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Counsel of Record on Next Page

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ATTORNEYS AT LAW
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

CHARLENE A. BRITTON,
individually, and on behalf of all others
similarly situated,

Plaintiff,

vs.

JOHNSON & JOHNSON, McNEIL-
PPC, INC., and JOHNSON &
JOHNSON CONSUMER
PRODUCTS, INC.,

Defendants.

) **Case No. 3:10-cv-04450-TEH**

) **CLASS ACTION**

) **JOINT STIPULATION AND [PROPOSED]**
) **ORDER GRANTING LEAVE TO FILE FIRST**
) **AMENDED COMPLAINT**

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22 JOHNSON & JOHNSON, McNEIL-PPC,
INC., and JOHNSON & JOHNSON
23 CONSUMER PRODUCTS, INC.

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1 Representative Plaintiff Charlene Britton (“Plaintiff”) and defendants Johnson &
2 Johnson, McNeil-PPC, Inc., and Johnson & Johnson Consumer Products, Inc. (collectively,
3 “Defendants”), by and through their respective counsel of record named herein, hereby stipulate
4 as follows:

5
6 **WHEREAS** on October 1, 2010, Plaintiff filed a class action complaint on behalf of
7 herself and all others similarly situated who had purchased Johnson & Johnson’s Listerine Total
8 Care Anticavity Mouthwash;

9 **WHEREAS** Plaintiff wishes to file a First Amended Complaint which would add
10 putative class members Itak Moradi and Kathy Pahigian into the case as additional class
11 representatives;

12 **WHEREAS** defendant Johnson & Johnson Consumer Products, Inc., has changed its
13 name to Johnson & Johnson Consumer Companies, Inc., and Plaintiff seeks to amend her
14 complaint to reflect the same;

15 **WHEREAS** Defendants have agreed that Plaintiff may file the First Amended Complaint
16 in the form of Exhibit “A” attached hereto; and,

17 **WHEREAS** the parties have attached a “redline” comparison of the operative Complaint
18 and the First Amended Complaint as Exhibit “B;”

19
20 **THEREFORE**, the parties, through their undersigned respective counsel, stipulate and
21 request that the Court hereby enter an Order granting Plaintiff leave to file the First Amended
22 Complaint in the form attached hereto as Exhibit “A.”

23
24 **IT IS SO STIPULATED.**

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Dated: December 20, 2010

SCOTT COLE & ASSOCIATES, APC

By: _____
/s/
Molly A. DeSario, Esq.
Attorneys for the Representative Plaintiffs
and the Plaintiff Classes

Dated: December 20, 2010

O'MELVENY & MEYERS LLP

By: _____
/s/
Richard B. Goetz, Esq.
Carlos M. Lazatin, Esq.
Timothy P. Caballero, Esq.
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JOHNSON & JOHNSON, McNEIL-PPC, INC.,
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PRODUCTS, INC.

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~~PROPOSED~~ ORDER

Good cause appearing, Plaintiff is hereby granted leave to file the First Amended Complaint in the form of Exhibit "A" attached hereto.

IT IS SO ORDERED.

Dated: December 21, 2010

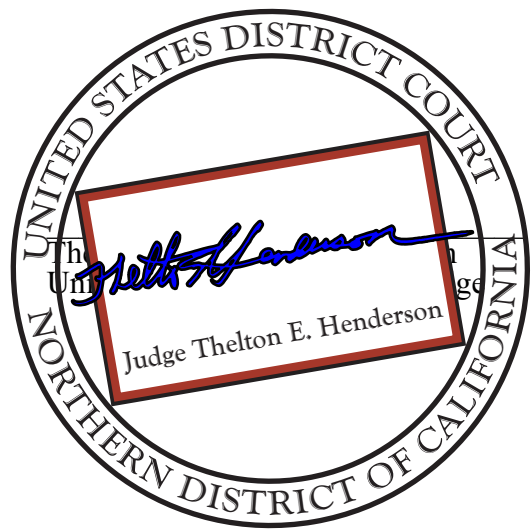


EXHIBIT A

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7
8 Attorneys for Representative Plaintiffs
and the Plaintiff Classes

9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

11
12 CHARLENE A. BRITTON, ITAK
MORADI, KATHY PAHIGIAN,
13 individually, and on behalf of all others
similarly situated,

14 Plaintiffs,

15 vs.

16 JOHNSON & JOHNSON, McNEIL-
17 PPC, INC., and JOHNSON &
JOHNSON CONSUMER
18 COMPANIES, INC.,

19 Defendants.

) **Case No. 3:10-cv-04450-TEH**

) **CLASS ACTION**

) **FIRST AMENDED COMPLAINT FOR
DAMAGES, INJUNCTIVE RELIEF AND
RESTITUTION**

) **[Jury Trial Demanded]**

20
21 Representative Plaintiffs allege as follows:

22 **PRELIMINARY STATEMENT**

23 1. This is a class action, brought under Rule 23(b)(2) and/or (b)(3) of the Federal
24 Rules of Civil Procedure, seeking damages, restitution, interest thereon, injunctive and other
25 equitable relief and reasonable attorneys' fees and costs on behalf of Representative Plaintiffs
26 and all other persons (hereinafter referred to as the "Class Members," the "Plaintiff Classes"
27 and/or either of the Classes defined herein) who have purchased Listerine Total Care Anticavity
28 Mouthwash (hereinafter referred to as "Listerine Total Care" or "mouthwash") from Defendants

1 Johnson & Johnson, McNEIL-PPC, Inc., and/or Johnson & Johnson Consumer Companies, Inc.
2 (hereinafter collectively referred to as “Defendants”), either directly therefrom or indirectly from
3 a distributor or retailer thereof within the United States at any time during the applicable
4 limitations period. The Representative Plaintiffs, on behalf of themselves and all Class Members,
5 also seek injunctive relief and restitution of all benefits Defendants have enjoyed from their
6 unlawful and/or deceptive business practices, as detailed herein.

7
8 **JURISDICTION AND VENUE**

9 2. Jurisdiction is proper in this Court under 28 U.S.C. § 1332 (diversity jurisdiction)
10 and/or 28 U.S.C. §1331 (controversy arising under United States law). Supplemental jurisdiction
11 to adjudicate issues pertaining to state law is proper in this Court under 28 U.S.C. § 1367.

12 3. Venue is proper in this Court under 28 U.S.C. § 1391 because the events that give
13 rise to Plaintiffs’ claims took place within the Northern District of California and because
14 Defendants market, distribute, and sell their products within this District.

15
16 **PLAINTIFFS**

17 4. Charlene Britton, Itak Moradi, and Kathy Pahigian, the named/representative
18 Plaintiffs identified herein, were and are natural persons and, during the relevant time period,
19 purchased and used (or attempted to use) Johnson & Johnson Listerine Total Care Anticavity
20 Mouthwash, yet did not receive the full value of the product, as promised by Defendants.

21 5. As used throughout this Complaint, the term “Class Members” and/or the
22 “Plaintiff Classes” refers to the named plaintiffs herein as well as each and every person eligible
23 for membership in one or more of the classes of persons, as further described and defined herein.

24 6. At all times herein relevant, Representative Plaintiffs were and are persons within
25 each of the classes of persons further described and defined herein.

26 7. Representative Plaintiffs bring this action on behalf of themselves and as a class
27 action, pursuant to Rule 23(b)(2) and/or (b)(3) of the Federal Rules of Civil Procedure, on behalf
28

1 of all persons similarly situated and proximately damaged by the unlawful conduct described
2 herein.

3
4 **DEFENDANTS**

5 8. At all times herein relevant, Defendant Johnson & Johnson was a corporation,
6 duly licensed in New Jersey and doing business in this Judicial District as well as throughout the
7 United States. Johnson & Johnson maintains its principal place of business in New Brunswick,
8 New Jersey.

9 9. Defendant McNeil-PPC, Inc. is a pharmaceutical company belonging to
10 Defendant Johnson & Johnson. At all times herein relevant, Defendant McNeil-PPC, Inc. was a
11 corporation, duly licensed in New Jersey and doing business in this Judicial District as well as
12 throughout the United States. Defendant McNeil-PPC, Inc. maintains its principal place of
13 business in Fort Washington, Pennsylvania.

14 10. Defendant Johnson & Johnson Consumer Companies, Inc. is a division of
15 McNeil-PPC, Inc. At all times herein relevant, Defendant Johnson & Johnson Consumer
16 Companies, Inc. was a corporation, duly licensed in New Jersey and doing business in this
17 Judicial District as well as throughout the United States. Defendant Johnson & Johnson
18 Consumer Companies, Inc. maintains its principal place of business in Fort Washington,
19 Pennsylvania.

20 11. Representative Plaintiffs are informed and believe and, on that basis, allege that,
21 at all relevant times herein-mentioned, each of the Defendants either identified herein and/or who
22 may be identified in subsequent versions of this Complaint was the agent and/or employee of
23 each of the remaining Defendants and, in doing the acts herein alleged, was acting within the
24 course and scope of such agency and/or employment.

25
26 **CLASS ACTION ALLEGATIONS**

27 12. Representative Plaintiffs bring this action on behalf of themselves and as a class
28 action on behalf of the following Plaintiff Classes:

1 California Class:

2 “All persons who purchased, within the State of California, Listerine Total Care
3 Anticavity Mouthwash.”

4 National Class:

5 “All persons who purchased, within the United States, Listerine Total Care
6 Anticavity Mouthwash.”

7 13. Defendants and their officers and directors are excluded from both of the Plaintiff
8 Classes.

9 14. This action has been brought and may properly be maintained as a class action
10 under Federal Rule of Civil Procedure Rule 23(b)(2) and/or (b)(3) because there is a well-defined
11 community of interest in the litigation and membership in the proposed Classes is easily
12 ascertainable:

13 a. Numerosity: A class action is the only available method for the fair and
14 efficient adjudication of this controversy. The members of the Plaintiff
15 Classes are so numerous that joinder of all members is impractical, if not
16 impossible, insofar as the Representative Plaintiffs are informed and
17 believe and, on that basis, allege that the total number of Class Members is
18 in the thousands, if not millions, of individuals. Membership in the Classes
19 will be determined by analysis of point of sale, electronic-mail and/or
20 other transactional information, among other records maintained by
21 Defendants.

