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

IN RE SAFEWAY TUNA CASES

Case No. 3:15-cv-05078-EMC

**CONSOLIDATED
CLASS ACTION COMPLAINT**

JURY TRIAL DEMANDED

1 Plaintiffs Ehder Soto, Heney Shihad, Dan Shiner, Julie Whitson, and Mauri Sanders
2 (collectively, “Plaintiffs”) bring this action on behalf of themselves and all others similarly situated
3 against Defendants Safeway Inc. (“Safeway”) and The Vons Companies, Inc. (“Vons”)
4 (collectively, “Defendants”). Plaintiffs make the following allegations pursuant to the
5 investigation of their counsel and based upon information and belief, except as to the allegations
6 specifically pertaining to themselves, which are based on personal knowledge.

7 NATURE OF ACTION

8 1. This is a class action lawsuit on behalf of purchasers of 5-ounce cans of Safeway
9 Chunk Light Tuna in Water, 5-ounce cans of Safeway Solid White Albacore Tuna in Water,
10 5-ounce cans of Open Nature Chunk Light Tuna in Water, and 5-ounce cans of Open Nature
11 Chunk White Albacore Tuna in Water (collectively, “Safeway Tuna”). Safeway Tuna cans are
12 underfilled and substantially underweight. Defendants are cheating purchasers by providing less
13 tuna than they are paid for. By way of example, among multiple rounds of testing conducted by
14 the plaintiffs, government testing revealed that 8 of 8 lots tested – and 141 of 156 individual cans
15 tested – failed to meet the federally mandated minimum standard of fill.

16 2. Independent testing by the U.S. National Oceanic and Atmospheric Administration
17 (“NOAA”)¹ determined that, over a sample of 5 cans, 5-ounce cans of Safeway Chunk Light Tuna
18 in Water contain an average of only 2.29 ounces of pressed cake tuna when measured precisely
19 according to the methods specified by 21 C.F.R. § 161.190(c). This is 19.4% below the federally
20 mandated minimum standard of fill of 2.84 ounces for these cans. *See* 21 C.F.R.
21 § 161.190(c)(2)(i)-(xii). Similarly, another test by NOAA determined that, over a sample of 7
22 cans, 5-ounce cans of Safeway Solid White Albacore Tuna in Water contained an average of only
23 2.83 ounces of pressed cake tuna, which is 12.4% below the federally mandated minimum standard
24 of fill of 3.23 ounces for these cans. *Id.* Of these tests, every individual can was below the
25 minimum standard of fill.

26
27
28 ¹ NOAA is an agency of the U.S. Department of Commerce with responsibility for regulating the nation’s fisheries.

1 3. These results are corroborated by additional rounds of testing. Another test by
2 NOAA determined that, over a sample of 24 cans, 5-ounce cans of Safeway Chunk Light Tuna in
3 Water contain an average of only 2.55 ounces of pressed cake tuna, which is 10.2% below the
4 federally mandated minimum standard of fill of 2.84 ounces for these cans. Yet another test by
5 NOAA determined that, over a sample of 24 cans, 5-ounce cans of Safeway Chunk Light Tuna in
6 Water contain an average of only 2.57 ounces of pressed cake tuna, which is 9.5% below the
7 federally mandated minimum standard of fill 2.84 ounces for these cans. And yet another test by
8 NOAA determined that, over a sample of 24 cans, 5-ounce cans of Safeway Chunk Light Tuna in
9 Water contain an average of only 2.67 ounces of pressed cake tuna, which is 6.0% below the
10 federally mandated minimum standard of fill of 2.84 ounces for these cans. Lastly, yet another test
11 by NOAA determined that, over a sample of 24 cans, 5-ounce cans of Safeway Chunk Light Tuna
12 in Water contain an average of only 2.54 ounces of pressed cake tuna, which is 10.6% below the
13 federally mandated minimum standard of fill of 2.84 ounces for these cans. Of these tests, 94 of 96
14 cans were below the minimum standard of fill.

15 4. Similarly, another test by NOAA determined that, over a sample of 24 cans, 5-ounce
16 cans of Open Nature Chunk White Albacore Tuna in Water contain an average of only 2.58 ounces
17 of pressed cake tuna, which is 9.2% below the federally mandated minimum standard of fill of 2.84
18 ounces for these cans. And another test by NOAA determined that, over a sample of 24 cans,
19 5-ounce cans of Open Nature Chunk Light Tuna in Water contain an average of only 2.83 ounces
20 of pressed cake tuna, which is 0.4% below the federally mandated minimum standard of fill of 2.84
21 ounces for these cans. Of these tests, 35 of 48 individual cans were below the minimum standard
22 of fill.

23 5. Plaintiffs assert claims on behalf of themselves and a nationwide class of purchasers
24 of Safeway Tuna for breach of express warranty, breach of the implied warranty of
25 merchantability, unjust enrichment, violation of California's Consumers Legal Remedies Act
26 ("CLRA"), violation of California's Unfair Competition Law ("UCL"), violation of California's
27 False Advertising Law ("FAL"), negligent misrepresentation, fraud, and fraudulent concealment.
28

PARTIES

1
2 6. Plaintiff Ehder Soto is a citizen of California who resides in Aptos, California.
3 Within the last four years, Plaintiff Soto regularly purchased 5-ounce canned Safeway Chunk Light
4 Tuna in Water at a Safeway store in California.

5 7. Plaintiff Heney Shihad is a citizen of California who resides in the city of Irvine,
6 California. Within the last three years, Plaintiff Shihad has regularly purchased 5-ounce cans
7 Safeway Tuna.

8 8. Plaintiff Dan Shiner is a citizen of California who resides in Mill Valley, California.
9 Within the last three years, Mr. Shiner has regularly purchased 5-ounce Safeway Chunk Light Tuna
10 in Water cans at a Safeway store in California.

11 9. Plaintiff Julie Whitson is a citizen of California who resides in Lomita, California.
12 Within the last three years, Ms. Whitson has regularly purchased 5-ounce Open Nature Chunk
13 White Albacore Tuna in Water cans at Vons in California.

