

1 Manfred P. Muecke (SBN: 222893)
mmuecke@bffb.com
2 Patricia Syverson (SBN: 203111)
3 psyverson@bffb.com
4 Bonnett Fairbourn Friedman & Balint PC
5 600 West Broadway, #900
6 San Diego, CA 92101
7 Telephone: (619) 798-4292
8 Fax: (602) 274-1199

9 Andrew S. Friedman (AZ 005425)
10 (*Pro Hac Vice* pending)
11 afriedman@bffb.com
12 Francis J. Balint, Jr. (AZ 007669)
13 (*Pro Hac Vice* pending)
14 fbalint@bffb.com
15 Bonnett Fairbourn Friedman
16 & Balint PC
17 2325 E. Camelback Road, Suite 300
18 Phoenix, AZ 85016
19 Tel: (602) 274-1100
20 Fax: (602) 274-1199

Adam M. Moskowitz (FL 984280)
(*Pro Hac Vice* pending)
adam@moskowitz-law.com
Howard M. Bushman (FL 0364230)
(*Pro Hac Vice* pending)
howard@moskowitz-law.com
Joseph M. Kaye (FL 117520)
(*Pro Hac Vice* pending)
joseph@moskowitz-law.com
The Moskowitz Law Firm, PLLC
2 Alhambra Plaza, Suite 601
Coral Gables, FL 33134
Telephone: (305) 740-1423

17 **UNITED STATES DISTRICT COURT**
18 **SOUTHERN DISTRICT OF CALIFORNIA**

19 ANDREA DURKEE, individually and
20 on behalf of herself and all others
21 similarly situated,

22 Plaintiff,

23 vs.

24 ALASKA AIRLINES, INC.,

25 Defendant

Case No.: 19CV1071 AJB JLB

CLASS ACTION COMPLAINT

26
27
28

1 For her Complaint against Defendant Alaska Airlines, Inc. (“Alaska”),
2 Plaintiff Andrea Durkee (“Plaintiff”), on behalf of herself and all others similarly
3 situated, by her undersigned attorneys, alleges as follows:

4 **INTRODUCTION**

5 1. This putative class action involves Alaska’s solicitation of the sale of
6 travel insurance products to its passengers. At the point of air travel purchase on
7 its website, Alaska strongly encourages its passengers to purchase the travel
8 insurance from its “preferred provider” Allianz Global Assistance (“AGA”), a
9 subsidiary of Allianz SE. Indeed, a prospective Alaska passenger cannot purchase
10 a ticket from Alaska without affirmatively electing to purchase or to decline the
11 travel insurance product through AGA.

12 2. In connection with such offer and sale of such third-party travel
13 insurance products by AGA, Alaska simultaneously represents itself (a) to be
14 acting as the Alaska passenger’s agent, and (b) to be serving no role beyond
15 communicating AGA’s separate offer of the travel insurance products.

16 3. Specifically, Alaska in its Contract of Carriage represents that, to the
17 extent it “makes arrangements for a Passenger with any third party to provide any
18 services other than Carriage by air...,” such as the purchase of travel insurance
19 services from third-party provider AGA, Alaska agrees to serve as the “Passenger’s
20 agent.”

21 4. On its website, meanwhile, Alaska describes “two easy ways to
22 purchase travel insurance,” either (a) “Get it while buying your ticket,” or (b) “Add
23 it after buying your ticket.” Regardless, the solicited passenger is compelled to
24 elect whether to purchase travel insurance from AGA when completing purchase
25 of air travel directly from Alaska via Alaska’s website. Pointedly, Alaska
26 specifically confirms (a) that the travel insurance coverage is being “recommended,
27 offered and sold” not by Alaska, but by AGA, and (b) that Alaska itself is not
28 providing or underwriting any travel insurance product.

1 5. When the Alaska passenger agrees to purchase the travel insurance
2 product at checkout on Alaska's website, the purchase price – although paid
3 through Alaska – is set out as a distinct line item on the purchaser's credit card
4 statement. This directly contrasts with the base fare and other related add-ons, such
5 as seat upgrades, which are provided by Alaska and are included in the total amount
6 charged by Alaska.

7 6. Accordingly, a reasonable Alaska passenger like Plaintiff is given the
8 impression that, although payment is being made through Alaska as the
9 passenger's agent, the travel insurance product is being purchased from AGA at
10 the pass-through cost. This, it turns out, is very much a false impression.

11 7. Unbeknownst to the purchaser, the price of the travel insurance
12 product is materially increased to fund the payment of an undisclosed commission
13 or kickback to Alaska. Nowhere does Alaska disclose in its ticket contract or on
14 its website that the purchase price of the travel insurance product includes a
15 payment to Alaska.

16 8. Accordingly, consumers like Plaintiff pay materially more for the
17 travel insurance product than they otherwise should have, since AGA pays a
18 significant portion of the premium to Alaska as undisclosed remuneration.

