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David Wilson, on behalf of himself
and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

DAVID WILSON, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

AIRBORNE, INC., AIRBORNE HEALTH, INC., KNIGHT-MCDOWELL LABS, THOMAS "RIDER" MCDOWELL, VICTORIA KNIGHT-MCDOWELL, and DOES 1-100, inclusive,

Defendants.

No. RCV RS095262

CLASS ACTION

SECOND AMENDED COMPLAINT FOR DAMAGES AND EQUITABLE RELIEF

JURY TRIAL DEMANDED

Plaintiff, David Wilson, individually and on behalf of others similarly situated, brings this action against Defendants Airborne, Inc., Airborne Health, Inc., Knight-McDowell Labs, Thomas "Rider" McDowell, Victoria Knight-McDowell, and Does 1 through 100, demanding a trial by jury, and alleges as follows:

SUMMARY OF COMPLAINT

1. This action is based on a very simple premise that has worked a massive fraud on American consumers: According to Defendants, a second-grade schoolteacher became "sick of catching colds in the classroom," so she invented Airborne, a product Defendants claim not only cures colds if taken at the onset of cold symptoms, but prevents colds if the product is taken before entering crowded environments where "germs" are likely to exist (such as class rooms, airplanes, movie theaters, etc.). The schoolteacher and her Hollywood script-writer husband then put together a "laboratory" that hired two individuals to conduct a "clinical study" of the remedy, which concluded that it really was the "Miracle Cold Buster" that they told consumers it was. The schoolteacher's husband then used his background in television scriptwriting to garner endorsements of celebrities, and the schoolteacher was interviewed by Oprah Winfrey.

2. The effort worked spectacularly well. Airborne became phenomenally popular, and rocketed to a position of market dominance as consumers spent hundreds of millions of dollars on it. And the investment company that purchased a majority interest in Airborne recently put it up for sale. The price tag: $1 billion. *See, e.g.*, http://biz.yahoo.com/ic/155/155280.html.

3. The problem with all this is that there is no cure for the common cold, and Airborne is not a "Miracle Cold Buster" that cures colds, or prevents a cold from developing if the product is consumed immediately before boarding a plane, entering a crowded room, or otherwise exposing themselves to others who already have a cold. To the contrary, Airborne is simply another in a long line of "snake oil" scams that prey on consumers' naiveté and their hope for a simple cure to a common, but very pervasive, problem that does not exist.

4. The purpose of this action is to put a stop to the false statements that persuaded consumers to part with their money; to provide warnings about the serious health problems — such as irreversible liver disease, birth defects, kidney damage and kidney stones — that can occur when Airborne is consumed as directed; and to provide consumers with monetary relief for Defendants' unjust enrichment and violations of the Unfair Competition Law ("UCL"), Bus. & Prof. Code §§ 17200-17209, the False Advertising Law ("FAL"), Bus. & Prof. Code §§ 17500-17536, the Consumers Legal Remedies Act ("CLRA"), Civ. Code §§ 1750-1784.

5. Airborne's actions also violate the California's Sherman Food, Drug, and Cosmetic Act, California Health & Safety Code §§ 108975-111915 ("Sherman Law"). Every Airborne product is "misbranded" if its labeling is "***false or misleading in any particular***." *Id.* §§ 110660 & 111330. "In determining whether the labeling or advertisement of a food, drug, device, or cosmetic is misleading, all representations made or suggested by statement, word, ***design***, ***device***, sound, or any combination of these, shall be taken into account. The extent that the labeling or advertising ***fails to reveal facts*** concerning the food, drug, device, or cosmetic or consequences of customary use of the food, drug, device, or cosmetic shall also be considered." *Id.* § 110290 (emphasis added). It is a violation of the Sherman Law for any person to (1) misbrand any food or drug, *id.* §§ 10398 & 111445; (3) manufacture, sell, deliver, hold, or offer for sale any food or drug that is misbranded, *id.* §§ 10398 & 111440; or (3) receive in commerce any food or drug that is misbranded, or deliver or proffer it for delivery, *id.* §§ 110770 & 111450. The violations of the UCL, FAL, and CLRA are the equivalent of "misbranding" under the Sherman Law.

6. As described more fully below, Plaintiff alleges that Defendants violated the foregoing statutes by making false and misleading statements on **(a)** Airborne packages, copies of which are attached hereto as Exhibit A, and **(b)** on Airborne's website, each iteration of which is attached hereto as Exhibit B.

7. Also described below are some of the other false advertisements Defendants have caused to be published and a variety of other unlawful and deceptive conduct in which Defendants have engaged. Those facts demonstrate the deliberate nature of the Defendants' conduct, and provide specific details about each individual Defendant's participation in the events that led to the filing of this lawsuit.

8. Defendants contend on their packaging that the product is a "dietary supplement" and that the statements made on the packaging "have not been evaluated by the Food and Drug Administration." In this action, Plaintiff does not sue to subject Airborne to the FDA premarket-approval process. Rather, because the inclusion of such a disclaimer or similar disclosures does not cure the deceptive nature of Defendants' representations and conduct, particularly where the deception concerns claims about disease benefits of a product, as alleged in this Complaint, Plaintiff seeks to prosecute Defendants' false advertising of Airborne and other unlawful, fraudulent, and unfair business practices in violation of California law.

THE PARTIES

9. Plaintiff and proposed class representative, David Wilson, is a resident of the County of San Bernardino, State of California.

10. Defendant Airborne, Inc., was incorporated as a California corporation on April 21, 1999, to promote, advertise, market, and sell the Airborne line of products from its office in Carmel, California. Plaintiff is informed and believes that, from its incorporation until May 24, 2005, Defendant Victoria Knight-McDowell, Defendant Thomas "Rider" McDowell (the "Individual Defendants"), and one other individual (who is not a party to this action) were the sole shareholders of Airborne, Inc., and that the Individual Defendants treated that corporation as their "alter ego," rather than as a separate entity, and that upholding the corporate entity and allowing the Individual Defendants to escape personal liability for its debts would sanction a fraud or promote an injustice.