22 b. Commonality: The Representative Plaintiffs and the Class Members share
23 a community of interests in that there are numerous common questions
24 and issues of fact and law which predominate over questions and issues
25 solely affecting individual members, including, but not necessarily limited
26 to:

- 27 1) Whether Defendants knew or should have known of the
28 ineffectiveness of the active ingredient contained in Listerine Total
29 Care;
- 30 2) Whether Defendants had a duty to disclose to consumers the true
31 effectiveness of the product;
- 32 3) Whether Defendants’ advertising of Listerine Total Care was false,
33 deceptive, and/or misleading;
- 34 4) Whether Defendants violated California Business and Professions
35 Code §17500, *et seq.* by engaging in misleading or deceptive
36 advertising;

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- 5) Whether Defendants violated California Civil Code §1750, *et seq.* by engaging in unfair or deceptive trade practices;
- 6) Whether Defendants breached express warranties and/or implied warranties of merchantability and/or fitness regarding Listerine Total Care’s functionality and effectiveness;
- 7) Whether Defendants violated California Civil Code §1790, *et seq.* by breaching express and implied warranties;
- 8) Whether Defendants intentionally or negligently misrepresented Listerine Total Care’s functionality and effectiveness;
- 9) Whether Defendants’ engagement in false representations regarding Listerine Total Care’s functionality and effectiveness constituted a fraud on consumers; and
- 10) Whether Defendants violated California Business and Professions Code §§ 17200, *et seq.* by engaging in unfair, unlawful and/or fraudulent business practices.

c. Typicality: The Representative Plaintiffs’ claims are typical of the claims of the Plaintiff Classes. Representative Plaintiffs and all members of the Plaintiff Classes sustained damages arising out of and caused by Defendants’ common course of conduct in violation of law, as alleged herein.

d. Adequacy of Representation: The Representative Plaintiffs in this class action are adequate representatives of each of the Plaintiff Classes in that the Representative Plaintiffs have the same interest in the litigation of this case as the Class Members, are committed to vigorous prosecution of this case and have retained competent counsel who are experienced in conducting litigation of this nature. The Representative Plaintiffs are not subject to any individual defenses unique from those conceivably applicable to other Class Members or the Classes in their entirety. The Representative Plaintiffs anticipate no management difficulties in this litigation.

e. Superiority of Class Action: Since the damages suffered by individual Class Members, while not inconsequential, may be relatively small, the expense and burden of individual litigation by each member makes or may make it impractical for members of the Plaintiff Classes to seek redress individually for the wrongful conduct alleged herein. Should separate actions be brought or be required to be brought, by each individual member of the Plaintiff Classes, the resulting multiplicity of lawsuits would cause undue hardship and expense for the Court and the litigants. The prosecution of separate actions would also create a risk of inconsistent rulings which might be dispositive of the interests of other Class Members who are not parties to the adjudications and/or may substantially impede their ability to adequately protect their interests.

- 1 f. Rule 23(b)(2): In addition, Defendants have acted and/or refused to act on
2 grounds that apply generally to the Plaintiff Classes, so that final
3 injunctive relief or corresponding declaratory relief is appropriate
4 respecting the class as a whole.
- 5 g. Rule 23(b)(3): Questions of law or fact common to class members
6 predominate over any questions affecting only individual members, and a
7 class action is superior, in ways including, but not limited to, paragraph (e)
8 herein, to other available methods for fairly and efficiently adjudicating
9 the controversy.

10 COMMON FACTUAL ALLEGATIONS

11 15. For more than 120 years, the Johnson & Johnson brand-name has been associated
12 with the innovation, development and marketing of home healthcare products.

13 16. As part of its “Oral Health Care” line, Defendants produce, manufacture, and
14 distribute Listerine Total Care in a variety of flavors and market the product to consumers
15 nationwide. As such, Listerine Total Care has been purchased by thousands, if not millions, of
16 consumers, both in California and nationwide, all of whom are putative Class Members.

17 17. Listerine Total Care is a home healthcare product designed and marketed for
18 consumer use as total oral healthcare.

19 18. Indeed, Listerine’s website (www.listerine.com) boasts that Listerine Total Care
20 is the “most complete mouthwash” as compared to other over-the-counter mouthwashes.

21 19. Its multi-purpose functions are advertised as including, but are not necessarily
22 limited to, “help[ing] [to] prevent cavities, restor[ing] enamel, strengthen[ing] teeth, kill[ing] bad
23 breath germs, freshen[ing] breath,” and “fight[ing] unsightly plaque above the gum line.”

24 20. The sole active ingredient in Listerine Total Care is sodium fluoride.

25 21. The product packaging includes statements that Listerine Total Care will: “help[]
26 prevent cavities, restore[] enamel, strengthen[] teeth, kill[] bad breath germs, freshen[] breath”
27 and “fight[] unsightly plaque above the gum line.”

28 22. Listerine Total Care does not effectively fight plaque above the gum line.

29 23. Defendants placed Listerine Total Care into the stream of commerce and
30 marketed it as a drug. By doing so, Defendants necessarily represented to consumers that the
31 product had the approval of the Food and Drug Administration (“FDA”). In fact, Listerine Total
32 Care does not have FDA approval for all of the purposes for which it is marketed.

1 24. Despite their knowledge of the ingredient composition of the mouthwash, which
2 rendered it ineffective for the purposes conveyed to consumers, Defendants engaged in a long-
3 standing, nationwide marketing campaign promoting this product as “total” oral healthcare.
4 Defendants’ campaign included, but was not limited to, the following acts:

- 5 a. On or before May 7, 2009, Defendants released a commercial which
6 advertised that Listerine Total Care provided “Six keys signs of a healthy
7 mouth: tartar free teeth, no plaque build-up, healthy gums, no tooth decay,
8 naturally white teeth, and fresh breath.” Defendants’ commercials were
9 disseminated nationwide, including, but not necessarily limited to, on the
10 internet.
11 b. In approximately October 2009, Defendants launched a micro website for
12 Listerine Total Care, advertising the following benefits: “Remove more
13 plaque and then strengthen teeth for a cleaner, healthier mouth.” The
14 microsite also touted that the product “finishes the job by fighting cavities
15 and killing bad breath and germs.”
16 c. In approximately October 2009, Defendants launched a Facebook page for
17 Listerine Total Care, advertising the following benefits: “Whiter Teeth,
18 Healthy Gums, Breath Protection, Kills Bacteria, Strengthens Teeth,
19 Reduces Plaque.”
20 d. Defendants also advertise the following benefits for Listerine Total Care
21 on their general website for Listerine products: “Helps Prevent Cavities,
22 Restores Minerals to Enamel, Strengthens Teeth, Kills Bad Breath Germs,
23 Freshens Breath, Fights Unsightly Plaque Above the Gum Line.”

24 25. In approximately June 2010, Representative Plaintiff Charlene Britton purchased
25 Listerine Total Care, after viewing and relying on the product’s representations, on its packaging,
26 that it would, *inter alia*, whiten teeth, prevent cavities, restore enamel, strengthen teeth, kill bad
27 breath germs, freshen breath, and fight unsightly plaque above the gum line. If Representative
28 Plaintiff Britton had known of the product’s ineffectiveness, she would not have purchased the
product or would not have purchased it at the same price.

29 26. Plaintiff Itak Moradi purchased Listerine Total Care during the relevant time
30 period after viewing and relying on the product’s representations, on its packaging, that it would,
31 *inter alia*, whiten teeth, prevent cavities, restore enamel, strengthen teeth, kill bad breath germs,
32 freshen breath, and fight unsightly plaque above the gum line. If Representative Plaintiff Moradi
33 had known of the product’s ineffectiveness, she would not have purchased the product or would
34 not have purchased it at the same price.

1 employees, made false representations to Representative Plaintiffs and members of each of the
2 Classes that were likely to deceive Representative Plaintiffs and members of each of the Classes.
3 Representative Plaintiffs and members of each of the Classes were misled by these false
4 representations into purchasing Listerine Total Care from Defendants.

5 33. Defendants' false representations include, but are not limited to, the statements
6 that Listerine Total Care is "total care," and "fights unsightly plaque above the gum line," as
7 alleged herein.

8 34. Defendants placed Listerine Total Care into the stream of commerce and
9 marketed it as a drug. By doing so, Defendants necessarily represented to consumers that the
10 product had the approval of the FDA. In fact, Listerine Total Care does not have FDA approval
11 for all of the purposes for which it is marketed.

12 35. Defendants knew, or reasonably should have known, of the false representations
13 alleged herein based on the ingredient composition of the mouthwash and intentionally
14 concealed information from Plaintiffs and members of each of the Classes.

15 36. The sole active ingredient of the mouthwash is listed as "sodium fluoride
16 0.0221%" - an ingredient which has not been shown to fight or prevent plaque.

17 37. Representative Plaintiffs and members of each of the Classes reasonably and
18 justifiably relied on Defendants' misrepresentations when purchasing the mouthwash, were
19 unaware of the existence of facts that Defendants suppressed and failed to disclose and, had the
20 facts been known, would not have purchased the mouthwash and/or would not have purchased it
21 at the price at which it was offered.

22 38. Specifically, Representative Plaintiffs and members of each of the Classes viewed
23 Defendants' product packaging, product commercials, and product specifications and, in reliance
24 on those representations, purchased the mouthwash for total oral care.

25 39. As a direct and proximate result of Defendants' wrongful conduct, Representative
26 Plaintiffs and members of each of the Classes have suffered and continue to suffer economic
27 losses and other general and specific damages, including, but not necessarily limited to, the
28 monies paid to Defendants for a product which does not deliver the purported total oral care.

1 46. Defendants' misrepresentations were the type of misrepresentations that are
2 material (i.e., the type of misrepresentations to which a reasonable person would attach
3 importance and would be induced to act thereon in making purchase decisions). The
4 misrepresentations were material in that Representative Plaintiffs and members of each of the
5 Classes purchased Listerine Total Care as a home healthcare product capable of providing total
6 oral healthcare benefits.

7 47. Representative Plaintiffs and members of each of the Classes reasonably and
8 justifiably relied on Defendants' misrepresentations when purchasing the mouthwash, were
9 unaware of the existence of facts that Defendants suppressed and failed to disclose and, had the
10 facts been known, would not have purchased the mouthwash and/or would not have purchased it
11 at the price at which it was offered. Representative Plaintiffs' and each Class member's reliance
12 was a substantial factor in making the purchase which led to the resulting injury, as alleged
13 herein.