19 9. To the extent Alaska is acting as the Alaska passenger's agent in
20 connection with the sale of the travel insurance services, its receipt of the
21 undisclosed payments in connection with the travel insurance products constitutes
22 a breach of the universally recognized fiduciary duties due from agent to principal.
23 Under principles of agency law so widely accepted as to be codified in the
24 Restatement of Law, an agent who, without the knowledge of the principal,
25 receives a material benefit in connection with, or because of, a transaction
26 conducted for the principal, has a duty to pay that benefit over to the principal even
27 though otherwise it has acted with perfect fairness to the principal and violates no
28 duty of loyalty in receiving the amount. Restatement Agency (Third) 8.02, cmt. e

1 (“The principal may recover any material benefit received by the agent through the
2 agent’s breach, the value of the benefit, or proceeds of the benefit retained by the
3 agent.”).

4 10. Alternatively, Alaska’s receipt of the undisclosed remuneration on the
5 travel insurance products constitutes an unfair and deceptive business practice,
6 warranting restitution under California’s Unfair Competition Law (“UCL”), Cal.
7 Business & Professions Code §17200 *et seq.*, in the amount of such undisclosed
8 kickbacks.

9 **PARTIES**

10 11. Plaintiff is a resident of the state of California, currently residing in
11 San Diego, California.

12 12. For diversity purposes, Plaintiff is a citizen of California.

13 13. Alaska is a Delaware corporation and subsidiary of Alaska Air Group,
14 Inc., with its headquarters and principal place of business in Seattle, Washington.

15 14. For diversity purposes, Alaska is a citizen of Washington.

16 **JURISDICTION AND VENUE**

17 15. This Court has subject-matter jurisdiction over this class action under
18 28 U.S.C. §1332(d)(2)(A) because the proposed Class consists of 100 or more
19 members and the aggregated claims of the individual Class members exceed the
20 sum or value of \$5,000,000, exclusive of costs and interest. Additionally, at least
21 one Class member is a citizen of a State different than Alaska.

22 16. Venue is proper in this District pursuant to 28 U.S.C. §1391 because
23 the challenged practices are alleged to have been committed in this District and
24 Alaska regularly conducts business in this District.

25 **FACTUAL ALLEGATIONS**

26 **Alaska Voluntarily Assumes an Agency Relationship with**
27 **Respect to Services other than Carriage by Air**
28

1 17. In its Contract for Carriage¹, Alaska lists the applicable terms and
2 conditions governing the air travel and baggage delivery for its customers.

3 18. In its Contract for Carriage, Alaska specifically agrees that it will
4 serve as the “Passenger’s agent” to the extent it makes any arrangements on behalf
5 of its passengers for third-party services, such as AGA’s travel insurance products:

6 *If Alaska makes arrangements for a Passenger with any third party*
7 *to provide any services other than Carriage by air*, or issues a Ticket
8 or voucher relating to transportation or services (other than Carriage by
9 air) provided by a third party such as hotel reservations or car rental,
Alaska acts only as Passenger’s agent in doing so. The terms and
conditions of the third party service provider will apply.

10 Alaska Contract for Carriage Rule 3(O) (emphasis added).

11 19. Such an assumption of agency confers fiduciary duties by the agent
12 to the principal, including the fiduciary duties of loyalty, good faith, full disclosure,
13 and to account. As famously stated of fiduciaries by Judge Cardozo, “Not honesty
14 alone, but the punctilio of an honor the most sensitive, is then the standard of
15 behavior.” *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928)
16 (Cardozo, C.J.).

17 20. In voluntarily assuming agency duties owed to passengers limited to
18 the context of procuring third party insurance products, Alaska owed a fiduciary
19 duty to disclose to Alaska passengers, including Plaintiff, any arrangement it has
20 with AGA that materially affected the price of the travel insurance product
21 purchased through AGA.

22 21. In voluntarily assuming agency duties owed to passengers limited to
23 the context of procuring third party insurance products, Alaska owed a fiduciary
24 duty to disclose to Alaska passengers, including Plaintiff, its receipt of
25

26
27 ¹ Alaska Airlines, Inc. Contract of Carriage;
28 <https://www.alaskaair.com/content/legal/contract-of-carriage/rule-3> (last accessed
on June 7, 2019)

1 remuneration or any other material benefit in connection with the sale of travel
2 insurance product.

3 22. In voluntarily assuming agency duties owed to passengers limited to
4 the context of procuring third party insurance products, Alaska owed a fiduciary
5 duty to account to Alaska passengers, including Plaintiff, for its receipt of
6 remuneration from AGA in connection with the sale of travel insurance product.

