

1 **GUTRIDE SAFIER LLP**  
ADAM J. GUTRIDE (State Bar No. 181446)  
2 SETH A. SAFIER (State Bar No. 197427)  
MARIE A. MCCRARY (State Bar No. 262670)  
3 100 Pine Street, Suite 1250  
4 San Francisco, CA 94111  
Telephone: (415) 271-6469  
5 Facsimile: (415) 449-6469  
6 MATTHEW T. MCCRARY (admitted *pro hac vice*)  
265 Franklin St, Suite 1702  
7 Boston, MA 02110  
8 Telephone: (214) 502-2171

9 *Counsel for Plaintiff and Plaintiffs-In-Intervention*

10 UNITED STATES DISTRICT COURT FOR THE  
11 NORTHERN DISTRICT OF CALIFORNIA

12 JACKIE FITZHENRY-RUSSELL, on  
behalf of herself, the general public and  
13 those similarly situated,  
14 Plaintiff,  
15 v.  
16 The COCA-COLA COMPANY.,  
17 Defendant.

Case No. 5:17-cv-00603-EJD  
**PLAINTIFFS' MOTION FOR APPROVAL  
OF CLASS ACTION SETTLEMENT**  
**Date: June 13, 2019**  
**Time: 9:00 a.m.**  
**Courtroom: 4**  
**Judge: Honorable Edward J. Davila**

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**NOTICE OF MOTION AND MOTION**

1           **PLEASE TAKE NOTICE** that on June 13, 2019, at 9:00 a.m. or as soon as the matter  
2 may be heard, in Courtroom 4, before the Honorable Edward J. Davila, Plaintiff Jackie Fitzhenry-  
3 Russell and Plaintiffs-in-Intervention David Swartz, Ashley Salcedo, Scott Miller, Isabelo  
4 Pascual, Florin Carlin, and Kristina Hoffman (Plaintiff Fitzhenry Russell and Plaintiffs-in-  
5 Intervention are referred to collectively as, “Plaintiffs”)<sup>1</sup> shall and hereby do move the Court for  
6 an order:

7           (1) granting, for settlement purposes only, Plaintiffs-in-Intervention’s motion to  
8 intervene and granting Plaintiffs leave to file the Second Amended Complaint;

9           (2) approving, for settlement purposes only, the certification of a settlement class  
10 defined as “all persons, other than Excluded Persons, who, (i) during the Class Period, purchased,  
11 in the United States, any of the Products, except for purpose of resale.” “Excluded Persons” from  
12 the Settlement Class are: (1) the Honorable Edward J. Davila, the Honorable Virginia K  
13 DeMarchi, the Honorable Howard R. Lloyd, the Honorable Wayne Andersen (Ret.), and any  
14 member of their immediate families; (2) any government entity; (3) Defendant; (4) any entity in  
15 which Defendant has a controlling interest; (5) any of Defendant’s subsidiaries, parents, affiliates,  
16 and officers, directors, employees, legal representatives, heirs, successors, or assigns; and (6) any  
17 persons who timely opt-out of the Settlement Class. The “Class Period” means the period of April  
18 1, 2013, through the date of Preliminary Approval. The “Products” means any Seagram’s brand  
19 ginger ale beverage, including but not limited to, Seagram’s Ginger Ale, Seagram’s Diet Ginger  
20 Ale, Seagram’s Raspberry Ginger Ale, and Seagram’s Diet Raspberry Ginger Ale.

21           (3) approving of sending notice to all class members who would be bound by the  
22 settlement of this class action as set forth in the class action settlement agreement dated May 9,  
23 2019 (“Settlement”);

24           (4) directing the dissemination of notice in the form and manner set forth in the  
25 Settlement; and

26 \_\_\_\_\_  
27 <sup>1</sup> The capitalized terms used herein are defined in and have the same meaning as used in the  
28 Settlement Agreement unless otherwise stated.



1 (5) setting a date for a final approval hearing.

2 A copy of the Plaintiffs' Unopposed Proposed Order Granting Preliminary Approval of  
3 Class Action Settlement is attached to the Settlement Agreement as Exhibit D and is also  
4 separately submitted herewith.

5 **PLEASE ALSO TAKE NOTICE** that, after expiration of the time for class members to  
6 opt out or object, and upon the occurrence of the final approval hearing, Plaintiffs will seek entry  
7 of a further order:

8 (1) granting final approval to the Settlement and entering judgment thereon;

9 (2) entering an injunction against Defendant The Coca-Cola Company ("Coke" or

10 "Defendant"), requiring changes to the labeling of Seagram's Ginger Ale as further set  
11 forth in the Settlement;

12 (3) requiring Defendant to create a settlement fund of \$2,450,000;

13 (4) awarding class representative service awards of \$5,000 to Plaintiff Jackie Fitzhenry-

14 Russell and \$2,500 to each of the Plaintiffs-in-Intervention, David Swartz, Ashley  
15 Salcedo, Scott Miller, Isabelo Pascual, Florin Carlin, and Kristina Hoffman; and

16 (5) awarding Plaintiffs' counsel \$735,000 in attorneys' fees and \$85,000 in costs.

17 This Motion is based on Federal Rule of Civil Procedure 23, this Notice of Motion, the  
18 supporting Memorandum of Points and Authorities, the Gutride Declaration, the Fite Declaration,  
19 the Filmore Declaration, and the pleadings and papers on file in this action, including the class  
20 action settlement agreement dated May 9, 2019, and any other matter of which this Court may  
21 take judicial notice.

**MEMORANDUM OF POINTS AND AUTHORITIES****A. Introduction**

1  
2 Plaintiff Jackie Fitzhenry-Russell and the six Plaintiffs-in-Intervention in the proposed  
3 second amended complaint, David Swartz, Ashley Salcedo, Scott Miller, Isabelo Pascual, Florin  
4 Carlin, and Kristina Hoffman (collectively, the “Plaintiffs”), respectfully move for preliminary  
5 approval of a proposed class action settlement with Defendant The Coca-Cola Company (“Coke”  
6 or “Defendant”), the terms and conditions of which are set forth in the Settlement Agreement.  
7 Declaration of Adam Gutride in Support of Plaintiffs’ Motion for Approval of Class Settlement  
8 (the “Gutride Decl.”), Exhibit 1 (the “Settlement”). Coke does not oppose this motion and has  
9 approved the form of the proposed Order of Preliminary Approval submitted herewith.

10 This case concerns Coke’s Seagram’s brand ginger ales, including Seagram’s Ginger Ale,  
11 Seagram’s Diet Ginger Ale, Seagram’s Raspberry Ginger Ale, and Seagram’s Diet Raspberry  
12 Ginger Ale (collectively, the “Products”). Plaintiff Fitzhenry-Russell filed a complaint in Santa  
13 Cruz County Superior Court (which Coke subsequently removed to this Court) alleging that Coke  
14 deceptively marketed and sold the Products with the representation “Made with Real Ginger” on  
15 the front label, when in fact they do not contain “real ginger” as reasonable consumers understand  
16 that term, nor do the Products provide the health benefits that consumers reasonably expect from  
17 real ginger. Coke denies these allegations.

18 To resolve this litigation, Coke has agreed to remove the phrase “Made With Real Ginger”  
19 from its ginger ale packaging. Further, Coke agreed to create a settlement fund of \$2,450,000 and  
20 allow purchasers to make claims for cash refunds of \$0.80 for each Product purchased during the  
21 class period, up to a maximum of 13 Products without Proof of Purchase or 100 products with  
22 Proof of Purchase, with a minimum payment for five purchases even if fewer than five purchases  
23 are claimed. The amounts to be paid to each class member may be reduced pro-rata, if the total  
24 value of claims exceeds the amount of the common fund after payment of notice, administration,  
25 fees, costs and incentives. Should funds remain in the common fund after paying all claims,  
26 incentive awards, and fees and costs, the parties have agreed to donate the money cy pres, in equal  
27 amounts, to two charitable organizations.

28 Plaintiff Fitzhenry-Russell seeks a \$5,000 representative service award and each of the

1 Plaintiffs-in-Intervention seeks a \$1,000 representative service award. Plaintiffs’ counsel seeks an  
2 award of actual costs expended, which currently total \$70,805.52, plus \$735,000 in attorneys’ fees  
3 (equal to 30% of the common fund, which is almost identical to their current lodestar, though less  
4 than the expected lodestar through date of judgment). Plaintiffs and their counsel have not yet  
5 received any compensation for their more than 892 hours of work on this case (equating to a  
6 lodestar of \$731,685.00) or for the out-of-pocket expenses they have incurred (for experts,  
7 deposition transcripts, filing fees, etc.).

8 As the fair, reasonable and adequate Settlement is the product of a non-collusive,  
9 adversarial negotiation, and Plaintiffs’ Counsel’s request for fees and costs is fair and reasonable,  
10 Plaintiffs respectfully request that this motion be granted so that notice of the proposal can be  
11 given to the Settlement Class.

#### 12 **B. Background and Settlement Negotiations**

13 On December 23, 2016, Jackie Fitzhenry-Russell (“Fitzhenry-Russell”) through her  
14 counsel Gutride Safier LLP (“GSLLP”), filed a Class Action Complaint in Santa Cruz County  
15 Superior Court alleging Defendant deceptively marketed and sold its Seagram’s Ginger Ale  
16 products by including the words “Made with Real Ginger” on the front label. (Dkt. 1.) Fitzhenry-  
17 Russell alleged claims for violations of the California Consumer Legal Remedies Act, Civil Code  
18 § 1780, *et seq.* (“CLRA”), false advertising under California Business and Professions Code  
19 § 17500, *et seq.*; unfair business practices under California Business and Professions Code  
20 § 17200 *et seq.*; and fraud, seeking damages, an injunction and other relief. (Id.) Fitzhenry-Russell  
21 sought to pursue these claims on behalf of herself and all purchasers of Seagram’s Ginger Ale in  
22 the United States (other than resellers) between December 23, 2012, and the present. (Id.)  
23 Defendant timely removed the action to the Northern District of California on February 6, 2017.  
24 (Id.)

25 On March 13, 2017, Defendant moved to dismiss Plaintiffs’ complaint. (Dkt. 25.)  
26 Defendant argued, *inter alia*, that Plaintiff failed to plead an actionable misrepresentation. (Id.)  
27 Plaintiff opposed the motion. On October 18, 2017, the Court denied Defendant’s motion to  
28 dismiss in its entirety. (Dkt. 48.) On November 8, 2017, Defendant answered the complaint,

1 denying Fitzhenry-Russell's allegations and asserting several affirmative defenses. (Dkt. 50.)  
2 Fitzhenry-Russell filed an amended complaint on January 8, 2018 (Dkt. 55), which Defendant  
3 answered on January 22, 2018 (Dkt. 56).

4 Beginning in mid-2017, the Parties engaged in extensive discovery. (Gutride Decl. ¶¶ 9-  
5 13.) Defendant produced over 12,000 pages of corporate documents and answered detailed  
6 interrogatories. (Id.) Further, the parties presented three discovery disputes to the Court in early  
7 2018 relating to Defendants' discovery obligations. (Dkt. 59-61.) From Fitzhenry-Russell's  
8 perspective, the most critical related to Defendant's refusal to produce documents and  
9 interrogatories relating to Seagram's formula and ingredients on grounds of relevance and  
10 protection of trade secrets. (Dkt. 60.) The Court agreed that this information was critical to  
11 whether Seagram's was "Made with Real Ginger," and ordered Defendant to produce documents  
12 and answer interrogatories. (Dkt. 63) Fitzhenry-Russell was deposed, and Defendant gave two  
13 days of 30(b)(6) testimony via three corporate designees. (Gutride Decl. ¶ 13.) In addition,  
14 Plaintiffs' Counsel retained and worked with a survey expert to conduct surveys of California and  
15 Nationwide consumers regarding what the understood the phrase "Made with Real Ginger" to  
16 mean and how the inclusion of the phrase affected the market price of Seagram's ginger ale. (Id. ¶  
17 14.) Plaintiffs' Counsel also retained and worked with an economist to estimate classwide  
18 damages. (Id.) He opined, based on the survey results, that during the Class Period consumers paid  
19 a price premium for the Seagram's Ginger Ale of approximately 6% of the purchase price, which  
20 is an average of \$0.14 per product purchase. (Id.) Defendant retained and worked with an  
21 economist, who opined that there was no price premium, the Products were lined priced, and  
22 damages were \$0.00. Further, Defendant engaged two consumer survey experts, who conducted a  
23 separate survey and opined that the claim at issue, "Made with Real Ginger," was not material to  
24 consumers and criticized Plaintiffs' expert's survey methodology as unreliable. (Id. ¶ 15.)

25 Plaintiff Fitzhenry-Russell and her counsel were, simultaneously with this case,  
26 prosecuting a similar ginger ale case against one of Coke's competitors, entitled *Jackie Fitzhenry-*  
27 *Russell et al. v. Keurig Dr. Pepper, Inc. et al.*, Case No. 5:2017-cv-00564-NC (the "Canada Dry  
28 case"). The Canada Dry case involved very similar claims relating to allegations that the phrase

1 “Made from Real Ginger” on the label of Canada Dry ginger ale was likely to mislead reasonable  
2 consumers. (Gutride Decl. ¶ 4.) The Canada Dry case proceeded more quickly than this case, and  
3 while the parties here were conducting expert discovery in late 2018, the parties in the Canada Dry  
4 case were preparing for trial, which was scheduled to begin on January 7, 2019. (Id. ¶¶ 8 and 18.)  
5 Given the pending trial of similar claims, the parties here agreed to stay the case until early 2019.  
6 (Dkt. 72.) The Canada Dry case settled on the eve of trial, and the Canada Dry Plaintiffs moved  
7 for preliminary approval of the settlement on January 4, 2019. (Gutride Decl. ¶ 27.) In order to  
8 settle the Canada Dry case, Keurig Dr. Pepper, Inc. agreed to: (i) an injunction requiring it to  
9 remove the “Made from Real Ginger” representation from its label and (ii) allow consumers to  
10 submit monetary claims for purchases of Canada Dry Ginger Ale for payment of \$0.40 per unit  
11 purchased, for a total of up to \$5.20 per consumer with no proof of purchase and \$40.00 per  
12 consumer with proof of purchase. (Id. ¶ 28.) Likewise, in *George v. Keurig Dr. Pepper, Inc.*, No.  
13 1822-CC11811 (Mo. Cir. Ct.), a Missouri Court approved a settlement for Canada Dry consumers  
14 in the remaining 49 states. (Id. ¶ 26.) In the 49-State Canada Dry case, Keurig Dr Pepper agreed to  
15 pay valid claims on the same terms, up to a cap of \$11.2 million. (Id. ¶ 28.)

16 On January 29, 2019, the Proposed-Intervenors from four states (California, Pennsylvania,  
17 Florida, and New Jersey) filed a motion to intervene and a proposed amended complaint seeking to  
18 pursue claims on behalf of a nationwide class of consumers and to assert claims under the laws of  
19 all states. Fitzhenry-Russell joined in the motion and filed a motion for leave to amend. (Dkt. 75-  
20 76.) As addressed, *supra*, it is appropriate to certify a nationwide class, because Coke’s  
21 misrepresentations and challenged practices are uniform for all purchasers, and the elements of the  
22 legal claims are nearly identical in all states. The minor differences among state laws are  
23 immaterial to certification, particularly because the laws of all 50 states state are substantively  
24 identical to those in at least one of the four states represented by the Plaintiffs, i.e., California,  
25 Pennsylvania, Florida, and New Jersey). The motions to intervene and amend were set to be heard  
26 on May 16, 2019, but the hearings were taken off calendar in light of the parties’ agreement to  
27 attend mediation and to stay all case-related deadlines. (Dkt. 77.) The motions remain pending.

28 After the Canada Dry settlements were preliminary approved, Coca-Cola agreed to attend

1 mediation. (Gutride Decl. ¶ 31.) On February 19, 2019, the Parties participated in an all-day  
 2 mediation conducted by Honorable Wayne Anderson (retired) at JAMS in Chicago, Illinois. (Id. ¶  
 3 32.) The parties selected Anderson because he was one of the mediators involved in resolving the  
 4 Canada Dry case. Id. That mediation, and subsequent exchanges between the parties resulted in the  
 5 Settlement Agreement. Id.

6 **C. The Benefits Conferred on the Settlement Class Under the Proposed**  
 7 **Settlement of this Action**

8 The proposed settlement agreement (“Settlement”) resolves claims between Coke and the  
 9 settlement class of “all persons (other than Excluded Persons) who, between April 1, 2013 and  
 10 [date of preliminary approval], purchased in the United States, any Seagram’s Ginger Ale  
 11 Product.”<sup>2</sup> (Settlement ¶ 2.40.) “Excluded Persons” are: (1) the Honorable Edward J. Davila, the  
 12 Honorable Virginia K DeMarchi; the Honorable Howard R. Lloyd; the Honorable Wayne  
 13 Andersen (Ret.); (2) any member of their immediate families; (3) any government entity, (4)  
 14 Defendant; (5) any entity in which Defendant has a controlling interest; (6) any of Defendant’s  
 15 subsidiaries, parents, affiliates, and officers, directors, employees, legal representatives, heirs,  
 16 successors, or assigns; (7) counsel for the Parties; and (8) any persons who timely opt-out of the  
 17 Settlement Class. (Id. ¶ 2.14.) Under the Settlement Agreement, Class Members (except any such  
 18 Person who has filed a proper any timely request for exclusion from the Class), will agree to  
 19 release all claims regarding the labeling, advertising, or formulation of the Products. (Id. ¶ 8.2.)

20 **1. Changed Practices**

21 Coke will agree to a Permanent Injunction barring the phrase “Made with Real Ginger” in  
 22 any labeling of the Products. (Settlement ¶¶ 3.12-3.16.) Coke shall be permitted, at its option, to  
 23 use any of the following phrases in the labeling of the Products: “ginger,” “real ginger,” or  
 24 “natural ginger,” in combination with one of the following three words: “taste,” “extract,” or  
 25

26 <sup>2</sup> The class definition in the complaint included consumers who had purchased the product since  
 27 December 23, 2012 (four years prior to the filing of the complaint). The Settlement Class period is  
 28 approximately 3 months shorter because discovery revealed that Defendant did not add the phrase  
 “Made with Real Ginger” to the Seagram’s label until April 2013. *See*. N.D. Cal Procedural  
 Guidance for Class Action Settlements ¶ 1(a) (“N.D. Cal Guide”).

1 “flavor.” (Id. ¶ 3.13.) For example, the words “taste,” “extract,” or “flavor” may be used  
2 preceding, or following, the words “ginger,” “real ginger,” or “natural ginger.” (Id.)

### 3 **2. Monetary Relief**

4 Class members can file a claim for a cash payment of up to eighty cents (\$0.80) for each  
5 Product purchased during the Class Period (i.e., between April 1, 2013 and the date of preliminary  
6 approval), with a minimum payment for any class member who submits a Valid Claim of one to  
7 five products. (Settlement ¶¶ 3.4 and 3.9.) Class members can file a claim for up to 100 purchases  
8 per Household if at least 87 of those purchases are corroborated with Proof of Purchase. (Id. ¶ 3.9.)  
9 Class members can file a claim for up to 13 purchases per Household for claimed purchases that  
10 are not corroborated by Proof of Purchase. (Id.) “Household” means any number of persons  
11 occupying the same dwelling unit. (Id. ¶ 2.18.) “Proof of Purchase” means an itemized retail sales  
12 receipt showing, at a minimum, the purchase of a Product, the purchase price, and the date and  
13 place of the purchase. (Id. ¶ 2.35.) Counsel estimate that each claim will be paid at least forty  
14 cents (\$0.40) per product—that is, at least as much than the amount paid in the Canada Dry  
15 settlement—with the possibility of up to \$0.80 if the number of claims are lower than expected,  
16 and with any remaining funds to be paid *cy pres* to consumer protection entities to be approved by  
17 the Court. (Gutride Decl. ¶ 32.)

18 The claim form is simple. The form can be completed online or downloaded and submitted  
19 by mail, and is designed to be completed in minutes. (Settlement ¶¶ 4.1-4.3 and Exh. A.) It  
20 requires no purchase details other than the name and number of Products purchased and  
21 approximate month(s) and year(s) of purchase. (Id.)

### 22 **3. Administrative Expenses, Attorneys’ Fees and Costs, 23 Representative Service Awards**

24 All costs of notice and administration of the settlement will be paid from the settlement  
25 fund. (Settlement ¶ 4.7.)

26 In addition, Plaintiffs will request payment from the settlement fund of incentive awards of  
27 \$5000 for Plaintiff Fitzhenry-Russell, and \$1000 for each of the Plaintiffs-in-Intervention. (Id. ¶  
28 6.2.) The incentive fees are designed to compensate Plaintiffs for (1) the time and risk they took in  
prosecuting this action (including the risk of liability for Defendant’s costs and for negative

1 attention from the press and on social media) and (2) agreeing to a release broader than the one  
2 that will bind settlement class members. (Id.)

3 Plaintiffs also will request payment from the settlement fund of their out of pocket  
4 expenses (approximately \$70,000) plus attorneys' fees equal to 30% of the fund (\$735,000). (Id. ¶  
5 6.1.1) This request is in line with standard awards under other common fund settlements, under  
6 which fees are awarded as percentage of the fund, as set out in *Williams v. MGM Pathe*  
7 *Communications Corp.*, 129 F.3d 1026 (9th Cir. 1997). The request also is also reasonable under a  
8 lodestar-multiplier cross-check. The reasonableness of this request is discussed in Section G, *infra*.

#### 9 **D. The Settlement Should Be Approved.**

##### 10 **1. Legal Framework**

11 Strong judicial policy favors settlement of class actions. *See Class Plaintiffs v. City of*  
12 *Seattle*, 955 F.2d 1269, 1276 (9th Cir. 1992); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234,  
13 1238 (9th Cir. 1998). Settlements of complex cases greatly contribute to the efficient utilization of  
14 scarce judicial resources and achieve the speedy resolution of justice. "The claims, issues, or  
15 defenses of a certified class may be settled . . . only with the court's approval." Fed. R. Civ. P.  
16 23(e). A decision "to approve or reject a settlement is committed to the sound discretion of the trial  
17 judge because [s]he is exposed to the litigants, and their strategies, positions, and proof." *In re*  
18 *Mego Fin. Corp.*, 213 F. 3d 454, 458 (9th Cir. 2000). The Court must consider whether the  
19 settlement as a whole is reasonable; it stands or falls in its entirety. *See Hanlon v. Chrysler Corp.*,  
20 150 F.3d 1101, 1026 (9th Cir. 1998) ("*Hanlon*"). In addition, Rule 23(e) "requires the district court  
21 to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable." *Id.* at  
22 1026. Under Ninth Circuit precedent, the district court must balance a number of factors including:

23 the strength of the plaintiffs' case; the risk, expense, complexity, and likely  
24 duration of further litigation; the risk of maintaining class action status throughout  
25 the trial; the amount offered in settlement; the extent of discovery completed and  
26 the stage of the proceedings; the experience and views of counsel; the presence of  
27 a governmental participant; and the reaction of the class members to the proposed  
28 settlement.

*Id.* Recent amendments to Rule 23 similarly require the district court to consider whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm's length;



1 (C) the relief provided for the class is adequate, taking into account:

2 (i) the costs, risks, and delay of trial and appeal;

3 (ii) the effectiveness of any proposed method of distributing relief to the class,  
4 including the method of processing class-member claims;

5 (iii) the terms of any proposed award of attorney’s fees, including timing of  
6 payment; and

7 (iv) any agreement required to be identified under Rule 23(e)(3); and

8 (D) the proposal treats class members equitably relative to each other.

9 Fed. R. Civ. P. 23(e)(2). The Court should apply “the framework set forth in Rule 23, while  
10 continuing to draw guidance from the Ninth Circuit’s factors and relevant precedent.” *Hefler v.*  
11 *Wells Fargo & Co.*, No. 16-cv-05479-JST, 2018 U.S. Dist. LEXIS 213045, at \*13 (N.D. Cal. Dec.  
12 17, 2018).

## 13 **2. Fairness, Adequacy, and Reasonableness of Settlement**

### 14 **(a) Procedural Concerns**

15 The Court must consider whether “the class representatives and class counsel have  
16 adequately represented the class” and whether “the proposal was negotiated at arm’s length.” Fed.  
17 R. Civ. P. 23(e)(2)(A)-(B). As the Advisory Committee notes suggest, these are “matters that  
18 might be described as ‘procedural’ concerns, looking to the conduct of the litigation and of the  
19 negotiations leading up to the proposed settlement.” Fed. R. Civ. P. 23(e)(2)(A)-(B) advisory  
20 committee’s note to 2018 amendment. These concerns implicate factors such as the non-collusive  
21 nature of the negotiations, as well as the extent of discovery completed and stage of the  
22 proceedings. *See Hanlon*, 150 F.3d at 1026.