14 48. Specifically, Representative Plaintiffs and members of each of the Classes viewed
15 Defendants' product packaging, product commercials, and product specifications, and, in
16 reliance on those representations, purchased Listerine Total Care for its purported total oral
17 health benefits.

18 49. Defendants intended that Representative Plaintiffs and members of each of the
19 Classes rely on the misrepresentations alleged herein and purchase the mouthwash for the uses
20 advertised, including total oral healthcare.

21 50. As a direct and proximate result of Defendants' intentional misrepresentation,
22 Representative Plaintiffs and members of each of the Classes were injured in ways including, but
23 not limited to, the purchase of a product which does not deliver the total oral care it purports to
24 deliver. Damages resulting from such injury may, but do not necessarily include nor are limited
25 to, monetary damages in the amount of the difference in value between a mouthwash capable of
26 providing total oral healthcare benefits and the value paid to Defendants for a product which
27 Defendants represented would provide benefits it is incapable of providing.

28 ///

1 51. Moreover, in that, at all times herein mentioned, Defendants intended to cause, or
2 acted with reckless disregard of the probability of causing, damage to Representative Plaintiffs
3 and members of each of the Classes, and because Defendants were guilty of oppressive,
4 fraudulent and/or malicious conduct, Representative Plaintiffs and members of each of the
5 Classes are entitled to an award of exemplary or punitive damages against Defendants in an
6 amount adequate to deter such conduct in the future. Specifically, despite knowledge that the
7 mouthwash product could not provide total oral healthcare and was not approved as an effective
8 means of fighting plaque, Defendants have refused, and continue to refuse, any response or
9 remedy.

10
11 **THIRD CAUSE OF ACTION**
12 **Negligent Misrepresentation**
13 ***(for the California and Nationwide Classes)***

14 52. Representative Plaintiffs incorporate in this cause of action each and every
15 allegation of the preceding paragraphs, with the same force and effect as though fully set forth
16 herein.

17 53. Defendants owed a duty to Representative Plaintiffs and members of each of the
18 Classes to exercise reasonable care in making representations about Listerine Total Care, which
19 they offered for sale thereto.

20 54. Defendants should have known of the ingredient composition of this product, as
21 detailed in this Complaint and, thus, should have known that their representations, as also
22 detailed, at least in part, in this Complaint, were false. In addition, given Defendants' knowledge
23 of the sole active ingredient of Listerine Total Care, Defendants had no reasonable grounds to
24 believe their representations as to the effectiveness of the product were true.

25 55. Defendants' representations were negligently and recklessly made to potential
26 consumers and the general public (including Representative Plaintiffs and members of each of
27 the Classes) through Defendants' statement that the mouthwash provided "total care," and was
28 effective in "fight[ing] unsightly plaque above the gum line."

///

1 56. Defendants placed Listerine Total Care into the stream of commerce and
2 marketed it as a drug. By doing so, Defendants necessarily represented to consumers that the
3 product had the approval of the FDA. In fact, Listerine Total Care does not have FDA approval
4 for all of the purposes for which it is marketed.

5 57. Representative Plaintiffs and members of each of the Classes viewed and
6 reasonably and justifiably relied on Defendants' misrepresentations when purchasing the
7 mouthwash, were unaware of the existence of facts that Defendants suppressed and failed to
8 disclose and, had the facts been known, would not have purchased the mouthwash and/or would
9 not have purchased it at the price at which it was offered.

10 58. As a direct and proximate result of these misrepresentations, Representative
11 Plaintiffs and members of each of the Classes have been damaged in an amount to be proven at
12 trial. The damages suffered by Representative Plaintiffs and members of each of the Classes
13 include, but are not limited to, the monies paid to Defendants for a product which does not
14 deliver the purported total oral care.

15
16 **FOURTH CAUSE OF ACTION**
17 **Deceptive Advertising Practices**
18 **(California Business & Professions Code §§ 17500, et seq.)**
19 ***(for the California Class Only)***

20 59. Representative Plaintiffs incorporate in this cause of action each and every
21 allegation of the preceding paragraphs, with the same force and effect as though fully set forth
22 herein.

23 60. California Business & Professions Code § 17500 prohibits "unfair, deceptive,
24 untrue or misleading advertising."

25 61. Defendants violated California Business & Professions Code § 17500 when they
26 represented that Listerine Total Care possessed characteristics and a value that it did not actually
27 have; these representations were made through Defendants' statements that the mouthwash
28 would provide "total [oral] care," and "fight[] unsightly plaque above the gum line," as alleged
herein.

1 of California Civil Code § 1770(a)(5) (the “Consumers Legal Remedies Act”). Representative
2 Plaintiffs and members of the California Class viewed and reasonably and justifiably relied on
3 Defendants’ misrepresentations when purchasing the mouthwash, were unaware of the existence
4 of facts that Defendants suppressed and failed to disclose and, had the facts been known, would
5 not have purchased the mouthwash or would not have purchased it at the price at which it was
6 offered.

7 69. Representative Plaintiffs and the members of the California Class have been
8 directly and proximately injured by Defendants’ conduct in ways including, but not limited to,
9 the monies paid to Defendants for a product which does not deliver the total oral care it purports
10 to deliver.

11 70. Insofar as Defendants’ conduct violated California Civil Code § 1770(a)(5),
12 Representative Plaintiffs and members of the California Class are entitled to (pursuant to
13 California Civil Code § 1780, *et seq.*) and do seek injunctive relief to end Defendants’ violations
14 of the California Consumers Legal Remedies Act.

15 71. In addition, pursuant to California Civil Code § 1782(a), Representative Plaintiff
16 Charlene Britton on her own behalf and on behalf of members of the California Class, has
17 notified Defendants of the alleged violations of the Consumer Legal Remedies Act. If, after 30
18 days from the date of the notification letter, Defendants have failed to provide appropriate relief
19 for the violations, Representative Plaintiffs will amend this Complaint to seek compensatory,
20 monetary and punitive damages, in addition to equitable and injunctive relief, and will further
21 request that this Court enter such orders or judgments as may be necessary to restore to any
22 person in interest any money which may have been acquired by means of such unfair business
23 practices, and for such other relief as provided in California Civil Code § 1780 and the Prayer for
24 Relief.

25 72. As a direct and proximate result of Defendants’ unfair and deceptive trade
26 practice, Representative Plaintiffs and members of each of the Classes have been damaged in an
27 amount to be proven at trial. Representative Plaintiffs further request that this Court enter such
28 orders or judgments as may be necessary to restore to any person in interest any money which

1 may have been acquired by means of such unfair business practices, and for such other relief as
2 provided in California Civil Code § 1780 and the Prayer for Relief.

3
4 **SIXTH CAUSE OF ACTION**
5 **Unfair Business Practices Under The Unfair Competition Act**
6 **(California Business & Professions Code §§ 17200-17208)**
7 ***(for the California Class Only)***

8 73. Representative Plaintiffs incorporate in this cause of action each and every
9 allegation of the preceding paragraphs, with the same force and effect as though fully set forth
10 herein.

11 74. Representative Plaintiffs further brings this cause of action seeking equitable and
12 injunctive relief to stop Defendants' misconduct, as complained of herein, and to seek restitution
13 of the amounts Defendants acquired through the unfair, unlawful, and fraudulent business
14 practices described herein.

15 75. Defendants' knowing conduct, as alleged herein, constitutes an unlawful and/or
16 fraudulent business practice, as set forth in California Business & Professions Code §§ 17200-
17 17208. Specifically, Defendants conducted business activities while failing to comply with the
18 legal mandates cited herein.

19 76. Defendants' conduct was, and continues to be, unlawful in that it is a violation of
20 California Civil Code §1750, *et seq.* and California Business & Professions Code §§ 17500, *et*
21 *seq.*, as alleged herein.

22 77. Defendants' conduct was, and continues to be fraudulent, because directly or
23 through their agents and employees, Defendants made false representations to Representative
24 Plaintiffs and members of the California Class that were likely to deceive Representative
25 Plaintiffs and members of the California Class. These false representations misled Representative
26 Plaintiffs and members of the California Class into purchasing Listerine Total Care.

27 78. Defendants' false representations include, but are not limited to, the statements
28 that the mouthwash would provide "total [oral] care," and "fight[] unsightly plaque above the
gum line," as alleged herein.

1 79. Representative Plaintiffs and members of the California Class reasonably and
2 justifiably relied on Defendants' misrepresentations when purchasing Listerine Total Care, were
3 unaware of the existence of facts that Defendants suppressed and failed to disclose, and, had the
4 facts been known, would not have purchased the mouthwash and/or would not have purchased it
5 at the price at which it was offered.

6 80. Specifically, Representative Plaintiffs and members of the California Class
7 viewed Defendants' product packaging, product commercials, and product specifications and, in
8 reliance on those representations, purchased the mouthwash for total oral care.

9 81. As a direct and proximate result of Defendants' wrongful conduct, Representative
10 Plaintiffs and members of the California Class have suffered and continue to suffer economic
11 losses and other general and specific damages, including, but not necessarily limited to, the
12 monies paid to Defendants for a product which does not deliver the purported total oral care.

13 82. Defendants' conduct in making the representations described herein, and failing
14 to disclose or remedy the problem despite their knowledge of the product limitations, constitutes
15 a knowing failure to adopt policies in accordance with and/or adhere to applicable laws, as set
16 forth herein, all of which are binding upon and burdensome to their competitors, engendering an
17 unfair competitive advantage for Defendants, thereby constituting an unfair business practice
18 under California Business & Professions Code §§ 17200-17208.

19 83. Defendants have clearly established a policy of accepting a certain amount of
20 collateral damage, as represented by the damages to the Representative Plaintiffs and to
21 California Class Members herein alleged, as incidental to their business operations, rather than
22 accept the alternative costs of full compliance with fair, lawful, and honest business practices,
23 ordinarily borne by their responsible competitors and as set forth in legislation and the judicial
24 record.

25 84. In addition, Defendants' conduct was, and continues to be, unfair, in that their
26 injury to millions of purchasers of the mouthwash is substantial, and is not outweighed by any
27 countervailing benefits to consumers or to competitors.

28 ///

1 85. Moreover, Representative Plaintiffs and members of the California Class could
2 not have reasonably avoided such injury given that Defendants failed to disclose the product's
3 effectiveness limitations at any point, and Representative Plaintiffs and members of the
4 California Class purchased the mouthwash in reliance on the representations made by
5 Defendants, as alleged herein.

