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Attorneys for Defendant:  
FRESHLY, INC.

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF CALIFORNIA**  
**SACRAMENTO DIVISION**

KYLE JOHNSON, individually and on behalf  
of all others similarly situated,

Plaintiff,

v.

FRESHLY, INC., a Delaware corporation; and  
DOES 1 – 10, inclusive,

Defendants.

Case No. 2:17-at-00391

**NOTICE OF REMOVAL**

[Removed from Placer County Superior Court,  
Case No. SCV0039098]

**FRESHLY'S NOTICE OF REMOVAL**

**PLEASE TAKE NOTICE** that, pursuant to 28 U.S.C. §§ 1332, 1441, 1446 and 1453, defendant Freshly, Inc. ("Freshly"), by its attorneys, Goodwin Procter LLP, hereby gives notice of removal of the above-captioned case, currently pending in the Superior Court of the State of California for the County of Placer as Case No. SCV0039098, to the United States District Court for the Eastern District of California.

Pursuant to 28 U.S.C. §§ 1332, 1441(a), 1446(a), and 1453, this case is removable because it presents a diversity of citizenship among the parties and therefore satisfies the requirements of 28 U.S.C. §§ 1332. The grounds for removal are as follows:

**PROCEDURAL HISTORY AND SUMMARY OF THE COMPLAINT**

This putative class action was commenced in the Superior Court of California, Placer County, Case No. SCV0039098, by plaintiff, Kyle Johnson ("Plaintiff") against Freshly, Inc. ("Defendant" or "Freshly"). Plaintiff filed the Complaint with the Clerk of the Superior Court of California for the County of Placer (the "State Court Action") on or about February 27, 2017.

In his Complaint, Plaintiff alleges that he and putative class members suffered damages in purchasing Defendant's meal-delivery subscription service (the "Service"). Specifically, Plaintiff alleges that the Service's terms and conditions violated California's Automatic Renewal Law, (Cal. Bus. & Prof. Code §§ 17600 *et seq.* ("ARL")). Plaintiff alleges that Freshly is liable for purported violations of the ARL, Complaint ¶¶ 35–50, and the Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200 *et seq.*) Complaint ¶¶ 51–58.

Plaintiff sues on his own behalf and on behalf of a putative class that he defines as follows: "All persons within California that, within the applicable statute of limitations period up to and including October 23, 2015, purchased any product or service in response to an offer constituting an 'Automatic Renewal' as defined by

1 [California Business and Professions Code] § 17601 from Freshly, Inc., its  
 2 predecessors, or its affiliates.” Complaint ¶ 27.

3 Plaintiff seeks various forms of relief, including: (a) declaratory relief; (b)  
 4 injunctive relief; (c) damages; (d) restitution; and (e) attorneys’ fees and costs  
 5 pursuant to California Code of Civil Procedure § 1021.5. Complaint pp. 15–16  
 6 (“Prayer for Relief”).

7 **THIS COURT HAS JURISDICTION**

8 **UNDER THE CLASS ACTION FAIRNESS ACT**

9 Freshly removes this action pursuant to 28 U.S.C. §§ 1332, 1441(a), 1446(a),  
 10 and 1453. This Court has original jurisdiction over this action pursuant to 28 U.S.C.  
 11 § 1332(d)(2)(A). Specifically, this Court has jurisdiction over this putative class  
 12 action under the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1332(d),  
 13 because (1) at least one putative class action member is a citizen of a State different  
 14 from at least one defendant; (2) the putative class action consists of at least one  
 15 hundred (100) putative class members; and (3) the amount in controversy, after  
 16 aggregating the claims of the proposed class members, exceeds \$5 million,  
 17 exclusive of interests and costs. *See* 28 U.S.C. § 1332(d).

18 This action may be removed to this Court pursuant to 28 U.S.C. § 1441(a),  
 19 which allows for the removal of any civil action brought in a state court of which the  
 20 District Courts of the United States have original jurisdiction, by the defendant, to  
 21 the District Court of the United States for the district and division embracing the  
 22 place where such action is pending.

23 The requirements for CAFA removal are met here.

24 **STATUTORY REQUIREMENTS**

25 The statutory requirements for CAFA removal are met here.

26 **Effective Date.** CAFA is applicable to the Action because it was commenced  
 27 after the effective date of the Act. Notes to 28 U.S.C. §§ 1332 & 1453 (“The  
 28 amendments made by this Act shall apply to any civil action commenced on or after

1 the date of enactment of this Act [February 18, 2005]”), citing Pub. L. 109-2, § 9,  
2 119 Stat. 14.

3 **Class Action.** The State Court Action is a “class action” within the meaning  
4 of CAFA because Plaintiff seeks to represent a “Class” of persons within California.  
5 Complaint ¶ 27; 28 U.S.C. §§ 1332(d)(1)(B), 1453(a).

6 **Minimal Diversity of Citizenship.** First, this action may be removed  
7 because there exists minimal diversity of citizenship of the parties pursuant to 28  
8 U.S.C. § 1332(d)(2)(A) both at the time of filing of the action in the Superior Court  
9 of California, Placer County, and at the time of the filing of this Notice of Removal,  
10 in that at least one member of the putative class, including Plaintiff, is a citizen of a  
11 different state than Defendant Freshly. *See Abrego v. Dow Chem. Co.*, 443 F.3d  
12 676, 680 n.5 (9th Cir. 2006).

13 Although Plaintiff does not directly allege his citizenship in the Complaint, he  
14 seeks to represent and alleges that he is a member of the class defined as “All  
15 persons within California...”. Complaint ¶¶ 27, 31; *see also* Complaint ¶ 1  
16 (“Plaintiff and Class Members are consumers for purposes of Cal. Bus. & Prof.  
17 Code §§ 17600–17606.”); *see also* Cal. Bus. & Prof. Code § 17602 (“It shall be  
18 unlawful for any business making an automatic renewal or continuous service offer  
19 to a consumer in this state to do any of the following . . .”). As such, the  
20 Complaint establishes that Plaintiff is a citizen of the State of California for  
21 diversity purposes pursuant to 28 U.S.C. § 1332.

22 The Complaint incorrectly alleges that Defendant is a Delaware corporation  
23 with its principal place of business in Arizona. Complaint ¶ 18. In fact, Defendant  
24 Freshly is a corporation duly organized under the laws of Delaware with its  
25 principal place of business in New York. *See Exhibit C*, Declaration of Michael  
26 Wystrach in Support of Notice of Removal of Defendant Freshly, Inc. (“Wystrach  
27 Declaration”), ¶¶ 3–4. Freshly therefore is a citizen of the States of Delaware and  
28 New York for diversity purposes under 28 U.S.C. § 1332. *See* 28 U.S.C.



§ 1332(c)(1) (“[A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . .”); *see also Hertz Corp. v. Friend*, 559 U.S. 77, 80–81 (2010). However, regardless of whether Defendant’s principal place of business is in Arizona or New York, because Plaintiff is domiciled in California and Freshly is incorporated in Delaware, minimal diversity exists.

**Putative Class Numerosity.** Second, the number of members of the putative class action brought by Plaintiff exceeds one hundred. *See* 28 U.S.C. § 1332(d)(5)(B); *Visendi v. Bank of Am., N.A.*, 733 F.3d 863, 868 (9th Cir. 2013). The CAFA numerosity requirement that there be at least 100 putative class members is satisfied in this case as the Complaint alleges that Plaintiff “believes that the total number of Class members is at least in the tens of thousands . . . .” Complaint ¶ 29.

**Amount in Controversy.** Third, the amount in controversy requirement of 28 U.S.C. § 1332(d)(6) is satisfied because the aggregate value of the amount in controversy based on Plaintiff’s allegations exceeds five million dollars (\$5,000,000), exclusive of interest and costs. *See Lewis v. Verizon Communs., Inc.*, 627 F.3d 395, 398–99 (9th Cir. 2010). Congress intended that federal jurisdiction properly be exercised under CAFA “if the value of the matter in litigation exceeds \$5,000,000 either from the viewpoint of the plaintiff or the viewpoint on the defendant, and regardless of the type of relief sought (e.g. damages, injunctive relief, or declaratory relief).” S. Rep. No. 109-14, \*42. While Freshly does not concede that a class can be certified, or that it engaged in any unlawful conduct, the allegations of the Complaint makes clear that the amount in controversy requirement is satisfied. For removal purposes, establishing the amount in controversy under CAFA requires only that a defendant provide a short and plain statement of the basis for jurisdiction, the equivalent of that required for a plaintiff filing a complaint. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 544 (2014). This means “a defendant’s notice of removal need only include a plausible

1 allegation that the amount in controversy exceeds the jurisdictional threshold.” *Id.*

2 Although Plaintiff does not plead a specific damages amount, Plaintiff claims  
3 that he and the putative class members are entitled to, *inter alia*, restitution,  
4 attorneys’ fees, and injunctive relief. Complaint pp. 15–16.<sup>1</sup> It is well-settled that  
5 all of these amounts, including the value of any injunctive relief, count toward the  
6 jurisdictional threshold. 28 U.S.C. § 1332(b); *Guglielmino v. McKee Foods Corp.*,  
7 506 F.3d 696 (9th Cir. 2007) (attorneys’ fees); *Brady v. Mercedes-Benz USA, Inc.*,  
8 243 F. Supp. 2d 1004, 1010-11 (N.D. Cal. 2002) (“a reasonable estimate of  
9 [attorneys’] fees likely to be incurred to resolution” counts toward the amount in  
10 controversy); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002) (injunctive  
11 relief); *Jackson v. American Bar Ass’n*, 538 F.2d 829, 831 (9th Cir. 1976)  
12 (injunctive relief).