#### 23 ***i. Adequate Representation of the Class***

24 As discussed more fully in Section E, *supra*, Plaintiffs have no conflicts of interest with the  
25 Settlement Class and have invested significant time and resources in this litigation. Class Counsel  
26 has successfully represented numerous plaintiff classes, involving a variety of claims, in state and  
27 federal courts throughout the country and effectively represented the class interests in this case.

#### 28 ***ii. Arm’s Length Negotiations***

The Ninth Circuit “put[s] a good deal of stock in the product of an arm’s-length, non-

1 collusive, negotiated resolution” in approving a class action settlement. *Rodriguez v. West Publ’g*  
2 *Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Class settlements are presumed fair when they are  
3 reached “following sufficient discovery and genuine arms-length negotiation,” both of which  
4 occurred here. *See Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D.  
5 Cal. 2004) (“*DIRECTV*”); 4 Newberg at § 11.24. “The extent of discovery [also] may be relevant  
6 in determining the adequacy of the parties’ knowledge of the case.” *DIRECTV*, 221 F.R.D. at 527  
7 (quoting *Manual for Complex Litigation, Third* § 30.42 (1995)). “A court is more likely to approve  
8 a settlement if most of the discovery is completed because it suggests that the parties arrived at a  
9 compromise based on a full understanding of the legal and factual issues surrounding the case.”  
10 *DIRECTV*, 221 F.R.D. at 527 (quoting 5 *Moore’s Federal Practice*, §23.85[2][e] (Matthew Bender  
11 3d ed.)).

12 Before agreeing upon the terms of the settlement, the parties engaged in extensive expert  
13 and factual investigation, which included exchange of nine expert reports, three expert depositions,  
14 two days of 30(b)(6) testimony from three Coca-Cola designees, service of interrogatories and  
15 court-ordered responses to the interrogatories, the production of over 12,000 pages of documents,  
16 service of non-party subpoenas and receipt of documents from those non-parties, and the briefing  
17 of multiple discovery disputes. Gutride Decl. ¶¶ 9-15. Among other things, Plaintiffs received  
18 extensive information relating to the formulation of Seagram’s ginger ales and documents relating  
19 to Coke’s strategy for marketing Seagram’s ginger ale. *Id.* ¶ 12.

20 Plaintiff Ms. Fitzhenry-Russell and her counsel have experience in other ginger ale  
21 litigation, which has further informed their views about the claims in this case. *Id.* ¶ 35. The record  
22 was thus sufficiently developed that the parties were fully informed as to the viability of the claims  
23 and able to adequately evaluate the strengths and weaknesses of their respective positions and risks  
24 to both sides if the case did not settle. *Id.*

25 The parties negotiated the proposed settlement in good faith with the assistance of an  
26 independent, experienced mediator, the Honorable Wayne R. Andersen (Ret.) of JAMS, who had  
27 resolved the Canada Dry case. *Id.* ¶ 32. “The assistance of an experienced mediator in the  
28 settlement process confirms that the settlement is non-collusive.” *Adams v. Inter-Con Sec. Sys.*

1 *Inc.*, No. C-06-5428 MHP, 2007 WL 3225466, at \*3 (N.D. Cal. Oct. 30, 2007). The settlement  
 2 agreement was modeled on the settlement reached in the Canada Dry cases, which two courts have  
 3 now approved. Gutride Decl. ¶¶ 28, 32. In particular, Coca-Cola agreed to the same injunctive  
 4 relief (i.e., label changes) that KDP agreed to in the Canada Dry settlements. *Id.* Further, Coca-  
 5 Cola agreed to a common fund (instead of the claims made structure in the KDP settlement) and  
 6 agreed that consumers could receive up to \$0.80 per purchase (rather than the fixed \$0.40 per  
 7 purchase in the KDP settlements). *Id.*

8 **(b) Substantive Concerns**

9 Rule 23(e)(2)(C) and (D) set forth factors for conducting “a ‘substantive’ review of the  
 10 terms of the proposed settlement.” Fed. R. Civ. P. 23(e)(2)(C)-(D) advisory committee’s note to  
 11 2018 amendment. In determining whether “the relief provided for the class is adequate,” the Court  
 12 must consider “(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any  
 13 proposed method of distributing relief to the class, including the method of processing class-  
 14 member claims; (iii) the terms of any proposed award of attorney’s fees, including timing of  
 15 payment; and (iv) any agreement required to be identified under Rule 23(e)(3).” Fed. R. Civ. P.  
 16 23(e)(2)(C). In addition, the Court must consider whether “the proposal treats class members  
 17 equitably relative to each other.” Fed. R. Civ. P. 23(e)(2)(D).

18 ***i. Strength of Plaintiffs’ Case and Risk of Continuing  
 19 Litigation***

20 Consistent with Rule 23’s instruction to consider “the costs, risks, and delay of trial and  
 21 appeal,” Fed. R. Civ. P. 23(e)(2)(C)(i), courts in this circuit evaluate “the strength of the plaintiffs’  
 22 case; the risk, expense, complexity, and likely duration of further litigation; [and] the risk of  
 23 maintaining class action status throughout the trial,” *Hanlon*, 150 F.3d at 1026. Generally, the  
 24 principal risks to be assessed are the difficulties and complexities of proving liability and damages.  
 25 *See, e.g., Mego*, 213 F.3d at 458-59 (assessing risk of inability to prove fraudulent scheme in  
 26 affirming settlement); *Linney v. Cellular Alaska Partnership*, 151 F.3d at 1240-1241 (9<sup>th</sup> Cir.  
 27 1998) (assessing risks involving fraudulent concealment and ability to obtain damages in affirming  
 28 settlement); *Torrisi v. Tucson Electric Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993), *cert denied*,  
 512 U.S. 1220 (1994) (approving settlement based in part on “inherent risks of litigation”); *Class*

1 *Plaintiffs*, 955 F.2d at 1292 (approving settlement based on uncertainty of claims and avoidance of  
2 summary judgment); *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615,  
3 625 (9th Cir. 1982, *cert denied*, 495 U.S. 1217 (1983) (approving settlement based in part on the  
4 possibility that a judgment after a trial, when discounted, might not reward class members for their  
5 patience and the likely delay reflected in the “track record” for large class actions).

6 In considering whether to enter into the Settlement, Plaintiffs, represented by counsel  
7 experienced in food labeling litigation, weighed the risks inherent in establishing all the elements  
8 of their claims in a jury trial, as well as the expense of trial and likely duration of post-trial  
9 motions and appeals. Plaintiffs agreed to settle this litigation on these terms based on their careful  
10 investigation and evaluation of the facts and law relating to Plaintiffs’ allegations and  
11 consideration of the facts and views expressed by the mediator and Coke during the settlement  
12 negotiations. *See Louie v. Kaiser Found. Health Plan, Inc.*, No. 08-cv-0795, 2008 WL 4473183, at  
13 \*6 (S.D. Cal. Oct. 6, 2008) (“Class counsels’ extensive investigation, discovery, and research  
14 weighs in favor of preliminary settlement approval.”).

15 Plaintiffs and Plaintiffs’ Counsel were aware that, in order to prevail at trial, they would  
16 have to prove not only that Coke’s “Made with Real Ginger” representation was misleading, but  
17 that those statements were material; that consumers relied on the misrepresentation; the  
18 representation caused injuries; that there were recoverable damages for the Class; and in order to  
19 obtain punitive damages, that Coke’s conduct constituted fraud, oppression, or malice. Although  
20 Plaintiffs believe the evidence obtained in discovery established Coke’s liability and damages,  
21 Coke vigorously denies those allegations, creating substantial uncertainty of obtaining a successful  
22 verdict after trial and appeal. Among other things, Coke disputed that the “Made with Real  
23 Ginger” claim was misleading to a reasonable consumer and regardless was not important to  
24 consumer decision-making. Further, Coke criticized Plaintiffs’ consumer understanding and  
25 conjoint surveys as flawed and unreliable. Plaintiffs also faced substantial challenges in  
26 establishing the amount of class-wide damages. Coke argued that the conjoint model Plaintiffs  
27 used to calculate damages makes unsupportable assumptions that are contradicted by the facts and  
28 are not reliable. In particular, Coke asserted that its products are line priced and that the pricing of

1 Seagram's is unaffected by the "Made with Real Ginger" claim.

2 While Plaintiffs' Counsel are confident in their positions and believe Plaintiffs' claims are  
3 strong, Plaintiffs' Counsel are also experienced and realistic enough to know that the recovery and  
4 certainty achieved through settlement, as opposed to the uncertainty inherent in the trial and  
5 appellate process, weighs heavily in favor of settlement, particularly given the above risks, which  
6 could easily have impeded Plaintiffs' successful prosecution at trial and in an eventual appeal.

7 Gutride Decl. ¶¶ 34-37. Under the circumstances, Plaintiffs and Plaintiffs' Counsel appropriately  
8 determined that the instant settlement outweighs the gamble of continued litigation. *Id.* Moreover,  
9 even if Plaintiffs prevailed at trial, any recovery could be delayed for years by an appeal. *Id.* Thus,  
10 even in the best case, it could take years to secure any meaningful relief for class members. *See*  
11 *Lipuma v. American Express Company*, 406 F. Supp. 2d 1298, 1322 (S.D. Fla. 2005) (likelihood  
12 that appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement).

13 Further, a comparison of the settlement award to the potential damages that might be  
14 recovered for the Settlement Class at trial, given the risks of the litigation, supports the  
15 reasonableness of the Settlement. *See* N.D. Cal. Guide ¶1(d) (preliminary approval motion should  
16 set forth "potential recovery if plaintiffs were to prevail" and "likely recovery per plaintiff" under  
17 the settlement). Plaintiffs believe that their likely "best case" recovery at trial would be  
18 approximately \$58-62 million, based on the following assumptions. First, it appears that the retail  
19 revenues from nationwide sales of the Products during the Class Period were approximately \$970  
20 million. Gutride Decl. ¶ 38. Second, Plaintiffs believe that expert analysis would show that the  
21 premium attributable to the false "Made with Real Ginger" claim on the Products was 6% or  
22 6.33% (depending on package size), or \$58-63 million. *Id.* Thus, the price premium damages were  
23 an average of \$0.14 per product purchased. *Id.*

24 The settlement amount of \$2,450,000, which does not include the value of the changed  
25 practices, is approximately 4% of this best-case recovery. *Id.* ¶ 39. Plaintiffs believe this recovery  
26 to be fair in light of the risks discussed above. *Id.* ¶¶ 39-43. Further, the per-claim amount of \$0.80  
27 per product purchased is good result compared to the possible result in a contested proceeding, i.e.,  
28 \$0.14 per product purchased, as discussed above. Moreover, even after trial, class members would

1 have to make claims because they cannot otherwise be identified. *See Briseno v. ConAgra Foods,*  
2 *Inc.*, 844 F.3d 1121, 1131-32 (9th Cir. 2017) (“Rule 23 specifically contemplates the need for such  
3 individualized claim determinations after a finding of liability.”). There is no reason to believe the  
4 post-trial claim rate would exceed a settlement claim rate. Further, the case law is unclear as to  
5 whether each individual who filed a claim could recover more than the approximately 6%  
6 premium per product purchased (i.e., \$0.14), and Coke might be able to assert defenses to  
7 individual recoveries, as contemplated by *Briseno*. Coke also could likely insist on a more onerous  
8 claims process than the one agreed in this settlement, which does not even require proof of  
9 purchase for the first 13 products, and which guarantees payment for five products even if fewer  
10 than five purchases were made. A large class damage award thus might have resulted in *less*  
11 money being paid to individual class members, with the overwhelming majority of class members  
12 (the persons who lack proof of purchase) receiving nothing. The bulk of the money would only be  
13 awarded *cy pres*, or under some reading of the case law, might revert to the Defendant. In this  
14 settlement, there is no reversion.<sup>3</sup> Additionally, there is some value to Coke’s changed practices  
15 (i.e. removing the “Made With Real Ginger” phrase from the Seagram’s labeling), which could  
16 eliminate any price premium the claim commands, or at a minimum, provide better information to  
17 Settlement Class Members when they make decisions between Seagram’s and other competing  
18 products that are actually made with real ginger. Thus, the settlement is a very favorable outcome  
19 given the substantial risks of continuing with this complex litigation, and the uncertainty inherent  
20 in a jury trial, as well as the advantages of obtaining an immediate cash benefit for Settlement  
21 Class Members and avoiding the substantial expenses of further litigation.

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22 <sup>3</sup> “[I]t is well-settled law that a proposed settlement may be acceptable even though it amounts to  
23 only a fraction of the potential recovery that might be available to the class members at trial.”  
24 *DIRECTV*, 221 F.R.D. at 527, *citing Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th  
25 Cir. 1998). *See also e.g., Destefano v. Zynga, Inc.*, No. 12-cv-04007-JSC, 2016 WL 537946, at  
26 \*11 (N.D. Cal. Feb. 11, 2016) (“Settlement Amount represent[ing] approximately 14 percent of  
27 likely recoverable aggregate damages at trial” was “well within the range of percentages approved  
28 in other securities-fraud related actions”); *In re Biolase, Inc. Sec. Litig.*, No. SACV 13-1300-JLS,  
2015 WL 12720318, at \*4 (C.D. Cal. Oct. 13, 2015) (settlement representing “approximately 8%  
of the maximum recoverable damages ... equals or surpasses the recovery in many other securities  
class actions”); *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008)  
(settlement representing 9% of maximum damages fair and reasonable and “higher than the  
median percentage of investor losses recovered in recent shareholder class action settlements”).

1 The Settlement release is no broader than a res judicata release that would be obtained after  
 2 trial. It releases only claims that were or could have been asserted regarding labeling, advertising  
 3 and product formulation—the very issues in suit. *See Allied Fire Prot. v. Diede Constr., Inc.*, 127  
 4 Cal. App. 4th 150, 155 (2005) (“Res judicata serves as a bar to all causes of action that were  
 5 litigated or that could have been litigated in the first action.”); *see also In re Anthem, Inc. Data*  
 6 *Breach Litig.*, 327 F.R.D. 299, 327 (N.D. Cal. 2018) (“the Ninth Circuit allows federal courts to  
 7 release not only those claims alleged in the complaint, but also claims ‘based on the identical  
 8 factual predicate as that underlying the claims in the settled class action.’”) (quoting *Hesse v.*  
 9 *Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010)). Claims relating to “personal injury or property  
 10 damage arising out of the use of the Product” are specifically excluded from the release.

11 **ii. Effectiveness of Distribution Method**

12 The Court must consider “the effectiveness of [the] proposed method of distributing relief  
 13 to the class.” Fed. R. Civ. P. 23(e)(2)(C)(ii). Settlement Class Members who seek benefits under  
 14 the Settlement must only to submit a relatively simple claim form with basic questions about class  
 15 membership. As Coke is a wholesaler and has no records of Settlement Class Member purchases, a  
 16 claim form is required to identify class members and their eligible purchases. The form can be  
 17 completed online, or class members have the option to print and mail the claim form to the claim  
 18 administrator. Settlement ¶¶ 4.1-4.3 and Exh. A. Payments will be made either electronically or by  
 19 check and mailed. *Id.* This procedure is claimant-friendly, efficient, cost-effective, proportional  
 20 and reasonable. Pursuant to N.D. Guide ¶1(g), Plaintiffs’ Counsel estimate, based on their  
 21 experiences with recent settlements in other food labeling cases and the input of the claims  
 22 administrator, that approximately 75,000 to 100,000 class members will submit a claim. Gutride  
 23 Decl. ¶ 57.

24 **iii. Effectiveness of Distribution Method**

25 If any balance remains in the settlement fund—after payment of notice, administration,  
 26 fees, costs, incentives and valid claims—the parties have agreed that the amount may be paid cy  
 27 pres to two worthy charitable organizations focused on consumer rights. Settlement ¶ 3.5; *See*  
 28 *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (holding that courts “may employ the

1 cy pres doctrine to ‘put the unclaimed fund to its next best compensation use, e.g., for the  
2 aggregate, indirect, prospective benefit of the class’”) (citing *Masters v. Wilhelmina Model*  
3 *Agency, Inc.*, 473 F.3d 423, 436 (2d Cir.2007)); *see also Bolton v. U.S. Nursing Corp.*, 2013 WL  
4 2456564, \*2 (N.D. Cal. June 6, 2013) (in order granting preliminary approval, deferring approval  
5 of proposed cy pres recipients until final approval). At the time of final approval, if it appears that  
6 there will be a balance remaining in the settlement fund after payment of all claims, Plaintiffs’  
7 Counsel will provide additional information about the proposed organizations and the basis for the  
8 award.

9 **iv. Terms of Attorneys’ Fees**

10 Class Counsel seeks an award of \$735,000 in attorneys’ fees and approximately \$70,000 in  
11 costs. That request is addressed in Section G, *infra*.

12 **v. Supplemental Agreements**

13 There are no applicable “supplemental agreements” within the meaning of Rule 23(e)(3).

14 **vi. Equitable Treatment of Class Members**

15 All class members are entitled to the same relief under the Settlement. Even though  
16 products may have been sold at different prices based on size or retail location, the alleged  
17 premium is always 6% or 6.33%, and uniform relief makes it unnecessary for claimants to testify  
18 how much they paid for each purchase and makes the settlement administratively efficient. The  
19 Settlement also provides for service awards for the Plaintiffs, which is explained in Section H,  
20 *infra*.

21 **vii. Plaintiffs’ Counsel’s Experience**

22 Although not articulated as a separate factor in Rule 23(e), courts have given considerable  
23 weight to the opinion of experienced and informed counsel who support settlement. *See*  
24 *DIRECTV*, 221 F.R.D. at 528; *see also In re NVIDIA Corp. Derivative Litig.*, No. C-06-06110-  
25 SBA, 2008 WL 5382544 at \*4 (N.D. Cal. Dec. 22, 2008); *Kirkorian v. Borelli*, 695 F. Supp. 446,  
26 451 (N.D. Cal. 1988). In deciding whether to approve a proposed settlement of a class action,  
27 “[t]he recommendations of plaintiffs’ counsel should be given a presumption of reasonableness.”  
28 *Stewart v. Applied Materials, Inc.*, No. 15-cv-02632-JST, 2017 WL 3670711, at \*6 (N.D. Cal.



1 Aug. 25, 2017); *accord Omnivision*, 559 F. Supp. 2d at 1043 (same). Here, Plaintiffs’ Counsel  
2 came to recommend this Settlement after over two years of litigation, during which it expended  
3 over nearly 900 hours, which includes briefing on a variety of contested legal issues and discovery  
4 efforts. Gutride Decl. ¶¶ 46-48. Further, Plaintiffs’ counsel separately had worked on the similar  
5 Canada Dry case until the eve of trial, so they were very familiar with the issues to be litigated and  
6 tried. *Id.* ¶ 35. Coke is also represented by seasoned, class-action litigators who support the  
7 settlement. *Id.* ¶ 34.

### 8 **viii. Past Distributions**

9 The information requested by N.D. Cal. Guide ¶ 11 regarding past distributions in other  
10 comparable class settlements is provided in the Gutride Declaration. Gutride Decl. ¶ 57 and Ex. 14.

### 11 **E. The Settlement Class Should Be Conditionally Certified**

12 When a class settlement occurs before class certification has taken place, a court may  
13 conditionally certify an action for settlement purposes. *See In re Wireless*, 253 F.R.D. 630, 633  
14 (S.D. Cal. 2008) (“parties may settle a class action before class certification and stipulate that a  
15 defined class be conditionally certified for settlement purposes”). When certification is sought  
16 under Rule 23(a) and (b)(3), the Court’s threshold task is to preliminarily determine whether the  
17 proposed settlement class satisfies the numerosity, commonality, typicality and adequacy  
18 requirements of Rule 23(a), and the predominance and superiority requirements of Rule 23(b)(3).  
19 *Id.* Here, the parties seek approval, for settlement purposes only, of a nationwide Settlement Class  
20 so that relief can be afforded to all consumers. All of the class certification elements are met here.  
21 Indeed the claims and facts in this case are virtually identical to those in the Canada Dry case, in  
22 which the Court certified a class. *Fitzhenry-Russell v. Pepper Snapple Grp. Inc.*, 326 F.R.D. 592,  
23 606 (N.D. Cal. 2018) (hereafter, “*Canada Dry*”).

24 Numerosity is satisfied because tens of millions of Products were sold to the Settlement  
25 Class (Gutride Decl. ¶ 38) and “joinder of all members is impracticable.” Rule 23(a)(1); *see*  
26 *Canada Dry*, 326 F.R.D. at 607 (“[I]t is clear that the class is sufficiently numerous. Dr. Pepper  
27 sold millions of units of Canada Dry during the class period.”).

28 Typicality under Rule 23(a)(3) is a “permissive” standard that requires only that the

1 representatives' claims be "reasonably coextensive with those of absent class members; they need  
2 not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). In  
3 *Canada Dry*, the Court found Fitzhenry-Russell was typical because "she was deceived as a result  
4 of Dr. Pepper's ginger claim, meaning that she has suffered the same alleged injury as the rest of  
5 the class." 326 F.R.D. at 610. The same holds true here. Plaintiffs' claims regarding the deceptive  
6 nature of Coke's "Made with Real Ginger" claim are identical to those of the settlement class  
7 members.

8 Adequacy under Rule 23(a)(4) concerns whether the class representatives will "fairly and  
9 adequately protect the interests of the class." This inquiry involves two questions: "(1) do the  
10 named Plaintiffs and their counsel have any conflicts of interest with other class members and  
11 (2) will the named Plaintiffs and their counsel prosecute the action vigorously on behalf of the  
12 class?" *Hanlon*, 150 F.3d at 1020. Both requirements are met here. All of the Plaintiffs' interests  
13 are in line with the interests of the Settlement Class because they seek the same relief as the class,  
14 based upon the same claims and uniform business practices. Plaintiffs have also vigorously  
15 prosecuted this action, as shown by their retention of experienced, competent counsel; Fitzhenry-  
16 Russell's production of documents and appearance for deposition; and Plaintiffs' participation in  
17 the negotiation of this settlement. Plaintiffs also assumed the risk of bearing Defendant's costs  
18 should the litigation have ultimately been unsuccessful. Gutride Decl. ¶ 55; *see also Canada Dry*,  
19 326 F.R.D. at 611 (finding Fitzhenry-Russell adequate).

20 Plaintiffs' Counsel is competent and qualified to represent the Class. Plaintiffs' Counsel  
21 has extensive experience with complex class actions, having served as class counsel in numerous  
22 federal and state court consumer fraud actions that have resulted in millions of dollars being  
23 returned to consumers. Gutride Decl. ¶ 33 and Ex. 2. Numerous courts have repeatedly found  
24 Plaintiffs' Counsel to be adequate class counsel, including many in this District. *Id.*; *see also, e.g.*,  
25 *Canada Dry*, 326 F.R.D. at 611 (finding GSLLP adequate).

26 Commonality under Rule 23(a)(2) requires only that "a single significant question of law  
27 or fact" be common. *Canada Dry*, 326 F.R.D. at 607. Here, as in *Canada Dry*, that "common  
28 question is: was Defendants 'Made [with] Real Ginger' label likely to deceive reasonable

1 consumers?” *Id.*

2 Under Rule 23(b)(3), the question becomes whether “common questions predominate over  
3 individual ones.” *Id.* at 611. Here, there are numerous common questions, all of which  
4 predominate over any individualized issues, including: (1) whether Defendant’s marketing and  
5 advertising materials were likely to deceive reasonable consumers, (2) the amount of the price  
6 premium associated with the false advertising; (3) whether class members are entitled to injunctive  
7 and other equitable relief and, if so, what is the nature of such relief; and (4) whether class  
8 members are entitled to payment of actual, incidental, consequential, exemplary and/or statutory  
9 damages plus interest thereon. Coke sold the same products nationwide with the same labelling,  
10 using the same manufacturing and distribution practices. Regardless of the state, Plaintiffs allege  
11 that the “Made with Real Ginger” statement is false or misleading. Accordingly, this claim will  
12 present uniform issues of material fact for class members nationwide, including whether the  
13 labelling was likely to deceive, whether it was material to reasonable consumers, and whether a  
14 price premium can be demonstrated using the conjoint damages model. *See Canada Dry*, 326  
15 F.R.D. at 611-616 (finding predominance as to the reasonable consumer standard, materiality, and  
16 damages based on virtually identical survey and conjoint evidence available in this case).

