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

MARK BEASLEY, on behalf of himself and all
others similarly situated,

Plaintiff,

v.

LUCKY STORES, INC., NESTLE USA, INC.,
SAVE MART SUPER MARKETS, THE
KROGER COMPANY, and THE SAVE MART
COMPANIES, INC.,

Defendants.

Case No: 3:18-cv-7144-MMC

Pleading Type: Class Action

SECOND AMENDED CLASS ACTION COMPLAINT

FOR VIOLATIONS OF:

CAL. BUS. & PROF. CODE §§17200 *et seq.*;

CAL. BUS. & PROF. CODE §§17500 *et seq.*;

CAL. CIV. CODE §§ 1750 *et seq.*; and

BREACH OF EXPRESS WARRANTY

Judge: The Honorable Maxine M. Chesney

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1 Plaintiff Mark Beasley, on behalf of himself, all others similarly situated, and the general public,
2 by and through his undersigned counsel, hereby sues Defendants Lucky Stores, Inc. (“Lucky”), Nestle
3 USA, Inc. (“Nestle”), Save Mart Super Markets (“Save Mart”), The Kroger Company (“Kroger”), and
4 The Save Mart Companies, Inc. (“SMCI”) (collectively “Defendants”) and, upon information and belief
5 and investigation of counsel, alleges as follows:

6 **I. JURISDICTION AND VENUE**

7 1. Plaintiff does not believe there is federal jurisdiction over this action. In his view,
8 jurisdiction is proper in the Superior Court of San Francisco because Plaintiff is a citizen of California,
9 all claims are asserted under the laws of California, several defendants are citizens of California, all
10 members of the proposed class are citizens of California, and the decisions about the labeling and
11 formulation of Coffee-mate during the class period were made in and emanated from Glendale,
12 California.

13 2. To the extent there is CAFA jurisdiction over this action, venue is proper in this District
14 because Plaintiff’s claims accrued, in part, in San Francisco and San Mateo counties, and Defendants are
15 found and do business in this District.

16 **II. NATURE OF THE ACTION**

17 3. Nestle manufactures, markets, and sells a line of coffee creamer products under the
18 Coffee-mate brand name (collectively “Coffee-mate”). During the class period defined herein, Nestle
19 unlawfully made Coffee-mate with the unsafe food additive known as partially hydrogenated oil
20 (“PHO”). Unless otherwise stated, references to Coffee-mate only include Coffee-mate during the period
21 it contained PHO.

22 4. Lucky, Save Mart, SMCI, and Kroger unlawfully sold Coffee-mate at their grocery stores
23 throughout California.

24 5. On June 16, 2015, the FDA issued a final regulation and declaratory order, after extensive
25 public comment, declaring PHO unsafe for any use in food.¹ The FDA came to the same conclusion
26

27 ¹ 80 Fed. Reg. 34650 (June 17, 2015) (hereinafter “FDA Final Determination”).
28

1 when it initially proposed the regulation in 2013. The FDA also made findings about the unsafe nature of
2 PHO and trans fat in 2010.

3 6. Defendants were aware that PHO was unsafe even before this time, yet still harmed their
4 customers by manufacturing, distributing, and selling Coffee-mate with an unsafe and unlawful
5 unapproved food additive, while at the same time defrauding the class by using the false and
6 unauthorized “0g Trans Fat” nutrient content claim on Coffee-mate packaging. All PHO, however,
7 contains trans fat, and the amount in Coffee-mate was not “0g,” but a substantial and dangerous amount.

8 7. Plaintiff purchased and consumed Coffee-mate from the grocery stores owned by
9 Defendants Lucky, Save Mart, SMCI, and Kroger (collectively the “Retailer Defendants”) during the
10 class period defined herein.

11 8. Plaintiff seeks an order of restitution for himself and a class for the economic harm they
12 suffered by paying good money for an unsafe, illegal product.

13 **III. PARTIES**

14 9. Defendant Lucky is a California corporation and a subsidiary of SMCI. Lucky operates a
15 chain of grocery stores in California and sold Coffee-mate bearing the false and unlawful “0g Trans Fat”
16 claim during the Class Period.

17 10. Defendant Nestle is a Delaware corporation with its principal place of business in
18 California or Virginia.

19 11. Nestle owns, manufactures, distributes, and sells Coffee-mate.

20 12. Nestle manufactured, labeled, and distributed Coffee-mate in California.

21 13. At all times during the class period, Nestle’s principal place of business was in California.
22 Decisions regarding Coffee-mate’s formulation, labeling, and marketing were made in California.

23 14. Nestle is a subsidiary of Nestle, S.A., a Swiss corporation headquartered in Vevey, Canton
24 of Vaud. Nestle, S.A. is the largest food company in the world, with 2017 annual revenue and profits of
25 about \$90 billion and \$7.2 billion.

26 15. Defendants Save Mart and SMCI are California corporations with their principal place of
27 business in Modesto, California. They own and operate multiple chains of grocery stores in California,
28 including Lucky, which sold Coffee-mate bearing the false and unlawful “0g Trans Fat” claim during the

1 Class Period.

2 16. Defendant Kroger is a Delaware corporation with its principle place of business in Ohio. It
 3 owns and operates grocery stores in California, including the Los Angeles-based Foods Co chain. Kroger
 4 sold Coffee-mate bearing the false and unlawful “0g Trans Fat” claim during the Class Period.

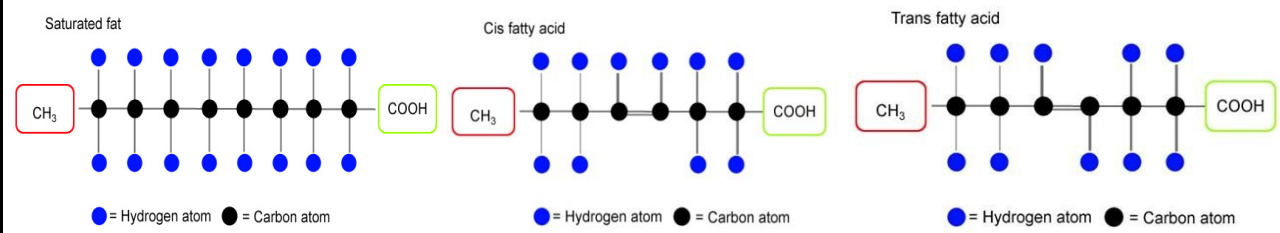
5 17. Plaintiff Mark Beasley is a citizen of California who repeatedly purchased Coffee-mate for
 6 personal and household consumption, as described in detail herein.

7 **IV. NATURE OF TRANS FAT**

8 18. Artificial trans fat is manufactured via an industrial process called partial hydrogenation,
 9 in which hydrogen atoms are added to normal vegetable oil by heating the oil to temperatures above
 10 400°F in the presence of ion donor catalyst metals such as rhodium, ruthenium, and nickel.² The resulting
 11 product is known as partially hydrogenated oil, or PHO.

12 19. PHO was invented in 1901 and patented in 1902 by German chemist Wilhelm Normann.
 13 PHO molecules chemically differ from the natural fat molecules in other food products.³

14 20. Natural fat, except the trace amounts of natural trans fat from ruminant animal sources like
 15 beef, milk, and mutton, comes in two varieties: (1) fats that lack carbon double bonds (“saturated fat”)
 16 and (2) fats that have carbon double bonds. Trans fat, in contrast to cis fat, has carbon double bonds with
 17 hydrogen atoms on opposite sides of the carbon chain.



22 21. PHO was initially a “wonder product” attractive to the processed food industry because it
 23

24 ² See Alice H. Lichtenstein, *Trans Fatty Acids, Plasma Lipid Levels, and Risk of Developing*
 25 *Cardiovascular Disease*, 95 CIRCULATION 2588, 2588-90 (1997).

