

1 **THE WESTON FIRM**  
2 GREGORY S. WESTON (239944)  
3 greg@westonfirm.com  
4 ANDREW C. HAMILTON (299877)  
5 andrew@westonfirm.com  
6 1405 Morena Blvd., Suite 201  
7 San Diego, CA 92110  
8 Telephone: (619) 798-2006  
9 Facsimile: (619) 343-2789

10 **Counsel for Plaintiff**

11  
12 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**  
13 **FOR THE COUNTY OF SAN FRANCISCO**

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

16 Plaintiff,

17 v.

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

22 Defendants.

**FILED**

San Francisco County Superior Court

OCT 29 2018

CLERK OF THE COURT

BY: Maria L. Gue  
Deputy Clerk

Case No. **CGC-18-570953**

**CLASS ACTION COMPLAINT FOR VIOLATIONS OF:**

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

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

**BREACH OF EXPRESS AND IMPLIED WARRANTIES**

By Fax

## TABLE OF CONTENTS

I.	JURISDICTION AND VENUE .....	1
II.	NATURE OF THE ACTION .....	1
III.	PARTIES .....	2
IV.	NATURE OF TRANS FAT .....	3
V.	PLAINTIFF'S PURCHASES OF COFFEE-MATE .....	12
VI.	COFFEE-MATE'S "0g TRANS FAT" CLAIM WAS FALSE, MISLEADING AND AN UNLAWFUL NUTRIENT CONTENT CLAIM .....	12
VII.	COFFEE-MATE UNNECESSARILY CONTAINED PHO AND TRANS FAT .....	14
VIII.	NESTLE HAS A PATTERN AND PRACTICE OF ENGAGING IN OPPRESSIVE CONDUCT TOWARD CONSUMERS .....	14
IX.	DEFENDANTS' PRACTICES ARE "UNFAIR" WITHIN THE MEANING OF THE CALIFORNIA UNFAIR COMPETITION LAW .....	22
X.	DEFENDANTS' PRACTICES ARE "UNLAWFUL" WITHIN THE MEANING OF THE CALIFORNIA UNFAIR COMPETITION LAW .....	23
XI.	RELIANCE AND INJURY .....	24
XII.	DELAYED DISCOVERY .....	24
XIII.	CLASS ACTION ALLEGATIONS .....	25
	CAUSES OF ACTION .....	27
XIV.	PRAYER FOR RELIEF .....	34
XV.	NO JURY DEMAND .....	34

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

## 6 **I. JURISDICTION AND VENUE**

7 1. Jurisdiction is proper in the Superior Court of San Francisco because Plaintiff is a citizen  
 8 of California and because all claims are asserted under the laws of California.

9 2. Venue is proper in the Superior Court for the County of San Francisco because  
 10 Plaintiff's claims accrued, in part, in San Francisco, and Defendants are found and do business in San  
 11 Francisco.

## 12 **II. NATURE OF THE ACTION**

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

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

20 5. On June 16, 2015, the FDA issued a final regulation and declaratory order, after  
 21 extensive public comment, declaring PHO unsafe for any use in food.<sup>1</sup> The FDA came to the same  
 22 conclusion when it initially proposed the regulation in 2013.

23 6. Defendants were aware that PHO was unsafe even before this time, yet still harmed their  
 24 customers by manufacturing, distributing, and selling Coffee-mate.

25 7. During the entire class period, inexpensive and commercially viable alternatives to PHO  
 26 existed, and indeed were even in used by the primary competitor to Coffee-mate, International Delight.

27 <sup>1</sup> 80 Fed. Reg. 34650 (June 17, 2015) (hereinafter "FDA Final Determination").  
 28

1 In order to increase profits, Defendants instead sold an unsafe and illegal product, and such behavior  
2 was an unfair business practice.

3 8. For much of the class period, Defendants also defrauded the class by using the false and  
4 unauthorized "0g Trans Fat" nutrient content claim on Coffee-mate packaging. All PHO, however,  
5 contains trans fat, and the amount in Coffee-mate was not "0g," but a substantial and dangerous  
6 amount.

7 9. Plaintiff purchased and consumed Coffee-mate from the grocery stores owned by  
8 Defendants Lucky, Save Mart, SMCI, and Kroger grocery stores during the Class Period defined  
9 herein.

10 10. Plaintiff seeks an order of restitution for himself and a class.

### 11 III. PARTIES

12 11. Defendant Lucky is a California corporation and a subsidiary of SMCI. Lucky operates a  
13 chain of grocery stores in California and sells Coffee-mate at these stores.

14 12. Defendant Nestle is a Delaware corporation with its principal place of business in  
15 California or Virginia.

16 13. Nestle owns, manufactures, distributes, and sells Coffee-mate.

17 14. Nestle manufactured, labeled, and distributed Coffee-mate in California. Further,  
18 decisions regarding its formulation, labeling, and marketing were made in California.

19 15. Defendant Nestle USA, Inc. is a subsidiary of Nestle, S.A., a Swiss corporation  
20 headquartered in Vevey, Canton of Vaud. Nestle, S.A. is the largest food company in the world, with  
21 2017 annual revenue and profits of about \$90 billion and \$7.2 billion.

22 16. Defendants Save Mart and SMCI are California corporations with their principal place  
23 of business in Modesto, California. They own and operate multiple chains of grocery stores in  
24 California, including Lucky, and sold Coffee-mate during this time.

25 17. Defendant Kroger is Delaware corporation with its principle place of business in Ohio. It  
26 owns and operates grocery stores in California, including under the brand name Foods Co, one of the  
27 places Plaintiff purchased Coffee-mate. Kroger sells Coffee-mate throughout its California grocery  
28 stores.

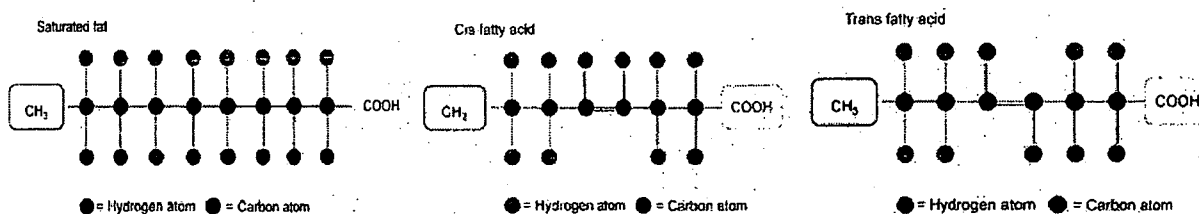
18. Plaintiff Mark Beasley is a citizen of California who repeatedly purchased Coffee-mate for personal and household consumption, including at a Foods Co store in San Francisco.

#### IV. NATURE OF TRANS FAT

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

20. PHO was invented in 1901 and patented in 1902 by German chemist Wilhelm Normann. PHO molecules chemically differ from the natural fat molecules in other food products.<sup>3</sup>

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



22. PHO was initially a "wonder product" attractive to the processed food industry because it combined the low cost of unsaturated cis fat with the flexibility and long shelf life of saturated fat. Like processed cis fat, PHO is manufactured from low-cost legumes,<sup>4</sup> while saturated fat is derived from relatively expensive animal and tropical plant sources.<sup>5</sup>

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

<sup>3</sup> See Alberto Ascherio et al., *Trans Fatty Acids & Coronary Heart Disease*, 340 NEW ENG. J. MED. 94, 94-8 (1999). See also Walter Willett, *The Scientific Case for Banning Trans Fats*, Scientific American, available at [www.scientificamerican.com/article/the-scientific-case-for-banning-trans-fats/](http://www.scientificamerican.com/article/the-scientific-case-for-banning-trans-fats/) (last visited October 22, 2018).

