

1 **THE WESTON FIRM**

2 GREGORY S. WESTON (239944)

3 *greg@westonfirm.com*

4 MELANIE PERSINGER (275423)

5 *mel@westonfirm.com*

6 PAUL K. JOSEPH (287057)

7 *paul@westonfirm.com*

8 1405 Morena Blvd., Suite 201

9 San Diego, CA 92110

10 Telephone: (619) 798-2006

11 Facsimile: (480) 247-4553

12 *Counsel for Plaintiff and the Proposed Class*

13 **UNITED STATES DISTRICT COURT**  
14 **SOUTHERN DISTRICT OF CALIFORNIA**

15 JACQUELYN MCGEE, on behalf of  
16 herself and all others similarly  
17 situated,

18 Plaintiff,

19 v.

20 DIAMOND FOODS, INC.

21 Defendant.

Case No: **'14CV2446 JAH DHB**

Pleading Type: Class Action

**COMPLAINT FOR INJUNCTIVE RELIEF,  
ABATEMENT OF NUISANCE, VIOLATIONS OF  
THE UNFAIR COMPETITION LAW, AND BREACH  
OF IMPLIED WARRANTY**

**TABLE OF CONTENTS**

1

2 I. JURISDICTION AND VENUE..... 3

3 II. NATURE OF THE ACTION ..... 3

4 III. PARTIES ..... 4

5 IV. NATURE OF TRANS FAT ..... 4

6

7 A. There is a Well-Established Scientific Consensus That Artificial Trans  
Fat is Extremely Harmful..... 6

8

9 B. Artificial Trans Fat Is So Inherently Dangerous It Has Been Banned in  
Several States and Countries..... 8

10

11 C. The Artificial Trans Fat in Trans Fat Popcorns Cause Cardiovascular  
Disease..... 9

12

13 D. The Artificial Trans Fat in the Trans Fat Popcorns Causes Type-2  
Diabetes..... 11

14

15 E. The Artificial Trans Fat in the Trans Fat Popcorns Causes Breast,  
Prostate, and Colorectal Cancer. .... 12

16

17 F. The Artificial Trans Fat in the Trans Fat Popcorns Causes  
Alzheimer’s Disease and Cognitive Decline..... 13

18

19 G. The Artificial Trans Fat in the Trans Fat Popcorn Causes Organ  
Damage..... 14

20 V. PLAINTIFF’S PURCHASES OF THE TRANS FAT POPCORN ..... 14

21 VI. THE TRANS FAT POPCORN UNNECESSARILY CONTAIN PHVO  
AND ARTIFICIAL TRANS FAT..... 15

22

23 VII. DEFENDANT’S PRACTICES ARE “UNFAIR” WITHIN THE MEANING  
OF THE CALIFORNIA UNFAIR COMPETITION LAW ..... 15

24

25 VIII. INJURY ..... 16

26 IX. CLASS ACTION ALLEGATIONS..... 17

27 X. CAUSES OF ACTION..... 19

28 A. FIRST CAUSE OF ACTION..... 19

1 B. SECOND CAUSE OF ACTION ..... 20  
2 C. THIRD CAUSE OF ACTION ..... 21  
3 XI. PRAYER FOR RELIEF ..... 21  
4 XII. APPENDIX A: LIST OF POP SECRET TRANS FAT POPCORN ..... I  
5  
6 XIII. APPENDIX B: COMPETING MICROWAVE POPCORN NOT MADE  
7 WITH ARTIFICIAL TRANS FAT ..... II  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 Plaintiff Jacquelyn McGee, on behalf of herself, all others similarly situated, and  
2 the general public, by and through undersigned counsel, hereby sues Defendant Diamond  
3 Foods, Inc. (“Diamond” or “Defendant”), and upon information and belief and  
4 investigation of counsel, alleges as follows:

5 **I. Jurisdiction and Venue**

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

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

17 **II. Nature of the Action**

18 3. Defendant manufactures and sells a variety of popcorn products (collectively  
19 “the Trans Fat Popcorns”) containing partially hydrogenated vegetable oil (“PHVO”), a  
20 food additive banned in many parts of the world because it is the only dietary source of  
21 artificial trans fat, a toxic carcinogen for which there are many safe and commercially  
22 acceptable substitutes. The Trans Fat Popcorns containing PHVO are sold under the Pop  
23 Secret brand.