26 ³ See Alberto Ascherio et al., *Trans Fatty Acids & Coronary Heart Disease*, 340 NEW ENG. J. MED. 94,
 27 94-8 (1999). See also Walter Willett, *The Scientific Case for Banning Trans Fats*, Scientific American,
 28 available at www.scientificamerican.com/article/the-scientific-case-for-banning-trans-fats/ (last visited September 26, 2019).

1 combined the low cost of unsaturated cis fat with the flexibility and long shelf life of saturated fat. Like
2 processed cis fat, PHO is manufactured from low-cost legumes,⁴ while saturated fat is derived from
3 relatively expensive animal and tropical plant sources.⁵

4 22. As detailed herein, PHO causes cardiovascular disease, diabetes, cancer, Alzheimer's
5 disease, and accelerates memory damage and cognitive decline. These risks were well known during the
6 entire class period, and at no point during the class period was there ever a consensus that PHO was safe
7 to use, neither in general nor as an ingredient in coffee creamer.

8 23. In using PHO as a food additive prior to 2015, Defendants failed to submit a food
9 additive petition and failed to undertake a GRAS self-determination.

10 **A. There is a Well-Established Scientific Consensus That Trans Fat is Extremely**
11 **Harmful.**

12 24. The National Academies of Science were chartered by an act of Congress, signed by
13 President Lincoln in 1863. Under that charter, in 1970, the National Academy of Medicine was created.
14 In a 2005 report, under its former name of the Institute of Medicine, it concluded there was “no safe
15 level” of PHO or artificial trans fat intake.⁶ Therefore, in 2005, there was no consensus that PHO was a
16 safe ingredient to use in food. To the contrary, the consensus was that it is unsafe.

17 25. In addition, “trans fatty acids are not essential and provide no known benefit to human
18 health.”⁷ Thus, while IOM provided safe maximum levels for other food elements like saturated fat, in
19 could not and declined to provide one for trans fat when requested by the FDA, the reason being that
20 “**any** incremental increase in trans fatty acid intake increases the risk of CHD.” *Id.* (emphasis added).

21 26. In 2006, Dariush Mozaffarian of Harvard Medical School wrote in the New England
22 Journal of Medicine, “the consumption of trans fatty acids results in considerable potential harm but no

23 _____
24 ⁴ e.g., corn oil, cottonseed oil, soybean oil, peanut oil

25 ⁵ e.g., butter, cream, tallow, palm oil, coconut oil

26 ⁶ Food & Nutrition Bd., Inst. of Med., *Dietary Reference Intakes For Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids* (2005).

27 ⁷ *Food Labeling; Health Claim; Phytosterols and Risk of Coronary Heart Disease; Proposed Rule*, 75
28 Fed. Reg. 76526, 76542 (Dec. 8, 2010).

1 apparent benefit.”⁸

2 27. Julie Louise Gerberding, who served eight years as the head of the United States Centers
3 for Disease Control and Prevention, wrote in 2009:

4 The scientific rationale for eliminating exposure to artificial trans fatty acids in foods is rock
5 solid. There is no evidence that they provide any health benefit, and they are certainly
6 harmful. These compounds adversely affect both low- and high-density lipoprotein
7 cholesterol levels and increase the risk for coronary heart disease, even at relatively low levels
8 of dietary intake. Gram for gram, trans fats are far more potent than saturated fats in
9 increasing the risk for heart disease, perhaps because they also have pro-inflammatory
10 properties and other adverse effects on vascular endothelium. The strong evidence of harm...
Eliminating exposure to these dangerous fats could have a powerful population impact—
potentially protecting 30,000 to 100,000 Americans from death related to heart disease each
year.⁹

11 28. Dr. Mozaffarian further writes:

12 Given the adverse effects of trans fatty acids on serum lipid levels, systemic inflammation,
13 and possibly other risk factors for cardiovascular disease and the positive associations with
14 the risk of CHD, sudden death from cardiac causes, and possibly diabetes, the potential for
15 harm is clear. The evidence and the magnitude of adverse health effects of trans fatty acids are
in fact far stronger on average than those of food contaminants or pesticide residues, which
have in some cases received considerable attention.¹⁰

16 29. In 2011, Walter Willet, also a professor at Harvard Medical School, described Defendants’
17 behavior of selling food made with PHO as “a food safety issue . . . this is actually contamination.”¹¹

18 30. The views of these experts, and many others, show that, even before the FDA formally
19 declared PHO to be unsafe for use in food in 2015, its use was still unlawful because there was not a
20 consensus of scientific experts that PHO was a safe food additive.

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23 ⁸ Dariush Mozaffarian et al., *Trans Fatty Acids and Cardiovascular Disease*, 354 N. ENGL. J. MED. 1601,
1608-1609 (2006).

24 ⁹ Julie Louise Gerberding, *Safer Fats for Healthier Hearts: The Case for Eliminating Dietary Artificial*
25 *Trans Fat Intake*, 151 ANN. INTERN. MED. 137-138 (2009).

26 ¹⁰ Dariush Mozaffarian et al., *Trans Fatty Acids and Cardiovascular Disease*, 354 N. ENGL. J. MED. 1601
(2006).

27 ¹¹ Rebecca Coombes, *Trans fats: chasing a global ban*, 343 BRITISH MED. J. (2011).

1 **B. The Trans Fat in Coffee-mate, Which Was Falsely and Unlawfully Labeled “0g**
2 **Trans Fat,” Caused Coronary Heart Disease and Death from Heart Disease.**

3 31. Trans fat raises the risk of CHD more than any other known consumed substance.¹²

4 32. A 1999 estimate published in the New England Journal of Medicine found that removing
5 PHO from the American diet “would prevent approximately 30,000 premature coronary deaths per year,
6 and epidemiologic evidence suggests this number is closer to 100,000 premature deaths annually.”¹³

7 33. By raising LDL levels and lowering HDL levels, trans fat causes a wide variety of
8 dangerous heart conditions, including vasodilation, coronary artery disease, and primary cardiac arrest.

9 34. In a joint Dietary Guidelines Advisory Committee Report, the Department of Health and
10 Human Services and the U.S. Department of Agriculture recognized “[t]he relationship between trans
11 fatty acid intake and LDL cholesterol is direct and progressive, increasing the risk of cardiovascular
12 disease.”¹⁴

13 35. The American Heart Association warns, “trans fats raise your bad (LDL) cholesterol
14 levels and lower your good (HDL) cholesterol levels. Eating trans fats increases your risk of developing
15 heart disease.”¹⁵

16 36. Even further back, in 2003, a review of literature on the connection between the
17 consumption of artificial trans fat and coronary heart disease, the FDA concluded:

18 [B]ased on the consistent results across a number of the most persuasive types of study
19 designs (i.e., intervention trials and prospective cohort studies) that were conducted using a
20 range of test conditions and across different geographical regions and populations . . . the
21 available evidence for an adverse relationship between trans fat intake and CHD risk is
strong.¹⁶

22 ¹² Mozaffarian, 354 NEW ENG. J. MED. at 1603.

23 ¹³ Alberto Ascherio et al., *Trans Fatty Acids & Coronary Heart Disease*, 340 NEW ENG. J. MED. 94, 94-8
24 (1999).

25 ¹⁴ Dep’t of Health & Human Serv. & U.S. Dep’t of Agric., 2005 Dietary Guidelines Advisory Committee
Report, Section 10 (2005).

26 ¹⁵ Am. Heart Ass’n., *Trans Fat Overview*, available at tinyurl.com/TransFatOverview (last visited
27 September 26, 2019).

28 ¹⁶ FDA, Final Rule, 68 Fed. Reg. 41433, 41445 (July 11, 2003).