<sup>4</sup> e.g., corn oil, cottonseed oil, soybean oil, peanut oil

<sup>5</sup> e.g., butter, cream, tallow, palm oil, coconut oil

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

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

24. The National Academies of Science were chartered by an act of Congress, signed by President Lincoln in 1863. Under that charter, in 1970, the National Academy of Medicine was created. In a 2005 report, under its former name of the Institute of Medicine, it issued a report finding there was "no safe level" of PHO or artificial trans fat intake.<sup>6</sup> Therefore, in 2005, there was no consensus that PHO was a safe ingredient to use in food. To the contrary, the consensus was that it is unsafe.

25. In addition, "trans fatty acids are not essential and provide no known benefit to human health."<sup>7</sup> Thus, while IOM provided safe maximum levels for other food elements like saturated fat, in could not and declined to provide one for trans fat when requested by the FDA, the reason being that "any incremental increase in trans fatty acid intake increases the risk of CHD."<sup>8</sup> (emphasis added).

26. In 2006, Dariush Mozaffarian of Harvard Medical School wrote in the New England Journal of Medicine, "the consumption of trans fatty acids results in considerable potential harm but no apparent benefit."<sup>9</sup>

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

The scientific rationale for eliminating exposure to artificial trans fatty acids in foods is rock solid. There is no evidence that they provide any health benefit, and they are certainly

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

<sup>7</sup> Food Labeling; Health Claim; Phytosterols and Risk of Coronary Heart Disease; Proposed Rule, 75 Fed. Reg. 76526, 76542 (Dec. 8, 2010).

<sup>8</sup> *Id.*

<sup>9</sup> Dariush Mozaffarian et al., *Trans Fatty Acids and Cardiovascular Disease*, 354 N. ENGL. J. MED. 1601, 1608-1609 (2006).

harmful. These compounds adversely affect both low- and high-density lipoprotein cholesterol levels and increase the risk for coronary heart disease, even at relatively low levels of dietary intake. Gram for gram, trans fats are far more potent than saturated fats in increasing the risk for heart disease, perhaps because they also have pro-inflammatory 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.<sup>10</sup>

28. Dr. Mozaffarian further writes:

Given the adverse effects of trans fatty acids on serum lipid levels, systemic inflammation, and possibly other risk factors for cardiovascular disease and the positive associations with the risk of CHD, sudden death from cardiac causes, and possibly diabetes, the potential for 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.<sup>11</sup>

29. In 2011, Walter Willet, also a professor at Harvard Medical School, described Defendants' behavior of selling food made with PHO as "a food safety issue . . . this is actually contamination."<sup>12</sup>

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

**B. The PHO in Coffee-mate Caused Coronary Heart Disease.**

31. Trans fat raises the risk of CHD more than any other known consumed substance.<sup>13</sup>

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

<sup>10</sup> Julie Louise Gerberding, *Safer Fats for Healthier Hearts: The Case for Eliminating Dietary Artificial Trans Fat Intake*, 151 ANN. INTERN. MED. 137-138 (2009).

<sup>11</sup> Dariush Mozaffarian et al., *Trans Fatty Acids and Cardiovascular Disease*, 354 N. ENGL. J. MED. 1601 (2006).

<sup>12</sup> Rebecca Coombes, *Trans fats: chasing a global ban*, 343 BRITISH MED. J. (2011).

<sup>13</sup> Mozaffarian, 354 NEW ENG. J. MED. at 1603.



1 annually.”<sup>14</sup>

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

4 34. In a joint Dietary Guidelines Advisory Committee Report, the Department of Health and  
5 Human Services and the U.S. Department of Agriculture recognized “[t]he relationship between trans  
6 fatty acid intake and LDL cholesterol is direct and progressive, increasing the risk of cardiovascular  
7 disease.”<sup>15</sup>

8 35. The American Heart Association warns, “trans fats raise your bad (LDL) cholesterol  
9 levels and lower your good (HDL) cholesterol levels. Eating trans fats increases your risk of developing  
10 heart disease.”<sup>16</sup>

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

13 [B]ased on the consistent results across a number of the most persuasive types of study  
14 designs (i.e., intervention trials and prospective cohort studies) that were conducted using a  
15 range of test conditions and across different geographical regions and populations . . . the  
16 available evidence for an adverse relationship between trans fat intake and CHD risk is  
17 strong.<sup>17</sup>

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

23 38. A study published in American Heart Association’s *Circulation* found that the largest

24 <sup>14</sup> Alberto Ascherio et al., *Trans Fatty Acids & Coronary Heart Disease*, 340 NEW ENG. J. MED. 94, 94-  
25 8 (1999).

26 <sup>15</sup> Dep’t of Health & Human Serv. & U.S. Dep’t of Agric., 2005 Dietary Guidelines Advisory  
27 Committee Report, Section 10 (2005).

28 <sup>16</sup> Am. Heart Ass’n., *Trans Fat Overview*, available at [tinyurl.com/TransFatOverview](http://tinyurl.com/TransFatOverview) (last visited  
October 22, 2018).

<sup>17</sup> FDA, Final Rule, 68 Fed. Reg. 41433, 41445 (July 11, 2003).



1 consumers of trans fat have three times the risk of suffering primary cardiac arrest, even after  
2 controlling for a variety of medical and lifestyle risk factors.<sup>18</sup>

3 39. Australian researchers observed that heart attack patients possess elevated amounts of  
4 trans fat in their adipose tissue (stored body fat) compared to controls. The effects of consuming trans  
5 fat are therefore shown to be long-lived because of its storage within the body in place of natural fats.<sup>19</sup>

6 40. Cholesterol dysregulation and systemic inflammation/immune system dysregulation are  
7 the most important pathways through which PHO consumption causes morbidity and death. Another  
8 route is by promoting atherosclerosis by degrading the function of TGF- $\beta$ , a protein responsible for  
9 preventing the development of atherosclerotic lesions.<sup>20</sup>

10 41. TGF- $\beta$  also functions to suppress cancerous tumors. Degradation of TGF- $\beta$  function is  
11 also likely one route by which artificial trans fat consumption promotes cancers in fatty organs and the  
12 digestive system.<sup>21</sup>

13 **C. The PHO in Coffee-mate Caused Type-2 Diabetes.**

14 42. Artificial trans fat also causes type-2 diabetes.<sup>22</sup>

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

18 44. Researchers at Northwestern University's medical school found that mice show multiple  
19  
20  
21

22 <sup>18</sup> Rozenn N. Lemaitre et al., *Cell Membrane Trans-Fatty Acids and the Risk of Primary Cardiac Arrest*, 105 CIRCULATION 697, 697-701 (2002).

23 <sup>19</sup> Peter M. Clifton et al., *Trans Fatty Acids In Adipose Tissue And The Food Supply Are Associated With Myocardial Infarction*, 134 J. NUTR. 874, 874-79 (2004).

24 <sup>20</sup> Chen, C.L. et al., *A mechanism by which dietary trans fats cause atherosclerosis*, J. NUTR. BIOCHEMISTRY 22(7) 649-655 (2011).

25 <sup>21</sup> *Id.*

26 <sup>22</sup> Am. Heart Ass'n., *Trans Fat Overview*, available at [tinyurl.com/TransFatOverview](http://tinyurl.com/TransFatOverview) (last visited October 22, 2018).  
27  
28

1 markers of type-2 diabetes after eating PHO for only four weeks.<sup>23</sup>

2 45. By the eighth week of the study, mice fed the high trans fat diet showed a 500% increase  
3 compared to the control group in hepatic interleukin-1 $\beta$  gene expression, one such marker of diabetes,  
4 indicating the extreme stress even short-term exposure to artificial trans fat places on the body.<sup>24</sup>

5 46. A 14-year study of 84,204 women found that for every 2 percent increase in energy  
6 intake from artificial trans fat, the relative risk of type-2 diabetes was increased by 39 percent.<sup>25</sup>

7 **D. The PHO in Coffee-mate Caused Breast, Prostate, and Colorectal Cancer.**

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

9 48. A 13-year study of 19,934 French women showed 75 percent more women contracted  
10 breast cancer in the highest quintile of trans fat consumption than did those in the lowest.<sup>26</sup>

11 49. In a 25-year study of 14,916 American physicians, those in the highest quintile of trans  
12 fat consumption had more than double the risk of developing prostate cancer than the doctors in the  
13 lowest quintile.<sup>27</sup>

14 50. A study of 1,012 American males observing trans fat intake and the risk of prostate  
15 cancer found “[c]ompared with the lowest quartile of total trans-fatty acid consumption, the higher  
16 quartiles gave odds ratios (ORs) equal to 1.58,” meaning those in the highest quartile are 58% more  
17 likely to contract prostate cancer than those in the lowest.<sup>28</sup>

18 51. A 600-person study found an 86 percent greater risk of colorectal cancer in the highest  
19

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

22 <sup>24</sup> *Id.*

23 <sup>25</sup> Jorge Salmerón et al., *Dietary Fat Intake and Risk of Type 2 Diabetes in Women*, 73 AM. J. CLINICAL  
NUTRITION 1019, 1023 (2001).