14 10. Plaintiff Mauri Sanders is a citizen of California who resides in Rancho
15 Cucamonga, California. Within the last three years, Ms. Sanders has regularly purchased 5-ounce
16 Open Nature Chunk White Albacore Tuna in Water cans at Vons in California.

17 11. Defendant Safeway Inc. is a Delaware corporation with its principal place of
18 business at 5918 Stoneridge Mall Rd., Pleasanton, California 94588.

19 12. Defendant The Vons Companies, Inc. is a Michigan corporation with headquarters
20 at 5918 Stoneridge Mall Rd., Pleasanton, California 94588.

21 13. The true names and capacities, whether individual, corporate, associate, or
22 otherwise of each of the defendants designated herein as a DOE are unknown to Plaintiffs at this
23 time, who therefore sue said defendants by fictitious names, and will ask leave of this Court for
24 permission to amend this Complaint to show their names and capacities when the same have been
25 ascertained. Plaintiffs are informed and believe and thereon allege that each of the defendants
26 designated as a DOE is legally responsible in some manner for the events and happenings herein
27 referred to, and caused injuries and damages thereby to these Plaintiffs as alleged herein.
28

1 14. Whenever reference is made in this Complaint to any representation, act, omission,
 2 or transaction of Safeway, that allegation shall mean that Safeway did the act, omission, or
 3 transaction through its officers, directors, employees, agents, and/or representatives while they
 4 were acting within the actual or ostensible scope of their authority.

5 15. On information and belief, Plaintiffs allege that the shareholders, executive officers,
 6 managers, and supervisors of the Defendants directed, authorized, ratified, and/or participated in
 7 the actions, omissions and other conduct that gives rise to the claims asserted herein. Plaintiffs are
 8 informed and believe, and thereon allege, that each of said defendants is in some manner
 9 intentionally, negligently, or otherwise responsible for the acts, omissions, occurrences, and
 10 transactions alleged herein.

11 **JURISDICTION AND VENUE**

12 16. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act,
 13 28 U.S.C. § 1332(d)(2)(A), because this case is a class action where the aggregate claims of all
 14 members of the proposed class are in excess of \$5,000,000.00, exclusive of interest and costs, and
 15 most members of the proposed class are citizens of states different from Defendants. This Court
 16 also has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

17 17. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because
 18 a substantial part of the events, omissions, and acts giving rise to the claims herein occurred in this
 19 District. Plaintiffs Soto and Shiner are citizens of California, reside in this District, and purchased
 20 Safeway Tuna from Safeway in this District. Moreover, Defendants distributed, advertised, and
 21 sold Safeway Tuna, which is the subject of the present complaint, in this District. Furthermore,
 22 Defendants' principal places of business are in this District.

23 **APPLICATION OF CALIFORNIA LAW IS APPROPRIATE**

24 18. Application of California law is appropriate in this case.

25 19. Both Defendants maintain their headquarters in Pleasanton, California, and their
 26 legal departments and marketing departments, which likely were involved in the labeling of the
 27 Safeway Tuna, are located in California.

1 20. Moreover, the Safeway Tuna is distributed by Lucerne Foods, Inc., which is
2 headquartered in Pleasanton, California. Lucerne Foods, Inc. is a subsidiary of Safeway, Inc.

3 **SUBSTANTIVE ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

4 **Tuna Fish – An Important Part of Many Americans’ Diets**

5 21. Canned tuna has long been a staple in many Americans’ kitchens. Canned tuna has
6 many benefits. Tuna in convenient-sized cans can be kept in cupboards for months or even years.
7 Canned tuna has many culinary uses, from sandwiches to salads to casseroles.

8 22. Canned tuna is high in protein. A typical five-ounce can of light tuna contains 28
9 grams of protein – 56 per cent of the adult daily protein requirement. Canned tuna, especially
10 when packed in water, is featured in many dishes recommended for sensible diets. Tuna is a
11 significant source of the heart-protective omega-3 fatty acids, EPA, and DHA. Tuna is also rich in
12 vitamin B6.

13 23. The United States and Canada constitute the largest world markets for canned tuna.
14 Tuna consumption in the United States peaked in 1989, with the average American eating almost
15 four pounds of canned tuna fish per year. Since then, although tuna remains popular, its
16 consumption has declined.

17 24. A primary reason for the decline in canned tuna consumption is the substantial
18 increase in the world price of tuna. In fact, during the same period that consumption of canned
19 tuna has been in decline, the dollar value of the canned tuna consumed has remained essentially
20 steady or even increased. Other factors affecting consumption are concerns that tuna, a large fish
21 near the top of the ocean food chain, can concentrate significant quantities of mercury in its tissues.
22 There are also concerns that the methods used by the tuna fishing industry to catch tuna harm
23 dolphins and damage the ocean ecosystem.

24 25. Canned tuna fish still remains popular in many Americans’ diets. In 2014, canned
25 tuna represented about 67% of all the canned seafood consumed in the U.S. Tuna accounts for
26 approximately 16 percent of all fish and shellfish consumed in the United States.

27 26. According to the FDA, for those who eat tuna, canned tuna is the safest form of tuna
28 in terms of mercury, with lower mercury levels than sushi and tuna steaks.

1 27. Consumers who purchase canned tuna generally are repeat purchasers, providing
2 continuing revenue and profit for the producers and venders of canned tuna. There is intense
3 competition among the producers of canned tuna.

4 28. Because of the high cost of raw tuna, producers of canned tuna have incentive to
5 underpack and overstate the net tuna content of the canned tuna they label and sell.

6 **Defendants' Operations**

7 29. Safeway is an American supermarket chain. According to the official account of
8 Safeway, the supermarket chain began in 1915 as a single store in American Falls, Idaho owned by
9 M.B. Skaggs. Mr. Skaggs, by keeping profit margins narrow gave his customers competitive value
10 and enjoyed noteworthy success, such that, by 1926, his first store had expanded to 428 Skaggs
11 stores in 10 states. Then, in that year, he merged his company with 322 "Safeway" (formerly
12 "Selig") stores and incorporated as Safeway, Inc. In the years that followed, the Safeway chain
13 continued to expand.

