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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No: _____

MAXINE BEASLEY on behalf of herself
and all others similarly situated,

Plaintiff,

v.

TOOTSIE ROLL INDUSTRIES, INC.

Defendants.

**CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE
UNFAIR COMPETITION LAW and for BREACH OF
IMPLIED WARRANTY**

CLASS ACTION CASE

NO JURY DEMAND

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1 Plaintiff Maxine Beasley on behalf of herself, all others similarly situated, and the general
2 public, by and through her undersigned counsel, hereby sues Defendant Tootsie Roll Industries, Inc.
3 (“Tootsie Industries”) and, upon information and belief and investigation of counsel, alleges as follows:

4 **I. JURISDICTION AND VENUE**

5 1. The Court has original jurisdiction over this action under 28 U.S.C. § 1332(d)(2) (The
6 Class Action Fairness Act) because the matter in controversy exceeds the sum or value of \$5,000,000
7 exclusive of interest and costs and because more than two-thirds of the members of the class defined
8 herein reside in states other than the state of which Defendant resides.

9 2. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because Plaintiff Maxine
10 Beasley suffered injuries as a result of Defendant’s acts in this District, many of the acts and transactions
11 giving rise to this action occurred in this District and Tootsie Industries: (1) is authorized to conduct
12 business in this District and has intentionally availed itself of the laws and markets of this District
13 through the distribution and sale of its products in this District; and (2) is subject to personal jurisdiction
14 in this District.

15 **II. INTRADISTRICT ASSIGNMENT**

16 3. This civil action arises in part out of the acts and omissions of Defendant which occurred
17 in San Francisco and San Mateo Counties, California. Pursuant to Civil Local Rule 3-2(c), this action
18 should be assigned to the San Francisco or the Oakland Division.

19 **III. NATURE OF THE ACTION**

20 4. Tootsie Industries manufactures, markets, and sells Tootsie Rolls and Tootsie Pops.
21 (collectively the “Tootsie Products”). During the class period defined herein, Tootsie Industries
22 unlawfully made the Tootsie products with partially hydrogenated oil (“PHO”), an unsafe, unapproved
23 food additive. Unless otherwise stated, references to the Tootsie products only include the Tootsie
24 products during the period they contained PHO, ending around 2016.

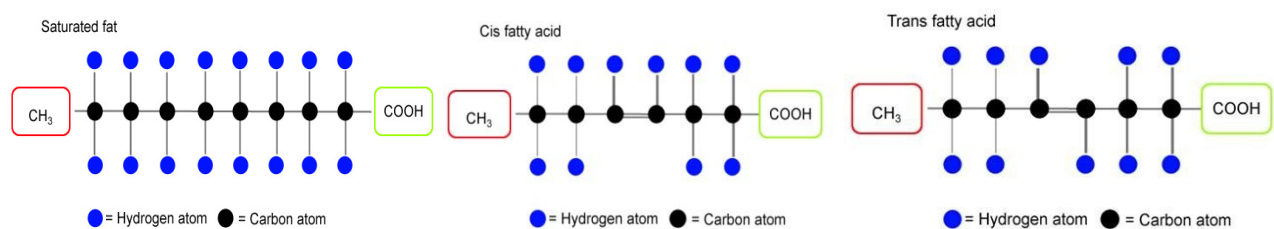
25 5. The Tootsie Products were sold in stores throughout California.
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27
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V. **THERE IS STRONG EVIDENCE THAT PHO AND TRANS FAT ARE UNSAFE**

15. 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.² The resulting product is known as partially hydrogenated oil, or PHO.

16. 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.³

17. 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.



18. 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,⁴ while saturated fat is derived from relatively expensive animal and tropical plant sources.⁵

19. 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

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

³ 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/ (last visited October 22, 2018).

⁴ e.g., corn oil, cottonseed oil, soybean oil, peanut oil

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

1 the entire class period, and at no point during the class period was there ever a consensus that PHO was
2 safe to use, neither in general nor as an ingredient in any candy product.