13 The following demonstrates that more than \$5 million is in controversy for  
14 jurisdictional purposes:

15 a. First, Plaintiff does not specify the exact size of the proposed class, but  
16 he alleges that the class consists of “All persons within California that,  
17 within the applicable statute of limitations period up to and including  
18 October 23, 2015, purchased any product or service in response to an  
19 offer constituting an ‘Automatic Renewal’ as defined by [California  
20 Business and Professions Code] § 17601 from Freshly, Inc., its  
21 predecessors, or its affiliates,” Complaint ¶ 27, and that he “believes  
22 that the total number of Class members is at least in the tens of  
23 thousands,” and that the purported “Class is numerous that individual  
24 joinder of all its members is impracticable.” *Id.* ¶ 29.

25 b. Under the UCL cause of action, Plaintiff seeks both “restitution  
26 pursuant to Cal. Bus. & Prof. Code § 17203 for all monies paid by  
27

28 <sup>1</sup> Freshly, of course, reserves all rights to dispute the facts alleged in the Complaint and to raise merits and other defenses.

Class Members under the subscription agreements from December 1, 2010, to the date of such restitution at rates specified by law,” Complaint ¶ 56, and “enforce[ment] [of] all applicable penalty provisions pursuant to Cal. Bus. & Prof. Code § 17202 . . . .” *Id.* ¶ 57. Under the ARL causes of action, Plaintiff seeks “all civil remedies that apply to a violation of Article 9, of Chapter 1, of Part 3, of Division 7 of the Cal. Bus. & Prof. Code,” *Id.* ¶ 38, 49, and restitution. *Id.* ¶ 43. In his Prayer for Relief, Plaintiff seeks “the Court award to Plaintiff and Class Members damages and full restitution . . . in the amount of their subscription agreement payments,” and “reasonable attorneys’ fees and costs pursuant to California Code of Civil Procedure § 1021.5, and/or other applicable law.” Complaint pp. 15–16.

- c. From December 1, 2010 through October 23, 2015, Freshly’s sales to residents of California *exceeded* \$4.2 million. *See Exhibit C*, Wystrach Declaration, ¶ 5 (emphasis added).
- d. Second, Plaintiff’s request for attorneys’ fees, Complaint p. 16, 58, is also considered for purposes of determining the amount in controversy. *See Guglielmino*, 506 F.3d at 700 (“Section 1332(a)’s amount-in-controversy requirement excludes only ‘interest and costs’ and therefore includes attorneys’ fees). And “[t]he parties may submit evidence outside the complaint, including affidavits or declarations, or other ‘summary-judgment-type evidence relevant to the amount in controversy at the time of removal.’” *Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015) (quoting *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir.1997)).
- e. Plaintiff’s counsel has represented to Defendant’s counsel that he intends to seek substantially more than \$1,000,000 in attorneys’ fees if this matter proceeds to trial. **Exhibit D**, Declaration of Steven A. Ellis

1 in Support of Notice of Removal of Defendant Freshly, Inc. (“Ellis  
2 Declaration”), ¶ 2. Assuming Plaintiff’s counsel received this amount  
3 in attorneys’ fees, adding that amount to just the amount the putative  
4 class could arguably receive by restitution alone would push the total  
5 amount in controversy above \$5,000,000 (\$1,000,000 + \$4,200,001).

6 f. Plaintiff’s counsel has further represented that he and others at his firm  
7 would need to expend over 1000 hours of work if this matter proceeded  
8 to trial. Ellis Declaration ¶ 3. And Plaintiff’s counsel, Scott J. Ferrell,  
9 testified 5 years ago that he had an hourly rate of \$750 per hour. *See*  
10 **Exhibit E**, Declaration of Scott J. Ferrell in Support of Defendant’s  
11 Motion for Award of Attorneys’ Fees, ¶ 8. Presumably, Plaintiff’s  
12 counsel rate has increased since 2012. If Plaintiff’s counsel billed 1000  
13 hours to this matter an hourly rate of \$800, he would seek \$800,000 in  
14 fees. Assuming Plaintiff’s counsel received this amount in attorneys’  
15 fees, adding that amount to just the amount the putative class could  
16 arguably receive by restitution alone would push the total amount in  
17 controversy above \$5,000,000 (\$800,000 + \$4,200,001).

18 g. In addition to Plaintiff’s counsel’s representations regarding the amount  
19 of attorneys’ fees he intends to seek, Ninth Circuit authority regarding  
20 the calculation of fees also demonstrates that the amount in controversy  
21 is satisfied. A “district court may exercise its discretion to choose  
22 between the lodestar and percentage method in calculating fees.” *In re*  
23 *Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir.  
24 2010). Using either calculation method here satisfies the amount in  
25 controversy requirement.

26 h. Under the percentage method, Ninth Circuit “ courts typically calculate  
27 25% of the fund as the ‘benchmark’ for a reasonable fee award,  
28 providing adequate explanation in the record of any ‘special

circumstances' justifying a departure." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) (quoting *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.1990)). Multiplying this benchmark by the amount the putative class could arguably receive by restitution alone yields \$1,050,000.25 in fees for Plaintiff's counsel (\$4,200,001 x .25), pushing the amount in controversy above \$5,000,000.

- i. Alternatively, Plaintiff's complaint references seeking fees under Code of Civil Procedure § 1021.5. Complaint ¶ 16. When a party is entitled to attorneys' fees under Code of Civil Procedure section 1021.5, the Ninth Circuit has indicated that the amount of the award is best determined according to the guidelines set forth by the California Supreme Court in *Serrano III*." *Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, 321 (1983) (citing *Serrano v. Priest*, 20 Cal. 3d 25, 48–49 (1977)). "Under *Serrano III*, a court assessing attorney fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case.'" *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131–32 (2001) (quoting *Serrano*, 20 Cal. 3d at 48). And "the lodestar is the basic fee for comparable legal services in the community; it may be adjusted by the court based on factors including . . . (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award." *Id.* at 1132. The "relevant community" for purposes of determining the prevailing market rate is the "forum in which the district court sits." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). "Courts in the Eastern



District of California have regularly approved hourly rates of \$400 or more for partners or experienced attorneys, \$150-175 for associates, and \$100 for law clerks in similarly complex cases.” *Estrada v. iYogi, Inc.*, No. CV21301989WBSCKD, 2016 WL 310279, at \*6 (E.D. Cal. Jan. 26, 2016).

- j. California courts often apply a multiplier to 1021.5 fees based on the contingent nature of the fee award, *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 579 (2004), and multipliers generally range from 2 to 4. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001).
- k. Plaintiff’s counsel has represented that he and others at his firm would expend more than 1,000 hours to litigate this class action through motion practice, discovery, summary judgment, class certification, and trial. **Exhibit D**, Ellis Declaration, ¶ 3. Here, assuming the Court applied a rate of \$400 per hour for Plaintiff’s counsel’s efforts, and found 1,001 hours reasonable, and then applied a multiplier of 2, Plaintiff’s counsel could receive \$800,800. When added to the amount the putative class may receive through restitution alone, the total amount in controversy exceeds \$5,000,000 (\$4,200,001 + \$800,800). Thus, under either a lodestar or percentage method, the amount in controversy reasonably exceeds \$5,000,000.
- l. Third, actual damages are not the final word on valuing the amount in controversy for diversity jurisdiction purposes. “In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation.” *Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333, 347, (U.S. 1977); *see also Richard C. Young & Co., Ltd. v. Leventhal*, 389 F.3d 1, 3 (1st Cir. 2004); *see also Ronzio v. Denver & R.G.W.R. Co.*, 116 F.2d 604, 606 (10th Cir. 1940) (“[T]he test for determining the



amount in controversy is the pecuniary result to either party which the judgment would directly produce.”). Thus, in accordance with the allegations in Plaintiff’s complaint, the cost of any such injunction would further increase the amount in controversy.

m. And Plaintiff’s request “That the Court award such other and further relief as this Court may deem appropriate,” Complaint p. 16, leaves open the opportunity for additional recovery beyond that alleged in the Complaint.<sup>2</sup>

When all of the relief Plaintiff seeks is considered together, it is “more likely than not” there is more than \$5,000,000 in controversy in this action.

**Jurisdiction is Mandatory.** Jurisdiction is mandatory, not discretionary, under CAFA because Defendant Freshly is not a citizen of California—the “state in which th[is] action was originally filed.” 28 U.S.C. § 1332(d)(3).

**No CAFA Exceptions Apply.** Although Freshly does not bear the burden of showing that CAFA’s exceptions to jurisdiction in 28 U.S.C. § 1332(d) are inapplicable, *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1023 (9th Cir. 2007), none of those exceptions apply here.

First, the exception in 28 U.S.C. § 1332(d)(4)(A) does not apply because the only named defendant, Freshly, is not a citizen of California. **Exhibit C**, Wystrach Declaration, ¶ 4. Thus, the exception in 28 U.S.C. § 1332(d)(4)(A) does not apply.

Second, the exception in 28 U.S.C. § 1332(d)(4)(B) does not apply because the primary (and only) defendant, Freshly, is not a citizen of the state of California, the state in which the action was originally filed. **Exhibit C**, Wystrach Declaration, ¶ 4.

Third, the exception in 28 U.S.C. § 1332(d)(5)(A) does not apply because the primary (and only) defendant is not a State, State official, or other governmental

<sup>2</sup> See Fed. R. Civ. P. 54(c) (providing that a court should award “relief to which each party is entitled,” though not specifically demanded in the pleadings).

entity.

Fourth, the exception in 28 U.S.C. § 1332(d)(5)(B) does not apply because the number of putative class members is alleged to be “at least in the tens of thousands . . . .” Complaint ¶ 29.

Fifth, the exception in 28 U.S.C. § 1332(d)(9) does not apply because this case does not (i) concern a covered security as defined under federal securities laws; (ii) relate to the internal affairs or governance of a corporation or other form of business enterprise; or (iii) relate to the rights, duties, and obligations relating to or created by or pursuant to any security.

### **PROCEDURAL REQUIREMENTS**

The procedural requirements for removal are met here.