11. Plaintiff is informed and believes and on that basis alleges that on December 22, 2005, Airborne, Inc., merged with and into Airborne Health, Inc., a newly-formed Delaware corporation. The name Airborne, Inc., was thereafter utilized by Airborne Health, Inc., as a d/b/a. Airborne Health, Inc., succeeded to the same employer identification number that Airborne, Inc., had prior to the merger. Airborne Health, Inc., registered to transact business under the name of Airborne, Inc., in California on January 12, 2006, and in Florida on January 11, 2006. Defendant Airborne Health, Inc., now serves as the wholesale distributor of the Airborne product line, and maintains offices in Bonita Springs, Florida; Parsippany, New Jersey; and Carmel, California. (Defendants Airborne, Inc., and Airborne Health, Inc., are sometimes referred to herein collectively as the "Corporate Defendants.")

12. Plaintiff is informed and believes and on that basis alleges that Defendant Knight-McDowell Labs is an unincorporated business entity that Plaintiff is informed and believes was formed and originally owned by Defendant Thomas "Rider" McDowell and is now owned by Defendant Airborne Health, Inc., which has used the name since January, 2006.

13. Plaintiff is informed and believes and on that basis alleges that Defendant Thomas McDowell, also known as "Rider" McDowell, is an individual residing in Monterey County, California.

14. Plaintiff is informed and believes and on that basis alleges that Defendant Victoria Knight-McDowell is an individual residing in Monterey County, California.

15. Defendants, and each of them, are authorized to do business in California, have sufficient minimum contacts with California, and/or otherwise have intentionally availed themselves of the markets in California through the promotion, marketing and sale of their products in California, to render the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

16. The true names and capacities, whether individual, corporate, associate or otherwise of defendants DOES 1 through 100, inclusive, and each of their roles in this case, are unknown to Plaintiff, who therefore sues said defendants by such fictitious names pursuant to Code of Civil Procedure section 474. Plaintiff further alleges that each fictitiously named Defendant is in some manner responsible for the acts and occurrences set forth herein. Plaintiff will amend this Complaint to show their true names and capacities when the same is ascertained, as well as the manner in which each fictitiously named Defendant is responsible.

17. Plaintiff is informed and believes, and thereon alleges that at all times mentioned, each of Defendants are and have been the partners, joint venturers, alter egos, and/or co-conspirators of each other. At all times mentioned, a unity of interest in ownership and other interests between each of the Defendants existed such that any separateness ceased to exist between them. The exercise of complete dominance and control over the other entities and their properties, rights and interests, rendered such entities as mere shells and instrumentalities of each other Defendant.

VENUE

18. Venue is proper in this Court pursuant to California Code of Civil Procedure section 395(b) and Civil Code section 1780, in that this action arises from an offer or provision of goods intended primarily for personal use and Plaintiff purchased the goods at issue in the County of San Bernardino. Plaintiff resided in the County of San Bernardino at the time that the purchases of the goods at issue were made, and continues to live in the County of San Bernardino.

19. At all relevant times, Defendants marketed and sold their products to purchasers in California, including but not limited to in the County of San Bernardino. Since its inception to the present Defendants Airborne, Inc., Airborne Health, Inc., and Knight-McDowell Labs have done business in California through offices in this State and, from inception through at least 2005, have

had their principal place of business in Monterey County, California — from which the unlawful conduct alleged herein emanated.

GENERAL ALLEGATIONS

20. Each of the Defendants named in this action have played a role in the unlawful, fraudulent, and unfair business practices that underlie this lawsuit.

21. Airborne is the brainchild of a second-grade school teacher, Defendant Victoria-Knight McDowell, and her husband, Defendant Rider McDowell, an aspiring screenwriter and comic-book author. Plaintiff is informed and believes that, in 1997, the school teacher and her husband set up shop in the kitchen of their Carmel Valley, California, home and began concocting a product that they hoped would net them a piece of the multi-billion dollar supplement market. That product is Airborne.

22. Although the Airborne tablets themselves are nothing more than multi-vitamins mixed with herbs and amino acids, Defendants began marketing and selling Airborne as a cold "remedy," a "miracle cold buster," and as a product that will prevent the user from catching a cold in the first place if taken before entering crowded environments where germs are most likely to be present (such as classrooms, airplanes, movie theaters, etc.)

23. From the inception of this product, Defendants have employed deceptive tactics to promote Airborne. For example, Plaintiff is informed and believes that, to trick their first few retail customers into believing Airborne was actually selling, the Individual Defendants would take turns buying up the product themselves. Later, Plaintiff is informed and believes that the Individual Defendants formed Defendant Knight-McDowell Labs for the purpose of making it seem as though there was scientific support for the notion that Airborne could actually prevent and cure the common cold. Today, Defendants insist that retailers who wish to carry their hot selling product

display Airborne in the "cough and cold" aisle, alongside bona fide drugs and medicines — not in the supplement aisle.

24. While Defendant Knight-McDowell relied heavily on her folksy charm to push Defendants' self-proclaimed miracle cold remedy (according to statements on Airborne packaging, she claims to have invented Airborne because she was "sick of catching colds in the classroom"), her husband utilized his experience as a screenwriter to develop a very successful ad campaign. Airborne's ads make use of the likeable second-grade teacher (Defendant Knight-McDowell), cartoonish "germs," and a string of paid celebrities to tout the product's ability to prevent or cure colds.

25. Defendant Knight-McDowell promoted Airborne by appearing on the Oprah Winfrey show in or about September 2004, where she claimed that she was inspired to begin selling Airborne because she had given it to friends and family and they had stopped getting sick. Plaintiff is informed and believes that product sales increased substantially after the show featuring Defendant Knight-McDowell aired. A synopsis describing Defendant Knight-McDowell continues to appear on the Oprah website:

> As a teacher and a mother, Victoria found herself catching colds all the time. In her spare time, Victoria took to her kitchen to wage war on the common cold. Within six months she had created the prototype for Airborne, her all-natural cold fighter. Her friends and family started using it and Victoria says no one was getting sick. So she and her husband set up shop in their home and began to market Airborne. The accounting office was in the dining room, one of the bedrooms was the marketing office and the bathroom was shipping and receiving! The orders started pouring in and in the first year, Victoria made $25,000—the same as her teaching salary.

http://www.oprah.com/tows/slide/200409/20040930/slide_20040930_202.jhtml.

26. Airborne's advertising campaign has been phenomenally successful: As a result of Defendant's efforts, Airborne is purportedly the number-one selling "cold and flu remedy" sold by

Drugstore.com and is, according to Defendants, the "#1 natural cold remedy in the U.S.," and one of the "fastest selling products in retail history."