24 <sup>26</sup> Véronique Chajès et al., *Association between Serum Trans-Monounsaturated Fatty Acids and Breast*  
25 *Cancer Risk in the E3N-EPIC Study*, 167 AM. J. EPIDEMIOLOGY 1312, 1316 (2008).

26 <sup>27</sup> Jorge Chavarro et al., *A Prospective Study of Blood Trans Fatty Acid Levels and Risk of Prostate*  
Cancer., 47 PROC. AM. ASSOC. CANCER RESEARCH 95, 99 (2006).

27 <sup>28</sup> Xin Liu et al., *Trans-Fatty Acid Intake and Increased Risk of Advanced Prostate Cancer:*  
28 *Modification by RNASEL R462Q Variant*, 28 CARCINOGENESIS 1232, 1232 (2007).

trans fat consumption quartile.<sup>29</sup>

52. A 2,910-person study found “trans-monounsaturated fatty acids . . . were dose-dependently associated with colorectal cancer risk,” which showed “the importance of type of fat in the etiology and prevention of colorectal cancer.”<sup>30</sup>

**E. The PHO in Coffee-mate Caused Alzheimer’s Disease and Cognitive Decline.**

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

54. In a study examining 815 Chicago area seniors, researchers found “increased risk of incident Alzheimer disease among persons with high intakes of . . . trans-unsaturated fats.”<sup>31</sup>

55. The study “observed a strong increased risk of Alzheimer disease with consumption of trans-unsaturated fat.”<sup>32</sup>

56. In a study of 1,486 women with type-2 diabetes, researchers found “[h]igher intakes of . . . trans fat since midlife . . . were [] highly associated with worse cognitive decline . . . .”<sup>33</sup>

57. The study cautioned “[d]ietary fat intake can alter glucose and lipid metabolism and is related to cardiovascular disease risk in individuals with type 2 diabetes. Because insulin, cholesterol, and vascular disease all appear to play important roles in brain aging and cognitive impairments, dietary fat modification may be a particularly effective strategy for preventing cognitive decline, especially in individuals with diabetes.”<sup>34</sup> (citations omitted).

58. Artificial trans fat also damages the brains of those who consume it. A study conducted by UCSD School of Medicine of 1,018 men, mostly younger men, found trans fat consumption to be

<sup>29</sup> L.C. Vinikoor et al., *Consumption of Trans-Fatty Acid and its Association with Colorectal Adenomas*, 168 AM. J. EPIDEMIOLOGY 289, 294 (2008).

<sup>30</sup> Evropi Theodoratou et al., *Dietary Fatty Acids and Colorectal Cancer: A Case-Control Study*, 166 AM. J. EPIDEMIOLOGY 181 (2007).

<sup>31</sup> Martha Clare Morris et al., *Dietary Fats and the Risk of Incident Alzheimer Disease*, 60 ARCH. NEUROL. 194, 198-99 (2003).

<sup>32</sup> *Id.*

<sup>33</sup> Elizabeth E. Devore et al., *Dietary Fat Intake and Cognitive Decline in Women with Type 2 Diabetes*, 32 DIABETES CARE 635 (2009).

<sup>34</sup> *Id.*

1 strongly correlated with impaired memory.<sup>35</sup> The authors of the study, appearing in *Circulation*, the  
 2 American Heart Association's peer-reviewed journal, conclude that "Greater dTFA [dietary trans fatty  
 3 acid] was significantly associated with worse word memory in adults aged 20-45 years, often critical  
 4 years for career building."

5 59. Performing a word memory test, each additional gram per day of trans fat consumed was  
 6 associated with 0.76 fewer words correctly recalled. The authors suggest trans fat's well-established  
 7 pro-oxidant effect and its damage to cell energy processes is the pathway by which trans fat  
 8 consumption damages memory ability. The young men with the highest trans fat consumption scored  
 9 12 fewer recalled words on the 104-word test.<sup>36</sup>

10 **F. The PHO in Coffee-mate Caused Organ Damage.**

11 60. Artificial trans fat molecules are readily incorporated into blood and organ cells in place  
 12 of natural fat molecules, which damages vital organs, including the heart, brain, and reproductive system.  
 13 Further, changing the chemical composition of cells induces systemic inflammation, where the immune  
 14 system fails to recognize such cells as native to the body and becomes persistently overactive, leading to  
 15 further organ damage.<sup>37</sup>

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

17 61. New York City banned trans fat in restaurants in 2006. Similar laws exist in Philadelphia;  
 18

19 <sup>35</sup> Golomb, B. et al., *Trans Fat Consumption is Adversely Linked to Memory in Working-Age Adults*,  
 20 *CIRCULATION*. 130:A15572 (2014).

21 <sup>36</sup> *Id.*

22 <sup>37</sup> *See:*

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

24 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);

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

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

1 Baltimore; Stamford, Connecticut; and Montgomery County, Maryland.

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

4 63. Nestle's home country, Switzerland, made the same restriction in 2008.<sup>38</sup>

5 64. A study of Denmark's 2004 trans fat ban concluded it "did not appreciably affect the  
6 quality, cost or availability of food" and did not have "any noticeable effect for the consumers."<sup>39</sup>

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

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

12 67. The FDA's Final Determination noted that "if there are data and information that  
13 demonstrates to a reasonable certainty that no harm will result from a specific use of a PHO in food,  
14 that information could be submitted as part of a food additive petition to FDA seeking issuance of a  
15 regulation to prescribe conditions under which the additive may be safely used in food." Final  
16 Determination at 34664.

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

25 <sup>38</sup> Andrew Collier, *Deadly Fats: Why Are We still Eating Them?*, The Independent (UK), June 10,  
26 2008.

27 <sup>39</sup> Mozaffarian, 354 NEW ENG. J. MED. at 1610; see also Steen, Stender, *High Levels of Industrially*  
28 *Produced Trans Fat in Popular Fast Food*, 354 NEW ENG. J. MED. 1650, 1652 (2006).

1 **V. PLAINTIFF'S PURCHASES OF COFFEE-MATE**

2 69. Plaintiff Mark Beasley purchased Coffee-mate during the Class Period approximately  
3 once per month. These purchases included both the liquid and powder versions of Coffee-mate.

4 70. The most frequent locations of Mr. Beasley's purchases of Coffee-mate were at the  
5 Foods Co located at 345 Williams Ave., San Francisco, CA 94124 and Lucky, located at 1322 El  
6 Camino Real, San Bruno, CA 94066.

7 71. Plaintiff first discovered Defendants' unlawful acts described herein in January 2017,  
8 when he learned that Coffee-mate contained an unsafe food additive for years and was fraudulently  
9 marketed.

10 72. Plaintiff, in the exercise of reasonable diligence, could not have discovered earlier  
11 Defendants' fraudulent and unlawful acts. Plaintiff is not a nutritionist, food expert, or food scientist,  
12 but rather a lay consumer who did not have the specialized human nutrition knowledge of Defendants,  
13 nor is Plaintiff, like Defendants, charged with compliance with state and federal food safety laws.