**Removal To Proper Court.** This Court is part of the “district and division” embracing the place where the State Court Action was filed—Placer County, California—and so is a proper venue for removal. *See* 28 U.S.C. §§ 1441(a), 1446(a).

**Removal Is Timely.** The Summons and Complaint were received by Freshly, via service upon Registered Agent Solutions, Inc., on March 13, 2017. Removal is timely because the action is being removed within thirty (30) days of the date that Freshly, the removing defendant, was served with notice of the suit. *See* 28 U.S.C. § 1446(b); *Murphy Bros. v Michetti Pipestringing, Inc.*, 526 U.S. 344, 350–51 (1999).

**Pleadings, Process, and Orders.** Attached hereto as **Exhibit A** is a true and correct copy of all pleadings, process, and orders received by Freshly in the State Court Action. *See* 28 U.S.C. § 1446(a).

**Notice.** A Notice of Filing of Notice of Removal will be timely filed with the clerk of the state court in which the State Court Action is pending and served on Plaintiff, pursuant to 28 U.S.C. § 1446(d). A true and correct copy of the Notice of Filing of Notice of Removal (without exhibits) is attached hereto as **Exhibit B**.

1       **Consent.** Freshly, the only named defendant, consents to and is seeking the  
2 removal of this action. Thus, 28 U.S.C. § 1446(b)(2)(A) is met.

3       **Signature.** This Notice of Removal is signed pursuant to Fed. R. Civ. P. 11.  
4 See 28 U.S.C. § 1446(a).

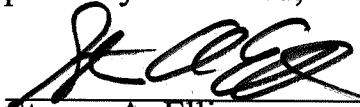
5       **Bond and Verification.** Pursuant to Section 1016 of the Judicial  
6 Improvements and Access to Justice Act of 1988 (the "Act"), no bond is required in  
7 connection with this Notice of Removal. Pursuant to Section 1016 of the Act, this  
8 Notice need not be verified.

9       **Reservation of Rights.** In the event that Plaintiff seeks to remand this case,  
10 or the Court considers remand *sua sponte*, Freshly respectfully requests the  
11 opportunity to submit such additional argument or evidence in support of removal as  
12 may be necessary. By filing this Notice of Removal, Freshly does not waive and  
13 expressly reserves its right to object to service of process, the sufficiency of process,  
14 personal jurisdiction, and venue. Freshly specifically reserves the right to assert any  
15 defenses and/or objections to which it may be entitled.

16  
17       WHEREFORE, this action should proceed in the United States District Court  
18 for the Eastern District of California, as an action properly removed thereto.

19       Dated:       April 12, 2017

Respectfully submitted,

20  
21       By:   
22       Steven A. Ellis  
23       **GOODWIN PROCTER LLP**  
24       601 S Figueroa Street, 41st Floor  
25       Los Angeles, California 90017  
26       Tel.: +1 213 426 2500  
27       Fax.: +1 213 623 1673

28       Attorney for Defendant:  
Freshly, Inc,

**PROOF OF SERVICE**

*Johnson v. Freshly Inc.*

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 601 South Figueroa Street, 41st Floor, Los Angeles, California 90017.

On April 12, 2017, I served the following documents on the person(s) below as follows:

**NOTICE OF REMOVAL**

PACIFIC TRIAL ATTORNEYS APC  
Scott J. Ferrell  
Victoria C. Knowles  
4100 Newport Place, Ste. 800  
Newport Beach, CA 92660

Counsel for Plaintiff: *Kyle Johnson*  
Tel. 949.706.6464  
Fax: 949.706.6469  
*sferrell@pacifictrialattorneys.com*  
*vkowles@pacifictrialattorneys.com*

☐ (MAIL). By United States mail. I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am employed in the county where mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

☒ (OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by FedEx, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as stated above, with fees for overnight delivery paid or provided for.

I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction this service was made and that the foregoing is true and correct.

Executed on April 12, 2017, at Los Angeles, California.

Adriana Avalos  
(Type or print name)

  
(Signature)

# ***EXHIBIT A***



1 PACIFIC TRIAL ATTORNEYS  
A Professional Corporation

2 Scott J. Ferrell, Bar No. 202091

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3 Victoria C. Knowles, Bar No. 277231

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4 4100 Newport Place, Ste. 800

Newport Beach, CA 92660

5 Tel: (949) 706-6464

6 Fax: (949) 706-6469

7 Attorneys for Plaintiff

**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF PLACER

**FEB 27 2017**

JAKE CHATTERS  
EXECUTIVE OFFICER & CLERK  
By: C. Lester, Deputy

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **FOR THE COUNTY OF PLACER**

10  
11 KYLE JOHNSON, individually and on behalf of  
all others similarly situated,

12 Plaintiff,

13 v.

14 FRESHLY, INC., a Delaware corporation; and  
15 DOES 1 – 10, inclusive,

16 Defendants.

Case No.

**SCV0039098**

CLASS ACTION COMPLAINT FOR:

1. VIOLATIONS OF CALIFORNIA'S  
AUTOMATIC RENEWAL LAW  
(BUSINESS AND PROFESSIONS CODE §§  
17600-17604); AND
2. VIOLATIONS OF CALIFORNIA'S  
UNFAIR COMPETITION LAW (BUSINESS  
AND PROFESSIONS CODE §§ 17200-  
17204)

**BY FAX**



Plaintiff Kyle Johnson ("Plaintiff"), on behalf of himself and all others similarly situated, complains and alleges as follows:

### INTRODUCTION & OVERVIEW OF CLAIMS

1. Plaintiff brings this class action on behalf of himself and a class of others similarly situated consisting of all persons who, within the applicable statute of limitations period, purchased subscriptions for products (such as "Chef prepared meals delivered to your door") from Freshly, Inc. ("Defendant"). The class of others similarly situated to Plaintiff is referred to herein as "Class Members." The claims for damages, restitution, injunctive and/or other equitable relief, and reasonable attorneys' fees and costs arise under California Business and Professions Code (hereinafter "Cal. Bus. & Prof. Code") §§ 17602, 17603, 17604) and 17200, *et seq.*, and California Code of Civil Procedure § 1021.5. Plaintiff and Class Members are consumers for purposes of Cal. Bus. & Prof. Code §§ 17600-17606.

2. During the Class Period, Defendant made automatic renewal or continuous service offers to consumers in California and (a) at the time of making the automatic renewal or continuous service offers, failed to present the automatic renewal offer terms or continuous service offer terms, in a clear and conspicuous manner and in visual proximity to the request for consent to the offer before the subscription or purchasing agreement was fulfilled in violation of Cal. Bus. & Prof. Code § 17602(a)(1); (b) charged Plaintiff's and Class Members' credit or debit cards, or third-party account (hereinafter "Payment Method") without first obtaining Plaintiff's and Class Members' affirmative consent to the agreement containing the automatic renewal offer terms or continuous service offer terms in violation of Cal. Bus. & Prof. Code § 17602(a)(2); and (c) failed to provide an acknowledgment that includes the automatic renewal or continuous service offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer in violation of Cal. Bus. & Prof. Code §§ 17602(a)(3) and 17602(b). As a result, all goods, wares, merchandise, or products sent to Plaintiff and Class Members under the automatic renewal of continuous service agreements are deemed to be an unconditional gift pursuant to Cal. Bus. & Prof. Code § 17603.

///

3. As a result of the above, Plaintiff, on behalf of himself and Class Members, seeks damages, restitution, declaratory relief, injunctive relief and reasonable attorneys' fees and costs pursuant to Cal. Bus. & Prof. Code, §§ 17603, 17203, and 17204, and Code of Civil Procedure § 1021.5.

#### JURISDICTION AND VENUE

4. This Court has jurisdiction over all causes of action asserted herein.

5. Venue is proper in this Court because Defendant knowingly engages in activities directed at consumers in this County and conducted wrongful conduct alleged herein against residents of this County.

6. Defendant and other out-of-state participants can be brought before this Court pursuant to California's "long-arm" jurisdictional statute.

#### PARTIES

7. Plaintiff purchased a subscription plan from Defendant in California during the Class Period. Plaintiff and Class Members are consumers as defined under Cal. Bus. & Prof. Code § 17601(d).

8. Plaintiff is informed and believes, and upon such information and belief alleges, that Defendant Freshly, Inc. is a Delaware corporation with its principal place of business located at 2013 East Cedar Street, Tempe, Arizona 85281. Defendant operates in California and has done business in California at all times during the Class Period. Also during the Class Period, Defendant made, and continues to make, automatic renewal or continuous service offers to consumers in California. Defendant operates a website which markets and sells meal plans.

9. The true names and capacities of the Defendants sued herein as DOES 1 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues such Defendants by fictitious names. Each of the Defendants designated herein as a DOE is legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend this Complaint to reflect the true names and capacities of the DOE Defendants when such identities become known.

10. At all relevant times, each and every Defendant was acting as an agent and/or employee of each of the other Defendants and was acting within the course and/or scope of said



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1 agency and/or employment with the full knowledge and consent of each of the Defendants. Each of  
2 the acts and/or omissions complained of herein were alleged and made known to, and ratified by, each  
3 of the other Defendants (Freshly, Inc. and DOE Defendants will hereafter collectively be referred to as  
4 "Defendant").

## 5 **FACTUAL BACKGROUND**

### 6 **California Business Professions Code §§ 17600-17606**

7 11. On December 1, 2010, sections 17600-17606 of the Cal. Bus. & Prof. Code came into  
8 effect. The Legislature's stated intent for this Article was to end the practice of ongoing charges to  
9 consumers' Payment Methods without consumers' explicit consent for ongoing shipments of a  
10 product or ongoing deliveries of service. See Cal. Bus. & Prof. Code § 17600.