27. The Airborne sales campaign is, and always has been, deceptively simple and straightforward: Airborne is sold as a "natural cold remedy" that prevents and cures colds. For example, Airborne entices consumers to purchase the Remedy by asking the rhetorical question "Sick of Catching Colds? Take Airborne." In ads and on the Airborne boxes themselves, a smiling Defendant Knight-McDowell tells consumers she invented Airborne specifically because she was "sick of catching colds in the classroom." *E.g.*, Ex. A at 3. The Airborne Health website elaborates:

> Victoria Knight-McDowell, an elementary school teacher who was sick of catching colds in class and on airplanes, spent over five years developing AIRBORNE with a team of health professionals. During the product's development process, TEAM Airborne determined that by combining seven Chinese herbs* (each with a specific function in Eastern medicine) then putting them through a patented extraction process, and THEN combining them with a unique formulation of amino acids, anti-oxidants and electrolytes, they created a product that helped support and protect immune system function against airborne germs and viruses, hence AIRBORNE was born. *[Clinical pharmacology for AIRBORNE herbal constituents reported respectively in, Materia Medica, Pharmacology And Applications of Chinese Materia Medica, Encyclopedia of Common Natural Ingredients Used In Food, Drugs, and Cosmetics.]* They used an effervescent carrier, as a way to deliver the nutritional benefits of AIRBORNE to the system immediately, and without the bulk. There's nothing else like it!

Ex. B at 19.

28. According to Defendants, all a consumer need do to stave off a cold — either after a cold has begun to produce symptoms, or to prevent one as a result of exposure to others — is to take the Product "at the first sign of a cold symptom, or before entering crowded environments, like airplanes or offices." Plaintiff is also informed and believes that Defendants "talking points," which they use in conjunction with third-party advertisers to promote their product include claims that each Airborne tablet provides "3 hours of protection against the common cold" or "30 Hours of herbal and vitamin support per tube."

29. Airborne's purported ability to prevent a cold so soon after consuming it is explained on the package, which states that its "effervescent technology offers 100% immediate absorption." *E.g.*, Ex. A at 3, 6, 9. In other words, with respect to their marketing of Airborne as a shield against exposure to the cold virus in a crowded environment, Plaintiff is also informed and believes that the purpose of proclaiming that Airborne's ingredients will be "absorbed" immediately is to explain how Airborne can prevent the user from catching a cold simply by taking it before entering into "crowded environments." Toward the same end, Airborne added Airborne "On the Go" to its product line, contributing to the illusion that Airborne will protect against colds even if taken just prior to entering crowded environments. *See* Ex. B at 54. To the extent that consumers had any doubts about these claims, Airborne attempted to allay them by stating on the Product's package that "Clinical Trial data is available at www.airbornehealth.com." Ex. A at 3.

30. Defendants have claimed that this "Clinical Trial data" was the product of a double-blind, placebo-controlled study (the "Clinical Study") that was commissioned by Defendant Knight-McDowell Labs and conducted in 2003 by a company that supposedly specializes in clinical trial management, GNG Pharmaceutical Services. Plaintiff is informed, however, that the Clinical Study was actually conducted by two individuals hired by Defendants; that these individuals are neither scientists nor physicians; that the Clinical Study was not conducted in a clinic. Even Defendants have admitted that the Clinical Study "confused consumers."

31. Until recently, however, Defendants continued to refer to the Clinical Study on Airborne's website and on the Product's packaging. Defendants also continued to claim that 47 percent of the participants in the clinical trial had their symptoms disappear or nearly disappear after taking Airborne for five days. *See generally* Ex. B at 14-15. Nonetheless, Defendant Airborne Health, Inc., continued to insist that the Clinical Study was valid, stating that "[t]he 2003 trial was a small study conducted for what was then a small company. ***While it yielded very strong results***, we feel that the methodology (protocol) employed is not consistent with our current product

usage recommendations. Therefore, we no longer make it available to the public." (Emphasis added.)

32. Defendants' claims about Airborne are patently false. The school teacher and the Hollywood screenwriter did not actually invent a cure for the common cold: Again, the tablets themselves are nothing more than a multi-vitamin tablet, combined with a few minerals, amino acids and some herbs.

33. Consumers spend nearly $3 billion a year on medications to treat colds, and Airborne has capitalized on consumers' vulnerability to promises that an over-the-counter product can immunize them from catching a cold, and to cure it if they already have one. But Airborne does neither. To the contrary, experts have said that "simply washing your hands during cold and flu season is a much more effective way of preventing colds." Nonetheless, Defendants have made millions of dollars by making false representations to consumers about Airborne, and they continue to make millions through false advertising to this day.

34. Defendants promoted, advertised and sold Airborne products on the Airborne Health website and in ***the cold and cough medication aisle*** of large retail outlets (such as Long's Drugs, CVS Pharmacies, Costco, Sam's Club, Walgreen's, and other large retailers). *See, e.g.*, Ex. B at 3, 6, 80. Plaintiff is informed and believes that the Corporate Defendants are now primarily responsible for promoting, advertising, distributing, and selling the Airborne line of products. Plaintiff is also informed and believes, however, that until late-2005 the Individual Defendants have manipulated and controlled Defendant Airborne, Inc.'s assets for their personal use and profit, thereby treating it as their alter ego rather than a separate entity, and that the Individual Defendants — individually and through Defendant Knight-McDowell Labs — were primarily and individually responsible for promoting advertising, distributing and selling the Airborne line of products until that time.

35. As such, Defendant Knight-McDowell and Defendant McDowell treated Defendant Airborne, Inc., and Defendant Airborne Health, Inc., as their alter egos, and there exists a unity of interest and ownership that in reality no separate entities exist with respect those entities, which Defendants Knight-McDowell and McDowell created and continued to have a financial interest. Under the circumstances, the failure to disregard the separate identities of these entities would enable Defendants Knight-McDowell and McDowell to escape liability and would result in fraud and injustice.

THE FALSE AND MISLEADING NATURE OF AIRBORNE PACKAGING

36. Each package of Airborne contains false statements and illustrations that are intended to mislead consumers into believing that it can prevent the common cold, or hasten recovery if the consumer already has a cold when they take it. In addition to repeatedly stating that Airborne is designed for use in crowded environments, each package of Airborne includes an illustration of people with concerned looks on their faces, surrounded by others who are coughing and sneezing in a crowded environment — replete with "germs" floating above their heads — suggesting that Airborne can somehow immunize them from catching a cold under such circumstances. *See generally* Ex. A. Similarly, one version of the package states "SICK OF CATCHING COLDS?" prominently on the front. *See, e.g.,* Ex. B at 42.