7 **Alaska's Deceptive and Unfair Misrepresentation**
8 **of a Pass-Through Purchase**

9 23. Alaska in multiple places in its websites emphasizes that Alaska itself
10 provides no travel insurance services. In the FAQ for AGA travel insurance
11 applicable to Alaska, entitled "Who provides the insurance for these programs?",

12 AGA explains:

13 Insurance benefits underwritten by BCS Insurance Company, Jefferson
14 Insurance Company or Nationwide Mutual Insurance Company and
15 Affiliated Companies, depending on insured's state of residence and
16 plan type. Plan(s) may not be available to residents of all states. Allianz
17 Global Assistance and Allianz Travel Insurance are brands of AGA
18 Service Company. AGA Service Company is the licensed producer and
19 administrator of these plans and an affiliate of Jefferson Insurance
20 Company. The insured shall not receive any special benefit or
21 advantage due to the affiliation between AGA Service Company and
22 Jefferson Insurance Company. Non-insurance benefits/products are
23 provided and serviced by AGA Service Company. Consumer is
24 responsible for charges incurred from outside vendors for assistance or
25 concierge services. Contact AGA Service Company at 800-284-8300
26 or 9950 Mayland Drive, Richmond, VA[.]²

27 24. AGA's website also includes a page, entitled "About Us," which
28 describes AGA as the provider of the offered travel insurance products:

² <https://www.etravelprotection.com/alaska/faq> (last accessed on June 7, 2019)

1 **About Us**

2 **“Our tagline says it all: ‘How can we help?’ We spend every day**
3 **trying to figure out how we can help more people.”- Mike Nelson,**
4 **Chief Executive Officer, Americas and Global Travel**

5 We’re a world leader in the travel insurance and assistance industry
6 because we really do help people—anytime, anywhere.

7 As a principal provider of travel insurance, corporate assistance, and
8 concierge services, we can help you find solutions to any travel-related
9 problem. Our partners number in the thousands and include travel
10 agencies, airlines, resorts, websites, event ticket brokers, corporations,
11 universities and credit card companies

12 Our parent company is Allianz SE, the world’s largest diversified
13 insurance company that has been helping protect the fabric of America
14 for more than 100 years—insuring the Wright Brothers’ flight, the
15 construction of the Golden Gate Bridge, and many Hollywood movies.
16 Thanks to Allianz SE’s scale, we can provide innovative products with
17 worldwide protection at a competitive rate.

18 Globally, we have 36 offices and a presence in 76 countries so you can
19 count on us to be there if you need help. We’re over 17,600 associates
20 strong, can communicate in 70 languages, and have a world-wide
21 network of nearly 70,000 pre-screened medical facilities—all to give
22 you the best care, anywhere your journey takes you.³

23 25. Alaska’s failure to disclose the remuneration it receives on the sale of
24 travel insurance products purchased by Alaska passengers amounts to a deceptive
25 and unfair trade practice, for Alaska’s actions reasonably lead its passengers to
26 believe that although payment is made through Alaska, the travel insurance product
27 is being purchased from third-party AGA at a pass-through cost. This false
28 impression is given by, among other things, (a) Alaska’s disavowal of rendering
any services with respect to the recommending, offering or selling any travel

³ <https://www.etravelprotection.com/alaska/about-us> (last accessed on June 7, 2019)

1 insurance product, (b) Alaska's offer of a choice to buy the travel insurance product
2 "[d]uring the process of buying your ticket of alaskaair.com" or "separately, "after
3 purchasing your tickets," (c) Alaska's use of a separate line-item charge for the
4 travel insurance product -- even when it is purchased during the process of buying
5 the ticket on alaskaair.com. In addition, Alaska's representation in the ticket
6 contract -- that to the extent it has any role in the arrangements for travel insurance
7 services, it is acting as the passenger's agent -- *reinforces* the misleading
8 impression that the travel insurance product is being sold on a pass-through basis,
9 since a reasonable consumer would not understand its own agent to be receiving
10 remuneration from counterparties like AGA.

11 **Alaska's Remuneration in Connection with**
12 **the Sale of Travel Insurance**

13 26. At pages 70-71 of its 2017 Form 10-K, Alaska admits that it receives
14 "commissions from car and hotel vendors and sales of travel insurance," as part of
15 "Other" revenue.⁴

16 27. Notably, any reference to commissions specifically from "sales of
17 travel insurance" is conspicuously absent in its 2018 Form 10-K filing.⁵ Yet,
18 revenue Alaska generates from its undisclosed commissions from sales of travel
19 insurance appears to be categorized as "Other revenue." At page 71 of its 2018
20 Form 10-K filing, Alaska characterizes these services as distinct from air travel
21 services provided to Alaska passengers which is consistent with the allegations
22 herein.