1 37. The FDA concluded in 2010 that “there have been no reports issued by authoritative
2 sources that provide a level of trans fat in the diet . . . below which there is no risk of [Coronary Heart
3 Disease].” 75 Fed. Reg. 76526, 76542 (Dec. 8, 2010). Rather, there “is a positive linear trend between
4 trans fatty acid intake and LDL cholesterol concentration, and therefore there is a positive relationship
5 between trans fatty acid intake and the risk of CHD.” *Id.*

6 38. A study published in American Heart Association’s *Circulation* found that the largest
7 consumers of trans fat have three times the risk of suffering primary cardiac arrest, even after controlling
8 for a variety of medical and lifestyle risk factors.¹⁷

9 39. Australian researchers observed that heart attack patients possess elevated amounts of
10 trans fat in their adipose tissue (stored body fat) compared to controls. The effects of consuming trans fat
11 are therefore shown to be long-lived because of its storage within the body in place of natural fats.¹⁸

12 40. Cholesterol dysregulation and systemic inflammation/immune system dysregulation are
13 the most important pathways through which PHO consumption causes morbidity and death. Another
14 route is by promoting atherosclerosis by degrading the function of TGF- β , a protein responsible for
15 preventing the development of atherosclerotic lesions.¹⁹

16 41. TGF- β also functions to suppress cancerous tumors. Degradation of TGF- β function is
17 also likely one route by which artificial trans fat consumption promotes cancers in fatty organs and the
18 digestive system. *Id.*

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24 ¹⁷ Rozenn N. Lemaitre et al., *Cell Membrane Trans-Fatty Acids and the Risk of Primary Cardiac Arrest*,
105 CIRCULATION 697, 697-701 (2002).

25 ¹⁸ Peter M. Clifton et al., *Trans Fatty Acids In Adipose Tissue And The Food Supply Are Associated With*
26 *Myocardial Infarction*. 134 J. NUTR. 874, 874-79 (2004).

27 ¹⁹ Chen, C.L. et al., *A mechanism by which dietary trans fats cause atherosclerosis*, J. NUTR.
28 BIOCHEMISTRY 22(7) 649-655 (2011).

1 **C. The Trans Fat in Coffee-mate, Which Was Falsely and Unlawfully Labeled “0g**
2 **Trans Fat,” Caused Type-2 Diabetes.**

3 42. Artificial trans fat also causes type-2 diabetes.²⁰

4 43. In particular, trans fat disrupts the body’s glucose and insulin regulation system by
5 incorporating itself into cell membranes, causing the insulin receptors on cell walls to misform and
6 malfunction, and in turn elevating blood glucose levels and stimulating further release of insulin.

7 44. Researchers at Northwestern University’s medical school found that mice show multiple
8 markers of type-2 diabetes after eating PHO for only four weeks.²¹

9 45. By the eighth week of the study, mice fed the high trans fat diet showed a 500% increase
10 compared to the control group in hepatic interleukin-1 β gene expression, one such marker of diabetes,
11 indicating the extreme stress even short-term exposure to artificial trans fat places on the body. *Id.*

12 46. A 14-year study of 84,204 women found that for every 2 percent increase in energy intake
13 from artificial trans fat, the relative risk of type-2 diabetes was increased by 39 percent.²²

14 **D. The Trans Fat in Coffee-mate, Which Was Falsely and Unlawfully Labeled “0g**
15 **Trans Fat,” Caused Breast, Prostate, and Colorectal Cancer.**

16 47. Trans fat is a carcinogen which causes breast, prostate, and colorectal cancer.

17 48. A 13-year study of 19,934 French women showed 75 percent more women contracted
18 breast cancer in the highest quintile of trans fat consumption than did those in the lowest.²³

19 49. In a 25-year study of 14,916 American physicians, those in the highest quintile of trans fat
20 consumption had more than double the risk of developing prostate cancer than the doctors in the lowest

21 _____
22 ²⁰ Am. Heart Ass’n., *Trans Fat Overview*, available at tinyurl.com/TransFatOverview (last visited
September 26, 2019).

23 ²¹ Sean W. P. Koppe et al., *Trans fat feeding results in higher serum alanine aminotransferase and*
24 *increased insulin resistance compared with a standard murine high-fat diet*, 297 AM. J. PHYSIOL.
GASTROINTEST LIVER PHYSIOL. 378 (2009).

25 ²² Jorge Salmeron et al., *Dietary Fat Intake and Risk of Type 2 Diabetes in Women*, 73 AM. J. CLINICAL
26 NUTRITION 1019, 1023 (2001).

27 ²³ Véronique Chajès et al., *Association between Serum Trans-Monounsaturated Fatty Acids and Breast*
28 *Cancer Risk in the E3N-EPIC Study*. 167 AM. J. EPIDEMIOLOGY 1312, 1316 (2008).

1 quintile.²⁴

2 50. A study of 1,012 American males observing trans fat intake and the risk of prostate cancer
3 found “[c]ompared with the lowest quartile of total trans-fatty acid consumption, the higher quartiles
4 gave odds ratios (ORs) equal to 1.58,” meaning those in the highest quartile are 58% more likely to
5 contract prostate cancer than those in the lowest.²⁵

6 51. A 600-person study found an 86 percent greater risk of colorectal cancer in the highest
7 trans fat consumption quartile.²⁶

8 52. A 2,910-person study found “trans-monounsaturated fatty acids . . . were dose-
9 dependently associated with colorectal cancer risk,” which showed “the importance of type of fat in the
10 etiology and prevention of colorectal cancer.”²⁷

11 **E. The Trans Fat in Coffee-mate, Which Was Falsely and Unlawfully Labeled “0g**
12 **Trans Fat,” Caused Alzheimer’s Disease and Cognitive Decline.**

13 53. Trans fat causes Alzheimer’s disease and cognitive decline.

14 54. In a study examining 815 Chicago area seniors, researchers found “increased risk of
15 incident Alzheimer disease among persons with high intakes of . . . trans-unsaturated fats.”²⁸

16 55. The study “observed a strong increased risk of Alzheimer disease with consumption of
17 trans-unsaturated fat.” *Id.*

18 56. In a study of 1,486 women with type-2 diabetes, researchers found “[h]igher intakes of . . .
19
20

21 ²⁴ Jorge Chavarro et al., *A Prospective Study of Blood Trans Fatty Acid Levels and Risk of Prostate*
22 *Cancer*, 47 PROC. AM. ASSOC. CANCER RESEARCH 95, 99 (2006).

23 ²⁵ Xin Liu et al., *Trans-Fatty Acid Intake and Increased Risk of Advanced Prostate Cancer: Modification*
24 *by RNASEL R462Q Variant*, 28 CARCINOGENESIS 1232, 1232 (2007).

25 ²⁶ L.C. Vinikoor et al., *Consumption of Trans-Fatty Acid and its Association with Colorectal Adenomas*,
26 168 AM. J. EPIDEMIOLOGY 289, 294 (2008).

27 ²⁷ Evropi Theodoratou et al., *Dietary Fatty Acids and Colorectal Cancer: A Case-Control Study*, 166 AM.
28 J. EPIDEMIOLOGY 181 (2007).

²⁸ Martha Clare Morris et al., *Dietary Fats and the Risk of Incident Alzheimer Disease*, 60 ARCH.
NEUROL. 194, 198-99 (2003).

1 trans fat since midlife . . . were [] highly associated with worse cognitive decline”²⁹

2 57. The study cautioned “[d]ietary fat intake can alter glucose and lipid metabolism and is
3 related to cardiovascular disease risk in individuals with type 2 diabetes. Because insulin, cholesterol, and
4 vascular disease all appear to play important roles in brain aging and cognitive impairments, dietary fat
5 modification may be a particularly effective strategy for preventing cognitive decline, especially in
6 individuals with diabetes.” *Id.* (citations omitted).