6 86. Representative Plaintiffs and the members of the California Class have been
7 directly and proximately injured by Defendants' conduct in ways including, but not necessarily
8 limited to, monies paid to Defendants for a product which does not deliver the purported total
9 oral care.

10
11 **SEVENTH CAUSE OF ACTION**
12 **Breach of Song-Beverly Consumer Warranty Act**
13 **(California Civil Code § 1790, et seq.)**
14 ***(for the California Class only)***

15 87. Representative Plaintiffs incorporate in this cause of action each and every
16 allegation of the preceding paragraphs, with the same force and effect as though fully set forth
17 herein.

18 88. Listerine Total Care is a "consumer good" within the meaning of California Civil
19 Code § 1791(a).

20 89. Representative Plaintiffs and each member of the California Class purchased
21 Defendants' Listerine Total Care in California.

22 90. Defendants' express warranty and implied warranty of merchantability arose out
23 of and/or were related to the sale of the mouthwash.

24 91. Defendants warranted to consumers, among other things, that Listerine Total Care
25 would constitute "total" oral care and would "fight[] unsightly plaque above the gum line."

26 92. Defendants' sale of the mouthwash is also subject to an implied warranty of
27 merchantability (i.e. that the mouthwash passes without objection in the trade under the
28 descriptions and advertisements provided by Defendants, is fit for the ordinary purpose for which

1 such goods are used, and conforms to the promises and affirmations of fact made on the
2 container and labels).

3 93. Ordinary use of Listerine Total Care is for general oral healthcare namely,
4 fighting plaque in addition to preventing cavities, strengthening teeth, killing bad breath germs,
5 freshening breath, and restoring tooth enamel.

6 94. When Defendants placed the mouthwash into the stream of commerce, they knew,
7 reasonably should have known, and/or were obligated to understand that the intended and
8 ordinary purpose of the mouthwash was to function as a total oral care product in providing
9 consumers with plaque-fighting properties.

10 95. The mouthwash cannot perform its ordinary and represented purpose because it
11 contains a sole active ingredient not proven effective for providing the oral healthcare benefits
12 sought by consumers.

13 96. As set forth herein, Defendants failed to comply with their obligations under their
14 express warranties and under their implied warranty of merchantability in that they did not
15 provide a product that functions as warranted, that serves its ordinary or intended purpose, or
16 functions in conformance with specifications as advertised.

17 97. Representative Plaintiffs and the California Class Members have suffered and will
18 continue to suffer damages as a direct and proximate result of Defendants' failure to comply with
19 their warranty obligations, and are entitled to judgment pursuant to California Civil Code §§
20 1791.1(d) and 1794, as well as attorneys' fees, costs and interest.

21
22 **EIGHTH CAUSE OF ACTION**
23 **Breach of Express Warranty**
(for the California and Nationwide Classes)

24 98. Representative Plaintiffs incorporate in this cause of action each and every
25 allegation of the preceding paragraphs, with the same force and effect as though fully set forth
26 herein.

27 99. Defendants, as the designers, manufacturers, distributors and sellers of the
28 mouthwash, expressly warranted that the mouthwash being sold to the general public would

1 effectively provide total oral care and assist consumers in the fight against disease-inducing oral
2 ailments, as advertised.

3 100. Defendants warranted to consumers that Listerine Total Care would constitute
4 “total” oral care and would “fight[] unsightly plaque above the gum line.”

5 101. In addition, Defendants’ promotional statements, representations and
6 demonstrations regarding the mouthwash became part of the basis of the bargain between
7 consumers and Defendants, creating express warranties that the product purchased by the
8 Representative Plaintiffs and members of each of the Classes would conform to Defendants’
9 representations.

10 102. Defendants’ breached their express warranties because Listerine Total Care does
11 not conform to the promises or affirmations made by Defendants to the Representative Plaintiffs
12 and members of each of the Classes.

13 103. Representative Plaintiffs, on their own behalf and on behalf of members of each
14 of the Classes, have provided and/or will provide reasonable notice to Defendants of the breach
15 of warranty.

16 104. Representative Plaintiffs and the members of each of the Classes have been
17 directly and proximately injured by Defendants’ conduct in ways including, but not limited to,
18 the purchase of a product which does not deliver the total oral care it purports to deliver.

19 105. As a direct and proximate result of Defendants’ unlawful conduct, as set forth
20 herein, Representative Plaintiffs and members of each of the Classes are entitled to monetary
21 damages in the amount of the difference in value between a mouthwash capable of providing
22 total oral healthcare benefits and the value paid to Defendants for a product which Defendants
23 represented would provide benefits it is incapable of providing.

24 ///

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NINTH CAUSE OF ACTION
Breach of Implied Warranty
(for the California and Nationwide Classes)

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2
3 106. Representative Plaintiffs incorporate in this cause of action each and every
4 allegation of the preceding paragraphs, with the same force and effect as though fully set forth
5 herein.

6 107. Defendants are merchants engaged in the business of selling, among other things,
7 healthcare products to consumers. Defendants' sale of Listerine Total Care is subject to an
8 implied warranty of merchantability. Defendants breached said warranty by selling a product
9 which does not pass without objection in the trade under the descriptions and advertisements
10 provided by Defendants, is not fit for the ordinary purpose for which such goods are used, and
11 does not conform to the promises and affirmations of fact made on the container and labels.

12 108. Representative Plaintiffs and members of each of the Classes purchased the
13 mouthwash and used it for its ordinary and intended purposes which included fighting plaque,
14 preventing cavities, and providing general oral healthcare such as strengthening teeth, killing bad
15 breath germs, freshening breath, and restoring tooth enamel.

16 109. The mouthwash cannot perform its ordinary and represented purpose because it
17 contains a sole active ingredient not proven effective for providing the oral healthcare benefits
18 sought by consumers.

19 110. When Defendants placed the mouthwash into the stream of commerce, they knew,
20 reasonably should have known, and/or were obligated to understand that the intended and
21 ordinary purpose of the mouthwash was to function as a total oral care product in providing
22 consumers with plaque-fighting properties.

23 111. Representative Plaintiffs and members of each of the Classes reasonably expected
24 that the mouthwash they purchased would provide the described and warranted health care
25 benefits represented by Defendants, including, but not necessarily limited to, fighting plaque
26 above the gum line and supplying a mode of total oral healthcare.

27 ///

28 ///

1 112. As a direct and proximate result of Defendants' unlawful conduct, as set forth
2 herein, Representative Plaintiffs and members of each of the Classes were injured and are
3 entitled to damages in an amount to be proven at trial.

4
5 **TENTH CAUSE OF ACTION**
6 **Unjust Enrichment**
7 ***(for the California and Nationwide Classes)***

8 113. Representative Plaintiffs incorporate in this cause of action each and every
9 allegation of the preceding paragraphs, with the same force and effect as though fully set forth
10 herein.

11 114. As alleged herein, Defendants intentionally and/or recklessly made false
12 representations to Representative Plaintiffs and members of each of the Classes to induce them to
13 purchase Listerine Total Care. Representative Plaintiffs and members of each of the Classes
14 reasonably relied on these false representations when purchasing Listerine Total Care.

15 115. Representative Plaintiffs and members of each of the Classes did not receive all of
16 the benefits promised by Defendants, and paid more to Defendants for the mouthwash than they
17 otherwise would and/or should have paid.

18 116. It would be inequitable and unconscionable for Defendants to retain the profit,
19 benefit and/or other compensation they obtained from their deceptive, misleading, and unlawful
20 conduct alleged herein.

21 117. Representative Plaintiffs and members of each of the Classes are entitled to
22 restitution of, disgorgement of, and/or the imposition of a constructive trust upon, all profits,
23 benefits, and other compensation obtained by Defendants from their deceptive, misleading, and
24 unlawful conduct as alleged herein.

25 **RELIEF SOUGHT**

26 **WHEREFORE, the Representative Plaintiffs**, on behalf of themselves and the
27 proposed **Plaintiff Classes**, pray for judgment and the following specific relief against
28 **Defendants**, as follows:

1 1. That the Court declare, adjudge and decree that this action is a proper class action
2 and certify each of the proposed classes and/or any other appropriate subclasses under F.R.C.P.
3 Rule 23(b)(2) and/or (b)(3);

4 **For the California Class Only:**

5 2. That Defendants are found to have violated California Business & Professions
6 Code § 17200, *et seq.*, and § 17500, *et seq.*, California Civil Code §1750, *et seq.*, and § 1790, *et*
7 *seq.*, as to the Representative Plaintiffs and California Class members;

8 3. That the Court order Defendants to pay restitution to the Representative Plaintiffs
9 and the California Class Members due to Defendants' unlawful activities, pursuant to California
10 Business and Professions Code §§ 17200-17208;

11 4. That the Court further enjoin Defendants, ordering them to cease and desist from
12 unlawful activities in violation of California Business and Professions Code §§ 17200, *et seq.*;

13 5. For reasonable attorneys' fees, pursuant to California Code of Civil Procedure §
14 1021.5 and/or California Civil Code §§ 1780(d) and/or 1794(d);

15 **For the California and National Classes:**

16 6. That Defendants are found to have made fraudulent and/or negligent
17 misrepresentations to Representative Plaintiffs and all Class members;

18 7. An award to Representative Plaintiffs and members of both Classes of damages in
19 an amount to be proven at trial;

20 8. For Punitive Damages in an amount appropriate to punish Defendants and to deter
21 others from engaging in similar misconduct in the future;

22 9. For all other Orders, findings and determinations identified and sought in this
23 Complaint;

24 10. For interest on the amount of any and all economic losses, at the prevailing legal
25 rate; and

26 11. For costs of suit and any and all other such relief as the Court deems just and
27 proper.

28 ///

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JURY DEMAND

Representative Plaintiffs and members of each of the Plaintiff Classes hereby demand trial by jury on all issues triable of right by jury.

Dated: December 20, 2010

SCOTT COLE & ASSOCIATES, APC

By: /s/Matthew R. Bainer
Matthew R. Bainer, Esq.
Attorneys for Representative Plaintiffs
and the Plaintiff Classes

EXHIBIT B

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7
8 Attorneys for Representative **Plaintiff****Plaintiffs**
and the Plaintiff Classes

9
10 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

11
12
13 CHARLENE A. BRITTON, **ITAK**
MORADI, KATHY PAHIGIAN,
14 individually, and on behalf of all others
similarly situated,

15 **Plaintiff****Plaintiffs**

16 ,
17 vs.