23 "The Company also earns other revenue for lounge memberships, hotel and
24 car commissions, and certain other immaterial items *not intrinsically tied to*
25 *providing air travel to passengers.*" (emphasis added)

26
27
28 ⁴ Alaska Air Group, Inc., Annual Report (Form 10-K), at 70-71 (Feb. 14, 2018)

⁵ Alaska Air Group, Inc., Annual Report (Form 10-K), at 71-72 (Feb. 15, 2019)

1 **Plaintiff's Transactions**

2 28. On or about July 13, 2017, Plaintiff utilized Alaska's website to
3 purchase roundtrip air carriage between San Diego and St. Louis using miles she
4 had accrued and purchased from her Alaska Mileage Plan.

5 29. After selecting her dates for travel and any seats, Plaintiff was
6 directed to the final steps of her air travel purchase at Alaska's webpage titled
7 "Checkout: Review and complete payment." Here, Plaintiff was directed to
8 confirm flight details and provide payment for her flight.

9 30. Alaska did not enable Plaintiff to complete her flight purchase until
10 she affirmatively elected to purchase or decline travel insurance offered by AGA.

11 31. Based on her belief that she was purchasing the travel insurance
12 product without any undisclosed remuneration to Alaska, Plaintiff paid \$17.00 by
13 credit card charge for the AGA travel insurance product.

14 32. Plaintiff's subsequent credit card statement, a true and accurate copy
15 of which is attached as **Exhibit A**, reflected a separate charge for her purchase of
16 the AGA travel insurance product.

17 33. On or about November 10, 2017, Plaintiff utilized Alaska's website
18 to purchase roundtrip air carriage between San Diego and Boston.

19 34. As part of the ticket buying process, Plaintiff was again directed to
20 Alaska's webpage titled "Checkout: Review and complete payment."

21 35. Again, Alaska did not enable Plaintiff to complete her flight purchase
22 until she affirmatively elected to purchase or decline travel insurance offered by
23 AGA.

24 36. Based on her belief that she was purchasing the travel insurance
25 product without any undisclosed remuneration to Alaska, Plaintiff chose to
26 purchase travel insurance and paid \$21.00 by credit card charge for the AGA travel
27 insurance product.

28

1 37. A true and accurate copy of the Confirmation Letter Alaska emailed
2 to Plaintiff is attached as **Exhibit B**, sets out the charge for air travel, and separately
3 confirms “Trip protection by [AGA],” without specifying any charge.

4 38. Plaintiff’s subsequent credit card statement, a true and accurate copy
5 of which is attached as **Exhibit C**, reflected a separate charge for her purchase of
6 the AGA travel insurance product.

7 **CLASS ALLEGATIONS**

8 39. Plaintiff brings this action as a class action under Rules 23(a),
9 23(b)(1), 23(b)(2), and 23(b)(3), *Federal Rules of Civil Procedure*.

10 40. Plaintiff asserts her claims for breach of fiduciary duty on behalf of
11 the following class (“the National Class”):

12 All persons and entities who, since 2015, purchased travel insurance
13 products from AGA through Alaska.

14 41. Plaintiff asserts her claims for violation of the UCL on behalf of the
15 following subclass “(California Subclass”):

16 All persons and entities residing within California who, since 2015,
17 purchased travel insurance products from AGA through Alaska.

18 42. The National Class and the California Subclass are referred to
19 collectively as the “Classes.”

20 43. Excluded from the Classes are Alaska; any affiliate, parent, or
21 subsidiary of Alaska; any entity in which Alaska has a controlling interest; any
22 officer, director, or employee of Alaska; any successor or assign of Alaska; any
23 Judge to whom this case is assigned as well as his or her immediate family and
24 staff.

25 44. Plaintiff reserves the right to amend or modify the Class definitions
26 in connection with a motion for class certification or with the result of discovery.

27 **Numerosity**

28 45. Plaintiff does not know the exact size or identities of the proposed
Classes. However, Plaintiff reasonably believes the Classes encompass tens of

1 thousands of individuals dispersed geographically throughout the United States
2 and California, respectively. Therefore, the proposed Classes are so numerous that
3 joinder of all members is impracticable. Membership in the Classes is ascertainable
4 by virtue of the records of Alaska and AGA. Members of the Classes can be
5 notified of the pendency of this action by mail and/or electronic mail,
6 supplemented if deemed necessary or appropriate by the Court by published notice.

7 **Predominance of Common Issues**

8 46. There are questions of law and fact that are common to the Classes,
9 which predominate over any questions affecting only individual members of the
10 Classes. The common questions include, but are not limited to, the following:

- 11 a. whether Alaska receives a kickback, commission, payment or
12 other remuneration in connection with AGA's sale of travel
13 insurance products to Alaska's passengers;
- 14 b. whether Alaska's receipt of the payment constitutes a breach of
15 a fiduciary duty of loyalty as the passenger's agent in connection
16 with the purchase of travel insurance products from third-parties;
- 17 c. whether Alaska's receipt of the payment constitutes a breach of
18 a fiduciary duty not to acquire material benefit as the passenger's
19 agent in connection with the purchase of travel insurance
20 products from third-parties;
- 21 d. whether Alaska's receipt of the undisclosed payment constitutes
22 a breach of a fiduciary duty of accounting as the passenger's
23 agent in connection with the purchase of travel insurance
24 products from third-parties;
- 25 e. whether Alaska's receipt of the payment violates the "fraudulent"
26 prong of the UCL;
- 27 f. whether Alaska's receipt of the payment violates the "unfair"
28 prong of the UCL;

1 g. the nature and scope of the remedy available to Plaintiff and
2 other similarly situated travel insurance product purchasers,
3 including but not limited to restitution or injunctive relief.