7 58. Artificial trans fat also damages the brains of those who consume it. A study conducted by
8 UCSD School of Medicine of 1,018 men, mostly younger men, found trans fat consumption to be
9 strongly correlated with impaired memory.³⁰ The authors of the study, appearing in *Circulation*, the
10 American Heart Association’s peer-reviewed journal, conclude that “Greater dTFA [dietary trans fatty
11 acid] was significantly associated with worse word memory in adults aged 20-45 years, often critical
12 years for career building.” *Id.*

13 59. Performing a word memory test, each additional gram per day of trans fat consumed was
14 associated with 0.76 fewer words correctly recalled. The authors suggest trans fat’s well-established pro-
15 oxidant effect and its damage to cell energy processes is the pathway by which trans fat consumption
16 damages memory ability. The young men with the highest trans fat consumption scored 12 fewer recalled
17 words on the 104-word test. *Id.*

18 **F. The Trans Fat in Coffee-mate, Which Was Falsely and Unlawfully Labeled “0g Trans**
19 **Fat,” Caused Organ Damage.**

20 60. Artificial trans fat molecules are readily incorporated into blood and organ cells in place of
21 natural fat molecules, which damages vital organs, including the heart, brain, and reproductive system.
22 Further, changing the chemical composition of cells induces systemic inflammation, where the immune
23 system fails to recognize such cells as native to the body and becomes persistently overactive, leading to
24

25 ²⁹ Elizabeth E. Devore et al., *Dietary Fat Intake and Cognitive Decline in Women with Type 2 Diabetes*,
26 32 DIABETES CARE 635 (2009).

27 ³⁰ Golomb, B. et al., *Trans Fat Consumption is Adversely Linked to Memory in Working-Age Adults*,
28 CIRCULATION. 130:A15572 (2014).

1 further organ damage.³¹

2 **G. PHO Use is Unlawful in California, the United States, and European Nations.**

3 61. New York City banned trans fat in restaurants in 2006. Similar laws exist in Philadelphia;
4 Baltimore; Stamford, Connecticut; and Montgomery County, Maryland.

5 62. A 2004 Danish law restricted all foods to fewer than 2 percent of calories from artificial
6 trans fat, a test that Coffee-mate did not meet during the class period.

7 63. Nestle’s home country, Switzerland, made the same restriction in 2008.³²

8 64. A study of Denmark’s 2004 trans fat ban concluded it “did not appreciably affect the
9 quality, cost or availability of food” and did not have “any noticeable effect for the consumers.”³³

10 65. These laws were all motivated by the strong evidence trans fat is dangerous, showing there
11 was not a scientific consensus during the class period that PHO was a safe food additive.

12 66. On June 17, 2015, the FDA released a declaratory order which it called its Final
13 Determination Regarding Partially Hydrogenated Oils, finding that “PHOs are not GRAS for any use in
14 human food.” 80 Fed. Reg. 34650, 34651 (June 17, 2015) (“Final Determination”).

15 67. The FDA’s Final Determination noted that “if there are data and information that
16 demonstrates to a reasonable certainty that no harm will result from a specific use of a PHO in food, that
17 information could be submitted as part of a food additive petition to FDA seeking issuance of a
18

19 ³¹ See:

20 Lopez-Garcia et al., *Consumption of Trans Fat is Related to Plasma Markers of Inflammation and*
Endothelial Dysfunction, 135 J. NUTR. 562-66 (2005);

21 Baer et al., *Dietary fatty acids affect plasma markers of inflammation in healthy men fed controlled diets;*
a randomized crossover study, 79 AM. J. CLIN. NUTR. 969-73 (2004);

22 Mozaffarian & Clarke, *Quantitative effects on cardiovascular risk factors and coronary heart disease*
23 *risk of replacing partially hydrogenated vegetable oils with other fats and oils*, 63 EURO. J. CLIN. NUTR.
S22-33 (2009);

24 Mozaffarian et al., *Trans Fatty acids and systemic inflammation in heart failure*, 80 AM. J. CLIN. NUTR.
25 1521-25 (2004).

26 ³² Andrew Collier, *Deadly Fats: Why Are We still Eating Them?*, The Independent (UK), June 10, 2008.

27 ³³ Mozaffarian, 354 NEW ENG. J. MED. at 1610; see also Steen, Stender, *High Levels of Industrially*
Produced Trans Fat in Popular Fast Food, 354 NEW ENG. J. MED. 1650, 1652 (2006).

1 regulation to prescribe conditions under which the additive may be safely used in food.” Final
2 Determination at 34664.

3 68. On June 11, 2015 and March 7, 2017, the Grocery Manufacturers Association (“GMA”)
4 submitted such a food additive petition and then an amended petition seeking approval to use partially
5 hydrogenated oil in “approximately 60 food categories,” including coffee creamers. On May 21, 2018,
6 the FDA denied the amended GMA petition, and stated it considered the first one abandoned. In doing
7 so, the FDA rejected the GMA’s argument for a “non-linear dose response” model and noted that “the
8 vast majority of scientific studies have been consistent in their conclusions that trans fat consumption has
9 a progressive and linear adverse effect on blood lipids and CHD risk.” Denial of Food Additive Petition,
10 83 Fed. Reg. 23382, 23390 (May 21, 2018).

11 **V. PLAINTIFF’S PURCHASES OF COFFEE-MATE**

12 69. Plaintiff Mark Beasley purchased Coffee-mate during the class period approximately once
13 per month, sometimes buying two bottles at once. These purchases included both the liquid and powder
14 versions of Coffee-mate.

15 70. Mr. Beasley’s first purchase of Coffee-mate occurred more than 30 years ago, and his
16 most recent purchase occurred in approximately January 2017 at the Lucky location in San Bruno
17 described in the following paragraph.

18 71. The most frequent locations of Mr. Beasley’s purchases of Coffee-mate were at the Foods
19 Co located at 345 Williams Ave., San Francisco, CA 94124 and the Lucky located at 1322 El Camino
20 Real, San Bruno, CA 94066.

21 72. Plaintiff does not know the exact date Nestle stopped using its unlawful and deceptive “0g
22 trans fat” nutrient content claim on Coffee-mate, so he does not know the last time he purchased Coffee-
23 mate with the false “0g trans fat” label claim. However, he provides notice to Nestle, which does know
24 this information, that he purchased the liquid Coffee-mate approximately once per month, so Nestle,
25 knowing when it stopped shipping the unlawful label to San Francisco stores, knows the approximate last
26 time Beasley purchased Coffee-mate with its unlawful “0g trans fat” nutrient content claim. Based on
27 Nestle’s prior employee declaration, Beasley’s best estimate of the last time he purchased Coffee-mate
28 with an unlawful label claim was in early 2014, and at the Foods Co location in San Francisco described

1 in the prior paragraph.

2 73. When purchasing Coffee-mate, Plaintiff was seeking products which were free of
3 unlawful food additives and other ingredients which are harmful to his health. He trusted that a large food
4 company such as Nestle would not intentionally add an unapproved and unsafe food additive, nor would
5 it claim to be free of something that it actually contained.

6 74. Plaintiff read and relied on Nestle's "0g Trans Fat" claim as a substantial factor in his
7 decision to continue purchasing Coffee-mate rather than other coffee creamers.

8 75. Plaintiff first purchased Coffee-mate in packaging bearing the "0g Trans Fat" claim
9 shortly after Nestle began using the claim. The date when Nestle added the false nutrient content of "0g
10 Tans Fat" is unknown to Plaintiff, but believed to be in 2006 or 2007.

11 76. Plaintiff first discovered Defendants' unlawful acts described herein on January 20, 2017,
12 when he learned that Coffee-mate contained an unsafe food additive for years and was fraudulently
13 marketed. He discovered this in the course of discussions at his house with his counsel here, who was at
14 the time representing his wife in a class action, now resolved, which was brought in California state court
15 and related to a falsely marketed cosmetic product.

16 77. Plaintiff, in the exercise of reasonable diligence, could not have discovered earlier
17 Defendants' fraudulent and unlawful acts. Plaintiff is not a food expert, but rather a lay consumer who
18 did not have the specialized knowledge of Defendants, nor is Plaintiff, like Defendants, charged with
19 compliance with state and federal food laws. Further, Nestle's labeling practices—in particular,
20 representing for many years that Coffee-mate has "0g Trans Fat"—actively impeded Plaintiff's ability to
21 discover the dangerous effects of Coffee-mate throughout the class period. Finally, food consumers,
22 including Mr. Beasley, are entitled to rely on nutrient content claims made on food labels, and have no
23 legal or equitable obligation to conduct research as to whether companies like Nestle are making false
24 and unlawful nutrient content claims.