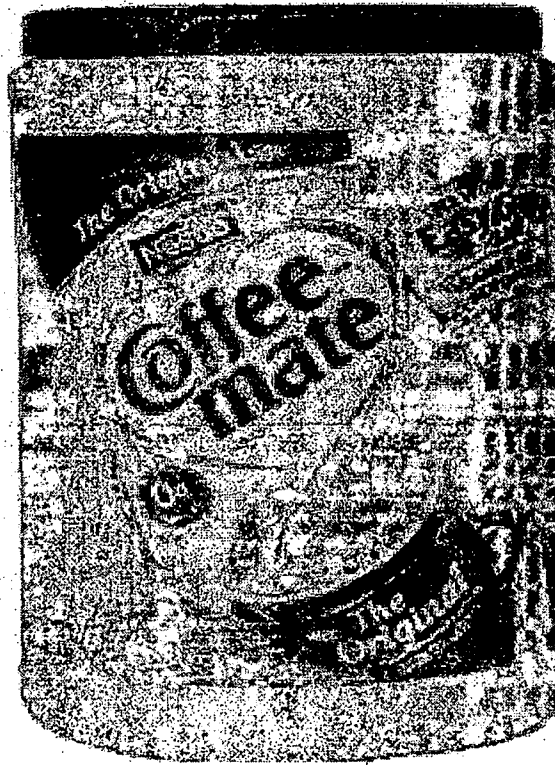
14 73. Plaintiff relied on Nestle's "0g TRANS FAT" claim as a substantial factor in some of  
15 his purchases of Coffee-mate.

16 **VI. COFFEE-MATE'S "0g TRANS FAT" CLAIM WAS FALSE, MISLEADING**  
17 **AND AN UNLAWFUL NUTRIENT CONTENT CLAIM**

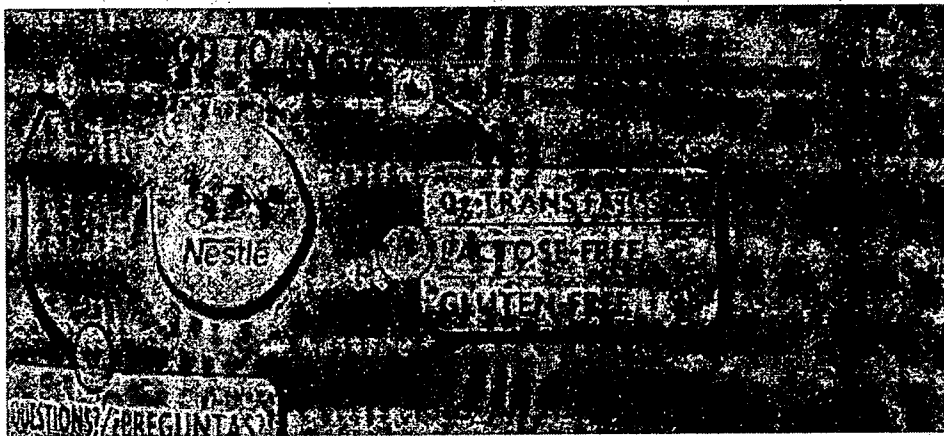
18 74. During much of the Class Period, Coffee-mate was made with PHO yet contained the  
19 deceptive health and wellness claim "0g Trans Fat" prominently displayed on the front of the bottle. It  
20 also at times made this unlawful nutrient content claim on the back of the product "IT'S GOOD TO  
21 KNOW: 0g TRANS FAT/SERV LACTOSE-FREE GLUTEN-FREE."

22  
23  
24  
25  
26  
27  
28









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

76. Nestle's conduct is especially egregious because milk, cream, soy milk, almond milk, and competing creamer brands like International Delight, are and were free of PHO and do not pose the serious health consequences associated with Coffee-mate.

77. "0g Trans Fat" and "IT'S GOOD TO KNOW: 0g TRANS FAT/SERV LACTOSE-FREE GLUTEN-FREE" are unauthorized nutrient content claims.

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

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

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

#### **VIII. NESTLE HAS A PATTERN AND PRACTICE OF ENGAGING IN OPPRESSIVE CONDUCT TOWARD CONSUMERS**

80. Nestle's use of dangerous PHOs when it knows there are safe substitutes is part of a pattern and practice of oppressive and unlawful conduct toward consumers.

**A. Nestle Gives Promotions to the Ringleaders in a Criminal Price Fixing Conspiracy**

81. Nestle Canada and its former executives were criminally charged by the Canada Competition Bureau.<sup>40</sup> The case in the Ontario Superior Court is numbered 13-90000394-000.

82. Hershey, a competitor, gained immunity as a whistleblower under a Canadian Immunity Program in return for describing in detail its criminal price fixing conspiracy with Nestle Canada.<sup>41</sup>

83. Canadian investigators uncovered a pattern of criminal behavior Nestle Canada's leading executives.

84. Robert Leonidas, former president of Nestle Canada and one of the executives named in the criminal investigation, frequently met with executives from competing chocolate firms.<sup>42</sup> For example, Leonidas met with a rival executive at restaurant Manoir Richelieu during the Confectionery Manufacturers Association of Canada annual meeting held June 2-5, 2005. At this meeting he informed his rival "We are going to take a price increase and I want you to hear it from the top." He also handed the executive an envelope which outlined Nestle's planned price increase on chocolate in 2005, which after taking note of the rival executive shredded.<sup>43</sup>

85. Later, Leonidas met with the assistant of a rival executive downstairs from his office because "it was better not to be seen in his office" and handed the assistant an envelope which contained an unsigned, future-dated letter with information about another price increase.<sup>44</sup>

86. At another date, Leonidas sent emails to a rival executive stating "want to see you Feb. 7th 8am to TALK." On this date, the two met at a coffee shop and Leonidas explained Nestle's specific

<sup>40</sup> See [www.confectionerynews.com/Regulation-Safety/Canada-price-fixing-woes-Chocolate-titans-settle-class-action-but-still-face-criminal-charges](http://www.confectionerynews.com/Regulation-Safety/Canada-price-fixing-woes-Chocolate-titans-settle-class-action-but-still-face-criminal-charges) (accessed October 22, 2018).

<sup>41</sup> See [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03569.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03569.html) (accessed October 22, 2018).

<sup>42</sup> Information of Daniel Wilcock, *The Commissioner of Competition v. Nestle Canada Inc. et al.*, Ontario Superior Court of Justice (November 19, 2007).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

1 pricing plans for Halloween and Easter chocolate.<sup>45</sup>

2 87. Nestle promoted Leonidas. Leonidas was replaced as president of Nestle Canada by  
3 Sandra Martinez, also named in the criminal complaint. In July 2007 she met with another food  
4 company's executive at Auberge du Pommier, a restaurant featuring "roasted leg of rabbit" and \$1,500  
5 wines, and

6 suggested the cooperator's company raise its prices first in 2007, 'as Nestle wanted to take a  
7 price increase in the third quarter.' The executive cooperating with authorities told Martinez  
8 he would follow on a price hike, but not lead, according to the affidavit.<sup>46</sup>

9 88. Despite being criminally prosecuted for price fixing, and with knowledge of these  
10 accusations, Defendant Nestle's parent, Nestle S.A., gave promotions to both of the executives  
11 Canadian authorities charged with running a criminal conspiracy.