4 *See, e.g., Just Film, Inc. v. Buono*, 847 F.3d 1108, 1122 (9th Cir. 2017) (whether
5 defendants assumed a fiduciary duty to plaintiffs, and whether defendants breached
6 the fiduciary duty presented predominant common questions, warranting class
7 certification).

8 **Typicality**

9 47. Plaintiff's claims are typical of the claims of the Classes and do not
10 conflict with the interests of any other members of the Classes. Plaintiff and the
11 Classes members were subjected to the same challenged course of conduct and
12 suffered the same economic harm resulting from the undisclosed travel insurance
13 sales commissions received by Alaska.

14 **Adequate Representation**

15 48. Plaintiff will fairly and adequately represent the interests of the
16 Classes. Plaintiff is committed to the vigorous prosecution of the Classes' claims
17 and has retained attorneys who are qualified to pursue this litigation and are
18 experienced in class action litigation. Neither Plaintiff nor her counsel have
19 interests conflicting with those of the other Classes members.

20 **Superiority**

21 49. A class action is superior to other methods for the fair and efficient
22 adjudication of this controversy. The damages suffered by each individual Classes
23 member do not justify the burden and expense of individual prosecution of the
24 complex and extensive litigation necessitated by Alaska's conduct. Further, it
25 would be virtually impossible for the Classes members to individually and
26 effectively redress the wrongs done to them. Use of the class action device in this
27 instance presents far fewer management difficulties than alternative methods of
28

1 adjudication, and provides the benefits of single adjudication, economy of scale,
2 and comprehensive supervision by a single court.

3 **Rule 23(b)(1)(B)**

4 50. Class certification is also warranted under Rule 23(b)(1)(B). Rule
5 23(b)(1)(B) allows for class actions if separate actions would create a risk of
6 “adjudications with respect to individual class members that, as a practical matter,
7 would be dispositive of the interests of the other members not parties to the
8 individual adjudications or would substantially impair or impede their ability to
9 protect their interests.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841 (1999) (Rule
10 23(b)(1)(B) certification is warranted in the case of a fund with a definitely
11 ascertained limit, all of which would be distributed to satisfy all those with
12 liquidated claims based on a common theory of liability, by an equitable, pro rata
13 distribution). The material benefit garnered by Alaska as the “passengers’ agent”
14 constitutes such a “limited fund,” which should be equitably allocated across the
15 Class.

16 **Rule 23(b)(2)**

17 51. Class certification is also warranted under Rule 23(b)(2). A class may
18 be certified under Rule 23(b)(2) where “the party opposing the class has acted or
19 refused to act on grounds that apply generally to the class, so that final injunctive
20 relief or corresponding declaratory relief is appropriate respecting the class as a
21 whole. *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014) (the requirements of
22 Rule 23(b)(2) “are unquestionably satisfied when members of a putative class seek
23 uniform injunctive or declaratory relief from policies or practices that are generally
24 applicable to the class as a whole”).

25 52. Certification under Rule 23(b)(2) is appropriate here because all of
26 the Class members have by definition been exposed to the solicitation of travel
27 insurance sales by Alaska. Moreover, the declaratory and injunctive relief sought
28 by Plaintiff are by definition generally applicable across the Classes as a whole.

1 **NO ADA PREEMPTION**

2 53. Because the claims alleged by Plaintiff do not relate to any “price,
3 route or service” provided by Alaska as an air transportation common carrier, they
4 are not preempted under the Airline Deregulation Act of 1978 (“ADA”), 49 U.S.C.
5 § 41713.

6 54. In particular, Plaintiff’s claims are premised solely on Alaska’s
7 conduct in connection with the offer and sale of the travel insurance products, and
8 not with respect to “the prices, schedules, origins and destinations of the point-to-
9 point transportation of passengers, cargo, or mail.” *National Federation of the*
10 *Blind v. United Airlines, Inc.*, 813 F.3d 718, 726 (9th Cir. 2016) (ADA preemption
11 inapplicable where the services rendered by the defendant airline were not services
12 in the “public utility sense”) (quoting *Charas v. Trans World Airlines, Inc.*, 160
13 F.3d 1259, 1266 (9th Cir.1998) (en banc)). Indeed, as noted above, to the extent
14 Alaska in the ticket contract assumed an agency relationship with its passengers
15 with respect to arrangements for travel insurance services, it specifically did so in
16 the context of “services other than Carriage by air,” thus self-distinguishing
17 services within the scope of the ADA.