24 4. Plaintiff Jacquelyn McGee repeatedly purchased and consumed the Trans  
25 Fat Popcorns during the Class Period defined herein.

26 5. Although there are safe, low-cost, and commercially acceptable alternatives  
27 to trans fat, including those used in competing brands and even in a few Pop Secret  
28 popcorn products, Defendant unfairly elects *not* to use those substitutes in the Trans Fat

1 Popcorns in order to increase profit at the expense of consumer health.

2 6. This action is brought to remedy Defendant's unlawful conduct. On behalf  
3 of the class defined herein, Plaintiff seeks an order compelling Defendant to, *inter alia*:  
4 (1) cease using artificial trans fat as an ingredient in the Trans Fat Popcorns and (2)  
5 award Plaintiff and the Class restitution.

### 6 **III. Parties**

7 7. Defendant Diamond Foods, Inc. is a Delaware corporation with its principal  
8 place of business in California. Diamond owns, manufactures, and sells the Trans Fat  
9 Popcorns, more particularly identified in Appendix A hereto.

10 8. Plaintiff Jacquelyn McGee is a resident of San Diego County, California  
11 who repeatedly purchased the Trans Fat Popcorns for personal and household  
12 consumption.

### 13 **IV. Nature of Trans Fat**

14 9. Artificial trans fat is manufactured via an industrial process called partial  
15 hydrogenation, in which hydrogen atoms are added to normal vegetable oil by heating the  
16 oil to temperatures above 400°F in the presence of ion donor catalyst metals such as  
17 rhodium, ruthenium, and nickel.<sup>1</sup> The resulting product is known as partially  
18 hydrogenated vegetable oil, or PHVO, which is the main source of trans fat in the  
19 American diet and used in dangerous quantities in the Trans Fat Popcorns.

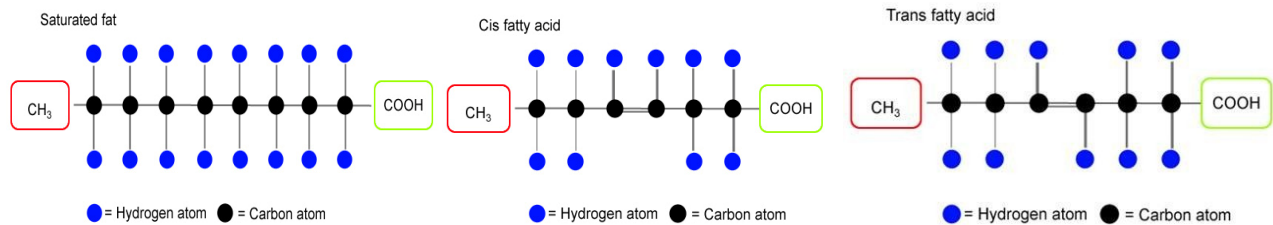
20 10. PHVO was invented in 1901 and patented in 1902 by German chemist  
21 Wilhelm Normann. PHVO molecules chemically differ from the natural fat molecules in  
22 other food products.<sup>2</sup>

---

24 <sup>1</sup> See Alice H. Lichtenstein, *Trans Fatty Acids, Plasma Lipid Levels, and Risk of*  
25 *Developing Cardiovascular Disease*, 95 *Circulation* 2588, 2588-90 (1997).

26 <sup>2</sup> See Alberto Ascherio *et al.*, *Trans Fatty Acids & Coronary Heart Disease*, 340 *New*  
27 *Eng. J. Med.* 94, 94-8 (1999). See also Ctr. for Food Safety & Applied Nutrition, U.S.  
28 Food & Drug Admin., Questions & Answers About *Trans* Fat Nutrition Labeling (Update  
2006) (2003), available at <http://www.cfsan.fda.gov/%7Edms/qatrans2.html>.

1 11. Natural fat, except the trace amounts of natural trans fat from ruminant  
 2 animals, comes in two varieties: (1) fats that lack carbon double bonds (“saturated fat”)  
 3 and (2) fats that have carbon double bonds with the hydrogen atoms on the same side on  
 4 the carbon chain (“cis fat”). Trans fat, however, has double bonds on opposite sides of its  
 5 carbon chain.