14 30. In 1988, Safeway sold most of its stores in southern California and southern Nevada
15 to Defendant Vons in exchange for an ownership stake. Sometime in April 1997, Safeway
16 exercised its option to acquire full control of the company, and Vons has since operated as a
17 subsidiary. A number of the Safeway brands and advertising campaigns are used by the Vons
18 stores, including the Open Nature brand.

19 31. In January 2015, Safeway and AB Acquisition LLC (AB Acquisition is controlled
20 by Cerberus Capital Management, L.P.) completed a merger that resulted in the present Safeway
21 Inc. – the second largest supermarket grocery chain in North America, with over 2,200 stores in 33
22 states and the District of Columbia, and employing approximately 265,000 people.

23 32. In 2013, Safeway realized approximately \$36.139 billion in revenue and \$3.507
24 billion in net income. In 2009, Safeway was estimated to be the eleventh largest retailer in the
25 United States. Safeway's primary base of operations is in the western and central United States,
26 with some stores located in the Mid-Atlantic region of the Eastern Seaboard. As part of its
27 operations, Safeway is engaged in the processing, packaging, and distribution of Safeway-brand
28

1 canned tuna products, which it sells through Safeway, Vons, and Pavilions grocery stores and other
2 means of distribution to consumers.

3 **Defendants' Packaging, Distribution, and Sale of Canned Tuna**

4 33. Defendants are leading retailers of canned tuna. In addition to selling brands of
5 canned tuna produced by other companies, including Bumblebee, Chicken of the Sea, and StarKist,
6 Safeway, Inc. also packages, labels and markets its own brands of canned tuna, including without
7 limitation the Safeway and Open Nature brands. It distributes and sells its brands of canned tuna
8 through its Safeway retail store locations, Vons retail store locations, and through its subsidiaries
9 and other outlets.

10 34. Safeway has long portrayed itself as a responsible purveyor of seafood products.
11 Safeway is considered an industry leader in embracing and promoting sustainable,
12 ecology-friendly, dolphin-safe, methods of catching and providing canned tuna to consumers.

13 35. In 2012, Safeway announced that it was introducing canned tuna that was
14 “responsibly caught using free-school purse-seine methods. The company will transition to the
15 purse-seine method by the end of the year.” Safeway heralded this transition as a significant step
16 forward in providing canned tuna that was dolphin-safe and that caused less harm to the ocean
17 ecosystem:

18 Safeway is implementing these new specifications at a time when the
19 tuna fishing industry is finding better ways to address the significant
20 negative ecosystem impacts associated with purse-seine netted tuna
21 fishing, a method that employs fish aggregating devices (FADs).
22 Safeway’s move to eliminate FAD-caught tuna is part of the effort to
23 make its branded tuna across the shelf stable category more
24 responsibly sourced and to also enhance the company’s “Dolphin
25 Safe” tuna commitments made years ago to Earth Island Institute.
26 Safeway is in the process of instituting additional specifications for
27 responsibly sourced albacore tuna caught on longline vessels with
28 improved fishing techniques. Safeway brand “responsibly caught”
tuna is the first brand in North America to make this important
move.

36. Safeway advertised the sustainable and eco-friendly nature of its tuna by using
slogans such as “Sustainably Caught” or “Responsibly Caught” on its labels and in its marketing.

Defendants Deceive Consumers and Obtain an Unfair Advantage Over Competitors by Selling Underfilled Cans and Misrepresenting the Amount of Tuna Contained

37. For canned tuna, which is often packed in oil or water, standards have been established by federal law as to the quantity of actual tuna flesh that must be present in a can of tuna of a particular size. These standards require a minimum amount of “pressed cake” tuna to be present in a can of a particular size and labeled as having a particular type and quantity of tuna, and require the label to state if the can is underfilled. These standards are set forth at 21 C.F.R. § 161.190.

38. Albacore is a species of tuna providing white meat that is popular with consumers. By law, albacore tuna is the only species of tuna that may be labeled as “white” tuna.

39. Chunk light tuna comes from smaller fish, such as skipjack, and is not white in color.

40. The use of albacore tuna is generally considered to be ecosystem friendly. The SeaChoice sustainable seafood program ranks albacore tuna as a “best choice” for consumers.

41. Covering the outside circumference of each Safeway Tuna can, Safeway affixes a label that states the type of tuna and net weight in ounces of the tuna that is supposed to be contained in the can. Plaintiffs and members of the proposed Class purchased Safeway Tuna based on the size of the can, and stated weight printed on the label.

42. While Defendants may be leaders in providing eco-friendly canned tuna, they unfortunately deceive consumers as to the amount of tuna that is actually in cans of Safeway Tuna.

43. The cans of Safeway Tuna sold by Safeway and Vons and purchased by Plaintiffs and members of the proposed Class were underfilled and contained significantly less tuna fish than they were labeled to contain and less tuna than was required by law for the can.

44. The tuna fish contained in cans of Safeway Tuna is less actual tuna meat than the net weight stated on the labels and less than the minimum amount by pressed weight required under 21 C.F.R. § 161.190 for the can.

1 45. For example, below are photos of the labels affixed on the 5-ounce Open Nature
2 brand of Chunk White Albacore Tuna in Water sold at Safeway and Vons:



1 46. Independent tests carried out by the NOAA, including tests commissioned by
2 Plaintiffs' counsel, reveal that cans of Safeway Tuna contain significantly less than labeled net
3 amount of tuna and less than the minimum mandated by 21 C.F.R. § 161.190(c)(2)(i)-(xii).

4 47. As reflected in the photos above, Defendants do not print any statement on the
5 labels affixed to the outer side of cans of Safeway Tuna that would alert consumers to the fact that
6 the cans are underfilled, as required under 21 C.F.R. § 161.190.

7 48. Defendants' underfilling, mislabeling, and selling of cans of Safeway Tuna deceived
8 and injured Plaintiffs and members of the proposed Class, and represents a continuing unlawful
9 practice causing harm to consumers in California and nationwide.