17 Further, these common questions of fact and law predominate nationwide. Although a  
18 Ninth Circuit panel rejected a national settlement class certification in *In re Hyundai & Kia Fuel*  
19 *Econ. Litig.*, 881 F.3d 679, 689 (9th Cir. 2018) (“*Hyundai*”), the panel’s decision has been vacated  
20 pending en banc review, *Espinosa v. Ahearn (In re Hyundai & Kia Fuel Econ. Litig.)*, 897 F.3d  
21 1003, 1007, (9th Cir. 2018) and in any event the panel’s decision casts no doubt on the viability of  
22 a nationwide settlement class here. In *Hyundai*, the plaintiffs challenged allegedly fraudulent  
23 representations made by hundreds of independent new and used car dealers across the country, in  
24 connection with 76 different models of cars. 881 F.3d at 704. The evidence showed wide  
25 variations among the statements made by the dealers and among the true features of the car  
26 models. Prior to settlement, the plaintiff had moved to certify a nationwide class applying  
27 California law to all class members, but the district court tentatively denied certification  
28 concluding that California law could not apply nationwide, and that variances in state law undercut

1 predominance—particularly in light of the wide-ranging representations at issue. *Id.* at 695.  
2 Around the same time, numerous other class actions were filed around the country alleging similar  
3 misconduct under their own states’ laws. *Id.* at 697. In response, plaintiffs’ counsel in the  
4 California action, where certification had been denied, conspired with the Defendant to settle out  
5 from under the plaintiffs and counsel from other states, by agreeing to a nationwide settlement  
6 class under California law. *Id.* at 697-700. Although the plaintiffs and counsel from the other states  
7 objected, the district court certified the nationwide settlement class without making any new  
8 findings about commonality or predominance, let alone why California law should apply to class  
9 members in all states when it had previously held that it could not even apply uniformly to class  
10 members in California. *Id.* at 700. The objector plaintiffs from the other states appealed, and the  
11 Ninth Circuit reversed.

12 Notably, *Hyundai* does not hold that a nationwide class can never be certified. Rather, as  
13 the panel explained in its now vacated decision, the district court must consider “whether the  
14 consumer-protection laws of the affected States vary in *material* ways.” *Id.* at 702 (internal  
15 citations omitted) (emphasis added). Numerous courts applying *Hyundai* have upheld nationwide  
16 class settlements. *See, e.g., Partl v. Volkswagen, AG (In re Volkswagen "Clean Diesel" Mktg.,*  
17 *Sales Practices, & Prods. Liab. Litig.)*, 895 F.3d 597, 609, (9th Cir. 2018) (approving nationwide  
18 settlement where “predominance analysis under Rule 23(b)(3), [was] sufficient under *In re*  
19 *Hyundai*”); *In re Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices, & Prods. Liab. Litig.*,  
20 2019 U.S. Dist. LEXIS 21990, \*43 (N.D. Cal. February 11, 2019) (preliminarily approving  
21 nationwide class settlement despite *Hyundai*, because “while there are some variations in state  
22 law, Plaintiffs have made at least a fair argument . . . that such variations are not so extensive or  
23 complicated that they defeat predominance”); *In re Anthem*, 327 F.R.D. at 315 (approving  
24 nationwide settlement despite *Hyundai* because although “[i]t is true that the state consumer-  
25 protection statutes at issue here are not identical . . . the Court concludes that this is a case in  
26 which ‘the idiosyncratic differences between state consumer protection laws are not sufficiently  
27 substantive to predominate over the shared claims’”); *Koller v. Med Foods, Inc.*, Case No. 14-cv-  
28 2400-RS, ECF No. 169 (N.D. Cal., Aug. 29, 2018) (granting final approval to nationwide

1 settlement of food labeling class action over objections based on *Hyundai*).

2 This case presents none of the problems that led the *Hyundai* panel to reject the approval of  
3 a nationwide settlement class. Here, unlike *Hyundai*, the Court never issued any ruling indicating  
4 that a nationwide class was unlikely, and, in fact, refused to strike Plaintiff’s nationwide class  
5 allegations despite Defendant’s request that the Court do so. *See* Dkt. #48. Accordingly, there *was*  
6 a substantial risk of a nationwide class in this case, meaning the settlement negotiations were not  
7 tainted unfairly in favor of the defendant. *Cf. id.* at 703 (noting that “there was little risk that they  
8 would face a nationwide litigation class action if they did not reach a settlement agreement”).  
9 Further, as there were not competing lawsuits filed against Coke over this issue, there was no  
10 pressure or incentive to settle this case at a low price. *Cf. id.* at 697 (noting that the settlement was  
11 reached one week after the Judicial Panel on Multidistrict Litigation issued its order transferring  
12 56 other actions to the settling plaintiff’s district). Finally, Plaintiffs are not seeking to apply  
13 California law to class members in all states, but to apply the law of each state to the residents of  
14 that state; which is possible because the laws are substantively identical, and to the extent there are  
15 differences, the seven named plaintiffs represent various permutations. *Cf. id.* at 692; *accord In re*  
16 *Anthem, Inc. Data Breach Litig.*, 327 F.R.D. at 313 (distinguishing *Hyundai* because “Plaintiffs  
17 here do not assert that ‘California law . . . appl[ies] to all plaintiffs in the[ir] nationwide class’ but  
18 instead concede that the laws of the fifty States apply” (alterations in original)).<sup>4</sup> Filed herewith as  
19 Appendix A and B are, respectively, (1) a summary chart of the elements of the relevant state laws  
20 and (2) a more detailed discussion of the same, including statutory and case citations in support  
21 thereof. These charts demonstrate predominance of common issues.

22 Finally, Rule 23(b)(3)’s superiority analysis essentially looks to alternative methods of  
23 adjudication and whether maintenance of a class action would be fair and efficient. *See Valentino v*

24 \_\_\_\_\_  
25 <sup>4</sup> Nor is certification here inconsistent with the Ninth Circuit’s earlier decision in *Mazza v. Am.*  
26 *Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012). That was another case involving myriad car  
27 dealers and individualized representataions. The defendant opposed certification and demonstrated  
28 material differences of fact and law, particularly regarding scienter, reliance, and the remedial  
structure. *Id.* at 591. For the reasons above, those differences do not exist here. And even if a  
defendant *could* assert differing defenses to claims in various states—for example, asserting  
different limitations periods—Coke decided not to assert such defenses but instead to settle.

1 *Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir 1996); 2 Newberg at § 4.27. Superiority is  
2 satisfied in the present case because: (1) prosecuting or defending separate actions at this stage  
3 would be impractical and inefficient; and (2) to the parties’ knowledge, there is no other litigation  
4 concerning this controversy. *See* Fed. R. Civ. Proc., Rule 23(b)(3). Here, there are a multitude of  
5 consumers who were injured in small amounts. This “small individual damages” factor is  
6 significant and weighs heavily in favor of class certification, especially given the common scheme  
7 at issue. *See Miletak*, 2010 WL 809579 at \*13; *see also Canada Dry*, 326 F.R.D. at 616 (finding  
8 class action mechanism superior to resolve claims).

#### 9 **F. Adequacy of Notice**

10 The proposed claim form and notice plan, which are attached to the Settlement as Exhibits  
11 A and B comport with the procedural and substantive requirements of Rule 23 and the N.D. Cal.  
12 Guide. Under Rule 23, due process requires that class members receive notice of the settlement  
13 using the best notice that is “practicable under the circumstances.” *See* Fed. R. Civ. P. 23(c)(2)(B).  
14 The mechanics of the notice process are left to the discretion of the Court, subject only to the  
15 broad “reasonableness” standards imposed by due process. *See* 7A Wright & Miller, FEDERAL  
16 PRACTICE & PROCEDURE § 1786 (3d ed. 2008); *see also Rosenburg v. I.B.M.*, No. CV-06-00430-  
17 PJH 2007, 2007 WL 128232 at \*5 (N.D. Cal. 2007) (notice should inform class members of  
18 essential terms of settlement including claims procedure and their rights to accept, object or opt-  
19 out of settlement); N.D. Cal. Guide ¶¶ 3-5 (identifying information to be included in notice). In  
20 this Circuit, it has long been the case that a notice of settlement will be adjudged satisfactory if it  
21 “generally describes the terms of the settlement in sufficient detail to alert those with adverse  
22 viewpoints to investigate and to come forward and be heard.” *Churchill*, 361 F.3d 566, 575 (9th  
23 Cir. 2004) (citing *Mendoza v. Tucson Sch. Dist. No.1*, 623 F.3d 1338, 1352 (9th Cir. 1980)). The  
24 proposed Notice Plan satisfies these content requirements and is designed to reach a high  
25 percentage of the Settlement Class.

26 Notice of the settlement is to be provided to the Settlement Class as follows: (1) via  
27 publication of a one-third page ad in People magazine (circulation of 3,031,829 with  
28 approximately 33,926,000 readers of the print edition); (2) online notice targeted at likely class

1 members served across lifestyle, news, and weather internet websites and via social media  
2 platforms (3) online notice served to users conducting internet searches with the Google/Bing  
3 website; and (4) a press release through a national wire service. *See* Settlement Exh. B.

4 The proposed notices inform class members about the proposed settlement; a summary of  
5 settlement benefits; their right to opt out and the information required by N.D. Cal. Guide ¶ 4  
6 regarding opt outs; their right to object and the information required by N.D. Cal. Guide ¶ 5  
7 regarding objections; the need to file a claim; and the prospective request for attorneys' fees, costs  
8 and representative service awards. The published notices refer class members to the settlement  
9 website where they can obtain the long-form notice, which provides more details about the case  
10 and the settlement, online and printable versions of the claim form and the opt out forms, a fuller  
11 discussion of the release, and methods to obtain additional information. In addition, the settlement  
12 website will also shall contain a contact information page that will include address and telephone  
13 numbers for the claim administrator and Class Counsel, the Settlement Agreement, the date of the  
14 final approval hearing, the motions for approval and for attorneys' fees and any other important  
15 documents in the case. Further, the administrator will provide a toll-free telephone number at  
16 which class members can obtain information.<sup>5</sup>

17 As explained in the declaration from the claim administrator filed herewith, this multi-  
18 communication method is expected to reach at least 80% of the settlement class members an  
19 estimated average of 2-2.5 times each, and it is the best notice practicable. *See*, Fite Decl. ¶¶ 15,  
20 24. *See, e.g., In re Google Referrer Header Privacy Litig.*, No. 5:10-cv-04809, 2014 WL 1266091,  
21 \*7 (N.D. Cal. Mar. 26, 2014) (where direct individual notice not practical, "publication or  
22 something similar is sufficient to provide notice to the individuals that will be bound by the  
23 judgment"); *see also In re Tableware*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (approving  
24 settlement; holding that where Defendant do not maintain complete lists of all class members,  
25 notice via publication is "reasonable").

26 The Class Action Fairness Act requires that Coke give notice of the proposed class action

27 \_\_\_\_\_  
28 <sup>5</sup> Direct notice is not possible because Defendant does not maintain records of consumer purchases.

1 settlement to appropriate state and federal officials and supply all of the information and  
2 documents set forth in 28 U.S.C. § 1715 (b)(1)-(8). The Claims Administrator will do so within ten  
3 days after the Settlement Agreement is filed with the Court. (Settlement Ex. B-2.)

4 **G. Approval of the Attorneys' Fees and Expenses.**

5 The Settlement Agreement provides for the payment of attorneys' fees and expenses from  
6 the common fund. Having reached a common fund settlement, Plaintiffs' Counsel is entitled to  
7 seek an award of fees and expenses from the fund. *See e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d  
8 1043, 1047 (9th Cir. 2002); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311  
9 (9th Cir. 1990). Plaintiffs request payment from the common fund of their out of pocket expenses,  
10 which are currently \$70,805.52, plus attorneys' fees equal to 30% of the fund (\$735,000).

11 **1. Plaintiffs' Fee Request is Reasonable Percentage of the Common  
12 Fund.**

13 Where a settlement involves a common fund, courts typically award attorneys' fees based  
14 on a percentage of the total settlement. *See State of Fla. v. Dunne*, 915 F.2d 542, 545 (9th Cir.  
15 1990); *see also In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming  
16 attorney's fee award of 33% of the recovery); *Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th  
17 Cir. 2003) (affirming attorney's fee award of 33% of the recovery). When determining the value of  
18 the settlement, courts consider both the monetary and non-monetary benefits conferred under the  
19 settlement terms. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 972-74 (9th Cir. 2003); *Hartless v.*  
20 *Clorox Co.*, 273 F.R.D. 630, 645 (S.D. Cal. 2011), *aff'd*, 473 F. App'x. 716 (9th Cir. 2012). The  
21 Court should take into account the value of injunctive relief when assessing fees, but need not  
22 determine a specific monetary value associated with that relief. *See Laguna v. Coverall N. Am.,*  
23 *Inc.*, 753 F.3d 918, 924 (9th Cir. 2014) *vacated on other grounds*, 772 F.3d 608 (9th Cir. 2014)  
24 (“[W]e have never required a district court to assign a monetary value to purely injunctive relief.  
25 To the contrary, we have stated that courts cannot ‘judge with confidence the value of the terms of  
26 a settlement agreement, especially one in which, as here, the settlement provides for injunctive  
27 relief.’”); *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003) (a district court still “should  
28 consider the value of the injunctive relief as a ‘relevant circumstance’” in its fee determination).  
Additionally, Ninth Circuit precedent requires courts to award class counsel fees based on the total



1 benefits being made available to class members rather than the amount actually claimed. *Young v.*  
2 *Polo Retail, LLC*, 2007 U.S. Dist. LEXIS 27269, at \*23 (N.D. Cal. Mar. 28, 2007) (citing *Williams*  
3 *v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026 (9th Cir. 1997) (finding “district court abused its  
4 discretion in basing attorney fee award on actual distribution to class” instead of amount being  
5 made available)).

6 In the Ninth Circuit, the benchmark for an attorney fee is 25% of the total settlement value,  
7 including the monetary and non-monetary recovery. *See Six Mexican Workers*, 904 F.2d at 1311;  
8 *see also Staton*, 327 F.3d at 974 (“[W]here the value to individual class members of benefits  
9 deriving from injunctive relief can be accurately ascertained . . . courts [may] include such relief as  
10 part of the value of a common fund for purposes of applying the percentage method . . .”). The  
11 benchmark percentage “can then be adjusted upward or downward to account for any unusual  
12 circumstances involved in the case.” *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272  
13 (9th Cir. 1989). Many cases have found that a larger percentage of the fund, i.e., between 30% and  
14 50% of the common fund, is appropriate when the settlement fund is less than ten million. *See Van*  
15 *Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 297-98 (N.D. Cal. 1995) (collecting cases); *see*  
16 *also Johnson v. Gen. Mills, Inc.*, 2013 WL 3213832, at \*6 (C.D. Cal. June 17, 2013) (awarding a  
17 fee award of 30% of the settlement fund in a food labeling class action).

18 Here Plaintiffs’ fee request amounts to 30% of the monetary value of the settlement.  
19 Although this is a slight increase on the benchmark of 25%, this is reasonable for several reasons.  
20 First, the lodestar incurred to date exceeds 25% of the fund, and by the time of the judgment will  
21 likely exceed 30% of the fund. (The lodestar would be even higher if it included the work  
22 performed in the Canada Dry case that benefited this case but was not compensated in the Canada  
23 Dry case; more than \$1.69 million of work there was not compensated). Gutride Decl. ¶ 29.  
24 Second, the settlement fund is under \$10 million so a larger percentage is warranted. *See Van*  
25 *Vranken*, 901 F. Supp. at 297-98; *Johnson*, 2013 WL 3213832, at \*6. Third, the “primary form of  
26 relief under the UCL” is an injunction, while monetary recovery—i.e., restitution—is only an  
27 “ancillary” form of relief. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 337 (2011).  
28 Defendant here is agreeing to a permanent injunction to change its label, which based on

1 Plaintiffs' expert conclusions about the premium, should save class members money in the future,  
2 or at a minimum provide them more accurate information on which to base their purchasing  
3 decisions. That is a significant portion of the total relief in the settlement, which is not accounted  
4 for in a strict monetary assessment.

5 **2. Plaintiff's Fee Request is Reasonable under a Lodestar Cross-  
6 Check.**

7 The Court is not obligated to perform a cross-check on Class Counsel's lodestar when  
8 evaluating the percentage of the fund to be awarded as fees. *In re Google Referrer Header Privacy*  
9 *Litig.*, 869 F.3d 737 (9th Cir. 2017) (noting that district court did but was not required to do a  
10 lodestar method cross-check); *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 547 (9th Cir.  
11 2016) ("[A] cross-check is entirely discretionary . . ."); *Bolton v. U.S. Nursing Corp.*, No. C 12-  
12 4466 LB, 2013 WL 5700403, at \*5 (N.D. Cal. Oct. 18, 2013) ("In a common fund case, a lodestar  
13 method does not necessarily achieve the stated purposes of proportionality, predictability and  
14 protection of the class and can encouraged unjustified work and protracting the litigation.").  
15 Indeed, "[i]n a common fund case, a lodestar method does not necessarily achieve the stated  
16 purposes of proportionality, predictability and protection of the class and can encouraged  
17 unjustified work and protracting the litigation." *Bolton v. U.S. Nursing Corp.*, No. C 12-4466 LB,  
18 2013 WL 5700403, at \*5 (N.D. Cal. Oct. 18, 2013) (citing *In re Activision Securities*  
19 *Litigation*, 723 F.Supp. 1373, 1378 (N.D. Cal. 1989)). Nevertheless, should the Court elect to  
20 utilize a lodestar cross-check, Class Counsel's fee here is likewise eminently reasonable.

21 Under the lodestar approach, "[t]he lodestar (or touchstone) is produced by multiplying the  
22 number of hours reasonably expended by counsel by a reasonable hourly rate." *Lealao v.*  
23 *Beneficial California, Inc.*, 82 Cal. App. 4th 19, 26 (2000). Once the court has fixed the lodestar, it  
24 may increase or decrease that amount by applying a positive or negative "multiplier to take into  
25 account a variety of other factors, including the quality of the representation, the novelty and  
26 complexity of the issues, the results obtained and the contingent risk presented." *Id.*; *see also*  
27 *Serrano III*, 20 Cal. 3d at 48-49; *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal. App. 4th  
28 615, 622; *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1418 (1991) (multipliers are used  
to compensate counsel for the risk of loss, and to encourage counsel to undertake actions that

1 benefit the public interest).

2 Plaintiffs' Counsel's lodestar through the date of this application is approximately  
3 \$731,865.00. Gutride Decl. ¶ 46. This includes, without limitation, Plaintiffs' Counsel efforts in:

- 4 • Pre-filing investigation and vetting of potential class representatives;
- 5 • Drafting and filing a class action complaint and two amended complaints;
- 6 • Drafting and filing an opposition to Defendant's motion to dismiss;
- 7 • Drafting and filing numerous case management conference statements and case  
8 management stipulations;
- 9 • Meeting-and-conferring with Defendant's counsel regarding the scope of discovery, the  
10 sufficiency of discovery responses and production, the retention of electronic  
11 documents, search terms for electronic discovery, the terms and scope of a stipulated  
12 protective order, the timing of production, the timing of depositions, and a stay of the  
13 case pending trial of a similar matter;
- 14 • Briefing multiple discovery disputes on issues relating to Defendant's discovery  
15 responses and the scope of discovery;
- 16 • Reviewing documents produced by Defendant, in addition to Defendant's written  
17 discovery responses;
- 18 • Subpoenaing and reviewing documents from third party witnesses;
- 19 • Taking depositions of three of Defendants' employees and one of Defendants' expert  
20 witnesses;
- 21 • Defending the depositions of Plaintiff Fitzhenry-Russell and two of Plaintiff's expert  
22 witnesses;
- 23 • Working to provide Plaintiffs' survey and damages experts with sufficient data to  
24 compile their expert reports, and consulting with additional experts regarding  
25 manufacturing and testing ginger ale, as well as the flavor components and health  
26 implications thereof;
- 27 • Drafting a comprehensive mediation statement, and participating in an all-day  
28 mediation before Judge Anderson;
- Negotiating and drafting the Settlement Agreement along with corresponding  
documents, including claim forms, summary notice, and long-form notice;
- Filing the motion for approval of the Settlement and supporting documents, including a  
proposed preliminary approval order and a proposed final judgment; and
- Selecting and retaining a Claims Administrator.

27 Gutride Decl. ¶ 48.

28 In addition, before the final approval hearing, Plaintiffs' Counsel's efforts will also

1 include, without limitation:

- 2 • Continued correspondence with Settlement Class Members and supervision of the work of the Claims Administrator; and
- 3 • Researching and drafting a reply memorandum and opposing objections, if any.

4  
5 Gutride Decl. ¶ 54.

6 Of further note, as discussed above, Plaintiffs' Counsel's lodestar does not include  
7 activities by Class Counsel from the Canada Dry case, which allowed Counsel to gain expertise  
8 and litigate this matter more efficiently and for which Plaintiffs' Counsel recovered less than 60%  
9 of their lodestar.

10 Plaintiffs' Counsel calculated their lodestar using their regular billing rates, which for the  
11 attorneys involved range from \$550 to \$1025 per hour. Gutride Decl., ¶¶ 46-47. Plaintiffs'  
12 Counsel are graduates of top law schools (including Yale, Harvard and NYU), and the principal  
13 work was performed by lawyers with 10 to 24 years of experience.<sup>6</sup> "Affidavits of the plaintiff[s]  
14 attorney and other attorneys regarding prevailing fees in the community, and rate determinations in  
15 other cases, particularly those setting a rate for the plaintiff[s] attorney, are satisfactory evidence  
16 of the prevailing market rate." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403,  
17 407 (9th Cir. 1990). For attorneys and staff at the Gutride Safier firm, these hourly rates are equal  
18 to market rates in San Francisco for attorneys of Plaintiffs' Counsel's background and experience.  
19 Gutride Decl., ¶¶ 49-52, Exh. 3-12. Additionally, the rates charged by Plaintiffs' Counsel have  
20 been deemed reasonable in connection with the approval its fee applications in at least seven  
21 recent matters. *Id.* ¶ 49. Courts in other cases over the past several years have also approved  
22 similar fees charged by other firms. *See In re Optical Disk Drive Prod. Antitrust Litig.*, 2016 WL  
23 7364803, at \*8 (N.D. Cal. Dec. 19, 2016) (approving hourly rates of \$205 to \$950); *Gutierrez v.*

24 \_\_\_\_\_  
25 <sup>6</sup> The lawyers also previously worked for top defense firms; had they remained at those firms their  
26 rates would be even higher than at GSELLP. Gutride Decl., ¶ 51. Furthermore, it is almost certain  
27 the rates paid by Defendant to its firms in this case far exceed the rates requested for Class  
28 Counsel. *Id.*; *see also Managing Class Action Litigation: A Pocket Guide For Judges* § IV(F)  
(suggesting an examination of the defendant's attorney fee records as a measure of what might be  
reasonable.) Finally, the Gutride Safier firm's billing rates were recently approved by other judges  
in this District as well as those in the Central District of California, Northern District of Illinois,  
and San Francisco Superior Court. Gutride Decl. ¶ 49.

1 *Wells Fargo Bank, N.A.*, 2015 WL 2438274, at \*5 (N.D. Cal. May 21, 2015) (approving hourly  
2 rates of \$475 to \$975).

3         These rates are the current rates charged by Plaintiffs' Counsel, which is appropriate given  
4 the deferred and contingent nature of counsel's compensation. *See LeBlanc-Sternberg v. Fletcher*,  
5 143 F.3d 748, 764 (2nd Cir. 1998) (“[C]urrent rates, rather than historical rates, should be applied  
6 in order to compensate for the delay in payment....”) (citing *Missouri v. Jenkins*, 491 U.S. 274,  
7 283-84 (1989)); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir.  
8 1994) (“The district court has discretion to compensate delay in payment in one of two ways:  
9 (1) by applying the attorneys' current rates to all hours billed during the course of litigation; or  
10 (2) by using the attorneys' historical rates and adding a prime rate enhancement.”).