18 JOHNSON & JOHNSON, McNEIL-
PPC, INC., and JOHNSON &
19 JOHNSON CONSUMER
PRODUCTSCOMPANIES, INC.,

20 Defendants.

) **Case No. 3:10-cv-04450-TEH**

) **CLASS ACTION**

) **FIRST AMENDED COMPLAINT FOR
DAMAGES, INJUNCTIVE RELIEF AND
RESTITUTION**

) **[Jury Trial Demanded]**

21
22 Representative **Plaintiff****alleges****Plaintiffs** **allege** as follows:

23
24 **PRELIMINARY STATEMENT**

25 1. This is a class action, brought under Rule 23(b)(2) and/or (b)(3) of the Federal
26 Rules of Civil Procedure, seeking damages, restitution, interest thereon, injunctive and other
27 equitable relief and reasonable attorneys' fees and costs on behalf of Representative
28 **Plaintiff****Plaintiffs** and all other persons (hereinafter referred to as the "Class Members," the

1 “Plaintiff Classes” and/or either of the Classes defined herein) who have purchased Listerine
2 Total Care Anticavity Mouthwash (hereinafter referred to as “Listerine Total Care” or
3 “mouthwash”) from Defendants Johnson & Johnson, McNEIL-PPC, Inc., and/or Johnson &
4 Johnson Consumer ~~Products~~Companies, Inc. (hereinafter collectively referred to as
5 “Defendants”), either directly therefrom or indirectly from a distributor or retailer thereof within
6 the United States at any time during the applicable limitations period. The Representative
7 ~~Plaintiff~~Plaintiffs, on behalf of ~~herself~~themselves and all Class Members, also ~~seeks~~seek
8 injunctive relief and restitution of all benefits Defendants have enjoyed from their unlawful
9 and/or deceptive business practices, as detailed herein.

11 JURISDICTION AND VENUE

12 2. Jurisdiction is proper in this Court under 28 U.S.C. § 1332 (diversity jurisdiction)
13 and/or 28 U.S.C. §1331 (controversy arising under United States law). Supplemental jurisdiction
14 to adjudicate issues pertaining to state law is proper in this Court under 28 U.S.C. § 1367.

15 3. Venue is proper in this Court under 28 U.S.C. § 1391 because the events that give
16 rise to ~~Plaintiff's~~Plaintiffs' claims took place within the Northern District of California and
17 because Defendants market, distribute, and sell their products within this District.

19 PLAINTIFF

20 PLAINTIFFS

21 4. Charlene Britton, Itak Moradi, and Kathy Pahigian, the named/representative
22 ~~Plaintiff~~Plaintiffs identified herein, ~~was~~were and ~~is~~are natural ~~person~~persons and, during the
23 relevant time period, purchased and used (or attempted to use) Johnson & Johnson Listerine
24 Total Care Anticavity Mouthwash, yet did not receive the full value of the product, as promised
25 by Defendants.

26 5. As used throughout this Complaint, the term “Class Members” and/or the
27 “Plaintiff Classes” refers to the named ~~plaintiff~~plaintiffs herein as well as each and every person
28

1 eligible for membership in one or more of the classes of persons, as further described and
2 defined herein.

3 6. At all times herein relevant, Representative ~~Plaintiff was~~Plaintiffs were and ~~is a~~
4 ~~person~~are persons within each of the classes of persons further described and defined herein.

5 7. Representative ~~Plaintiff brings~~Plaintiffs bring this action on behalf of
6 ~~herself~~themselves and as a class action, pursuant to Rule 23(b)(2) and/or (b)(3) of the Federal
7 Rules of Civil Procedure, on behalf of all persons similarly situated and proximately damaged by
8 the unlawful conduct described herein.

9 ~~7.~~

10 **DEFENDANTS**

11 8. At all times herein relevant, Defendant Johnson & Johnson was a corporation,
12 duly licensed in New Jersey and doing business in this Judicial District as well as throughout the
13 United States. Johnson & Johnson maintains its principal place of business in New Brunswick,
14 New Jersey.

15 9. Defendant McNeil-PPC, Inc. is a pharmaceutical company belonging to
16 Defendant Johnson & Johnson. At all times herein relevant, Defendant McNeil-PPC, Inc. was a
17 corporation, duly licensed in New Jersey and doing business in this Judicial District as well as
18 throughout the United States. Defendant McNeil-PPC, Inc. maintains its principal place of
19 business in Fort Washington, Pennsylvania.

20 10. Defendant Johnson & Johnson Consumer ~~Products~~Companies, Inc. is a division
21 of McNeil-PPC, Inc. At all times herein relevant, Defendant Johnson & Johnson Consumer
22 ~~Products~~Companies, Inc. was a corporation, duly licensed in New Jersey and doing business in
23 this Judicial District as well as throughout the United States. Defendant Johnson & Johnson
24 Consumer ~~Products~~Companies, Inc. maintains its principal place of business in Fort Washington,
25 Pennsylvania.

26 11. Representative ~~Plaintiff is~~Plaintiffs are informed and ~~believes~~believe and, on that
27 basis, ~~alleges~~allege that, at all relevant times herein-mentioned, each of the Defendants either
28 identified herein and/or who may be identified in subsequent versions of this Complaint was the

1 agent and/or employee of each of the remaining Defendants and, in doing the acts herein alleged,
2 was acting within the course and scope of such agency and/or employment.

3
4 **CLASS ACTION ALLEGATIONS**

5 12. Representative ~~Plaintiff brings~~Plaintiffs bring this action on behalf of
6 ~~herself~~themselves and as a class action on behalf of the following Plaintiff Classes:

7 California Class:

8 “All persons who purchased, within the State of California, Listerine Total Care
9 Anticavity Mouthwash.”

10 National Class:

11 “All persons who purchased, within the United States, Listerine Total Care
12 Anticavity Mouthwash.”

13 13. Defendants and their officers and directors are excluded from both of the Plaintiff
14 Classes.

15 14. This action has been brought and may properly be maintained as a class action
16 under ~~Federal~~ Rule of Civil Procedure Rule 23(b)(2) and/or (b)(3) because there is a well-
17 defined community of interest in the litigation and membership in the proposed Classes is easily
18 ascertainable:

19 a. Numerosity: A class action is the only available method for the fair and
20 efficient adjudication of this controversy. The members of the Plaintiff
21 Classes are so numerous that joinder of all members is impractical, if not
22 impossible, insofar as the Representative ~~Plaintiff is~~Plaintiffs are informed
23 and ~~believes~~believe and, on that basis, ~~alleges~~allege that the total number
24 of Class Members is in the thousands, if not millions, of individuals.
25 Membership in the Classes will be determined by analysis of point of sale,
26 electronic-mail and/or other transactional information, among other
27 records maintained by Defendants.

28 b. Commonality: The Representative ~~Plaintiff~~Plaintiffs and the Class
Members share a community of interests in that there are numerous
common questions and issues of fact and law which predominate over
questions and issues solely affecting individual members, including, but
not necessarily limited to:

1) Whether Defendants knew or should have known of the
ineffectiveness of the active ingredient contained in Listerine Total
Care;

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- 2) Whether Defendants had a duty to disclose to consumers the true effectiveness of the product;
- 3) Whether Defendants' advertising of Listerine Total Care was false, deceptive, and/or misleading;
- 4) Whether Defendants violated California Business and Professions Code §17500, *et seq.* by engaging in misleading or deceptive advertising;
- 5) Whether Defendants violated California Civil Code §1750, *et seq.* by engaging in unfair or deceptive trade practices;
- 6) Whether Defendants breached express warranties and/or implied warranties of merchantability and/or fitness regarding Listerine Total Care's functionality and effectiveness;
- 7) Whether Defendants violated California Civil Code §1790, *et seq.* by breaching express and implied warranties;
- 8) Whether Defendants intentionally or negligently misrepresented Listerine Total Care's functionality and effectiveness;
- 9) Whether Defendants' engagement in false representations regarding Listerine Total Care's functionality ~~and~~ effectiveness constituted a fraud on consumers; and
- 10) Whether Defendants violated California Business and Professions Code §§ 17200, *et seq.* by engaging in unfair, unlawful and/or fraudulent business practices.

c. Typicality: The Representative ~~Plaintiff's~~Plaintiffs' claims are typical of the claims of the Plaintiff Classes. Representative ~~Plaintiff~~Plaintiffs and all members of the Plaintiff Classes sustained damages arising out of and caused by Defendants' common course of conduct in violation of law, as alleged herein.

d. Adequacy of Representation: The Representative ~~Plaintiff~~Plaintiffs in this class action ~~is an~~are adequate ~~representative~~representatives of each of the Plaintiff Classes in that the Representative ~~Plaintiff has~~Plaintiffs have the same interest in the litigation of this case as the Class Members, ~~is~~are committed to vigorous prosecution of this case and ~~has~~have retained competent counsel who ~~is~~are experienced in conducting litigation of this nature. The Representative ~~Plaintiff is~~Plaintiffs are not subject to any individual defenses unique from those conceivably applicable to other Class Members or the Classes in their entirety. The Representative

1 ~~Plaintiff anticipates~~Plaintiffs anticipate no management difficulties in this
litigation.

- 2 e. Superiority of Class Action: Since the damages suffered by individual
3 Class Members, while not inconsequential, may be relatively small, the
4 expense and burden of individual litigation by each member makes or may
5 make it impractical for members of the Plaintiff Classes to seek redress
6 individually for the wrongful conduct alleged herein. Should separate
7 actions be brought or be required to be brought, by each individual
8 member of the Plaintiff Classes, the resulting multiplicity of lawsuits
9 would cause undue hardship and expense for the Court and the litigants.
10 The prosecution of separate actions would also create a risk of inconsistent
11 rulings which might be dispositive of the interests of other Class Members
12 who are not parties to the adjudications and/or may substantially impede
13 their ability to adequately protect their interests.
- 14 f. Rule 23(b)(2): In addition, Defendants have acted and/or refused to act on
15 grounds that apply generally to the Plaintiff Classes, so that final
16 injunctive relief or corresponding declaratory relief is appropriate
17 respecting the class as a whole.
- 18 g. Rule 23(b)(3): Questions of law or fact common to class members
19 predominate over any questions affecting only individual members, and a
20 class action is superior, in ways including, but not limited to, paragraph (e)
21 herein, to other available methods for fairly and efficiently adjudicating
22 the controversy.