11 12. Cal. Bus. & Prof. Code § 17602(a) makes it unlawful for any business making an  
12 automatic renewal or continuous service offer to a consumer in this state to do any of the following:

- 13 (1) Fail to present the automatic renewal offer terms or continuous service offer  
14 terms in a clear and conspicuous manner before the subscription or purchasing  
15 agreement is fulfilled and in visual proximity, or in the case of an offer  
16 conveyed by voice, in temporal proximity, to the request for consent to the  
17 offer.
- 18 (2) Charge the consumer's credit or debit card or the consumer's account with a  
19 third party for an automatic renewal or continuous service without first  
20 obtaining the consumer's affirmative consent to the agreement containing the  
21 automatic renewal offer terms or continuous service offer terms.
- 22 (3) Fail to provide an acknowledgment that includes the automatic renewal or  
23 continuous service offer terms, cancellation policy, and information regarding  
24 how to cancel in a manner that is capable of being retained by the consumer. If  
25 the offer includes a free trial, the business shall also disclose in the  
26 acknowledgment how to cancel and allow the consumer to cancel before the  
27 consumer pays for the goods or services.

28 13. Cal. Bus. & Prof. Code § 17601(a) defines the term "Automatic renewal" as a "plan or  
arrangement in which a paid subscription or purchasing agreement is automatically renewed at the end  
of a definite term for a subsequent term."

14. Cal. Bus. & Prof. Code § 17601(b) defines the term "Automatic renewal offer terms"  
as "the following clear and conspicuous disclosures: (1) That the subscription or purchasing  
agreement will continue until the consumer cancels. (2) The description of the cancellation policy that  
applies to the offer. (3) The recurring charges that will be charged to the consumer's credit or debit

1 card or payment account with a third party as part of the automatic renewal plan or arrangement, and  
2 that the amount of the charge may change, if that is the case, and the amount to which the charge will  
3 change, if known. (4) The length of the automatic renewal term or that the service is continuous,  
4 unless the length of the term is chosen by the consumer. (5) The minimum purchase obligation, if any.”

5 15. Pursuant to Cal. Bus. & Prof. Code § 17601(c), “clear and conspicuous” or “clearly and  
6 conspicuously” means “in larger type than the surrounding text, or in contrasting type, font, or color  
7 to the surrounding text of the same size, or set off from the surrounding text of the same size by  
8 symbol ls or other marks, in a manner that clearly calls attention to the language.”

9 16. Section 17602(b) provides: “A business making automatic renewal or continuous  
10 service offers shall provide a toll-free telephone number, electronic mail address, a postal address only  
11 when the seller directly bills the consumer, or another cost-effective, timely, and easy-to-use  
12 mechanism for cancellation that shall be described in the acknowledgment specified in paragraph (3)  
13 of subdivision (a).”

14 17. Section 17603 of Cal. Bus. & Prof. Code provides: “In any case in which a business  
15 sends any goods, wares, merchandise, or products to a consumer, under a continuous service  
16 agreement or automatic renewal of a purchase, without first obtaining the consumer’s affirmative  
17 consent as described in Section 17602, the goods, wares, merchandise, or products shall for all  
18 purposes be deemed an unconditional gift to the consumer, who may use or dispose of the same in any  
19 manner he or she sees fit without any obligation whatsoever on the consumer’s part to the business,  
20 including, but not limited to, bearing the cost of, or responsibility for, shipping any goods, wares,  
21 merchandise, or products to the business.”

22 **Defendant’s Business**

23 18. Defendant offers via its website at [www.freshly.com](http://www.freshly.com), various subscriptions for delivery  
24 of prepared meals. Defendant’s product and services plan constitutes an automatic renewal and/or  
25 continuous service plan or arrangement for the purposes of Cal. Bus. & Prof. Code § 17601.

26 **Defendant’s Terms & Conditions**

27 19. During the Class Period, Defendant’s webpage, found at [www.freshly.com](http://www.freshly.com), contained a  
28 section entitled “Terms & Conditions”. This is a lengthy document in which any information



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1 concerning the recurring nature of Defendant's subscription programs and the manner in which  
2 the subscriptions may be canceled was, at all relevant times, not set forth in clear and  
3 conspicuous language, as required by the applicable statutes and as set forth below.

4 **Defendant's Terms & Conditions Failed to Provide Clear and Conspicuous Disclosures As**  
5 **Required by Law.**

6 20. During the Class Period, within the Terms & Conditions, Defendant failed to state in  
7 clear and conspicuous language (*i.e.*, in larger type than the surrounding text, or in contrasting type,  
8 font, or color to the surrounding text of the same size, or set off from the surrounding text of the same  
9 size by symbols or other marks, in a manner that clearly calls attention to the language) that:

- 10 i) The subscription or purchasing agreement will continue until the consumer  
11 cancels (there is language in capitals stating that the subscription will continue  
12 after the free trial period unless canceled, but language concerning recurring  
13 charges thereafter is not so prominently displayed);
- 14 ii) Described the cancellation policy that applies to the offer;
- 15 iii) Recurring charges that will be charged to the consumer's Payment Method  
16 account with a third party as part of the automatic renewal plan or arrangement,  
17 and that the amount of the charge may change, if that is the case, and the  
18 amount to which the charge will change, if known; and
- 19 iv) The length of the automatic renewal term or that the service is continuous  
20 unless the length of tile term is chosen by the consumer.

21 21. By letter dated October 23, 2015, counsel for Plaintiff notified Defendant that its  
22 website did not comply with the provisions of the Auto- Renewal Statutes as set forth herein.  
23 Evidently in response to this letter, Defendant has revised the Terms & Conditions to include a  
24 separate "Pause or Cancel a Subscription" section. This fact underscores strongly the correctness and  
25 validity of Plaintiff's position and of the factual and legal contentions set forth in this Complaint.

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**Defendant Failed to Present the Automatic Renewal Offer Terms or Continuous Service Offer Terms in a Clear and Conspicuous Manner Before the Subscription or Purchasing Agreement was Fulfilled and in Visual Proximity to the Request for Consent to the Offer in Violation of Cal. Bus. & Prof. Code § 17602(a)(1), (2).**

22. During the Class Period, Defendant made an automatic renewal offer for its subscriptions plans to Consumers in the United States, including Plaintiff and Class Members. On the page where the subscriber essentially finalized the purchase, there was no description of that policy. Accordingly, the website did not contain automatic renewal offer terms or continuous service offer terms as defined by Cal. Bus. & Prof. Code § 17601(b).





Defendant failed to obtain Plaintiff's and Class Members' affirmative consent to the automatic renewal offer terms or continuous service offer terms as required by Cal. Bus. & Prof. Code § 17602(a)(1), (2).

24. Because of Defendant's failure to gather affirmative consent to the automatic renewal terms, all goods, wares, merchandise, or products, sent to Plaintiff and Class Members under the automatic renewal or continuous service agreement are deemed to be an unconditional gift pursuant to Cal. Bus. & Prof. Code § 17603, and Plaintiff and Class Members may use or dispose of the same in any manner they see fit without any obligation whatsoever on their part to Defendant, including, but not limited to, bearing the cost of, or responsibility for, shipping any goods, wares, merchandise or products.

25. By letter dated October 23, 2015, counsel for Plaintiff notified Defendant that its website did not comply with the provisions of the Auto-Renewal Statutes as set forth herein. Evidently in response to this letter, Defendant has inserted language, on the page where a subscriber finalizes a purchase, to the effect that one may "Pause or Cancel Anytime." This fact underscores strongly the correctness and validity of Plaintiff's position and of the factual and legal contentions set forth in this Complaint.

**Defendant Failed to Provide an Acknowledgment as Required by Cal. Bus. & Prof. Code §§ 17602(a)(3) and 17602(b)**

26. Furthermore, and in addition to the above, after Plaintiff and Class Members subscribed to one of Defendant's subscription plans, Defendant has failed, and continues to fail, to provide an acknowledgement that includes the automatic renewal or continuous service offer terms, cancellation policy, and information on how to cancel in a manner that is capable of being retained by Plaintiff and Class Members in violation of Cal. Bus. & Prof. Code §§ 17602(a)(3) and 17602(b).

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Please find the confirmation for my Freshly deliveries. I haven't received an email confirmation yet, but I will forward it to you when it comes.

PLAN	DELIVERY DATE	MEALS	CHECKOUT	MENU
Refer and Earn				
Thank you! Your order has been received.				
ORDER NUMBER	DATE	TOTAL	PAYMENT METHOD	
	October 18, 2015	\$69.00 / week	Credit Card	
View the status of your subscription in your account.				
<b>Order Details</b>				
PRODUCT		TOTALS		
Freshly Flex 6				
meals per week: 6		\$69.00		
Delivered: Thursdays				
PAYMENT METHOD:		Credit Card		
TOTAL:		\$69.00 / week		

### CLASS ACTION ALLEGATIONS

27. Plaintiff brings this class action for damages and other monetary and injunctive relief on behalf of the following class:

"All persons within California that, within the applicable statute of limitations period up to and including October 23, 2015, purchased any product or service in response to an offer constituting an "Automatic Renewal" as defined by § 17601(a) from Freshly, Inc., its predecessors, or its affiliates."

28. Excluded from the Class are governmental entities, Defendant, any entity in which Defendant has a controlling interest, and Defendant's officers, directors, affiliates, legal representatives, employees, co-conspirators, successors, subsidiaries, and assigns, and individuals bound by any prior settlement. Also, excluded from the Class is any judge, justice, or judicial officer

29. The proposed Class is so numerous that individual joinder of all its members is impracticable. Due to the nature of the trade and commerce involved, however, Plaintiff believes that the total number of Class members is at least in the tens of thousands and members of the Class are numerous and geographically dispersed across the United States. While the exact number and identities of the Class members are unknown at this time, such information can be ascertained through appropriate investigation and discovery. The disposition of the claims of the Class members in a single class action will provide substantial benefits to all parties and to the Court.