10 **PRIVATE ATTORNEY GENERAL ALLEGATIONS**

11 49. In addition to asserting class claims, Plaintiffs assert claims on behalf of class
12 members pursuant to California Business & Professions Code § 17200, *et seq.* The purpose of
13 such claims is to obtain injunctive orders regarding the false labeling, deceptive marketing and
14 pattern and practice of under filling 5-ounce cans of Safeway Tuna and to require the disgorgement
15 of all profits and/or restoration of monies wrongfully obtained through Safeway's and Vons' unfair
16 and deceptive business practices – which emanated from Safeway's and Vons' principal places of
17 business in Pleasanton, California. This private attorney general action is necessary and
18 appropriate because Defendants have engaged in wrongful acts described herein as part of the
19 regular practice of their business.

20 **CLASS ACTION ALLEGATIONS**

21 50. Plaintiffs bring this action on their own behalf and on behalf of all similarly situated
22 persons and seek to represent the following classes of consumers defined initially as follows:

23 “All persons who purchased Safeway Tuna in the United States” (the “National Class”).

24 “All Class members who purchased Safeway Tuna in California” (the “California
25 Subclass”).

26 Excluded from the Class are Defendants, their corporate parents, subsidiaries, officers, directors,
27 employees, and partners, any entity in which Defendants have a controlling interest, any and all
28

1 legal representatives, heirs, successors, and assigns of Defendants, any persons who purchased
2 Safeway Tuna for purpose of resale, and any judge and court staff assigned to this case.

3 51. The National Class and California Subclass are collectively referred to as the
4 “Class” unless otherwise stated.

5 52. Plaintiffs reserve the right to amend the class definitions if discovery and further
6 investigation reveal that the National Class or California Subclass should be expanded, divided into
7 additional subclasses, or modified in any other way.

8 53. This action has been properly brought and may properly be maintained as a class
9 action under Rule 23(a)(1-4), Rule 23(b)(1), (2) or (3), and/or Rule 23(c)(4) of the Federal Rules of
10 Civil Procedure and case law thereunder.

11 **Numerosity of the Class**

12 **(Fed. R. Civ. P. 23(a)(1))**

13 54. The members of the Class are so numerous that joinder of all members is
14 impracticable. While the exact number of Class members has not yet been ascertained, Plaintiffs
15 believe that over one million Californians and United States citizens have purchased and continue
16 to purchase Safeway Tuna and that, as a result, on information and belief, there are at least one
17 million aggregate members of the Class and Subclass. Class members may be notified of the
18 pendency of this action by mail or email and/or publication through the purchase and club card
19 records of Defendants and other third party retailers and vendors.

20 **Typicality of Claims**

21 **(Fed. R. Civ. P. 23(a)(3))**

22 55. Plaintiffs’ claims are typical of the claims of the Class. Plaintiffs and members of
23 the Class sustained injuries and damages arising out of Defendants’ common course of conduct in
24 violation of the law as alleged herein. The injuries and damages of each member of the Class were
25 caused directly by Defendants’ wrongful conduct as alleged herein and are/were common to all
26 class members.

Adequacy of Representation

(Fed. R. Civ. P. 23(a)(4))

56. Plaintiffs and their counsel will fairly and adequately represent the interests of the Class members. Plaintiffs have no interest antagonistic to, or in conflict with, the interests of the Class members. Plaintiffs' lawyers are highly experienced in the prosecution of consumer class actions and complex commercial litigation.

Superiority of a Class Action

(Fed. R. Civ. P. 23(b)(3))

57. A class action is superior to other available means for the fair and efficient adjudication of the claims of Plaintiffs and Class members. The damages suffered by each individual Class member, while significant, are small given the burden and expense of individual prosecution of the complex and extensive litigation necessitated by Defendants' conduct. Further, it would be virtually impossible for the members of the Class individually to redress effectively the wrongs done to them. And, even if members of the Class themselves could afford such individual litigation; the court system could not, given the many thousands of cases that would need to be filed. Individualized litigation would also present a potential for inconsistent or contradictory judgments. Individualized litigation would increase the delay and expense to all parties and the court system, given the complex legal and factual issues involved. By contrast, the class action device presents far fewer management difficulties and provides the benefits of a single adjudication, economy of scale, and comprehensive supervision by a single court.

**Risk of Inconsistent or Dispositive Adjudications and the Appropriateness
of Final Injunctive or Declaratory Relief**

(Fed. R. Civ. P. 23(b)(1) And (2))

58. In the alternative, this action may properly be maintained as a class action, because:

(a) the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudication with respect to individual Class members, which would establish incompatible standards of conduct for the Defendants; or

(b) the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to individual members of the Class which would, as a

1 practical matter, be dispositive of the interests of other Class members not parties to the
2 adjudications, or substantially impair or impede their ability to protect their interests; or

3 (c) the Defendants have acted or refused to act on grounds generally applicable
4 to the Class, thereby making appropriate final injunctive or corresponding declaratory relief with
5 respect to the Class as a whole.

6 **Predominance of Common Questions of Fact and Law**

7 **(Fed. R. Civ. P. 23(a)(2); 23(b)(3))**

8 59. There are common questions of law and fact as to the Class that predominate over
9 questions affecting only individual members, including but not limited to:

- 10 A. whether Defendants engaged in an unlawful business practice;
- 11 B. whether Defendants engaged in unlawful, false or deceptive advertising;
- 12 C. whether Safeway Tuna cans were underfilled on a class-wide basis;
- 13 D. whether 5-ounce cans of Safeway Tuna are substantially underweight;
- 14 E. whether Defendants warranted that Safeway Tuna contained an adequate amount of
15 tuna for 5-ounce cans;
- 16 F. whether Defendants knew that they misrepresented the amount of tuna in their 5-
17 ounce cans;
- 18 G. whether Defendants knew or should have known that their 5-ounce cans of tuna
19 were underfilled;
- 20 H. whether Defendants warranted that their 5-ounce Safeway Tuna were legally
21 compliant when offered for sale;
- 22 I. whether Defendants breached warranties in connection with 5-ounce cans of
23 Safeway Tuna;
- 24 J. whether or not Defendants made misrepresentations, false promises, or reckless
25 statements to Plaintiffs and Class members;
- 26 K. whether the under filled cans of tuna confirmed via independent laboratory testing
27 are typical of Defendants' widespread business practices;
- 28 L. whether Defendants knew and intended to under fill their cans;

1 M. whether Defendants gained an unfair commercial or competitive benefit by
2 underfilling tuna cans;

3 N. whether Defendants sold the Safeway Tuna with affixed labels that misrepresented
4 the contents; and

5 O. whether Defendants failed to disclose, in advertising and on labels affixed to the
6 Safeway Tuna, the accurate quantity of tuna in the cans that they labeled and/or sold.