10

11 12. PHVO was initially a “wonder product” attractive to the packaged food  
 12 industry because it combines the low cost of unsaturated cis fat with the flexibility and  
 13 long shelf life of saturated fat. Like cis fat, PHVO is manufactured from lower-cost  
 14 vegetable and legume oils,<sup>3</sup> while saturated fat is derived from relatively expensive  
 15 animal and tropical plant sources.<sup>4</sup> Given its versatility, PHVO was once used in 40  
 16 percent of processed packaged foods.<sup>5</sup> Now, given its toxic properties, few food  
 17 companies continue to use PHVO. Defendant, however, has decided not to follow their  
 18 more responsible peers and cease using PHVO, instead placing its profits over public  
 19 health.

20 13. PHVO causes cardiovascular heart disease, diabetes, cancer, Alzheimer’s  
 21 disease, and accelerates cognitive decline in diabetics.

22

23

24 \_\_\_\_\_

25 <sup>3</sup> e.g., corn oil, soybean oil, and peanut oil.

26 <sup>4</sup> e.g., butter, cream, tallow, and coconut oil.

27 <sup>5</sup> Mary Carmichael, *The Skinny on Bad Fat*, Newsweek, Dec. 1, 2003, at 66. See also  
 28 Kim Severson, *Hidden Killer. It’s Trans Fat. It’s Dangerous. And It’s In Food You Eat Every Day*, S.F. Chron., Jan. 30, 2002.

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

3 14. There is “no safe level” of artificial trans fat intake.<sup>6</sup>

4 15. According to the established consensus of the scientific community,  
5 consumers should keep their consumption of trans fat “as low as possible.”<sup>7</sup>

6 16. In addition, “trans fatty acids are not essential and provide no known benefit  
7 to human health.”<sup>8</sup> Thus, while “the [Institute of Medicine] sets tolerable upper intake  
8 levels (UL) for the highest level of daily nutrient intake that is likely to pose no risk of  
9 adverse health effects to almost all individuals in the general population[,] . . . the IOM  
10 does **not** set a UL for trans fatty acid because **any** incremental increase in trans fatty acid  
11 intake increases the risk of CHD.”<sup>9</sup> (emphasis added).

12 17. Dariush Mozaffarian of Harvard Medical School writes in the New England  
13 Journal of Medicine:

14 [T]rans fats from partially hydrogenated oils have no intrinsic health  
15 value above their caloric value. Thus from a nutritional standpoint, the  
16 consumption of trans fatty acids results in considerable potential harm  
17 but no apparent benefit. . . . Thus, complete or near-complete avoidance  
18 of industrially produced trans fat—a consumption of less than 0.5 percent  
of the total energy intake—may be necessary to avoid adverse effects and  
would be prudent to minimize health risks.<sup>10</sup>

19 18. Today there is no question about the scientific consensus on trans fat. Dr.  
20 Julie Louise Gerberding, former director of the Centers for Disease Control, writes:  
21

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

25 <sup>7</sup> *Id.*

26 <sup>8</sup> 75 Fed. Reg. at 76542.

27 <sup>9</sup> *Id.*

28 <sup>10</sup> Dariush Mozaffarian *et al.*, *Trans Fatty Acids and Cardiovascular Disease*, 354 N. Engl. J. Med. 1601-13 at 1608-1609 (2006).

1 The scientific rationale for eliminating exposure to artificial trans fatty  
2 acids in foods is rock solid. There is no evidence that they provide any  
3 health benefit, and they are certainly harmful. These compounds  
4 adversely affect both low- and high-density lipoprotein cholesterol levels  
5 and increase the risk for coronary heart disease, even at relatively low  
6 levels of dietary intake. Gram for gram, trans fats are far more potent  
7 than saturated fats in increasing the risk for heart disease, perhaps  
8 because they also have pro-inflammatory properties and other adverse  
9 effects on vascular endothelium. The strong evidence of harm motivated  
10 the Institute of Medicine to issue recommendations that the intake of  
11 trans fats be minimized and prompted the [FDA] to require the addition  
12 of information about trans fat content to food labels beginning in 2006.  
13 Eliminating exposure to these dangerous fats could have a powerful  
14 population impact—potentially protecting 30,000 to 100,000 Americans  
15 from death related to heart disease each year.<sup>11</sup>

16 19. Darius Mozaffarian, Professor of Medicine at Harvard Medical School,  
17 concludes in an article in the New England Journal of Medicine:

