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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CINDY BECHTEL, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

WALMART INC.,

Defendant.

Case No.:

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

1
2 Plaintiff, Cindy Bechtel (“**Plaintiff**”), on behalf of herself and all others
3 similarly situated, brings this class action against Defendant, Walmart Inc.,
4 (“**Defendant**” or “**Walmart**”), and alleges on personal knowledge, investigation
5 of her counsel, and on information and belief as follows:
6

7
8 **INTRODUCTION**

9 1. Defendant, Walmart, offers a variety of over-the-counter products
10 including transdermal patches, pain relief products, and skin care products.
11 Defendant’s over-the-counter lidocaine products include a range of external pain-
12 relieving patches and creams for pain associated with or caused by ailments such
13 as arthritis, backache, muscle strains, sprains, and bruises.
14

15
16 2. Particularly, Defendant sells, markets, and distributes “Equate”
17 Maximum Strength Lidocaine Pain Relieving Patch (the “**Patch**”) and “Equate”
18 Maximum Strength Pain Relief Cream (the “**Cream**”) (collectively, the
19 “**Products**”).
20

21 3. Nearly every individual suffers muscle aches and pains and seeks
22 relief for this common problem.
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1 4. When consumers purchase pain-relieving products the strength of the
2 dose is an important purchasing consideration. In fact, consumers willingly pay a
3 premium for pain-reliving products that have strong doses.¹
4

5 5. Defendant takes advantage of this consumer preference for strong
6 doses and/or maximum strength by prominently representing where the one place
7 that every consumer looks when purchasing a product – the packaging and labels
8 themselves. In fact, Defendant touts its representation and claim right on the front
9 of its Products’ labels that the Products are “Maximum Strength” lidocaine
10 products.
11

12 6. Consumers including Plaintiff lack the scientific knowledge
13 necessary to determine whether the Products are “Maximum Strength” lidocaine
14 products or to ascertain the true nature of the quality or strength of the Products.
15 As such, reasonable consumers must and do rely on manufacturers, like Defendant,
16 to be transparent and properly disclose on the packaging all material information
17 regarding the Products and their dose and strength.
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22
23 ¹ Defendant’s competitors sell 4% lidocaine pain relieving patches for approximately \$0.86 per
24 patch while Defendant sells the ‘maximum strength’ 4% lidocaine patches sell for \$1.16 per
25 patch. *See* <https://www.walmart.com/ip/Equate-Maximum-Strength-Lidocaine-Pain-Relieving-Patches-6-Count/121592299> (for Defendant’s ‘maximum strength’ version) and
26 <https://www.walgreens.com/store/c/walgreens-lidocaine-patches/ID=300394242-product> (for the
27 competitor pricing version). Plaintiff only uses the pricing in the previous paragraph as an
28 example to plausibly plead that Defendant does indeed charge a large premium for its Product.
The specific premium on a granular level will be determined later in the case by an expert.

1 7. However, Defendant makes this “Maximum Strength” representation
2 in a knowingly false and deceptive manner because Defendant’s Products contains
3 only 4% lidocaine; with regard to “Patch” products, similar prescription patches
4 manufactured by at least one of Defendant’s competitors contains 5% lidocaine;
5 with regard to “cream” products, similar creams manufactured by at least one of
6 Defendant’s competitors contain 5% lidocaine and are also available over-the-
7 counter (“OTC”) as Defendant’s Products are.²
8
9

10 8. Moreover, Defendant has not only represented that its Products are
11 “Maximum Strength” lidocaine products, but it has also omitted from the Products’
12 labeling the fact that there are other prescription products available in the market
13 that contain a higher percentage of lidocaine (i.e. 5%).
14

15 9. Defendant sells and distributes the Products employing a marketing and
16 advertising campaign centered around claims that appeal to consumers who
17 Defendant knows seek out strong and/or maximum doses of lidocaine to relieve
18 their back pain and aches by touting their Products as “Maximum Strength”. As
19 such, reasonable consumers, like Plaintiff, reasonably believe that they are
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24 ² Regarding lidocaine cream products, at least one of Defendant’s competitors offers a
25 prescription lidocaine cream with a 5% concentration. *See*
26 [https://dailymed.nlm.nih.gov/dailymed/fda/fdaDrugXsl.cfm?setid=88ca9cba-0c4a-482f-b502-
ceefdb1bfbcd&type=display](https://dailymed.nlm.nih.gov/dailymed/fda/fdaDrugXsl.cfm?setid=88ca9cba-0c4a-482f-b502-
ceefdb1bfbcd&type=display), *see also*
27 [https://www.drugsdepot.com/store.php/drugsdepot/pd9612367/lidocaine-5-ointment-3544-gm-
by-fougera-amp-co](https://www.drugsdepot.com/store.php/drugsdepot/pd9612367/lidocaine-5-ointment-3544-gm-
by-fougera-amp-co) (Last Accessed January 21, 2022).

1 purchasing a Lidocaine product which is at maximum strength, i.e. the highest
2 dosage they can buy.