3 **A. There is a Well-Established Scientific Consensus That PHO and Trans Fat Is**
4 **Extremely Harmful.**

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

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

14 22. In 2006, Dariush Mozaffarian of Harvard Medical School wrote in the New England
15 Journal of Medicine, “the consumption of trans fatty acids results in considerable potential harm but no
16 apparent benefit.”⁹

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

19 The scientific rationale for eliminating exposure to artificial trans fatty acids in foods is rock
20 solid. There is no evidence that they provide any health benefit, and they are certainly
21 harmful. These compounds adversely affect both low- and high-density lipoprotein
22 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

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

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

26 ⁸ *Id.*

27 ⁹ Dariush Mozaffarian et al., *Trans Fatty Acids and Cardiovascular Disease*, 354 N. ENGL. J. MED.
28 1601, 1608-1609 (2006).

1 increasing the risk for heart disease, perhaps because they also have pro-inflammatory
2 properties and other adverse effects on vascular endothelium. The strong evidence of harm...
3 Eliminating exposure to these dangerous fats could have a powerful population impact—
4 potentially protecting 30,000 to 100,000 Americans from death related to heart disease each
5 year.¹⁰

6 24. Dr. Mozaffarian further writes:

7 Given the adverse effects of trans fatty acids on serum lipid levels, systemic inflammation,
8 and possibly other risk factors for cardiovascular disease and the positive associations with
9 the risk of CHD, sudden death from cardiac causes, and possibly diabetes, the potential for
10 harm is clear. The evidence and the magnitude of adverse health effects of trans fatty acids
11 are in fact far stronger on average than those of food contaminants or pesticide residues,
12 which have in some cases received considerable attention.¹¹

13 25. In 2011, Walter Willet, also a professor at Harvard Medical School, described
14 Defendant's behavior of selling food made with PHO as "a food safety issue . . . this is actually
15 contamination."¹²

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

19 **B. The PHO in the Tootsie Products Caused Coronary Heart Disease.**

20 27. Trans fat raises the risk of CHD more than any other known consumed substance.¹³

21 28. A 1999 estimate published in the New England Journal of Medicine found that
22 removing PHO from the American diet "would prevent approximately 30,000 premature coronary
23 deaths per year, and epidemiologic evidence suggests this number is closer to 100,000 premature deaths
24 annually."¹⁴

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

27 ¹¹ Dariush Mozaffarian et al., *Trans Fatty Acids and Cardiovascular Disease*, 354 N. ENGL. J. MED.
28 1601 (2006).

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

¹³ Mozaffarian, 354 NEW ENG. J. MED. at 1603.

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

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

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

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

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

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

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

22 34. A study published in American Heart Association’s *Circulation* found that the largest
23 consumers of trans fat have three times the risk of suffering primary cardiac arrest, even after
24

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

27 ¹⁶ Am. Heart Ass’n., *Trans Fat Overview*, available at tinyurl.com/TransFatOverview (last visited
28 October 22, 2018).

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

1 controlling for a variety of medical and lifestyle risk factors.¹⁸

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

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

9 37. TGF- β also functions to suppress cancerous tumors. Degradation of TGF- β function is
10 also likely one route by which artificial trans fat consumption promotes cancers in fatty organs and the
11 digestive system.²¹

12 **C. The PHO in the Tootsie Products Caused Type-2 Diabetes.**

13 38. Artificial trans fat also causes type-2 diabetes.²²

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

17 40. Researchers at Northwestern University's medical school found that mice show multiple
18 markers of type-2 diabetes after eating PHO for only four weeks.²³

19
20 ¹⁸ Rozenn N. Lemaitre et al., *Cell Membrane Trans-Fatty Acids and the Risk of Primary Cardiac Arrest*, 105 CIRCULATION 697, 697-701 (2002).

21 ¹⁹ 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).

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

23 ²¹ *Id.*

24 ²² Am. Heart Ass'n., *Trans Fat Overview*, available at tinyurl.com/TransFatOverview (last visited October 22, 2018).

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

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

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

6 **D. The PHO in the Tootsie Products Caused Breast, Prostate, and Colorectal Cancer.**

7 43. Trans fat is a carcinogen which causes breast, prostate, and colorectal cancer.