18 55. Moreover, to the extent Alaska’s rendition of travel insurance services
19 is implicated by its agreement to serve as the “Passenger’s agent” in arranging the
20 acquisition of travel insurance products, that agreement was voluntarily undertaken
21 and is accordingly enforceable through private action under state law. *Hickcox-*
22 *Huffman v. US Airways, Inc.*, 855 F.3d 1057, 1062 (9th Cir. 2017) (“The States
23 may not impose their own rules regarding fares, routes, or services, but may afford
24 relief for breaches of obligations the airlines voluntarily undertook themselves,
25 even when the obligations directly relate to fares, routes, and services.”).

26 **THE STATE FILED RATE DOCTRINE DOES NOT APPLY**

27 56. Under the state filed-rate doctrine, rates duly adopted by a regulatory
28 agency are not subject to collateral attack in court. Even assuming that this doctrine

1 exists with respect to state regulator-approved rates, it does not bar actions—as
2 here—where “the underlying conduct challenged was not the charging of an
3 approved rate.” *Friedman v. AARP*, 283 F. Supp. 3d 873, 878-79 (C.D. Cal. 2018)
4 (state filed-rate doctrine did not bar the plaintiff’s challenges to AARP marketing
5 of health insurance policies); *Ellsworth v. U.S. Bank, N.A.*, 908 F. Supp. 2d 1063,
6 1082-83 (N.D. Cal. 2012)(the California insurance code protected defendant only
7 in “situations where a plaintiff challenged a charged rate as excessive *per se*, and
8 effectively asked the Court to calculate an alternative it deemed more ‘fair’”)
9 (quotation omitted). This action is in essence about Alaska’s false or misleading
10 advertising of third party travel insurance, and not challenges to the reasonableness
11 of the actual rates that were approved by any insurance regulator, including the
12 California Department of Insurance (“DOI”). Adjudication of Plaintiffs’ claims
13 would not improperly encroach on such rate-making authority.

14 **THE PRIMARY JURISDICTION DOCTRINE DOES NOT APPLY**

15 57. The doctrine of primary jurisdiction doctrine operates when
16 enforcement of the claim requires the resolution of issues which, under a regulatory
17 scheme, have been placed within the special competence of an administrative body.
18 The claims alleged in this action are, however, within the conventional competence
19 of the courts, and therefore do not require the specialized ratemaking expertise of
20 any insurance regulator, including the DOI. *Friedman v. AARP*, 283 F. Supp. 3d
21 873, 878-79 (C.D. Cal. 2018) (primary jurisdiction doctrine did not bar the
22 plaintiff’s challenges to AARP marketing of health insurance policies).

23 **COUNT I**

24 **BREACH OF FIDUCIARY DUTY**
25 **(on behalf of Plaintiff and the National Class)**

26 58. Plaintiff repeats and re-alleges paragraphs 1–57 above as if set forth
27 herein in full.
28

1 59. Alaska agreed to serve as “Passenger’s Agent” in connection with its
2 rendition of services other than Carriage by air, including making arrangements
3 for the purchase of travel insurance products by Alaska passengers like Plaintiff
4 from AGA. Alaska’s voluntarily assumption of limited agency on behalf of its
5 passengers in this context conferred upon Alaska fiduciary duties owed to Plaintiff
6 and the other members of the National Class, including the duty of loyalty, the duty
7 of full disclosure, the duty not to acquire a material benefit, and the duty to account.

8 60. Upon information and belief, Alaska received remuneration from
9 AGA in connection with both of Plaintiff’s purchases of the AGA travel insurance
10 products.

11 61. Alaska breached its fiduciary duties owed to Plaintiff and the other
12 members of the National Class when it received the undisclosed payments on the
13 purchase of AGA travel insurance products through Alaska’s website.

14 62. Plaintiff and the other members of the National Class were damaged
15 by Alaska’s breach of the foregoing fiduciary duties owed to them, including by
16 (a) Alaska’s retention of undisclosed profits resulting from its agency relationship,
17 and/or (b) paying more for AGA travel insurance products than they otherwise
18 should have.

19 63. As a result of its’ breach of fiduciary duties, Alaska should be
20 compelled (a) to account for all undisclosed remuneration, and (b) to make
21 restitution or otherwise disgorge into a common fund for the benefit of Plaintiff
22 and the other members of the National Class all such remuneration received by
23 Alaska in connection with the sale of the travel insurance services and products.

24 **COUNT II**

25 **VIOLATION OF THE CALIFORNIA UNFAIR COMPETITION LAW**
26 **Cal. Business & Professions Code §§ 17200 *et seq.***
(on Behalf of Plaintiff and the California Subclass)

27 64. Plaintiff repeats and re-alleges paragraphs 1–57 above as if set forth
28 herein in full.