30. There is a well-defined community of interest in the questions of law and fact involved affecting the plaintiff class and these common questions predominate over any questions that may affect individual Class members. Common questions of fact and law include, but are not limited to, the following:

- i. Whether during the Class Period Defendant failed to present the automatic renewal offer terms, or continuous service offer terms, in a clear and conspicuous manner before the subscription or purchasing agreement was fulfilled and in visual proximity to the request for consent to the offer in violation of Cal. Bus. & Prof. Code § 17602(a)(1);
- ii. Whether during the Class Period Defendant charged Plaintiff's and Class Members' Payment Method for an automatic renewal or continuous service without first obtaining the Plaintiff's and Class Members' affirmative consent to the automatic renewal offer terms or continuous service offer terms in violation of Cal. Bus. & Prof. Code § 17602(a)(2);
- iii. Whether during the Class Period Defendant failed to provide an acknowledgement that included the automatic renewal or continuous service offer terms, cancellation policy, and information on how to cancel in a manner that is capable of being retained by Plaintiff and Class Members, in violation of Cal. Bus. & Prof. Code § 17602(a)(3);

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- iv. Whether during the Class Period Defendant failed to provide an acknowledgment that describes a cost-effective, timely, and easy-to-use mechanism for cancellation in violation of Cal. Bus. & Prof. Code § 17602(b);
- v. Whether Plaintiff and the Class Members are entitled to restitution of money paid in circumstances where the goods and services provided by Defendant are deemed an unconditional gift in accordance with Cal. Bus. & Prof. Code § 17603;
- vi. Whether Plaintiff and Class Members are entitled to restitution in accordance with Cal. Bus. & Prof. Code §§ 17200, 17203;
- vii. Whether Plaintiff and Class Members are entitled to injunctive relief under Cal. Bus. & Prof. Code § 17203;
- viii. Whether Plaintiff and Class Members are entitled to attorneys' fees and costs under California Code of Civil Procedure § 1021.5; and
- ix. The proper formula(s) for calculating the restitution owed to Class Members.

31. Plaintiff's claims are typical of the claims of the members of the Class. Plaintiff and all members of the Class have been subjected to Defendant's common course of unlawful conduct as complained of herein and are entitled to the same statutory damages based on Defendant's wrongful conduct as alleged herein.

32. Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff has retained counsel with substantial experience in handling complex class action litigation. Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of the Class and have the financial resources to do so.

33. A class action is superior to other available methods for the fair and efficient adjudication of the present controversy. Individual joinder of all members of the class is impracticable. Even if individual class members had the resources to pursue individual litigation, it would be unduly burdensome to the courts in which the individual litigation would proceed.

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34. The conduct of this action as a class action conserves the resources of the parties and of the judicial system and protects the rights of the class members. Furthermore, for many, if not most, a class action is the only feasible mechanism that allows an opportunity for legal redress and justice.

**FIRST CAUSE OF ACTION**

**FAILURE TO PRESENT AUTOMATIC RENEWAL OFFER TERMS OR CONTINUOUS SERVICE OFFER TERMS CLEARLY AND CONSPICUOUSLY AND IN VISUAL, PROXIMITY TO THE REQUEST FOR CONSENT OFFER (CAL. BUS. & PROF. CODE § 17602(a)(1))**

**(By Plaintiff, on his own behalf and on behalf of the Class, against All Defendants)**

35. The foregoing paragraphs are alleged herein and are incorporated herein by reference.

36. Cal. Bus. Prof. Code § 17602(a)(1) provides:

(a) It shall be unlawful for any business making an automatic renewal or continuous service offer to a consumer in this state to do any of the following:

(1) Fail to present the automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity, or in the case of an offer conveyed by voice, in temporal proximity, to the request for consent to the offer.

37. Plaintiff and Class Members purchased Defendant's delivery of prepared meals and related products for personal, family or household purposes. Defendant failed to present the automatic renewal offer terms, or continuous service offer terms, in a clear and conspicuous manner and in visual proximity the request for consent to the offer before the subscription or purchasing agreement was fulfilled.

38. As a result of Defendant's violations of Cal. Bus. & Prof. Code § §17602(a)(1), Defendant is subject under Cal. Bus. & Prof. Code § 17604 to all civil remedies that apply to a violation of Article 9, of Chapter 1, of Part 3, of Division 7 of the Cal. Bus. & Prof. Code.

39. Plaintiff, on behalf of himself and Class Members, requests relief as described below.

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**FAILURE TO OBTAIN CONSUMER'S AFFIRMATIVE CONSENT  
BEFORE THE SUBSCRIPTION IS FULFILLED  
(CAL BUS. & PROF. CODE §§ 17602(a)(2) and 17603)**

**(By Plaintiff, on his own behalf and on behalf of the Class, against All Defendants)**

40. The foregoing paragraphs are alleged herein and are incorporated herein by reference.

41. Cal. Bus. & Prof. Code § 17602(a)(2) provides:

(a) It shall be unlawful for any business making an automatic renewal or continuous service offer to a consumer in this state to do any of the following:

(2) Charge the consumer's credit or debit card or the consumer's account with a third party for an automatic renewal or continuous service without first obtaining the consumer's affirmative consent to the agreement containing the automatic renewal offer terms or continuous service offer terms.

42. Plaintiff and Class Members purchased Defendant's delivery of prepared meals and related products for personal, family or household purposes. Defendant charged Plaintiff's and Class Members' Payment Method for an automatic renewal or continuous service without first obtaining Plaintiff's and Class Members affirmative consent to the Terms & Conditions containing the automatic renewal offer terms or continuous service offer terms.

43. As a result of Defendant's violations of Cal. Bus. & Prof. Code § 17602(a)(2), Defendant is liable to provide restitution to Plaintiff and Class Members under Cal. Bus. & Prof. Code § 17603.

44. Plaintiff, on behalf of himself and Class Members, requests relief as described below.

**THIRD CAUSE OF ACTION**

**FAILURE TO PROVIDE ACKNOWLEDGMENT WITH  
AUTOMATIC RENEWAL TERMS AND INFORMATION REGARDING  
CANCELLATION POLICY**

**(CAL. BUS. & PROF. CODE §§ 17602(a)(3), 17602(b))**

**(By Plaintiff, on his own behalf and on behalf of the Class, against All Defendants)**

45. The foregoing paragraphs are alleged herein and are incorporated herein by reference.

46. Cal. Bus. & Prof. Code § 17602(a)(3) provides:



(a) It shall be unlawful for any business making an automatic renewal or continuous service offer to a consumer in this state to do any of the following:

(3) Fail to provide an acknowledgment that includes the automatic renewal or continuous service offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer. If the offer includes a free trial, the business shall also disclose in the acknowledgment how to cancel and allow the consumer to cancel before the consumer pays for the goods or services.

47. Cal. Bus. & Prof. Code § 17602(b) provides:

“A business making automatic renewal or continuous service offers shall provide a toll-free telephone number, electronic mail address, a postal address only when the seller directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for cancellation that shall be described in the acknowledgment specified in paragraph (3) of subdivision (a).”

48. Plaintiff and Class Members purchased Defendant’s meal plan and related products for personal, family or household purposes. Defendant failed to provide an acknowledgement that includes the automatic renewal or continuous service offer terms, cancellation policy, and information on how to cancel in a manner that is capable of being retained by Plaintiff and Class Members.

49. As a result of Defendant’s violations of Cal. Bus. & Prof. Code §§ 17602(a)(3) and 17602(b), Defendant is subject to all civil remedies under Cal. Bus. & Prof. Code § 17604 that apply to a violation of Article 9, of Chapter 1 of Part 3, of Division 7 of the Cal. Bus. & Prof. Code.

50. Plaintiff, on behalf of himself and Class Members, requests relief as described below.

#### **FOURTH CAUSE OF ACTION**

#### **VIOLATION OF THE UNFAIR COMPETITION LAW**

**(CAL. BUS. & PROF. CODE § 17200 *et seq.*)**

**(By Plaintiff, on his own behalf and on behalf of the Class, against All Defendants)**

51. The foregoing paragraphs are alleged herein and are incorporated herein by reference.

52. Cal. Bus. & Prof. Code § 17200, *et seq.* (the “UCL”) prohibits unfair competition in the form of any unlawful or unfair business act or practice. Cal. Bus. & Prof. Code § 17204 allows “a person who has suffered injury in fact and has lost money or property” to prosecute a civil action for violation of the UCL. Such a person may bring such an action on behalf of himself or herself and others similarly situated who are affected by the unlawful and/or unfair business practice or act.

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1 Since December 1, 2010, and continuing during the Class Period, Defendant has  
2 committed unlawful and/or unfair business acts or practices as defined by the UCL, by violating Cal.  
3 Bus. & Prof. Code §§ 17602(a)(1), 17602(a)(2), 17602(a)(3) and 17602(b). The public policy which is  
4 a predicate to a UCL action under the unfair prong of the UCL is tethered to a specific statutory  
5 provision. See Cal. Bus. & Prof. Code §§ 17600, 17602.

6 54 Plaintiff has standing to pursue this claim because he suffered injury in fact and has lost  
7 money or property as a result of Defendant's actions as set forth herein. Plaintiff purchased  
8 Defendant's delivery of prepared meals and related products for personal, family, or household  
9 purposes.

10 55. As a direct and proximate result of Defendant's unlawful and/or unfair business acts or  
11 practices described herein, Defendant has received, and continues to hold, unlawfully obtained  
12 property and money belonging to Plaintiff and Class Members in the form of payments made for  
13 subscription agreements by Plaintiff and Class Members. Defendant has profited from its unlawful  
14 and/or unfair business acts or practices in the amount of those business expenses and interest accrued  
15 thereon.

16 56. Plaintiff and similarly-situated Class Members are entitled to restitution pursuant to  
17 Cal. Bus. & Prof. Code § 17203 for all monies paid by Class Members under the subscription  
18 agreements from December 1, 2010, to the date of such restitution at rates specified by law.  
19 Defendant should be required to disgorge all the profits and gains it has reaped and restore such profits  
20 and gains to Plaintiff and Class Members, from whom they were unlawfully taken.