37. Each Airborne package also states — repeatedly, in various locations on the front, side, and back of the package — that the product should be taken as soon as a cold symptom becomes manifest or when the consumer expects to be in a crowded environment. On the side panel, the statement appears after the usage instructions in bold capital letters: "**TAKE AT THE FIRST SIGN OF A COLD SYMPTOM OR IN CROWDED PLACES.**" Ex. A at 3. The same statement is made on the top of the package. *See id.* And on the back of the package, it states that Airborne "can be taken in two ways: at the first sign of a cold symptom, or before entering crowded environments, like airplanes and offices." *Id.*

38. The front of the package enumerates the locations in which it was purportedly designed to be used, stating that Airborne is intended "FOR USE IN: ► Airplanes ► Offices ► Schools ► Restaurants ► Health Clubs ► Theaters . . . ." *E.g.*, Ex. A at 3. The same message is included in the usage instructions: "DIRECTIONS: AT THE **FIRST** SIGN OF A COLD SYMPTOM, SIMPLY DROP (1) AIRBORNE TABLET IN A SMALL AMOUNT OF PLAIN WATER, LET DISSOLVE ABOUT (1) MINUTE AND DRINK.* REPEAT EVERY THREE HOURS AS NECESSARY." *Id.* (emphasis in original).

39. Plaintiff is informed and believes that the only way a so-called "dietary supplement" could be designed for use in airplanes, offices, schools, restaurants, and other places where people with colds are likely to congregate is if the "supplement" somehow immunized those who consumed it from the "germs" that those people are carrying. Moreover, because consumers are instructed to take Airborne at the "first sign" a cold has begun to materialize, consumers are led to believe that Airborne is a remedy with therapeutic value, and not merely a supplement that should be taken as a preventative, immune system booster.

40. The supposed importance of taking the product in a timely manner is further underscored by another claim that appears on each package: That "effervescent technology offers 100% immediate absorption." *E.g.*, Ex. A at 3. Plaintiff is informed and believes that Airborne is ***not*** 100% absorbed ***immediately*** into the blood stream, and that the true reason for this statement is to mislead consumers into believing that "immediate" absorption will prevent a cold when taken just before going to a crowded place.

41. Plaintiff is also informed and believe that Airborne does ***not*** "immediately" boost the consumers' immune system or prevent the consumer from contracting a cold in a crowded area because (1) Airborne's ingredients are not immediately absorbed into the bloodstream; (2) Airborne does not immediately boost the immune system in a manner that will ward off a cold — in a

crowded area or anywhere else; and (3) Airborne cannot prevent a consumer from contracting a cold in a crowded area if taken pursuant to the directions.

42. Another misleading message appears in the usage instructions: By stating that Airborne should be taken "every three hours as necessary," the package creates the potential for overdoses of vitamins C and A, which can lead to serious side effects. One tablet of Airborne contains one gram of vitamin C. *See* Ex. A at 3. Plaintiff is informed and believes that Vitamin C in doses higher than one gram increases oxalate and urate excretion, which can cause kidney stones and severe diarrhea. Thus, by recommending that consumers take three times that amount — and more "as necessary" — the packaging creates a dangerously misleading notion that such high doses are actually beneficial.

43. Even more potentially dangerous is the amount of vitamin A contained in Airborne. A single tablet contains 5,000 international units of vitamin A per serving, and the recommended safe upper limit for vitamin A is 10,000 international units daily. Thus, taking Airborne three times a day will cause consumers to consume 15,000 international units, and far more if they continue to take it throughout the day and night "as necessary" per the instructions on the package. Plaintiff is informed and believes that consuming Airborne as directed on the package can create serious health issues — such as birth defects, liver abnormalities, and osteoporosis.

44. On the back of the package, immediately following statements recommending that Airborne be taken at the first sign of a cold or when entering crowded environments is a reference to "Clinical Trial data" that is available on the Airborne Health website (www.airbornehealth.com). *See* Ex. A at 3. Plaintiff is informed and believe that, contrary to the ostensible support suggested by the reference on Airborne packaging, the so-called "Clinical Study" was neither independent nor legitimate in any way.

45. After this lawsuit was filed (on May 17, 2006), Airborne packaging was revised. The usage instructions on the new package now state that Airborne should be taken "no more than three times a day." Given that taking three Airborne tablets in a single day would exceed the maximum safe daily dosage of vitamin A by 5,000 international units, it is still misleading. Moreover, the older (unrevised) packages of Airborne continue to be sold via the Airborne Health website as recently as March 2007 and in retail outlets as recently as May 2007. Because the false and misleading statements on the older (unrevised) Airborne packages and Airborne Health website were made while the individual and corporate Defendants were in California, all the unlawful, fraudulent, and unfair conduct at issue in this lawsuit emanated from California.

FALSE AND MISLEADING STATEMENTS ON THE AIRBORNE WEBSITE

46. As stated on Airborne packages, the so-called Clinical Study was available on the Airborne Health website. *See, e.g.,* Ex. B at 11-18. (Each iteration of Airborne's website, from July 6, 2000, through May 27, 2006 — 10 days after this lawsuit was filed — is available on the Internet Archive, which is commonly known as the "Wayback Machine," at www.archive.org.) ("The Internet Archive is a 501(c)(3) non-profit that was founded to build an Internet library, with the purpose of offering permanent access for researchers, historians, and scholars to historical collections that exist in digital format." www.archive.org/about.php.)

47. The "Clinical Trial" was purportedly an independent and objective double-blind, placebo controlled, multi-center, randomized clinical trial that was conducted by GNG Pharmaceutical Services, Inc., in or about 2003. *See* Ex. B at 11-18. The "Clinical Trial" purportedly involved 120 adults, some of whom were given Airborne and some of whom were given a placebo. According to the report that was generated by the "Clinical Trial," 47 percent of those who consumed Airborne showed little or no cold or flu symptoms, whereas only 23 percent of the recipients of the placebo showed the same results.