1 65. This claim is brought by Plaintiff and the California Subclass to obtain
2 restitutionary and injunctive relief from Alaska for acts and practices, as alleged
3 herein, that violated § 17200 of the California Business and Professions Code,
4 commonly known as the UCL.

5 66. The UCL prohibits any “unlawful,” “fraudulent,” or “unfair” business
6 act or practice. *Friedman v. AARP, Inc.*, 855 F.3d 1047, 1051-52 (2017) (“Because
7 the statute is written in the disjunctive, it is violated if a defendant violates any of
8 the unlawful, unfair or fraudulent prongs.”); *Cortez v. Purolator Air Filtration*
9 *Products Co.*, 23 Cal.4th 163, 172, 96 Cal.Rptr.2d 518, 999 P.2d 706 (2000) (“A
10 UCL action is an equitable action by means of which a plaintiff may recover money
11 or property obtained from the plaintiff or persons represented by the plaintiff
12 through unfair ... business practices.”).

13 67. Had Alaska not misrepresented the travel insurance products as pass-
14 through charges, Plaintiff would not have purchased the products through Alaska.

15 68. But for Alaska’s acts, Plaintiff would have paid less for the AGA
16 travel insurance coverage.

17 69. Plaintiff was thus exposed to misleading information about the travel
18 insurance products she purchased, which caused the products to be sold at a higher
19 price, and she would not have purchased them absent Alaska’s misrepresentation.

20 70. The acts and practices of Alaska alleged above have caused Plaintiff
21 and the other members of the California Subclass to lose money or property by
22 being secretly charged by AGA in order to fund the undisclosed remuneration to
23 Alaska. Alaska’s acts and practices are actionable under the “fraudulent” and
24 “unfair” prongs of the UCL, as alleged with more specificity below.

25 71. Alaska has been unjustly enriched as a result of its wrongful acts of
26 unfair competition. Plaintiff and the other members of the California Subclass are
27 accordingly entitled to injunctive relief prohibiting Alaska from continuing such
28 practices. Plaintiff and the other members of the California Subclass are also

1 entitled to further equitable relief, including accounting, restitution and/or
2 disgorgement of all revenues and profits that may have been obtained by Alaska
3 as a result of such business acts and practices, pursuant to California Business and
4 Professions Code §§ 17203 and 17204.

5 72. Plaintiff flies Alaska frequently, and is a member of its “Mileage Plan”
6 frequent flier program. Plaintiff, as a previously harmed Alaska passenger,
7 maintains a desire to purchase travel insurance products through Alaska if priced
8 without the concealed kickback to Alaska, but can longer no longer rely upon the
9 validity of the information provided by Alaska, thus affording her standing to
10 pursue prospective injunctive relief. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d
11 956, 971 (9th Cir. 2018).

12 **Fraudulent Prong**

13 73. By omitting the disclose its remuneration from AGA and otherwise
14 giving Alaska passengers the false impression that it was functioning as an unpaid
15 conduit for the purchase of travel insurance products from third-party AGA,
16 Alaska deceptively lead Plaintiffs and the other members of the California
17 Subclass to reasonably believe that they were being charged for the travel
18 insurance product on a pass-through basis.

19 74. As a consequence of Alaska’s failure to disclose the marked-up cost
20 of the AGA travel insurance product to fund Alaska’s remuneration, Plaintiff and
21 other members of the California Subclass unwittingly paid more for the AGA
22 travel insurance coverage than they otherwise would.

23 75. Alaska’s conduct is deceptive within the meaning of the UCL’s
24 fraudulent prong, for “members of the public are likely to be deceived by the
25 practice.” *See, e.g., Friedman v. AARP, Inc.*, 855 F.3d 1047, 1056 (9th Cir. 2017)
26 (defendant misleadingly omitted to disclose that health insurance premium
27 included an imbedded commission to the defendant); *see also, e.g., Coleman v.*
28 *CubeSmart*, No. 16-25009-CIV, 2018 WL 3672241, at *8 (S.D. Fla. June 21, 2018)

1 (sustaining on motion to dismiss claim under the Florida Deceptive and Unfair
2 Trade Practices Act (“FDUTPA”) that defendant created false impression of a
3 pass-through charge); *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 703
4 (Fla. 3d DCA 2000) (“We therefore conclude that where the cruise line bills the
5 passenger for port charges but keeps part of the money for itself, that is a deceptive
6 practice under FDUTPA.”).