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

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

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

17 47. A 600-person study found an 86 percent greater risk of colorectal cancer in the highest
18 trans fat consumption quartile.²⁹

19 48. A 2,910-person study found “trans-monounsaturated fatty acids . . . were dose-

20 ²⁴ *Id.*

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

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

24 ²⁷ 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).

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

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

1 dependently associated with colorectal cancer risk,” which showed “the importance of type of fat in the
2 etiology and prevention of colorectal cancer.”³⁰

3 **E. The PHO in Tootsie Products Caused Alzheimer’s Disease and Cognitive Decline.**

4 49. Trans fat causes Alzheimer’s disease and cognitive decline.

5 50. In a study examining 815 Chicago area seniors, researchers found “increased risk of
6 incident Alzheimer disease among persons with high intakes of . . . trans-unsaturated fats.”³¹

7 51. The study “observed a strong increased risk of Alzheimer disease with consumption of
8 trans-unsaturated fat.”³²

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

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

16 54. Artificial trans fat also damages the brains of those who consume it. A study conducted
17 by UCSD School of Medicine of 1,018 men, mostly younger men, found trans fat consumption to be
18 strongly correlated with impaired memory.³⁵ The authors of the study, appearing in *Circulation*, the
19 American Heart Association’s peer-reviewed journal, conclude that “Greater dTFA [dietary trans fatty
20

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

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

25 ³² *Id.*

26 ³³ Elizabeth E. Devore et al., *Dietary Fat Intake and Cognitive Decline in Women with Type 2 Diabetes*,
27 32 DIABETES CARE 635 (2009).

28 ³⁴ *Id.*

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

1 acid] was significantly associated with worse word memory in adults aged 20-45 years, often critical
2 years for career building.”

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

8 **F. The PHO in Tootsie Products Caused Organ Damage.**

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

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

15 57. New York City banned trans fat in restaurants in 2006. Similar laws exist in Philadelphia;
16 Baltimore; Stamford, Connecticut; and Montgomery County, Maryland.

17 58. A study of Denmark’s 2004 trans fat ban concluded it “did not appreciably affect the
18
19

20 ³⁶ *Id.*

21 ³⁷ *See:*

22 Lopez-Garcia et al., *Consumption of Trans Fat is Related to Plasma Markers of Inflammation and*
23 *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).
28

1 quality, cost or availability of food” and did not have “any noticeable effect for the consumers.”³⁸

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

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

7 61. The FDA’s Final Determination noted that “if there are data and information that
8 demonstrates to a reasonable certainty that no harm will result from a specific use of a PHO in food,
9 that information could be submitted as part of a food additive petition to FDA seeking issuance of a
10 regulation to prescribe conditions under which the additive may be safely used in food.” Final
11 Determination at 34664.

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

20 **VI. PLAINTIFF’S PURCHASES OF TOOTSIE PRODUCTS**

21 63. Plaintiff Maxine Beasley regularly purchased and consumed the Tootsie Products during
22 the Class Period.

23 64. The most frequent locations of Plaintiff’s purchases of the Tootsie Products were at the
24 Walgreens located at 2238 Westborough Blvd., South San Francisco, CA 94080. She purchased them
25

26
27 ³⁸ 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 less often at other retailers. During the Class Period she spent about \$150 on Tootsie Products
2 containing PHO.

3 **VII. TOOTSIE PRODUCTS UNNECESSARILY CONTAINED PHO AND TRANS FAT.**

4 65. Tootsie Industries' use of PHO in the Tootsie Products was always unnecessary. There
5 are several safe substitutes for PHO and artificial trans fat. Indeed, Tootsie Industries now uses "Palm
6 Oil," which does not contain trans fat, as a substitute for PHO in the current formulation.

7 66. The Tootsie Products were made with PHO even when competing chocolate candy
8 products did not engage in this unfair and unlawful conduct. During the class period, candy brands
9 without PHO included Hershey's, Mars, and Reese's.

10 67. Although alternative formulations and substitutes for PHO were available, Defendant
11 elected to not use them in the Tootsie Products to increase its profits.