21 57. Plaintiff and similarly situated Class Members are entitled to enforce all applicable  
22 penalty provisions pursuant to Cal. Bus. & Prof. Code § 17202, and to obtain injunctive relief  
23 pursuant to Cal. Bus. & Prof. Code § 17203.

24 58. Plaintiff has assumed the responsibility of enforcement of the laws and public policies  
25 specified herein by suing on behalf of himself and other similarly-situated Class Members. Plaintiff's  
26 success in this action will enforce important rights affecting the public interest. Plaintiff will incur a  
27 financial burden in pursuing this action in the public interest. An award of reasonable attorneys' fees  
28 to Plaintiff is thus appropriate pursuant to California Code of Civil Procedure § 1021.5.



2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiff requests the following relief:

4 A. That the Court determine that this action may be maintained as a class action, and  
5 define the Class as requested herein;

6 B. That the Court find and declare that Defendant has violated Cal. Bus. & Prof. Code §  
7 17602(a)(1) by failing to present the automatic renewal offer terms, or continuous service offer terms,  
8 in a clear and conspicuous manner and the visual proximity to the request for consent to the offer  
9 before the subscription or purchasing agreement was fulfilled;

10 C. That the Court find and declare that Defendant has violated Cal. Bus. & Prof. Code §  
11 17602(a)(2) by charging Plaintiff's and Class Members' Payment Method without first obtaining their  
12 affirmative consent to the automatic renewal offer terms or continuous service terms;

13 D. That the Court find and declare that Defendant has violated Cal. Bus. & Prof. Code §  
14 17602(a)(3) by failing to provide an acknowledgement that includes the automatic renewal or  
15 continuous service offer terms, cancellation policy and information on how to cancel in a manner that  
16 is capable of being retained by Plaintiff and Class Members;

17 E. That the Court find and declare that Defendant has violated Cal. Bus. & Prof. Code §  
18 17602(b) by failing to provide an acknowledgment that describes a toll-free telephone number,  
19 electronic mail address, a postal address only when the seller directly bills the consumer, or another  
20 cost-effective, timely, and easy-to-use mechanism for cancellation;

21 F. That the Court find and declare that Defendant has violated the UCL and committed  
22 unfair and unlawful business practices by violating Cal. Bus. & Prof. Code § 17602;

23 G. That the Court award to Plaintiff and Class Members damages and full restitution due  
24 to Defendant's UCL violations, pursuant to Cal. Bus. & Prof. Code §§ 17200-17205 in the amount of  
25 their subscription agreement payments;

26 H. That the Court find that Plaintiff and Class Members are entitled to injunctive relief  
27 pursuant to Cal. Bus. & Prof. Code § 17203;

28 ///

1 I. That Plaintiff and the Class be awarded reasonable attorneys' fees and costs pursuant to  
2 Case 2:17-cv-00773-MCE-CKD Document 1-1 Filed 04/12/17 Page 18 of 22  
California Code of Civil Procedure § 1021.5, and/or other applicable law, and

3 J. That the Court award such other and further relief as this Court may deem appropriate.  
4

5 Dated: February 24, 2017

PACIFIC TRIAL ATTORNEYS, APC

6 By:   
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8 Scott. J. Ferrell  
9 Attorneys for Plaintiff  
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ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Scott J. Ferrell (Bar #202091) PACIFIC TRIAL ATTORNEYS, A Professional Corporation 4100 Newport Place Drive, Suite 800, Newport Beach, CA 92660 TELEPHONE NO.: (949) 706-6464 FAX NO.: ATTORNEY FOR (Name): Plaintiff Victoria Kissel		<b>FOR COURT USE ONLY</b>  <div style="font-size: 2em; font-weight: bold; margin: 10px 0;">FILED</div> SUPERIOR COURT OF CALIFORNIA COUNTY OF PLACER  <div style="font-size: 1.5em; font-weight: bold; margin: 10px 0;">FEB 27 2017</div> JAKE CHATTERS EXECUTIVE OFFICER & CLERK By: C. Lester, Deputy	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER STREET ADDRESS: 10820 Justice Center Drive MAILING ADDRESS: CITY AND ZIP CODE: Roseville, CA 95678 BRANCH NAME:		CASE NUMBER: <div style="font-size: 1.5em; font-weight: bold; margin: 10px 0;">SCV0039098</div> JUDGE:  DEPT:	
CASE NAME:  <div style="text-align: center; font-weight: bold;">Johnson v. Freshly, Inc., et al.</div>			
<b>CIVIL CASE COVER SHEET</b> <input checked="" type="checkbox"/> <b>Unlimited</b> (Amount demanded exceeds \$25,000) <input type="checkbox"/> <b>Limited</b> (Amount demanded is \$25,000 or less)		<b>Complex Case Designation</b> <input type="checkbox"/> <b>Counter</b> <input type="checkbox"/> <b>Joinder</b> Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)	

Items 1–6 below must be completed (see instructions on page 2).

1. Check **one** box below for the case type that best describes this case:
- |  |  |   |
|--|--|---|
| <b>Auto Tort</b><br><input type="checkbox"/> Auto (22)<br><input type="checkbox"/> Uninsured motorist (46)<br><b>Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort</b><br><input type="checkbox"/> Asbestos (04)<br><input type="checkbox"/> Product liability (24)<br><input type="checkbox"/> Medical malpractice (45)<br><input type="checkbox"/> Other PI/PD/WD (23)<br><b>Non-PI/PD/WD (Other) Tort</b><br><input type="checkbox"/> Business tort/unfair business practice (07)<br><input type="checkbox"/> Civil rights (08)<br><input type="checkbox"/> Defamation (13)<br><input type="checkbox"/> Fraud (16)<br><input type="checkbox"/> Intellectual property (19)<br><input type="checkbox"/> Professional negligence (25)<br><input type="checkbox"/> Other non-PI/PD/WD tort (35)<br><b>Employment</b><br><input type="checkbox"/> Wrongful termination (36)<br><input type="checkbox"/> Other employment (15) | <b>Contract</b><br><input type="checkbox"/> Breach of contract/warranty (06)<br><input type="checkbox"/> Rule 3.740 collections (09)<br><input type="checkbox"/> Other collections (09)<br><input type="checkbox"/> Insurance coverage (18)<br><input type="checkbox"/> Other contract (37)<br><b>Real Property</b><br><input type="checkbox"/> Eminent domain/Inverse condemnation (14)<br><input type="checkbox"/> Wrongful eviction (33)<br><input type="checkbox"/> Other real property (26)<br><b>Unlawful Detainer</b><br><input type="checkbox"/> Commercial (31)<br><input type="checkbox"/> Residential (32)<br><input type="checkbox"/> Drugs (38)<br><b>Judicial Review</b><br><input type="checkbox"/> Asset forfeiture (05)<br><input type="checkbox"/> Petition re: arbitration award (11)<br><input type="checkbox"/> Writ of mandate (02)<br><input type="checkbox"/> Other judicial review (39) | <b>Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400–3.403)</b><br><input type="checkbox"/> Antitrust/Trade regulation (03)<br><input type="checkbox"/> Construction defect (10)<br><input checked="" type="checkbox"/> Mass tort (40)<br><input type="checkbox"/> Securities litigation (28)<br><input type="checkbox"/> Environmental/Toxic tort (30)<br><input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41)<br><b>Enforcement of Judgment</b><br><input type="checkbox"/> Enforcement of judgment (20)<br><b>Miscellaneous Civil Complaint</b><br><input type="checkbox"/> RICO (27)<br><input type="checkbox"/> Other complaint (not specified above) (42)<br><b>Miscellaneous Civil Petition</b><br><input type="checkbox"/> Partnership and corporate governance (21)<br><input type="checkbox"/> Other petition (not specified above) (43) |
|--|--|---|
2. This case ☒ is ☐ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- |  |   |
|--|---|
| a. <input checked="" type="checkbox"/> Large number of separately represented parties<br>b. <input checked="" type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve<br>c. <input type="checkbox"/> Substantial amount of documentary evidence | d. <input checked="" type="checkbox"/> Large number of witnesses<br>e. <input checked="" type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court<br>f. <input checked="" type="checkbox"/> Substantial postjudgment judicial supervision |
|--|---|
3. Remedies sought (check all that apply): a. ☒ monetary    b. ☒ nonmonetary; declaratory or injunctive relief    c. ☐ punitive
4. Number of causes of action (specify): Four (4)
5. This case ☒ is ☐ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: February 24, 2017

Scott J. Ferrell

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

**NOTICE**

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2



## INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

**To Plaintiffs and Others Filing First Papers.** If you are filing a first paper (for example, a complaint) in a civil case, you **must** complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check **one** box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the **primary** cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

**To Parties in Rule 3.740 Collections Cases.** A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than \$25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

**To Parties in Complex Cases.** In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

## CASE TYPES AND EXAMPLES

## Auto Tort

Auto (22)—Personal Injury/Property Damage/Wrongful Death  
Uninsured Motorist (46) (*if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto*)

## Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

Asbestos (04)  
Asbestos Property Damage  
Asbestos Personal Injury/Wrongful Death  
Product Liability (*not asbestos or toxic/environmental*) (24)  
Medical Malpractice (45)  
Medical Malpractice—Physicians & Surgeons  
Other Professional Health Care Malpractice  
Other PI/PD/WD (23)  
Premises Liability (e.g., slip and fall)  
Intentional Bodily Injury/PD/WD (e.g., assault, vandalism)  
Intentional Infliction of Emotional Distress  
Negligent Infliction of Emotional Distress  
Other PI/PD/WD

## Non-PI/PD/WD (Other) Tort

Business Tort/Unfair Business Practice (07)  
Civil Rights (e.g., discrimination, false arrest) (*not civil harassment*) (08)  
Defamation (e.g., slander, libel) (13)  
Fraud (16)  
Intellectual Property (19)  
Professional Negligence (25)  
Legal Malpractice  
Other Professional Malpractice (*not medical or legal*)  
Other Non-PI/PD/WD Tort (35)