23 COMMON FACTUAL ALLEGATIONS

24 15. For more than 120 years, the ~~JOHNSON & JOHNSON~~Johnson & Johnson brand-
25 name- has been associated with the innovation, development and marketing of home healthcare
26 products.

27 16. As part of its “Oral Health Care” line, Defendants produce, manufacture, and
28 distribute Listerine Total Care in a variety of flavors and market the product to consumers
nationwide. As such, Listerine Total Care has been purchased by thousands, if not millions, of
consumers, both in California and nationwide, all of whom are putative Class Members.

17. Listerine Total Care is a home healthcare product designed and marketed for
consumer use as total oral healthcare.

18. Indeed, Listerine’s website (www.listerine.com) boasts that Listerine Total Care
is the “most complete mouthwash” as compared to other over-the-counter mouthwashes.

19. -Its multi-purpose functions are advertised as including, but are not necessarily
limited to, “help[ing] [to] prevent cavities, restor[ing] enamel, strengthen[ing] teeth, kill[ing] bad
breath germs, freshen[ing] breath,” and “fight[ing] unsightly plaque above the gum line.”

- 1 20. The sole active ingredient in Listerine Total Care is sodium fluoride.
- 2 21. The product packaging includes statements that Listerine Total Care will: “help[]
- 3 prevent cavities, restore[] enamel, strengthen[] teeth, kill[] bad breath germs, freshen[] breath”
- 4 and “fight[] unsightly plaque above the gum line.”
- 5 22. Listerine Total Care does not effectively fight plaque above the gum line.
- 6 23. Defendants placed Listerine Total Care into the stream of commerce and
- 7 marketed it as a drug. By doing so, Defendants necessarily represented to consumers that the
- 8 product had the approval of the Food and Drug Administration (“FDA”). In fact, Listerine Total
- 9 Care does not have FDA approval for all of the purposes for which it is marketed.
- 10 24. Despite their knowledge of the ingredient composition of the mouthwash, which
- 11 rendered it ineffective for the purposes conveyed to consumers, Defendants engaged in a long-
- 12 standing, nationwide marketing campaign promoting this product as “total” oral healthcare.
- 13 Defendants’ campaign included, but was not limited to, the following acts:
- 14 a. On or before May 7, 2009, Defendants released a commercial which
- 15 advertised that Listerine Total Care provided “Six keys signs of a healthy
- 16 mouth: tartar free teeth, no plaque build-up, healthy gums, no tooth decay,
- 17 naturally white teeth, and fresh breath.” Defendants’ commercials were
- 18 disseminated nationwide, including, but not necessarily limited to, on the
- 19 internet.
- 20 b. In approximately October 2009, Defendants launched a micro website for
- 21 Listerine Total Care, advertising the following benefits: “Remove more
- 22 plaque and then strengthen teeth for a cleaner, healthier mouth.” The
- 23 microsite also touted that the product “finishes the job by fighting cavities
- 24 and killing bad breath and germs.”
- 25 c. In approximately October, 2009, Defendants launched a Facebook page
- 26 for Listerine Total Care, advertising the following benefits: “Whiter Teeth,
- 27 Healthy Gums, Breath Protection, Kills Bacteria, Strengthens Teeth,
- 28 Reduces Plaque.”
- 29 d. Defendants also advertise the following benefits for Listerine Total Care
- 30 on their general website for Listerine products: “Helps Prevent Cavities,
- 31 Restores Minerals to Enamel, Strengthens Teeth, Kills Bad Breath Germs,
- 32 Freshens Breath, Fights Unsightly Plaque Above the Gum Line.”
- 33 25. In approximately June 2010, Representative Plaintiff Charlene Britton purchased
- 34 Listerine Total Care, after viewing and relying on the product’s representations, on its packaging,
- 35 that it would, *inter alia*, whiten teeth, prevent cavities, restore enamel, strengthen teeth, kill bad

1 breath germs, freshen breath, and fight unsightly plaque above the gum line. If Representative
2 Plaintiff Britton had known of the product's ineffectiveness, she would not have purchased the
3 product or would not have purchased it at the same price.

4 26. Plaintiff Itak Moradi purchased Listerine Total Care during the relevant time
5 period after viewing and relying on the product's representations, on its packaging, that it would,
6 inter alia, whiten teeth, prevent cavities, restore enamel, strengthen teeth, kill bad breath germs,
7 freshen breath, and fight unsightly plaque above the gum line. If Representative Plaintiff Moradi
8 had known of the product's ineffectiveness, she would not have purchased the product or would
9 not have purchased it at the same price.

10 27. Plaintiff Kathy Pahigian purchased Listerine Total Care during the relevant time
11 period after viewing and relying on the product's representations, on its packaging, that it would,
12 inter alia, whiten teeth, prevent cavities, restore enamel, strengthen teeth, kill bad breath germs,
13 freshen breath, and fight unsightly plaque above the gum line. If Representative Plaintiff
14 Pahigian had known of the product's ineffectiveness, she would not have purchased the product
15 or would not have purchased it at the same price.

16 ~~26-28.~~ Despite their legal obligations to do so, Defendants have taken no apparent steps
17 to inform either potential consumers or previous purchasers of the false promises detailed in this
18 Complaint.

19 ~~27-29.~~ This action is brought to redress and end this pattern of unlawful conduct. Indeed,
20 without an award of damages and injunctive relief by this Court, Defendants are likely to
21 continue to injure consumers and harm the public interest.

22 ~~28-30.~~ As a direct and proximate result of Defendants' unlawful conduct, as set forth
23 herein, Representative PlaintiffPlaintiffs and Class Members were misled into purchasing
24 Listerine Total Care, unjustly enriching Defendants at the expense of these consumers.
25 Defendants, at all times, knew that Representative PlaintiffPlaintiffs and the Class Members
26 would rely upon the misrepresentations and/or omissions of Defendants. Defendants'
27 concealment, misbranding and non-disclosure were intended to influence consumers' purchasing
28 decisions and were done with reckless disregard for the rights of consumers. Representative

1 ~~Plaintiff's~~Plaintiffs' and Class Members' reliance, and resultant substantial monetary loss, were
2 reasonably foreseeable by Defendants.

3
4 **FIRST CAUSE OF ACTION**
5 **Fraud**
6 ***(for the California and Nationwide Classes)***

7 ~~29.~~31. Representative ~~Plaintiff incorporates~~Plaintiffs incorporate in this cause of action
8 each and every allegation of the preceding paragraphs, with the same force and effect as though
9 fully set forth herein.

10 32. The conduct of Defendants constitutes a fraud against Representative
11 ~~Plaintiff~~Plaintiffs and members of each of the Classes. Defendants, directly and/or through their
12 agents and employees, made false representations to Representative ~~Plaintiff~~Plaintiffs and
13 members of each of the Classes that were likely to deceive Representative ~~Plaintiff~~Plaintiffs and
14 members of each of the Classes.

15 ~~30.~~ Representative ~~Plaintiff~~Plaintiffs and members of each of the Classes were misled by
16 these false representations into purchasing Listerine Total ~~Care from~~Care from Defendants.

17 ~~31.~~33. Defendants' false representations include, but are not limited to, the statements
18 that Listerine Total Care is "total care," and "fights unsightly plaque above the gum line," as
19 alleged herein.

20 ~~32.~~34. Defendants placed Listerine Total Care into the stream of commerce and
21 marketed it as a drug. By doing so, Defendants necessarily represented to consumers that the
22 product had the approval of the FDA. In fact, Listerine Total Care does not have FDA approval
23 for all of the purposes for which it is marketed.

24 ~~33.~~35. Defendants knew, or reasonably should have known, of the false representations
25 alleged herein based on the ingredient composition of the mouthwash and intentionally
26 concealed information from ~~Plaintiff~~Plaintiffs and members of each of the Classes.

27 ~~34.~~36. The sole active ingredient of the mouthwash is listed as "sodium fluoride
28 0.0221%" - an ingredient which has not been shown to fight or prevent plaque.

1 ~~40:42.~~ At all times relevant herein, Defendants were engaged in the business of
2 designing, manufacturing, marketing, distributing and/or selling, among other products, home
3 healthcare products, as alleged herein.

4 ~~41:43.~~ Defendants willfully, falsely, and knowingly misrepresented material facts
5 relating to the character and quality of the mouthwash, in ways including, but not limited to, the
6 statements that the mouthwash would provide “total [oral] care,” and “fight[] unsightly plaque
7 above the gum line,” as alleged herein.

8 ~~42:44.~~ Defendants placed Listerine Total Care into the stream of commerce and
9 marketed it as a drug. By doing so, Defendants necessarily represented to consumers that the
10 product had the approval of the FDA. In fact, Listerine Total Care does not have FDA approval
11 for all of the purposes for which it is marketed.

12 ~~43:45.~~ Defendants knew that the misrepresentations alleged herein were false at the time
13 they made them and/or acted recklessly in making such misrepresentations, based on
14 Defendants’ knowledge of the sole active ingredient intended to provide such benefits to
15 consumers.

16 ~~44:46.~~ Defendants’ misrepresentations were the type of misrepresentations that are
17 material (i.e., the type of misrepresentations to which a reasonable person would attach
18 importance and would be induced to act thereon in making purchase decisions). The
19 misrepresentations were material in that Representative ~~Plaintiff~~Plaintiffs and members of each
20 of the Classes purchased Listerine Total Care as a home healthcare product capable of providing
21 total oral healthcare benefits.

22 ~~45:47.~~ Representative ~~Plaintiff~~Plaintiffs and members of each of the Classes reasonably
23 and justifiably relied on Defendants’ misrepresentations when purchasing the mouthwash, were
24 unaware of the existence of facts that Defendants suppressed and failed to disclose and, had the
25 facts been known, would not have purchased the mouthwash and/or would not have purchased it
26 at the price at which it was offered. Representative ~~Plaintiff’s~~Plaintiffs’ and each Class member’s
27 reliance was a substantial factor in making the purchase which led to the resulting injury, as
28 alleged herein.

1 46.48. Specifically, Representative ~~Plaintiff~~Plaintiffs and members of each of the Classes
2 viewed Defendants' product packaging, product commercials, and product specifications, and, in
3 reliance on those representations, purchased Listerine Total Care for its purported total oral
4 health benefits.

5 47.49. Defendants intended that Representative ~~Plaintiff~~Plaintiffs and members of each
6 of the Classes rely on the misrepresentations alleged herein and purchase the mouthwash for the
7 uses advertised, including total oral healthcare.

8 48.50. As a direct and proximate result of Defendants' intentional misrepresentation,
9 Representative ~~Plaintiff~~Plaintiffs and members of each of the Classes were injured in ways
10 including, but not limited to, the purchase of a product which does not deliver the total oral care
11 it purports to deliver. Damages resulting from such injury may, but do not necessarily include
12 nor are limited to, monetary damages in the amount of the difference in value between a
13 mouthwash capable of providing total oral healthcare benefits and the value paid to Defendants
14 for a product which Defendants represented would provide benefits it is incapable of providing.

15 ///

16 49.51. Moreover, in that, at all times herein mentioned, Defendants intended to cause, or
17 acted with reckless disregard of the probability of causing, damage to Representative
18 ~~Plaintiff~~Plaintiffs and members of each of the Classes, and because Defendants were guilty of
19 oppressive, fraudulent and/or malicious conduct, Representative ~~Plaintiff~~Plaintiffs and members
20 of each of the Classes are entitled to an award of exemplary or punitive damages against
21 Defendants in an amount adequate to deter such conduct in the future. Specifically, despite
22 knowledge that the mouthwash product could not provide total oral healthcare and was not
23 approved as an effective means of fighting plaque, Defendants have refused, and continue to
24 refuse, any response or remedy.

25
26 **THIRD CAUSE OF ACTION**
27 **Negligent Misrepresentation**
28 *(for the California and Nationwide Classes)*

1 ~~50.~~52. Representative ~~Plaintiff incorporates~~Plaintiffs incorporate in this cause of action
2 each and every allegation of the preceding paragraphs, with the same force and effect as though
3 fully set forth herein.

4 ~~51.~~53. Defendants owed a duty to Representative ~~Plaintiff~~Plaintiffs and members of each
5 of the Classes to exercise reasonable care in making representations about Listerine Total Care,
6 which they offered for sale thereto.

7 ~~52.~~54. Defendants should have known of the ingredient composition of this product, as
8 detailed in this Complaint and, thus, should have known that their representations, as also
9 detailed, at least in part, in this Complaint, were false. In addition, given Defendants' knowledge
10 of the sole active ingredient of Listerine Total Care, Defendants had no reasonable grounds to
11 believe their representations as to the effectiveness of the product were true.

12 ~~53.~~55. Defendants' representations were negligently and recklessly made to potential
13 consumers and the general public (including Representative ~~Plaintiff~~Plaintiffs and members of
14 each of the Classes) through Defendants' statement that the mouthwash provided "total care,"
15 and was effective in "fight[ing] unsightly plaque above the gum line."

16 ///

17 ~~54.~~56. Defendants placed Listerine Total Care into the stream of commerce and
18 marketed it as a drug. By doing so, Defendants necessarily represented to consumers that the
19 product had the approval of the FDA. In fact, Listerine Total Care does not have FDA approval
20 for all of the purposes for which it is marketed.

21 ~~55.~~57. Representative ~~Plaintiff~~Plaintiffs and members of each of the Classes viewed and
22 reasonably and justifiably relied on Defendants' misrepresentations when purchasing the
23 mouthwash, were unaware of the existence of facts that Defendants suppressed and failed to
24 disclose and, had the facts been known, would not have purchased the mouthwash and/or would
25 not have purchased it at the price at which it was offered.

26 ~~56.~~58. As a direct and proximate result of these misrepresentations, Representative
27 ~~Plaintiff~~Plaintiffs and members of each of the Classes have been damaged in an amount to be
28 proven at trial. The damages suffered by Representative ~~Plaintiff~~Plaintiffs and members of each

1 of the Classes include, but are not limited to, the monies paid to Defendants for a product which
2 does not deliver the purported total oral care.

3 ##

4 **FOURTH CAUSE OF ACTION**
5 **Deceptive Advertising Practices**
6 **(California Business & Professions Code §§ 17500, et seq.)**
7 **(for the California Class Only)**

8 ~~57.59.~~ Representative ~~Plaintiff incorporates~~ Plaintiffs incorporate in this cause of action
9 each and every allegation of the preceding paragraphs, with the same force and effect as though
10 fully set forth herein.

11 ~~58.60.~~ California Business & Professions Code § 17500 prohibits “unfair, deceptive,
12 untrue or misleading advertising.”

13 ~~59.61.~~ Defendants violated California Business & Professions Code § 17500 when they
14 represented that Listerine Total Care possessed characteristics and a value that it did not actually
15 have; these representations were made through Defendants’ statements that the mouthwash
16 would provide “total [oral] care,” and “fight[] unsightly plaque above the gum line,” as alleged
17 herein.

18 ~~60.62.~~ Defendants’ deceptive practices were specifically designed to induce
19 Representative ~~Plaintiff~~ Plaintiffs and members of the California Class to purchase the
20 mouthwash over the mouthwashes of their competitors. Defendants engaged in broad-based
21 marketing efforts, including posting statements on Defendants’ website, releasing television
22 commercials nationwide, and establishing promotional websites on social networking sites, as
23 alleged herein, in order to reach Representative ~~Plaintiff~~ Plaintiffs and California Class members
24 and induce them to purchase this product.

25 ~~61.63.~~ The content of the advertisements, as alleged herein, were of a nature likely to
26 deceive a reasonable consumer.

27 ~~62.64.~~ Defendants knew or, in the exercise of reasonable care, should have known that
28 the representations were untrue or misleading and likely to deceive reasonable consumers.

1 ~~68.~~70. Insofar as Defendants' conduct violated California Civil Code § 1770(a)(5),
2 Representative ~~Plaintiff~~Plaintiffs and members of the California Class are entitled to (pursuant to
3 California Civil Code § 1780, *et seq.*) and do seek injunctive relief to end Defendants' violations
4 of the California Consumers Legal Remedies Act.

5 ~~69.~~71. In addition, pursuant to California Civil Code § 1782(a), Representative Plaintiff
6 Charlene Britton on her own behalf and on behalf of members of the California Class, has
7 notified Defendants of the alleged violations of the Consumer Legal Remedies Act. If, after 30
8 days from the date of the notification letter, Defendants have failed to provide appropriate relief
9 for the violations, Representative ~~Plaintiff~~Plaintiffs will amend this Complaint to seek
10 compensatory, monetary and punitive damages, in addition to equitable and injunctive relief, and
11 will further request that this Court enter such orders or judgments as may be necessary to restore
12 to any person in interest any money which may have been acquired by means of such unfair
13 business practices, and for such other relief as provided in California Civil Code § 1780 and the
14 Prayer for Relief.

15 ~~70.~~72. As a direct and proximate result of Defendants' unfair and deceptive trade
16 practice, Representative ~~Plaintiff~~Plaintiffs and members of each of the Classes have been
17 damaged in an amount to be proven at trial. Representative ~~Plaintiff~~Plaintiffs further request that
18 this Court enter such orders or judgments as may be necessary to restore to any person in interest
19 any money which may have been acquired by means of such unfair business practices, and for
20 such other relief as provided in California Civil Code § 1780 and the Prayer for Relief.

21
22 **SIXTH CAUSE OF ACTION**
23 **Unfair Business Practices Under The Unfair Competition Act**
24 **(California Business & Professions Code §§ 17200-17208)**
25 **(for the California Class Only)**

26 ~~71.~~73. Representative ~~Plaintiff incorporates~~Plaintiffs incorporate in this cause of action
27 each and every allegation of the preceding paragraphs, with the same force and effect as though
28 fully set forth herein.

1 ~~72.74.~~ Representative PlaintiffPlaintiffs further brings this cause of action seeking
2 equitable and injunctive relief to stop Defendants’ misconduct, as complained of herein, and to
3 seek restitution of the amounts Defendants acquired through the unfair, unlawful, and fraudulent
4 business practices described herein.

5 ~~73.75.~~ Defendants’ knowing conduct, as alleged herein, constitutes an unlawful and/or
6 fraudulent business practice, as set forth in California Business & Professions Code §§ 17200-
7 17208. Specifically, Defendants conducted business activities while failing to comply with the
8 legal mandates cited herein.

9 ~~74.76.~~ Defendants’ conduct was, and continues to be, unlawful in that it is a violation of
10 California Civil Code §1750, *et seq.* and California Business & Professions Code §§ 17500, *et*
11 *seq.*, as alleged herein.

12 ~~75.77.~~ Defendants’ conduct was, and continues to be fraudulent, because directly or
13 through their agents and employees, Defendants made false representations to Representative
14 PlaintiffPlaintiffs and members of the California Class that were likely to deceive Representative
15 PlaintiffPlaintiffs and members of the California Class. These false representations misled
16 Representative PlaintiffPlaintiffs and members of the California Class into purchasing Listerine
17 Total Care.

18 ~~76.78.~~ Defendants’ false representations include, but are not limited to, the statements
19 that the mouthwash would provide “total [oral] care,” and “fight[] unsightly plaque above the
20 gum line,” as alleged herein.

21 ~~77.79.~~ Representative PlaintiffPlaintiffs and members of the California Class reasonably
22 and justifiably relied on Defendants’ misrepresentations when purchasing Listerine Total Care,
23 were unaware of the existence of facts that Defendants suppressed and failed to disclose, and,
24 had the facts been known, would not have purchased the mouthwash and/or would not have
25 purchased it at the price at which it was offered.

26 ~~78.80.~~ Specifically, Representative PlaintiffPlaintiffs and members of the California
27 Class viewed Defendants’ product packaging, product commercials, and product specifications
28 and, in reliance on those representations, purchased the mouthwash for total oral care.

1 ~~79.~~81. As a direct and proximate result of Defendants’ wrongful conduct, Representative
2 PlaintiffPlaintiffs and members of the California Class have suffered and continue to suffer
3 economic losses and other general and specific damages, including, but not necessarily limited
4 to, the monies paid to Defendants for a product which does not deliver the purported total oral
5 care.

6 ~~80.~~82. Defendants’ conduct in making the representations described herein, and failing
7 to disclose or remedy the problem despite their knowledge of the product limitations, constitutes
8 a knowing failure to adopt policies in accordance with and/or adhere to applicable laws, as set
9 forth herein, all of which are binding upon and burdensome to their competitors, engendering an
10 unfair competitive advantage for Defendants, thereby constituting an unfair business practice
11 under California Business & Professions Code §§ 17200-17208.