12 **VIII. DEFENDANT'S PRACTICES ARE "UNFAIR" WITHIN THE MEANING OF THE**
13 **CALIFORNIA UNFAIR COMPETITION LAW.**

14 68. Defendant's practices as described herein are "unfair" within the meaning of the
15 California Unfair Competition Law because its conduct is immoral, unethical, unscrupulous, and
16 substantially injurious to consumers, and the utility of this conduct to Defendant does not outweigh the
17 gravity of the harm to Defendant's victims.

18 69. In particular, while the unlawful sale of the Tootsie Products may have had some utility
19 to Defendant in the form of profits, this utility was small and far outweighed by the gravity of the
20 serious health harm they inflicted on consumers.

21 70. Defendant's conduct injured competing manufacturers and sellers of candy products that
22 do not engage in its unfair behavior, especially given its large market share, large market power, and
23 limited retail shelf space.

24 71. Moreover, Defendant's practices violated public policy as declared by specific
25 constitutional, statutory, or regulatory provisions, including the California Health & Safety Code §
26 114377 and California Education Code § 49431.7.

27 72. Defendant's actions also violated public policy by causing the United States and
28 California to pay—via Medicare, Medicaid, Affordable Care Act Exchange subsidies, veterans' health

1 programs, public employee and retiree health insurance—for treatment of trans fat-related illnesses.

2 73. Further, the injury to consumers from Defendant’s practices is substantial, not
3 outweighed by benefits to consumers or competition, and not an injury consumers themselves could
4 reasonably have avoided.

5 74. The unfairness of Defendant’s conduct is also illustrated by, *inter alia*:

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

15 **IX. DEFENDANT’S PRACTICES ARE “UNLAWFUL” WITHIN THE MEANING OF THE**
16 **CALIFORNIA UNFAIR COMPETITION LAW.**

17 75. The PHO used in Tootsie Products appears nowhere on the FDA’s list of the hundreds of
18 substances it considers GRAS.³⁹

19 76. 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 77. 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 Tootsie Products do not
25 meet either of these exceptions, they are, and long have been, unsafe and unlawful for use in food.

26 78. Defendant’s practices as described herein are “unlawful” within the meaning of the

27 ³⁹ See 21 C.F.R. §§ 181, 182, 184 and 186.
28

1 California Unfair Competition Law because PHO is not Generally Recognized as Safe (GRAS).
2 Therefore, the PHO in Tootsie Products rendered it adulterated within the meaning of 21 U.S.C. §
3 342(a)(2)(C).

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

6 80. In using PHO as a food additive prior to 2015, Defendant failed to submit a food
7 additive petition and failed to undertake a GRAS self-determination.

8 **X. INJURY**

9 81. When purchasing the Tootsie Products, Plaintiff was seeking products made with safe
10 and lawful ingredients.

11 82. Plaintiff lost money as a result of Defendant's conduct because she purchased products
12 that were detrimental to their health and that were unfairly offered for sale in violation of federal and
13 California law. Had Defendant not violated the law, Plaintiff would not have been able to purchase the
14 Tootsie Products.

15 83. Plaintiff suffered physical injury when she repeatedly consumed the Tootsie Products,
16 because consuming artificial trans fat in *any* quantity, including the quantity she actually consumed,
17 inflames and damages vital organs and increases the risk of heart disease, diabetes, cancer, and death.

18 84. Reasonable consumers in California, including Plaintiff, expect food sold in grocery
19 stores to be fit for human consumption, not unlawful foods that are adulterated under California and
20 federal law. During the class period, the Tootsie Products were not fit for human consumption and had a
21 value of \$0.

22 85. Plaintiff never would have purchased Tootsie Products had she known they were
23 adulterated and unlawfully offered for sale.

24 86. Plaintiff lost money as a result of Defendant's unlawful behavior. Plaintiff altered her
25 positions to her detriment and suffered loss in an amount equal to the amount they paid for Tootsie
26 Products.

1 **XII. DELAYED DISCOVERY**

2 87. Plaintiff did not discover Defendant’s unlawful acts until October 2018, when she
3 learned that the Tootsie Products contained artificial trans fat and caused heart disease, diabetes, cancer,
4 and death, while competing products used safe and commercially acceptable substitutes for PHO.