## Employment

Wrongful Termination (36)  
Other Employment (15)

## Contract

Breach of Contract/Warranty (06)  
Breach of Rental/Lease  
Contract (*not unlawful detainer or wrongful eviction*)  
Contract/Warranty Breach—Seller Plaintiff (*not fraud or negligence*)  
Negligent Breach of Contract/Warranty  
Other Breach of Contract/Warranty  
Collections (e.g., money owed, open book accounts) (09)  
Collection Case—Seller Plaintiff  
Other Promissory Note/Collections Case  
Insurance Coverage (*not provisionally complex*) (18)  
Auto Subrogation  
Other Coverage  
Other Contract (37)  
Contractual Fraud  
Other Contract Dispute

## Real Property

Eminent Domain/Inverse Condemnation (14)  
Wrongful Eviction (33)  
Other Real Property (e.g., quiet title) (26)  
Writ of Possession of Real Property  
Mortgage Foreclosure  
Quiet Title  
Other Real Property (*not eminent domain, landlord/tenant, or foreclosure*)

## Unlawful Detainer

Commercial (31)  
Residential (32)  
Drugs (38) (*if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential*)

## Judicial Review

Asset Forfeiture (05)  
Petition Re: Arbitration Award (11)  
Writ of Mandate (02)  
Writ—Administrative Mandamus  
Writ—Mandamus on Limited Court Case Matter  
Writ—Other Limited Court Case Review  
Other Judicial Review (39)  
Review of Health Officer Order  
Notice of Appeal—Labor Commissioner Appeals

## Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)

Antitrust/Trade Regulation (03)  
Construction Defect (10)  
Claims Involving Mass Tort (40)  
Securities Litigation (28)  
Environmental/Toxic Tort (30)  
Insurance Coverage Claims (*arising from provisionally complex case type listed above*) (41)

## Enforcement of Judgment

Enforcement of Judgment (20)  
Abstract of Judgment (Out of County)  
Confession of Judgment (*non-domestic relations*)  
Sister State Judgment  
Administrative Agency Award (*not unpaid taxes*)  
Petition/Certification of Entry of Judgment on Unpaid Taxes  
Other Enforcement of Judgment Case

## Miscellaneous Civil Complaint

RICO (27)  
Other Complaint (*not specified above*) (42)  
Declaratory Relief Only  
Injunctive Relief Only (*non-harassment*)  
Mechanics Lien  
Other Commercial Complaint Case (*non-tort/non-complex*)  
Other Civil Complaint (*non-tort/non-complex*)

## Miscellaneous Civil Petition

Partnership and Corporate Governance (21)  
Other Petition (*not specified above*) (43)  
Civil Harassment  
Workplace Violence  
Elder/Dependent Adult Abuse  
Election Contest  
Petition for Name Change  
Petition for Relief From Late Claim  
Other Civil Petition



SUM-100

# SUMMONS (CITACION JUDICIAL)

## NOTICE TO DEFENDANT: (AVISO AL DEMANDADO):

FRESHLY, INC., a Delaware corporation; and DOES 1 – 10, inclusive,

## YOU ARE BEING SUED BY PLAINTIFF:

### (LO ESTÁ DEMANDANDO EL DEMANDANTE):

KYLE JOHNSON, individually and on behalf of all others similarly situated,

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)

**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF PLACER

**FEB 27 2017**

JAKE CHATTERS  
EXECUTIVE OFFICER & CLERK  
By: C. Lester, Deputy

**NOTICE!** You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **¡AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California, ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:

(El nombre y dirección de la corte es):

SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER  
10820 Justice Center Drive, Roseville CA 95678

CASE NUMBER:  
(Número del Caso):

SCV0039098

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Scott J. Ferrell (Bar # 202091)

PACIFIC TRIAL ATTORNEYS, APC

4100 Newport Place Drive, Suite 800, Newport Beach, CA 92660

DATE:

FEB 27 2017

(Fecha)

Clerk, by

(Secretario)

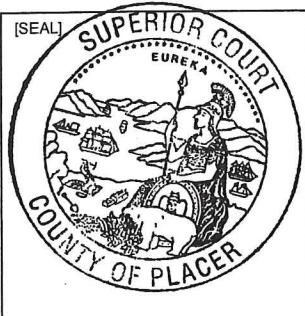
*Cristina Lester*

Phone No.: (949) 706-6464

, Deputy  
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).



**NOTICE TO THE PERSON SERVED:** You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):

3. ☐ on behalf of (specify):

under: ☐ CCP 416.10 (corporation)

☐ CCP 416.20 (defunct corporation)

☐ CCP 416.40 (association or partnership)

☐ other (specify):

4. ☐ by personal delivery on (date):

☐ CCP 416.60 (minor)

☐ CCP 416.70 (conservatee)

☐ CCP 416.90 (authorized person)



**Superior Court of the State of California**

**In and For The County of Placer**

CASE NO. **SCV0039098**

**A CASE MANAGEMENT CONFERENCE HAS BEEN SCHEDULED:**

DATE: June 27, 2017

TIME: ☒ **10:00 A.M. If your case number starts with "S-CV"**

☐ **10:30 A.M. If your case number starts with "S-CV" and is deemed Complex**

☐ **11:00 A.M. If your case number starts with "M-CV"**

DEPT: **40 - 10820 Justice Center Drive, Roseville, California**

**IF YOU DO NOT HAVE AN ATTORNEY, READ THIS:**

The judge does not decide whether you win or lose your case at this court date. If you do not file an "Answer," or other "responsive pleading," you will automatically lose this case, usually before this court date. The Answer or responsive pleading must be given to the court clerk within 30 days of the day you received the Summons, along with a filing fee or application for waiver of court fees.

You can get free help filling out your Answer or responsive pleading at the court's Legal Help Center. For more information or to schedule an appointment, go to the court's website at [www.placer.courts.ca.gov](http://www.placer.courts.ca.gov) and select "Legal Help Center."

**INFORMATION ABOUT CASE MANAGEMENT CONFERENCES:**

15 calendar days before the Case Management Conference, you must file and serve a completed Case Management Statement (CM-110).

You do not need to come to court for the first Case Management Conference. You can see the court's proposed orders 12 calendar days before the Case Management Conference on the court's website, [www.placer.courts.ca.gov](http://www.placer.courts.ca.gov). Select "Tentative Rulings and Calendar Notes," then "Civil Case Management Conference." If you do not have Internet access, call the court at 916-408-6000 to get the information.

**The court does not provide a court reporter** at Case Management Conferences or Law & Motion hearings. If you want the proceedings reported, you must provide your own court reporter at your own expense.

**IF YOU WANT TO APPEAR BY TELEPHONE**, you must schedule your telephonic appearance through the court's website, [www.placer.courts.ca.gov](http://www.placer.courts.ca.gov). Select "Telephonic Appearance System." For more information on the telephonic appearance system, please visit our "How to" guide on the website. **YOU MUST PAY ONLINE TO USE THIS SERVICE UNLESS YOU HAVE BEEN GRANTED A FEE WAIVER BY THE COURT.**

# ***EXHIBIT B***

1 Steven A. Ellis (SBN 171742)  
2 *sellis@goodwinlaw.com*  
3 **GOODWIN PROCTER LLP**  
4 601 S. Figueroa Street, 41st Floor  
5 Los Angeles, California 90017  
6 Tel.: +1 213 426 2500  
7 Fax.: +1 213 623 1673

8 Attorneys for Defendant:  
9 FRESHLY, INC.

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **FOR THE COUNTY OF PLACER**

12 KYLE JOHNSON, individually and on behalf  
13 of all others similarly situated,

14 Plaintiff,

15 v.

16 FRESHLY, INC., a Delaware corporation; and  
17 DOES 1 – 10, inclusive,

18 Defendants.

Case No. SCV0039098

**NOTICE OF FILING OF NOTICE OF  
REMOVAL**

Dept.:  
Judge: Hon.

Complaint Filed: February 27, 2017

19 ACTIVE/90509680.1

20 NOTICE OF FILING OF NOTICE OF REMOVAL



To: Office of the Clerk  
Superior Court of California, Placer  
P.O. Box 619072  
Roseville, CA 95661-9072


Defendant FRESHLY, INC. hereby advises the Clerk of this Court that the above-captioned case has been removed to the United States District Court for the Eastern District of California, Sacramento Division. A true and correct copy of the underlying Notice of Removal, without exhibits, is attached hereto as **Exhibit A** for lodging in the Court's file of this matter. The Notice of Removal will be served with its exhibits on all counsel of record.

Furthermore, pursuant to 28 U.S.C. § 1446(d), this matter shall proceed no further unless and until the case is remanded to this Court by the United States District Court.

Respectfully submitted,

Dated: April 12, 2017

By:

  
STEVEN A. ELLIS  
*sellis@goodwinlaw.com*  
LAURA A. STOLL  
*lstoll@goodwinlaw.com*  
**GOODWIN PROCTER LLP**

Attorneys for Defendant:  
**FRESHLY, INC.**

**PROOF OF SERVICE**

*Johnson v. Freshly Inc.*  
*Superior Court Case No. SCV0039098*

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 601 South Figueroa Street, 41st Floor, Los Angeles, California 90017.

On **April 12, 2017**, I served the following documents on the person(s) below as follows:

**NOTICE OF FILING OF NOTICE OF REMOVAL**

PACIFIC TRIAL ATTORNEYS APC  
Scott J. Ferrell  
Victoria C. Knowles  
4100 Newport Place, Ste. 800  
Newport Beach, CA 92660

Counsel for Plaintiff: *Kyle Johnson*  
Tel. 949.706.6464  
Fax: 949.706.6469  
*sferrell@pacifictrialattorneys.com*  
*vkowles@pacifictrialattorneys.com*

☐ (MAIL). By United States mail. I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am employed in the county where mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

☒ (OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by FedEx, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as stated above, with fees for overnight delivery paid or provided for.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **April 12, 2017**, at Los Angeles, California.

\_\_\_\_\_  
Adriana Avalos  
(Type or print name)

\_\_\_\_\_  
*Adriana Avalos*  
(Signature)

PROOF OF SERVICE

# ***EXHIBIT C***



Goodwin Procter LLP  
601 S Figueroa Street, 41st Floor  
Los Angeles, CA 90017

1 Steven A. Ellis (SBN 171742)  
2 *sellis@goodwinlaw.com*  
3 **GOODWIN PROCTER LLP**  
4 601 S Figueroa Street, 41st Floor  
5 Los Angeles, California 90017  
6 Tel.: +1 213 426 2500  
7 Fax.: +1 213 623 1673

8 Attorneys for Defendant:  
9 FRESHLY, INC.

10 **UNITED STATES DISTRICT COURT**  
11 **EASTERN DISTRICT OF CALIFORNIA**  
12 **SACRAMENTO DIVISION**

13 KYLE JOHNSON, individually and on behalf  
14 of all others similarly situated,

15 Plaintiff,

16 v.

17 FRESHLY, INC., a Delaware corporation; and  
18 DOES 1 – 10, inclusive,

19 Defendants.

Case No.

**DECLARATION OF MICHAEL  
WYSTRACH IN SUPPORT OF NOTICE  
OF REMOVAL OF DEFENDANT  
FRESHLY, INC.**

Courtroom:  
Judge:

**DECLARATION OF MICHAEL WYSTRACH**

I, Michael Wystrach, declare as follows:

1. I serve as Chief Executive Officer and President of Freshly, Inc. ("Freshly"). I submit this Declaration in support of the Notice of Removal of Defendant Freshly. This Declaration is based on my personal knowledge; if called as a witness, I could and would testify as follows.

2. As Chief Executive Officer and President of Freshly, I am familiar with Freshly's corporate organization and structure, and its financial records.

3. Freshly is (and has been at all times since the filing of this litigation on February 27, 2017) a corporation organized and existing under the laws of the State of Delaware, with its principal place of business and headquarters in New York, New York. The principal place of business and headquarters of Freshly is and has been the place where the majority of Freshly's corporate books and records are located.

4. Freshly has never at any time had its principal place of business or headquarters in California.

5. I have knowledge of and am familiar with Freshly's financial records covering the period of December 1, 2010 through October 23, 2015. Freshly maintains these financial records in the ordinary course of business. During the period of December 1, 2010 through October 23, 2015, Freshly's sales to residents of California exceeded \$4.2 million.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 11, 2017.

/s/ 

Goodwin Procter LLP  
601 S Figueroa Street, 41st Floor  
Los Angeles, CA 90017

# ***EXHIBIT D***



Steven A. Ellis (SBN 171742)  
*sellis@goodwinlaw.com*  
**GOODWIN PROCTER LLP**  
601 S Figueroa Street, 41st Floor  
Los Angeles, California 90017  
Tel.: +1 213 426 2500  
Fax.: +1 213 623 1673

Attorneys for Defendant:  
FRESHLY, INC.

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF CALIFORNIA**  
**SACRAMENTO DIVISION**

KYLE JOHNSON, individually and on behalf  
of all others similarly situated,

Plaintiff,

v.

FRESHLY, INC., a Delaware corporation; and  
DOES 1 – 10, inclusive,

Defendants.

Case No.

**DECLARATION OF STEVEN A. ELLIS IN  
SUPPORT OF NOTICE OF REMOVAL OF  
DEFENDANT FRESHLY, INC.**

Courtroom: TBD  
Judge: TBD

**DECLARATION OF STEVEN A. ELLIS**

I, Steven A. Ellis, declare as follows:

1. I am a partner with the law firm Goodwin Procter LLP and a member of the bar of this Court, and I represent Defendant Freshly, Inc. ("Freshly" or "Defendant") in the above-captioned matter. I submit this Declaration in support of the Notice of Removal of Defendant Freshly. This Declaration is based on my personal knowledge; if called as a witness, I could and would testify as follows.

2. Scott J. Ferrell, counsel for Plaintiff Kyle Johnson in this matter, recently communicated to me that if this matter proceeded to trial, he would seek substantially more than \$1,000,000 in attorneys' fees.

3. Mr. Ferrell further communicated to me that he expected that he and others at his firm would expend substantially more than 1,000 hours to litigate this matter through motion practice, discovery, summary judgment, class certification, and trial.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 12, 2017.

/s/   
STEVEN A. ELLIS

# ***EXHIBIT E***



**EXHIBIT B**

1 Scott J. Ferrell, Bar No. 202091  
2 NEWPORT TRIAL GROUP  
3 A Professional Corporation  
4 895 Dove Street, Suite 425  
5 Newport Beach, CA 92660  
6 Tel: (949) 706-6464/Fax: (949) 706-6469

7 John B. Greenberg  
8 H. Kent Munson  
9 THE STOLAR PARTNERSHIP LLP  
10 911 Washington Avenue, 7<sup>th</sup> Floor  
11 St. Louis, MO 63101  
12 Tel: (314) 231-2800/Fax: (314) 436-8400

13 For Defendant American Board of Optometry, Inc.

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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

**AMERICAN OPTOMETRIC  
SOCIETY, INC.,**

Plaintiff,

vs.

**AMERICAN BOARD OF  
OPTOMETRY, INC.,**

Defendant.

Case No.: CV10 3983  
Assigned to Honorable A. Howard Matz

**DECLARATION OF SCOTT J.  
FERRELL IN SUPPORT OF  
DEFENDANT'S MOTION FOR  
AWARD OF ATTORNEYS' FEES**

Hearing Date: October 29, 2012  
Time: 10:00 a.m.  
Place: Courtroom 14

Scott J. Ferrell, under penalty of perjury pursuant to 28 U.S.C. § 1746,  
hereby attests as follows:

1. I am competent to testify about the facts set forth herein, and I do so  
based upon personal knowledge.

2. I am an attorney admitted to practice before this Court. I am the  
founding partner of the Newport Beach law firm Newport Trial Group ("NTG"),  
co-counsel of record for Defendant American Board of Optometry, Inc. ("ABO")  
in the above-referenced litigation. I have 15 years of civil litigation and trial  
experience, including extensive experience in false advertising litigation. I have  
tried over 20 cases to verdict. I was admitted to the California Bar in 1996. I am  
a graduate of Georgetown University Law School.

1           3. I am the attorney at NTG responsible for overseeing all work  
2 performed by NTG in connection with the litigation. I am personally familiar  
3 with all such work. As a custodian of records of NTG, I also am familiar with the  
4 billing and time records maintained by NTG in connection with the litigation.  
5 **Exhibit D** to the Appendix of Exhibits in Support of Defendant's Motion for  
6 Award of Attorneys' Fees are true and correct copies of the billing and time  
7 records reflecting work performed by NTG in connection with the litigation.  
8 (Exhibit D is incorporated into this Declaration by this reference.) These records  
9 were maintained in the ordinary course of NTG's business. NTG has been paid in  
10 full for all work reflected in these records.

11           4. All time entries set forth in Exhibit D accurately reflect the amount of  
12 time expended on the identified task.

13           5. Upon information and belief, all time entries set forth in Exhibit D  
14 reflect only work performed in connection with the defense of the First Amended  
15 Complaint. For avoidance of doubt, the ABO seeks in the instant Motion  
16 attorneys' fees solely with respect to work performed in connection with the First  
17 Amended Complaint and not for any work related to the original Complaint.  
18 Exhibit D has been redacted in order to remove time entries that are not applicable  
19 to work on the First Amended Complaint as well as to remove privileged and  
20 confidential material.

21           6. As set forth in Exhibit D, the total fees incurred by NTG for which  
22 recovery is sought by this Motion are \$37,127.50. This represents 83 hours  
23 expended by me (at the rate of \$425) and 12.35 hours expended by a NTG  
24 paralegal, Jeanette Francis (at the rate of \$150).

25           7. I believe that all services reflected in Exhibit D were necessarily  
26 incurred and reasonably performed. This was a complex false advertising case.  
27 Moreover, Plaintiff's theory was not well articulated. Plaintiff alleged its theory  
28 in its pleading in unusually broad terms. In addition, during the course of the



1 litigation, Plaintiff articulated its theory in multiple, often conflicting ways.  
2 Plaintiff also raised numerous ancillary "red herring" issues. Thus, separate and  
3 apart from the ordinary extensive work that was required to defend this type of  
4 complex commercial case, the ABO was compelled to perform extensive extra  
5 work, including, without limitation, in terms of motion practice, factual  
6 investigations, legal research and discovery and counter-designations of fact and  
7 expert witnesses.

8 8. Pursuant to an agreement with the ABO, my work in this litigation  
9 was capped at the hourly rate of \$425. However, my regular hourly rate, which  
10 has been approved as reasonable by multiple judges in this market, is \$750. As  
11 noted above, the ABO also utilized the services of a NTG paralegal, Jeanette  
12 Francis, whose hourly billing rate is \$150. I believe the rates charged by NTG are  
13 reasonable, based upon my extensive knowledge developed from many years of  
14 handling dozens of complex civil litigation, including false advertising cases, in  
15 the Los Angeles market.

16 9. I am aware that The Stolar Partnership LLP, lead counsel for the ABO  
17 in this litigation, capped its hourly rate for all of its work at \$170. This rate is  
18 reasonable – and, indeed, dramatically below prevailing rates in this market – base  
19 upon my extensive knowledge of rates charged in the Los Angeles market for  
20 complex civil litigation, including false advertising case.

21 Executed this 5<sup>th</sup> day of September, 2012, in Newport Beach, California.

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25 Scott J. Ferrell  
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