12 89. Specifically, Martinez was promoted to head of global chocolate and confectionery  
13 business.<sup>47</sup>

14 90. Leonidas was promoted to president and CEO for Nestle Prepared Foods and the Nestle  
15 Baking group.<sup>48</sup>

16 **B. Nestle Lies to Women in Developing Countries, Using Saleswomen Dressed as  
17 Nurses, Telling Them Nestle Powder Formula is Superior to Mother's Breast Milk.**

18 91. Nestle for decades has fraudulently promoted its infant formula as superior to breast  
19 milk.<sup>49</sup> This has included having Nestle saleswomen dress up in nurse uniforms when they are not

---

20 <sup>45</sup> *Id.*

21 <sup>46</sup> Greg Saitz, *Canadian investigation of industry drizzles into United States*, New Jersey, Newark Star  
22 Ledger, Business Sunday, Page 1, Jan. 28, 2008 available at  
23 [www.labaton.com/en/about/press/upload/Sunday-Star-Ledger-Jan-20-2008-Final-version.pdf](http://www.labaton.com/en/about/press/upload/Sunday-Star-Ledger-Jan-20-2008-Final-version.pdf) (accessed  
October 22, 2018).

24 <sup>47</sup> See <https://www.nestle.com/stories/cassava-plant-tackle-child-labour-women-empowerment> (accessed  
October 23, 2018).

25 <sup>48</sup> See [www.refrigeratedfrozenfood.com/articles/85280-leonidas-leads-nestle-prepared-foods](http://www.refrigeratedfrozenfood.com/articles/85280-leonidas-leads-nestle-prepared-foods) (accessed  
October 22, 2018).

26 <sup>49</sup> For an early overview, see the report by the English non-profit War on Want, "The Baby Killer: A  
27 War on Want investigation into the promotion and sale of powdered baby milks in the Third World."  
28 (March 1974), available at [archive.babymilkaction.org/pdfs/babykiller.pdf](http://archive.babymilkaction.org/pdfs/babykiller.pdf) (accessed October 22, 2018).

1 actually nurses, to sell its powder formula product.<sup>50</sup>

2 92. These practices led to mothers in developing countries abandoning breast milk in favor  
3 of formula in increasingly numbers, the opposite of the trend in the West.

4 93. Nestle's continuing behavior in promoting its powdered infant formula over breast milk  
5 has inspired long-running global boycotts.<sup>51</sup>

6 94. In 2011, a group of NGOs in Laos including Save the Children and Oxfam issued a joint  
7 open letter about Nestle's cruel and oppressive behavior, summed up with this joint conclusion: "Your  
8 marketing of formula milk still jeopardizes the health of infants and children in Laos."

9 95. They charged Nestle with corrupting many doctors in that very poor country<sup>52</sup> by  
10 "visiting hospitals and providing incentives, such as gifts and trips, to doctors and nurses, to promote  
11 formula usage." They further write that "In poor nations, formula-fed infants *are four to six times more*  
12 *likely to die of infectious disease than breastfed babies*" (emphasis added).<sup>53</sup>

13 96. The 2011 open letter also notes that that Nestle's "[a]dvertising is promoting unscientific  
14 and unsubstantiated claims that formula increases intelligence and enhances immunity. This creates a  
15 situation where family income is being spent unnecessarily on formula for infants and young children,  
16 keeping households poor."

17 97. A Nestle company was named in a 2013 report by Save the Children which found that  
18 healthcare professionals in poor countries were being targeted and exploited by infant formula  
19 companies to push their products as superior to breast milk.<sup>54</sup>

20 98. The deceptively named "'Nestle Nutrition Institute' is also continuing to organize  
21

---

22 <sup>50</sup> *Id.*

23 <sup>51</sup> See [www.theguardian.com/sustainable-business/nestle-baby-milk-scandal-food-industry-standards](http://www.theguardian.com/sustainable-business/nestle-baby-milk-scandal-food-industry-standards)  
24 (accessed October 22, 2018).

25 <sup>52</sup> Per capita GDP in Laos was \$1,646 in 2013, compared to \$53,042 in the United States.

26 <sup>53</sup> See [www.irinnews.org/report/93040/laos-ngos-flay-nestl%C3%A9-s-infant-formula-strategy](http://www.irinnews.org/report/93040/laos-ngos-flay-nestl%C3%A9-s-infant-formula-strategy)  
(accessed October 22, 2018).

27 <sup>54</sup> See [www.theguardian.com/business/2013/feb/24/food-companies-flout-baby-milk-formula-code](http://www.theguardian.com/business/2013/feb/24/food-companies-flout-baby-milk-formula-code)  
28 (accessed October 22, 2018).

1 doctors meetings despite objections from the Government of India.”<sup>55</sup>

2 99. A 2013 report by IBFAN found examples of Nestle using misleading labeling in China,  
3 Mexico, South Africa, Tanzania, Armenia, Zimbabwe and the Republic of Georgia to promote its infant  
4 formula products.<sup>56</sup>

5 100. A 2018 report by the Changing Markets Foundation analyzed over 70 Nestle baby  
6 formula products in 40 countries and found that Nestle violated the UN’s World Health Organization  
7 (WHO) advertising codes.

8 101. The report further found that Nestle made claims on their products sold in various  
9 American and Asian countries and in some European countries which are prohibited in Europe by the  
10 European Food Safety Authority (ESFA) as not having sufficient scientific evidence.

11 102. Further, Nestle offers contradictory nutritional advice in different countries, ignoring its  
12 own nutrition advice with products of contradicting composition.

13 103. For example, some of Nestle’s infant milks sold in Brazil and Hong Kong advise  
14 (correctly) against giving sucrose (white table sugar) to infants, while selling formula in South Africa  
15 with sucrose.

16 104. The ESFA advises against the addition of sucrose as “it can lead to severe symptoms,  
17 including poor feeding, vomiting and overall failure to thrive in some infants” and “it may, because of  
18 their greater sweetness, increase the preference for sweet tastes in infants.”<sup>57</sup>

19 105. A Nestle Hong Kong product explicitly states “no sucrose has been added...for baby’s  
20 good growth” illustrating that Nestle knows of the health risks sucrose presents to infant health, yet  
21 Nestle contradicts its own advertising claims by choosing to include sucrose in its South Africa  
22 products.<sup>58</sup>

23  
24 <sup>55</sup> See [ibfan.org/heinz-nestle-abbott-breaking-the-rules-misleading-mothers](http://ibfan.org/heinz-nestle-abbott-breaking-the-rules-misleading-mothers) (accessed October 22, 2018).

25 <sup>56</sup> See [www.ibfan.org/art/302-17.pdf](http://www.ibfan.org/art/302-17.pdf) (accessed October 22, 2018).

26 <sup>57</sup> See EFSA Panel on Dietetic Products, Nutrition and Allergies (NDA). “Scientific Opinion on the  
essential composition of infant and follow-on formulae.” *EFSA Journal* 12.7 (2014): 3760.

27 <sup>58</sup> See [http://changingmarkets.org/wp-content/uploads/2018/02/BUSTING-THE-MYTH-OF-SCIENCE-](http://changingmarkets.org/wp-content/uploads/2018/02/BUSTING-THE-MYTH-OF-SCIENCE-BASED-FORMULA.pdf)  
28 [BASED-FORMULA.pdf](http://changingmarkets.org/wp-content/uploads/2018/02/BUSTING-THE-MYTH-OF-SCIENCE-BASED-FORMULA.pdf) (accessed October 25, 2018).

106. Nestle's nutritional advice is based on "product-specific marketing purposes rather than based on science" or even consistency across markets.<sup>59</sup>

107. In Hong Kong, Nestle products are marketed as healthier for not having "any added vanilla flavor or flavorings for baby's good growth" as ESPA advises against the addition of such substances for they "put a burden on the infant's metabolism".

108. Nutrition experts also advise against the consumption of flavoring in infancy as it may contribute to the preference of sweet tastes later in life.

109. Yet despite knowing of the nutritional science showing that the consumption of flavoring by infants is dangerous, Nestle includes flavorings such as ethyl vanillin and vanillin in their infant products sold in China and South Africa.

**C. Nestle Does Business With Cocoa Bean Companies That Use Child Slave Labor.**

110. Nestle has a lengthy history of knowingly doing business with companies that use slave labor and has shown no sign of stopping this practice.