5 88. Plaintiff is a reasonably diligent consumer who exercised reasonable diligence in her
6 purchase, use, and consumption of the Tootsie Products. Nevertheless, she would not have been able to
7 discover Defendant’s deceptive practices and lacked the means to discover them given that, like nearly
8 all consumers, she is not an expert on nutrition and does not typically read or have ready access to
9 scholarly journals such as *The Journal of Nutrition*,⁴⁰ *The European Journal of Clinical Nutrition*,⁴¹ and
10 *The New England Journal of Medicine*,⁴² where the scientific evidence of artificial trans fat’s dangers
11 has been published.

12 **XIII. CLASS ACTION ALLEGATIONS**

13 89. Plaintiff brings this action on behalf of herself and all others similarly situated (the
14 “Class”), excluding Defendant’s officers, directors, and employees, and the Court, its officers and their
15 families.

16 90. The Class is defined as follows:

17 All citizens of California who purchased in California Tootsie Products containing
18 partially hydrogenated oil between January 1, 2010 and December 31, 2016.

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

- 20 a. Whether Defendant’s conduct was immoral, unethical, unscrupulous, or substantially
21 injurious to consumers;
22

23 ⁴⁰ Peter M. Clifton et al., *Trans Fatty Acids In Adipose Tissue And The Food Supply Are Associated*
24 *With Myocardial Infarction*, 134 J. Nutr. 874, 874-79 (2004).

25 ⁴¹ A. Tavani et al., *Margarine intake and risk of nonfatal acute myocardial infarction in Italian women*,
26 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”).

27 ⁴² Mozaffarian, 354 New Eng. J. Med. at 1611 (“10 to 19 percent of CHD events in the United States
28 could be averted by reducing the intake of trans fat”).

- 1 b. Whether the slight utility Defendant realized as a result of its conduct outweighs the
- 2 gravity of the harm the conduct causes to its victims;
- 3 c. Whether Defendant's conduct violated public policy as declared by specific
- 4 constitutional, statutory, or regulatory provisions;
- 5 d. Whether the injury to consumers from Defendant's practices was substantial;
- 6 e. Whether the injury to consumers from Defendant's practices was one consumers
- 7 themselves could reasonably have avoided;
- 8 f. Whether members of the Class are entitled to restitution and, if so, the measure of
- 9 restitution;
- 10 g. Whether members of the Class are entitled to prejudgment interest, and how that
- 11 interest is to be calculated; and
- 12 h. Whether members of the Class are entitled to any further relief.

13 92. Plaintiff's claims are typical of Class member's claims because all Class members were
14 subjected to the same unfair and unlawful conduct when they purchased the Tootsie Products and
15 suffered economic injury.

16 93. Absent Defendant's unlawful sale, distribution, and marketing of the Tootsie Products,
17 Plaintiff and other Class members would not have purchased the Tootsie Products.

18 94. The Class is sufficiently numerous, as it includes thousands of individuals who
19 purchased the Tootsie Products throughout California during the Class Period.

20 95. Class representation is superior to other options for the resolution of the controversy.
21 The relief sought for each Class member is small, as little as one dollar for some Class members.
22 Absent the availability of class action procedures, it would be infeasible for Class members to redress
23 the wrongs done to them.

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

26 97. Class treatment is appropriate under Fed. R. Civ. P. 23. Plaintiff will, if notice is
27 required, confer with Defendant and seek to present the Court with a stipulation and proposed order on
28 the details of a class notice plan.

1 **CAUSES OF ACTION**

2 **First Cause of Action**

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

4 98. Plaintiff realleges and incorporates by reference each and every allegation contained
5 elsewhere in the Complaint, as if fully set forth herein.

6 **Unfair Conduct**

7 99. The business practices and omissions of Defendant as alleged herein constitute “unfair”
8 business acts and practices in that Defendant’s conduct was immoral, unethical, unscrupulous, and
9 substantially injurious to consumers and the utility of its conduct, if any, did not outweigh the gravity
10 of the harm to Defendant’s victims.

11 100. Further, Defendant’s practices were unfair because they violated public policy as
12 declared by specific constitutional, statutory, or regulatory provisions, including those embodied in the
13 FDCA, California Health and Safety Code, and California Education Code.