25 **VI. COFFEE-MATE'S "0G TRANS FAT" CLAIM WAS FALSE, MISLEADING, AND AN**
26 **UNLAWFUL NUTRIENT CONTENT CLAIM.**

27 78. Throughout the class period, Coffee-mate, in all of its regular liquid and powder sizes and
28 flavors, though not the "Natural Bliss" line with its distinct name, branding, and design, was made with

1 PHO yet contained the deceptive nutrient content claim “0g Trans Fat” prominently displayed on the
2 front of the bottle. It also at times made this unlawful nutrient content claim on the back of the label as
3 follows and pictured: “IT’S GOOD TO KNOW: 0g TRANS FAT/SERV.”





79. This language was part of an intentional, long-term campaign to deceptively market Coffee-mate as healthful and free of trans fat.

80. Nestlé's conduct is especially egregious because milk, cream, soy milk, almond milk, and competing creamer brands like International Delight, really are free of trans fat and do not pose the serious health consequences associated with Coffee-mate.

81. "0g Trans Fat" and "IT'S GOOD TO KNOW: 0g TRANS FAT/SERV" are unauthorized nutrient content claims.

82. Powdered Coffee-mate products bearing the challenged "0g Trans Fat" claim were on stores shelves from about 2007 to approximately late 2013 or early 2014. Mr. Beasley purchased them two to four times per year during the entire Class Period, with his first purchased estimated to be in 2007, his first purchase within the class period to be in early 2010, and his last purchase within the class period

1 estimated to be in late 2013 or early 2014.

2 83. Liquid Coffee-mate products bearing the challenged “0g Trans Fat” claim were on store
3 shelves from about 2007 to approximately late 2013. Mr. Beasley purchased liquid Coffee-mate at a rate
4 of one or two bottles per month during this entire time, with his first purchased estimated to be in 2007,
5 his first purchase within the class period to be in early 2010, and his last purchase within the class period
6 estimated to be in late 2013.

7 **VII. COFFEE-MATE UNNECESSARILY CONTAINED PHO AND TRANS FAT.**

8 84. Nestle’s use of PHO in Coffee-mate was always unnecessary. There are several safe
9 substitutes for PHO and artificial trans fat. Indeed, Nestle now uses “soybean and/or canola oil,” neither
10 of which contain trans fat, as a substitute for PHO in the current formulation.

11 85. Coffee-mate was made with PHO even as competing creamer products did not engage in
12 this unfair and unlawful conduct. During the class period, brands of coffee creamer without PHO
13 included International Delight, Nature’s First Natural Dairy Creamer, Silk For Coffee Soy Beverage, and
14 Bailey’s Coffee Creamer.

15 **VIII. DEFENDANTS’ PRACTICES ARE “UNFAIR” WITHIN THE MEANING OF THE**
16 **CALIFORNIA UNFAIR COMPETITION LAW.**

17 86. Defendants’ practices as described herein are “unfair” within the meaning of the
18 California Unfair Competition Law because their conduct is immoral, unethical, unscrupulous, and
19 substantially injurious to consumers, and the utility of this conduct to Defendants does not outweigh the
20 gravity of the harm to Defendants’ victims.

21 87. In particular, while the unlawful and fraudulent sale of Coffee-mate may have had some
22 utility to Defendants in the form of profits, this utility was small and far outweighed by the gravity of the
23 serious health harm they inflicted on consumers, and further unlawful and fraudulent business practices
24 are not weighed and balanced against consumer harm for the purposes of the Unfair Competition Law.

25 88. Defendants’ conduct injured competing manufacturers and sellers of coffee creamer and
26 dairy cream that do not engage in their unfair behavior, especially given their large market share, large
27 market power, and limited retail shelf space.

28 89. The Retailer Defendants’ conduct injured competing retailers that did not sell unlawfully

1 and fraudulently labeled coffee creamers.

2 90. Defendants' practices violated public policy as declared by specific constitutional,
3 statutory, or regulatory provisions, including the former California Health & Safety Code § 114377 and
4 California Education Code § 49431.7.

5 91. Defendants' actions also violated public policy by causing the United States and
6 California to pay—via Medicare, Medicaid, Affordable Care Act Exchange subsidies, veterans' health
7 programs, public employee and retiree health insurance—for treatment of trans fat-related illnesses.

8 92. Further, the injury to consumers from Defendants' practices is substantial, not outweighed
9 by benefits to consumers or competition, and not an injury consumers themselves could reasonably have
10 avoided.

11 93. The unfairness of Defendant Nestle's conduct is also illustrated by, *inter alia*:

- 12 • Nestle's largest competitor, International Delight, has long made its refrigerated coffee creamers
13 without adding trans fat;
- 14 • Many other smaller brands, even cheaper store brands, are also made without adding trans fat;
- 15 • Peer-reviewed studies published in scholarly public health journals have repeatedly found that the
16 removal of trans fat does not affect the price or availability of any food;
- 17 • The State of California has made legislative findings that artificial trans fat is a dangerous hazard
18 to public health;
- 19 • The FDA has found the partially hydrogenated oil used in Coffee-mate to not be Generally
20 Recognized as Safe;
- 21 • Doctors' associations such as the American Heart Association, and learned societies such as the
22 National Academies of Science, found that the addition of trans fat to the American diet by
23 causing tens of thousands excess deaths per year, and worked to publicize these findings. Nestle
24 was well aware of these dangers, but choose not to follow its food industry peers in immediately
25 removing trans fat from its products.

1 **IX. DEFENDANTS' PRACTICES ARE "UNLAWFUL" WITHIN THE MEANING OF THE**
2 **CALIFORNIA UNFAIR COMPETITION LAW.**

3 94. Nestle's conduct is "unlawful" because it violated the Federal Food, Drug and Cosmetic
4 Act ("FDCA"), specifically, (a) 21 U.S.C. § 343(a), which deems food misbranded when the label
5 contains a statement that is "false or misleading in any particular," and (b) 21 C.F.R. § 101.13(i)(3),
6 which bars nutrient content claims voluntarily placed on the front of a product label that are "false or
7 misleading in any respect."

8 95. Nestle's conduct further violated 21 U.S.C. § 331(a), which bars "[t]he introduction or
9 delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or
10 cosmetic that is adulterated or misbranded."

11 96. Nestle's conduct further violated 21 U.S.C. § 331(b), which bars "[t]he adulteration or
12 misbranding of any food, drug, device, tobacco product, or cosmetic in interstate commerce."

13 97. Nestle further violated the FDCA's implementing regulation, 21 C.F.R. § 1.21, because
14 Coffee-mate's packaging fails to reveal material facts, namely the dangers of PHO described in detail
15 herein, "in light of other representations," namely the misleading "0g Trans Fat" front label claim.

16 98. Nestle's conduct further violated The California Sherman Food, Drug, and Cosmetic Law
17 ("Sherman Law"), Health & Safety Code § 110660, which deems food products "misbranded" if their
18 labeling is "false or misleading in any particular," and Health & Safety Code § 110670, which bars
19 nutrient content claims voluntarily placed on the front of a product label that fail to comply with the
20 federal regulation for nutrient content claims (i.e., "may not be false or misleading in any respect").