18 Given the adverse effects of trans fatty acids on serum lipid levels,  
19 systemic inflammation, and possibly other risk factors for cardiovascular  
20 disease and the positive associations with the risk of CHD, sudden death  
21 from cardiac causes, and possibly diabetes, the potential for harm is clear.  
22 The evidence and the magnitude of adverse health effects of trans fatty  
23 acids are in fact far stronger on average than those of food contaminants  
24 or pesticide residues, which have in some cases received considerable  
25 attention. Furthermore, trans fats from partially hydrogenated oils have  
26 no intrinsic health value above their caloric value. Thus, from a  
27 nutritional standpoint, the consumption of trans fatty acids results in  
28 considerable potential harm but no apparent benefit.<sup>12</sup>

29 20. Given its nature as an artificial chemical not naturally found in any food and  
30 the considerable harm that causes to human health, Walter Willett, Professor of Medicine  
31 at Harvard Medical School, finds the most direct analogue of trans fat to be not any

---

32 <sup>11</sup> Julie Louise Gerberding, MD, MPH, *Safer Fats for Healthier Hearts: The Case for*  
33 *Eliminating Dietary Artificial Trans Fat Intake*, Ann. Intern. Med., 151:137-138 (2009).

34 <sup>12</sup> Dariush Mozaffarian *et al.*, *Trans Fatty Acids and Cardiovascular Disease*, 354 N.  
35 Engl. J. Med. 1601-13 (2006).



1 natural fat but contaminants such as pesticides. He states that banning trans fat “is a food  
2 safety issue . . . this is actually contamination.”<sup>13</sup>

3 **B. Artificial Trans Fat Is So Inherently Dangerous It Has Been Banned in**  
4 **Several States and Countries.**

5 21. In 2008, California became the first state to ban all restaurant food with  
6 artificial trans fat, a law affecting approximately 88,000 eating establishments. Trans fats  
7 now may not be served in California’s schools or restaurants in an amount greater than  
8 half a gram per serving.<sup>14</sup>

9 22. New York City banned trans fat in quantities greater than half a gram per  
10 serving in its 20,000 food establishments in 2006. Similar laws exist in Philadelphia;  
11 Baltimore; Stamford, Connecticut; and Montgomery County, Maryland.

12 23. A 2004 Danish law restricted all foods to under 2 percent of calories from  
13 trans fat. Switzerland made the same restriction in 2008.<sup>15</sup>

14 24. After conducting a surveillance study of Denmark’s trans fat ban,  
15 researchers concluded the change “did not appreciably affect the quality, cost or  
16 availability of food” and did not have “any noticeable effect for the consumers.”<sup>16</sup>

17 25. Similar bans have been introduced in Austria and Switzerland. Brazil,  
18 Argentina, Chile and South Africa have all taken steps to reduce or eliminate trans fats  
19 from food.<sup>17</sup>

20 26. In 2006, a trans fat task force co-chaired by Health Canada and the Heart  
21

---

22 <sup>13</sup> Rebecca Coombes, *Trans fats: chasing a global ban*, 343 *British Med. J.* (2011).

23 <sup>14</sup> Cal. Educ. Code § 49431.7, Cal. Health & Saf. Code § 114377.

24 <sup>15</sup> Andrew Collier, *Deadly Fats: Why Are We still Eating Them?*, *The Independent* (UK),  
25 June 10, 2008.

26 <sup>16</sup> Mozaffarian, 354 *New Eng. J. Med.* at 1610; *see also* Steen Stender, *High Levels of*  
27 *Industrially Produced Trans Fat in Popular Fast Food*, 354 *New Eng. J. Med.* 1650,  
28 1652 (2006).

<sup>17</sup> Coombes, *Trans fats: chasing a global ban*, 343 *British Med. J.* d5567 (2011).

1 and Stroke Foundation of Canada recommended capping trans fat content at 2 percent of  
2 lipid calories for tub margarines and spreads and 5 percent for all other foods. On  
3 September 30, 2009, British Columbia became the first province to impose these rules on  
4 all restaurants, schools, hospitals, and special events.<sup>18</sup>

5 **C. The Artificial Trans Fat in Trans Fat Popcorns Cause Cardiovascular**  
6 **Disease.**

7 27. Trans fat raises the risk of CHD more than any other known nutritive  
8 product.<sup>19</sup>

9 28. Removing trans fat equal to 2% of total calories from the American diet  
10 “would prevent approximately 30,000 premature coronary deaths per year, and  
11 epidemiologic evidence suggests this number is closer to 100,000 premature deaths  
12 annually.”<sup>20</sup>

13 29. “10 to 19 percent of CHD events in the United States could be averted by  
14 reducing the intake of trans fat.”<sup>21</sup>

15 30. By raising LDL levels and lowering HDL levels, trans fat causes a wide  
16 variety of dangerous heart conditions, including low flow-mediated vasodilation,  
17 coronary artery disease, and primary cardiac arrest.

18 31. In a joint Dietary Guidelines Advisory Committee Report, the Department of  
19 Health and Human Services and the U.S. Department of Agriculture recognized “[t]he  
20 relationship between trans fatty acid intake and LDL cholesterol is direct and progressive,  
21  
22

---

23  
24 <sup>18</sup> *Province Restricts Trans Fat in B.C.*, British Columbia Ministry of Healthy Living and  
Sport Press Release (2009), available at <http://tinyurl.com/popcorn14>.

25 <sup>19</sup> Mozaffarian, 354 New Eng. J. Med. at 1603.

26 <sup>20</sup> Alberto Ascherio *et al.*, *Trans Fatty Acids & Coronary Heart Disease*, 340 New Eng.  
27 J. Med. 94, 94-8 (1999).

28 <sup>21</sup> Mozaffarian, 354 New Eng. J. Med. at 1611.

1 increasing the risk of cardiovascular disease.”<sup>22</sup>

2 32. The American Heart Association warns, “trans fats raise your bad (LDL)  
3 cholesterol levels and lower your good (HDL) cholesterol levels. Eating trans fats  
4 increases your risk of developing heart disease.”<sup>23</sup>

5 33. After a review of literature on the connection between the consumption of  
6 artificial trans fat and coronary heart disease, the FDA concluded:

7 [B]ased on the consistent results across a number of the most persuasive  
8 types of study designs (i.e., intervention trials and prospective cohort  
9 studies) that were conducted using a range of test conditions and across  
10 different geographical regions and populations . . . the available evidence  
11 for an adverse relationship between trans fat intake and CHD risk is  
12 strong.<sup>24</sup>

13 34. The FDA further found “[t]o date, there have been no reports issued by  
14 authoritative sources that provide a level of trans fat in the diet . . . below which there is  
15 no risk of [Coronary Heart Disease].”<sup>25</sup> Rather, there “is a positive linear trend between  
16 trans fatty acid intake and LDL cholesterol concentration, and therefore there is a positive  
17 relationship between trans fatty acid intake and the risk of CHD.”<sup>26</sup>

18 35. A study investigating the impact of trans fatty acids on heart health provides  
19 evidence that:

20 [E]ven the lower estimates from the effects [of PHVO] on blood lipids  
21 would suggest that more than 30,000 deaths per year may be due to the  
22 consumption of partially hydrogenated vegetable fat. Furthermore, the

---

23 <sup>22</sup> Dep’t of Health & Human Serv. & U.S. Dep’t of Agric., 2005 Dietary Guidelines  
24 Advisory Committee Report, Section 10 (2005).

25 <sup>23</sup> Am. Heart Ass’n., *Trans Fat Overview*, available at  
26 [http://www.heart.org/HEARTORG/GettingHealthy/FatsAndOils/Fats101/Trans-Fats\\_UCM\\_301120\\_Article.jsp](http://www.heart.org/HEARTORG/GettingHealthy/FatsAndOils/Fats101/Trans-Fats_UCM_301120_Article.jsp).

27 <sup>24</sup> Ctr. for Food Safety & Applied Nutrition, U.S. Food & Drug Admin., Questions &  
28 Answers About *Trans* Fat Nutrition Labeling.

<sup>25</sup> 75 Fed. Reg. 76526, 76542 (Dec. 8, 2010).

