaintiff Warren known the truth about Defendant’s materially
24 misleading representations and omissions, she would not have purchased the Products.

25 43. By purchasing Defendant’s falsely advertised Products, Plaintiff Warren
26 suffered injury in fact and lost money.

27 44. Plaintiff Warren would like to continue purchasing Defendant’s Products
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1 if Defendant's false and misleading statements were true. Plaintiff Warren is,
2 however, unable to rely on Defendant's representations in deciding whether to
3 purchase Defendant's Products in the future.

4 *Plaintiff Christian Campos*

5 45. Plaintiff Campos purchased the Products for his personal use on various
6 occasions within the applicable statute of limitations, but as recently as February,
7 2022.

8 46. Although the Products were more expensive than other choices he
9 viewed, Plaintiff Campos chose to pay the premium price based upon the various
10 claims and promises made by Defendant.

11 47. Prior to and at the time of his purchase of the Products, Plaintiff Campos
12 was exposed to, saw, and relied upon Defendant's materially misleading
13 misrepresentations on the Products' label and online which, viewed in their totality,
14 implicitly or explicitly claim to mitigate and prevent disease.

15 48. Defendant did not receive FDA approval for such disease claims.

16 49. Defendant's claims, alone or in tandem, are deceptive and violate federal
17 regulations, as alleged below.

18 50. Plaintiff Campos's decision to buy the Products was directly impacted
19 and caused by the Defendant's materially misleading representations, as set forth
20 above.

21 51. Had Plaintiff Campos known the truth about Defendant's materially
22 misleading representations and omissions, he would not have purchased the Products.

23 52. By purchasing Defendant's falsely advertised Products, Plaintiff Campos
24 suffered injury in fact and lost money.

25 53. Plaintiff Campos would like to continue purchasing Defendant's
26 Products if Defendant's false and misleading statements were true. Plaintiff Campos
27 is, however, unable to rely on Defendant's representations in deciding whether to
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1 purchase Defendant's Products in the future.

2 **CLASS ACTION ALLEGATIONS**

3 54. Plaintiffs bring this action individually and as representatives of all those
4 similarly situated, pursuant to Federal Rule of Civil Procedure 23, on behalf of the
5 below-defined Classes:

6 **National Class:** All persons in the United States who, within the applicable
7 limitations period, purchased the Products (the "National Class") for personal
8 use and not for resale.

9 **California Subclass:** All persons in the state of California who, within the
10 applicable limitations period, purchased the Products (the "California
11 Subclass") for personal use and not for resale.

12 55. Specifically excluded from these definitions are: (1) Defendant, any
13 entity in which Defendant has a controlling interest, and its legal representatives,
14 officers, directors, employees, assigns and successors; (2) the Judge to whom this case
15 is assigned and any member of the Judge's staff or immediate family; and (3) Class
16 Counsel. Plaintiffs reserve the right to amend the Class definition and Subclass
17 definitions as necessary.

18 56. Certification of Plaintiffs' claims for class-wide treatment are
19 appropriate because Plaintiffs can prove the elements of the claims on a class-wide
20 basis using the same evidence that individual Class members would use to prove those
21 elements in individual actions alleging the same claims.

22 57. Numerosity. The members of the Classes are so numerous that joinder of
23 all members is impracticable. While the exact number of Class members is presently
24 unknown, it likely consists of thousands of consumers. The number of Class members
25 can be determined by sales information and other records. Moreover, joinder of all
26 potential Class members is not practicable given their numbers and geographic
27 diversity. The Classes are readily identifiable from information and records in the
28 possession of Defendant and its authorized retailers.

58. Typicality. The claims of the representative Plaintiffs are typical in that

1 Plaintiffs, like all Class members, purchased the Products that were manufactured,
2 marketed, advertised, distributed, and sold by Defendant. Furthermore, the factual
3 basis of Defendant's misconduct is common to all Class members because Defendant
4 has engaged in systematic fraudulent behavior that was deliberate, includes negligent
5 misconduct, and results in the same injury to all Class members.