21 Nestle's ' conduct also violated the following sections of the Sherman Law:

- 22 • § 110100 (adopting all FDA food labeling regulations as state regulations);
- 23 • § 110290 ("In determining whether the labeling or advertisement of a food . . . is misleading, all
24 representations made or suggested by statement, word, design, device, sound, or any combination
25 of these shall be taken into account. The extent that the labeling or advertising fails to reveal facts
26 concerning the food . . . or consequences of customary use of the food . . . shall also be
27 considered.");

- 1 • § 110390 (“It is unlawful for any person to disseminate any false advertisement of any food
2 An advertisement is false if it is false or misleading in any particular.”);
- 3 • § 110395 (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any
4 food . . . that is falsely advertised.”);
- 5 • § 110398 (“It is unlawful for any person to advertise any food, drug, device, or cosmetic that is
6 adulterated or misbranded.”);
- 7 • § 110400 (“It is unlawful for any person to receive in commerce any food . . . that is falsely
8 advertised or to deliver or proffer for delivery any such food”);
- 9 • § 110670 (“Any food is misbranded if its labeling does not conform with the requirements for
10 nutrient content or health claims as set forth in Section 403(r) (21 U.S.C. Sec. 343(r)) of the
11 federal act and the regulations adopted pursuant thereto.”);
- 12 • § 110680 (“Any food is misbranded if its labeling or packaging does not conform to the
13 requirements of Chapter 4 (commencing with Section 110290).”);
- 14 • § 110705 (“Any food is misbranded if any word, statement, or other information required
15 pursuant to this part to appear on the label or labeling is not prominently placed upon the label or
16 labeling and in terms as to render it likely to be read and understood by the ordinary individual
17 under customary conditions of purchase and use.”);
- 18 • § 110760 (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any
19 food that is misbranded.”);
- 20 • § 110765 (“It is unlawful for any person to misbrand any food.”); and
- 21 • § 110770 (“It is unlawful for any person to receive in commerce any food that is misbranded or to
22 deliver or proffer for delivery any such food.”).

23 99. The Retailer Defendants’ conduct violated 21 U.S.C. § 331(c), which bars “[t]he receipt in
24 interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or
25 misbranded, and the delivery or proffered delivery thereof for pay or otherwise.”

26 100. The Retailer Defendants’ conduct further violated at least the following provisions of The
27 California Sherman Law:
28

- 1 • § 110100 (adopting all FDA food labeling regulations as state regulations);
- 2 • § 110390 (“It is unlawful for any person to disseminate any false advertisement of any food
- 3 An advertisement is false if it is false or misleading in any particular.”);
- 4 • § 110395 (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any
- 5 food . . . that is falsely advertised.”);
- 6 • § 110398 (“It is unlawful for any person to advertise any food, drug, device, or cosmetic that is
- 7 adulterated or misbranded.”);
- 8 • § 110400 (“It is unlawful for any person to receive in commerce any food . . . that is falsely
- 9 advertised or to deliver or proffer for delivery any such food”);
- 10 • § 110760 (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any
- 11 food that is misbranded.”);
- 12 • § 110770 (“It is unlawful for any person to receive in commerce any food that is misbranded or to
- 13 deliver or proffer for delivery any such food.”).

14 **X. ADDITIONAL TOLLING ALLEGATIONS**

15 101. Nestle was aware Coffee-mate did not have “0g Trans Fat” at all times during the Class
16 Period it made this claim.

17 102. Nestle made this claim knowing that it was false and illegal in order to deceive its
18 customers and increase its sales.

19 103. The Retailer Defendants likewise knew that the “0g Trans Fat” claim was false and illegal,
20 but nonetheless sold Coffee-mate bearing this claim.

21 104. Nestle was aware that the absence of trans fat was a major selling point that allowed it to
22 sell more Coffee-mate, and at a higher price, which is why its “0g Trans Fat” nutrient content claim was
23 made so prominently, and for so long, at the top and front of its product label.

24 105. The Retailer Defendants likewise were aware that the absence of trans fat was important to
25 consumers, and that the “0g Trans Fat” claim appearing on Coffee-mate allowed them to sell more
26 Coffee-mate and at a higher price.

27 106. All Defendants had a continuing and affirmative moral and legal obligation to correct their
28

1 false and illegal nutrient content claim about the amount of trans fat but intentionally choose to ignore
2 their obligation to do so.

3 107. Class members had no duty and no reason to inquire as to whether nutrient content claims
4 made on packaged food labels like Coffee-mate were true but were rather entitled to rely on their
5 accuracy. They likewise had no reason to disbelieve a prominent statement on a product label was false.
6 Nor did they have a reason to suspect the nutrient content claim was unauthorized. Mr. Beasley has no
7 training on the interpretation of the regulation of nutrient content claim regulations promulgated by the
8 FDA, and reasonably relied on the assumption that Defendants would not manufacture and sell a product
9 with prominent, false, unauthorized, and unlawful statements about its ingredients. The complexity of the
10 regulations is such that Mr. Beasley lacked the means to discover their falsehood and illegality until he
11 discussed the issue with his counsel.

12 108. Because of the fraudulent concealment of the fact that Coffee-mate was not “0g Trans Fat”
13 when it was promoted as such, as well as the concealment of the fact that this claim is separately an
14 unauthorized and unlawful nutrient content claim, class members are unaware even now of their claims
15 against Defendant.

16 109. Reasonable consumers, including Plaintiff, had no reason to suspect Defendants’ unfair
17 competition and violations of federal and state law prohibiting misbranding and unauthorized nutrient
18 content claims.

19 110. All Defendants owed a special duty of honesty toward Plaintiff and all Class Members,
20 akin to a fiduciary duty, which they violated by falsely and unlawfully manufacturing and selling Coffee-
21 mate with a false and unlawful nutrient content claim, and then continued to violate by not disclosing
22 their violations after the violations ceased.

23 111. California’s strong public policy against consumer fraud applies with special force where,
24 as here, the fraud concerns a toxic substance that has caused the untimely deaths of many thousands of
25 class members. This fraud and its harms are described in detail herein, and in even more detail in the
26 referenced scientific studies quoted and cited. During the entire class period, Defendants were aware that
27 their acts were oppressive and cruel, causing permanent physical as well as economic injury, and
28 consciously continued these acts for years while knowing the extent of the harm they were causing.

1 Equity and the public policy of California, embodied in its statutes jointly demand, in such circumstance,
2 that laches and tolling cannot apply in such a way to permit Defendants to continue to enjoy the fruits of
3 their intentional, cruel, fraudulent, oppressive, and unlawful acts.

4 **XI. RELIANCE AND INJURY**

5 112. Plaintiff read and relied on Nestle’s “0g Trans Fat” claim as a substantial factor in his
6 decision to continue purchasing Coffee-mate rather than other coffee creamers.

7 113. Plaintiff expected the claims made on a packaged food product manufactured by a large
8 corporation would be true and not misleading.

9 114. When purchasing Coffee-mate, Plaintiff sought a product that complied with federal and
10 state law and did not contain harmful ingredients like trans fat, or false nutrient content claims about
11 ingredients which were harmful to his health.

12 115. Plaintiff lost money as a result of Defendants’ conduct because he purchased products that
13 were detrimental to his health and unfairly offered for sale in violation of federal and California law.

14 116. Plaintiff, on at least one occasion, would not have purchased Coffee-mate absent its
15 misleading and unlawful “0g Trans Fat” nutrient content claim, and he likewise never would have
16 purchased it had he known it was misbranded and contained a prominent false statement on the front of
17 its label about its content.

18 117. Plaintiff lost money as a result of Defendants’ unlawful behavior. Plaintiff altered his
19 position to his detriment and suffered loss in an amount equal to the amount he paid for Coffee-mate.

20 **XII. CLASS ACTION ALLEGATIONS**

21 118. Plaintiff brings this action on behalf of himself and all others similarly situated (the
22 “Class”), excluding Defendants’ officers, directors, and employees, and the Court, its officers and their
23 families.

24 119. The Class is defined as follows:

25 All citizens of California who purchased in California, between January 1, 2010 and
26 December 31, 2014, Coffee-mate containing the nutrient content claim “0g Trans Fat” and
containing partially hydrogenated oil.