48. After touting the "Clinical Trial" on packages of Airborne and in advertisements for years, all references to it were suddenly removed from Airborne packages and ads, and the results were no longer made available on the Airborne Health website.

49. In that report, ABC News revealed that the "Clinical Trial" was paid for by Defendant Knight-McDowell Labs; that GNG Pharmaceutical Services had no clinic, no scientists, and no doctors in its employ; that GNG Pharmaceutical Service's entire "staff" was composed of the two men who had formed GNG for the sole and specific purpose of performing the "Clinical Trial" for Defendant Knight-McDowell Labs.

50. Several months after this lawsuit was filed — three years after the "Clinical Trial" was conducted — Plaintiff is informed and believes that requests for copies of it were denied.

51. The Airborne Health website contained a number of other false and misleading statements about Airborne as well, such as characterizing it as a "Natural Cold Remedy," a "Miracle Cold Buster," an "awesome cold remedy," and by telling consumers that Airborne "wards the cold off within hours" and when a cold starts, "it wipes it out. This product works!" *See, e.g.,* Ex. B at 3, 24-25.

52. The website also stated that Airborne's "herbal" formula is actually more effective than pharmaceutical remedies:

> Some of the formulas have been used for at least two thousand years. There is a Chinese medicine text called the Nei Ching that was first written out in about 200 a.d. It contains formulas that are still used effectively for infections today. This "resistance to resistance" of Chinese herbal formulas is probably because there are several herbs in each formula and each herb has many complex plant alkaloids. ***This complexity is just too much for the "bugs" to process. It is much easier for them to adapt and "outwit" the simpler "one item" pharmaceuticals. Traditional herbal medicines may soon be our only weapon against bacteria, like staphylococcus—"staph"—that are fast becoming resistant to all antibiotics!***

Ex. B at 20 (emphasis added).

53. Plaintiff is informed and believes that Defendants' efforts to promote and sell Airborne have worked astonishingly well. According to the Los Angeles Daily News in 2003, Airborne Cold Remedy was the No. 1 "cold and flu remedy" sold by Drugstore.com. Since then, Airborne has been sold at major drug-store chains, such as Rite-Aid and CVS, as well as online through its own website and Amazon.com, in addition to membership outlets, such as Costco, Sam's Club. Thus, last year alone, Airborne is reported to have generated ***over $150 million.*** *See*, *e.g.*, http://biz.yahoo.com/ic/155/155280.html. And, as *Advertising Age* reported recently, that figure is expected to double — to $300 million — for the present fiscal year.

PLAINTIFF WILSON'S EXPERIENCE WITH AIRBORNE

54. Plaintiff David Wilson had seen several advertisements for Airborne before deciding to travel to Europe by air in or about October 2005, and he decided to purchase a package of Airborne before his trip. After reading the representations on a package of the original version of Airborne, Plaintiff Wilson purchased it just before leaving for his trip to Europe. Based on the representations on the package, Plaintiff believed that Airborne would prevent him from getting a cold from fellow passengers in the crowded environment of an airplane during the lengthy trip to Europe.

55. Plaintiff Wilson consumed the product as directed on the package immediately before entering the crowded environment of the airplane. Despite following the directions on the Airborne package to the letter, Plaintiff Wilson nevertheless came down with a cold during his European trip.

56. Plaintiff Wilson continued to use Airborne during his trip in the hope that it would hasten his recovery, as represented on the package. Nonetheless, Plaintiff Wilson continued to experience the symptoms of a cold, which was of the same duration and same severity as other colds he had contracted before using Airborne. In short, contrary to the representations made on the

package, Airborne did not prevent Plaintiff Wilson from catching a cold and did nothing to hasten his recovery from his cold after he caught it.

CLASS ACTION ALLEGATIONS

57. Plaintiff brings this class action pursuant to the provisions of California Code of Civil Procedure section 382 and California Civil Code section 1781, on behalf of himself and all other persons similarly situated.

58. The class that Plaintiff seeks to represent is defined as follows: All persons who purchased Airborne while residing in the United States, from May 17, 2002, to the present. The proposed class includes a subclass, comprising all class members who are "consumers" within the meaning of California Civil Code section 1761(d) (the "CLRA subclass").

59. Excluded from the class are Defendants, their subsidiaries and affiliates, officers, directors, and employees; persons who have suffered physical injury that was proximately caused by Airborne; and persons who have settled with and validly released Defendants from separate, non-class legal actions against Defendants based on the conduct alleged herein.

60. Plaintiff is informed and believes that millions of consumers purchased Airborne within the United States during the four years prior to the filing of the initial complaint in this action to the present. The class is, therefore, so numerous and geographically dispersed that joinder of all members in one action is impracticable.

61. Defendants have acted with respect to Plaintiff and members of the proposed class in a manner generally applicable to each of them. There is a well-defined community of interest in the questions of law and fact involved, which affect all class members. The questions of law and fact common to the class predominate over the questions that may affect individual class members, including the following:

a. whether Airborne can prevent a person from catching a cold;

b. whether Airborne can prevent a person from catching a cold if consumed shortly before (*i.e.*, within several hours of) entering into a crowded environment;

c. whether Airborne can hasten a person's recovery from a cold if Airborne is consumed at the "first sign" of a cold;

d. whether consuming Airborne in accordance with the usage instructions on the Airborne package can cause serious health problems;

e. whether Airborne's ingredients are immediately absorbed into a person's bloodstream in a manner that would enable Airborne to prevent a person from catching a cold in a crowded environment;

f. whether Airborne's ingredients are immediately absorbed into a person's bloodstream in a manner that would enable Airborne to hasten the recovery from a cold;

g. whether Defendants represented on Airborne's packaging that Airborne had a characteristics, ingredients, uses, or benefits that it does not have, in violation of Civil Code section 1770(a)(5);

h. whether Defendants represented on Airborne's packaging that Airborne is of a particular standard, quality, or grade that it is not, in violation of Civil Code section 1770(a)(7);

i. whether Defendants advertised Airborne with the intent not to sell it as advertised in violation of Civil Code section 1770(a)(9);

j. whether the representations on Airborne packaging constitute a drug or disease claim or otherwise violate the Sherman Law;

k. whether Defendants are subject to liability for violating the Consumers Legal Remedies Act ("CLRA"), Civ. Code §§ 1750-1784;

n. whether Defendants have violated the Unfair Competition Law, Bus. & Prof. Code §§ 17200-17209;

o. whether Defendants have violated the False Advertising Law ("FAL"), Bus. & Prof. Code §§ 17500-17536;

p. whether the CLRA subclass is entitled to an award of compensatory damages pursuant to Civil Code section 1780(a)(1);

q. whether the CLRA subclass is entitled to an award of statutory damages pursuant to Civil Code section 1780(a)(1);

r. whether the CLRA subclass is entitled to an award of restitution pursuant to Civil Code section 1780(a)(3);

s. whether the CLRA subclass is entitled to an award of punitive damages pursuant to Civil Code section 1780(a)(4);

t. whether Defendants have been unjustly enriched as a result of the unlawful, fraudulent, and unfair conduct alleged in this Complaint, such that it would be inequitable for Defendants to retain the benefits conferred upon them by Plaintiff and the proposed class; and

u. whether the class is entitled to an award of restitution pursuant to Business & Professions Code section 17203.

62. Plaintiff's claims are typical of the claims of all proposed class members.

63. Plaintiff will fairly and adequately represent and protect the interests of the proposed class, and does not have interests that are antagonistic to or in conflict with those he seeks to represent.

64. Plaintiff has retained counsel who have considerable experience in the prosecution of class actions and other forms of complex litigation.

65. In view of the complexity of the issues and the expense that an individual plaintiff would incur if he or she attempted to obtain relief from a large corporation such as those that have been named as Defendants in this action, the separate claims of individual class members are monetarily insufficient to support separate actions. Because of the size of the individual class members' claims, few, if any, class members could afford to seek legal redress for the wrongs complained of in this Complaint.

66. The proposed class is readily definable, and prosecution of Plaintiff's claims as a class action will eliminate the possibility of repetitious litigation and will provide redress for claims too small to support the expense of individual, complex litigation. Absent a class action, class members will continue to suffer losses, Defendant's violations of law will be allowed to proceed

without a full, fair, judicially supervised remedy, and Defendants will retain sums received as a result of its wrongdoing. A class action therefore provides a fair and efficient method for adjudicating this controversy.

67. The prosecution of separate claims by individual class members would create a risk of inconsistent or varying adjudications with respect to thousands of individual class members, which would, as a practical matter, dispose of the interests of the class members not parties to those separate actions or would substantially impair or impede their ability to protect their interests and enforce their rights.

68. The proposed class and CLRA subclass satisfy the certification criteria applicable to this action, including California Code of Civil Procedure section 382 and California Civil Code section 1781 and the cases construing and applying those statutes.

FIRST CAUSE OF ACTION

DECLARATORY RELIEF

(All Defendants)

69. Plaintiff realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

70. Pursuant to California Code of Civil Procedure section 1060, Plaintiff seeks a declaration of the respective rights and duties of the parties. As alleged in Paragraphs 10-12, 21-26, and 34-35 of this Complaint, Plaintiff contends that a unity of interest in ownership has existed and now exists between the Individual Defendants and Defendant Airborne, Inc., such that, to the extent any individuality and separateness ever existed between the Individual Defendants and Defendant Airborne, Inc., it has ceased, rendering Defendant Airborne, Inc., the alter ego of the Individual Defendants at all times relevant to the subject matter of this Complaint.

71. Defendants deny these allegations. Therefore, an actual controversy has arisen and now exists between Defendants and Plaintiff and the class he proposes to represent in this action. Accordingly, Plaintiff hereby requests a judicial declaration that adherence to the fiction of Defendant Airborne, Inc.'s existence as an entity separate and distinct from the Individual Defendants would permit an abuse of the corporate privilege and would promote fraud and injustice for the following reasons:

a. that from in or about 1997 to December 2005, the Individual Defendants have manipulated and controlled the Defendant Airborne, Inc.'s assets for their personal use and profit, thereby treating Defendant Airborne, Inc., as their alter ego rather than a separate entity;

b. that from in or about 1997 to December 2005, the Individual Defendants have used Defendant Airborne, Inc., as a device to avoid individual liability for the fraudulent conduct described in this Complaint; and

c. that from its inception until December 2005, Defendant Airborne, Inc., and the Individual Defendants failed to maintain an arm's-length relationship with Defendant Airborne, Inc.; rather, the Individual Defendants have exercised complete control and dominance of Defendant Airborne, Inc., to an extent that any individuality or separateness of Defendant Airborne, Inc., and the Individual Defendants did not and does not exist, thus rendering Defendant Airborne, Inc., a mere shell, instrumentality and conduit by which the Individual Defendants carried out their plan to defraud Plaintiff and the proposed class.

72. Plaintiff desires a judicial declaration of the rights and duties of Plaintiff and the proposed class and the Defendants with respect to each of the foregoing issues in controversy. Such a declaration is necessary and appropriate at this time for Plaintiff and the proposed class to

ascertain their rights and duties under the law, and to determine whether Defendant Airborne, Inc.'s corporate status should insulate the Individual Defendants from personal liability in this action.

SECOND CAUSE OF ACTION

UNFAIR AND DECEPTIVE ACTS AND PRACTICES IN VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT

(All Defendants)

73. Plaintiff realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

74. Plaintiff and members of the CLRA subclass are "consumers," as that term is defined by Civil Code section 1761(d) because they bought Airborne for personal, family, or household purposes.

75. Plaintiff, members of the CLRA subclass, and Defendants have engaged in "transactions," as that term is defined by Civil Code section 1761(e).

76. The conduct alleged in this Complaint constitute unfair methods of competition and unfair and deceptive acts and practices for the purposes of the CLRA, and were undertaken by Defendants in transactions intended to result in, and which resulted in, the sale of goods to consumers.

77. As alleged more fully in Paragraphs 20 through 56, above, and as demonstrated in Exhibits A and B hereto, Defendants have violated the CLRA by falsely representing to Plaintiff and the CLRA subclass **(a)** that Airborne can prevent a person from catching a common cold if taken before entering a crowded environment; **(b)** that Airborne can prevent a person from catching a common cold if taken at the "first sign" of a cold; and **(c)** that Airborne can hasten the recovery from a common cold.

78. As a result of engaging in such conduct, Defendants have violated Civil Code section 1770, subdivisions (a)(5), (a)(7), and (a)(9). Pursuant to Section 1782 of the CLRA, Plaintiff has notified Defendants in writing of their violations of the CLRA (the "Notice") and have demanded that they correct or otherwise rectify the problem created by their misrepresentations and other deceptive and unfair business practices.

79. Defendants have failed to make an appropriate correction, repair or replacement, or other remedy with respect to Airborne.

80. Plaintiff and the members of the CLRA subclass have suffered damages as a result of Defendants' violations of the CLRA. Accordingly, Plaintiff seek an award of damages pursuant to Civil Code section 1780(a), subdivision (a)(1).

81. The willful, deliberate, and deceptive nature of the conduct described herein, including but not limited to Defendants' exposing consumers to potentially dangerous doses of vitamin C and vitamin A, entitles Plaintiff and the CLRA subclass to an award of punitive damages pursuant to Civil Code section 1780(a)(4).

82. Pursuant to Civil Code section 1780, subdivisions (a)(2), (a)(3), and (a)(5), Plaintiff seeks and order of this Court that includes, but is not limited to, requiring Defendants **(a)** to remove depictions of sneezing and coughing people and of germs from Airborne packaging and advertisements: **(b)** to remove all anti-viral claims from Airborne packaging and advertisements; **(c)** to advise consumers that taking in excess of two doses of Airborne per day exceeds the upper safe limit for vitamins A and C; **(d)** to explain the potential danger in taking Airborne in conjunction with other vitamin supplements; **(e)** to cease representing that Airborne will cure or provide "immediate" protection against the common cold; **(f)** to comply with all applicable requirements of the Sherman Law (including, but not limited to **(i)** unlawfully labeling packages of Airborne, **(ii)** making an implicit disease claim (by depicting sneezing and coughing passengers on Airborne packages and by making

claims that Airborne can prevent or hasten the recovery from a common cold), **(iii)** by making unlawful nutrient-content claims (by, *e.g.*, failing to state the specific amount of the nutrients, except with respect to vitamins A and C and amino acids, rather than listing the cumulative amounts of these ingredients), **(iv)** failing to include information in the Supplement Facts panel on the Airborne package, **(v)** making statements as to the role of a nutrient or dietary ingredient intended to affect the structure or function in humans or describes general well-being from consumption of a nutrient or dietary ingredient; **(vi)** misbranding any food or drug, Health & Safety Code §§ 10398 & 111445, **(vii)** manufacturing, selling, delivering, holding, or offering for sale any food or drug that is misbranded, *id.* §§ 10398, 111440, and **(viii)** receiving in commerce any food or drug that is misbranded, or delivering or proffering it for delivery, *id.* §§ 110770, 111450); **(j)** to compel Defendants to provide restitution and to disgorge all revenues obtained as a result of their violations of the CLRA; and **(k)** to compel Defendants to pay Plaintiff's and the class's attorney fees and costs.

THIRD CAUSE OF ACTION

VIOLATIONS OF THE FALSE ADVERTISING LAW

(All Defendants)

83. Plaintiff realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

84. As alleged in Paragraphs 20 through 56, above, and as demonstrated in Exhibits A and B hereto, Defendants have falsely advertised Airborne by falsely claiming that Airborne can and does prevent the common cold if taken before entering a crowded environment, and can and does hasten recovery from a cold if Airborne is taken at the "first sign" of a cold.

85. Plaintiff and the members of the proposed class have suffered injury in fact and have lost money or property as a result of Defendants' violations of the FAL.

86. Pursuant to Business & Professions Code §§ 17203 and 17535, Plaintiff seeks and order of this Court that includes, but is not limited to, requiring Defendants **(a)** to remove depictions of sneezing and coughing people and of germs from Airborne packaging and advertisements: **(b)** to remove all anti-viral claims from Airborne packaging and advertisements; **(c)** to advise consumers that taking in excess of two doses of Airborne per day exceeds the upper safe limit for vitamins A and C; **(d)** to explain the potential danger in taking Airborne in conjunction with other vitamin supplements; **(e)** to cease representing that Airborne will cure or provide "immediate" protection against the common cold; **(f)** to comply with all applicable requirements of the Sherman Law (including, but not limited to **(i)** unlawfully labeling packages of Airborne, **(ii)** making an implicit disease claim (by depicting sneezing and coughing passengers on Airborne packages and by making claims that Airborne can prevent or hasten the recovery from a common cold), **(iii)** by making unlawful nutrient-content claims (by, *e.g.*, failing to state the specific amount of the nutrients, except with respect to vitamins A and C and amino acids, rather than listing the cumulative amounts of these ingredients), **(iv)** failing to include information in the Supplement Facts panel on the Airborne package, **(v)** making statements as to the role of a nutrient or dietary ingredient intended to affect the structure or function in humans or describes general well-being from consumption of a nutrient or dietary ingredient; **(vi)** misbranding any food or drug, Health & Safety Code §§ 10398 & 111445, **(vii)** manufacturing, selling, delivering, holding, or offering for sale any food or drug that is misbranded, *id.* §§ 10398, 111440, and **(viii)** receiving in commerce any food or drug that is misbranded, or delivering or proffering it for delivery, *id.* §§ 110770, 111450); **(j)** to compel Defendants to provide restitution and to disgorge all revenues obtained as a result of their violations of the FAL; and **(k)** to compel Defendants to pay Plaintiff's and the class's attorney fees and costs.

FOURTH CAUSE OF ACTION

VIOLATIONS OF THE UNFAIR COMPETITION LAW

(All Defendants)

87. Plaintiff realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

88. By committing the acts and practices alleged herein, Defendants have engaged in deceptive, unfair and unlawful business practices in violation of California's Unfair Competition Law as to the class as a whole. Defendants' violations of the UCL include, but are not limited to, the following:

a. **Unlawful Conduct**: Defendants have violated the UCL's proscription against engaging in unlawful conduct as a result of **(i)** their violations of the CLRA, Civil Code sections 1770, subdivisions (a)(5), (a)(7) and (a)(9), as alleged above; **(ii)** their violations of the FAL, Bus. & Prof. Code §§ 17500-17536, as alleged above; and **(iii)** their violations of the Sherman Law, including, but not limited to, **(a)** unlawfully labeling packages of Airborne, **(b)** making an implicit disease claim (by depicting sneezing and coughing passengers on Airborne packages and by making claims that Airborne can prevent or hasten the recovery from a common cold), **(c)** by making unlawful nutrient-content claims (by, *e.g.,* failing to state the specific amount of the nutrients, except with respect to vitamins A and C and amino acids, rather than listing the cumulative amounts of these ingredients), **(d)** failing to include information in the Supplement Facts panel on the Airborne package, **(e)** making statements as to the role of a nutrient or dietary ingredient intended to affect the structure or function in humans or describes general well-being from consumption of a nutrient or dietary ingredient; **(f)** misbranding any food or drug, Health & Safety Code §§ 10398 & 111445, **(g)** manufacturing, selling, delivering, holding, or offering for sale any food or drug that is misbranded, *id.* §§ 10398, 111440, and **(h)** receiving in commerce any food or drug that is misbranded, or delivering or proffering it for delivery, *id.* §§ 110770, 111450).

b. **Fraudulent Conduct**: Defendants have violated the UCL's proscription against fraud by falsely advertising Airborne, as in Paragraphs 20 through 56 of this Complaint.

c. **Unfair Conduct**: Defendants have violated the UCL's proscription against unfair conduct by engaging in the conduct alleged in Paragraphs 20 through 56 of this Complaint.

89. Defendants' violations of the UCL continue to this day. Plaintiff and all members of the class have suffered injury in fact and have lost money or property as a result of Defendants' violations of the UCL.

90. Pursuant to Business & Professions Code § 17203, Plaintiff seeks and order of this Court that includes, but is not limited to, requiring Defendants **(a)** to remove depictions of sneezing and coughing people and of germs from Airborne packaging and advertisements: **(b)** to remove all anti-viral claims from Airborne packaging and advertisements; **(c)** to advise consumers that taking in excess of two doses of Airborne per day exceeds the upper safe limit for vitamins A and C; **(d)** to explain the potential danger in taking Airborne in conjunction with other vitamin supplements; **(e)** to cease representing that Airborne will cure or provide "immediate" protection against the common cold; **(f)** to comply with all applicable requirements of the Sherman Law (including, but not limited to **(i)** unlawfully labeling packages of Airborne, **(ii)** making an implicit disease claim (by depicting sneezing and coughing passengers on Airborne packages and by making claims that Airborne can prevent or hasten the recovery from a common cold), **(iii)** by making unlawful nutrient-content claims (by, *e.g.*, failing to state the specific amount of the nutrients, except with respect to vitamins A and C and amino acids, rather than listing the cumulative amounts of these ingredients), **(iv)** failing to include information in the Supplement Facts panel on the Airborne package, **(v)** making statements as to the role of a nutrient or dietary ingredient intended to affect the structure or function in humans or describes general well-being from consumption of a nutrient or dietary ingredient; **(vi)** misbranding any food or drug, Health & Safety Code §§ 10398 & 111445, **(vii)** manufacturing, selling, delivering, holding, or offering for sale any food or drug that is misbranded, *id.* §§ 10398, 111440,

and **(viii)** receiving in commerce any food or drug that is misbranded, or delivering or proffering it for delivery, *id.* §§ 110770, 111450); **(j)** to compel Defendants to provide restitution and to disgorge all revenues obtained as a result of their violations of the UCL; and **(k)** to compel Defendants to pay Plaintiff's and the class's attorney fees and costs.

FIFTH CAUSE OF ACTION

UNJUST ENRICHMENT

(All Defendants)

91. Plaintiff realleges and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

92. By engaging in the conduct described in this Complaint, Defendants have been unjustly enriched by their sale of Airborne by the use of false advertising and by engaging in fraudulent and deceptive conduct to persuade consumers that Airborne actually prevents the common cold and hastens the recovery of colds that are contracted before using it.

93. As a proximate result of Defendants' unlawful, fraudulent, and unfair conduct, Defendants have obtained revenues by which they became unjustly enriched at Plaintiff and members of the proposed class's expense. Under the circumstances alleged herein, it would be unfair and inequitable for Defendants to retain the profits it has unjustly obtained at the expense of the Plaintiff and the class.

94. Accordingly, Plaintiff seeks an order establishing Defendants as constructive trustees of the profits that served to unjustly enrich them, together with interest during the period in which Defendants have retained such funds, and requiring Defendants to disgorge those funds to Plaintiff and members of the proposed class in a manner to be determined by the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and as representative of all other persons similarly situated, prays for judgment against Defendants, as follows:

1. for an order certifying the class and the CLRA subclass to proceed as a class action, and appointing Plaintiff, David Wilson, and his counsel, to represent the class;

2. for judicial declaration of the parties' respective rights and duties with respect to the alter-ego issues alleged in the First Cause of Action;

3. for an award of damages pursuant to Civil Code section 1780(a)(1);

4. for an award of restitution pursuant to Civil Code section 1780(a)(3);

5. for an award of punitive damages pursuant to Civil Code section 1780(a)(4);

6. for an award of restitution pursuant to Bus. & Prof. Code §§ 17203, 17535;

7. for an award of disgorgement pursuant to Bus. & Prof. Code §§ 17203, 17535;

8. for an order awarding restitution to prevent Defendants from becoming unjustly enriched as a result of their unlawful and deceptive conduct.

9. for an order enjoining Defendants' unlawful and deceptive acts and practices pursuant to Civ. Code § 1780(a)(2) and Bus. & Prof. Code §§ 17203, 17535 as follows:

a. to remove depictions of sneezing and coughing people and of germs from Airborne packaging and advertisements:

b. remove all anti-viral claims from Airborne packaging and advertisements;

c. to advise consumers that taking in excess of two doses of Airborne per day exceeds the upper safe limit for vitamins A and C;

d. to explain the potential danger in taking Airborne in conjunction with other vitamin supplements;

e. to cease representing that Airborne will cure or provide "immediate" protection against the common cold;

f. to comply with all applicable requirements of the Sherman Law;

g. to cease representing that Airborne prevents the common cold if taken shortly before entering a crowded environment; and

h. to cease making reference to the Clinical Study as support for Airborne's efficacy as a cold remedy.

10. for an award of attorney fees;

11. for an award of costs;

12. for an award of pre- and post-judgment interest on any amounts awarded; and

13. for any and all other relief the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff and the class demand a jury trial in this action for all the claims so triable.

DATED: May 21, 2007

WASSERMAN, COMDEN & CASSELMAN LLP

by_____
Melissa M. Harnett
Attorneys for Plaintiff