<sup>26</sup> *Id.*

1 number of attributable cases of nonfatal coronary heart disease will be  
2 even larger.<sup>27</sup>

3 36. By taking blood samples from 179 survivors of cardiac arrest and 285  
4 randomly-selected control patients and comparing the top fifth with the bottom fifth of  
5 participants by trans fat intake, another study published in the American Heart  
6 Association's Circulation found that the largest consumers of trans fat have three times  
7 the risk of suffering primary cardiac arrest, even after controlling for a variety of medical  
8 and lifestyle risk factors.<sup>28</sup>

9 37. Australian researchers observed that heart attack patients possess elevated  
10 amounts of trans fat in their adipose tissue, strongly linking heart disease with long-term  
11 consumption of trans fat.<sup>29</sup>

12 **D. The Artificial Trans Fat in the Trans Fat Popcorns Causes Type-2 Diabetes.**

13 38. Artificial trans fat causes type-2 diabetes.<sup>30</sup>

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

18 40. Researchers at Northwestern University's medical school found mice show  
19  
20  
21  
22

23 <sup>27</sup> W.C. Willett *et al.*, *Trans Fatty Acids: Are the Effects only Marginal?*, 84 Am. J. Pub.  
24 Health 722, 723 (1994).

25 <sup>28</sup> Rozenn N. Lemaitre *et al.*, *Cell Membrane Trans-Fatty Acids and the Risk of Primary*  
*Cardiac Arrest*, 105 Circulation 697, 697-701 (2002).

26 <sup>29</sup> Peter M. Clifton *et al.*, *Trans Fatty Acids In Adipose Tissue And The Food Supply Are*  
27 *Associated With Myocardial Infarction*. 134 J. of Nutrition 874, 874-79 (2004).

28 <sup>30</sup> Am. Heart Ass'n., *Trans Fat Overview*.

1 multiple markers of type-2 diabetes after eating a high trans fat diet for only four weeks.<sup>31</sup>

2 41. By the eighth week of the study, mice fed the diet high in trans fat showed a  
3 500 percent increase compared to the control group in hepatic interleukin-1 $\beta$  gene  
4 expression, one such marker of diabetes, indicating the extreme stress artificial trans fat  
5 places on the body.<sup>32</sup>

6 42. A 14-year study of 84,204 women found that for every 2 percent increase in  
7 energy intake from artificial trans fat, the relative risk of type-2 diabetes was increased by  
8 39 percent.<sup>33</sup>

9 **E. The Artificial Trans Fat in the Trans Fat Popcorns Causes Breast, Prostate,**  
10 **and Colorectal Cancer.**

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

12 44. A 13-year study of 19,934 French women showed 75 percent more women  
13 contracted breast cancer in the highest quintile of trans fat consumption than did those in  
14 the lowest.<sup>34</sup>

15 45. In a 25-year study of 14,916 U.S. physicians, the doctors in the highest  
16 quintile of trans fat intake had more than double the risk of developing prostate cancer  
17 than the doctors in the lowest quintile.<sup>35</sup>

18 46. A study of 1,012 American males observing trans fat intake and the risk of  
19

---

20 <sup>31</sup> Sean W. P. Koppe *et al.*, *Trans fat feeding results in higher serum alanine*  
21 *aminotransferase and increased insulin resistance compared with a standard murine*  
22 *high-fat diet*, 297 *Am. J. Physiol. Gastrointest Liver Physiol.* G378-84 (2009).

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

24 <sup>33</sup> Jorge Salmeron *et al.*, *Dietary Fat Intake and Risk of Type 2 Diabetes in Women*, 73  
25 *Am. J. of Clinical Nutrition* 1019, 1023 (2001).

26 <sup>34</sup> Véronique Chajès *et al.*, *Association between Serum Trans-Monounsaturated Fatty*  
27 *Acids and Breast Cancer Risk in the E3N-EPIC Study*. 167 *Am. J. of Epidemiology* 1312,  
28 1316 (2008).

29 <sup>35</sup> Jorge Chavarro *et al.*, *A Prospective Study of Blood Trans Fatty Acid Levels and Risk*  
30 *of Prostate Cancer.*, 47 *Proc. Am. Assoc. of Cancer Research* 95, 99 (2006).

1 prostate cancer found “[c]ompared with the lowest quartile of total trans-fatty acid  
2 consumption, the higher quartiles gave odds ratios (ORs) equal to 1.58,” meaning those  
3 in the highest quartile are 58% more likely to contract prostate cancer than those in the  
4 lowest.<sup>36</sup>

5 47. A 600-person study found an 86 percent greater risk of colorectal cancer in  
6 the highest trans fat consumption quartile.<sup>37</sup>

7 48. A 2,910-person study found “trans-monounsaturated fatty acids . . . were  
8 dose-dependently associated with colorectal cancer risk,” which showed “the importance  
9 of type of fat in the etiology and prevention of colorectal cancer.”<sup>38</sup>

10 **F. The Artificial Trans Fat in the Trans Fat Popcorns Causes Alzheimer’s**  
11 **Disease and Cognitive Decline.**

12 49. Trans fat causes Alzheimer’s Disease and cognitive decline.