7 **Issue Certification**

8 **(Fed. R. Civ. P. 23(c)(4))**

9 60. In the alternative, common questions of fact and law, including those set forth
10 above, are appropriate for issue certification.

11 **COUNT I**

12 **(Breach of Express Warranty)**

13 **By Plaintiffs and the National Class and California Subclass against Defendants**

14 61. Plaintiffs hereby incorporate by reference the allegations contained in all preceding
15 paragraphs of this complaint.

16 62. Plaintiffs bring this claim individually and on behalf of the National Class and
17 California Subclass against Defendants.

18 63. Defendants' acts and omissions as described herein constitute breach of express
19 warranty, in violation of Cal. Com. Code § 2313.

20 64. Through the Safeway Tuna cans and labels affixed to the cans, Defendants made an
21 express warranty and/or approved the use of the express warranty to Plaintiffs and Class members
22 that their tuna cans contained specific quantities of tuna as described herein. In particular,
23 Defendants made statements of fact with respect to the quantity of tuna contained therein, i.e. "5
24 ounces" and two "2.5 ounce" servings per container.

25 65. The express warranties made to Plaintiffs and Class members appear on every
26 Safeway Tuna can labeled, marketed and/or sold by Defendants.

1 73. Defendants impliedly warranted that that the Safeway Tuna cans marketed and sold
2 to Plaintiffs and Class members were not underfilled, contained an adequate amount of tuna for a 5-
3 ounce can, and were legal for sale in the United States.

4 74. Defendants breached the warranty implied in the sale of Safeway Tuna cans because
5 the cans were underfilled and substantially underweight, did not contain an adequate amount of
6 tuna for a 5-ounce can, and was illegal for sale in the United States. The Safeway Tuna was not of
7 the same quality as similar goods generally accepted in the trade, was not fit for the ordinary
8 purpose for which such goods are used, was not adequately or accurately packaged or labeled, and
9 did not measure up to the promises or facts stated on the container or label, as a result, Plaintiffs
10 and Class members did not receive the goods as impliedly warranted by Defendants to be
11 merchantable.

12 75. Plaintiffs and the Class purchased Safeway Tuna in reliance upon Defendants' skill
13 and judgment and the implied warranties of fitness for the purpose intended. Safeway Tuna was
14 not altered by Plaintiffs or the Class and was defective when leaving the exclusive control of
15 Defendants. Defendants knew that Safeway Tuna would be purchased and used without additional
16 testing or measurement by Plaintiffs or the Class.

17 76. Safeway Tuna was defective and unfit for its intended purpose such that Plaintiffs
18 and the Class did not receive the goods as warranted.

19 77. Defendants' breach of the implied warranty directly and proximately caused harm to
20 Plaintiffs and the Class members because they would not have purchased Safeway Tuna on the
21 agreed-upon terms if the true facts had been known, including that the cans were underfilled,
22 contained an inadequate amount of tuna for a 5-ounce can, and did not comply with federal
23 regulations.

24 78. As a proximate result of this breach of implied warranty by Defendants, Plaintiffs
25 and the Class have suffered damages in an amount to be determined at trial.

COUNT III

(Unjust Enrichment)

By Plaintiffs and the National Class and California Subclass against Defendants

79. Plaintiffs hereby incorporate by reference the allegations contained in all preceding paragraphs of this complaint.

80. Plaintiffs bring this claim individually and on behalf of the National Class and California Subclass against Defendants.

81. Plaintiffs and Class members conferred benefits on Defendants by purchasing Safeway Tuna.

82. Defendants have been unjustly enriched in retaining the revenues derived from Plaintiff and Class members' purchases of Safeway Tuna. Retention of those moneys under these circumstances is unjust and inequitable because Defendants misrepresented that Safeway Tuna contained an adequate amount of tuna for a 5-ounce can and that Safeway Tuna was legal for sale in the United States. These misrepresentations caused injuries to Plaintiffs and the Class members because they would not have purchased Safeway Tuna if the true facts had been known.

83. Because Defendants' retention of the benefits conferred on them by Plaintiffs and the Class members is unjust and inequitable, Defendants must pay restitution to Plaintiffs and the Class members for their unjust enrichment, as ordered by the Court.

COUNT IV

(Fraud)

By Plaintiffs and the National Class and California Subclass against Defendants

84. Plaintiffs hereby incorporate by reference the allegations contained in all preceding paragraphs of this complaint.

85. Plaintiffs bring this claim individually and on behalf of the National Class and California Subclass against Defendants.

86. Defendants provided Plaintiffs and the Class members with false or misleading material information and failed to disclose material facts about Safeway Tuna products.

1 87. Defendants misrepresented the actual amount contained in its 5-ounce cans of tuna
2 and/or failed to disclose that the cans were underfilled and contained an inadequate amount of tuna
3 for a 5-ounce can and/or that the cans were illegal for sale in the United States.

4 88. The representations by the Defendants were false. Defendants made the foregoing
5 misrepresentations and omissions in knowing disregard of their falsehood.

6 89. The misrepresentations and omissions made by Defendants, upon which Plaintiffs
7 and the Class reasonably and justifiably relied, were intended to induce and did induce Plaintiffs
8 and the Class to purchase Safeway Tuna to their detriment.

9 90. The fraudulent actions of Defendants caused damage to Plaintiffs and the Class,
10 who are entitled to damages, punitive damages, and other legal and equitable relief as a result.

11
12 **COUNT V**
13 **(For Fraudulent Concealment)**

14 **By Plaintiffs and the National Class and California Subclass against Defendants**

15 91. Plaintiffs incorporate by reference each and every allegation set forth above as if
16 fully stated herein.