7 76. Reliance on Alaska’s omission with respect to the mark-up on the
8 insurance product to fund the payment to Alaska is reasonably inferred because the
9 substantial undisclosed payment to Alaska is a material fact: a “reasonable man
10 would attach importance to [its] existence or nonexistence in determining his
11 choice of action in the transaction in question.” *In re Tobacco II Cases*, 46 Cal. 4th
12 298, 327, 207 P.3d 20, 39 (2009); *see also id.* (whether a misrepresentation is
13 sufficiently material to allow for an inference of reliance “is generally a question
14 of fact unless the fact misrepresented is so obviously unimportant that the jury
15 could not reasonably find that a reasonable man would have been influenced by
16 it”).

17 **Unfair Prong**

18 77. Alaska engaged in “unfair” business acts or practices by, among other
19 things, failing to disclose to its financial interest in the sale of travel insurance
20 products by AGA, while representing those products as presented, offered, sold,
21 and serviced by AGA. *Friedman v. AARP, Inc.*, 855 F.3d 1047, 1056 (9th Cir.
22 2017) (it is not, as a matter of law, an “obviously unimportant” consideration for a
23 reasonable purchaser of insurance to know that an undisclosed fee would be
24 collected in addition to -- rather than from -- the actual cost of the insurance)

25 78. Alaska further engaged in unfair business acts or practices by holding
26 itself out to be an agent of passengers who elected to purchase AGA travel
27 insurance policies, while at the same time receiving undisclosed payments from
28

1 AGA on each travel insurance product sold to Plaintiff and the other members of
2 the California Subclass.

3 79. In the course of conducting business, Alaska has thus committed
4 “unfair” business acts or practices, by which it has been unjustly enriched. Because
5 the utility of Alaska’s conduct (zero) is outweighed by the gravity of harm to
6 Plaintiff, other members of the California Subclass, and the competitive market,
7 Alaska’s conduct is “unfair” having offended an established public policy. Further,
8 Alaska engaged in immoral, unethical, oppressive, and unscrupulous activities that
9 are reasonably avoidable and substantially injurious to the public at large. There
10 were reasonably available alternatives to further Alaska’s legitimate business
11 interests other than the conduct described herein.

12 80. Plaintiff and the other members of the California Subclass were
13 economically harmed by Alaska’s alleged violations of the “unfair” prong of the
14 UCL through their payment of money to acquire the travel insurance products for
15 which Alaska was secretly remunerated. On behalf of herself and all other
16 members of the California Subclass, Plaintiff accordingly seeks relief seeks
17 restitution of the remuneration Alaska received as a consequence of Alaska’s
18 violations.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiff respectfully requests the following relief:

- 21 A. Certification of this case as a class action on behalf of the National
22 Class and the California Subclass, and certification of Plaintiff as an
23 adequate Class Representative and her counsel as Class Counsel for
24 both the National Class and the California Subclass;
- 25 B. Issuance of a Court order finding Alaska in breach of its fiduciary
26 duties owed to Plaintiff and the other members of the National Class;
- 27 C. Issuance of a Court order finding Alaska in violation of the UCL as
28 to Plaintiff and the other members of the California Subclass;

- 1 D. Issuance of a Court order awarding appropriate equitable relief to
2 Plaintiff and the other members of the Classes, including injunctive
3 relief precluding Alaska from receiving undisclosed remuneration
4 and restitution and disgorgement of Alaska's past remuneration
5 stemming from the sale of travel insurance products;
6 E. An award of costs and reasonable attorneys' fees; and
7 F. Such other and further relief as this Court finds necessary and proper.

8 **JURY TRIAL DEMANDED**

9 Plaintiff demands a trial by jury on all issues so triable as permitted under
10 applicable law.

11 Dated: June 7, 2019.

12 **BONNETT FAIRBOURN FRIEDMAN
& BALINT, PC**

13 s/ Manfred P. Muecke

14 Manfred P. Muecke (SBN: 222893)

15 mmuecke@bffb.com

16 Patricia Syverson (SBN: 203111)

17 psyverson@bffb.com

18 Bonnett Fairbourn Friedman & Balint PC

19 600 West Broadway, #900

20 San Diego, CA 92101

21 Telephone: (619) 798-4292

22 Fax: (602) 274-1199

23 Andrew S. Friedman (*Pro Hac Vice* pending)

24 afriedman@bffb.com

25 Francis J. Balint, Jr. (*Pro Hac Vice* pending)

26 fbalint@bffb.com

27 Bonnett Fairbourn Friedman & Balint PC

28 2325 E. Camelback Road, Suite 300

Phoenix, AZ 85016

Tel: (602) 274-1100

Fax: (602) 274-1199

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Adam M. Moskowitz (*Pro Hac Vice* pending)
adam@moskowitz-law.com
Howard M. Bushman (*Pro Hac Vice* pending)
howard@moskowitz-law.com
Joseph M. Kaye (*Pro Hac Vice* pending)
joseph@moskowitz-law.com
THE MOSKOWITZ LAW FIRM, PLLC
2 Alhambra Plaza, Suite 601
Coral Gables, FL 33134
Telephone: (305) 740-1423

Attorneys for Plaintiff