12 ~~81.~~83. Defendants have clearly established a policy of accepting a certain amount of
13 collateral damage, as represented by the damages to the Representative PlaintiffPlaintiffs and to
14 California Class Members herein alleged, as incidental to their business operations, rather than
15 accept the alternative costs of full compliance with fair, lawful, and honest business practices,
16 ordinarily borne by their responsible competitors and as set forth in legislation and the judicial
17 record.

18 ~~82.~~84. In addition, Defendants’ conduct was, and continues to be, unfair, in that their
19 injury to millions of purchasers of the mouthwash is substantial, and is not outweighed by any
20 countervailing benefits to consumers or to competitors.

21 ///

22 ~~83.~~85. Moreover, Representative PlaintiffPlaintiffs and members of the- California Class
23 could not have reasonably avoided such injury given that Defendants failed to disclose the
24 product’s effectiveness limitations at any point, and Representative PlaintiffPlaintiffs and
25 members of the California Class purchased the mouthwash in reliance on the representations
26 made by Defendants, as alleged herein.

27 86. Representative PlaintiffPlaintiffs and the members of the California Class have
28 been directly and proximately injured by Defendants’ conduct in ways including, but not

1 necessarily limited to, monies paid to Defendants for a product which does not deliver the
2 purported total oral care.

3 ~~84.~~

4 **SEVENTH CAUSE OF ACTION**
5 **Breach of Song-Beverly Consumer Warranty Act**
6 **(California Civil Code § 1790, et seq.)**
7 **(for the California Class only)**

8 ~~85-87.~~ Representative ~~Plaintiff incorporates~~ Plaintiffs incorporate in this cause of action
9 each and every allegation of the preceding paragraphs, with the same force and effect as though
10 fully set forth herein.

11 ~~86-88.~~ Listerine Total Care is a “consumer good” within the meaning of California Civil
12 Code § 1791(a).

13 ~~##~~

14 ~~87-89.~~ Representative ~~Plaintiff~~ Plaintiffs and each member of the California Class
15 purchased Defendants’ Listerine Total Care in California.

16 ~~88-90.~~ Defendants’ express warranty and implied warranty of merchantability arose out
17 of and/or were related to the sale of the mouthwash.

18 ~~89-91.~~ Defendants warranted to consumers, among other things, that Listerine Total
19 Care, would constitute “total” oral care and would “fight[] unsightly plaque above the gum line.”

20 ~~90-92.~~ Defendants’ sale of the mouthwash is also subject to an implied warranty of
21 merchantability (i.e. that the mouthwash passes without objection in the trade under the
22 descriptions and advertisements provided by Defendants, is fit for the ordinary purpose for which
23 such goods are used, and conforms to the promises and affirmations of fact made on the
24 container and labels).

25 ~~91-93.~~ Ordinary use of Listerine Total Care is for general oral healthcare namely,
26 fighting plaque in addition to preventing cavities, -strengthening teeth, killing bad breath germs,
27 freshening breath, and restoring tooth enamel.

28 ~~92-94.~~ When Defendants placed the mouthwash into the stream of commerce, they knew,
reasonably should have known, and/or were obligated to understand that the intended and

1 ordinary purpose of the mouthwash was to function as a total oral care product in providing
2 consumers with plaque-fighting properties.

3 ~~93.95.~~ The mouthwash cannot perform its ordinary and represented purpose because it
4 contains a sole active ingredient not proven effective for providing the oral healthcare benefits
5 sought by consumers.

6 ~~94.96.~~ As set forth herein, Defendants failed to comply with their obligations under their
7 express warranties and under their implied warranty of merchantability in that they did not
8 provide a product that functions as warranted, that serves its ordinary or intended purpose, or
9 functions in conformance with specifications as advertised.

10 ~~95.97.~~ Representative ~~Plaintiff~~Plaintiffs and the California Class Members have suffered
11 and will continue to suffer damages as a direct and proximate result of Defendants' failure to
12 comply with their warranty obligations, and are entitled to judgment pursuant to California Civil
13 Code §§ 1791.1(d) and 1794, as well as attorneys' fees, costs and interest.

14
15 **EIGHTH CAUSE OF ACTION**
16 **Breach of Express Warranty**
(for the California and Nationwide Classes)

17 ~~96.98.~~ Representative ~~Plaintiff incorporates~~Plaintiffs incorporate in this cause of action
18 each and every allegation of the preceding paragraphs, with the same force and effect as though
19 fully set forth herein.

20 ~~97.99.~~ Defendants, as the designers, manufacturers, distributors and sellers of the
21 mouthwash, expressly warranted that the mouthwash being sold to the general public would
22 effectively provide total oral care and assist consumers in the fight against disease-inducing oral
23 ailments, as advertised.

24 ~~98.100.~~ Defendants warranted to consumers that Listerine Total Care would
25 constitute "total" oral care and would "fight[] unsightly plaque above the gum line."

26 ~~99.101.~~ In addition, Defendants' promotional statements, representations and
27 demonstrations regarding the mouthwash became part of the basis of the bargain between
28 consumers and Defendants, creating express warranties that the product purchased by the

1 Representative ~~Plaintiff~~Plaintiffs and members of each of the Classes would conform to
2 Defendants' representations.

3 ~~100.102.~~ Defendants' breached their express warranties because Listerine Total
4 Care does not conform to the promises or affirmations made by Defendants to the Representative
5 ~~Plaintiff~~Plaintiffs and members of each of the Classes.

6 ~~101.103.~~ Representative ~~Plaintiff~~Plaintiffs, on ~~her~~their own behalf and on behalf of
7 members of each of the Classes, ~~has~~have provided and/or will provide reasonable notice to
8 Defendants of the breach of warranty.

9 ~~102.104.~~ Representative ~~Plaintiff~~Plaintiffs and the members of each of the Classes
10 have been directly and proximately injured by Defendants' conduct in ways including, but not
11 limited to, the purchase of a product which does not deliver the total oral care it purports to
12 deliver.

13 ##

14 ~~103.105.~~ As a direct and proximate result of Defendants' unlawful conduct, as set
15 forth herein, Representative ~~Plaintiff~~Plaintiffs and members of each of the Classes are entitled to
16 monetary damages in the amount of the difference in value between a mouthwash capable of
17 providing total oral healthcare benefits and the value paid to Defendants for a product which
18 Defendants represented would provide benefits it is incapable of providing.

19 ///

20 ///

21 ///

22 ///

23 ///

24 **NINTH CAUSE OF ACTION**
25 **Breach of Implied Warranty**
26 ***(for the California and Nationwide Classes)***

27 ~~104.106.~~ Representative ~~Plaintiff incorporates~~Plaintiffs incorporate in this cause of
28 action each and every allegation of the preceding paragraphs, with the same force and effect as
though fully set forth herein.

(for the California and Nationwide Classes)

1
2
3 ~~111.113.~~ Representative ~~Plaintiff incorporates~~ Plaintiffs incorporate in this cause of
4 action each and every allegation of the preceding paragraphs, with the same force and effect as
5 though fully set forth herein.

6 ~~112.114.~~ As alleged herein, Defendants intentionally and/or recklessly made false
7 representations to Representative ~~Plaintiff~~ Plaintiffs and members of each of the Classes to induce
8 them to purchase Listerine Total Care. Representative ~~Plaintiff~~ Plaintiffs and members of each of
9 the Classes reasonably relied on these false representations when purchasing Listerine Total
10 Care.

11 ~~113.115.~~ Representative ~~Plaintiff~~ Plaintiffs and members of each of the Classes did
12 not receive all of the benefits promised by Defendants, and paid more to Defendants for the
13 mouthwash than they otherwise would and/or should have paid.

14 ~~114.116.~~ It would be inequitable and unconscionable for Defendants to retain the
15 profit, benefit and/or other compensation they obtained from their deceptive, misleading, and
16 unlawful conduct alleged herein.

17 ~~115.117.~~ Representative ~~Plaintiff~~ Plaintiffs and members of each of the Classes are
18 entitled to restitution of, disgorgement of, and/or the imposition of a constructive trust upon, all
19 profits, benefits, and other compensation obtained by Defendants from their deceptive,
20 misleading, and unlawful conduct as alleged herein.

21 **RELIEF SOUGHT**

22 **WHEREFORE, the Representative ~~Plaintiff~~ Plaintiffs, on behalf of ~~herself~~ themselves**
23 **and the proposed Plaintiff Classes, ~~prays~~ pray for judgment and the following specific relief**
24 **against Defendants, as follows:**

25 1. That the Court declare, adjudge and decree that this action is a proper class action
26 and certify each of the proposed classes and/or any other appropriate subclasses under F.R.C.P.
27 Rule 23(b)(2) and/or (b)(3);

28 **For the California Class Only:**

1 2. That Defendants are found to have violated California Business & Professions
2 Code § 17200, *et seq.*, and § 17500, *et seq.*, California Civil Code §1750, *et seq.*, and § 1790, *et*
3 *seq.*, as to the Representative PlaintiffPlaintiffs and California Class members;

4 3. That the Court order Defendants to pay restitution to the Representative
5 PlaintiffPlaintiffs and the California Class Members due to Defendants' unlawful activities,
6 pursuant to California Business and Professions Code §§ 17200-17208;

7 4. That the Court further enjoin Defendants, ordering them to cease and desist from
8 unlawful activities in violation of California Business and Professions Code §§ 17200, *et seq.*;

9 5. For reasonable attorneys' fees, pursuant to California Code of Civil Procedure §
10 1021.5 and/or California Civil Code §§ 1780(d) and/or 1794(d);

11 **For the California and National Classes:**

12 6. That Defendants are found to have made fraudulent and/or negligent
13 misrepresentations to Representative PlaintiffPlaintiffs and all Class members;

14 7. An award to Representative PlaintiffPlaintiffs and members of both Classes of
15 damages in an amount to be proven at trial;

16 8. For Punitive Damages in an amount appropriate to punish Defendants and to deter
17 others from engaging in similar misconduct in the future;

18 9. For all other Orders, findings and determinations identified and sought in this
19 Complaint;

20 ##

21 10. For interest on the amount of any and all economic losses, at the prevailing legal
22 rate; -and

23 11. For costs of suit and any and all other such relief as the Court deems just and
24 proper.

25 ///

26 **JURY DEMAND**

27 Representative PlaintiffPlaintiffs and members of each of the Plaintiff Classes hereby
28 demand trial by jury on all issues triable of right by jury.