6 59. Commonality. Common questions of law and fact exist as to all members
7 of the Classes. These questions predominate over questions that may affect only
8 individual Class members because Defendant has acted on grounds generally
9 applicable to the Classes. Such common legal or factual questions include, *inter alia*:

- 10 a. Whether Defendant is explicitly or implicitly claiming that its Products
11 can mitigate or prevent a disease or class of diseases in violation of the
12 FDCA and DSHEA;
- 13 b. Whether Defendant knowingly made misleading statements in
14 connection with consumer transactions that reasonable consumers were
15 likely to rely upon to their detriment;
- 16 c. Whether Defendant knew or should have known that the representations
17 and advertisements regarding the Products were false and misleading;
- 18 d. Whether Defendant has breached express and implied warranties in the
19 sale and marketing of the Products;
- 20 e. Whether Defendant's conduct violates public policy;
- 21 f. Whether Defendant's acts and omissions violate California law;
- 22 g. Whether the Plaintiffs and the Class members suffered monetary
23 damages, and, if so, what is the measure of those damages; and
- 24 h. Whether Plaintiffs and the Class members are entitled to an injunction,
25 damages, restitution, equitable relief, and other relief deemed
26 appropriate, and, if so, the amount and nature of such relief.

27 60. Adequacy of Representation. Plaintiffs will fairly and adequately protect
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1 the interests of Class members. They have no interests antagonistic to those of Class
2 members. Plaintiffs retained attorneys experienced in the prosecution of class actions,
3 including consumer and product defect class actions, and Plaintiffs intend to prosecute
4 this action vigorously.

5 61. Injunctive/Declaratory Relief: The elements of Rule 23(b)(2) are met.
6 Defendant will continue to commit the unlawful practices alleged herein, and Class
7 members are likely to continue being damaged by Defendant's deceptive trade practices.
8 Defendant has acted and refused to act on grounds that apply generally to the Class, such
9 that final injunctive relief and corresponding declaratory relief is appropriate respecting
10 the Class as a whole.

11 62. Predominance and Superiority. Plaintiffs and Class members have all
12 suffered and will continue to suffer harm and damages as a result of Defendant's
13 unlawful and wrongful conduct. A class action is superior to other available methods
14 for the fair and efficient adjudication of the controversy. Absent a class action, Class
15 members would likely find the cost of litigating their claims prohibitively high and
16 would therefore have no effective remedy at law. Because of the relatively small size
17 of Class members' individual claims, it is likely that few Class members could afford
18 to seek legal redress for Defendant's misconduct. Absent a class action, Class
19 members will continue to incur damages, and Defendant's misconduct will continue
20 without remedy. Class treatment of common questions of law and fact would also be
21 a superior method to multiple individual actions or piecemeal litigation in that class
22 treatment will conserve the resources of the courts and the litigants and will promote
23 consistency and efficiency of adjudication.

24 63. Plaintiffs know of no difficulty to be encountered in the maintenance of
25 this action that would preclude its maintenance as a class action.

26 64. Defendant has acted or refused to act on grounds generally applicable to
27 the Class, thereby making appropriate final injunctive relief or corresponding
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1 declaratory relief with respect to the Class appropriate.

2 **CAUSES OF ACTION**

3 **COUNT I**

4 **California’s Unfair Competition Law**

5 **Cal. Bus. & Prof. Code § 17200 et seq. (“UCL”)**

6 **(On Behalf of the California Subclass)**

7 65. Plaintiffs reallege and incorporate by reference the allegations contained
8 in the preceding paragraphs as though set forth fully herein.

9 66. Plaintiffs bring this claim individually and on behalf of all members of
10 the California Subclass against Defendant.

11 67. The UCL prohibits any “unlawful, unfair or fraudulent business act or
12 practice.” Cal. Bus. & Prof. Code § 17200.

13 68. The acts, omissions, misrepresentations, practices, and non-disclosures
14 of Defendant as alleged herein constitute business acts and practices.