27 120. Questions of law and fact common to Plaintiff and the Class include:
28

- 1 • Whether Defendants’ conduct was immoral, unethical, unscrupulous, or substantially injurious to
- 2 consumers;
- 3 • Whether the slight utility Defendants realize as a result of their conduct outweighs the gravity of
- 4 the harm the conduct caused to their victims;
- 5 • Whether Defendants’ conduct violated public policy as declared by specific constitutional,
- 6 statutory, or regulatory provisions;
- 7 • Whether the injury to consumers from Defendants’ practices is substantial;
- 8 • Whether the injury to consumers from Defendants’ practices is one consumers themselves could
- 9 reasonably have avoided;
- 10 • Whether Coffee-mate communicated a misleading health and wellness message and made an
- 11 unauthorized nutrient content claim through its “0g Trans Fat” claim;
- 12 • Whether that message was material to a reasonable consumer;
- 13 • Whether “0g Trans Fat” is an unlawful and/or misleading nutrient content claim;
- 14 • Whether Defendants’ conduct constitutes violations of California’s False Advertising Law;
- 15 • Whether members of the Class are entitled to entitled to actual damages, restitution, rescission,
- 16 punitive damages, and attorney fees and costs;
- 17 • Whether members of the Class are entitled to prejudgment interest, and how that interest is to be
- 18 calculated;
- 19 • Whether members of the Class are entitled to any further relief; and
- 20 • The fair apportionment of liability among Defendants.

21 121. Plaintiff’s claims are typical of Class members’ claims because all Class members were
22 subjected to the same unlawful, unfair, and deceptive conduct when they purchased Coffee-mate in
23 packaging bearing the deceptive and unlawful nutrient content claim “0g Trans Fat” and suffered the
24 same economic injury.

25 122. Absent Defendants’ material deceptions, misstatements, and omissions, and Defendants’
26 unlawful sale, distribution, and marketing of Coffee-mate, Plaintiff and other Class members would not
27 have purchased Coffee-mate.

1 123. The Class is sufficiently numerous, as it includes thousands of individuals who purchased
2 Coffee-mate throughout California during the class period.

3 124. Class representation is superior to other options for the resolution of the controversy. The
4 relief sought for each Class member is small, as little as two dollars for some Class members. Absent the
5 availability of class action procedures, it would be infeasible for Class members to redress the wrongs
6 done to them.

7 125. Questions of law and fact common to the Class predominate over any questions affecting
8 only individual members.

9 126. To the extent Plaintiff is wrong and the Northern District of California has CAFA
10 jurisdiction over this case, class treatment is appropriate under Fed. R. Civ. P. 23. Plaintiff will, if notice
11 is required, confer with Defendants and seek to present the Court with a stipulation and proposed order
12 on the details of a class notice plan. For the same reasons, class treatment is appropriate under the
13 procedural rules of California's courts.

14 **CAUSES OF ACTION**

15 **First Cause of Action**

16 **Unfair Competition Law, Bus. & Prof. Code §§ 17200 et seq.**

17 127. In this and every cause of action, Plaintiff realleges and incorporates by reference each
18 and every allegation contained elsewhere in the Complaint, as if fully set forth herein.

19 **Unlawful Conduct**

20 128. Defendants have made and distributed, in interstate commerce and in this county products
21 that make false or misleading statements of fact regarding their content. Coffee-mate was placed into
22 interstate commerce by Defendants and sold throughout the country and throughout California.

23 129. The acts, omissions, misrepresentations, practices, and non-disclosures of Defendants as
24 alleged herein constitute "unlawful" business acts and practices in that Defendants' conduct violated the
25 California False Advertising Law and Consumer Legal Remedies Act, as alleged herein.

26 130. Nestle's conduct is further "unlawful" because it violated the Federal Food, Drug and
27 Cosmetic Act ("FDCA"), specifically, (a) 21 U.S.C. § 343(a), which deems food misbranded when the
28 label contains a statement that is "false or misleading in any particular," and (b) 21 C.F.R. § 101.13(i)(3),

1 which bars nutrient content claims voluntarily placed on the front of a product label that are “false or
2 misleading in any respect.”

3 131. Nestle further violated the FDCA’s implementing regulation, 21 C.F.R. § 1.21, because
4 Coffee-mate’ packaging fails to reveal material facts, namely the dangers of PHO described in detail
5 herein, “in light of other representations,” namely the misleading “0g Trans Fat” front label claim

6 132. Nestle’s conduct further violated The California Sherman Food, Drug, and Cosmetic Law
7 (“Sherman Law”), Health & Safety Code § 110660, which deems food products “misbranded” if their
8 labeling is “false or misleading in any particular,” and Health & Safety Code § 110670, which bars
9 nutrient content claims voluntarily placed on the front of a product label that fail to comply with the
10 federal regulation for nutrient content claims (i.e., “may not be false or misleading in any respect”).

11 133. Nestle’s conduct also violated the following sections of the Sherman Law:

- 12 • § 110100 (adopting all FDA food labeling regulations as state regulations);
- 13 • § 110290 (“In determining whether the labeling or advertisement of a food . . . is misleading, all
14 representations made or suggested by statement, word, design, device, sound, or any combination
15 of these shall be taken into account. The extent that the labeling or advertising fails to reveal facts
16 concerning the food . . . or consequences of customary use of the food . . . shall also be
17 considered.”);
- 18 • § 110390 (“It is unlawful for any person to disseminate any false advertisement of any food
19 An advertisement is false if it is false or misleading in any particular.”);
- 20 • § 110395 (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any
21 food . . . that is falsely advertised.”);
- 22 • § 110398 (“It is unlawful for any person to advertise any food, drug, device, or cosmetic that is
23 adulterated or misbranded.”);
- 24 • § 110400 (“It is unlawful for any person to receive in commerce any food . . . that is falsely
25 advertised or to deliver or proffer for delivery any such food”);
- 26 • § 110670 (“Any food is misbranded if its labeling does not conform with the requirements for
27 nutrient content or health claims as set forth in Section 403(r) (21 U.S.C. Sec. 343(r)) of the
28

1 federal act and the regulations adopted pursuant thereto.”);

- 2 • § 110680 (“Any food is misbranded if its labeling or packaging does not conform to the
3 requirements of Chapter 4 (commencing with Section 110290).”);
- 4 • § 110705 (“Any food is misbranded if any word, statement, or other information required
5 pursuant to this part to appear on the label or labeling is not prominently placed upon the label or
6 labeling and in terms as to render it likely to be read and understood by the ordinary individual
7 under customary conditions of purchase and use.”);
- 8 • § 110760 (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any
9 food that is misbranded.”);
- 10 • § 110765 (“It is unlawful for any person to misbrand any food.”); and
- 11 • § 110770 (“It is unlawful for any person to receive in commerce any food that is misbranded or to
12 deliver or proffer for delivery any such food.”).

13 134. Nestle’s marketing, and sale of Coffee-mate in packaging bearing the “0g Trans Fat” thus
14 constitute violations of the FDCA and the Sherman Law and, as such, violated the “unlawful” prong of
15 the UCL.

16 135. The Retailer Defendants’ conduct violated 21 U.S.C. § 331(c), which bars “[t]he receipt in
17 interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or
18 misbranded, and the delivery or proffered delivery thereof for pay or otherwise.”

19 136. The Retailer Defendants’ conduct further violated at least the following provisions of The
20 California Sherman Law:

- 21 • § 110100 (adopting all FDA food labeling regulations as state regulations);
- 22 • § 110390 (“It is unlawful for any person to disseminate any false advertisement of any food
23 An advertisement is false if it is false or misleading in any particular.”);
- 24 • § 110395 (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any
25 food . . . that is falsely advertised.”);
- 26 • § 110398 (“It is unlawful for any person to advertise any food, drug, device, or cosmetic that is
27 adulterated or misbranded.”);

- 1 • § 110400 (“It is unlawful for any person to receive in commerce any food . . . that is falsely
2 advertised or to deliver or proffer for delivery any such food”);
- 3 • § 110760 (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any
4 food that is misbranded.”);
- 5 • § 110770 (“It is unlawful for any person to receive in commerce any food that is misbranded or to
6 deliver or proffer for delivery any such food.”).