111. In 2005, Nestle was sued by Global Exchange and three individuals from Mali alleging that Nestle trafficked them into Côte d'Ivoire as child slaves and forced them to work harvesting and cultivating cocoa beans for Nestle chocolate.

112. In 2018, Nestle was sued in a class action alleging that Nestle omitted and failed to disclose the child labor practices it engages in to consumers who would not have purchased the chocolate products had they had known about the child and slave labor in the supply chain.

113. The 2018 complaint describes how Nestle represents itself as socially and ethically responsible its actions say otherwise as they continue to turn a blind eye to known human rights abuses and engage in business with companies that use the "worst form of child labor as recognized by the United Nations: 'the compulsory labor of trafficked children and the labor of children involving dangerous tools, transport of heavy loads, and exposure to toxic substances, i.e., hazardous work.'"

114. Ivory Coast's 'cocoa sector employed an estimated 1,203,473' child laborers ages 5 to

---

<sup>59</sup> See <http://changingmarkets.org/wp-content/uploads/2018/02/BUSTING-THE-MYTH-OF-SCIENCE-BASED-FORMULA.pdf> (accessed October 25, 2018).



17, of which 95.9 percent were engaged in hazardous work in cocoa production.’ Such work includes burning and clearing fields with machetes, spraying pesticides, using sharp tools to break open cocoa pods, and carrying heavy loads of cocoa pods and water.”<sup>61</sup>

115. A 2015 Fair Labor Association report found that children younger than 15 continue to work at cocoa farms connected to Nestle, more than a decade after the food company promised to end the use of child labor in its supply chain. These children were expected to work in hazardous conditions and carry out dangerous tasks, including using machetes and transporting heavy loads. And the Fair Labor Association found evidence of forced labor, with a young worker not receiving any salary for a year’s work at a farm.<sup>62</sup>

116. Nestle’s defense for profiting off of child slave labor was to have a spokesperson claim “no company sourcing cocoa from Ivory Coast can guarantee that it has completely removed the risk of child labour from its supply chain.”<sup>63</sup>

**D. The FDA Warns Nestle Its Gerber Baby Foods Have “Unauthorized” and “Misleading” Label Claims and Websites.**

117. In October 2014, the FDA issued a warning letter to Nestle regarding its Gerber Good Start Gentle Infant Formula products, stating that Nestle’s “product label and [] website bear health claims that were not authorized by FDA” that its “labeling is misleading” and therefore the product is misbranded.

118. Specifically, the FDA concluded that the product label “bears a series of statements that, taken together, characterize the relationship of a nutrient to a disease or health-related condition” because the label referred to the product as the “1<sup>st</sup> and ONLY Routine Formula TO REDUCE THE

<sup>61</sup> See <https://www.dol.gov/sites/default/files/documents/ilab/reports/child-labor/CotedIvoire.pdf> (last accessed October 25, 2018).

<sup>62</sup> See <http://www.fairlabor.org/report/2014-assessments-nestle-c3-a9-cocoa-supply-chainivory-coast> (last accessed October 25, 2018).

<sup>63</sup> See <https://www.theguardian.com/global-development-professionals-network/2015/sep/02/child-labour-on-nestle-farms-chocolate-giants-problems-continue> (last accessed October 25, 2018).



1 RISK OF DEVELOPING ALLERGIES.” Further, the FDA noted that the “product label and . . .  
 2 website further assert that 100% whey partially hydrolyzed may reduce the risk of atopic dermatitis,”  
 3 which constituted an unauthorized health claim.<sup>64</sup>

4 119. In February 2010, the FDA sent Nestle a warning letter regarding mislabeling of their  
 5 Gerber Graduates Fruit Puffs line of baby food. Nestle violated multiple “regulations [which] do not  
 6 allow the claim[s made by Nestle] for products specifically intended for children under two years of  
 7 age.”

8 120. The FDA determined that the product label included nutrient content claims such as  
 9 “good source of iron, zinc, and vitamin E for infants and toddlers” in violation of 21 C.F.R. § 101.54  
 10 which “does not allow such claims for foods intended specifically for infants and children under 2.”  
 11 Further, the letter noted that the label of Nestle’s “2<sup>nd</sup> Food Carrots” product contained, like Coffee-  
 12 mate, unlawful nutrient content claims such as “As Healthy as Fresh,” “Excellent Source . . . of  
 13 Vitamin A,” and “No Added Sugar.”

14 **E. In Addition to Infant Formula and Baby Food, Nestle Also Targets Parents of Older**  
 15 **Children With False and Misleading Advertising on Its Diabetes-inducing Junk**  
 16 **Foods.**

17 121. In February 2010, the FDA sent another warning letter to Nestle reprimanding its  
 18 mislabeling of various Dryers ice cream products “because the products’ labels bear a nutrient content  
 19 claim but do not meet the requirements to make the claim.”

20 122. In December 2009, the FDA sent a warning letter to Nestle castigating the company’s  
 21 misbranding of Juicy Juice products “because the labels are misleading,” as well as “[t]he labeling  
 22 found on [Nestle’s] website [which] makes an additional unauthorized nutrient content claim, which  
 23 further misbrands the product.”

24 123. In December 2009, the FDA sent a warning letter to Nestle which found that it was  
 25 advertising Boost Kid Essentials Nutritionally Complete Drink in a manner that was “false or

26 <sup>64</sup> Available at  
 27 <https://www.fda.gov/iceci/enforcementactions/warningletters/ucm423087.htm> (last  
 28 accessed October 25, 2018).

1 misleading.”

2 124. In November 2006, the FDA sent a warning letter to Nestle finding Good Start Infant  
3 Formula with Iron to be “adulterated.”

4 **IX. DEFENDANTS’ PRACTICES ARE “UNFAIR” WITHIN THE MEANING OF**  
5 **THE CALIFORNIA UNFAIR COMPETITION LAW.**

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

10 126. Plaintiff’s claims for unfair business practices are independent of his claim for false  
11 advertising. Even absent the unlawful and deceptive Og Trans Fat claim, the sale of Coffee-mate  
12 violates the UCL and implied warranty of merchantability.

13 127. In particular, while the unlawful sale of Coffee-mate may have had some utility to  
14 Defendants in the form of profits, this utility was small and far outweighed by the gravity of the serious  
15 health harm they inflicted on consumers.

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

19 129. Moreover, Defendants’ practices violated public policy as declared by specific  
20 constitutional, statutory, or regulatory provisions, including the California Health & Safety Code §  
21 114377 and California Education Code § 49431.7.

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

25 131. Further, the injury to consumers from Defendants’ practices is substantial, not  
26 outweighed by benefits to consumers or competition, and not an injury consumers themselves could  
27 reasonably have avoided.

28 132. The unfairness of Defendant Nestle’s conduct is also illustrated by, *inter alia*:

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

15 **X. DEFENDANTS' PRACTICES ARE "UNLAWFUL" WITHIN THE MEANING**

16 **OF THE CALIFORNIA UNFAIR COMPETITION LAW.**

17 133. The PHO used in Coffee-mate appears nowhere on the FDA's list of the hundreds of

18 substances it considers GRAS.<sup>65</sup>

19 134. PHO also fails to meet the fundamental requirement for GRAS status—that the

20 substance is safe. In fact, the FDA has explicitly recognized that there is no safe level of artificial trans

21 fat consumption.

22 135. Under the Food Additives Amendment of 1958, which amended the FDCA, all food

23 additives are unsafe unless they (1) fall within a specified exemption to the statute's definition of food

24 additive, or (2) their use is pursuant to FDA approval. Because the PHO used in Coffee-mate do not

25 meet either of these exceptions, they are, and long have been, unsafe and unlawful for use in food.

26

27 <sup>65</sup> See 21 C.F.R. §§ 181, 182, 184 and 186.

28

1 136. Defendants' practices as described herein are "unlawful" within the meaning of the  
2 California Unfair Competition Law because PHO is not Generally Recognized as Safe (GRAS).  
3 Therefore, the PHO in Coffee-mate rendered it adulterated within the meaning of 21 U.S.C. §  
4 342(a)(2)(C).