14 101. Moreover, Defendant’s practices were unfair because the injury to consumers from
15 Defendant’s practices was substantial, not outweighed by benefits to consumers or competition, and not
16 one consumers themselves could reasonably have avoided or should be obligated to avoid.

17 **Unlawful Conduct**

18 102. Defendant has made and distributed, in interstate commerce and in this district, products
19 that contained unlawful food additives. The Tootsie Products were placed into interstate commerce by
20 Defendant.

21 103. Defendant’s conduct was “unlawful” because it violated the Federal Food, Drug, and
22 Cosmetic Act (“FDCA”), specifically, the Food Additives Amendment of 1958, which deems a food
23 additive unsafe unless it has met two exceptions, neither of which the PHO used in the Tootsie Products
24 has met. 21 U.S.C. §§ 348, 342.

25 104. Defendant’s conduct further violated The California Sherman Food, Drug, and Cosmetic
26 Law (“Sherman Law”), Health & Safety Code § 110100, which adopts all FDA regulations as state
27 regulations. Defendants conduct also violated the following sections of the Sherman Law:

- 28 • § 110085 (adopting all FDA food additive regulations as state regulations);

- 1 • § 110100 (adopting all FDA regulations as state regulations);
- 2 • § 110545 (“Any food is adulterated if it bears or contains any poisonous or deleterious
- 3 substance that may render it injurious to health of man or any other animal that may consume
- 4 it.”)
- 5 • § 110550 (“Any food is adulterated if it bears or contains any added poisonous or deleterious
- 6 substance that is unsafe within the meaning of Section 110445.”)
- 7 • § 110398 (“It is unlawful for any person to advertise any food, drug, device, or cosmetic that is
- 8 adulterated or misbranded.”);
- 9 • § 110555 (“Any food is adulterated if it is, bears, or contains any food additive that is unsafe
- 10 within the meaning of Section 110445.”)
- 11 • § 110620 (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any
- 12 food that is adulterated.”);
- 13 • § 110625 (“It is unlawful for any person to adulterate any food.”); and
- 14 • § 110630 (“It is unlawful for any person to receive in commerce any food that is adulterated or
- 15 to deliver or proffer for delivery any such food.”).

16 105. The use of artificial trans fat in the Tootsie Products thus constituted a violation of the
17 FDCA and the Sherman Law and, as such, violated the “unlawful prong” of the UCL.

18 106. Plaintiff suffered injury in fact and lost money or property as a result of Defendant’s
19 unlawful acts: she was denied the benefit of the bargain when she decided to purchase the Tootsie
20 Products over competing products that were less expensive and/or contained no artificial trans fat.

21 107. Had Plaintiff been aware of Defendant’s unlawful tactics, she would not have purchased
22 the Tootsie Products.

23 108. Defendant’s unlawful acts allowed it to sell more units of the Tootsie Products than it
24 would have otherwise, and at a higher price, and higher margin.

25 109. Plaintiff seeks an order for the disgorgement and restitution of all revenue received by
26 Defendant from the sale of the Tootsie Products.

1 **Second Cause of Action**

2 **Breach of Implied Warranty of Merchantability**

3 110. Plaintiff realleges and incorporates by reference each and every allegation contained
4 elsewhere in the Complaint, as if fully set forth herein.

5 111. Defendant, through its acts and omissions set forth herein, in the sale, marketing and
6 promotion of the Tootsie Products, made representations to Plaintiff and the Class that the Tootsie
7 Products were safe to consume.

8 112. Plaintiff and the Class bought the Tootsie Products manufactured, advertised, and sold
9 by Defendant, as described herein.

10 113. Defendant is a merchant 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.

13 114. Defendant breached that implied warranty, however, in that the Tootsie Products were
14 not fit for their ordinary purpose in that they were not safe, wholesome, and legal food products.

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

18 116. Plaintiff and the Class have sustained damages as a proximate result of the foregoing
19 breach of implied warranty in the amount of Tootsie products' purchase price.