7 137. Defendants leveraged their deception to induce Plaintiff and members of the Class to
8 purchase products that were of lesser value and quality than advertised.

9 138. Plaintiff suffered injury in fact and lost money or property as a result of Defendants’
10 deceptive advertising: he was denied the benefit of the bargain when he decided to purchase Coffee-mate
11 over competitor products that are not adulterated with artificial trans fat.

12 139. Had Plaintiff been aware of Defendants’ false and misleading advertising tactics, he would
13 not have purchased Coffee-mate, and had Defendants not advertised and sold Coffee-mate in a fraudulent
14 manner, he would have paid less for it or not purchased it

15 140. Plaintiff also seeks an order for the restitution of all revenue received by Defendants from
16 the sale of Coffee-mate which was acquired through acts of unlawful, unfair, or fraudulent competition.

17 **Fraudulent Conduct**

18 141. Defendants leveraged their deception to induce Plaintiff and members of the Class to
19 purchase products that were of lesser value and quality than advertised.

20 142. Plaintiff suffered injury in fact and lost money or property as a result of Defendants’
21 deceptive advertising: he was denied the benefit of the bargain when he decided to purchase Coffee-mate
22 over competitor products, which are less expensive or contain no artificial trans fat.

23 143. The acts of Defendants as alleged herein constitute “fraudulent” business acts and
24 practices in that Defendants’ conduct has a likelihood, capacity or tendency to deceive Plaintiff, the
25 Class, and the general public.

26 144. Plaintiff further seeks an order for the restitution of all revenue received by Defendants
27 from the sale of Coffee-mate containing artificial trans fat and the false “0g Trans Fat” nutrient content
28

1 claim.

2 **Unfair Conduct**

3 145. Defendants leveraged their deception to induce Plaintiff and members of the Class to
4 purchase products that were of lesser value and quality than advertised.

5 146. Plaintiff suffered injury in fact and lost money or property as a result of Defendants'
6 deceptive advertising: he was denied the benefit of the bargain when he decided to purchase Coffee-mate
7 over competitor products, which are less expensive and/or contain no artificial trans fat.

8 147. Had Plaintiff been aware of Defendants' false and misleading advertising tactics, he would
9 not have purchased Coffee-mate, and had Defendants not advertised them in a fraudulent manner,
10 Plaintiff would have paid less for them.

11 148. The acts, omissions, misrepresentations, practices, and non-disclosures of Defendants as
12 alleged herein constitute "unfair" business acts and practices because Defendants' conduct is:

- 13 • immoral, unethical, unscrupulous, and offends public policy;
14 • the gravity of Defendants' conduct outweighs any conceivable benefit of such conduct; and
15 • the injury to consumers caused by Defendants' conduct is substantial, not outweighed by any
16 countervailing benefits to consumers or competition, and not one that consumers themselves
17 could reasonably have avoided.

18 149. Plaintiff seeks an order for the restitution of all revenue received by Defendants from the
19 sale of Coffee-mate which were acquired through acts of unlawful, unfair, or fraudulent competition.

20 **Second Cause of Action**

21 **California False Advertising Law,**

22 **Bus. & Prof. Code §§ 17500 *et seq.***

23 150. In violation of Bus. & Prof. Code §§ 17500 *et seq.*, the advertisements, labeling, policies,
24 acts, and practices described herein were designed to, and did, result in the purchase and use of Coffee-
25 mate without the knowledge that they contained harmful amounts of toxic artificial trans fat.

26 151. Defendants knew and reasonably should have known that the labels on Coffee-mate were
27 untrue and misleading.

1 152. As a result, Plaintiff, the Class, and the general public are entitled to equitable relief,
2 restitution, and an order for the disgorgement of the funds by which Defendants were unjustly enriched.

3 **Third Cause of Action**

4 **Breach of Express Warranty**

5 **(Against Nestle Only)**

6 153. Nestle made written representations to the public, including Plaintiff, with its front label
7 “0g Trans Fat” claim.

8 154. These promises and related promises printed on the label became part of the basis of the
9 bargain between the parties and thus constituted an express warranty.

10 155. Thereon, Nestle sold the goods to Plaintiff and other consumers.

11 156. However, Nestle breached this express warranty in that Coffee-mate did not contain “0g
12 Trans Fat” because it contained partially hydrogenated oil, which necessarily contains artificial trans fat.

13 157. As a result of this breach, Plaintiff and other consumers in fact did not receive goods as
14 warranted by Nestle.

15 158. As a proximate result of this breach of warranty by Nestle, Plaintiff and other consumers
16 have been damaged in an amount to be determined at trial.

17 **Fourth Cause of Action**

18 **California Consumer Legal Remedies Act,**

19 **Cal. Civ. Code §§ 1750 *et seq.***

20 159. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if set
21 forth in full herein.

22 160. The CLRA prohibits deceptive practices in connection with the conduct of a business that
23 provides goods, property, or services primarily for personal, family, or household purposes.

24 161. Defendants’ policies, acts and practices were designed to, and did, result in the purchase
25 and use of the Products primarily for personal, family, or household purposes, and violated the following
26 sections of the CLRA:

- 27 • § 1770(a)(5): representing that goods have characteristics, uses, or benefits which they do not
28 have;

- 1 • § 1770(a)(7): representing that goods are of a particular standard, quality, or grade if they are of
- 2 another;
- 3 • § 1770(a)(9): advertising goods with intent not to sell them as advertised; and
- 4 • § 1770(a)(16): representing the subject of a transaction has been supplied in accordance with a
- 5 previous representation when it has not.

6 162. In compliance with Civ. Code § 1782, Plaintiff sent Defendants written notice of his
7 claims on October 29, 2018. Pursuant to section 1782 *et seq.* of the CLRA, Plaintiff notified Defendants
8 in writing by certified mail of the particular violations of § 1770 of the Act as to misleading claims and
9 demanded that Defendants rectify the problems associated with the actions detailed above and give notice
10 to all affected consumers of its intent to so act. Defendants' wrongful business practices regarding
11 Coffee-mate constituted a course of conduct in violation of the CLRA.

12 163. Defendants received Plaintiff's written notice on November 5, 2018.

13 **XIII. PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiff, on behalf of himself, all others similarly situated, and the general
15 public, prays for judgment against Defendants as follows:

- 16 A. An order confirming that this class action is properly maintainable as a class action as
- 17 defined above, appointing Plaintiff and his undersigned counsel to represent the Class,
- 18 and requiring Defendants to bear the cost of class notice;
- 19 B. Damages for breach of warranty;
- 20 C. An order requiring Defendants to pay restitution to Plaintiff and class members so that they
- 21 may be restored the money which Defendants acquired by means of any unfair,
- 22 deceptive, unconscionable, fraudulent, and negligent acts;
- 23 D. An order requiring Defendants to disgorge any benefits received from Plaintiff and unjust
- 24 enrichment realized as a result of its improper and misleading advertising and marketing
- 25 of Coffee-mate;
- 26 E. An order requiring Defendants to pay restitution and damages to Plaintiff and the "0g Trans
- 27 Fat" Class members so that they may be restored any money which was acquired by
- 28

1 means of any unfair, deceptive, unconscionable, fraudulent, or negligent acts;

2 F. An award of punitive damages in an amount to be proven at trial;

3 G. An award of pre-judgment and post-judgment interest;

4 H. An award of attorney fees and costs; and

5 I. Such other and further relief as this Court may deem just, equitable, or proper.

6 **XIV. NO JURY DEMAND**

7 Plaintiff does not demand a trial by jury.

8
9 DATED: October 4, 2019

Respectfully Submitted,

10
11 s/ Gregory S. Weston
12 **THE WESTON FIRM**
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Counsel for Plaintiff