5 137. At no point during the class period was there a scientific consensus PHO was safe.  
6 Indeed, for more than two decades, the scientific consensus has been that it is unsafe.

#### 7 **XI. RELIANCE AND INJURY**

8 138. When purchasing Coffee-mate, Plaintiff was seeking a product made with safe and lawful  
9 ingredients.

10 139. Plaintiff lost money as a result of Defendants' conduct because he purchased products  
11 that were detrimental to his health and were unfairly offered for sale in violation of federal and  
12 California law. Had Defendants not violated the law, Plaintiff would not have been able to purchase  
13 Coffee-mate.

14 140. Plaintiff suffered physical injury when he repeatedly consumed Coffee-mate, because  
15 consuming artificial trans fat in *any* quantity, including the quantity he actually consumed, inflames and  
16 damages vital organs and increases the risk of heart disease, diabetes, cancer, and death.

17 141. Reasonable consumers in California, including Plaintiff, expect food sold in grocery  
18 stores to be fit for human consumption, not unlawful foods that are adulterated under California and  
19 federal law. Coffee-mate during the class period was not fit for human consumption and has a value of  
20 \$0.

21 142. Plaintiff, on at least one occasion, would not have purchased Coffee-mate absent  
22 Defendants' 0g trans fat misrepresentation, and never would have purchased it had he known it was  
23 unlawful and adulterated.

24 143. Plaintiff lost money as a result of Defendants' unlawful behavior. Plaintiff altered his  
25 position to his detriment and suffered loss in an amount equal to the amount he paid for Coffee-mate.

#### 26 **XII. DELAYED DISCOVERY**

27 144. Plaintiff did not discover that Defendants' behavior was unfair and unlawful and  
28 Nestle's labeling was false, deceptive or misleading until January 2017, when he learned that Coffee-

mate contained, despite its explicit label claim, trans fat, and that trans fat is harmful to human health in any quantity because it causes heart disease, diabetes, and cancer. Until this time, he lacked the knowledge regarding the facts of his claims against Defendants.

145. Plaintiff is a reasonably diligent consumer who exercised reasonable diligence in his purchase, use, and consumption of Coffee-mate. Nevertheless, he would not have been able to discover Defendants' deceptive practices and lacked the means to discover them given that, like nearly all consumers, he is not an expert on nutrition and does not typically read or have ready access to scholarly journals such as *The Journal of Nutrition*,<sup>66</sup> *The European Journal of Clinical Nutrition*,<sup>67</sup> and *The New England Journal of Medicine*,<sup>68</sup> where the scientific evidence of artificial trans fat's dangers has been published. Furthermore, Nestle's labeling practices—in particular, representing for many years that Coffee-mate has “0g trans fat”—actively impeded Plaintiff's and Class members' abilities to discover the dangerous effects of Coffee-mate throughout the Class Period.

### XIII. CLASS ACTION ALLEGATIONS

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

147. The Class is defined as follows:

All citizens of California who purchased in California, on or after January 1, 2010,  
Coffee-mate products containing partially hydrogenated oil.

Plaintiff also defines a the 0g Trans Fat Claim Subclass as follows:

All citizens of California who purchased in California, on or after January 1, 2010,

<sup>66</sup> Peter M. Clifton et al., *Trans Fatty Acids In Adipose Tissue And The Food Supply Are Associated With Myocardial Infarction*, 134 J. Nutr. 874, 874-79 (2004).

<sup>67</sup> A. Tavani et al., *Margarine intake and risk of nonfatal acute myocardial infarction in Italian women*, 51 Eur. J. Clin. Nutr. 30-32 (1997) (estimating a 50 percent greater risk of heart attack in women with high consumption of margarine, an association “independent of body mass index, history of hypertension and hyperlipidemia”).

<sup>68</sup> Mozaffarian, 354 New Eng. J. Med. at 1611 (“10 to 19 percent of CHD events in the United States could be averted by reducing the intake of trans fat”).

Coffee-mate containing the nutrient content claim “0g Trans Fat” and containing partially hydrogenated oil.

148. Questions of law and fact common to Plaintiff and the Class include:

- a. Whether Defendants’ conduct was immoral, unethical, unscrupulous, or substantially injurious to consumers;
- b. Whether the slight utility Defendants realize as a result of their conduct outweighs the gravity of the harm the conduct causes to their victims;
- c. Whether Defendants’ conduct violates public policy as declared by specific constitutional, statutory, or regulatory provisions;
- d. Whether the injury to consumers from Defendants’ practices is substantial;
- e. Whether the injury to consumers from Defendants’ practices is one consumers themselves could reasonably have avoided;
- f. Whether Coffee-mate communicated a misleading health and wellness message and made an unauthorized nutrient content claim through its “0g Trans Fat” claim;
- g. Whether that message was material to a reasonable consumer;
- h. Whether Defendants’ conduct constitutes violations of California’s False Advertising Law;
- i. Whether members of the Class are entitled to restitution and, if so, the measure of restitution
- j. Whether members of the Class are entitled to prejudgment interest, and how that interest is to be calculated;
- k. Whether members of the Class are entitled to any further relief;
- l. The fair apportionment of liability among Defendants.

149. Plaintiff’s claims are typical of Class members’ claims because all Class members were subjected to the same unlawful, unfair, and deceptive conduct when they purchased Coffee-mate and suffered the same economic injury.



150. Absent Defendants' material deceptions, misstatements, and omissions, and Defendants' unlawful sale, distribution, and marketing of Coffee-mate, Plaintiff and other Class members would not have purchased Coffee-mate.

151. The Class is sufficiently numerous, as it includes thousands of individuals who purchased Coffee-mate throughout California during the Class Period.

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

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

154. Class treatment is appropriate under Civ. Code § 382. Plaintiff will, if notice is required, confer with Defendants and seek to present the Court with a stipulation and proposed order on the details of a class notice plan.

## **CAUSES OF ACTION**

### **First Cause of Action**

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

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

#### **Unfair Conduct**

156. The business practices and omissions of Defendants as alleged herein constitute "unfair" business acts and practices in that Defendants' conduct is immoral, unethical, unscrupulous, and substantially injurious to consumers and the utility of its conduct, if any, does not outweigh the gravity of the harm to Defendants' victims.

157. Further, Defendants' practices are unfair because they violate public policy as declared by specific constitutional, statutory, or regulatory provisions, including those embodied in the FDCA, California Health and Safety Code, and California Education Code.

158. Further, Defendants' practices are unfair because the injury to consumers from



1 Defendants' practices is substantial, not outweighed by benefits to consumers or competition, and not  
 2 one consumers themselves could reasonably have avoided or should be obligated to avoid.

3 159. Plaintiff also seeks an order for the disgorgement and restitution of all revenue received  
 4 by Defendants' from the sale of Coffee-mate.

### 5 **Unlawful Conduct**

6 160. Defendants' have made and distributed, in interstate commerce and in this county,  
 7 products that contain unlawful food additives. Coffee-mate was placed into interstate commerce by  
 8 Defendants.

9 161. Defendants' conduct is "unlawful" because it violates the Federal Food, Drug, and  
 10 Cosmetic Act ("FDCA"), specifically, the Food Additives Amendment of 1958, which deems a food  
 11 additive unsafe unless it has met two exceptions, neither of which the PHO used in Coffee-mate has  
 12 met. 21 U.S.C. §§ 348, 342.

13 162. Defendants' conduct further violates The California Sherman Food, Drug, and Cosmetic  
 14 Law ("Sherman Law"), Health & Safety Code § 110100, which adopts all FDA regulations as state  
 15 regulations. Defendants' conduct also violates the following sections of the Sherman Law:

- 16 • § 110100 (adopting all FDA regulations as state regulations);
- 17 • § 110398 ("It is unlawful for any person to advertise any food, drug, device, or cosmetic that is  
 18 adulterated or misbranded.");

19 163. The use of artificial trans fat in Coffee-mate thus constitutes a violation of the FDCA  
 20 and the Sherman Law and, as such, violated the "unlawful prong" of the UCL.