17 92. Plaintiffs bring this claim individually and on behalf of the National Class and
18 California Subclass against Defendants.

19 93. Defendants' acts and omissions constitute fraudulent concealment.

20 94. Defendants concealed or suppressed material facts in the marketing and labeling of
21 the Safeway Tuna, as described herein.

22 95. Defendants had a duty to disclose the concealed facts to Plaintiffs and Class
23 members.

24 96. Defendants intentionally concealed or suppressed the facts with the intent to defraud
25 Plaintiffs and Class members.

26 97. Plaintiffs and Class members were unaware of the facts concealed and would not
27 have purchased the canned tuna at issue if they had known of the concealed or suppressed facts.

28 98. As a result of the concealment or suppression of the facts by Defendants, Plaintiffs

1 and members of the Class sustained damage.

2 99. Plaintiffs and Class members are accordingly entitled to damages, as prayed for
3 hereunder.

4 **COUNT VI**

5 **(Negligent Misrepresentation)**

6 **By Plaintiffs and the National Class and California Subclass against Defendants**

7 100. Plaintiffs hereby incorporate by reference the allegations contained in all preceding
8 paragraphs of this complaint.

9 101. Plaintiffs bring this claim individually and on behalf of the National Class and
10 California Subclass against Defendants.

11 102. Defendants negligently misrepresented or omitted facts about Safeway Tuna
12 products.

13 103. Defendants misrepresented the actual amount of tuna contained in 5-ounce cans of
14 Safeway Tuna and/or failed to disclose that Safeway Tuna was underfilled and contained an
15 inadequate amount of tuna for a 5-ounce can and/or that it was illegal for sale in the United States.

16 104. Defendants had an obligation to disclose the true facts, and failed to do so with
17 knowledge of the concealment and materiality thereof, and/or in reckless disregard of their duty to
18 ensure that representations to consumers were accurate and complete.

19 105. At the time Defendants made these representations, Defendants knew or should
20 have known that these representations were false or made them without knowledge of the truth or
21 veracity thereof.

22 106. The negligent misrepresentations and/or omissions made by Defendants, upon
23 which Plaintiffs and the Class members reasonably and justifiably relied, were intended to induce
24 and actually induced Plaintiffs and the Class members to purchase Safeway Tuna.

25 107. Plaintiffs and the Class members would not have purchased Safeway Tuna if the
26 true facts had been known.

27 108. The negligent actions of Defendants actually and proximately caused damage to
28 Plaintiffs and the Class, who are entitled to damages and other legal and equitable relief as a result.

COUNT VII

(Consumers Legal Remedies Act, California Civil Code §§ 1750, *et seq.*)

By Plaintiffs and the National Class and California Subclass against Defendants

109. Plaintiffs hereby incorporate by reference the allegations contained in all preceding paragraphs of this complaint.

110. Plaintiffs bring this claim individually and on behalf of the National Class and California Subclass against Defendants.

111. Each defendant is a “person” within the meaning of California Civil Code sections 1761(c) and 1770, and provides “goods” within the meaning of Civil Code sections 1761(a) and 1770. Defendants’ customers, including Plaintiffs and Class members, are “consumers” within the meaning of Civil Code sections 1761(d) and 1770. Each purchase of a can of a Safeway Tuna Can by Plaintiffs and each Class member constitutes a “transaction” within the meaning of Civil Code sections 1761(e) and 1770.

112. Defendants’ acts and practices violate the California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* (“CLRA”), including Cal. Civ. Code §§ 1770(a)(5), (a)(7) and (a)(9).

113. The CLRA, Cal. Civ. Code § 1770(a)(5), prohibits “[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.”

114. The CLRA, Cal. Civ. Code § 1770(a)(7), prohibits “[r]epresenting 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.”

115. The CLRA, Cal. Civ. Code § 1770(a)(9), prohibits “[a]dvertising goods or services with intent not to sell them as advertised.”

116. Defendants violated the CLRA, including these provisions, by misrepresenting that Safeway Tuna contained an adequate amount of tuna for a 5-ounce can and that Safeway Tuna is legal for sale in the United States.

1 117. Plaintiffs and the Class members suffered injuries caused by Defendants' violations
2 of the CLRA because: (a) they would not have purchased Safeway Tuna on the same terms if the
3 true facts were known concerning its quantity and failure to comply with FDA regulations; (b) they
4 paid a price premium for Safeway Tuna due to Defendants' representations that it contained an
5 adequate amount of tuna for a 5-ounce can; (c) Safeway Tuna did not have the characteristics,
6 ingredients, uses, benefits, or quantities as represented, and (d) Safeway Tuna did not meet
7 appropriate federal standards.

8 118. Plaintiffs have served Defendants with a CLRA Notice pursuant to Cal. Civ. Code §
9 1782(a).

10 119. Plaintiffs have attached hereto the declaration of venue required by Civil Code §
11 1780(d).

12 120. Plaintiffs seek damages, restitution, and/or injunctive relief from Defendants for the
13 foregoing violations of the CLRA.

14 **COUNT VIII**

15 **(Violations of California Business & Professions Code §§17500, *et seq.*)**

16 **By Plaintiffs and the National Class and California Subclass against Defendants**

17 121. Plaintiffs hereby incorporate by reference the allegations contained in all preceding
18 paragraphs of this complaint.

19 122. Plaintiffs bring this claim individually and on behalf of the National Class and
20 California Subclass against Defendants.

21 123. The conduct and actions of Defendants complained of herein constitute false
22 advertising in violation of the False Advertising Law ("FAL"). Cal. Bus. & Prof. Code §§ 17500,
23 *et seq.*

24 124. Plaintiffs bring this cause of action as individuals, in their capacity as private
25 attorneys general pursuant to Business & Professions Code § 17535 and on behalf of the Class.

26 125. Defendants intended to sell goods – 5 oz. cans of Safeway Tuna - to Plaintiffs and
27 the Class members.

1 126. Pursuant to the FAL, it is unlawful for any person to make or disseminate or cause
2 to be made or disseminated before the public in this state in any advertising device or in any other
3 manner or means whatever, including over the internet, any statement, concerning personal
4 property or services, professional or otherwise, or performance or disposition thereof, which is
5 untrue or misleading and which is known, or which by the exercise of reasonable care should be
6 known, to be untrue or misleading.

7 127. Defendants disseminated advertising before the public that: (a) contained statements
8 that were illegal, untrue or misleading; (b) Defendants knew, or in the exercise of reasonable care
9 should have known, was illegal, untrue or misleading; (c) concerned the nature, quantity and
10 characteristics of goods intended for sale to consumers, including Plaintiffs and the Class; and (d)
11 was likely to mislead or deceive a reasonable consumer.

12 128. The illegal, untrue and/or misleading statements and representations made by
13 Defendants include, but are not limited to, words that state or imply that Safeway Tuna is not
14 underfilled and contains at least the federal minimum quantity required for the tuna cans when, in
15 fact, Defendants underfill the cans and do not provide the federal minimum quantity of tuna
16 required for the cans.

17 129. Defendants committed acts of false advertising, as defined by the FAL, by
18 misrepresenting that Safeway Tuna was not underfilled, and contained an adequate amount of tuna
19 for a 5-ounce can, and that its sale of Safeway Tuna was legal in the United States.

20 130. Defendants knew or should have known, through the exercise of reasonable care
21 that their representations concerning Safeway Tuna were false, untrue and misleading to Plaintiffs,
22 the Class members and the general public.

23 131. Defendants' actions in violation of the FAL were false and misleading such that the
24 Plaintiffs, the Class and the general public were and are likely to be deceived.

25 132. Plaintiffs and the Class lost money or property as a result of Defendants' false
26 advertising. Plaintiffs and the Class members would not have purchased Safeway Tuna if they had
27 reason to know that Safeway Tuna was and is under-filled and underweight, and contains
28

1 substantially less tuna than would have been obtained Plaintiff and the Class had purchased legally
2 compliant competing brands of tuna.

3 133. Accordingly, Plaintiffs, on behalf of themselves and all others similarly situated,
4 seek equitable relief in the form of an order requiring Defendants to refund Plaintiffs and Class
5 members monies paid for the canned tuna at issue, and injunctive relief in the form of an order
6 prohibiting Defendants from engaging in the alleged misconduct described herein, as prayed for
7 hereunder.

8 **COUNT IX**

9 **(Violations of California Business & Professions Code § 17200, *et seq.*)**

10 **By Plaintiffs and the National Class and California Subclass against Defendants**

11 134. Plaintiffs hereby incorporate by reference the allegations contained in all preceding
12 paragraphs of this complaint.

13 135. Plaintiffs bring this claim individually and on behalf of the National Class and
14 California Subclass against Defendants.

15 136. The conduct and actions and omissions of Defendants complained of herein
16 constitute violations of the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*
17 (“UCL”).

18 137. Plaintiffs and Defendants are “person[s]” as defined by California Business &
19 Professions Code § 17201. California Business & Professions Code § 17204 authorizes a private
20 right of action on both an individual and representative basis.

21 138. “Unfair competition” is defined by Business & Professions Code § 17200 as
22 encompassing several types of business “wrongs,” including: “unlawful, unfair or fraudulent
23 business act or practice and unfair, deceptive, untrue or misleading advertising.” The definitions in
24 § 17200 are drafted in the disjunctive, meaning that each of these “wrongs” is independently
25 actionable from the others.

26 139. Defendants have engaged in conduct which constitutes unlawful,
27 fraudulent/deceptive and/or unfair business practices, and unfair, deceptive, untrue or misleading
28 advertising, in violation of the UCL.

A. The “Unlawful” Prong

140. Beginning at a date currently unknown through the time of this Complaint, Defendants have committed acts of unfair competition, including those described above, by engaging in a pattern of “unlawful” business practices, within the meaning of the UCL, by manufacturing, distributing, advertising, labeling and/or marketing Safeway Tuna as legally compliant to be sold in the United States without complying with the federal minimum standards for the quantity of tuna contained therein as required by 21 C.F.R. § 161.190.

141. Defendants have also violated the unlawful prong of the UCL by marketing and selling the Safeway Tuna in a manner which violated the California Consumers Legal Remedies Act, California Civil Code §§ 1750, *et seq.*, by, among other things, representing that the Safeway Tuna had characteristics, ingredients, uses, benefits, or quantities which it did not have, and by representing that their goods were of a particular standard, quality or grade when they were of another standard, quality or grade.

B. The “Unfair” Prong

142. Beginning at a date currently unknown and continuing up through the time of this Complaint, Defendants have committed acts of unfair competition that are prohibited by the UCL. Defendants engaged in a pattern of “unfair” business practices that include the manufacture, marketing and distribution of Safeway Tuna with labels setting forth language affirming they contain “5-ounces” of tuna when, in fact, they regularly contain less, and by supplying cans of tuna which are underfilled under federal law. Because Safeway knows that the average consumer will not test or certify the content of their purchases of Safeway Tuna, Safeway’s pattern and practice of labeling the cans while systematically underfilling them is an unfair business practice.

143. Alternatively, Defendants have engaged in a pattern of “unfair” business practices in violation of the UCL by engaging in practices that are immoral, unethical, oppressive or unscrupulous, the utility of such conduct, if any, being far outweighed by the harm done to consumers and against public policy. Such practices include manufacturing, distributing, and/or marketing Safeway Tuna with less tuna contained therein than is required by 21 C.F.R. § 161.190,

1 and by falsely representing that the cans contain “5-ounces” when, in fact, the cans were
2 underfilled for cans of that size.

3 144. Alternatively, Defendants engaged in a pattern of “unfair” business practices that
4 violate the wording and intent of the abovementioned statutes by engaging in practices, including
5 manufacturing, distributing, marketing, and/or advertising Safeway Tuna in violation of 21 C.F.R.
6 § 161.190 by falsely representing that the products contain “5-ounces” and two “2.5 ounce”
7 servings, wherein: (1) the injury to the consumer was substantial; (2) the injury was not outweighed
8 by any countervailing benefits to consumers or competition; and (3) the injury was not of the kind
9 that consumers themselves could not have reasonably avoided.

10 **C. The “Unfair, Deceptive, Untrue or Misleading Advertising” Prong**

11 145. Defendants’ advertising is unfair, deceptive, untrue or misleading in that consumers
12 are led to believe that Defendants’ products are legally compliant to be sold in the United States,
13 that they contain “5-ounces” of tuna and two “2.5 ounce” servings and that therefore they are of
14 marketable quality, quantity and workmanship, and that they were produced according to U.S.
15 standards and laws when in fact they are not.

16 146. Plaintiffs and the public were likely to be, and in fact were, deceived and misled by
17 Defendants’ advertising as they interpreted the representation in accord with ordinary usage that
18 the products were actually legally compliant to be sold in the United States when, in fact, they are
19 not.

20 147. Defendants’ unlawful and unfair business practices and unfair, deceptive, untrue or
21 misleading advertising presents a continuing threat to the public in that Defendants continue to
22 engage in unlawful conduct resulting in harm to Plaintiffs, the Class and the general public.

23 148. Defendants engaged in these unlawful and unfair business practices motivated by
24 Defendants’ self-interest with the purpose of collecting unlawful and unauthorized monies from
25 Plaintiffs and the Class members, thereby unjustly enriching the Defendants.

26 149. Such acts and omissions by Defendants are unlawful and/or unfair and constitute a
27 violation of Business & Professions Code section 17200, *et seq.* Plaintiffs reserve the right to
28 allege additional violations as may be identified.

1 150. As a direct and proximate result of the aforementioned acts and representations
2 described above and herein, Defendants received and continue to receive unearned commercial
3 benefits at the expense of their competitors and the public.

4 151. As a direct and proximate result of Defendants' unlawful and unfair conduct
5 described herein, Defendants have been and will continue to be unjustly enriched by the receipt of
6 ill-gotten gains from customers, including Plaintiffs and the Class, who unwittingly provided
7 money to Defendants based on Defendants' actual and implied representations when Defendants'
8 products are contain less than the federally mandated minimum quantity of tuna and are
9 systematically under-filled.

10 152. Plaintiffs suffered "injury in fact" because Plaintiffs' money was taken by
11 Defendants as a result of Defendants' unfair, unlawful, deceptive business practices in connection
12 with the sale and purchase of Safeway Tuna that is not legally compliant to be sold in the United
13 States.

14 153. In prosecuting this action for the enforcement of important rights affecting the
15 public interest, Plaintiffs seek the recovery of attorneys' fees.

16 154. Pursuant to Business & Professions Code § 17203, Plaintiffs and the Class seek
17 from Defendants, and each of them, restitution and the disgorgement of all earnings, profits,
18 compensation, benefits and other ill-gotten gains obtained by Defendants as a result of Defendants'
19 conduct in violation of Business & Professions Code § 17200, *et seq.*

20 155. Pursuant to Business & Professions Code § 17204, Plaintiffs and the Class seek an
21 order of this Court enjoining Defendants, and each of them, from continuing to engage in the acts
22 as set forth in this complaint, which acts constitute violations of Business & Professions Code §
23 17200, *et seq.* Plaintiffs, the Class and the general public will be irreparably harmed if such an
24 order is not granted.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, seek judgment against Defendants, as follows:

- A. For an order certifying the Class under Rule 23 of the Federal Rules of Civil Procedure;
- B. For an order appointing Plaintiffs as the representatives of the Class and Plaintiffs' attorneys as Class Counsel to represent the interests of the Class;
- C. For an order declaring that the Defendants' conduct violates the statutes and laws identified herein;
- D. For an order of judgment in favor of Plaintiffs and the Class on all causes of action alleged herein;
- E. For an award of compensatory and punitive damages in amounts to be determined;
- F. For prejudgment interest;
- G. For an order of restitution and all other forms of equitable monetary relief;
- H. For an order of injunctive relief to remedy the past, present and threatened future harm of Defendants' conduct as set forth herein;
- I. For an order awarding Plaintiffs and the Class reasonable attorneys' fees and costs of suit; and
- J. For all other relief this Court deems just and proper.

//

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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand trial by jury of all claims so triable.

Date: April 7, 2016

Respectfully submitted,

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Attorneys for Plaintiff Heney Shihad

**DECLARATION OF ROSEMARY M. RIVAS
PURSUANT TO CALIFORNIA CIVIL CODE § 1780(d)**

I, Rosemary M. Rivas, declare as follows:

1. I am an attorney with the law firm Finkelstein Thompson LLP, counsel of record for Plaintiffs Dan Shiner, Julie Whitson, and Mauri Sanders. I am admitted to practice law in California and before this Court, and am a member in good standing of the State Bar of California. This declaration is made pursuant to California Civil Code section 1780(d). I make this declaration based on my research of public records and also upon personal knowledge, and if called upon to do so, could and would testify competently thereto.

2. Based on my research of publicly available records available at the website of the California Secretary of State, Defendants Safeway Inc. and The Vons Companies, Inc. maintain their principal executive offices at 5918 Stoneridge Mall Rd., Pleasanton, California 94588, and conduct business within this judicial district.

I declare under penalty of perjury under the laws of the United States and the State of California this 7th day of April 2016 in San Francisco, California that the foregoing is true and correct.

/s/ Rosemary M. Rivas
Rosemary M. Rivas

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**ATTORNEYS FOR PLAINTIFFS
AND THE PROPOSED CLASS**

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

IN RE SAFEWAY TUNA CASES

Case No.: 3:15-cv-05078-EMC

PROOF OF SERVICE

PROOF OF SERVICE

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I, Taylor Warren, declare as follows:

I am employed by Finkelstein Thompson LLP, 1 California Street, Suite 900, San Francisco, California 94111. I am over the age of eighteen years and am not a party to this action.

On April 7, 2016, I served the following document(s):

CONSOLIDATED CLASS ACTION COMPLAINT

BY CM/ECF ELECTRONIC SERVICE: Electronically filing the foregoing with the Clerk of the Court using the CM/ECF system sent notification of such filing to the e-mail addresses of registered participants.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed this 7th day of April 2016 at San Francisco, California.

Taylor Warren