15 69. Unlawful: The acts alleged herein are “unlawful” under the UCL in that
16 they violate at least the following laws:

- 17 a. The False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.*;
- 18 b. The Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*;
- 19 c. The Federal FDCA, 21 U.S.C. §§ 301 *et seq.*; as incorporated into
20 California law in the Sherman Food, Drug, and Cosmetic Law, Cal.
21 Health & Safety Code §§ 110100 *et seq.*

22 70. Unfair: Defendant’s conduct with respect to the labeling, advertising, and
23 sale of the Products was “unfair” because Defendant’s conduct was immoral,
24 unethical, unscrupulous, or substantially injurious to consumers and the utility of their
25 conduct, if any, does not outweigh the gravity of the harm to their victims.

26 71. Defendant’s conduct with respect to the labeling, advertising, and sale of
27 the Products was and is also unfair because it violates public policy as declared by
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1 specific constitutional, statutory or regulatory provisions, including but not limited to
2 the applicable sections of: the Consumers Legal Remedies Act, the False Advertising
3 Law, the FDCA, and the California Sherman Food, Drug, and Cosmetic Law.

4 72. Defendant's conduct with respect to the labeling, advertising, and sale of
5 the Products was and is unfair because the consumer injury was substantial, not
6 outweighed by benefits to consumers or competition, and not one consumer
7 themselves could reasonably have avoided.

8 73. Fraudulent: A statement or practice is "fraudulent" under the UCL if it is
9 likely to mislead or deceive the public, applying an objective reasonable consumer
10 test.

11 74. As set forth in detail above, Defendant has fraudulently misbranded its
12 Products in violation of the FDCA.

13 75. Defendant profited from its sale of the falsely, deceptively, and
14 unlawfully advertised and packaged Products to unwary consumers.

15 76. Plaintiffs and the Class members are likely to continue to be damaged by
16 Defendant's deceptive trade practices, because Defendant continues to disseminate
17 misleading information on the Products' packaging. Plaintiffs and the Class members
18 lack an adequate remedy at law to prevent this prospective harm and, therefore,
19 injunctive relief enjoining Defendant's deceptive practices is proper.

20 77. Defendant's conduct caused and continues to cause substantial injury to
21 Plaintiffs and the Class members. Plaintiffs and the Class members have suffered
22 injury in fact as a result of Defendant's unlawful conduct.

23 78. In accordance with Bus. & Prof. Code § 17203, Plaintiffs seek an order
24 enjoining Defendant from continuing to conduct business through unlawful, unfair,
25 and/or fraudulent acts and practices, and to commence a corrective advertising
26 campaign.

1 claims, which amount to intentional misbranding of the Products under the FDCA and
2 DSHEA.

3 82. Defendant's business practices as alleged herein constitute deceptive,
4 untrue, and misleading advertising pursuant to the FAL because Defendant has
5 advertised the Products in a manner that is untrue and misleading, which Defendant
6 knew or reasonably should have known, and omitted material information from its
7 advertising.

8 83. Defendant profited from its sale of the falsely and deceptively advertised
9 Products to unwary consumers.

10 84. As a result, Plaintiffs, Class members, and the general public are entitled
11 to injunctive and equitable relief, restitution, and an order for the disgorgement of the
12 funds by which Defendant was unjustly enriched.

13 85. Pursuant to Cal. Bus. & Prof. Code § 17535, Plaintiffs, on behalf of
14 themselves and the California Subclass, seek an order enjoining Defendant from
15 continuing to engage in deceptive business practices, false advertising, and any other
16 act prohibited by law, including those set forth in this Complaint.

17 **COUNT III**

18 **California's Consumer Legal Remedies Act**

19 **Cal. Civ. Code § 1750 et seq. ("CLRA")**

20 **(On Behalf of the California Subclass)**

21 86. Plaintiffs reallege and incorporate by reference the allegations contained
22 in the preceding paragraphs as if fully set forth herein.

23 87. Plaintiffs bring this claim individually and on behalf of the members of
24 the California Subclass against Defendant.

25 88. Defendant is a "person" under the CLRA, Cal. Civ. Code § 1761(c).

26 89. Plaintiffs and Subclass members are "consumers" under the CLRA, Cal.
27 Civ. Code § 1761(d).