13 50. In a study examining 815 Chicago area seniors, researchers found “increased  
14 risk of incident Alzheimer disease among persons with high intakes of... trans-  
15 unsaturated fats.”<sup>39</sup>

16 51. The study “observed a strong increased risk of Alzheimer disease with  
17 consumption of trans-unsaturated fat.”<sup>40</sup>

18 52. In a study of 1,486 women with type 2 diabetes, researchers found “[h]igher  
19 intakes of . . . trans fat since midlife . . . were [] highly associated with worse cognitive  
20

21 \_\_\_\_\_  
22 <sup>36</sup> Xin Liu *et al.*, *Trans-Fatty Acid Intake and Increased Risk of Advanced Prostate*  
*Cancer: Modification by RNASEL R462Q Variant*, 28 *Carcinogenesis* 1232, 1232 (2007).

23 <sup>37</sup> L.C. Vinikoor *et al.*, *Consumption of Trans-Fatty Acid and its Association with*  
*Colorectal Adenomas*, 168 *Am. J. of Epidemiology* 289, 294 (2008).

24 <sup>38</sup> Evropi Theodoratou *et al.*, *Dietary Fatty Acids and Colorectal Cancer: A Case-Control*  
*Study*, 166 *Am. J. of Epidemiology* 181 (2007).

25 <sup>39</sup> Martha Clare Morris *et al.*, *Dietary Fats and the Risk of Incident Alzheimer Disease*, 60  
26 *Arch. Neurol.* 194, 198-99 (2003).

27 <sup>40</sup> *Id.*  
28

1 decline . . . .<sup>41</sup>

2 53. The study cautioned “[d]ietary fat intake can alter glucose and lipid  
3 metabolism and is related to cardiovascular disease risk in individuals with type 2  
4 diabetes. Because insulin, cholesterol, and vascular disease all appear to play important  
5 roles in brain aging and cognitive impairments, dietary fat modification may be a  
6 particularly effective strategy for preventing cognitive decline, especially in individuals  
7 with diabetes.”<sup>42</sup> (citations omitted).

8 **G. The Artificial Trans Fat in the Trans Fat Popcorn Causes Organ Damage**

9 54. Artificial trans fat causes organ damage, including the heart, by causing  
10 chronic systemic inflammation, where the immune system becomes persistently  
11 overactive, damages cells, and causes organ dysfunction.<sup>43</sup>

12 **V. Plaintiff’s Purchases of the Trans Fat Popcorns**

13 55. Plaintiff Jacquelyn McGee repeatedly purchased the Trans Fat Popcorns  
14 during the Class Period.

15 56. Ms. McGee purchased the Trans Fat Popcorns approximately once every  
16 two to three months over the past three years.

17 57. The most frequent of Ms. McGee’s purchases of the Trans Fat Popcorns was  
18 at the Walmart located at 1200 Highland Ave. National City, CA 91950.

19

20 <sup>41</sup> Elizabeth E. Devore et al., *Dietary Fat Intake and Cognitive Decline in Women with*  
21 *Type 2 Diabetes*, 32 *Diabetes Care* 635 (2009).

22 <sup>42</sup> *Id.*

23 <sup>43</sup> See Lopez-Garcia et al., *Consumption of Trans Fat is Related to Plasma Markers of*  
24 *Inflammation and Endothelial Dysfunction*, 135 *J. of Nutr.* 562-66 (2005); see also Baer et  
25 *al.*, *Dietary fatty acids affect plasma markers of inflammation in healthy men fed*  
26 *controlled diets; a randomized crossover study*, 79 *Am. J. Clin. Nutr.* 969-73 (2004);  
27 Mozaffarian & Clarke, *Quantitative effects on cardiovascular risk factors and coronary*  
28 *heart disease risk of replacing partially hydrogenated vegetable oils with other fats and*  
*oils*, 63 *Euro. J. of Clin. Nutr.* S22-S33 (2009); Mozaffarian et al., *Trans Fatty acids and*  
*systemic inflammation in heart failure*, 80 *Am. J. Clin. Nutr.* 1521-25 (2004).