11         Class Counsel's requested \$735,000 fee is nearly equivalent to the lodestar and will be less  
12 than the lodestar at the time of judgment. Even if some hours were disallowed or some rates were  
13 reduced, it would be appropriate to apply a small multiplier and award the full requested fee of  
14 \$735,000. A law firm that focuses on contingent-fee class action cases does not get paid in every  
15 case. Frequently, it gets nothing or is awarded fees equal to only a small percentage of the amount  
16 it had worked—as in the *Canada Dry* case where it recovered only 59% of its lodestar. Gutride  
17 Decl. ¶ 29. Where a plaintiff's firm does succeed, therefore, a multiplier serves to compensate for  
18 the risks the firm regularly undertakes. *See, e.g., Vizcaino*, 290 F.3d at 1051 (finding 3.65  
19 multiplier to be “within the range of multipliers applied in common fund cases”); *Noll v. eBay*,  
20 *Inc.*, 309 F.R.D. 593, 610 (N.D. Cal. 2015) (listing multipliers as high as 5.2 among “the range of  
21 acceptable lodestar multipliers”); *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal.  
22 2014) (“A 2.83 multiplier falls within the Ninth Circuit's presumptively acceptable range of 1.0–  
23 4.0.”); *Van Vranken*, 901 F. Supp. at 298 (“Multipliers in the 3–4 range are common  
24 in lodestar awards for lengthy and complex class action litigation.”).

25         This Court has discretion to apply a multiplier to account for various factors, including,  
26 *inter alia*, the contingent nature of the fee award (both from the point of view of eventual victory  
27 on the merits and the point of view of establishing eligibility for an award), the novelty and  
28 complexity of the questions involved, the value of class benefits obtained, the efficiency and skill

1 displayed by class counsel, and the importance of other injunctive relief obtained. *See Serrano III*,  
2 20 Cal. 3d at 49; *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001); *City of Oakland*, 203 Cal.  
3 App. 3d at 78; *Downey Cares v. Downey Community Dev. Comm'n*, 196 Cal. App. 3d 983 (1987),  
4 995 n11; *see also Maria P. v. Riles*, 43 Cal. 3d 1281, 1294 n8 (1987); *Press v. Lucky Stores, Inc.*,  
5 34 Cal. 3d 311, (1983), 322; *Serrano v. Unruh (Serrano IV)*, 32 Cal.3d 621, 625 n6 (1982). Each  
6 of these factors exists here.

7 First, both this litigation and the underlying legal claims and factual issues were complex.  
8 For example, Defendant raised standing questions and complex arguments related to the FAL,  
9 UCL, and CLRA in its motions to dismiss. In discovery several expert analyses were necessary,  
10 including surveys relating to consumer understanding and materiality, as well as an econometric  
11 conjoint analysis to determine the price premium associated with the challenged label claim. In  
12 addition to the time-consuming research and investigation needed to support Plaintiffs' theories,  
13 success on any given motion was far from certain. Nonetheless, Plaintiffs' Counsel presented  
14 Settlement Class Members' claims with creativity, skill, and ingenuity.

15 Second, Plaintiffs' Counsel commenced settlement negotiations immediately following  
16 settlement of the similar Canada Dry case without significant additional litigation, and thus should  
17 be rewarded for its efficiency (and the concomitant savings to the judicial system). In *Lealao*, the  
18 Court explained that, unless multipliers are provided when counsel agree to settle early, there will  
19 be "a disincentive to settle promptly inherent in the lodestar methodology. Considering that our  
20 Supreme Court has placed an extraordinarily high value on settlement, it would seem counsel  
21 should be rewarded, not punished, for helping to achieve that goal, as in federal courts." *Lealao*,  
22 82 Cal. App. 4th at 52 (*citing Merola v. Atlantic Richfield Company*, 515 F.2d 165, 168 (3d Cir.  
23 1975)) (lodestar-multiplier approach "permits the court to recognize and reward achievements of a  
24 particularly resourceful attorney who secures a substantial benefit for his clients with a minimum  
25 of time invested"); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1282-1283 (S.D. Ohio 1996) (case  
26 settled "in swift and efficient fashion"); *Arenson v. Board of Trade of City of Chicago*, 372 F.  
27 Supp. 1349, 1358 (N.D. Ill. 1974) (awarding a fee of four times the normal hourly rate on ground  
28 that, if the case had not settled and gone to verdict, "there is no doubt that the number of hours of

1 lawyer's time expended would be more than quadruple the number of hours expended to date").  
2 Similarly, in *Thayer v. Wells Fargo Bank*, 92 Cal. App. 4th 819 (2001), the California Supreme  
3 Court noted that "[t]he California cases appear to incorporate the 'results obtained' factor into the  
4 'quality' factor: i.e., high-quality work may produce greater results in less time than would work  
5 of average quality, thus justifying a multiplier."

6 Third, Plaintiffs' Counsel bore considerable risk in litigating this case wholly on a contingent  
7 basis and advancing all costs. Gutride Decl. ¶ 44. During the pendency of the litigation, Plaintiffs'  
8 Counsel turned away other work. *Id.* As the California Supreme Court has explained:

9 [a] contingent fee must be higher than a fee for the same legal services paid as  
10 they are performed. The contingent fee compensates the lawyer not only for the  
11 legal services he renders but for the loan of those services. The implicit interest  
12 rate on such a loan is higher because the risk of default (the loss of the case,  
13 which cancels the debt of the client to the lawyer) is much higher than that of  
conventional loans. A lawyer who both bears the risk of not being paid and  
provides legal services is not receiving the fair market value of his work if he is  
paid only for the second of these functions. If he is paid no more, competent  
counsel will be reluctant to accept fee award cases.

14 *Ketchum*, 24 Cal. 4th at 1132-33; *see also Cazares v. Saenz*, 208 Cal. App. 3d 279, 288 (1989) ("in  
15 theory, a contingent fee in a case with a 50 percent chance of success should be twice the amount  
16 of a non-contingent fee for the same case."). Indeed, in *In re Continental Illinois Securities*  
17 *Litigation*, 962 F.2d 566 (7th Cir. 1993), a federal appellate court reversed a fee award in a class  
18 action for, among other things, the trial court's refusal to enhance class counsel's lodestar for  
19 contingency risk, explaining:

20 The judge refused to award a risk multiplier—that is, to give the lawyers more  
21 than their ordinary billing rates in order to reflect the risky character of their  
22 undertaking. This was error in a case in which the lawyers had no source of  
23 compensation for their services. The failure to make any provision for risk of loss  
may result in systematic under-compensation of Plaintiff's counsel in a class  
action case, where as we have said the only fee that counsel can obtain is, in the  
nature of the case, a contingent one.

24 *Id.* at 569.

25 Fourth, as explained above, Plaintiffs' Counsel achieved an excellent settlement in this  
26 Litigation.

### 3. Plaintiffs' Counsel Should be Awarded Costs.

1 Plaintiffs' Counsel requests that, in addition to reasonable attorneys' fees, the Court grant  
2 its application for reimbursement of its actual expenses in connection with the prosecution of this  
3 Litigation, which to date are \$70,805.52. These expenses are itemized in the Gutride Declaration.  
4 Gutride Decl., Exh. 13. Plaintiffs' Counsel is typically entitled to reimbursement of all reasonable  
5 out-of-pocket expenses and costs in prosecution of the claims and in obtaining a settlement. *See*  
6 *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *Vincent v. Hughes Air West*, 557 F.2d 759,  
7 769 (9th Cir. 1977). Costs compensable under Rule 23(h) include "nontaxable costs that are  
8 authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h).

#### H. The Incentive Award for The Class Representatives is Reasonable.

9  
10 This Court should also approve an inventive award of \$5,000 for Plaintiff Fitzhenry-  
11 Russell, and \$1,000 for the remaining named Plaintiffs, for a total of \$11,000 in incentives. In  
12 deciding whether to approve such an award, the court must evaluate named plaintiffs' awards  
13 individually, using relevant factors including "the actions the plaintiff has taken to protect the  
14 interests of the class, the degree to which the class has benefitted from those actions, . . . [and] the  
15 amount of time and effort the plaintiff expended in pursuing the litigation." *Staton v. Boeing Co.*,  
16 327 F.3d 938, 977 (9th Cir. 2003). "Such awards are discretionary . . . and are intended to  
17 compensate class representatives for work done on behalf of the class, to make up for financial or  
18 reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness  
19 to act as a private attorney general." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958-959  
20 (9th Cir. 2009). In particular, a court should consider: "(1) the risk to the class representative in  
21 commencing suit, both financial and otherwise; (2) the notoriety and personal difficulty  
22 encountered by the class representative; (3) the amount of time and effort spent by the class  
23 representative; (4) the duration of the litigation and; (5) the personal benefit (of lack thereof)  
24 enjoyed by the class representative as a result of the litigation." *Van Vranken*, 901 F. Supp. at 299;  
25 *see also* N.D. Cal. Guide ¶ 7. Further, as a matter of public policy, representative service awards  
26 are necessary to encourage consumers to formally challenge perceived false advertising and unfair  
27 business practices.

28 Plaintiffs took on substantial risk, most importantly the risk of bearing Defendant's costs



1 and of negative public attention. Gutride Decl., ¶ 55. Fitzhenry-Russell also worked with counsel  
2 to provide information throughout the litigation, which has now progressed for over two years. *Id.*  
3 She answered interrogatories and requests for production. *Id.* She conducted searches of her  
4 personal records and sat for a deposition. *Id.* The other named Plaintiffs all provided Class  
5 Counsel with sufficient information regarding their experiences and claims to enable them to join  
6 this case and represent a nationwide class. *Id.* All Plaintiffs remained actively involved in the  
7 litigation after the Settlement was reached. *Id.*

8 The proposed representative service awards are reasonable in light of the Plaintiffs' efforts  
9 and the relief to the Class resulting from this litigation. *See* Theodore Eisenberg & Geoffrey P.  
10 Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303,  
11 1333 (2006) (an empirical study of incentive awards to class action plaintiffs has determined that  
12 the average aggregate incentive award within a consumer class action case is \$29,055.20, and that  
13 the average individual award is \$6,358.80.); *see also* *Mego*, 213 F.3d at 463 (awarding the named  
14 plaintiff \$5,000 involving a class of 5,400 people and a total recovery of \$1.725 million); *Smith v.*  
15 *CRST Van Expedited, Inc.*, 2013 WL 163293, \*6 (S.D. Cal. Jan. 14, 2013) (finding the amount of  
16 the incentive payments requested, \$15,000, is well within the range awarded in similar cases);  
17 *Embry v. Acer America Corp.*, Dkt.# 218 (N.D. Cal. Feb. 14, 2012) (awarding \$15,000 incentive  
18 award); *Gibson & Co. Ins. Brokers, Inc. v. Jackson Nat. Life Ins. Co.*, 2008 WL 618893 (C.D. Cal.  
19 Feb. 27, 2008) (awarding \$5,000 incentive fee).

#### 20 **I. Dates for the Final Approval Process**

21 Plaintiffs request that in connection with preliminary approval, this Court set a date for a  
22 final approval hearing; Plaintiffs reserved September 26, 2019 with the clerk. The deadline for  
23 objections, claims and opt outs would be 28 days before final approval, or August 29, 2019.  
24 Assuming preliminary approval is entered shortly after the June 13 hearing, then notice could  
25 initiate in the first or second week of July, allowing seven to eight weeks for the period to make  
26 claims, opt out, or object. If objections are filed, the parties would respond to those objections by  
27 14 days prior to final approval (September 14, 2019). On the same date, the parties and claim  
28 administrator would report about completion of notice, the number of opt outs, and the number

1 and estimated value of claims.

2 **J. Conclusion**

3 For the reasons stated above, Plaintiffs respectfully request that this Court grant  
4 preliminary approval to the proposed class action settlement.

5 Dated: May 9, 2019

**GUTRIDE SAFIER LLP**

/s/ Adam J. Gutride

ADAM J. GUTRIDE (State Bar No. 181446)

SETH A. SAFIER (State Bar No. 197427)

MARIE A. MCCRARY (State Bar No. 262670)

100 Pine Street, Suite 1250

San Francisco, CA 94111

Telephone: (415) 271-6469

Facsimile: (415) 449-6469

MATTHEW T. MCCRARY (admitted *pro hac vice*)

265 Franklin St, Suite 1702

Boston, MA 02110

Telephone: (214) 502-2171

*Counsel for Plaintiffs and Proposed Intervenors*

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# **APPENDIX A**

	<b>Must Consumers Provide Pre-Suit Notice?</b>	<b>Statute of Limitations</b>	<b>Unfair?</b>	<b>Deceptive (broad) or Deceptive (enumerated)?</b>	<b>Broad, Enumerated, Enumerated With Catchall</b>	<b>Standard</b>
<b>Alabama</b>	Yes	1 yr after discovery	Yes	Deceptive (enumerated)	Enumerated with Catchall	Capacity to Deceive
<b>Alaska</b>	No	2 yrs after discovery	Sperry	Deceptive (enumerated)	Enumerated with Catchall	Capacity to Deceive
<b>Arizona</b>	No	1 yr after discovery	Yes	Deceptive (broad)	Broad	Capacity to Deceive
<b>Arkansas</b>	No	5 yrs from violation	No	Deceptive (enumerated)	Enumerated	Reasonable Consumer
<b>California (UCL)</b>	No	4 yrs after discovery	Non-Sperry	N/A	Broad	Reasonable Consumer
<b>California (CLRA)</b>	Yes	3 yrs after violation	No	Deceptive (enumerated)	Enumerated	Reasonable Consumer
<b>Colorado</b>	No	3 yrs	No	Deceptive (enumerated)	Enumerated	Capacity to Deceive
<b>Connecticut</b>	No	3 yrs after violation	Sperry	Deceptive (broad)	Broad	Capacity to Deceive
<b>Delaware</b>	No	3 yrs after discovery	Yes	Deceptive (enumerated)	Enumerated with Catchall	Capacity to Deceive

	<b>Must Consumers Provide Pre-Suit Notice?</b>	<b>Statute of Limitations</b>	<b>Unfair?</b>	<b>Deceptive (broad) or Deceptive (enumerated)?</b>	<b>Broad, Enumerated, Enumerated With Catchall</b>	<b>Standard</b>
<b>District of Columbia</b>	No	3 yrs	Non-Sperry	Deceptive (enumerated)	Enumerated with Catchall	Reasonable Consumer
<b>Florida</b>	No	4 yrs	Sperry	Deceptive (broad)	Broad	Reasonable Consumer
<b>Georgia</b>	No	4 yrs after discovery	Yes	Deceptive (enumerated)	Enumerated with Catchall	Reasonable Consumer
<b>Hawaii</b>	No	4 yrs after discovery	Sperry	Deceptive (Enumerated)	Enumerated with Catchall	Reasonable Consumer
<b>Idaho</b>	No	2 yrs	No	Deceptive (enumerated)	Enumerated with Catchall	Reasonable Consumer
<b>Illinois</b>	Yes	3 yrs after discovery	Sperry	Deceptive (broad)	Broad	Capacity to Deceive
<b>Indiana</b>	Yes	2 yrs after violation	Yes	Deceptive (enumerated)	Enumerated with Catchall	Reasonable Consumer

	<b>Must Consumers Provide Pre-Suit Notice?</b>	<b>Statute of Limitations</b>	<b>Unfair?</b>	<b>Deceptive (broad) or Deceptive (enumerated)?</b>	<b>Broad, Enumerated, Enumerated With Catchall</b>	<b>Standard</b>
<b>Iowa</b>	No	2 yrs after discovery or 2 yrs after violation, whichever later	Yes	Deceptive (broad)	Broad	Reasonable Consumer
<b>Kansas</b>	No	3 yrs after violation	No	Deceptive (enumerated)	Enumerated with Catchall	Capacity to Deceive
<b>Kentucky</b>	No	2 yrs after violation	Yes	N/A	Broad	
<b>Louisiana</b>	Yes	1 yr after violation	Sperry	Deceptive (broad)	Broad	Reasonable Consumer
<b>Maine</b>	Yes	6 yrs after discovery	Yes	Deceptive (broad)	Broad	Reasonable Consumer
<b>Maryland</b>	Yes	3 yrs after discovery	Non-Sperry	Deceptive (enumerated)	Enumerated with Catchall	Reasonable Consumer
<b>Massachusetts</b>	No	4 yrs after discovery	Sperry	Deceptive (broad)	Broad	Reasonable Consumer

	<b>Must Consumers Provide Pre-Suit Notice?</b>	<b>Statute of Limitations</b>	<b>Unfair?</b>	<b>Deceptive (broad) or Deceptive (enumerated)?</b>	<b>Broad, Enumerated, Enumerated With Catchall</b>	<b>Standard</b>
<b>Michigan</b>	No	6 yrs after violation	Sperry	Deceptive (enumerated)	Enumerated	Capacity to Deceive
<b>Minnesota (Consumer Fraud Act)</b>	Yes	6 yrs	No	Deceptive (broad)	Broad	Capacity to Deceive
<b>Minnesota (Unlawful Trade Practices Act)</b>	Yes	6 yrs	No	Deceptive (enumerated)	Enumerated with Catchall	Capacity to Deceive
<b>Mississippi</b>	Plaintiff must have first made a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the Attorney General	3 yrs after discovery	Yes	Deceptive (enumerated)	Enumerated with Catchall	Capacity to Deceive
<b>Missouri</b>	No	5 yrs	Sperry	Deceptive (broad)	Broad	Reasonable Consumer

	<b>Must Consumers Provide Pre-Suit Notice?</b>	<b>Statute of Limitations</b>	<b>Unfair?</b>	<b>Deceptive (broad) or Deceptive (enumerated)?</b>	<b>Broad, Enumerated, Enumerated With Catchall</b>	<b>Standard</b>
<b>Montana</b>	No	2 yrs after discovery	Sperry	Deceptive (broad)	Broad	Reasonable Consumer
<b>Nebraska</b>	No	4 yrs after violation	Sperry	Deceptive (enumerated)	Enumerated with Catchall	Capacity to Deceive
<b>Nevada</b>	No	4 yrs after violation	No	Deceptive (enumerated)		
<b>New Hampshire</b>	No	3 yrs after discovery	Sperry	Deceptive (enumerated)	Enumerated with Catchall	Reasonable Consumer
<b>New Jersey</b>	Plaintiff must first provide notice to AG, but no cases have been dismissed for failure to comply	6 yrs	No	Deceptive (broad)	Broad	Reasonable Consumer
<b>New Mexico</b>	No	4 yrs	Yes	Deceptive (enumerated)	Enumerated with Catchall	Reasonable Consumer
<b>New York</b>	No	3 yrs	No	Deceptive (broad)	Broad	Reasonable Consumer



	<b>Must Consumers Provide Pre-Suit Notice?</b>	<b>Statute of Limitations</b>	<b>Unfair?</b>	<b>Deceptive (broad) or Deceptive (enumerated)?</b>	<b>Broad, Enumerated, Enumerated With Catchall</b>	<b>Standard</b>
<b>North Carolina</b>	No	4 yrs	Sperry	Deceptive (broad)	Broad	Reasonable Consumer
<b>North Dakota</b>	No	6 yrs	No	Deceptive (broad)	Broad	Reasonable Consumer
<b>Ohio</b>	No	2 yrs	No	Deceptive (enumerated)	Enumerated	Capacity to Deceive
<b>Oklahoma</b>	No	3 yrs	Sperry	Deceptive (enumerated)	Enumerated with Catchall	Reasonable Consumer
<b>Oregon</b>	No	1 yr after discovery	Yes	Deceptive (enumerated)	Enumerated with Catchall	Reasonable Consumer
<b>Pennsylvania</b>	No	6 yrs after discovery	Sperry	Deceptive (enumerated)		
<b>Rhode Island</b>	No	10 yrs	Sperry	Deceptive (enumerated)	Enumerated with Catchall	Reasonable Consumer

	<b>Must Consumers Provide Pre-Suit Notice?</b>	<b>Statute of Limitations</b>	<b>Unfair?</b>	<b>Deceptive (broad) or Deceptive (enumerated)?</b>	<b>Broad, Enumerated, Enumerated With Catchall</b>	<b>Standard</b>
<b>South Carolina</b>	No	3 yrs	Sperry	Deceptive (broad)	Broad	Capacity to Deceive
<b>South Dakota</b>	No	4 yrs	No	Deceptive (broad)	Broad	Capacity to Deceive
<b>Tennessee</b>	Yes	1 yr after discovery, 5 yrs after violation	No	Deceptive (enumerated)	Enumerated with Catchall	Reasonable Consumer
<b>Texas</b>	No	2 yrs after discovery	No	Deceptive (enumerated)		
<b>Utah</b>	No	2 yrs	No	Deceptive (enumerated)	Enumerated with Catchall	Reasonable Consumer
<b>Vermont</b>	No	6 yrs	Sperry	Deceptive (broad)	Broad	Reasonable Consumer
<b>Virginia</b>	No	2 yrs	No	Deceptive (enumerated)	Enumerated with Catchall	Reasonable Consumer

	<b>Must Consumers Provide Pre-Suit Notice?</b>	<b>Statute of Limitations</b>	<b>Unfair?</b>	<b>Deceptive (broad) or Deceptive (enumerated)?</b>	<b>Broad, Enumerated, Enumerated With Catchall</b>	<b>Standard</b>
<b>Washington</b>	Yes	4 yrs	Sperry	Deceptive (broad)	Broad	Reasonable Consumer
<b>West Virginia</b>	Yes	2 yrs after discovery	Yes	Deceptive (enumerated)	Enumerated with Catchall	Reasonable Consumer
<b>Wisconsin</b>	Yes	3 yrs	No	Deceptive (broad)	Broad	Capacity to Deceive
<b>Wyoming</b>	Yes	first of 1 yr from discovery or 2 yrs from violation	Yes	Deceptive (enumerated)	Enumerated with Catchall	Reasonable Consumer

	What Are The Reliance Requirements?	Reliance Group	Is Knowledge Required?	Is Intent Required?	Can Consumers Seek to Enjoin Deceptive Practices?	Can Consumers Obtain Monetary Relief?	Can Class Action Consumers Seek Per-Violation Statutory Damages?	Can Class Action Consumers Seek Additional Damages Upon a Showing of Willfulness, Knowledge, and/or Recklessness?
<b>Alabama</b>	Not required	1	No	No	No	Yes	No	Judicial discretion
<b>Alaska</b>	Not required	1	No	No	Yes	Yes	Greater of \$500 or treble for violation	No
<b>Arizona</b>	Proximate cause or ascertainable loss	1	No	No	Yes	Yes	No	Judicial discretion
<b>Arkansas</b>	Yes/class undecided	3	Yes	No	No	Yes	No	No
<b>California (UCL)</b>	Yes/keys off plaintiff	2	No	No	Yes	Yes	No	No
<b>California (CLRA)</b>	Yes/objective inquiry	3	No	No	Yes	Yes	No	Punitives permitted without heightened requirement
<b>Colorado</b>	Yes/objective inquiry	3	Yes	No	No	Yes	No	No
<b>Connecticut</b>	Not required	1	No	No	Yes	Yes	No	Judicial discretion

	What Are The Reliance Requirements?	Reliance Group	Is Knowledge Required?	Is Intent Required?	Can Consumers Seek to Enjoin Deceptive Practices?	Can Consumers Obtain Monetary Relief?	Can Class Action Consumers Seek Per-Violation Statutory Damages?	Can Class Action Consumers Seek Additional Damages Upon a Showing of Willfulness, Knowledge, and/or Recklessness?
<b>Delaware</b>	Proximate cause or ascertainable loss	1	No	No	Yes	Yes	No	Judicial discretion
<b>District of Columbia</b>	Not required	1	No	No	Yes	Yes	Greater of \$1500 or treble	Punitives permitted without heightened requirement
<b>Florida</b>	Not required	1	No	No	Yes	Yes	No	No
<b>Georgia</b>	Yes/class undecided	3	No	No	Yes	Yes	No	Treble for willful
<b>Hawaii</b>	Yes/objective inquiry	3	No	No	Yes	Yes	treble	No
<b>Idaho</b>	Not required	1	Yes	No	Yes	Yes	No	Judicial discretion
<b>Illinois</b>	Proximate cause or ascertainable loss	1	No	No	Yes	Yes	No	Judicial discretion
<b>Indiana</b>	Yes/class undecided	3	Yes	No	Yes	Yes	Greater of \$500 or actual	If willful, greater of three times actual damages or \$1000