1 90. The CLRA prohibits deceptive practices in connection with the conduct
2 of a business that provides goods, property, or services primarily for personal, family,
3 or household purposes.

4 91. Defendant's false and misleading labeling and other policies, acts, and
5 practices were designed to, and did, induce the purchase and use of the Products for
6 personal, family, or household purposes by Plaintiffs and Subclass members, and
7 violated and continue to violate the following sections of the CLRA:

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

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

12 c. § 1770(a)(9): advertising goods with intent not to sell them as
13 advertised; and

14 d. § 1770(a)(16): representing the subject of a transaction has been
15 supplied in accordance with a previous representation when it has not.

16 77. Defendant profited from the sale of the falsely, deceptively, and
17 unlawfully advertised Products to unwary consumers.

18 78. Defendant's wrongful business practices constituted, and constitute, a
19 continuing course of conduct in violation of the CLRA.

20 79. Plaintiffs lack an adequate remedy at law to prevent prospective harm
21 from Defendant's unlawful business practices.

22 80. Pursuant to California Civil Code § 1780, Plaintiffs and Subclass
23 members seek injunctive relief, their reasonable attorneys' fees and costs, and any
24 other relief the Court deems proper.

25 81. Pursuant to the provisions of Cal. Civ. Code § 1782(a), on August 29,
26 2023, Plaintiffs, through counsel, mailed Defendant a letter by certified mail addressed
27 to its registered agent in Hartford, Connecticut, providing notice of Defendant's
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1 alleged violations of the CLRA, demanding that Defendant correct such violations,
2 and providing Defendant with the opportunity to correct its business practices. If
3 Defendant does not correct its business practices, Plaintiffs will amend (or seek leave
4 to amend) the complaint to add claims for monetary relief, including restitution and
5 actual damages under the CLRA.

6 **COUNT IV**

7 **Breach of Express Warranties**

8 **(On Behalf of the National Class and California Subclass)**

9 82. Plaintiffs reallege and incorporate by reference the preceding paragraphs
10 as if fully set forth herein.

11 83. Plaintiffs bring this claim individually and on behalf of the members of
12 National Class and the California Subclass against Defendant.

13 84. Through the Products' labels and advertising, Defendant made
14 affirmations of fact or promises, or descriptions of goods, described above, which
15 were "part of the basis of the bargain," in that Plaintiffs and the Class members
16 purchased the Products in reasonable reliance on those statements.

17 85. Plaintiffs and the Class members have privity of contract with Defendant
18 through their purchase of the Products, and through the express warranties Defendant
19 issued to its customers. Defendant's warranties accompanied the Products and were
20 intended to benefit end-users of the Products. To the extent Plaintiffs and/or the Class
21 members purchased the Products from third-party retailers, privity is not required
22 because Plaintiffs and the Class members are intended third-party beneficiaries of the
23 contracts between Defendant and third-party retailers, and because the express
24 warranty is intended to benefit purchasers or owners subsequent to the third-party
25 retailers. In other words, the contracts are intended to benefit the ultimate consumer
26 or user of the Products.

1 86. Defendant breached the express warranties by selling Products that are
2 misbranded as mitigating or preventing diseases like infections from antibiotic use.

3 87. Plaintiffs and the Class members relied on Defendant's
4 misrepresentations and misstatements and would not have purchased the Products had
5 they known the Products are misbranded as mitigating or preventing diseases like
6 infections from antibiotic use.

7 88. That breach actually and proximately caused injury in the form of the lost
8 purchase price that Plaintiffs and Class members paid for the Products.

9 89. Furthermore, Defendant had actual knowledge that the Products were
10 illegally sold and misbranded because it knows the disease claims it makes on the
11 Products' labeling and on Defendant's and third-party retailers' websites and
12 advertising are false.

13 90. Plaintiffs provided Defendant with notice of the alleged breach within a
14 reasonable time after they discovered the breach or should have discovered it.

15 91. As a result of Defendant's breach of warranty, Plaintiffs and the Class
16 members have been damaged in the amount of the purchase price of the Products and
17 any consequential damages resulting from the purchases.