3 10. Defendant’s multiple and prominent systematic mislabeling of the Products
4 form a pattern of unlawful and unfair business practices that deceives and harms
5 consumers and the public.
6

7 11. Accordingly, Plaintiff brings this suit on behalf of herself and similarly
8 situated consumers who purchased Defendant’s Products. Plaintiff and Class
9 Members were damaged because they would not have purchased (or would not
10 have paid a premium) for Defendant’s Products had they known the true facts
11 regarding the Products’ “Maximum Strength” representations and omissions.
12

13 12. For all the reasons set forth herein, including but not limited to
14 Defendant’s misrepresentations and omissions regarding its “Maximum Strength”
15 claims, Plaintiff seeks relief in this action individually, and as a class action on
16 behalf of similarly situated purchasers of Defendant’s Products, for: (i) violations
17 of the state consumer fraud statutes invoked below, (ii) violation of California’s
18 False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.* (“FAL”); (iii)
19 violation of California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§
20 17200 *et seq.* (“UCL”); (iv) violation of California’s Consumers Legal Remedies
21 Act, Cal. Civ. Code §§ 1750 *et seq.* (“CLRA”); (v) common law fraud; and (vi)
22 unjust enrichment.
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THE PARTIES

1
2 13. Plaintiff Cindy Bechtel is a resident and citizen of California residing
3 in Dublin, California. She purchased Equate Maximum Strength Lidocaine Pain
4 Relieving Patches and Equate Max Strength Lidocaine Pain Relief Cream on
5 numerous occasions during all applicable statute of limitations periods at Walmart
6 brick and mortar retail locations in California, including in Pleasanton, California.
7
8

9 14. Defendant Walmart is an Arkansas corporation, with its principal place
10 of business and headquarters located at 702 S.W. 8th St. Bentonville, AK 72716.
11 Defendant is a resident and citizen of Arkansas. Defendant Walmart markets,
12 distributes, and sells Equate Maximum Strength Lidocaine Pain Relieving Patch and
13 Equate Maximum Strength Pain Relief Cream. Defendant Walmart markets,
14 distributes and sells the aforementioned Products to consumers throughout the
15 United States through their brick-and-mortar locations and online through
16 Defendant’s website.
17
18

19 15. Plaintiff reserves the right to amend this Complaint to add different or
20 additional defendants, including without limitation any officer, director, employee,
21 supplier, or distributor of Defendant who has knowingly and willfully aided,
22 abetted, or conspired in the false and deceptive conduct alleged herein.
23
24

JURISDICTION AND VENUE

25
26 16. This Court has personal jurisdiction over Defendant in this matter.
27
28

1 The acts and omissions giving rise to this action occurred in the state of California.
2 Defendant has been afforded due process because it has, at all times relevant to this
3 matter, individually or through its agents, subsidiaries, officers and/or
4 representatives, operated, conducted, engaged in and carried on a business venture
5 in this state and/or maintained an office or agency in this state, and/or marketed,
6 advertised, distributed and/or sold products, committed a statutory violation within
7 this state related to the allegations made herein, and caused injuries to Plaintiff and
8 putative Class Members, which arose out of the acts and omissions that occurred in
9 the state of California, during the relevant time period, at which time Defendant
10 were engaged in business activities in the state of California.
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13

14 17. This Court has subject matter jurisdiction over this matter pursuant to
15 28 U.S.C. § 1332 of the Class Action Fairness Act of 2005 because: (i) there are 100
16 or more putative Class Members, (ii) the aggregate amount in controversy exceeds
17 \$5,000,000, exclusive of interest and costs, and (iii) there is minimal diversity
18 because at least one Plaintiff and Defendant are citizens of different states. This
19 Court has supplemental jurisdiction over Plaintiff's state law claims pursuant to 28
20 U.S.C. § 1367.
21
22

23 18. Pursuant to 28 U.S.C. § 1391(a), venue is proper because a substantial
24 part of the events giving rise to the claims asserted occurred in this District. Venue
25 is also proper pursuant to 28 U.S.C. § 1391(c) because Defendant conducts
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1 substantial business in this District, has sufficient minimum contacts with this
2 District, and otherwise purposely avails itself of the markets in this District, through
3 the promotion, sale, and marketing of the Products in this District.
4

5 **INTRADISTRICT ASSIGNMENT**

6 19. Pursuant to Civil Local Rule 3-2(c-d), a substantial part of the events
7 giving rise to the claims herein arose in Alameda County, California and this action
8 should be assigned to the Oakland Division.
9

10 **FACTS COMMON TO ALL CLASS MEMBERS**

11
12 20. Lidocaine is the active ingredient in Defendant’s Products, and it
13 forms the basis for Defendant’s “Maximum Strength” misrepresentations on the
14 Products’ front labeling, omissions, and overall advertising and marketing
15 campaign.
16

17 21. “Lidocaine belongs to the family of medicines called local
18 anesthetics. This medicine prevents pain by blocking the signals at the nerve
19 endings in the skin.”³
20

21 22. Lidocaine is commonly used in products such as Defendant’s
22 Products to help with body soreness and pain.
23
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26 ³[https://www.mayoclinic.org/drugs-supplements/lidocaine-topical-application-
27 route/description/drg-20072776](https://www.mayoclinic.org/drugs-supplements/lidocaine-topical-application-route/description/drg-20072776) (last accessed January 24, 2022)

1 **A. Defendant's Products Prominently Feature the "Maximum Strength"**
2 **Claim**

3 23. At all relevant times, Defendant has marketed its Products in a
4 consistent and uniform manner nationwide. Defendant sells the Products in all 50
5 states in their brick-and-mortar stores and through their online store.

6
7 24. Aware of the consumer preference for strong and/or maximum doses
8 of lidocaine in pain-relieving products to alleviate their pain, aches, and soreness,
9 Defendant specifically advertises its Products as "Maximum Strength" lidocaine
10 products.

11
12 25. One attribute that consumers specifically value when purchasing any
13 pain-relieving product is the strength of the dose.⁴

14
15 26. Aware of this consumer preference, Defendant specifically advertises
16 its Products as "MAXIMUM STRENGTH" Lidocaine patches. Below is an image
17 of the Equate Maximum Strength Lidocaine Pain Relieving Patch front label⁵:
18

19
20 ⁴ Strength of dose is so important that nearly every manufacturer of common pain-relieving
21 products emphasize it. See [https://www.tylenol.com/products/tylenol-extra-strength-](https://www.tylenol.com/products/tylenol-extra-strength-caplets?utm_source=google&utm_medium=cpc&utm_campaign=GO-USA-ENG-PS-Tylenol-BC-EX-RN-Brand-Core+EST&utm_content=Core&utm_term=extra+tylenol&gclid=Cj0KCQjwi7yCBhDJARIsAMWFSCTqYK8J3go53nS0bag4R7EVHQZ7ogd_3MoAMUKWoVzH4FMj8sQj9kaAtbXEALw_wcB&gclidsrc=aw.ds&)
22 [caplets?utm_source=google&utm_medium=cpc&utm_campaign=GO-USA-ENG-PS-Tylenol-](https://www.tylenol.com/products/tylenol-extra-strength-caplets?utm_source=google&utm_medium=cpc&utm_campaign=GO-USA-ENG-PS-Tylenol-BC-EX-RN-Brand-Core+EST&utm_content=Core&utm_term=extra+tylenol&gclid=Cj0KCQjwi7yCBhDJARIsAMWFSCTqYK8J3go53nS0bag4R7EVHQZ7ogd_3MoAMUKWoVzH4FMj8sQj9kaAtbXEALw_wcB&gclidsrc=aw.ds&)
23 [BC-EX-RN-Brand-](https://www.tylenol.com/products/tylenol-extra-strength-caplets?utm_source=google&utm_medium=cpc&utm_campaign=GO-USA-ENG-PS-Tylenol-BC-EX-RN-Brand-Core+EST&utm_content=Core&utm_term=extra+tylenol&gclid=Cj0KCQjwi7yCBhDJARIsAMWFSCTqYK8J3go53nS0bag4R7EVHQZ7ogd_3MoAMUKWoVzH4FMj8sQj9kaAtbXEALw_wcB&gclidsrc=aw.ds&)
24 [Core+EST&utm_content=Core&utm_term=extra+tylenol&gclid=Cj0KCQjwi7yCBhDJARIsAM](https://www.tylenol.com/products/tylenol-extra-strength-caplets?utm_source=google&utm_medium=cpc&utm_campaign=GO-USA-ENG-PS-Tylenol-BC-EX-RN-Brand-Core+EST&utm_content=Core&utm_term=extra+tylenol&gclid=Cj0KCQjwi7yCBhDJARIsAMWFSCTqYK8J3go53nS0bag4R7EVHQZ7ogd_3MoAMUKWoVzH4FMj8sQj9kaAtbXEALw_wcB&gclidsrc=aw.ds&)
25 [WFSCTqYK8J3go53nS0bag4R7EVHQZ7ogd_3MoAMUKWoVzH4FMj8sQj9kaAtbXEALw_](https://www.tylenol.com/products/tylenol-extra-strength-caplets?utm_source=google&utm_medium=cpc&utm_campaign=GO-USA-ENG-PS-Tylenol-BC-EX-RN-Brand-Core+EST&utm_content=Core&utm_term=extra+tylenol&gclid=Cj0KCQjwi7yCBhDJARIsAMWFSCTqYK8J3go53nS0bag4R7EVHQZ7ogd_3MoAMUKWoVzH4FMj8sQj9kaAtbXEALw_wcB&gclidsrc=aw.ds&)
26 [wcB&gclidsrc=aw.ds&? \(Tylenol extra strength\); see also](https://www.tylenol.com/products/tylenol-extra-strength-caplets?utm_source=google&utm_medium=cpc&utm_campaign=GO-USA-ENG-PS-Tylenol-BC-EX-RN-Brand-Core+EST&utm_content=Core&utm_term=extra+tylenol&gclid=Cj0KCQjwi7yCBhDJARIsAMWFSCTqYK8J3go53nS0bag4R7EVHQZ7ogd_3MoAMUKWoVzH4FMj8sQj9kaAtbXEALw_wcB&gclidsrc=aw.ds&)
27 <https://www.bayeraspirin.com/products/bayer-extra-strength-aspirin> (extra strength aspirin).

28 ⁵ The labels shown in the complaint represents the labeling present, upon information and belief,
of each product at the time of filing and that Plaintiff and the proposed classes read and relied on.
[https://www.walmart.com/ip/Equate-Maximum-Strength-Lidocaine-Pain-Relieving-Patches-6-](https://www.walmart.com/ip/Equate-Maximum-Strength-Lidocaine-Pain-Relieving-Patches-6-Count/121592299)
Count/121592299 (Equate Maximum Strength Lidocaine Pain Relieving Patch); (last accessed
January 24, 2022).



27. Below is an image of the Equate Maximum Strength Pain Relief Cream⁶:



⁶ The labels shown in the complaint represents the labeling present, upon information and belief, of each product at the time of filing and that Plaintiff and the proposed classes read and relied on. <https://www.walmart.com/ip/Equate-Max-Strength-Lidocaine-Pain-Relief-Cream-2-5-fl-oz/253155134?athbdg=L1600> (Equate Maximum Strength Pain Relief Cream); (last accessed January 24, 2022).

1 28. As shown above, the “MAXIMUM STRENGTH” representation is
2 located on the very center of the front label of the Products in bold lettering
3 surrounded by a bubble that contrasts with the background of the packaging, which
4 instantly catches the eye of all reasonable consumers, including Plaintiff and Class
5 Members.
6

7 29. Defendant, however, is well aware that its Products are not a
8 “maximum strength” or maximum strength lidocaine products and deceives
9 trusting reasonable consumers like Plaintiff to believe that they are in fact
10 purchasing such Products while omitting from the Products’ labeling the fact that
11 there are other prescription products available in the market that contain a higher
12 percentage of lidocaine (i.e. 5%).
13

14 30. Indeed, Defendant’s over the counter Products contain only 4%
15 lidocaine while competing prescription lidocaine products contain 5% lidocaine.⁷
16

17 31. So, consumers can obtain a stronger dose comparable lidocaine
18 product that is available in the market.
19

20 32. As such, Defendant’s Products are not “Maximum Strength”
21 lidocaine products as advertised.
22

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25 ⁷ “This article discusses lidocaine 5% patch products available by your doctor’s prescription.
26 While there are similar over-the-counter (OTC) varieties available, those contain a lower
27 percentage of lidocaine.” See
[https://www.spineuniverse.com/treatments/medication/prescription-lidoderm-patches-may-
28 help-relieve-back-pain](https://www.spineuniverse.com/treatments/medication/prescription-lidoderm-patches-may-help-relieve-back-pain) (last accessed January 24, 2022)

1 33. But rather than accurately advertise its Products through its labeling,
2 Defendant preys on consumers' desire for maximum pain relief to drive substantial
3 profits.

4
5 34. All reasonable consumers, including Plaintiff, read and relied on
6 Walmart's "Maximum Strength" representations when purchasing the Products.

7
8 35. Defendant's "Maximum Strength" representation was material to
9 Plaintiff's and Class Members' decision to purchase the Product.

10 36. Defendant's marketing efforts are made in order to – and do in fact –
11 induce consumers to purchase the Products at a premium because consumers
12 believe they are getting lidocaine products with "Maximum Strength."
13

14 37. As shown throughout this Complaint, however, Defendant's Products
15 are *not* "Maximum Strength" lidocaine products. Defendant's representations and
16 omissions are false and misleading.
17

18 38. Defendant intended for Plaintiff and Class Members to be deceived or
19 misled by its misrepresentations and omissions.
20

21 39. Defendant's deceptive and misleading practices proximately caused
22 harm to Plaintiff and the Class.

23 40. Plaintiff and Class Members would not have purchased the Products
24 or would have not paid as much for the Products, had they known the truth about
25 the mislabeled and falsely advertised Products.
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PLAINTIFF BECHTEL'S FACTUAL ALLEGATIONS

1
2 41. Plaintiff, Cindy Bechtel, purchased the Products in the past year from
3 a Walmart brick and mortar store in Pleasanton, California for approximately \$7.00
4 for the Patch and \$5.00 for the Cream. Before purchasing the Products, Plaintiff
5 Bechtel reviewed information about the Products on the Products' labels and the
6 fact that the Products were being sold for personal use, and not resale. At the time
7 of purchasing her Products, Plaintiff Bechtel also reviewed the accompanying
8 disclosures, warranties, and marketing materials, and understood them as
9 representations and warranties by Walmart, specifically the Patch and Cream
10 Representations. Plaintiff Bechtel relied on these representations and warranties in
11 deciding to purchase Walmart's Products. Accordingly, these representations and
12 warranties were part of the basis of the bargain, in that she would not have
13 purchased the Products had she known these representations were not true. Here,
14 Plaintiff did not receive the benefit of her bargain because Walmart's Lidocaine
15 Patch Representations are false.
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21 42. As a result of Walmart's concealment, Lidocaine Patch
22 Representations and omissions, Plaintiff Bechtel purchased the Products. Had
23 Plaintiff known the true nature of the Products, she would not have purchased the
24 Products.
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FED. R. CIV. P. 9(b) ALLEGATIONS

1
2 43. Rule 9(b) of the Federal Rules of Civil Procedure provides that “[i]n
3 alleging fraud or mistake, a party must state with particularity the circumstances
4 constituting fraud or mistake.” To the extent necessary, as detailed in the
5 paragraphs above and below, Plaintiff has satisfied the requirements of Rule 9(b)
6 by establishing the following elements with sufficient particularity.
7

8
9 44. **WHO:** Defendant, Walmart Inc., made material misrepresentations
10 and/or omissions of fact in its labeling and marketing of the Products by
11 representing that the Products are “Maximum Strength” lidocaine products.
12

13 45. **WHAT:** Defendant’s conduct here was and continues to be fraudulent
14 because it has the effect of deceiving consumers into believing that the Products
15 are “Maximum Strength” lidocaine products. Defendant omitted from Plaintiff and
16 Class Members that the Products are not “Maximum Strength” lidocaine products
17 because other lidocaine products exist in the market that contain a higher amount
18 (i.e. 5%) of lidocaine. Defendant knew or should have known this information is
19 material to all reasonable consumers and impacts consumers’ purchasing
20 decisions. Yet, Defendant has and continues to represent that the Products are
21 “Maximum Strength” lidocaine products when they are not, and has omitted from
22 the Products’ labeling the fact that there are other prescription products available
23 in the market that contain a higher percentage of lidocaine (i.e. 5%).
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1 46. **WHEN:** Defendant made material misrepresentations and/or
2 omissions detailed herein, including that the Products are “Maximum Strength”
3 lidocaine products, continuously throughout the applicable Class period(s).
4

5 47. **WHERE:** Defendant’s material misrepresentations and omissions,
6 that the Products are “Maximum Strength” lidocaine products, were located on the
7 very center of the front label of the Products in bold lettering surrounded by a
8 bubble that contrasts with the background of the packaging, which instantly catches
9 the eye of all reasonable consumers, including Plaintiff, at the point of sale in every
10 transaction. The Products are sold in Defendant’s brick and mortar stores and
11 online store nationwide.
12

13 48. **HOW:** Defendant made written misrepresentations right on the front
14 label of the Products that the Products were “Maximum Strength” lidocaine
15 products even though other stronger lidocaine products are available in the market.
16 As such, Defendant’s “Maximum Strength” representations are false and
17 misleading. Moreover, Defendant omitted from the Products’ labeling the fact that
18 there are other prescription products available in the market that contain a higher
19 percentage of lidocaine (i.e. 5%). And as discussed in detail throughout this
20 Complaint, Plaintiff and Class Members read and relied on Defendant’s
21 “Maximum Strength” representations and omissions before purchasing the
22 Products.
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1 employees, of any Defendant or any entity in which a Defendant has a controlling
2 interest, (d) any legal counsel or employee of legal counsel for any Defendant, and
3 (e) the presiding Judge in this lawsuit, as well as the Judge's staff and their
4 immediate family members.
5

6 52. Plaintiff reserves the right to amend the definition of the Classes if
7 discovery or further investigation reveals that the Classes should be expanded or
8 otherwise modified.
9

10 53. **Numerosity – Federal Rule of Civil Procedure 23(a)(1).** Class
11 Members are so numerous and geographically dispersed that joinder of all Class
12 Members is impracticable. While the exact number of Class Members remains
13 unknown at this time, upon information and belief, there are thousands, if not
14 hundreds of thousands, of putative Class Members. Moreover, the number of
15 members of the Classes may be ascertained from Defendant's books and records.
16 Class Members may be notified of the pendency of this action by mail and/or
17 electronic mail, which can be supplemented if deemed necessary or appropriate by
18 the Court with published notice.
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22 54. **Predominance of Common Questions of Law and Fact – Federal**
23 **Rule of Civil Procedure 23(a)(2) and 23(b)(3).** Common questions of law and
24 fact exist as to all Class Members and predominate over any questions affecting
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1 only individual Class Members. These common legal and factual questions
2 include, but are limited to, the following:

- 3 a. Whether the Products contain the defect alleged herein;
- 4 b. Whether Defendant made the “MAXIMUM STRENGTH”
5 Representations;
- 6 c. Whether Defendant had actual or imputed knowledge of the defect
7 but did not disclose it to Plaintiff and the Classes;
- 8 d. Whether Defendant promoted the Products with false and misleading
9 statements of fact and material omissions;
- 10 e. Whether Defendant’s “MAXIMUM STRENGTH” Representations
11 are deceptive, unfair or misleading;
- 12 f. Whether Defendant’s actions and/or omissions violate California law;
- 13 g. Whether Defendant’s conduct violates public policy;
- 14 h. Whether Defendant’s acts, omissions or misrepresentations of
15 material facts constitute fraud;
- 16 i. Whether Plaintiff and putative members of the Classes have suffered
17 an ascertainable loss of monies or property or other value as a result
18 of Defendant’s acts, omissions or misrepresentations of material facts;
- 19 j. Whether Defendant was unjustly enriched at the expense of Plaintiff
20 and members of the putative Classes in connection with the Products;
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1 k. Whether Plaintiff and members of the putative Classes are entitled to
2 monetary damages and, if so, the nature of such relief; and

3 l. Whether Plaintiff and members of the putative Classes are entitled to
4 equitable, declaratory or injunctive relief and, if so, the nature of such
5 relief.
6

7 55. Pursuant to Rule 23(b)(2), Defendant has acted or refused to act on
8 grounds generally applicable to the putative Classes, thereby making final
9 injunctive or corresponding declaratory relief appropriate with respect to the
10 putative Classes as a whole. In particular, Defendant has, marketed, advertised,
11 distributed and sold Products containing the Products’ “MAXIMUM
12 STRENGTH” Representations, which are false and misleading.
13

14 56. **Typicality – Federal Rule of Civil Procedure 23(a)(3).** Plaintiff’s
15 claims are typical of those of the absent Class Members in that Plaintiff and the
16 Class Members each purchased and used the Products and each sustained damages
17 arising from Defendant’s wrongful conduct, as alleged more fully herein. Plaintiff
18 shares the aforementioned facts and legal claims or questions with putative
19 members of the Classes, and Plaintiff and all members of the putative Classes have
20 been similarly affected by Defendant’s common course of conduct alleged herein.
21 Plaintiff and all members of the putative Classes sustained monetary and economic
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1 injuries including, but not limited to, ascertainable loss arising out of Defendant's
2 false and deceptive Lidocaine Patch Representations, as alleged herein.

3 **57. Adequacy – Federal Rule of Civil Procedure 23(a)(4).** Plaintiff will
4 fairly and adequately represent and protect the interests of the members of the
5 putative Classes. Plaintiff has retained counsel with substantial experience in
6 handling complex class action litigation, including complex questions that arise in
7 this type of consumer protection litigation. Further, Plaintiff and her counsel are
8 committed to the vigorous prosecution of this action. Plaintiff does not have any
9 conflicts of interest or interests adverse to those of putative Classes.
10

11
12 **58. Insufficiency of Separate Actions – Federal Rule of Civil**
13 **Procedure 23(b)(1).** Absent a class action, Plaintiff and members of the Classes will
14 continue to suffer the harm described herein, for which they would have no remedy.
15 Even if separate actions could be brought by individual consumers, the resulting
16 multiplicity of lawsuits would cause undue burden and expense for both the Court
17 and the litigants, as well as create a risk of inconsistent rulings and adjudications that
18 might be dispositive of the interests of similarly situated consumers, substantially
19 impeding their ability to protect their interests, while establishing incompatible
20 standards of conduct for Defendant. Accordingly, the proposed Classes satisfy the
21 requirements of Fed. R. Civ. P. 23(b)(1).
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1 **59. Declaratory and Injunctive Relief – Federal Rule of Civil**
2 **Procedure 23(b)(2).** Defendant has acted or refused to act on grounds generally
3 applicable to Plaintiff and all Members of the Classes, thereby making appropriate
4 final injunctive relief and declaratory relief, as described below, with respect to the
5 members of the Classes as a whole.
6

7 **60. Superiority – Federal Rule of Civil Procedure 23(b)(3).** A class
8 action is superior to any other available methods for the fair and efficient
9 adjudication of the present controversy for at least the following reasons:
10

- 11 a. The damages suffered by each individual members of the putative
12 Classes do not justify the burden and expense of individual
13 prosecution of the complex and extensive litigation necessitated by
14 Defendant’s conduct;
15
16 b. Even if individual members of the Classes had the resources to pursue
17 individual litigation, it would be unduly burdensome to the courts in
18 which the individual litigation would proceed;
19
20 c. The claims presented in this case predominate over any questions of
21 law or fact affecting individual members of the Classes;
22
23 d. Individual joinder of all members of the Classes is impracticable;
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1 e. Absent a Class, Plaintiff and members of the putative Classes will
2 continue to suffer harm as a result of Defendant's unlawful conduct;
3 and

4
5 f. This action presents no difficulty that would impede its management
6 by the Court as a class action, which is the best available means by
7 which Plaintiff and members of the putative Classes can seek redress
8 for the harm caused by Defendant.

9
10 g. In the alternative, the Classes may be certified for the following
11 reasons:

12
13 i. The prosecution of separate actions by individual members of the
14 Classes would create a risk of inconsistent or varying
15 adjudication with respect to individual members of the Classes,
16 which would establish incompatible standards of conduct for
17 Defendant;

18
19 ii. Adjudications of claims of the individual members of the Classes
20 against Defendant would, as a practical matter, be dispositive of
21 the interests of other members of the putative Classes who are
22 not parties to the adjudication and may substantially impair or
23 impede the ability of other putative Class Members to protect
24 their interests; and
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1 d. The California Sherman Food, Drug, and Cosmetic Law, Cal. Health
2 & Safety Code §§ 110100 et seq.

3 65. Unfair: Defendant’s conduct with respect to the labeling, advertising,
4 and sale of the Products was “unfair” because Defendant’s conduct was immoral,
5 unethetical, unscrupulous, or substantially injurious to consumers and the utility of
6 their conduct, if any, does not outweigh the gravity of the harm to their victims.
7

8 66. Defendant’s conduct with respect to the labeling, advertising, and sale
9 of the Products was and is also unfair because it violates public policy as declared
10 by specific constitutional, statutory or regulatory provisions, including but not
11 limited to the applicable sections of: the Consumers Legal Remedies Act, the False
12 Advertising Law, the Federal Food, Drug, and Cosmetic Act, and the California
13 Sherman Food, Drug, and Cosmetic Law.
14

15 67. Defendant’s conduct with respect to the labeling, advertising, and sale
16 of the Products was and is unfair because the consumer injury was substantial, not
17 outweighed by benefits to consumers or competition, and not one consumer
18 themselves could reasonably have avoided.
19

20 68. Fraudulent: A statement or practice is “fraudulent” under the UCL if it
21 is likely to mislead or deceive the public, applying an objective reasonable consumer
22 test.
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1 69. As set forth herein, Defendant’s “MAXIMUM STRENGTH”
2 Representations stated on the Products’ labeling and advertising is likely to mislead
3 reasonable consumers to believe the “MAXIMUM STRENGTH” Representations
4 regarding the Products are true.
5

6 70. Defendant profited from its sale of the falsely, deceptively, and
7 unlawfully advertised Products to unwary consumers.
8

9 71. Plaintiff and Class Members are likely to continue to be damaged by
10 Defendant’s deceptive trade practices, because Defendant continues to disseminate
11 misleading information, in particular the “MAXIMUM STRENGTH”
12 Representations on the Products’ packaging. Thus, injunctive relief enjoining
13 Defendant’s deceptive practices is proper.
14

15 72. Defendant’s conduct caused and continues to cause substantial injury
16 to Plaintiff and the other Class Members. Plaintiff has suffered injury in fact as a
17 result of Defendant’s unlawful conduct.
18

19 73. In accordance with Bus. & Prof. Code § 17203, Plaintiff seeks an order
20 enjoining Defendant from continuing to conduct business through unlawful, unfair,
21 and/or fraudulent acts and practices, and to commence a corrective advertising
22 campaign.
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1 74. Plaintiff and the Class also seek an order for and restitution of all
2 monies from the sale of the Products, which were unjustly acquired through acts of
3 unlawful competition.
4

5 **COUNT II**
6 **California’s False Advertising Law**
7 **Cal. Bus. & Prof. Code § 17500 (“FAL”)**
8 **(On Behalf of the California Sub-Class)**

9 75. Plaintiff repeats and realleges the allegations in the previous paragraphs
10 as if fully set forth herein.

11 76. The FAL provides that “[i]t is unlawful for any person, firm,
12 corporation or association, or any employee thereof with intent directly or indirectly
13 to dispose of real or personal property or to perform services” to disseminate any
14 statement “which is untrue or misleading, and which is known, or which by the
15 exercise of reasonable care should be known, to be untrue or misleading.” Cal. Bus.
16 & Prof. Code § 17500.
17

18 77. It is also unlawful under the FAL to disseminate statements concerning
19 property or services that are “untrue or misleading, and which is known, or which
20 by the exercise of reasonable care should be known, to be untrue or misleading.” *Id.*
21

22 78. As alleged herein, Walmart committed acts of false and misleading
23 advertising, as defined by the FAL, by using statements to promote the sale of it’s
24 the Products and making “MAXIMUM STRENGTH” Representations. Walmart
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1 knew or should have known that its advertising claims have not been substantiated
2 and are misleading and/or false.

3 79. Walmart knew or should have known, through the exercise of
4 reasonable care, that its “MAXIMUM STRENGTH” Representations were false and
5 misleading and likely to deceive consumers and cause them to purchase Walmart’s
6 Lidocaine products.
7

8 80. Defendant’s wrongful conduct is ongoing and part of a general practice
9 that is still being perpetuated and repeated throughout the State of California and
10 nationwide.
11

12 81. Plaintiff suffered injury in fact as a result of Walmart’s actions as set
13 forth herein because she purchased the Products in reliance on Walmart’s false and
14 misleading “MAXIMUM STRENGTH” Representations.
15

16 82. Walmart’s business practices as alleged herein constitute deceptive,
17 untrue, and misleading advertising pursuant to the FAL because Walmart has
18 advertised the Products in a manner that is untrue and misleading, which Walmart
19 knew or reasonably should have known, and omitted material information from its
20 advertising, which Walmart
21 knew or reasonably should have known, and omitted material information from its
22 advertising.

23 83. Walmart profited from its sale of the falsely and deceptively advertised
24 Products to unwary consumers.
25

1 84. As a result, Plaintiff, the California Sub-Class members, and the general
2 public are entitled to injunctive and equitable relief, restitution, and an order for the
3 disgorgement of the funds by which Defendant was unjustly enriched.

4
5 85. Pursuant to Cal. Bus. & Prof. Code § 17535, Plaintiff, on behalf of
6 herself and the California Sub-Class, seeks an order enjoining Defendant from
7 continuing to engage in deceptive business practices, false advertising, and any other
8 act prohibited by law, including those set forth in this Complaint.
9

10 **COUNT III**
11 **California’s Consumer Legal Remedies Act**
12 **Cal. Civ. Code § 1750 et seq. (“CLRA”)**
13 **(On Behalf of the California Sub-Class)**

14 86. Plaintiff repeats and realleges the allegations in the previous paragraphs
15 as if fully set forth herein.

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

19 88. Walmart’s false and misleading labeling and other policies, acts, and
20 practices were designed to, and did, induce the purchase and use of the Products for
21 personal, family, or household purposes by Plaintiff and Class Members, and
22 violated and continue to violate the following sections of the CLRA:
23

- 24
25 a. § 1770(a)(5): representing that goods have characteristics, uses, or
26 benefits which they do not have;
27

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

3 c. § 1770(a)(9): advertising goods with intent not to sell them as
4 advertised; and
5

6 d. § 1770(a)(16): representing the subject of a transaction has been
7 supplied in accordance with a previous representation when it has not.
8

9 89. Defendant profited from the sale of the falsely, deceptively, and
10 unlawfully advertised Products to unwary consumers.

11 90. Defendant's wrongful business practices constituted, and constitute, a
12 continuing course of conduct in violation of the CLRA.
13

14 91. Pursuant to the provisions of Cal. Civ. Code § 1782(a), Plaintiff will
15 provide a letter to Defendant concurrently with the filing of this Class Action
16 Complaint or shortly thereafter with notice of its alleged violations of the CLRA,
17 demanding that Defendant correct such violations, and providing it with the
18 opportunity to correct its business practices. If Defendant does not thereafter correct
19 its business practices, Plaintiff will amend (or seek leave to amend) the complaint to
20 add claims for monetary relief, including restitution and actual damages under the
21 Consumers Legal Remedies Act.
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1 92. Pursuant to California Civil Code § 1780, Plaintiff seeks injunctive
2 relief, her reasonable attorney fees and costs, and any other relief that the Court
3 deems proper.
4

5 **COUNT VI**
6 **Fraud**
7 **(On Behalf of the Nationwide and/or**
8 **California Sub-Class)**

9 93. Plaintiff repeats and realleges the allegations in the previous paragraphs
10 as if fully set forth herein.

11 94. Plaintiff brings this cause of action on behalf of herself, the Nationwide
12 Class and/or the California Class against Defendant, Walmart.

13 95. Rule 9(b) of the Federal Rules of Civil Procedure provides that “[i]n
14 alleging fraud or mistake, a party must state with particularity the circumstances
15 constituting fraud or mistake.” To the extent necessary, as detailed in the
16 paragraphs above and below, Plaintiff has satisfied the requirements of Rule 9(b)
17 by establishing the following elements with sufficient particularity.
18
19

- 20
21 a. **WHO:** Defendant, Walmart Inc., made material misrepresentations
22 and/or omissions of fact in its labeling and marketing of the Products
23 by representing that the Products are “Maximum Strength” lidocaine
24 products.
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1 b. **WHAT:** Defendant’s conduct here was and continues to be fraudulent
2 because it has the effect of deceiving consumers into believing that
3 the Products are “Maximum Strength” lidocaine products. Defendant
4 omitted from Plaintiff and Class Members that the Products are not
5 “Maximum Strength” lidocaine products because other lidocaine
6 products exist in the market that contain a higher amount (i.e. 5%) of
7 lidocaine. Defendant knew or should have known this information is
8 material to all reasonable consumers and impacts consumers’
9 purchasing decisions. Yet, Defendant has and continues to represent
10 that the Products are “Maximum Strength” lidocaine products when
11 they are not, and has omitted from the Products’ labeling the fact that
12 there are other prescription products available in the market that
13 contain a higher percentage of lidocaine (i.e. 5%).

14 c. **WHEN:** Defendant made material misrepresentations and/or
15 omissions detailed herein, including that the Products are “Maximum
16 Strength” lidocaine products, continuously throughout the applicable
17 Class period(s).

18 d. **WHERE:** Defendant’s material misrepresentations and omissions,
19 that the Products are “Maximum Strength” lidocaine products, were
20 located on the very center of the front label of the Products in bold
21 located on the very center of the front label of the Products in bold
22 located on the very center of the front label of the Products in bold
23 located on the very center of the front label of the Products in bold
24 located on the very center of the front label of the Products in bold
25 located on the very center of the front label of the Products in bold
26 located on the very center of the front label of the Products in bold
27 located on the very center of the front label of the Products in bold
28 located on the very center of the front label of the Products in bold

1 lettering surrounded by a bubble that contrasts with the background
2 of the packaging, which instantly catches the eye of all reasonable
3 consumers, including Plaintiff, at the point of sale in every
4 transaction. The Products are sold in Defendant’s brick and mortar
5 stores and online store nationwide.
6

7 e. **HOW:** Defendant made written misrepresentations right on the front
8 label of the Products that the Products were “Maximum Strength”
9 lidocaine products even though other stronger lidocaine products are
10 available in the market. As such, Defendant’s “Maximum Strength”
11 representations are false and misleading. Moreover, Defendant
12 omitted from the Products’ labeling the fact that there are other
13 prescription products available in the market that contain a higher
14 percentage of lidocaine (i.e. 5%). And as discussed in detail
15 throughout this Complaint, Plaintiff and Class Members read and
16 relied on Defendant’s “Maximum Strength” representations and
17 omissions before purchasing the Products.
18

19 f. **WHY:** Defendant misrepresented its Products as being “Maximum
20 Strength” lidocaine products and omitted from the Products’ labeling
21 the fact that there are other prescription products available in the
22 market that contain a higher percentage of lidocaine (i.e. 5%) for the
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1 express purpose of inducing Plaintiff and Class Members to purchase
2 the Products at a substantial price premium. As such, Defendant
3 profited by selling the misrepresented Products to at least thousands
4 of consumers throughout the nation.
5

6 96. As alleged herein, Walmart knowingly made material
7 misrepresentations and omissions regarding the Products on the Products' labeling
8 and packaging in the Products' advertisements, and/or on its website, specifically
9 the "MAXIMUM STRENGTH" Representations alleged more fully herein.
10

11 97. Defendant, Walmart, made these material "MAXIMUM STRENGTH"
12 Representations and omissions in order to induce Plaintiff and putative Class
13 Members to purchase the Products.
14

15 98. Defendant, Walmart, knew the "MAXIMUM STRENGTH"
16 Representations regarding the Products were false and misleading but nevertheless
17 made such representations through the marketing, advertising and on the Products'
18 labeling. In reliance on these "MAXIMUM STRENGTH" Representations, Plaintiff
19 and putative Class Members were induced to, and did, pay monies to purchase the
20 Products.
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23 99. Had Plaintiff and the Class known the truth about the Products, they
24 would not have purchased the Products.
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1 108. Defendant either knew or should have known that payments rendered
2 by Plaintiff and putative Class Members were given and received with the
3 expectation that the “MAXIMUM STRENGTH” Representations made by
4 Defendant in advertising, on Defendant’s websites, and on the Products’ labels and
5 packaging were true. It is inequitable for Defendant to retain the benefit of payments
6 under these circumstances because the “MAXIMUM STRENGTH” Representations
7 are not true.
8
9

10 109. Plaintiff and putative Class Members are entitled to recover from
11 Defendant all amounts wrongfully collected and improperly retained by Defendant.
12

13 110. When required, Plaintiff and Class Members are in privity with
14 Defendant because Defendant’s sale of the Products was direct.
15

16 111. As a direct result of Defendant’s wrongful conduct and unjust
17 enrichment, Plaintiff and putative Class Members are entitled to restitution of,
18 disgorgement of, and/or imposition of a constructive trust upon all profits, benefits,
19 and other compensation obtained by Defendant for their inequitable and unlawful
20 conduct.
21

22 **PRAYER FOR RELIEF**
23

24 WHEREFORE, Plaintiff, individually and on behalf of all others similarly
25 situated members of the Classes, pray for relief and judgment, including entry of
26 an order:
27

- 1 A. Declaring that this action is properly maintained as a class action, certifying
2 the proposed Class(es), appointing Plaintiff as Class Representative and
3 appointing Plaintiff's counsel as Class Counsel;
- 4 B. Directing that Defendant bear the costs of any notice sent to the Class(es);
- 5 C. Declaring that Defendant must disgorge, for the benefit of the Class(es), all
6 or part of the ill-gotten profits they received from the sale of the Products, or
7 order Defendant to make full restitution to Plaintiff and the members of the
8 Class(es) except that no monetary relief is presently sought for violations of
9 the Consumers Legal Remedies Act;
- 10 D. Awarding restitution and other appropriate equitable relief;
- 11 E. Granting an injunction against Defendant to enjoin it from conducting its
12 business through the unlawful, unfair and fraudulent acts or practices set
13 forth herein;
- 14 F. Granting an Order requiring Defendant to fully and appropriately recall the
15 Products and/or to remove the claims on its website and elsewhere, including
16 Lidocaine Patch Representations regarding the Products;
- 17 G. Ordering a jury trial and damages according to proof;
- 18 H. Awarding Plaintiff and members of the Class(es) statutory damages, as
19 provided by the applicable state consumer protection statutes invoked above,
20 except that no monetary relief is presently sought for violations of the
21 Consumers Legal Remedies Act;
- 22 I. Enjoining Defendant from continuing to engage in the unlawful and unfair
23 business acts and practices as alleged herein;
- 24 J. Awarding attorneys' fees and litigation costs to Plaintiff and members of the
25 Class(es);
- 26 K. Awarding civil penalties, prejudgment interest and punitive damages as
27 permitted by law; and
- 28 L. Ordering such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury of all claims in this Complaint so triable.

Dated: January 24, 2022

Respectfully submitted,

/s/ Jonathan Shub

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**Pro Hac Vice Application Forthcoming*

*Attorneys for Plaintiff and Putative Class
Members*

1 **CLRA Venue Declaration Pursuant to California Civil Code Section 1780(d)**

2 I, Jonathan Shub, declare as follows:

3
4 1. I am an attorney at law licensed to practice in the State of California
5 and a member of the bar of this Court. I am an attorney at Shub Law Firm LLC,
6 counsel of record for Plaintiff in this action. I have personal knowledge of the facts
7 set forth in this declaration and, if call as a witness, I could and would competently
8 testify thereto under oath.
9

10
11 2. The Complaint filed in this action is filed in the proper place for trial
12 under Civil Code Section 1780(d) in that a substantial portion of the events alleged
13 in the Complaint occurred in the Northern District of California.
14

15 I declare under the penalty of perjury under the laws of the State of California
16 and the United States that the foregoing is true and correct and that this declaration
17 was executed at Haddonfield, New Jersey this 24th day of January, 2022.
18

19 /s/ Jonathan Shub
20 Jonathan Shub
21
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