21 164. Plaintiff suffered injury in fact and lost money or property as a result of Defendants'  
 22 unlawful acts: he was denied the benefit of the bargain when he decided to purchase Coffee-mate over  
 23 competing products that are less expensive and/or contain no artificial trans fat.

24 165. Had Plaintiff been aware of Defendants' unlawful tactics, he would not have purchased  
 25 Coffee-mate.

26 166. Defendants' unlawful acts allowed them to sell more units of Coffee-mate than they  
 27 would have otherwise, and at a higher price, and higher margin.

1 167. Plaintiff seeks an order for the disgorgement and restitution of all revenue received by  
2 Defendants from the sale of Coffee-mate.

3 **Second Cause of Action**

4 **Breach of Implied Warranty of Merchantability**

5 168. Defendants, through their acts and omissions set forth herein, in the sale, marketing and  
6 promotion of Coffee-mate, made representations to Plaintiff and the Class that Coffee-mate was safe to  
7 consume.

8 169. Plaintiff and the Class bought Coffee-mate manufactured, advertised, and sold by  
9 Defendants, as described herein.

10 170. Defendants are merchants with respect to the goods of this kind which were sold to  
11 Plaintiff and the Class, and there was in the sale to Plaintiff and other members of the Class an implied  
12 warranty that those goods were merchantable.

13 171. Defendants breached that implied warranty, however, in that Coffee-mate was not fit for  
14 its ordinary purpose and did not conform with the representations on its labels, as set forth in detail  
15 herein.

16 172. As an actual and proximate result of Defendants' conduct, Plaintiff and the Class did not  
17 receive goods as impliedly warranted by Defendants to be merchantable in that they did not conform to  
18 the promises and affirmations made on the container or label of the goods.

19 173. Plaintiff and Class have sustained damages as a proximate result of the foregoing breach  
20 of implied warranty in the amount of Coffee-mate's purchase price.

21 **Third Cause of Action**

22 **Unfair Competition Law**

23 **Bus. & Prof. Code §§ 17200 *et seq.***

24 **(Limited to the "0g Trans Fat" Subclass)**

25 **Unlawful Conduct**

26 174. Defendants have made and distributed, in interstate commerce and in this county  
27 products that make false or misleading statements of fact regarding their content. Coffee-mate was  
28 placed into interstate commerce by Defendants and sold throughout the country and throughout

1 California.

2 175. The acts, omissions, misrepresentations, practices, and non-disclosures of Defendants as  
3 alleged herein constitute “unlawful” business acts and practices in that Defendants’ conduct violates the  
4 California False Advertising Law, as alleged herein.

5 176. Defendants’ conduct is further “unlawful” because it violates the Federal Food, Drug  
6 and Cosmetic Act (“FDCA”), specifically, (a) 21 U.S.C. § 343(a), which deems food misbranded when  
7 the label contains a statement that is “false or misleading in any particular,” and (b) 21 C.F.R. §  
8 101.13(i)(3), which bars nutrient content claims voluntarily placed on the front of a product label that  
9 are “false or misleading in any respect.”

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

13 178. Defendants’ conduct further violates The California Sherman Food, Drug, and Cosmetic  
14 Law (“Sherman Law”), Health & Safety Code § 110660, which deems food products “misbranded” if  
15 their labeling is “false or misleading in any particular,” and Health & Safety Code § 110670, which  
16 bars nutrient content claims voluntarily placed on the front of a product label that fail to comply with  
17 the federal regulation for nutrient content claims (i.e., “may not be false or misleading in any respect”).  
18 Defendants’ conduct also violates the following sections of the Sherman Law:

- 19 • § 110100 (adopting all FDA food labeling regulations as state regulations);
- 20 • § 110290 (“In determining whether the labeling or advertisement of a food . . . is misleading,  
21 all representations made or suggested by statement, word, design, device, sound, or any  
22 combination of these shall be taken into account. The extent that the labeling or advertising fails  
23 to reveal facts concerning the food . . . or consequences of customary use of the food . . . shall  
24 also be considered.”);
- 25 • § 110390 (“It is unlawful for any person to disseminate any false advertisement of any food . . .  
26 . An advertisement is false if it is false or misleading in any particular.”);
- 27 • § 110395 (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any  
28 food . . . that is falsely advertised.”);

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

19 179. All of the challenged labeling statements made by Nestle thus constitute violations of  
20 the FDCA and the Sherman Law and, as such, violated the "unlawful" prong of the UCL.

21 180. Defendants leveraged their deception to induce Plaintiff and members of the Subclass to  
22 purchase products that were of lesser value and quality than advertised.

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

26 182. Had Plaintiff been aware of Defendants' false and misleading advertising tactics, he  
27 would not have purchased Coffee-mate, and had Defendants not advertised and sold Coffee-mate in a  
28 fraudulent manner, he would have paid less for it.

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

#### **Fraudulent Conduct**

184. Defendants leveraged their deception to induce Plaintiff and members of the Subclass to purchase products that were of lesser value and quality than advertised.

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

186. The acts of Defendants as alleged herein constitute "fraudulent" business acts and practices in that Defendants' conduct has a likelihood, capacity or tendency to deceive Plaintiff, the Subclass, and the general public.

187. Plaintiff further seeks an order for the restitution of all revenue received by Defendants from the sale of Coffee-mate containing artificial trans fat and the false "0g Trans Fat" nutrient content claim.

#### **Unfair Conduct**

188. Defendants leveraged their deception to induce Plaintiff and members of the Subclass to purchase products that were of lesser value and quality than advertised.

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

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

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

- a. immoral, unethical, unscrupulous, and offends public policy;

b. the gravity of Defendants' conduct outweighs any conceivable benefit of such conduct;  
and

c. the injury to consumers caused by Defendants' conduct is substantial, not outweighed by  
any countervailing benefits to consumers or competition, and not one that consumers  
themselves could reasonably have avoided.

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

**Fourth Cause of Action**

**California False Advertising Law,**

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

**(Limited to the "0g Trans Fat" Claim Subclass)**

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

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

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

**Fifth Cause of Action**

**Breach of Express Warranty**

**(Against Nestle Only, Limited to the "0g Trans Fat" Subclass)**

196. Nestle made written representations to the public, including Plaintiff, with its front label  
"0g Trans Fat" claim.

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

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

199. However, Nestle breached this express warranty in that Coffee-mate does not contain "0g Trans Fat" because it contained partially hydrogenated oil, which necessarily contains artificial trans fat.

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

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

#### **XIV. PRAYER FOR RELIEF**

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

- A. An order confirming that this class action is properly maintainable as a class action as defined above, appointing Plaintiff and his undersigned counsel to represent the Class, and requiring Defendants to bear the cost of class notice;
- B. An order requiring Defendants to pay restitution to Plaintiff and class members so that they may be restored the money which Defendants acquired by means of any unfair, deceptive, unconscionable, fraudulent, and negligent acts;
- C. An award of pre-judgment and post-judgment interest;
- D. An award of attorney fees and costs; and
- E. Such other and further relief as this Court may deem just, equitable, or proper.

#### **XV. NO JURY DEMAND**

Plaintiff does not demand a trial by jury.

//

//

//

//

//

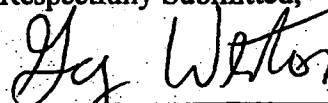
//

//



1 DATED: October 26, 2018

Respectfully Submitted,



**THE WESTON FIRM**

GREGORY S. WESTON

ANDREW C. HAMILTON

1405 Morena Blvd., Suite 201

San Diego, CA 92110

Telephone: (619) 798-2006

Facsimile: ((619) 343-2789

**Counsel for Plaintiff**