18 **COUNT VII**

19 **Breach of Implied Warranty of Merchantability**

20 **(On Behalf of the National Class and California Subclass)**

21 92. Plaintiffs reallege and incorporate by reference the preceding paragraphs
22 as if fully set forth herein.

23 93. Plaintiffs bring this claim individually and on behalf of the members of
24 National Class and the California Subclass against Defendant.

25 94. Defendant, through its acts and omissions set forth herein, in the sale,
26 marketing, and promotion of the Products, made representations to Plaintiffs and the
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1 Class members regarding the Products' ability to mitigate or prevent diseases like
2 infections from antibiotic use.

3 95. Plaintiffs and the Class members bought the Products manufactured,
4 advertised, and sold by Defendant, as described herein.

5 96. Defendant is a merchant with respect to the goods of this kind which were
6 sold to Plaintiffs and the Class members, and there was, in the sale to Plaintiffs and
7 other consumers, an implied warranty that those goods were merchantable.

8 97. Plaintiffs and the Class members purchased the Products manufactured
9 and marketed by Defendant by and through Defendant and Defendant's authorized
10 sellers for retail sale to consumers, or were otherwise expected to be the third-party
11 beneficiaries of Defendant's contracts with authorized sellers, or eventual purchasers
12 when bought from a third party. Defendant knew or had reason to know of the specific
13 use for which the Products were purchased.

14 98. However, Defendant breached the implied warranty of merchantability
15 in that the Products are misbranded under 21 U.S.C. § 343(r).

16 99. Plaintiffs provided Defendant with notice of the alleged breach within a
17 reasonable time after they discovered the breach or should have discovered it.

18 100. As an actual and proximate result of Defendant's conduct, Plaintiffs and
19 the Class members did not receive goods as impliedly warranted by Defendant to be
20 merchantable in that they did not conform to promises and affirmations made on the
21 container or label of the Products, nor are they fit for their ordinary purpose of
22 providing the benefits as promised.

23 101. Here, privity is not required because the implied warranty claim relates
24 to food or other substances intended for human consumption by consumers, such as
25 the Product.

26 102. To the extent privity is required, Defendant entered into contracts with
27 the authorized retailers from whom Plaintiffs and the Class members purchased the
28

1 Product, and Plaintiffs and the Class members were the intended third-party
2 beneficiaries of those contracts, an exception to the privity requirement.

3 103. Plaintiffs and the Class members have sustained damages as a proximate
4 result of the foregoing breach of implied warranty in the amount of the Product's
5 purchase prices.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiffs pray that this case be certified and maintained as a
8 class action and for judgment to be entered against Defendant as follows:

9 A. Enter an order certifying the proposed Class (and subclass, if applicable),
10 designating Plaintiffs as the class representatives, and designating the undersigned as
11 class counsel;

12 B. Enter an order awarding Plaintiffs and the Class members their actual
13 damages and/or any other form of monetary relief provided by law, except that no
14 monetary relief is presently sought for violations of the CLRA;

15 C. Declare that Defendant is financially responsible for notifying all Class
16 members of the mislabeling and misbranding of the Product;

17 D. Declare that Defendant must disgorge, for the benefit of the Class, all or
18 part of the ill-gotten profits it received from the sale of the Product, or order Defendant
19 to make full restitution to Plaintiffs and the members of the Class, except that no
20 monetary relief is presently sought for violations of the CLRA;

21 E. Defendant shall audit and reassess all prior customer claims regarding
22 the Product, including claims previously denied in whole or in part;

23 F. An order awarding Plaintiffs and the Classes pre-judgment and post-
24 judgment interest as allowed under the law;

25 G. Grant reasonable attorneys' fees and reimbursement of all costs for the
26 prosecution of this action, including expert witness fees; and

27 H. Grant such other and further relief as this Court deems just and
28

1 appropriate.

2 **DEMAND FOR JURY TRIAL**

3 Plaintiffs and the putative Class members hereby demand a trial by jury on all
4 issues so triable.

5 Dated: September 7, 2023

Respectfully submitted,

6 By: /s/ Kristen Lake Cardoso
Kristen Lake Cardoso

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