	What Are The Reliance Requirements?	Reliance Group	Is Knowledge Required?	Is Intent Required?	Can Consumers Seek to Enjoin Deceptive Practices?	Can Consumers Obtain Monetary Relief?	Can Class Action Consumers Seek Per-Violation Statutory Damages?	Can Class Action Consumers Seek Additional Damages Upon a Showing of Willfulness, Knowledge, and/or Recklessness?
<b>Iowa</b>	Proximate cause or ascertainable loss	1	No	No	Yes	Yes	No	If willfull or reckless, treble damages
<b>Kansas</b>	Proximate cause or ascertainable loss	1	Yes	No	Yes	Yes	Double actual	No
<b>Kentucky</b>	Proximate cause or ascertainable loss	1	No	No	Yes	Yes	No	Yes
<b>Louisiana</b>	Proximate cause or ascertainable loss	1	No	No	No	Yes	No	If knowing, treble damages
<b>Maine</b>	Undecided		No	No	Yes	Yes	No	No
<b>Maryland</b>	Yes/objective inquiry	3	No	No	No	Yes	No	No
<b>Massachusetts</b>	Yes/objective inquiry	3	No	No	Yes	Yes	Greater of actual or \$25	If willful, 2-3 times actual

	What Are The Reliance Requirements?	Reliance Group	Is Knowledge Required?	Is Intent Required?	Can Consumers Seek to Enjoin Deceptive Practices?	Can Consumers Obtain Monetary Relief?	Can Class Action Consumers Seek Per-Violation Statutory Damages?	Can Class Action Consumers Seek Additional Damages Upon a Showing of Willfulness, Knowledge, and/or Recklessness?
<b>Michigan</b>	Not required	1	No	No	Yes	Yes	No	No
<b>Minnesota (Consumer Fraud Act)</b>	Proximate cause or ascertainable loss	1	No	Intent to induce reliance	Yes	Yes	No	No
<b>Minnesota (Unlawful Trade Practices Act)</b>	Proximate cause or ascertainable loss	1	No	No	Yes	Yes	No	No
<b>Mississippi</b>	Proximate cause or ascertainable loss	1	No	No	No	Yes	No	No
<b>Missouri</b>	Not required	1	No	No	Yes	Yes	No	Judicial discretion
<b>Montana</b>	Not required	1	No	No	No	Yes	No	Judicial discretion
<b>Nebraska</b>	Not required	1	No	No	Yes	Yes	No	No
<b>Nevada</b>	Yes/individualized		No	No	Yes	Yes	No	Judicial discretion

	<b>What Are The Reliance Requirements?</b>	<b>Reliance Group</b>	<b>Is Knowledge Required?</b>	<b>Is Intent Required?</b>	<b>Can Consumers Seek to Enjoin Deceptive Practices?</b>	<b>Can Consumers Obtain Monetary Relief?</b>	<b>Can Class Action Consumers Seek Per-Violation Statutory Damages?</b>	<b>Can Class Action Consumers Seek Additional Damages Upon a Showing of Willfulness, Knowledge, and/or Recklessness?</b>
<b>New Hampshire</b>	Proximate cause or ascertainable loss	1	No	No	Yes	Yes	No	Yes
<b>New Jersey</b>	Proximate cause or ascertainable loss	1	No	No	Yes	Yes	treble	No
<b>New Mexico</b>	Proximate cause or ascertainable loss	1	Yes	No	Yes	Yes	No	No
<b>New York</b>	Proximate cause or ascertainable loss	1	No	No	Yes	Yes	Greater of actual or \$50	If willful, greater of treble actual or \$1000
<b>North Carolina</b>	Proximate cause or ascertainable loss	1	No	No	Yes	Yes	treble	No
<b>North Dakota</b>	Not required	1	No	Intent to induce reliance	No	Yes	No	If knowing violation, treble damages
<b>Ohio</b>	Proximate cause or ascertainable loss	1	No	No	Yes	Yes	No	No



	What Are The Reliance Requirements?	Reliance Group	Is Knowledge Required?	Is Intent Required?	Can Consumers Seek to Enjoin Deceptive Practices?	Can Consumers Obtain Monetary Relief?	Can Class Action Consumers Seek Per-Violation Statutory Damages?	Can Class Action Consumers Seek Additional Damages Upon a Showing of Willfulness, Knowledge, and/or Recklessness?
<b>Oklahoma</b>	Not required	1	Yes	No	Yes	Yes	No	No
<b>Oregon</b>	Proximate cause or ascertainable loss	1	No	No	No	Yes	Greater of actual or \$200	Judicial discretion
<b>Pennsylvania</b>	Yes/individualized		Unclear	Intent to induce reliance	Yes	Yes	Greater of actual or \$100	Judicial discretion
<b>Rhode Island</b>	Proximate cause or ascertainable loss	1	No	No	Yes	Yes	Greater of actual damages or \$200	Judicial discretion
<b>South Carolina</b>	Proximate cause or ascertainable loss	1	No	No	No	Yes	No	If willful, three times actual damages
<b>South Dakota</b>	Yes/class undecided	3	Yes	No	No	Yes	No	No
<b>Tennessee</b>	Proximate cause or ascertainable loss	1	No	No	Yes	Yes	No	If willful, Judicial discretion to award

	What Are The Reliance Requirements?	Reliance Group	Is Knowledge Required?	Is Intent Required?	Can Consumers Seek to Enjoin Deceptive Practices?	Can Consumers Obtain Monetary Relief?	Can Class Action Consumers Seek Per-Violation Statutory Damages?	Can Class Action Consumers Seek Additional Damages Upon a Showing of Willfulness, Knowledge, and/or Recklessness?
<b>Texas</b>	Yes/individualized		No	No	Yes	Yes	No	If knowing, treble damages
<b>Utah</b>	Proximate cause or ascertainable loss	1	Yes	No	Yes	Yes	No	No
<b>Vermont</b>	Proximate cause or ascertainable loss	1	No	No	Yes	Yes	No	Punitive permitted without heightened requirement
<b>Virginia</b>	Yes/class undecided	3	No	No	No	Yes	Greater of actual or \$500	If willful, greater of treble actual or \$1000
<b>Washington</b>	Proximate cause or ascertainable loss	1	No	No	Yes	Yes	No	Judicial discretion
<b>West Virginia</b>	Yes/class undecided	3	No	No	Yes	Yes	No	No
<b>Wisconsin</b>	Not required	1	No	No	Yes	Yes	Double damages	Punitive permitted without heightened requirement

	What Are The Reliance Requirements?	Reliance Group	Is Knowledge Required?	Is Intent Required?	Can Consumers Seek to Enjoin Deceptive Practices?	Can Consumers Obtain Monetary Relief?	Can Class Action Consumers Seek Per-Violation Statutory Damages?	Can Class Action Consumers Seek Additional Damages Upon a Showing of Willfulness, Knowledge, and/or Recklessness?
<b>Wyoming</b>	Yes/class undecided	3	Yes	No	No	Yes	No	No

# **APPENDIX B**

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**Alabama**

**Statute:** Ala. Code §§ 8-19-1 through 8-19-15 (Alabama Deceptive Trade Practices Act)

**Pre-Suit Notice:** Ala. Code § 8-19-10(e) requires advance notice.

**Enumerated Violations:** Ala. Code § 8-19-5(5) (misrepresentations as to product's characteristics); Ala. Code § 8-19-5 (7) (misrepresentations as to a product's standard or style); Ala. Code § 8-19-5(9) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** Ala. Code § 8-19-5(27)

**Statute of Limitations:** Ala. Code § 8-19-14 (one year from discovery but no more than four years after the violation; if the contract or warranty has a term of more than three years, then one year from the expiration of that contract or one year from discovery, whichever occurred first).

**Elements:** "The [Alabama Defective Trade Practices Act] makes it unlawful, *inter alia*, to represent 'that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another'" *Lake v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 912 (N.D. Ill. 2013).

**Standard:** Alabama uses the capacity to deceive standard to evaluate deception. *See Lake v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 914 (N.D. Ill. 2013) (interpreting Alabama law).

**Reliance:** Nothing in the text of the statute requires a showing of reliance.

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's intent or knowledge, except in the case of an omission.

**Injunctive Relief:** The statute does not authorize individuals to obtain injunctive relief.

**Monetary Relief:** Ala. Code § 8-19-10(a)(1) (actual damages)

**Punitive Damages:** Ala. Code § 8-19-10(a)(2)

**Alaska**

**Statute:** Alaska Stat. §§ 45.50.471 through 45.50.561 (Alaska Unfair Trade Practices and Consumer Protection Act)

**Pre-Suit Notice:** Alaska Stat. § 45.50.531 requires pre-suit notice only when the consumer seeks an injunction.

**Enumerated Violations:** Alaska Stat. § 45.50.471(b)(4) (misrepresentations as to product's characteristics); § 45.50.471(b)(6) (misrepresentations as to a product's standard or style); § 45.50.471(b)(8) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** Alaska Stat. § 45.50.471(a)

**Statute of Limitations:** Alaska Stat. § 45.50.531(f) (two years after discovery).

**Elements:** (1) defendant engaged in trade or commerce; (2) that in the conduct of trade or commerce, an unfair act or practice occurred; and (3) the plaintiff suffered an ascertainable loss of money or property as a result of the deceptive or unfair act or practice. *ASRC Energy Servs. Power & Communs. LLC v. Golden Valley Elec. Ass'n*, 267 P.3d 1151, 1160 n.43 (Alaska 2011).

**Standard:** Alaska uses a capacity to deceive standard to evaluate deception. *Borgen v. A&M Motors, Inc.*, 273 P.3d 575, 590 (Alaska 2012).

**Reliance:** Nothing in the text of the statute requires a showing of reliance. In *Odom v. Fairbanks Memorial Hosp.*, 999 P.2d 123, 132 (Alaska 2000), the Supreme Court of Alaska stated that actual injury as a result of the deception is not required. All that is required is a showing that the acts and practices were capable of being interpreted in a misleading way.”

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's intent or knowledge.

**Injunctive Relief:** Alaska Stat. § 45.50.535(a)

**Monetary Relief:** Alaska Stat. § 45.50.531(a) (actual damages; greater of \$500 or treble damages)

**Punitive Damages:** Alaska Stat. § 45.50.531(a) (treble damages)

**Attorneys' Fees:** Plaintiff entitled to full reasonable attorneys' fees. Alaska Stat. § 45.50.537.



## Arizona

**Statute:** Ariz. Rev. Stat. §§ 44-1521 through 44-1534 (Arizona Consumer Fraud Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** Ariz. Rev. Stat. § 44-1522

**Statute of Limitations:** Ariz. Rev. Stat § 12-541(5) (one year after discovery). This statute does not correspond directly to consumer protection; rather, § 12-541(5) refers to “a liability created by statute” which has been held to encompass consumer protection actions. *Alaface v. Nat’l Inv. Co.*, 892 P.2d 1375, 1380 (Ariz. App. 1994).

**Elements:** (1) the defendant used deception, used a deceptive act or practice, used fraud, used false pretense, made a false promise, made a misrepresentation, or concealed, suppressed, or omitted a material fact in connection with the sale or advertisement of merchandise; (2) actual reliance; (3) the plaintiff suffered damages as a result of relying on the defendant’s unlawful practice; and (4) the plaintiff’s damages. *Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338, 342-44 (Ct. App. 1983); *Adelman v. Rheem Mfg. Co.*, 2015 U.S. Dist. LEXIS 107265, at \*19 (D. Ariz. Aug. 14, 2015).

**Standard:** Injury occurs when the consumer relies on the misrepresentation, even if such reliance is not reasonable. *Correa v. Pecos Valley Dev. Corp.*, 126 Ariz. 601, 605 (Ct. App. 1980).

**Reliance:** The text of the statute does not require a showing of reliance. Ariz. Rev. Stat. § 44-1522(A) (stating that a violation is actionable “whether or not any person has in fact been misled, deceived or damaged thereby”). Nevertheless, courts have read into the statute a reliance requirement. With respect to classwide reliance, one court has stated that all that is required is that all class members purchased the product. *Siemer v. Assocs. First Capital Corp.*, 2001 WL 35948712 (D. Ariz. 2001).

**Knowledge and Intent:** When the claim is based on concealment, suppression, or omission of a material fact, Ariz. Rev. Stat. § 44-1522(A) requires a showing of intent that others rely on the concealment, suppression, or omission, but otherwise intent need not be shown. *State ex rel. Babbitt v. Goodyear Tire & Rubber Co.*, 626 P.2d 1115, 1118 n.1 (Ariz. App. 1981).

**Injunctive Relief:** Ariz. Rev. Stat. § 44-1528(A). The Arizona Supreme Court has interpreted the statute to provide for a private right of action to seek the same remedies as the attorney general. *See Sellinger v. Freeway Mobile Home Sales, Inc.* 521 P.2d 1119 (Ariz. 1974).

**Monetary Relief:** Ariz. Rev. Stat. § 44-1528(A)

**Punitive Damages:** Although the statute is silent, the Arizona supreme court has held that punitive damages can be awarded. *Sellinger v. Freeway Motor Home Sales, Inc.*, 521 P.2d 1119 (Ariz. 1974).

Arkansas

**Statute:** Ark. Code. §§ 4-88-101 through 4-88-207 (Arkansas Deceptive Trade Practices Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Enumerated Violations:** Ark. Code § 4-88-108(a)(1) (misrepresentations as to product's characteristics); § 4-88-108(a)(3) (misrepresentations as to a product's standard or style); § 4-88-108(a)(10) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** Ark. Code § 4-88-107(a)

**Statute of Limitations:** Ark. Code § 4-88-115 (five years from the violation).

**Elements:** (1) a deceptive consumer-oriented act or practice which is misleading in a material respect; (2) injury resulting from the act. *Craig v. Twinings N. Am., Inc.*, 2015 U.S. Dist. LEXIS 14839, at \*20-21 (W.D. Ark. Feb. 5, 2015).

**Standard:** *Curtis Lumber Co., v. Louisiana Pacific Corp.*, 618 F.3d 762, 779 (8th Cir. 2010) (trade practices are deceptive under the Arkansas Deceptive Trade Practices Act if they are likely to deceive or have a capacity to deceive a reasonable consumer).

**Reliance:** As amended in 2017, Arkansas's statute requires a showing of reliance as a precondition to the private cause of action that the statute provides. Ark. Code § 4-88-113(f). Plaintiff is not aware of any cases addressing the question of classwide reliance.

**Knowledge and Intent:** Knowledge is required to prove violations of the first two prohibited acts.

**Injunctive Relief:** The statute does not authorize individuals to obtain injunctive relief. *See Baptist Health v. Murphy*, 373 S.W.3d 269 (Ark. 2010).

**Monetary Relief:** Ark. Code § 4-88-113(f)(1)(A) (actual financial loss)

**Punitive Damages:** The statute has no provision for punitive damages.

**Attorneys' Fees:** Yes. Ark. Code. § 4-88-113.

### California CLRA

**Statute:** Cal Civ. Code § 1750 (Consumer Legal Remedies Act) (“CLRA”)

**Pre-Suit Notice:** Cal. Civil Code § 1782 requires pre-suit notice for damages.

**Enumerated Violations:** Cal. Civil Code § 1770(a)(5) (misrepresentations as to product’s characteristics); § 1770(a)(7) (misrepresentations as to a product’s standard or style); § 1770(a)(9) (advertising goods with intent not to sell as advertised).

**Statute of Limitations:** Cal. Civil Code § 1783 (three years from the violation).

**Elements:** (1) an unlawful act or practice; (2) reliance; (3) damages; and (4) causation. *See Moore v. Apple, Inc.*, 73 F. Supp. 3d 1191, 1201 (N.D. Cal. 2014).

**Standard:** The question for claims under California consumer protection laws is whether a “reasonable consumer” is likely to be deceived. *See Colgan v. Leatherman Tool Grp.*, 135 Cal. App. 4th 663, 682 (2006).

**Reliance:** Reliance is required and an inference of classwide reliance arises if representations are material, as judged by an objective standard. *Massachusetts Mut. Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1293 (2002), *as modified on denial of reh'g* (May 29, 2002).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant’s knowledge. Intent is only required to prove a violation of § 1770(a)(9).

**Injunctive Relief:** Cal. Civil Code § 1780(a)(2).

**Monetary Relief:** Cal. Civil Code § 1780(a)(1) (actual damages); Cal. Civil Code § 1780(a)(3) (restitution).

**Punitive Damages:** Cal. Civ. Code § 1780(a)(4) allows punitive damages.

**Attorneys’ Fees:** Yes. Cal. Civ. Code § 1780(e).

**Miscellaneous notes:** Person bringing suit must be a consumer and must be aggrieved (a real party in interest). Consumer is defined as “an individual who seeks or acquires by purchase or lease, any goods or services for personal, family, or household purposes.” Cal. Civ. Code § 1761(d).

**California UCL**

**Statute:** Cal. Bus. & Prof. Code § 17200 (Unfair Competition Law) (“UCL”)

**Pre-Suit Notice:** The statute does not require pre-suit notice.

**Broad Prohibition:** Cal. Bus. & Prof. Code § 17200

**Statute of Limitations:** Cal. Bus. & Prof. Code § 17208 (four years after discovery).

**Elements:** (1) unlawful, unfair, or fraudulent business act or practices or (2) unfair, deceptive, untrue or misleading advertising. *Makreas v. First Nat’l. Bank of N. Cal.*, 856 F. Supp. 2d 1097, 1101 (N.D. Cal. 2012). Standing is limited to those actually injured by a defendant’s business practices. *Schwartz v. Provident Life & Accident Ins. Co.*, 216 Cal. App. 4th 607, 611 (2013).

**Standard:** The question for claims under California consumer protection laws is whether a “reasonable consumer” is likely to be deceived. *See Colgan v. Leatherman Tool Grp.*, 135 Cal. App. 4th 663, 682 (2006).

**Reliance:** In a class action, only the named plaintiffs need establish reliance, and reliance can be established by a showing that the misrepresentation was a substantial factor in the purchasing decision. *In re Tobacco II Cases*, 207 P.3d 20 (Cal. 2009).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant’s intent or knowledge.

**Injunctive Relief:** Cal. Bus. & Prof. Code § 17203

**Monetary Relief:** Cal. Bus. & Prof. Code § 17203 (restitution)

**Punitive Damages:** The statute has no provision for punitive damages.

**Attorneys’ Fees:** No. *Shadoan v. World Sav. & Loan Ass’n.*, 219 Cal. App. 3d 97, 108 n.7 (1990).

## Colorado

**Statute:** Colo. Rev. Stat. § 6-1-101 *et seq.* (Colorado Consumer Protection Act) (“CCPA”)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Prohibited Acts:** Colo. Rev. Stat. § 6-1-105(1)(e) (misrepresentations as to product’s characteristics); § 6-1-105(1)(g) (misrepresentations as to a product’s standard or style); § § 6-1-105(1)(i) (advertising goods with intent not to sell as advertised).

**Statute of Limitations:** Colo. Rev. Stat. § 6-1-115 (three years).

**Elements:** (1) defendant engaged in an unfair or deceptive trade practice; (2) the challenged practice occurred in the course of defendant’s business, vocation or occupation; (3) it significantly impacts the public as actual or potential consumers of defendant’s goods, services or property; (4) the plaintiff suffered injury in fact to a legally protected interest; and (5) the challenged practice caused the plaintiff’s injury. In addition, class action plaintiffs must prove actual damages. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 146-47 (Colo. 2003).

**Standard:** The false representation must have the capacity or tendency to attract customers. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 147 (Colo. 2003).

**Reliance:** Classwide reliance may be presumed where the class challenges uniform, written representations viewed by all. *See, e.g. Patterson v. BP Am. Prod. Co.*, 240 P.3d 456, 469 (Colo. App. 2010), *aff’d*, 263 P.3d 103 (Colo. 2011); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 988 (C.D. Cal. 2015) (interpreting Colorado law), *aff’d sub nom. Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), and *aff’d sub nom. Briseno v. ConAgra Foods, Inc.*, 674 F. App’x 654 (9th Cir. 2017).

**Knowledge and Intent:** Knowledge is required to prove violations of the first two prohibited acts.

**Injunctive Relief:** The statute does not authorize individuals to obtain injunctive relief.

**Monetary Relief:** Colo. Rev. Stat. § 6-1-113(2)(a)(II) (actual damages)

**Punitive Damages:** Colo. Rev. Stat. § 6-1-113(2)(b). but this is an unusually narrow provision, allowing multiple damages only if bad faith is shown by clear and convincing evidence

**Attorneys’ Fees:** Yes. Colo. Rev. Stat. § 6-1-113(b).

### Connecticut

**Statute:** Conn. Gen. Stat. § 42-110a-q (Connecticut Unfair Trade Practices Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** Conn. Gen. Stat. § 42-110b(a)

**Statute of Limitations:** Conn. Gen. Stat. § 42-110g(f) (three years after violation).

**Elements:** (1) the defendant engaged in unfair or deceptive acts or practices in the conduct of any trade or commerce; and (2) each class member claiming entitlement to relief under CUTPA has suffered an ascertainable loss of money or property as a result of the defendant's act or practices. *Neighborhood Builders, Inc. v. Town of Madison*, 294 Conn. 651, 658 (2010).

**Standard:** Connecticut uses the capacity to deceive standard to evaluate deception. *See, e.g., McLaughlin Ford, Inc. v. Ford Motor Co.*, 192 Conn. 558, 565 (1984).

**Reliance:** Nothing in the text of the statute requires a showing of reliance. *Hinchliffe v. American Motors Corp.*, 440 A.2d 810 (Conn. 1981) holds that the consumer need not prove reliance.

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's intent or knowledge.

**Injunctive Relief:** Conn. Gen. Stat. § 42-110g(d)

**Monetary Relief:** Conn. Gen. Stat. § 42-110g(a) (actual damages)

**Punitive Damages:** Courts have the discretion to award punitive damages. Conn. Gen. Stat. § 42-110g(a).

**Attorneys' Fees:** Yes. Conn. Gen. Stat. § 42-110g(d).

## Delaware

**Statute:** Del Code Ann. tit. 6, § 2531 *et seq.* (Delaware Deceptive Trade Practices Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Enumerated Violations:** Del Code Ann. tit. 6 § 2532(a)(5) (misrepresentations as to product's characteristics); § 2532(a)(7) (misrepresentations as to a product's standard or style); § 2532(a)(9) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** Del Code Ann. tit. 6, § 2532(a)

**Statute of Limitations:** Del. Code Ann. tit. 10, § 8106 (three years from discovery).

**Elements:** “elements of the tort of unfair competition are that the plaintiff has a reasonable expectancy of entering a valid business relationship, with which the defendant wrongly interferes, and thereby defeats the plaintiff's legitimate and causes him harm.” *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1057 (Del. Super. 2001).

**Standard:** The state has never enunciated a standard, but it appears to have rejected the reasonable consumer standard. *See Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983) (noting that reasonable reliance is not required).

**Reliance:** Nothing in the text of the statute requires a showing of reliance. The Delaware Supreme Court has held that the plaintiff does not need to show reliance but must show that the defendant's conduct caused the injury. *Teamsters Local 237 Welfare Fund v. AstraZeneca Pharmaceuticals LP*, 136 A.3d 688, 694 (Del. 2016).

**Knowledge and Intent:** Del. Code Ann. tit. 6, § 2513 requires a showing of intent that others rely on the concealment, suppression, or omission.

**Injunctive Relief:** Del. Code Ann. tit. 6, § 2523 (injunction), § 2525 (private right of action)

**Monetary Relief:** Del. Code Ann. tit. 6, § 2524 (damages), § 2525 (private right of action)

**Punitive Damages:** Courts have the discretion to award punitive damages. *See Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1076-77 (Del. 1983).

**Attorneys' Fees:** Attorneys' fees are the exception and not the rule. “The court in exceptional cases may award reasonable attorneys' fees to the prevailing party. Costs or attorneys' fees may be assessed against a defendant only if the court finds that defendant has willfully engaged in a deceptive trade practice.” Del Code Ann. tit. 6, § 2533(b).

**District of Columbia**

**Statute:** D.C. Code § 28-3904 (Uniform Deceptive Trade Practices Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Enumerated Violations:** D.C. Code § 28-3904(a) (misrepresentations as to product's characteristics); § 28-3904(d) (misrepresentations as to a product's standard or style); § 28-3904(h) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** D.C. Code § 28-3904

**Statute of Limitations:** "D.C. Code § 12-301(8) ("for which a limitation is not otherwise specified—3 years").

**Elements:** To state a claim under the Act, "the plaintiff must allege that the defendant made a material misrepresentation or omission that has a tendency to mislead." D.C. Code § 28-3904(e) and (f); *Alicke v. MCI Communs. Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997).

**Standard:** *Grayson v. AT&T Corp.*, 15 A.3d 219, 251 (D.D.C. 2011) (concluding that Plaintiff did not allege a material fact under the D.C. Consumer Protection Procedures Act because "He [made] no showing through his allegations or reasonable inferences from them that ... a reasonable consumer would consider information about how a phone company treats breakage to be material to the decision to purchase a calling card from that company").

**Reliance:** Reliance is not required. *See Athridge v. Aetna Cas. & Sur. Co.*, 351 F.3d 1166, 1175 (D.D.C. 2003).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's knowledge or intent.

**Injunctive Relief:** D.C. Code § 28-3905(k)(2)(D)

**Monetary Relief:** D.C. Code § 28-3909(k)(2)(A) (only specifies treble and statutory damages, but actual implicitly available)

**Punitive Damages:** D.C. Code § 28-3905(k)(1)(A), (C) authorize punitive damages.



**Florida**

**Statute:** Fla. Stat. Ann. § 501.201 *et seq.* (Florida Deceptive and Unfair Trade Practices Act)

**Pre-Suit Notice:** Fla. Stat. Ann. § 501.98 only requires pre-suit notice for suits against motor vehicle dealers.

**Broad Prohibition:** Fla. Stat. Ann. § 501.204

**Statute of Limitations:** Fla. Stat. Ann § 95.11(3)(f) (four years).

**Elements:** (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006).

**Standard:** “The Florida Supreme Court has noted that ‘deception occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.’” *Zlotnick v. Premier Sales Grp., Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007). Materiality of representation or omission is judged objectively through a “reasonable consumer” standard. *See, e.g., Davis v. Powertel, Inc.*, 776 So. 2d 971, 974 (Fla. Dist. Ct. App. 2000); *Lady of Am. Franchise Corp. v. Arcese*, 2006 U.S. Dist. LEXIS 68415, at \*30 (S.D. Fla. 2006).

**Reliance:** *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 985 (11th Cir. 2016) holds that reliance is not a requirement, and that common issues predominate if the advertisement was likely to deceive an “objectively reasonable observer.”

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant’s intent or knowledge.

**Injunctive Relief:** Fla. Stat. Ann. § 501.211(1)

**Monetary Relief:** Fla. Stat. Ann. § 501.211(2) (damages)

**Punitive Damages:** The statute has no provision for punitive damages.

**Attorneys’ Fees:** Yes. Fla. Stat. Ann. § 501.211(2).

## Georgia

**Statute:** Ga. Code. Ann. §§ 10-1-390 through 407 (Georgia Fair Business Practices Act)

**Pre-Suit Notice:** Ga. Code. Ann. § 10-1-399(b) requires pre-suit notice except when the claim is brought as a counterclaim.

**Enumerated Violations:** Ga. Code. Ann. § 10-1-393(b)(5) (misrepresentations as to product's characteristics); § 10-1-393(b)(7) (misrepresentations as to a product's standard or style); § 10-1-393(b)(9) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** Ga. Code. Ann. § 10-1-393(a), (b)

**Statute of Limitations:** Ga. Code. Ann. § 9-3-31 (four years after discovery for "injuries to personalty").

**Elements:** "A person who suffers injury or damages, or whose business or property has been injured or damaged as a result of consumer acts or practices may bring an action under the FBPA." *Friedlander v. Pdk Labs*, 266 Ga. 180, 180-81 (1996).

**Standard:** The statute requires that it be interpreted consistent with section 5 of the FTC act. *See* Ga. Code. Ann. § 10-1-391. *See also In re Arby's Rest. Grp. Litig.*, No. 1:17-cv-0514-AT, 2018 U.S. Dist. LEXIS 131140, at \*65 (N.D. Ga. Mar. 5, 2018) (referencing the FTCA; employing the reasonable person standard).

**Reliance:** The Georgia Supreme Court has held that a showing of reliance is required for an individual claim, at least as to deception claims. *Tiismann v. Linda Martin Homes Corp.*, 637 S.E.2d 14 (Ga. 2006). Plaintiff is not aware of any cases addressing the question of classwide reliance. However, when certifying out of state classes, this district has held that "the Ninth Circuit does not treat the need for individual inquiries into reliance and damages as necessarily precluding certification as long as common issues focusing on the defendant's conduct predominate," notwithstanding the jurisprudence in other states. *See Gold v. Lumber Liquidators, Inc.*, 323 F.R.D. 280, 292 (N.D. Cal. 2017).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's knowledge. Intent is only required to prove a violation of § 10-1-393(b)(9).

**Injunctive Relief:** Ga. Code. Ann. § 10-1-399(a)

**Monetary Relief:** Ga. Code. Ann. § 10-1-399(a) (general damages)

**Punitive Damages:** Ga. Code. Ann. § 10-1-399(c) allows treble damages for willful violations. This section also authorizes punitive damages.

## Hawaii

**Statute:** Haw. Rev. Stat. § 480A-1 *et seq.* (Hawaii Unfair or Deceptive Acts and Practices Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Enumerated Violations:** Haw. Rev. Stat. § 480A-3(a)(5) (misrepresentations as to product's characteristics); § 480-3(a)(7) (misrepresentations as to a product's standard or style); § 480A-3(a)(9) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** Haw. Rev. Stat. § 480A-3(12)

**Statute of Limitations:** Haw. Rev. Stat. § 480-24 (four years after discovery).

**Elements:** (1) violation of the act; (2) injury resulting from such violation; and (3) damages. *Barber v. Ohana Military Cmty's., LLC*, 2014 U.S. Dist. LEXIS 96218, at \*20 (D. Haw. July 15, 2014).

**Standard:** *Stanton v. Bank of Am., N.A.*, 2010 U.S. Dist. LEXIS 77468, at \*38 (D. Haw. July 30, 2010) holds that plaintiffs need only show that a misrepresentation has the capacity to deceive a reasonable person.

**Reliance:** Nothing in the text of the statute requires a showing of reliance. Reliance is not required, but the plaintiff must show the deceptive practice is objectively misleading to reasonable consumers. *See, e.g., Courbat v. Dahana Ranch, Inc.*, 111 Haw. 254, 262 (2006); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1093 (9th Cir. 2010).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's intent or knowledge.

**Injunctive Relief:** Haw. Rev. Stat. § 487-13(a)(2)

**Monetary Relief:** Haw. Rev. Stat. § 487-13(a)(1) (treble damages)

**Punitive Damages:** The statute has no provision for punitive damages.

## Idaho

**Statute:** Idaho Code § 48-601 (Idaho Consumer Protection Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Enumerated Violations:** Idaho Code § 48-603(5) (misrepresentations as to product's characteristics); § 48-603(7) (misrepresentations as to a product's standard or style); § 48-603(9) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** Idaho Code § 48-603(17)

**Statute of Limitations:** Idaho Code § 48-619 (two years).

**Standard:** Whether a misrepresentation or omission is material is judged objectively through a "reasonable consumer" standard under Section 5(a) of the FTCA. *In the Matter of Cliffdale Assocs.*, 103 F.T.C. 110, 107 (1984). This state's courts give "great weight" to interpretations of the FTCA by the Federal Trade Commission ("FTC") and courts. *In re Western Acceptance Corp.*, 117 Idaho 399, 401 (1990).

**Reliance:** The Idaho Supreme Court has held that a showing of individual reliance is not required under the statute. *State ex rel. Kidwell v. Master Distribs., Inc.*, 615 P.2d 116, 122-23 (Idaho 1980).

**Knowledge and Intent:** Knowledge is required to prove violations of the first two prohibited acts.

**Injunctive Relief:** Idaho Code § 48-608(1)

**Monetary Relief:** Idaho Code § 48-608(1) (actual damages; restitution)

**Punitive Damages:** Idaho Code § 48-608 authorizes punitive damages. In addition, Idaho Code § 48-608(2), as amended effective July 1, 2008, allows elderly consumers to recover an enhanced penalty of \$15,000 or treble damages, whichever is greater, for certain violations.

## Illinois

**Statute:** 815 ILCS 505/1-505/12 (Consumer Fraud Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** 815 Ill. Comp. Stat. Ann. § 505/2

**Statute of Limitations:** 815 Ill. Comp. Stat. Ann § 505/10a(e) (three years from discovery).

**Elements:** (1) a deceptive act or practice by defendant; (2) defendant's intent that plaintiff rely on the deception; (3) the deception occurred in the course of conduct involving trade or commerce; and (4) actual damage as a result of defendant's violation of the Act. *Harris v. Castle Motor Sales, Inc.*, 2001 U.S. Dist. LEXIS 5797, at \*12 (N.D. Ill. 2001).

**Standard:** *Aliano v. Ferriss*, 2013 IL App (1st) 120242, ¶ 26, 370 Ill. Dec. 392, 401, 988 N.E.2d 168, 177 (“In order for a defendant's conduct to be considered deceptive under the Consumer Fraud Act, it must, at the very least, create the likelihood of confusion or misunderstanding.”).

**Reliance:** The Seventh Circuit has held that reliance is not required under the statute. *Cozzi Iron & Metal, Inc. v. U.S. Office Equip., Inc.*, 250 F.3d 570, 576 (7th Cir. 2001). For purposes of class certification, plaintiffs must show that defendant proximately caused the injuries of the class. *In re Synthroid Mktg. Litig.*, 188 F.R.D. 287, 292 (N.D. Ill. 1999).

**Knowledge and Intent:** 815 Ill. Comp. Stat. Ann. § 505/2 requires a showing that the defendant acted with “intent that others rely” on the concealment of a material fact. Nothing in the statute requires a showing of knowledge or intent for any other type of claim.

**Injunctive Relief:** 815 Ill. Comp. Stat. Ann. § 505/10a(c)

**Monetary Relief:** 815 Ill. Comp. Stat. Ann. § 505/10a(a) (actual damages)

**Punitive Damages:** 815 Ill. Comp. Stat. Ann. § 505/10a. *See Martin v. Heinold Commodities, Inc.*, 643 N.E.2d 734 (Ill. 1994) (punitive damages).

**Attorneys' Fees:** Yes

## Indiana

**Statute:** Ind. Code §§ 24-5-0.5-1 to -12. (Deceptive Consumer Sales Act)

**Pre-Suit Notice:** Pre-suit notice is required by Ind. Code §§ 24-5-0.5-5 and 24-5-0.5-2(a)(5)-(8) (with an exception for deceptive acts done as part of scheme, artifice, or device with intent to defraud or mislead).

**Enumerated Violations:** Ind. Code § 24-5-0.5-3(b)(1) (misrepresentations as to product's characteristics) § 24-5-0.5-3(b)(2) (misrepresentations as to a product's standard or style); Ind. Code § 24-5-0.5-3(b)(11) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** Ind. Code § 24-5-0.5-3(a)

**Statute of Limitations:** Ind. Code § 24-5-0.5-5(b) (two years after violation).

**Elements:** It is deceptive act for a supplier to make "certain representations as to the subject matter of a consumer transaction," including that it has "characteristics, uses or benefits which the supplier knows or reasonably should know it does not have." Ind. Code § 24-5-0.5(3)(a)(1); *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 332 (Ind. Oct. 29, 2013).

**Standard:** Indiana uses the reasonable consumer standard. *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 333 (Ind. Oct. 29, 2013).

**Reliance:** While the statute requires the individual plaintiff show reliance, Plaintiff is not aware of any cases addressing the question of classwide reliance. As the state uses an objective standard for deception, it is likely classwide reliance can be presumed.

**Knowledge and Intent:** Knowledge is required to prove violations of both prohibited acts. Intent is only required when the plaintiff alleges an incurable scheme to defraud. *McKinney v. State*, 693 N.E.2d 65, 68-69 (Ind. 1998).

**Injunctive Relief:** The statute does not authorize individuals to obtain injunctive relief.

**Monetary Relief:** Ind. Code § 24-5-0.5-4(a) (actual damages; greater of \$500 or actual). *See also* Ind. Code § 24-5 0.5-4(i) (allowing seniors to recover treble damages without the need to show willfulness).

**Punitive Damages:** Ind. Code § 24-5-0.5-4(1) (greater of treble damages or \$1000 upon a showing of willfulness)

**Attorneys' Fees:** Yes. Ind. Code § 24-5-0.5-4

**Iowa**

**Statute:** Iowa Code § 714.16

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** Iowa Code § 714H.3(1)

**Statute of Limitations:** Iowa Code § 714H.5(5) (two years after discover or two years after violation, whichever is later).

**Standard:** Iowa Code § 714H.2(5) prohibits practices that are “likely to mislead a substantial number of consumers.”

**Reliance:** Nothing in the text of the statute requires a showing of reliance. The Eighth Circuit has held that Section 714H.5(1) does not require individual reliance, but simply that the plaintiff lost money “as a result of the prohibited practice.” *Brown v. Louisiana-Pacific Corp.*, 820 F.3d 339, 348-349 (8th Cir. 2016).

**Knowledge and Intent:** Iowa Code § 714.16(7) requires a private plaintiff to show that the defendant acted with intent to cause reliance only in omissions and concealment cases.

**Injunctive Relief:** Iowa Code § 714H.5(1)

**Monetary Relief:** Iowa Code § 714H.5(1) (actual damages)

**Punitive Damages:** Iowa Code § 714H.5(4) provides for treble damages in cases of willful and wanton disregard for the rights and safety of others.

**Kansas**

**Statute:** Kan Stat. § 50-623 *et seq.* (Kansas Consumer Protection Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Enumerated Violations:** Kan. Stat. § 50-626(b)(1)(A) (misrepresentations as to product's characteristics); § 50-626(b)(1)(D) (misrepresentations as to a product's standard or style)

**Statute of Limitations:** Kan. Stat. § 60-512(2) (three years after violation).

**Elements:** (1) defendant knowingly and/or willfully engaged in an unlawful act or practice under the act; (2) injury; and (3) causation. *In Re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1150 (D. Kan. 2003).

**Standard:** *Smith v. Gateway Ford-Mercury, Inc.*, 763 P.2d 20 (Kan. Ct. App. 1987) holds that a practice is deceptive "if it has the capacity or tendency to deceive."

**Reliance:** Nothing in the text of the statute requires a showing of reliance. Courts have held that Kan. Stat. § 50-626 does not require reliance, but simply a showing of a causal connection between the challenged act and the consumer's injuries. *See, e.g., Finstad v. Washburn Univ. of Topeka*, 845 P.2d 685, 474 (Kan. 1993).

**Knowledge and Intent:** Knowledge is required to prove violations of the first two prohibited acts.

**Injunctive Relief:** Kan. Stat. § 50-634(a)(2)

**Monetary Relief:** Kan. Stat. § 50-634(d) (damages; double actual damages)

**Punitive Damages:** The statute's punitive damages provision does not apply in class actions.

**Attorneys' Fees:** Yes. K.S. 50-634



**Kentucky**

**NOTE:** No class actions. *See discussion in In re Anthem Data Breach Litig.*, 162 F. Supp. 3d 953, 1001 (N.D. Cal. 2016)

**Statute:** Ky. Rev. Stat. §§ 367.110 through 367.990 (Kentucky Consumer Protection Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** Ky. Rev. Stat. § 367.170

**Statute of Limitations:** Ky. Rev. Stat. §367.220(5) (one year after any action of the Attorney General has been terminated or two years after violation, whichever is later).

**Elements:** (1) defendant engaged in an unlawful act or practice under the Act; (2) causation; and (3) and injury. *Kempf v. Lumber Liquidators, Inc.*, 2017 U.S. Dist. LEXIS 158299, at \*14-16 (W.D. Ky. Sep. 27, 2017).

**Standard:** *unknown*

**Reliance:** Nothing in the text of the statute requires a showing of reliance. In *Corder v. Ford Motor Co.*, 869 F. Supp. 2d 835, 838 (W.D. Ky. 2012), the court held that the statute requires proof of a causal nexus between plaintiff's loss and defendant's allegedly deceitful practices, but reliance is not required.

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's intent or knowledge.

**Injunctive Relief:** The statute does not authorize individuals to obtain injunctive relief.

**Monetary Relief:** Ky. Rev. Stat. § 367.220(1) (actual damages)

**Punitive Damages:** Ky. Rev. Stat. § 367.220 permits punitive damages.

**Attorneys' Fees:** Yes. Ky. Rev. Stat. § 367.220.

**Louisiana**

**Statute:** La. Rev. Stat. Ann. §§ 51:1401 through 51:1420

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Statute of Limitations:** La. Rev. Stat. Ann. § 51:1409(E) (one year after violation).

**Elements:** “To recover under the Louisiana Unfair Trade and Consumer Protection Law, a plaintiff must prove some element of fraud, misrepresentation, deception or other unethical conduct” in connection with consumer activity. *Garbutt v. Fairbanks Capital Corp.*, 2004 U.S. Dist. LEXIS 17138, at \*5 (E.D. La. 2004) (internal citation omitted).

**Standard:** Courts appear not to have considered the standard for evaluating deception, however, the law was modeled after the Federal Trade Commission Act and follows that law’s interpretations. *See Quality Envtl. Processes, Inc. v. I.P. Petro. Co.*, 2013-1582 (La. 2014), 144 So. 3d 1011, 1025

**Broad Prohibition:** La. Rev. Stat. Ann. § 51:1405(A)

**Reliance:** Nothing in the text of the statute requires a showing of reliance. Section 1409 merely requires a showing of an ascertainable loss.

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant’s intent or knowledge.

**Injunctive Relief:** The statute does not authorize individuals to obtain injunctive relief.

**Monetary Relief:** La. Rev. Stat. Ann. § 51:1409(A) (actual damages)

**Punitive Damages:** La. Rev. Stat. Ann. § 51:1409(A) permits treble damages if the violation is knowing and the Attorney General is given notice.

**Maine**

**Statute:** 5 Me. Rev. Stat. Ann. § 205-A-214 (Maine Unfair Trade Practices Act)

**Pre-Suit Notice:** Me. Rev. Stat. Ann. tit. 5 § 213(1-A).

**Broad Prohibition:** Me. Rev. Stat. Ann. tit. 5 § 207

**Statute of Limitations:** Me. Rev. Stat. Ann. tit. 14, § 752 (six years from discovery).

**Elements:** Defendant committed (1) an unfair or deceptive act or practice (2) in the conduct of trade or commerce. A plaintiff must also allege that something was purchased or leased from the Defendant for personal, family, or household purposes. *Curtis v. Allstate Ins. Co.*, 2002 ME 9, at 38.

**Standard:** An act or practice is deceptive if it is a material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances. *Darling v. Western Thrift & Loan*, 600 F. Supp. 2d 189, 202 (D. Me. 2009).

**Reliance:** Nothing in the text of the statute requires a showing of reliance. Courts are undecided as to whether reliance is required. *Compare Tungate v. MacLean-Stevens Studios*, 714 A. 2d 792, 797 (Me. 1998) (noting that only a showing of loss is required) *with GxG Management, LLC v. Young Bros. and Co., Inc.*, 457 F. Supp. 2d 47 (D. Me. 2006) (granting summary judgment because reliance was not shown).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's intent or knowledge.

**Injunctive Relief:** Me. Rev. Stat. Ann. tit. 5 § 213(1)

**Monetary Relief:** Me. Rev. Stat. Ann. tit. 5 § 213(1) (actual damages or restitution)

**Punitive Damages:** The statute has no provision for punitive damages.

**Attorneys' Fees:** Yes.

## Maryland

**Statute:** Md. Code Com. Law § 13-101, *et seq.* (Maryland Consumer Protection Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Enumerated Violations:** Md. Code Com. Law § 13-301(2)(i) (misrepresentations as to product's characteristics); § 13-301(2)(iv) (misrepresentations as to a product's standard or style); § 13-301(5)(i) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** Md. Code Com. Law § 13-301(1)

**Statute of Limitations:** Md. Code Com. Law § 5-101 (three years after discovery).

**Elements:** (1) defendant engaged in an unfair or deceptive act or practice; (2) the individual sustained injury or loss; and (3) the injury or loss was a result of a practice prohibited by the CPA. *Kamara v. Shaprio Brown & ALT, LLP*, 2016 Md. App. LEXIS 373, at \*24-25 (Mar. 17, 2016).

**Standard:** The state has adopted the reasonable consumer test. *See Luskin's, Inc. v. Consumer Protection Div.*, 353 Md. 335, 346-47 (Ct. App. 1999).

**Reliance:** A showing of reliance is typically required. *See, e.g., Healy v. BWW Law Group, LCC*, 2017 WL 281997, at \*3-4 (D. Md. Jan. 23, 2017); *Green v. Wells Fargo Bank*, 927 F. Supp. 2d 244, 254 n.8 (D. Md. 2013) (showing of reliance required for private suit), *aff'd*, 582 Fed. App'x 246 (4th Cir. 2014). The Maryland Supreme Court however has held that the question of whether a practice is deceptive and materially is an objective standard. *See Luskin's, Inc. v. Consumer Prot. Div.*, 353 Md. 335, 358-59, 726 A.2d 702 (1999).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's knowledge. Intent is only required to prove a violation of § 13-301(5)(i).

**Injunctive Relief:** The statute does not authorize individuals to obtain injunctive relief.

**Monetary Relief:** Md. Code Com. Law § 13-408(a)

**Punitive Damages:** The statute has no provision for punitive damages.

**Attorneys' Fees:** Yes. Md. Code Com. Law § 13-408(b)

### Massachusetts

**Statute:** Mass. Gen. L. ch. 93A (Regulation of Business Practices for Consumers Protection)

**Pre-Suit Notice:** Mass. Gen. L. ch. 93A, § 9(3) requires pre-suit notice, with limited exceptions.

**Broad Prohibition:** Mass. Gen. L. ch. 93A, § 2(a)

**Statute of Limitations:** Mass. Gen. L. ch. 260, § 5A (four years after discovery).

**Elements:** (1) defendant is a business that engaged in an unfair method of competition or its actions were unfair or deceptive; and (2) the actions resulted in a loss of money or property. *Stagikas v. Saxon Mortg. Servs.*, 795 F. Supp. 2d 129, 137 (D. Mass. 2011).

**Standard:** Under the Massachusetts standard, “[a]n act or practice will be found deceptive if... there is a representation, omission, or practice that... is likely to mislead consumers acting reasonably under the circumstances.” *Commonwealth v. AmCan Enterprises, Inc.*, 712 N.E. 2d 1205, 1209 (Mass. App. Ct. 1999).

**Reliance:** Nothing in the text of the statute requires a showing of reliance. *See Hershenow v. Enter. Rent-A-Car Co. Of Boston, Inc.*, 445 Mass. 790, 799 (2006) (requiring only ascertainable loss). *But see Rodi v. Southern New England Sch. of Law*, 532 F.3d 11 (1st Cir. 2008) (finding that under the facts of that case, ascertainable loss could only be shown by establishing reliance). For purposes of a class action predicated on a price premium theory, individualized evidence is not required. *See, e.g., Olson v. Energy N., Inc.*, No. 9800228, 1999 WL 1332362, at \*5 (Mass. Super. 1999).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant’s intent or knowledge.

**Injunctive Relief:** Mass. Gen. Laws ch. 93A, § 9(1)

**Monetary Relief:** Mass. Gen. Laws ch. 93A, § 9(1) (damages; greater of actual damages or \$25)

**Punitive Damages:** Mass. Gen. Laws ch. 93A, § 9(3) permits punitive damages if the violation was willful, knowing, in bad faith, or committed with knowledge of violations in refusing to grant relief in response to consumer’s demand.

**Attorneys’ Fees:** Yes.

## Michigan

**Statute:** Mich. Comp. Laws Ann. § 445.901 *et seq.* (Michigan Consumer Protection Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Enumerated Violations:** Mich. Comp. Laws Ann. § 445.903(c) (misrepresentations as to product's characteristics); § 445.903(e) (misrepresentations as to a product's standard or style); § 445.903(g) (advertising goods with intent not to sell as advertised).

**Statute of Limitations:** Mich. Comp. Laws Ann. § 445.911(7) (six years after violation or one year after last payment if applicable, whichever is later).

**Elements:** (1) violation of the act; (2) plaintiff's reliance; (3) injury; (4) causation. *Shain v. Advanced Techs. Grp., LLC*, 2017 U.S. Dist. LEXIS 27438, at \*27 (E.D. Mich. Feb. 28, 2017).

**Standard:** The state has never enunciated a standard, but it has rejected the reasonable consumer standard for 31 of the 33 enumerated acts. *See, e.g., Cormier v. PF Fitness-Midland, LLC*, No. 331286, 2017 Mich. App. LEXIS 893, at \*19-20 (Ct. App. June 1, 2017); *Zine v. Chrysler Corp.*, 236 Mich. App. 261, 283-84, 600 N.W.2d 384, 398 (1999).

**Reliance:** Reliance is only an element of two of the thirty-three enumerated prohibited acts. *Cormier v. PF Fitness-Midland, LLC*, No. 331286, 2017 Mich. App. LEXIS 893, at \*19 (Ct. App. June 1, 2017); *Galecka v. Savage Arms, Inc.*, No. 313350, 2014 Mich. App. LEXIS 1224, at \*8 (Ct. App. June 26, 2014). Reliance is not an element of the aforementioned prohibited acts. That said, where it is required, the Michigan Supreme Court has held that class action plaintiffs need only show that a reasonable person would have relied on the representations to satisfy predominance. *Dix. v. Am. Bankers Life Assurance Co.*, 415 N.W.2d 206, 209 (Mich. 1987).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's knowledge. Intent is only required to prove a violation of § 445.903(g).

**Injunctive Relief:** Mich. Comp. Laws Ann. § 445.911(1)(b)

**Monetary Relief:** Mich. Comp. Laws Ann. § 445.911(2) (actual damages or \$250, whichever is greater)

**Punitive Damages:** The statute has no provision for punitive damages.

**Attorneys' Fees:** Attorneys' fees are not permitted in a class action. 445.911(2).

**Minnesota -- Consumer Fraud Act**

**Statute:** Minn. Stat. § 325F.69

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** Minn. Stat. § 325F.69(1)

**Statute of Limitations:** Minn. Stat. § 541.05(1) – (2) (within six years).

**Elements:** (1) defendant uses fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice with intent that plaintiff will rely on it; (2) reliance; (3) causation; (4) injury. *King v. Reed, LLC*, 2008 U.S. Dist LEXIS 1341 (D. Minn. 2008).

**Standard:** The standard for finding unlawful deception is “the tendency or capacity to deceive.” *State v. Am. Family Prepaid Legal Corp.*, 2012 WL 2505843, at \*17 (Minn. Ct. App. 2012).

**Reliance:** In *Wiegand v. Walser Automotive Groups, Inc.*, 683 N.W.2d 807, 811 (Minn. 2004), the Minnesota Supreme Court held that it was not necessary to plead individual reliance, but to recover, the consumer had to prove a causal nexus.

**Knowledge and Intent:** Although it is a less demanding standard than proof of intent to deceive, Minn. Stat. § 325F.69(1) requires a showing of intent that others rely on the defendant’s deception.

**Injunctive Relief:** Minn. Stat. §§ 8.31(3a)

**Monetary Relief:** Minn. Stat. § 8.31(3a) (damages)

**Punitive Damages:** The statute has no provision for punitive damages.

**Attorneys’ Fees:** Yes.

**Minnesota -- Unlawful Trade Practices Act**

**Statute:** Minn. Stat. § 325D.44

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** Minn. Stat. § 325D.44

**Enumerated Violations:** Minn. Stat. § 325D.44(5) (misrepresentations as to product's characteristics); § 325D.44(7) (misrepresentations as to a product's standard or style); § 325D.44(10) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** Minn. Stat. § 325D.44(13)

**Statute of Limitations:** Minn. Stat. § 541.05(1) – (2) (within six years).

**Elements:** A person must show they are likely to be damaged by a deceptive trade practice of another. Minn. Stat. § 325D.45.

**Standard:** The standard for finding unlawful deception is “the tendency or capacity to deceive.” *State v. Am. Family Prepaid Legal Corp.*, 2012 WL 2505843, at \*17 (Minn. Ct. App. 2012).

**Reliance:** In *Wiegand v. Walser Automotive Groups, Inc.*, 683 N.W.2d 807, 811 (Minn. 2004), the Minnesota Supreme Court held that it was not necessary to plead individual reliance, but to recover, the consumer had to prove a causal nexus.

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's knowledge. “Intent” is required for only one of the enumerated provisions of the UDTPA (intent not to sell as advertised).

**Injunctive Relief:** Minn. Stat. §§ 8.31(3a)

**Monetary Relief:** Minn. Stat. § 8.31(3a) (damages)

**Punitive Damages:** The statute has no provision for punitive damages.

**Attorneys' Fees:** Yes.



## Mississippi

**Statute:** Miss. Code § 75-24-1, *et seq.*

**Pre-Suit Notice:** Miss. Code § 75-24-15(2) requires pre-suit participation in AG-approved informal dispute settlement program, which necessarily entails a pre-suit notice.

**Enumerated Violations:** Miss. Code § 75-24-5(2)(e) (misrepresentations as to product's characteristics); § 75-24-5(2)(g) (misrepresentations as to a product's standard or style); § 75-24-5(2)(i) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** Miss. Code § 75-24-5(1)

**Statute of Limitations:** Miss. Code § 15-1-49 (three years after discovery).

**Standard:** The state uses the capacity to deceive test. *See Watson Labs., Inc. v. State*, 241 So. 3d 573, 598 (Miss. 2018).

**Reliance:** Mississippi courts have not imposed an explicit requirement of reliance, but one court has noted that individuals must plead allegations of a causal connection between the defendants' deception and the plaintiffs' injuries. *Mayberry v. Bristol-Meyers Squibb Co.*, 2009 WL 5216968, at \*8-9 (D.N.J. Dec. 30, 2009) (Miss. law). Plaintiff is not aware of any cases addressing the question of classwide reliance. However, when certifying out of state classes, this district has held that "the Ninth Circuit does not treat the need for individual inquiries into reliance and damages as necessarily precluding certification as long as common issues focusing on the defendant's conduct predominate," notwithstanding the jurisprudence in other states. *See Gold v. Lumber Liquidators, Inc.*, 323 F.R.D. 280, 292 (N.D. Cal. 2017).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's knowledge. Intent is only required to prove a violation of § 75-24-5(2)(i).

**Injunctive Relief:** The statute does not authorize individuals to obtain injunctive relief.

**Monetary Relief:** Miss. Code § 75-24-15 (recovery of the purchase price)

**Punitive Damages:** The statute has no provision for punitive damages.

**Missouri**

**Statute:** Mo. Rev. Stat. §§ 407.010 – 407.307 (Missouri Merchandising Practices Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** Mo. Rev. Stat. § 407.020(1)

**Statute of Limitations:** Mo. Rev. Stat. § 516.120 (five years)

**Elements:** Use or employment of (1) deception, fraud, a false pretense, false promise, misrepresentation, unfair practice or concealment, suppression or omission of material fact; (2) in connection with the sale or advertisement of any merchandise in trade or commerce; (3) which results in an ascertainable loss of money or real or personal property, and; (4) the loss must occur to a person who purchases or leases merchandise primarily for personal, family, or household purposes. *Binkley v. Am. Equity Mortg., Inc.*, 447 S.W.3d 194 (Mo. Nov. 12, 2014).

**Standard:** Missouri uses the reasonable person standard to evaluate deception. *See, e.g., Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 774 (Mo. 2007).

**Reliance:** The statute states that reliance and actual deception are not elements. *See* Mo. Code Regs. Ann. tit. 15, § 60-9.020(2). *See also Plubell v. Merck & Co.*, 289 S.W.3d 707, 714 (Mo. Ct. App. 2009).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's intent or knowledge.

**Injunctive Relief:** Mo. Rev. Stat. § 407.025(2)

**Monetary Relief:** Mo. Rev. Stat. § 407.025(1) (actual damages)

**Punitive Damages:** Courts have the discretion to award punitive damages. Mo. Rev. Stat. § 407.025.

**Attorneys' Fees:** Yes.

## Montana

**Statute:** Mont. Code §§ 30-14-101 through 30-14-142 (Unfair Trade Practices and Consumer Protection Act).

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** Mont. Code § 30-14-103

**Statute of Limitations:** Two years, not accrued until discovery by aggrieved party the facts constituting fraud/mistake. Mont. Code Ann. § 27-2-203; *Osterman v. Sears, Roebuck & Co.*, 80 P.3d 435, 440 (Mont. 2003) (“fraud claims are subject to a two-year statute of limitations.”).

**Elements:** (1) A consumer (2) who suffers any ascertainable loss of money or property, real or personal, (3) as a result of the use or employment by another person of “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce[.]” Mont. Code §§ 30-14-103 & -133; *Durbin v. Ross*, 916 P.2d 758, 766 (Mont. 1996).

**Standard:** While the state does not appear to have set forth a standard, Montana uses current interpretations of the FTCA to evaluate deception. *See, e.g., WLW Realty Partners, LLC v. Cont'l Partners VIII, LLC*, 2015 MT 312, ¶ 31, 381 Mont. 333, 342, 360 P.3d 1112, 1118

**Reliance:** Nothing in the statute requires a showing of reliance, and the only court to address the question holds that a showing of reliance is not required. *PNC Bank v. Wilson*, 2015 WL 3887602, at \*7-8 (D. Mont. June 23, 2015).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant’s intent or knowledge.

**Injunctive Relief:** The statute does not authorize individuals to obtain injunctive relief.

**Monetary Relief:** Mont. Code § 30-14-133(1) (actual damages)

**Punitive Damages:** Courts have the discretion to award punitive treble damages. Mont. Code § 30-14-133(1)

**Attorneys’ Fees:** Yes. Mont. Code § 30-14-133(3) allows fees to the prevailing party, but also, “When faced with a successful defendant, a district court should only award attorneys’ fees upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.” *Tripp v. Jeld-Wen, Inc.* 112 P.3d 1018, 1026-27 (Mont. 2005).

**Nebraska**

**Statute:** Neb. Rev. Stat. §§ 59-1601 through 59-1623 (Consumer Protection Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Enumerated Violations:** Neb. Rev. Stat. § 59-1602 (misrepresentations as to product's characteristics); § (misrepresentations as to a product's standard or style); § (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** §

**Statute of Limitations:** Under the CPA, four years after the cause of action accrues. Neb. Rev. Stat. § 59-1612.

**Elements:** (1) plaintiff is a consumer, direct or indirect, (2) who sustained an injury, (2) as a result of an unfair or deceptive act (3) in trade or commerce (4) that affects the public interest. *Arthur v. Microsoft Corp.*, 267 Neb. 586, 595 (2004).

**Standard:** A deceptive practice is one that possesses the tendency or capacity to mislead, or creates the likelihood of deception. *Raad v. Wal-Mart Stores*, 13 F. Supp. 2d 1003, 1013 (D. Neb. 1998) (internal quotations and citations omitted).

**Reliance:** Neb. Rev. Stat. § 56-1609 creates a private cause of action for a violation, and makes no mention of reliance. Plaintiff is not aware of any cases addressing the question of classwide reliance.

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's intent or knowledge.

**Injunctive Relief:** Neb. Rev. Stat. § 59-1609

**Monetary Relief:** Neb. Rev. Stat. § 59-1609 (actual damages)

**Punitive Damages:** The statute has no provision for punitive damages.

**Attorneys' Fees:** Yes. Neb. Rev. Stat. § 59-1609 (*under Consumer Protection Act*)

**Miscellaneous Notes:** In a private citizen suit, plaintiff must prove that the alleged unfair or deceptive acts or practices injured not only the plaintiff, but also had an impact upon the public interest.

### **New Hampshire**

**Statute:** N.H. Rev. Stat. §§ 358-A:1 through 358-A:13 (Consumer Protection Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Enumerated Violations:** N.H. Rev. Stat. § 358-A:2(V) (misrepresentations as to product's characteristics); § 358-A:2(VII) (misrepresentations as to a product's standard or style); § 358-A:2(X) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** N.H. Rev. Stat. § 358-A:

**Statute of Limitations:** 3 years from date violation was known or reasonably should have been known, but evidence of conduct more than 3years earlier may be introduced. N.H. Rev. Stat. § 358-A:3.

**Standard:** New Hampshire does not appear to have delineated a standard but appears to use current interpretations of the FTCA to evaluate deception. *Chroniak v. Golden Inv. Corp.*, 983 F.2d 1140, 1146 (1st Cir. 1993).

**Reliance:** The statute does not require a showing of reliance, and in a class action, plaintiffs must show a causal connection between the misrepresentation and the injuries of the class. *Mulligan v. Choice Mortgage Corp.*, 1998 WL 544431, at \*12 (D.N.H. 1998).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's knowledge. Intent is only required to prove a violation of § 358-A:2(X).

**Injunctive Relief:** N.H. Rev. Stat. § 358-A:10(I)

**Monetary Relief:** N.H. Rev. Stat. § 358-A:10(I) (actual damages)

**Punitive Damages:** N.H. Rev. Stat. § 358-A:10(1) if willful or knowing

**Attorneys' Fees:** Yes. N.H. Rev. Stat. § 358-A:10(1)

## New Jersey

**Statute:** N.J. Stat. Ann. § 56:8-1, *et seq.* (New Jersey Consumer Fraud Act)

**Pre-Suit Notice:** The statute does not impose a pre-suit notice requirement.

**Broad Prohibition:** N.J. Stat. Ann. § 56:8-2

**Statute of Limitations:** Six years. *Mirra v. Holland America Line*, 331 N.J. Super. 86, 90, 751 A.2d 138, 140, 2000 N.J. Super. LEXIS 200, at \*5 (“the statute of limitations that applies to consumer fraud claims is the same six-year general limitation contained in *N.J.S.A.* 2A:14-1”).

**Elements:** (1) an ascertainable loss on the part of the plaintiff for standing purposes; (2) unlawful conduct by defendant and (3) a causal relationship between the defendant’s unlawful conduct and the plaintiff’s ascertainable loss. *Weinberg v. Sprint Corp.*, 173 N.J. 233, 251, 801 A.2d 281 (2002).

**Standard:** New Jersey uses the reasonable person test to evaluate deception. *See, e.g., In re Mercedes-Benz Tele Aid Contract Litig.*, 267 F.R.D. 113, 132 (D.N.J. 2010) (noting that all that is necessary to establish causation under the New Jersey Consumer Fraud Act “is that the facts withheld be material in the sense that a reasonable purchaser might have considered them important in the making of his or her decision”).

**Reliance:** The New Jersey Supreme Court has held that a showing of reliance is not required. *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 366 (N.J. 1997). In a class action, the plaintiff must show the class suffered an ascertainable loss as a result of the defendant’s conduct. *See, e.g., Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 248 (2005).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant’s intent or knowledge, except that concealment of a material fact is a violation only if knowing.

**Injunctive Relief:** N.J. Stat. Ann. § 56:8-19 (equitable relief)

**Monetary Relief:** N.J. Stat. Ann. § 56:8-19 (treble damages)

**Punitive Damages:** The statute has no provision for punitive damages.

**Attorneys’ Fees:** Yes. In some cases, fees may be awarded even with zero dollars in damages. N.J. Stat. Ann. § 56:8-19; *See Perez v. Professionally Green, LLC*, (Super. Ct. App. Div. 2011).

## New Mexico

**Statute:** N.M. Stat. § 57-12-1, *et seq.* (Unfair Trade Practices Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** N.M. Stat. § 57-12-2(D)(5) (misrepresentations as to product's characteristics); § 57-12-2(D)(7) (misrepresentations as to a product's standard or style).

**Statute of Limitations:** N.M. Stat. § 37-1-7 (four years)

**Elements:** (1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading; (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant's business; and (3) the representation was of the type that may, tends to, or does deceive or mislead any person. (4) plaintiff is a consumer. *See generally* N.M. Stat. § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 112 N.M. 97, 100, 811 P.2d 1308, 1311 (1991).

**Standard:** Whether a misrepresentation or omission is material is judged objectively through a "reasonable consumer" standard under Section 5(a) of the FTCA. *In the Matter of Cliffdale Assocs.*, 103 F.T.C. 110, 107 (1984); *see also Richardson Ford Sales v. Johnson*, 676 P.2d 1344, 1346 (N.M. Ct. App. 1984) ("It is the intent of the legislature that in construing Section 3 [57-12-3 NMSA 1978] of the Unfair Practices Act the courts to the extent possible will be guided by the interpretations given by the federal trade commission and the federal courts.") (quoting N.M. Stat. § 57-12-4).

**Reliance:** Reliance is not required to sustain a claim in New Mexico, but in a class action, the plaintiff must show a causal link between the injuries of the class and the defendant's conduct. *See, e.g., Mulford v. Altria Group, Inc.*, 242 F.R.D. 615, 622 (D.N.M. 2007).

**Knowledge and Intent:** N.M. Stat. § 57-12-2(D) requires knowledge as an element of a deceptive practice. This requirement was held applicable to all deceptive practices listed in the statute by *Stevenson v. Louis Dreyfus Corp.*, 811 P.2d 1308 (N.M. 1991). That decision also holds, however, that the requirement is satisfied if the party knows or should know of the deceptive nature of a statement.

**Injunctive Relief:** N.M. Stat. § 57-12-10(A)

**Monetary Relief:** N.M. Stat. § 57-12-10(B) (actual damages)

**Punitive Damages:** The statute has no provision for punitive damages.

**Attorneys' Fees:** Yes. N.M. Stat. § 57-12-10(C)

## New York

**Statute:** N.Y. Gen. Bus. Law § 349

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** N.Y. Gen. Bus. Law § 349(a)

**Statute of Limitations:** Three years. *Gaidon v Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201, 727 N.Y.S.2d 30, 750 N.E.2d 1078, 2001 N.Y. LEXIS 1060 (N.Y. 2001).

**Elements:** Plaintiff must demonstrate (1) defendant's deceptive acts were directed at consumers, (2) acts were misleading in a (3) material way, and (4) the plaintiff has been injured as a result. Plaintiff must show the act was likely to "mislead a reasonable consumer acting reasonably in the circumstances" where courts view each misleading statement in light of its context. *Belfiore v. Procter & Gamble Co.*, 311 F.R.D. 29, 53 (E.D.N.Y. Oct. 5, 2015) (citing *Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir. 2000) ("Plaintiffs need not show justifiable reliance")).

**Standard:** New York courts have adopted "an objective definition of deceptive acts and practices, whether representations or omissions, limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 745 (N.Y. 1995); *See also St. Patrick's Home for Aged & Infirm v. Laticrete Int'l, Inc.*, 696 N.Y.S.2d 117, 122 (N.Y. App. Div. 1999).

**Reliance:** Reliance is not required to sustain a claim in New York, but in a class action, the plaintiff must show a causal link between the injuries of the class and the defendant's conduct. *See, e.g., Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 549 (E.D.N.Y. Mar. 27, 2017). New York routinely certifies product labeling cases. *See, e.g., Ackerman v. Coca-Cola Co.*, No. 09 CV 395 (DLI)(RML), 2013 U.S. Dist. LEXIS 184232, at \*74-75 (E.D.N.Y. July 17, 2013) (in food labeling case, finding predominance, explaining proximate causation "can be resolved through generalized proof applicable to the class").

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's intent or knowledge.

**Injunctive Relief:** N.Y. Gen. Bus. Law § 349(h)

**Monetary Relief:** N.Y. Gen. Bus. Law § 349(h) (greater of \$50 or actual damages)

**Punitive Damages:** Upon a showing of willfulness, N.Y. Gen. Bus. Law § 349(h) permits treble damages (not more than \$1,000).

**Attorneys' Fees:** Yes. N.Y. Gen. Bus. Law §§ 349(h)



### North Carolina

**Statute:** N.C. Gen. Stat. §§ 75.1.1 through 75-35 (North Carolina Unfair and Deceptive Acts and Practices Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** N.C. Gen. Stat. § 75-1.1(a)

**Statute of Limitations:** Four years. *Nash v. Motorola Communications & Elecs., Inc.*, 96 N.C. App. 329, 385 S.E.2d 537 (1989), *aff'd*, 328 N.C. 267, 400 S.E.2d 36 (1991).

**Elements:** “[I]n order to establish a violation of N.C. Gen. Stat. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs.” *Walker v. Fleetwood Homes of N. Carolina, Inc.*, 362 N.C. 63, 71–72 (2007). “A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers” . . . “[A] practice is deceptive if it has the capacity or tendency to deceive.” *Id.*

**Standard:** A practice is deceptive if it has the capacity or tendency to deceive the average consumer, but proof of actual deception is not required. *Spartan Leasing, Inc. v. Pollard*, 400 S.E.2d 476, 482, 101 N.C. App. 450, 461 (1991) (citing *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980)). *See also Bumpers v. Cmty. Bank*, 747 S.E.2d 220 (N.C. 2013) (requiring “reasonable” reliance).

**Reliance:** The North Carolina Supreme Court has held that, when a claim stems from an alleged misrepresentation, the plaintiff must show reasonable reliance in order to demonstrate proximate causation. *Bumpers v. Cmty. Bank*, 747 S.E.2d 220 (N.C. 2013). Reliance can be proven on a classwide basis where representations to the class are substantially the same. *See, e.g., Pitts v. Am. Sec. Ins. Co.*, 144 N.C. App. 1, 14 (2001), *aff'd*, 356 N.C. 292 (2002).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant’s intent or knowledge.

**Injunctive Relief:** The statute does not explicitly authorize individuals to obtain injunctive relief, although the Fourth Circuit affirmed an injunction under the statute in *Shell Oil Co. v. Commercial Petroleum, Inc.*, 928 F.2d 104, 108 (4th Cir. 1991).

**Monetary Relief:** N.C. Gen. Stat. § 75-16 (treble damages)

**Punitive Damages:** N.C. Gen. Stat. § 75-16

**Attorneys’ Fees:** Yes, if violation willful and knowing, or on a part of instituting party, if the suit was frivolous N.C. Gen. Stat. § 75-16.1.

**North Dakota**

**Statute:** N.D. Cent. Code §§ 51-15-01 through 51-15-11 (Unlawful Sales or Advertising Practices Law)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** N.D. Cent. Code §§ 51-15-02, 51-15-02.3.

**Statute of Limitations:** N.D. Cent. Code § 28-01-16(2) (six years).

**Elements:** (1) injury, (2) deceptive act, (3) not necessarily a consumer, but must be negatively impacted, (4) reliance on those representations, whether or not the plaintiff sees those specific representations. *DJ Coleman, Inc. v. Nufarm Americas, Inc.*, 693 F. Supp. 2d 1055, 1077 (D.N.D. 2010)

**Standard:** North Dakota appears not to have set forth a standard.

**Reliance:** N.D. Cent. Code § 51-15-02 does not require reliance. Plaintiff is not aware of any cases addressing the question of classwide reliance.

**Knowledge and Intent:** N.D. Century Code § 51-15-02 requires a showing of intent that others rely on the defendant's deception.

**Injunctive Relief:** The statute does not authorize individuals to obtain injunctive relief.

**Monetary Relief:** N.D. Cent. Code § 51-15-09 (actual damages)

**Punitive Damages:** N.D. Cent. Code § 51-15-09 permits an award of treble damages if the violation was knowing.

**Attorneys' Fees:** Yes, if knowingly. N.D. Cent. Code § 51-15-09.

## Ohio

**Statute:** Ohio Rev. Code. § 4165.02

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Enumerated Violations:** Ohio Rev. Code § 4165.02 (A)(7) (misrepresentations as to product's characteristics); § 4165.02 (A)(9) (misrepresentations as to a product's standard or style); Ohio Rev. Code § 4165.02 (A)(11) (advertising goods with intent not to sell as advertised)

**Statute of Limitations:** Ohio Rev. Code § 1345.10(c) (two years)

**Elements:** (1) injury to plaintiff, (2) deceptive act by defendant, (3) for which defendant had notice was deceptive. *Reeves v. PharmaJet, Inc.*, 846 F. Supp. 2d 791 (N.D. Ohio 2012).

**Standard:** Ohio uses the capacity to deceive standard to evaluate deception. *See Cranford v. Joseph Airport Toyota*, 1996 Ohio App. LEXIS 2252, at \*4-5 (Ct. App. 1996) ("A sales practice is deceptive within the meaning of R.C. 1345.02(A) if it has the tendency or capacity to mislead consumers concerning a fact or circumstance material to a decision to purchase the product or service offered for sale. The focus of any inquiry in that regard is the likely effect of the act or practice on consumers.").

**Reliance:** A number of decisions hold that plaintiff need not prove reliance, just a causal connection or ascertainable loss. *See, e.g., Nessel v. Whirlpool Corp.*, 2008 WL 2967703, at \*3 (N.D. Ohio 2008). In class actions, the question of whether an advertisement deceived the class can be established without proof of individual reliance. *See, e.g., Blankenship v. CFMOTO Powersports, Inc.*, 166 Ohio Misc. 2d 21, 45 (Com. Pl. 2011).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's knowledge or intent.

**Injunctive Relief:** Ohio Rev. Code § 4165.02 (B)

**Monetary Relief:** Ohio Rev. Code § 4165.02 (B) (actual economic damages)

**Punitive Damages:** The statute does not contain a provision for punitive damages.

## Oklahoma

**Statute:** Okla. Stat. tit. 15, §§ 751 through 763 (Consumer Protection Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Enumerated Violations:** Okla. Stat. tit. 15, § 753(5) (misrepresentations as to product's characteristics); § 753(7) (misrepresentations as to a product's standard or style); § 753(8) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** Okla. Stat. tit. 15, § 752

**Statute of Limitations:** Three years. *See Brashears v. Sight N Sound Appliance Ctrs., Inc.*, 1999 OK CIV APP 52, 981 P.2d 1270 (1999).

**Elements:** (1) defendant engaged in an unlawful practice; (2) that the challenged practice occurred in the course of defendant's business; (3) that the plaintiff, as a consumer, suffered an injury in fact; and (4) that the challenged practice caused the plaintiff's injury. *Walls v. American Tobacco Co.*, 2000 OK 66

**Standard:** The statute sets forth that a reasonable consumer standard. Okl. Stat. Ann. tit. 15 § 752(11).

**Reliance:** The statute does not include an explicit reliance requirement, but Oklahoma courts have not directly addressed the question whether a showing of reliance is required.

**Knowledge and Intent:** Knowledge is required to prove violations of the first two prohibited acts.

**Injunctive Relief:** The statute does not authorize individuals to obtain injunctive relief.

**Monetary Relief:** Okla. Stat. tit. 15, § 761.1(A) (actual damages)

**Punitive Damages:** The statute has no provision for punitive damages.

## Oregon

**Statute:** Or. Rev. Stat. §§ 646.605 through 646.656 (Unlawful Trade Practices Law)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Enumerated Violations:** Or. Rev. Stat. § 646.608(1)(e) (misrepresentations as to product's characteristics); § 646.608(1)(g) (misrepresentations as to a product's standard or style); § 646.608(1)(i) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** Or. Rev. Stat. § 646.608(1)(u)

**Statute of Limitations:** One year. Or. Rev. Stat. § 646.638(6). The time period begins with the discovery of the unlawful method, act or practice. *Sherwood v. Finch*, 2000 U.S. Dist. LEXIS 20906 (D. Or. Dec. 20, 2000).

**Elements:** (1) a willful use of a method, act or practice declared unlawful; (2) causation; and (3) ascertainable loss of money or property. Or. Rev. Stat. § 646.638(1); *Raudebaugh v. Action Pest Control, Inc.*, 650 P.2d 1006, 1009 (Or. 1982).

**Standard:** *Pearson v. Philip Morris, Inc.*, 358 Or. 88, 135 n.26, 361 P.3d 3, 32 (2015) holds that “whether that was a misrepresentation is determined based on an objective standard of what a reasonable consumer would understand the representation to be.”

**Reliance:** Nothing in the text of the statute requires a showing of reliance. In *Pearson v. Philip Morris, Inc.*, 361 P.3d 3, 26-33 (Or. 2015), the Oregon Supreme Court discussed the state of the case law and noted in dicta that consumers might be able to show predominance on a classwide basis through a price premium supported by expert testimony.

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's knowledge. Intent is only required to prove a violation of § 646.608(1)(i).

**Injunctive Relief:** Or. Rev. Stat. § 646.638

**Monetary Relief:** Or. Rev. Stat. § 646.638 (actual damages)

**Punitive Damages:** Courts have the discretion to award punitive damages. Or. Rev. Stat. § 646.638.

**Attorneys' Fees:** Court may award costs and attorneys' fees to prevailing plaintiff, or to prevailing defendant if there was no objectively reasonable basis for bringing suit or appeal, but not to prevailing defendant in class action. Or. Rev. Stat. § 646.638(3).

### Rhode Island

**Statute:** R.I. Gen. Laws §§ 6-13.1-1 through 6-13.1-27 (Unfair Trade Practice and Consumer Protection Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Enumerated Violations:** R.I. Gen. Laws § 6-13.1-1(6)(v) (misrepresentations as to product's characteristics); § 6-13.1-1(6)(vii) (misrepresentations as to a product's standard or style); § 6-13.1-1(6) (ix) (advertising goods with intent not to sell as advertised).\

**Broad Prohibition:** R.I. Gen. Laws § 6-13.1-1(6)(xiii); 6-13.1-2

**Statute of Limitations:** R.I. Gen. Laws § 9-1-13 (10 years).

**Elements:** (1) consumer, (2) ascertainable loss of money or property, (3) as a result of a deceptive act declared unlawful by by § 6-13.1-2. *Whouley v. Shoreham, Inc.*, No. C.A. 08-411S, 2009 WL 762315, at \*3 (D.R.I. Mar. 23, 2009); *Park v. Ford Motor Co.*, 844 A.2d 687, 693 (R.I. 2004); *Long v. Dell, Inc.*, 93 A.3d 988, 1001, 1003 (R.I. 2014).

**Standard:** Materiality is judged objectively through a “reasonable consumer” standard under Section 5(a) of the FTCA. *See Ames v. Oceanside Welding & Towing Co.*, 767 A.2d 677, 682 n.6 (R.I. 2001) (directing courts to utilize standards adopted by the Federal Trade Commission).

**Reliance:** R.I. Gen. Laws § 6-13.1-5.2 requires an ascertainable loss. In *Long v. Dell, Inc.*, 93 A.3d 988, 1003 (R.I. 2014), the Rhode Island Supreme Court adopted the FTC standard and did not require that reliance be shown.

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's knowledge. Intent is only required to prove a violation of § 6-13.1-1(6) (ix).

**Injunctive Relief:** R.I. Gen. Laws § 6-13.1-5.2(a)

**Monetary Relief:** R.I. Gen. Laws § 6-13.1-5.2(a) (greater of actual damages or \$100)

**Punitive Damages:** Courts have the discretion to award punitive damages. R.I. Gen. Laws § 6-13.1-5.2.

**Attorneys' Fees:** Yes. R.I. Gen. Laws § 6-13.1-5.2(a).

**South Carolina**

**Statute:** S.C. Code §§ 39-5-10 through 39-5-160 (Unfair Trade Practices Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** S.C. Code § 39-5-20(a)

**Statute of Limitations:** S.C. Code § 39-5-150 (three years)

**Elements:** (1) Person injured in his business or property (2) by reason of (3) any manufacturer, factory branch, factory representative, distributor, or wholesaler, distributor branch, distributor representative or motor vehicle dealer, (4) acting arbitrarily, in bad faith, or unconscionably. *See Jackson v. Speed*, 486 S.E.2d 750, 756 (S.C. 1997)

**Standard:** The state has adopted the capacity to deceive standard to evaluate deception. *See, e.g., State ex rel. McLeod v. Brown*, 278 S.C. 281, 285, 294 S.E.2d 781, 783 (1982) (“actual deception need not be shown; a finding of a tendency to deceive and mislead will suffice”).

**Reliance:** Reliance is not required. *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 777 S.E.2d 176, 191-92 (S.C. 2015) states that a causal connection is sufficient.

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant’s intent or knowledge.

**Injunctive Relief:** The statute does not authorize individuals to obtain injunctive relief.

**Monetary Relief:** S.C. Code § 39-5-140(a) (actual damages)

**Punitive Damages:** S.C. Code § 39-5-140(a) permits an award of treble damages if the violation was willful or knowing.

### South Dakota

**Statute:** S.D. Codified Laws §§ 37-24-1 through 37-24-35 (Deceptive Trade Practices and Consumer Protection Law)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** S.D. Codified Laws § 37-24-6

**Statute of Limitations:** Four years after occurrence or discovery of conduct. S.D. Codified Laws § 37-24-33.

**Elements:** Private cause of action requires: (1) plaintiff must have suffered actual damages (2) that were proximately caused by (3) defendant's alleged violations of the Act. *Nygaard v. Sioux Valley Hospitals & Health Sys.*, 731 N.W.2d 184, 197 (S.D. 2007).

**Standard:** The state does not appear to have delineated a standard, however, the statute prohibits deceptive conduct, regardless of any actual deceit, thus it appears the legislative intent was to utilize a capacity to deceive standard.

**Reliance:** S.D. Codified Laws § 37-24-31 allows consumer who is “adversely affected” to sue. In *Nygaard v. Sioux Valley Hospitals & Health System*, 731 N.W.2d 184, 196 (S.D. 2007), the South Dakota Supreme Court held that the law requires a causal connection between the challenged conduct and the injuries. Some courts have interpreted this to mean that reliance is required. *See, e.g., Rainbow Play Sys., Inc. v. Backyard Adventure, Inc.*, 2009 WL 3150984, at \*7 (D.S.D. 2009); *Cheval Int'l v. Smartpak Equine, LLC*, No. CV 14-5010, 2016 WL 1064496, at \*12 (D.S.D. Mar. 15, 2016). Plaintiff is not aware of any cases addressing the question of classwide reliance.

**Knowledge and Intent:** The most commonly-applicable substantive prohibition, S.D. Codified Laws § 37-24-6(1), requires knowledge, but most do not.

**Injunctive Relief:** The statute does not authorize individuals to obtain injunctive relief.

**Monetary Relief:** S.D. Codified Laws § 37-24-31 (actual damages)

**Punitive Damages:** The statute has no provision for punitive damages.



Tennessee

**Statute:** Tenn. Code § 47-18-101, *et seq.*

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** Tenn. Code § 47-18-104(b)

**Enumerated Violations:** § (misrepresentations as to product's characteristics); § (misrepresentations as to a product's standard or style); § (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** §

**Statute of Limitations:** One year after discovery of deceptive act, but not more than five years after conduct. Tenn. Code § 47-18-110.

**Elements:** In order to recover under the TCPA, the plaintiff must prove: (1) that the defendant engaged in an unfair or deceptive act or practice declared unlawful by the TCPA and (2) that the defendant's conduct caused an "ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated . . ." Tenn. Code § 47-18-109(a)(1); *Hanson v. J.C. Hobbs Co.*, 2012 Tenn. App. LEXIS 807, at \*25.

**Standard:** The state typically uses the reasonable consumer standard to evaluate deception. *See, e.g., Fayne v. Vincent*, 301 S.W.3d 162, 177 (Tenn. 2009).

**Reliance:** The statute does not require proof of reliance, just a showing of proximate causation. *See, e.g., Nickell v. Bank of Am.*, 2012 WL 394467, at \*7 (W.D. Tenn. Feb. 26, 2002); *Fleming v. Murphy*, 2007 WL 2050930 (Tenn. Ct. App. 2007).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's intent or knowledge.

**Injunctive Relief:** Tenn. Code § 47-18-109(b)

**Monetary Relief:** Tenn. Code § 47-18-109(1) (actual damages)

**Punitive Damages:** Tenn. Code § 47-18-109(a)(3) allows an award of treble damages if violation was willful or knowing.

Utah

**Statute:** Utah Code Ann. §§ 13.11a-1 through 13.11a-6 (West) (Truth in Advertising)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Prohibited Acts:** Utah Code Ann. § 13-11a-3(1)(e) (misrepresentations as to product's characteristics); § 13-11a-3(1)(g) (misrepresentations as to a product's standard or style); § 13-11a-3(1)(i) (advertising goods with intent not to sell as advertised).

**Statute of Limitations:** 2 years

**Elements:** Private cause of action requires: (1) a deceptive representation (2) in connection with goods or services. Utah Code Ann. § 13-11a-3(1)(d); *Robert J. DeBry & Assocs., P.C. v. Qwest Dex, Inc.*, 2006 UT 41, at \*12, 144 P.3d 1079, 1081.

**Standard:** none

**Reliance:** Utah law requires that a party bringing a claim for fraud establish reliance on the fraud. *Fidelity Nat'l. Title Ins. Co. v. Worthington*, 2015 UT App 19, 344 P.3d 156, 159.

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's intent or knowledge.

**Injunctive Relief:** Utah Code Ann. § 13-11a-4(2)(a)

**Monetary Relief:** Utah Code Ann. § 13-11a-4(2)(b)

**Punitive Damages:** The statute does not provide for multiple or punitive damages.

**Attorneys' Fees:** Yes. Utah Code Ann. § 13-11a-4(2)(c).

**Vermont**

**Statute:** Vt. Stat. Ann. tit. 9, §§ 2451 through 2480g (Consumer Fraud Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** Vt. Stat. Ann. tit. 9, § 2453(a)

**Statute of Limitations:** Six years. 12 Vt. Stat. Ann. § 511.

**Elements:** “Private cause of action requires: (1) An unfair act or practice and (2)(a) a consumer contracting in reliance upon or (b) sustaining damages or injury as a result of that unfair act or practice.” *Glassford v. Dufresne & Assocs., P.C.*, 2015 VT 77. An unfair or deceptive act involves a (1) representation/omission likely to mislead consumers, (2) consumer's interpretation of representation was reasonable in the circumstances, and (3) the misleading representation must be likely to affect the consumer's conduct or decision with regard to the product. *First Quality Carpets, Inc. v. Kirschbaum*, 54 A.3d 465, 472 (Vt. 2012).

**Standard:** *Jordan v. Nissan N. Am., Inc.*, 2004 VT 27, at \*43 (“Under the Act's objective standard, a consumer establishes the first element if she proves that the representation or omission had the tendency or capacity to deceive a reasonable consumer.”).

**Reliance:** § 2461(b) of the statute requires either reliance *or* that consumer “sustain damages or injury as a result of” a prohibited practice. *See also Dernier v. Mortgage Network, Inc.*, 87 A.3d 465, 481 (Vt. 2013).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant’s intent or knowledge.

**Injunctive Relief:** Vt. Stat. Ann. tit. 9, § 2461(b) (equitable relief)

**Monetary Relief:** Vt. Stat. Ann. tit. 9, § 2461(b) (damages “or the consideration or the value of the consideration given by the consumer”)

**Punitive Damages:** Vt. Stat. Ann. tit. 9, § 2461(b) permits treble damages.

**Attorneys’ Fees:** Yes. Vt. Stat. Ann. tit. 9, § 2461(b)

## Virginia

**Statute:** Va. Code § 59.1-196 *et seq.* (Virginia Consumer Protection Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Enumerated Violations:** Va. Code § 59.1-200(A)(5) (misrepresentations as to product's characteristics); § 59.1-200(A)(6) (misrepresentations as to a product's standard or style); § 59.1-200(A)(8) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** Va. Code § 59.1-200(A)(14)

**Statute of Limitations:** Two years. Va. Code § 59.1-204.1(A). Right of action runs from the date of injury and not from the date of discovery unless claim is solely equitable. Va. Code § 8.01-230.

**Elements:** (1) Any person who (2) suffers loss (3) as the result of a violation . . . shall be entitled to initiate an action to recover actual damages. Va. Code § 59.1-204. "The VCPA, however, still requires proof, in misrepresentation cases, of the elements of reliance and damages." *Owens v. DRS Auto. Fantomworks, Inc.*, 764 S.E.2d 256, 260 (Va. 2014); *see also Cooper v. GGGR Invs., LLC*, 334 B.R. 179, 188, 2005 U.S. Dist. LEXIS 32333, at \*21 ("loss must be the result of, that is caused by, the violation. And, of course, this causal connection cannot exist without the consumer's reliance on the misrepresentation.").

**Standard:** The state appears not to have delineated a standard, but because the statute requires reliance and actual deception, Plaintiffs presume the reasonable consumer standard applies.

**Reliance:** A showing of reliance is required. *See Owens v. DRS Automotive Fantomworks, Inc.*, 764 S.E.2d 256, 498 (Va. 2014). Plaintiff is not aware of any cases addressing the question of classwide reliance. However, when certifying out of state classes, this district has held that "the Ninth Circuit does not treat the need for individual inquiries into reliance and damages as necessarily precluding certification as long as common issues focusing on the defendant's conduct predominate," notwithstanding the jurisprudence in other states. *See Gold v. Lumber Liquidators, Inc.*, 323 F.R.D. 280, 292 (N.D. Cal. 2017).

**Knowledge and Intent:** *Except* to rebut an affirmative defense under available in limited situations (Va. Code § 59.1-207), nothing in the statute requires a showing of the defendant's intent or knowledge.

**Injunctive Relief:** The statute does not authorize individuals to obtain injunctive relief.

**Monetary Relief:** Va. Code § 59.1-204(a) (actual damages)

**Punitive Damages:** Va. Code § 59.1-204(A) permits the greater of treble actual damages or \$1000 if the violation was willful.

## Washington

**Statute:** Wash. Rev. Code §§ 19.86.010 through 19.86.920 (Consumer Protection Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** Wash. Rev. Code § 19.86.020

**Statute of Limitations:** Four years. Wash. Rev. Code § 19.86.120.

**Elements:** (1) an unfair or deceptive act or practice; (2) in the conduct of trade or commerce; (3) that has an impact on the public interest; (4) injury to the plaintiff in their business or property; and (5) a causal link between the unfair or deceptive act and the injury suffered. *Leingang v. Pierce County Medical Bureau*, 930 P.2d 288, 296 (Wash. 1997); *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986).

**Standard:** A practice is unfair or deceptive if it has the capacity to deceive a substantial portion of the public. *Dwyer v. J.I. Kislak Mortgage Corp.*, 13 P.3d 240 (Wash. 2000); *see also Panag v. Farmers Ins. Co. of Wash.*, 204 P.3d 885, 895 (Wash. 2009) (holding that deception exists if there is a representation, omission, or practice that is likely to mislead a reasonable consumer).

**Reliance:** In *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 170 P.3d 10 (Wash. 2007), the Washington Supreme Court held that proximate causation must be shown, and rejected the argument that reliance is required. *See also Thornell v. Seattle Service Bur., Inc.*, 363 P.3d 587, 591-92 (Wash. 2015).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's intent or knowledge.

**Injunctive Relief:** Wash. Rev. Code § 19.86.090

**Monetary Relief:** Wash. Rev. Code § 19.86.090 (actual damages)

**Punitive Damages:** Wash. Rev. Code § 19.86.090 provides courts the discretion to award up to treble damages, capped at \$25,000.

**Attorneys' Fees:** Yes. Wash. Rev. Code § 19.86.090

### West Virginia

**Statute:** W. Va. Code §§ 46A-6-101 through 46A-6-110

**Pre-Suit Notice:** W. Va. Code § 46A-6-106(b).

**Enumerated Violations:** W. Va. Code § 46A-6-102(7)(E) (misrepresentations as to product's characteristics); § 46A-6-102(7)(G) (misrepresentations as to a product's standard or style); § 46A-6-102(7)(I)(advertising goods with intent not to sell as advertised).

**Broad Prohibition:** W. Va. Code §§ 46A-6-102(7) (prefatory language), 46A-6-104

**Statute of Limitations:** Two years. W.Va. Code Ann. § 55-2-12. Statute of limitations begins to run when fraud discovered or should have been discovered by reasonable diligence. *Brumbaugh v. Princeton Partners*, 985 F.2d 157,161-62 (4th Cir. 1993).

**Elements:** (1) any person who (2) purchases or leases goods or services and thereby (3) suffers an ascertainable loss of money or property, real or personal, (4) as a result of the use or employment by another person of a (5) method, act or practice prohibited or declared to be unlawful by the provisions of this article may bring an action for damages. W. Va. Code § 46A-6-106. *See also White v. Wyeth*, 227 W. Va. 131, 138, 705 S.E.2d 828, 837 (2010).

**Standard:** The state has adopted the reasonable consumer standard to evaluate deception. *See, e.g., White v. Wyeth*, 227 W. Va. 131, 140, 705 S.E.2d 828, 837 (2010).

**Reliance:** As amended in 2015, W. Va. Code § 46A-6-106(b) requires a plaintiff who bases a claim on an affirmative misrepresentation to show that it "caused him or her to enter into the transaction," and that, for an omission, the plaintiff must show that his or her loss was "proximately caused" by the omission.

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant's intent or knowledge.

**Injunctive Relief:** W. Va. Code § 46A-6-106(a)

**Monetary Relief:** W. Va. Code § 46A-6-106(a) (actual damages)

**Punitive Damages:** The statute does not provide for multiple or punitive damages.

**Attorneys' Fees:** Yes. However, no attorneys' fees or court costs to consumer unless actual damages awarded exceed any cure offer. W. Va. Code § 46A-6-106(h). Court may award fees to defendant for bad faith claims.

**Miscellaneous Notes:** Demand letter giving opportunity to cure required 20 days prior to suit.

### Wisconsin

**Statute:** Wis. Stat. § 100.18 (Deceptive Trade Practice Act)

**Pre-Suit Notice:** Nothing in the statute requires pre-suit notice.

**Broad Prohibition:** Wis. Stat. § 100.18

**Statute of Limitations:** Three years. Wis. Stat. § 100.18(11)(b)(3).

**Elements:** (1) the defendant made a representation to the public with the intent to induce an obligation; (2) the representation was untrue, deceptive or misleading; and (3) the representation caused the plaintiff a pecuniary loss. Wis. Stat. § 100.18(1); *Novell v. Migliaccio*, 2008 749 N.W.2d 544, 553.

**Standard:** The state has adopted the capacity to deceive standard to evaluate deception. See *Stuart v. Weisflog's Showroom Gallery, Inc.*, 296 Wis. 2d 249, 268, 722 N.W.2d 766, 775 (2006) (“Thus, the hallmark of DATP liability is not intentional or knowing deception but rather whether, in the course of trying to sell something, the seller makes statements that have a propensity to mislead.”). See also *Novell v. Migliaccio*, 749 N.W.2d 544, 550 (Wis. 2007) (“A plain reading of the statute reveals that reasonable reliance is not an element of a statutory false representation claim.”).

**Reliance:** Reliance is not required under Wis. Stat. § 100.18. *Novell v. Migliaccio*, 749 N.W.2d 554, 550 (Wis. 2007); *Haley v. Kolbe & Kolbe Millwork Co.*, 863 F.3d 600, 615 (7th Cir. 2017).

**Knowledge and Intent:** Nothing in the statute requires a showing of the defendant’s intent or knowledge.

**Injunctive Relief:** Wis. Stat. § 100.18(11) is unclear as to whether private individuals may obtain an injunction.

**Monetary Relief:** Wis. Stat. § 100.18(11)(b)(2) (pecuniary loss); Wis. Stat. Ann. § 100.20(5) allows double damages

**Punitive Damages:** Wis. Stat. § 100.19(3)(b)(4) permits an award of punitive damages not to exceed the greater of \$50,000 per violation or three times the aggregate amount awarded for all violations under the statute.

**Attorneys’ Fees:** Yes. Wis. Stat. § 100.18(b)(2)

## Wyoming

**Statute:** Wyo. Stat. Ann. §§ 40-12-101 through 114

**Pre-Suit Notice:** Wyo. Stat. Ann. §§ 40-12-102(a)(ix), 40-12-108(a)

**Enumerated Violations:** Wyo. Stat. Ann. § 40-12-105(a)(i) (misrepresentations as to product's characteristics); § 40-12-105(a)(iii) (misrepresentations as to a product's standard or style); § 40-12-105(x) (advertising goods with intent not to sell as advertised).

**Broad Prohibition:** Wyo. Stat. Ann. § 40-12-105(a)(xv)

**Statute of Limitations:** Written notice of the alleged violation must be given to defendant within one year of discovery or two years of occurrence, whichever is first. Wyo. Stat. Ann. § 40-12-109.

**Elements:** (1) A person (2) relying upon (3) an uncured unlawful deceptive trade practice may bring an action under this act for the (4) damages he has actually suffered as a consumer (5) as a result of such unlawful deceptive trade practice. Wyo. Stat. § 40-12-108.

**Standard:** The state uses the reasonable consumer standard to evaluate deception. *See, e.g., Osborn v. Emporium Videos*, 848 P.2d 237, 243 (Wyo. 1993).

**Reliance:** Wyo. Stat. Ann. § 40-12-108(a) explicitly requires a showing of reliance: "a person relying upon an uncured unlawful deceptive practice may bring an action under this act for the damages he has actually suffered." Plaintiff is not aware of any cases addressing the question of classwide reliance. However, when certifying out of state classes, this district has held that "the Ninth Circuit does not treat the need for individual inquiries into reliance and damages as necessarily precluding certification as long as common issues focusing on the defendant's conduct predominate," notwithstanding the jurisprudence in other states. *See Gold v. Lumber Liquidators, Inc.*, 323 F.R.D. 280, 292 (N.D. Cal. 2017).

**Knowledge and Intent:** The definition of unlawful practices at Wyo. Stat. Ann. § 40-12-105 requires that the defendant act knowingly.

**Injunctive Relief:** The statute does not authorize individuals to obtain injunctive relief.

**Monetary Relief:** Wyo. Stat. Ann. § 40-12-108(a) (actual damages)

**Punitive Damages:** The statute does not provide for multiple or punitive damages.

**Attorneys' Fees:** Yes, to prevailing plaintiff in class actions.