20 **XIV. PRAYER FOR RELIEF**

21 WHEREFORE, Plaintiff, on behalf of herself, all others similarly situated, and the general
22 public, prays for judgment against Defendant as follows:

23 A. An order confirming that this class action is properly maintainable as a class action as
24 defined above, appointing Plaintiff and her undersigned counsel to represent the Class,
25 and requiring Defendant to bear the cost of class notice;

26 B. An order requiring Defendant to pay restitution to Plaintiff and class members so that
27 they may be restored the money which Defendant acquired by means of any unfair,
28 unlawful, deceptive, unconscionable, fraudulent, and negligent acts;

- 1 C. An award of pre-judgment and post-judgment interest;
- 2 D. An award of attorney fees and costs; and
- 3 E. Such other and further relief as this Court may deem just, equitable, or proper.

4 **XV. NO JURY DEMAND**

5 Plaintiff does not demand a trial by jury.

6
7
8
9 DATED: December 26, 2018

Respectfully Submitted,

10
11 /s/ Gregory S. Weston
12 **THE WESTON FIRM**
13 GREGORY S. WESTON
14 ANDREW C. HAMILTON
15 1405 Morena Blvd., Suite 201
16 San Diego, CA 92110
17 Telephone: (619) 798-2006
18 Facsimile: ((619) 343-2789

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28
Counsel for Plaintiff

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Mark Beasley and Maxine Beasley

(b) County of Residence of First Listed Plaintiff Solano (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Gregory S. Weston The Weston Firm 1405 Morena Blvd., Suite 201, San Diego, CA 92110, (619) 798-2006

DEFENDANTS

Tootsie Roll Industries, Inc.

County of Residence of First Listed Defendant Cook County, IL (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known) David M. Jolley Covington & Burling, LLP One Front St., San Francisco, CA 94111, (415) 591-6000

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff 2 U.S. Government Defendant 3 Federal Question (U.S. Government Not a Party) 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation-Transfer 8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. § 1332(d)(2)

Brief description of cause: California Unfair Competition Law, Breach of Implied Warranty

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$ 5,000,000.00

CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

DATE 12/26/2018

SIGNATURE OF ATTORNEY OF RECORD

s/ Gregory S. Weston

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-CAND 44

Authority For Civil Cover Sheet. The JS-CAND 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the “defendant” is the location of the tract of land involved.)
- c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section “(see attachment).”
- II. Jurisdiction.** The basis of jurisdiction is set forth under Federal Rule of Civil Procedure 8(a), which requires that jurisdictions be shown in pleadings. Place an “X” in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- (1) United States plaintiff. Jurisdiction based on 28 USC §§ 1345 and 1348. Suits by agencies and officers of the United States are included here.
 - (2) United States defendant. When the plaintiff is suing the United States, its officers or agencies, place an “X” in this box.
 - (3) Federal question. This refers to suits under 28 USC § 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 - (4) Diversity of citizenship. This refers to suits under 28 USC § 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS-CAND 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an “X” in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an “X” in one of the six boxes.
- (1) Original Proceedings. Cases originating in the United States district courts.
 - (2) Removed from State Court. Proceedings initiated in state courts may be removed to the district courts under Title 28 USC § 1441. When the petition for removal is granted, check this box.
 - (3) Remanded from Appellate Court. Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 - (4) Reinstated or Reopened. Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 - (5) Transferred from Another District. For cases transferred under Title 28 USC § 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 - (6) Multidistrict Litigation Transfer. Check this box when a multidistrict case is transferred into the district under authority of Title 28 USC § 1407. When this box is checked, do not check (5) above.
 - (8) Multidistrict Litigation Direct File. Check this box when a multidistrict litigation case is filed in the same district as the Master MDL docket. Please note that there is no Origin Code 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC § 553. Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an “X” in this box if you are filing a class action under Federal Rule of Civil Procedure 23. Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction. Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS-CAND 44 is used to identify related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- IX. Divisional Assignment.** If the Nature of Suit is under Property Rights or Prisoner Petitions or the matter is a Securities Class Action, leave this section blank. For all other cases, identify the divisional venue according to Civil Local Rule 3-2: “the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated.”
- Date and Attorney Signature.** Date and sign the civil cover sheet.

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*: _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc: