

1 Jonas B. Jacobson (SBN 269912)

jonas@dovel.com

2 Simon Franzini (SBN 287631)

simon@dovel.com

3 DOVEL & LUNER, LLP

4 201 Santa Monica Blvd., Suite 600

Santa Monica, California 90401

5 Telephone: (310) 656-7066

6 Facsimile: (310) 656-7069

7 Yeremey Krivoshey (SBN 295032)

ykrivoshey@bursor.com

8 Brittany S. Scott (SBN 327132)

bscott@bursor.com

9 BURSOR & FISHER, P.A.

10 1990 North California Blvd., Suite 940

Walnut Creek, CA 94596

11 Telephone: (925) 300-4455

12 Facsimile: (925) 407-2700

13 *Attorneys for Plaintiff*

14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN JOSE DIVISION**

16 KRYSTAL YVETTE LOPEZ, individually
17 and on behalf of all others similarly situated,

18 *Plaintiff,*

19 v.

20 TARGET CORPORATION,

21 *Defendant.*

Case No. 5:22-cv-03069

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

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1 **I. Introduction.**

2 1. Defendant makes, sells, and markets “Up & Up” over-the-counter cough medicine,
3 including generic Up & Up versions of brands like DayQuil and Robitussin. Many Up & Up
4 products contain the active ingredient Dextromethorphan Hydrobromide (“DXM”) and state
5 prominently on the front of their label that they are “Non-Drowsy.”¹

6 2. Defendant’s Non-Drowsy Up & Up Products state prominently on the front of their
7 label that they are “Non-Drowsy” products (juxtaposed against Defendant’s nighttime versions that
8 have no such claim and that are known to cause drowsiness). By prominently labeling these
9 products as “Non-Drowsy,” Defendant led Plaintiff and other reasonable consumers to believe that
10 the Non-Drowsy Up & Up Products do not cause drowsiness, and that drowsiness is not a side
11 effect of those products. But the truth is that products containing DXM—and thus the Non-Drowsy
12 Up & Up Products—do cause drowsiness, and that drowsiness is a common side effect of DXM.

13 3. In this way, Defendant misled Plaintiff and other reasonable consumers about the
14 effects of the Non-Drowsy Up & Up Products.

15 4. Defendant’s misrepresentations allowed it to overcharge Plaintiff and other
16 consumers for the Non-Drowsy Up & Up Products.

17 **II. Parties.**

18 5. Plaintiff Krystal Yvette Lopez is a citizen of California (domiciled in Salinas,
19 California). The proposed class (identified below) includes citizens of every state within the United
20 States.

21 6. Defendant Target Corporation is a corporation organized and existing under the laws
22 of the state of Minnesota, with its principal place of business in Minnesota. Defendant has been
23 doing business in the State of California during all relevant times. Defendant manufactures, sells,
24 and/or distributes Up & Up-brand products, and is responsible for the advertising, marketing, trade
25

26
27
28 ¹ Throughout this Complaint, Up & Up products containing DXM that state on their label that they
are “Non-Drowsy” are called “Non-Drowsy Up & Up Products.”

1 dress, and packaging of the Non-Drowsy Up & Up Products. Target manufactured, marketed, and
2 sold the Non-Drowsy Up & Up Products during the class period.

3 **III. Jurisdiction and Venue.**

4 7. This Court has subject matter jurisdiction under 28 U.S.C. § 1332(d)(2). The amount
5 in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and the
6 matter is a class action in which one or more members of the proposed class are citizens of a state
7 different from the Defendant.

8 8. The Court has personal jurisdiction over Defendant because Defendant sold Non-
9 Drowsy Up & Up products to consumers in California, including Plaintiff.

10 9. Venue is proper under 28 U.S.C. § 1391(b)(1) and 28 U.S.C. § 1391(d) because
11 Defendant would be subject to personal jurisdiction in this District if this District were a separate
12 state, given that Defendant sold the Non-Drowsy Up & Up Products to consumers in this District,
13 including Ms. Lopez. Venue is also proper under 28 U.S.C. § 1391(b)(2) because a substantial part
14 of Defendant’s conduct giving rise to the claims occurred in this District, including selling the Non-
15 Drowsy Up & Up Products to Ms. Lopez.

16 **IV. Divisional Assignment.**

17 10. This action arose in Monterey County (San Jose Division). As alleged in detail
18 below, Ms. Lopez purchased a Non-Drowsy Up & Up Product in Salinas, California (in Monterey
19 County). Thus a substantial part of the events giving rise to the claim occurred in Monterey County.

20 **V. Facts.**

21 **A. Defendant makes, markets, and sells Up & Up products prominently labeled**
22 **“Non-Drowsy.”**

23 11. Defendant makes, markets and sells the Non-Drowsy Up & Up Products.

24 12. The front label of each Non-Drowsy Up & Up Product prominently states that the
25 product is “Non-Drowsy.” For example:

1 **Up & Up Daytime Cold and Flu Multi-Symptom Relief Softgels²**



11 **Up & Up Daytime Cold and Flu Multi-Symptom Relief Liquid³**



26 ² <https://www.target.com/p/daytime-cold-38-flu-relief-softgels-24ct-up-38-up-8482/-/A-11003529#lnk=sametab>

27 ³ <https://www.target.com/p/daytime-cold-38-flu-multi-symptom-relief-liquid-12-fl-oz-up-38-up-8482/-/A-11046966#lnk=sametab>

28

1 **Up & Up Maximum Strength Cough+Chest Congestion DM Max⁴**



13. Further, the Products are sold as “Daytime” products that are meant to be consumed during the day, and offered for sale as an alternative to Defendant’s Nighttime Cold & Flu Relief Products (which have no “Non-Drowsy” claim), such as the one pictured below:

⁴ <https://www.target.com/p/cough-38-chest-congestion-dm-liquid-raspberry-menthol-8-fl-oz-up-38-up-8482/-/A-12980983>



14. In reality, however, the “Daytime” version causes drowsiness. Accordingly, if a reasonable consumer knew the truth, it would eviscerate the reason that consumers buy Daytime cold and flu relief products in the first place: to avoid drowsiness when they need to be alert.

15. These representations are materially the same across all Non-Drowsy Up & Up Products.

16. Based on the prominent “Non-Drowsy” and “Daytime” label included on the face of each product, a reasonable consumer would believe that the products do not cause drowsiness. That is, a reasonable consumer would believe that drowsiness is not a side-effect of the products.

17. Defendant labeled the products this way because it intended consumers to rely on the labels and to believe that the products would not cause drowsiness, so that consumers would buy more products or pay more for them.

B. The Non-Drowsy Up & Up Products cause drowsiness.

18. In truth, products containing DXM—like the Non-Drowsy Up & Up Products—do cause drowsiness, and drowsiness is a documented side effect of DXM.⁵

⁵ Dextromethorphan: MedlinePlus Drug Information, NIH National Library of Medicine, <https://medlineplus.gov/druginfo/meds/a682492.html> (listing drowsiness as a side effect)

1 19. In fact, drowsiness is a common side effect at the recommended dosages. According
 2 to a 2017 GlaxoSmithKline presentation on drug labeling, a “common” adverse reaction (i.e., side
 3 effect) is one that occurs in 3% or more drug takers and a “very common” side effect occurs in 10%
 4 or more drug takers. Similarly, Pfizer’s safety data sheet for DXM drugs states that “drowsiness” is
 5 a “common” adverse reaction associated with “clinical use.”⁶ For example, one study found that
 6 “[s]omnolence is a common side effect of centrally acting antitussive drugs” like dextromethorphan,
 7 and that 10.4% of users of products containing dextromethorphan develop drowsiness within three
 8 days of starting treatment with DXM cough medicine.^{7,8} The “cases of intense somnolence” were
 9 “related only to dextromethorphan” and not to the other drug studied. And patients in this clinical
 10 study were given an even smaller dosage of DXM (15 mg three times a day) than the recommended
 11 dose found in many Up & Up products.⁹

12 20. The FDA’s adverse event report database confirms that “sedation” is one of the most
 13 frequently-cited side effects of dextromethorphan-containing products.¹⁰

14 21. For this reason, the Federal Aviation Administration prohibits pilots from flying after
 15 ingesting medicines that contain “dextromethorphan,” including specifically DayQuil, which
 16 Defendant copies with its Up & Up brand. As illustrated above (¶11), drugs like DayQuil are
 17 “antihistamine free,” yet are still banned by the FAA because they have DXM and DXM causes
 18 drowsiness:¹¹

19 _____
 20 6

21 [https://imgcdn.mckesson.com/CumulusWeb/Click_and_learn/SDS_9PFIZ_ROBITUSSIN_DM_SY
 RP_4OZ.pdf](https://imgcdn.mckesson.com/CumulusWeb/Click_and_learn/SDS_9PFIZ_ROBITUSSIN_DM_SY

 RP_4OZ.pdf)

22 ⁷ E. Catena and L. Daffonchio, “Efficacy and Tolerability of Levodropropizine in Adult Patients
 23 with Non-productive Cough, Comparison with Dextromethorphan,” 10 Pulmonary Pharmacology &
 Therapeutics 89-96 (1997).

24 ⁸ The study reports this side effect as “somnolence.” Somnolence means “the quality or state of
 25 being drowsy.” Merriam Webster Dictionary, [https://www.merriam-
 webster.com/dictionary/somnolence](https://www.merriam-

 webster.com/dictionary/somnolence)

26 ⁹ For example: Up & Up Daytime Cold & Flu Multi-symptom Relief Liquid contains 20 mg of
 DXM per 30 ml of syrup and the recommended dosage is 30 ml orally every 4 hours.

27 ¹⁰ Sedation is associated with drowsiness. See IV/Monitored Sedation, American Society of
 Anesthesiologists, [https://www.asahq.org/madeforthismoment/anesthesia-101/types-of-
 anesthesia/ivmonitored-sedation/](https://www.asahq.org/madeforthismoment/anesthesia-101/types-of-

 anesthesia/ivmonitored-sedation/) (even “minimal” sedation means that “you’ll feel drowsy”)

28 ¹¹ https://www.faa.gov/licenses_certificates/medical_certification/media/OTCMedicationsforPilots.pdf

| | | | | |
|-------|---------------------|---|---|---|
| Cough | Cough/cold products | <p>Coricidin (allowed if no chlorpheniramine)</p> <p>guaifenesin (found in Mucinex and Robitussin)</p> <p>Mucinex fast-max severe congestion and cough (liquid)</p> <p>Identify combo vs isolated</p> | <p>dextromethorphan (Delsym)</p> <p>Dayquil (contains dextromethorphan)</p> <p>Most "night-time" or "PM" medications contain a sedating antihistamine:</p> <ul style="list-style-type: none"> - Coricidin HBP cough & cold (contains chlorpheniramine) - Nyquil (contains doxylamine) | <p>Most cough medications are safe for flight, but caution for combination products with sedating antihistamines. If the label states PM (for nighttime use) or DM (containing dextromethorphan), you should not fly for at least 5 half-lives after the last dose (see above).</p> |
|-------|---------------------|---|---|---|

C. Defendant’s Non-Drowsy representations are misleading to reasonable consumers.

22. The Food and Drug Administration prohibits drug labeling that is “false or misleading.” 21 C.F.R. § 201.6. It is misleading to label a product “Non-Drowsy” when it does cause drowsiness, or if drowsiness is a known side effect of one of its active ingredients.

23. This case is about Defendant’s affirmative, “Non-Drowsy” representation on the Product labels. No FDA regulation allows antitussives containing DXM to be labelled “Non-Drowsy” and the FDA has never considered whether this claim is false and misleading. (Nor would the FDA ever approve such a claim, because it is in fact false and misleading).

24. Based on the fact that Defendant labeled the Non-Drowsy Up & Up Products as “Non-Drowsy,” a reasonable consumer would expect that those products do not cause drowsiness. Similarly, a reasonable consumer would expect that drowsiness is not a side effect of the products (much less a common side effect). Indeed, according to Consumer Reports, “‘Non-drowsy’ is code for antihistamines and other medications that don’t make you sleepy.”¹² This is the plain meaning of “non-drowsy,” which means “not causing or accompanied by drowsiness.”

25. Unlike Defendant, some other drug makers do not falsely claim that DXM-products are non-drowsy. For example, DXM is an active ingredient in Mucinex DM, sold by Reckitt. But the Mucinex label does not claim that Mucinex DM is non-drowsy, because this is not the truth.

¹² How to read over the counter (OTC) drug labels, Consumer Reports, <https://www.consumerreports.org/cro/2014/04/how-to-read-over-the-counter-drug-labels/index.htm>



26. So Defendant could have simply omitted the false and misleading statements, “Non-Drowsy” and “Daytime” from its products.

27. Or, if Defendant wanted to say something to indicate that a Non-Drowsy Up & Up Product might cause *less* drowsiness than another product, they could have made a truthful statement to this effect, as other drug makers do.

28. For example, Dramamine contains an active ingredient that causes drowsiness, Dimenhydrinate. Dramamine also sells a “less drowsy” version that contains a different active ingredient, Meclizine, which causes less drowsiness. The front label of Dramamine Less Drowsy prominently displays that it is “less drowsy”:



1 29. Whether or not an over-the-counter drug causes drowsiness is material to a
2 reasonable customer. In certain situations, consumers prefer over-the-counter drugs that will not
3 make them drowsy to products that may make them drowsy. For example, all else equal, a
4 reasonable consumer would prefer to take a drug that does not cause drowsiness to one that does
5 cause drowsiness during the day (or any periods of time when they plan to be awake). As a second
6 example, if a consumer is planning to engage in activities that require them to be alert (like work),
7 or during which they would prefer to be alert, that consumer would prefer to take a drug that does
8 not cause drowsiness to one that does. Indeed, in many situations, taking a drug that does or can
9 cause drowsiness can be dangerous. For example, taking a drug that causes drowsiness while
10 driving is dangerous.

11 30. Because Defendant makes and sells the Non-Drowsy Up & Up Products, Defendant
12 researched the known and common side effects of DXM. This is diligence that a large company
13 like Defendant would do when selling a drug. As a result, Defendant knew that DXM causes
14 drowsiness. Furthermore, Defendant controls its labeling, knowingly put on the “Non-Drowsy” and
15 “Daytime” representations, and knows the plain meaning of “Non-Drowsy.” Finally, it is standard
16 practice in the industry to test labeling with consumers, and Defendant’s testing would confirm that
17 “Non-Drowsy” is misleading. For these reasons, Defendant knew that its labeling was false and
18 misleading, or was reckless or willfully blind to this fact. And as alleged above, Defendant
19 intended that consumers would rely on the “Non-Drowsy” and “Daytime” labeling, so that
20 consumers would purchase more products, pay a price premium, and buy them as alternatives to its
21 “Nighttime” products.

22 31. Defendant’s false statements increased the demand for Non-Drowsy Up & Up
23 Products and allowed Defendant to charge a price premium. As explained above, consumers
24 specifically value the “Non-Drowsy” claim because consumers demand cough medicine that will
25 not make them drowsy (e.g., during the day, at work or while driving). As a result, Defendant was
26 able to charge more for these products than it would have been able to had the labeling been
27 truthful. Accordingly, as a direct result of Defendant’s false statements, Defendant was able to
28

1 charge a price premium for these products. As purchasers, Plaintiff and each class member paid
2 this price premium and sustained economic injury.

3 32. In addition, because the Non-Drowsy Up & Up Products actually do cause
4 drowsiness, Plaintiff and each class member did not get what they paid for: a cough medicine that
5 does not cause drowsiness. Instead, they received something that is worth less: a cough medicine
6 that does cause drowsiness. Plaintiff and each class member sustained an economic injury for this
7 additional reason, i.e., they received something worth less than the price they paid for it.

8 33. Moreover, the Non-Drowsy Up & Up Products are sold specifically for use in
9 situations where it is not acceptable for consumers to become drowsy (e.g., while driving, working,
10 or supervising children). As a result, the products that Plaintiff and each class member did receive
11 in exchange for the price they paid—Non-Drowsy Up & Up Products that cause drowsiness—were
12 not suitable for, and were thus worthless for, their intended purpose. So the economic injury
13 Plaintiff and each class member sustained consists of the entire purchase price of the products,
14 because what they received was worthless for its intended use.

15 **D. Plaintiff was misled by Defendant’s misrepresentations.**

16 34. In or around March 2020, Plaintiff Krystal Lopez bought a Non-Drowsy Up & Up
17 Product (Up & Up Daytime Cold and Flu Multi-Symptom Relief) at a Target in Salinas, California.
18 This was the first time she had purchased the product. The package said “Non-Drowsy” and
19 “Daytime” prominently on the label, and Plaintiff read and relied on this statement when purchasing
20 the product. But when Plaintiff took the recommended dose of the medication as directed on the
21 label by Defendant, she became unexpectedly drowsy. Plaintiff was not on any other medication
22 that would have caused drowsiness, and there was no other potential cause for this drowsiness, aside
23 from the ingredients in the Up & Up medication. Plaintiff would not have bought the Up & Up
24 medication had she known that the product did, in fact, cause drowsiness, and that drowsiness was a
25 known side-effect of the product. The price Plaintiff paid for the Up & Up medication was inflated
26 due to the misleading “Non-Drowsy” and “Daytime” labels, for the reasons set forth above. In fact,
27 because the product causes drowsiness, it was worthless to her.

28

1 35. Plaintiff would purchase Non-Drowsy Up & Up Products again if they were actually
2 “Non-Drowsy” (i.e., if the product was sold as advertised). Plaintiff, however, faces an imminent
3 threat of harm because she will not be able to rely on the labels in the future, and thus will not be
4 able to purchase the products.

5 **E. Class Action Allegations.**

6 36. Plaintiff brings certain claims on behalf of the proposed class of: all persons who
7 purchased a Non-Drowsy Up & Up Product in the United States during the applicable statute of
8 limitations (the “**Nationwide Class**”).

9 37. For other claims, Plaintiff brings those claims on behalf of a subclass of consumers
10 who live in the identified states (the “**Consumer Protection Subclass**”).

11 38. For certain claims, Plaintiff brings those claims on behalf of a subclass of consumers
12 who, like Plaintiff, purchased Non-Drowsy Up & Up Products in California (the “**California**
13 **Subclass**”).

14 39. The following people are excluded from the Class and the Subclasses: (1) any Judge
15 or Magistrate Judge presiding over this action and the members of their family; (2) Defendant,
16 Defendant’s subsidiaries, parents, successors, predecessors, and any entity in which the Defendant
17 or its parents have a controlling interest and their current employees, officers and directors; (3)
18 persons who properly execute and file a timely request for exclusion from the Class; (4) persons
19 whose claims in this matter have been finally adjudicated on the merits or otherwise released; (5)
20 Plaintiff’s counsel and Defendant’s counsel, and their experts and consultants; and (6) the legal
21 representatives, successors, and assigns of any such excluded persons.

22 ***Numerosity***

23 40. The proposed class contains members so numerous that separate joinder of each
24 member of the class is impractical. Based on the pervasive distribution of Non-Drowsy Up & Up
25 Products, there are millions of proposed class members.

26 ***Commonality***

27 41. There are questions of law and fact common to the proposed class. Common
28 questions of law and fact include, without limitation:

- 1 • Whether the Non-Drowsy Up & Up Products cause drowsiness;
- 2 • Whether Defendant’s labeling of the Non-Drowsy Up & Up Products as “Non-
- 3 Drowsy” and “Daytime” is deceptive and misleading;
- 4 • Whether Defendant violated state consumer protection statutes;
- 5 • Whether Defendant committed a breach of express warranty; and
- 6 • Damages needed to reasonably compensate Plaintiff and the proposed class.

7 ***Typicality***

8 42. Plaintiff’s claims are typical of the proposed class. Like the proposed class, Plaintiff
9 purchased Non-Drowsy Up & Up Products.

10 ***Predominance and Superiority***

11 43. The prosecution of separate actions by individual members of the proposed class
12 would create a risk of inconsistent or varying adjudication with respect to individual members,
13 which would establish incompatible standards for the parties opposing the class. For example,
14 individual adjudication would create a risk that breach of the same express warranty is found for
15 some proposed class members, but not others.

16 44. Common questions of law and fact predominate over any questions affecting only
17 individual members of the proposed class. These common legal and factual questions arise from
18 central issues which do not vary from class member to class member, and which may be determined
19 without reference to the individual circumstances of any particular class member. For example, a
20 core liability question is common: whether Defendant’s “Non-Drowsy” labeling is false and
21 misleading.

22 45. A class action is superior to all other available methods for the fair and efficient
23 adjudication of this litigation because individual litigation of each claim is impractical. It would be
24 unduly burdensome to have individual litigation of millions of individual claims in separate
25 lawsuits, every one of which would present the issues presented in this lawsuit.

1 **VI. Claims.**

2 **Count I: Violations of California Consumer Protection Law and Materially-Similar State**
3 **Consumer Protection Laws**

4 **(on behalf of Plaintiff and the Consumer Protection Subclass)**

5 46. Plaintiff incorporates by reference each and every factual allegation set forth above.

6 47. As alleged below, Plaintiff (who lives in California) brings her individual and certain
7 subclass claims based on California consumer protection laws. At the motion to dismiss stage (pre-
8 certification), her claims are governed by California law. At certification, Plaintiff intends to certify
9 this count on behalf of the Consumer Protection Subclass, which includes consumers who live in
10 the states listed below:

| State | Statute |
|------------------|---|
| California | Cal. Bus. & Prof. Code § 17200, and the following; <i>Id.</i> §17500, and the following Cal. Civ. Code §1750 and the following; |
| Illinois | 815 ILCS § 501/1, and the following. |
| Maryland | Md. Code Ann. Com. Law, § 13-301, and the following. |
| Hawaii | Haw. Rev. Stat. § 480-2, and the following. |
| New York | N.Y. Gen. Bus. Law § 349, and the following. |
| Washington, D.C. | D.C. Code § 28-3901, and the following. |
| Missouri | Mo. Rev. Stat. § 407, and the following. |
| Rhode Island | R.I. Gen. Laws § 6-13.1- 5.2(B), and the following. |
| Vermont | 9 V.S.A. § 2451, and the following. |
| Washington | Wash. Rev. Code § 19.86.010, and the following. |
| Connecticut | Conn. Gen. Stat. Ann. §§ 42-110, and the following. |

1
2 48. Each of these statutes is materially similar to California consumer protection law.
3 Each broadly prohibits deceptive conduct in connection with the sale of goods to consumers. No
4 state requires proof of individualized reliance, or proof of Defendant's knowledge or intent.
5 Instead, it is sufficient that the deceptive conduct is misleading to reasonable consumers and that the
6 conduct proximately caused harm. Defendant's conduct violates each statute's shared prohibitions.

7 49. Each of these consumer protection statutes prohibits unfair, unconscionable, and/or
8 deceptive acts or practices in the course of trade or commerce or in connection with the sales of
9 goods or services to consumers. Defendant's conduct, including the false labeling of the Non-
10 Drowsy Up & Up Products and sale of those misleading products to Plaintiff and Class members,
11 violates each statute's prohibitions.

12 50. Defendant's misrepresentations were a substantial factor in Plaintiff's purchase
13 decision and the purchase decision of Class members. Defendant's misrepresentations were
14 misleading to a reasonable consumer, and Plaintiff and Class members reasonably relied on
15 Defendant's misrepresentations.

16 51. Plaintiff and Subclass members were injured as a direct and proximate result of
17 Defendant's conduct because (a) they would not have purchased the Products if they had known
18 that the products cause drowsiness; (b) they overpaid for the Products because the products are sold
19 at a price premium due to Defendant's misrepresentations; or (c) they received products that were
20 worthless for their intended purpose.

21 **Count II: Violation of California's Unfair Competition Law (UCL)**

22 **(on behalf of Plaintiff and the California Subclass)**

23 52. Plaintiff incorporates by reference and re-alleges each and every factual allegation
24 set forth above as though fully set forth herein.

25 53. Plaintiff brings this cause of action on behalf of herself and members of the
26 California Subclass.

27 54. Defendant has violated California's Unfair Competition Law (UCL) by engaging in
28 unlawful, fraudulent, and unfair conduct (i.e., violating each of the three prongs of the UCL).

1 63. Defendant’s misrepresentations were a substantial factor and proximate cause in
2 causing damages and losses to Plaintiff and Subclass members.

3 64. Plaintiff and Subclass members were injured as a direct and proximate result of
4 Defendant’s conduct because (a) they would not have purchased the Products if they had known
5 that the products cause drowsiness; (b) they overpaid for the Products because the products are sold
6 at a price premium due to Defendant’s misrepresentations; or (c) they received products that were
7 worthless for their intended purpose.

8 65. Plaintiff seeks an injunction and equitable restitution (in the alternative to legal
9 relief).

10 **Count III: Violation of California’s False Advertising Law (FAL)**

11 **(on behalf of Plaintiff and the California Subclass)**

12 66. Plaintiff incorporates by reference and re-alleges each and every allegation set forth
13 above as though fully set forth herein.

14 67. Plaintiff brings this cause of action on behalf of herself and members of the
15 California Subclass.

16 68. As alleged more fully above, Defendant has falsely advertised Non-Drowsy Up &
17 Up Products by falsely representing that the products do not cause drowsiness and that drowsiness
18 is not a side-effect of the products.

19 69. Defendant’s representations were likely to deceive, and did deceive, Plaintiff and
20 reasonable consumers. Defendant knew, or should have known through the exercise of reasonable
21 care, that these statements were inaccurate and misleading.

22 70. Defendant’s misrepresentations were intended to induce reliance, and Plaintiff saw,
23 read and reasonably relied on them when purchasing Non-Drowsy Up & Up Products. Defendant’s
24 misrepresentations were a substantial factor in Plaintiff’s purchase decision.

25 71. In addition, classwide reliance can be inferred because Defendant’s
26 misrepresentations were material, i.e., a reasonable consumer would consider them important in
27 deciding whether to buy the Non-Drowsy Up & Up Products.

1 72. Defendant’s misrepresentations were a substantial factor and proximate cause in
2 causing damages and losses to Plaintiff and Subclass members

3 73. Plaintiff and Subclass members were injured as a direct and proximate result of
4 Defendant’s conduct because (a) they would not have purchased the Products if they had known
5 that the products cause drowsiness; (b) they overpaid for the Products because the products are sold
6 at a price premium due to Defendant’s misrepresentations; or (c) they received products that were
7 worthless for their intended purpose.

8 74. Plaintiff seeks an injunction and equitable restitution (in the alternative to legal
9 relief).

10 **Count IV: Violation of California’s Consumer Legal Remedies Act (CLRA)**

11 **(on behalf of Plaintiff and the California Subclass)**

12 75. Plaintiff incorporates by reference and re-alleges each and every allegation set forth
13 above as though fully set forth herein.

14 76. Plaintiff brings this cause of action on behalf of herself and members of the
15 California Subclass.

16 77. Plaintiff and the other members of the California Subclass are “consumers,” as the
17 term is defined by California Civil Code § 1761(d).

18 78. Plaintiff, the other members of the California Subclass, and Defendant has engaged
19 in “transactions,” as that term is defined by California Civil Code § 1761(e).

20 79. The conduct alleged in this Complaint constitutes unfair methods of competition and
21 unfair and deceptive acts and practices for the purpose of the CLRA, and the conduct was
22 undertaken by Defendant in transactions intended to result in, and which did result in, the sale of
23 goods to consumers.

24 80. As alleged more fully above, Defendant has violated the CLRA by falsely
25 representing to Plaintiff and the other members of the California Subclass that the Non-Drowsy Up
26 & Up Products do not cause drowsiness, and that drowsiness is not a side effect of the products,
27 when in fact, the products do cause drowsiness.

28

1 81. As a result of engaging in such conduct, Defendant has violated California Civil
2 Code § 1770(a)(5), (a)(7), and (a)(9).

3 82. Defendant's representations were likely to deceive, and did deceive, Plaintiff and
4 reasonable consumers. Defendant knew, or should have known through the exercise of reasonable
5 care, that these statements were inaccurate and misleading.

6 83. Defendant's misrepresentations were intended to induce reliance, and Plaintiff saw,
7 read and reasonably relied on them when purchasing Non-Drowsy Up & Up Products. Defendant's
8 misrepresentations were a substantial factor in Plaintiff's purchase decision.

9 84. In addition, classwide reliance can be inferred because Defendant's
10 misrepresentations were material, i.e., a reasonable consumer would consider them important in
11 deciding whether to buy the Non-Drowsy Up & Up Products.

12 85. Defendant's misrepresentations were a substantial factor and proximate cause in
13 causing damages and losses to Plaintiff and Subclass members.

14 86. Plaintiff and Subclass members were injured as a direct and proximate result of
15 Defendant's conduct because (a) they would not have purchased the Products if they had known
16 that the products cause drowsiness; (b) they overpaid for the Products because the products are sold
17 at a price premium due to Defendant's misrepresentations; or (c) they received products that were
18 worthless for their intended purpose.

19 87. Accordingly, pursuant to California Civil Code § 1780(a)(3), Plaintiff, on behalf of
20 herself and all other members of the California Subclass, seeks injunctive relief.

21 88. CLRA § 1782 NOTICE. On May 10, 2022, a CLRA demand letter was sent to
22 Defendant's headquarters and California registered agent, via certified mail (return receipt
23 requested). This letter provided notice of Defendant's violation of the CLRA, for Plaintiff and the
24 class, and demanded that Defendant correct the unlawful, unfair, false and/or deceptive practices
25 alleged here. If Defendant does not fully correct the problem for Plaintiff and the Class within 30
26 days, Plaintiff will amend to seek all available monetary relief.

Count V: Breach of Express Warranty

(on behalf of Plaintiff and the Nationwide Class)

89. Plaintiff incorporates by reference each and every factual allegation set forth above.

90. Plaintiff (who lives in California) brings this claim individually and on behalf of the Nationwide Class.

91. Defendant, as the designer, manufacturer, marketer, distributor, supplier, and/or seller of the Non-Drowsy Up & Up Products, issued material, written warranties by representing that the products were “Non-Drowsy” and for “Daytime.” This was an affirmation of fact about the products (i.e., a description of the effects of the ingredients) and a promise relating to the goods.

92. This warranty was part of the basis of the bargain and Plaintiff and members of the Nationwide Class relied on this warranty.

93. In fact, the Non-Drowsy Up & Up Products do not conform to the above-referenced representation because, as alleged in detail above, they cause drowsiness. Thus, the warranty was breached.

94. Plaintiff provided Defendant with notice of this breach of warranty, for herself and the class, by mailing a notice letter to Defendant’s headquarters and California registered agent, on May 10, 2022.

95. Plaintiff and Class members were injured as a direct and proximate result of Defendant’s conduct because (a) they would not have purchased the Products if they had known that the products cause drowsiness; (b) they overpaid for the Products because the products are sold at a price premium due to Defendant’s false warranty; or (c) they received products that were worthless for their intended purpose.

Count VI: Breach of Contract

(on behalf of Plaintiff and the Nationwide Class)

96. Plaintiff incorporates by reference each and every factual allegation set forth above.

97. Plaintiff alleges this claim individually and on behalf of the Nationwide Class.

98. Plaintiff and the Class purchased Non-Drowsy Up & Up Products directly from Defendant (e.g., in Target stores or online).

1 110. Defendant's misrepresentations were a substantial factor and proximate cause in
2 causing damages and losses to Plaintiff and Subclass members.

3 111. Plaintiff and Subclass members were injured as a direct and proximate result of
4 Defendant's conduct because (a) they would not have purchased the Products if they had known
5 that the products cause drowsiness; (b) they overpaid for the Products because the products are sold
6 at a price premium due to Defendant's false misrepresentations; or (c) they received products that
7 were worthless for their intended purpose.

8 **Count VIII: Quasi-Contract / Unjust Enrichment**

9 **(on behalf of Plaintiff and the California Subclass)**

10 112. Plaintiff incorporates by reference the facts alleged above.

11 113. Plaintiff brings this claim in the alternative to her legal claims.

12 114. As alleged in detail above, Defendant's false and misleading labeling caused
13 Plaintiff and the Class to purchase Non-Drowsy Up & Up Products and to pay a price premium for
14 these products.

15 115. In this way, Defendant received a direct and unjust benefit, at Plaintiff's expense.

16 116. Plaintiff and the Class seek restitution.

17 **VII. Jury Demand.**

18 117. Plaintiff demands a jury trial on all issues so triable.

19 **VIII. Prayer for Relief.**

20 118. Plaintiff seeks the following relief individually and for the proposed class and
21 subclasses:

- 22 • An order certifying the asserted claims, or issues raised, as a class action;
- 23 • A judgment in favor of Plaintiff and the proposed class;
- 24 • Damages, treble damages, and punitive damages where applicable;
- 25 • Restitution;
- 26 • Disgorgement, and other just equitable relief;
- 27 • Pre- and post-judgment interest;
- 28

- An injunction prohibiting Defendant’s deceptive conduct, as allowed by law;
- Reasonable attorneys’ fees and costs, as allowed by law;
- Any additional relief that the Court deems reasonable and just.

Dated: May 25, 2022

Respectfully submitted,

By: /s/ Jonas Jacobson
 Jonas B. Jacobson (SBN 269912)
 jonas@dovel.com
 Simon Franzini (SBN 287631)
 simon@dovel.com
 DOVEL & LUNER, LLP
 201 Santa Monica Blvd., Suite 600
 Santa Monica, California 90401
 Telephone: (310) 656-7066
 Facsimile: (310) 656-7069

Yeremey Krivoshey (SBN 295032)
 ykrivoshey@bursor.com
 Brittany S. Scott (SBN 327132)
 bscott@bursor.com
 BURSOR & FISHER, P.A.
 1990 North California Blvd., Suite 940
 Walnut Creek, CA 94596
 Telephone: (925) 300-4455
 Facsimile: (925) 407-2700

Counsel for Plaintiff

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

KRYSTAL LOPEZ, individually and
on behalf of all others similarly
situated,

Plaintiff,

v.

TARGET CORPORATION,

Defendant.

CLRA Venue Declaration

1 I, Krystal Lopez, declare as follows:

- 2 1. I am a named Plaintiff in this action.
- 3 2. In or around March 2020, I purchased a bottle of “Non-Drowsy” Up
- 4 & Up Daytime Cold and Flu Multi-Symptom Relief at a Target in
- 5 Salinas, California.
- 6 3. I understand that, because I purchased the product in Salinas, the
- 7 transaction occurred within the Northern District of California and
- 8 therefore this is a proper place to bring my California Consumer Legal
- 9 Remedies Act claim.

10 I declare under penalty of perjury, under the laws of the United States and the State
11 of California, that the foregoing is true and correct to the best of my knowledge.

12 DocuSigned by:
13 Signature: 
14 _____
247638597D0941F...

14 Krystal Lopez
15 Salinas, California

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