1 that do not engage in its unfair, immoral behavior, especially given Defendant's large  
2 market share and the limited retail shelf space.

3 64. Further, Defendant's practices violate public policy as declared by specific  
4 constitutional, statutory, or regulatory provisions, including the California Health and  
5 Safety Code § 114377 and California Education Code § 49431.7.

6 65. Diamond's actions also violate public policy by causing the United States,  
7 California, and every other state to pay—via Medicare, Medicaid, Veterans Health  
8 Administration, public employee and retiree health insurance, and other programs—for  
9 treatment of trans fat-related illnesses.

10 66. Further, the injury to consumers from Defendant's practices is substantial,  
11 not outweighed by benefits to consumers or competition, and not one consumers  
12 themselves could reasonably have avoided.

### 13 **VIII. Injury**

14 67. Plaintiff suffered physical injury when she repeatedly consumed Defendant's  
15 Trans Fat Popcorns, because consuming artificial trans fat in any quantity causes  
16 inflammation and damage to vital organs and an increased risk of heart disease, diabetes,  
17 cancer, and death.

18 68. Plaintiff first discovered Defendant's unlawful acts described herein in  
19 August 2014, when she learned that the Trans Fat Popcorns contained artificial trans fat  
20 and caused heart disease, diabetes, cancer, and death, while competing products used safe  
21 and commercially acceptable substitutes for PHVO.

22 69. Plaintiff, in the exercise of reasonable diligence, could not have discovered  
23 earlier Defendant's unlawful acts, described herein because the dangers of artificial trans  
24 fats were known to Defendant, but not to Plaintiff, throughout the Class Period defined  
25 herein. Plaintiff is not a nutritionist, food expert, or food scientist, but rather a lay  
26 consumer who does not have the specialized knowledge that Defendant had, which  
27 otherwise would have enabled her to associate partially hydrogenated oil with artificial  
28 trans fat, and artificial trans fat with disease. Even today the nature and extensive

1 utilization of artificial trans fats – including that they necessarily exist where partially  
2 hydrogenated oil is used as an ingredient in a food product – is largely unknown to the  
3 average consumer.

4 70. Plaintiff bought the Trans Fat Popcorns seeking popcorn that was safe for  
5 her and her family to consume, not one containing an artificial laboratory-produced fat  
6 that causes heart disease and cancer.

7 71. Plaintiff also lost money as a result of Defendant’s conduct described herein  
8 in that she purchased products that, because they were detrimental to her health, were  
9 unfairly offered for sale in violation of California law. Had Defendant not violated the  
10 law, Plaintiff would not have been able to purchase the Trans Fat Popcorns, or would  
11 have only been able to purchase Pop Secret popcorn varieties containing safe alternatives  
12 to PHVO and trans fat.

13 **IX. Class Action Allegations**

14 72. Plaintiff brings this action on behalf of herself and all others similarly  
15 situated (the “Class”), excluding Defendant’s officers, directors, and employees, and the  
16 Court, its officers and their families. The Class is defined as:

17 All persons who purchased in the United States, on or after January 1,  
18 2008, for household or personal use, Pop Secret popcorn varieties  
19 manufactured or distributed by Diamond Foods, Inc. containing partially  
hydrogenated vegetable oil.

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

21 a. Whether Defendant’s conduct constitutes a violation of the unfair  
22 prong of California’s Unfair Competition Law;

23 b. Whether Defendant’s conduct is a nuisance as defined by Cal. Civ.  
24 Code §§ 3479-3493;

25 c. Whether Defendant’s conduct constitutes a violation of the unlawful  
26 prong of California’s Unfair Competition Law;

27 d. Whether Defendant’s conduct was immoral, unethical, unscrupulous,  
28 or substantially injurious to consumers;

1 e. Whether any slight utility to themselves of Defendant's conduct  
2 outweighs the gravity of the harm the conduct causes to their victims;

3 f. Whether Defendant's conduct violates public policy as declared by  
4 specific constitutional, statutory, or regulatory provisions;

5 g. Whether the injury to consumers from Defendant's practices is  
6 substantial;

7 h. Whether the injury to consumers from Defendant's practices is  
8 outweighed by benefits to consumers or competition;

9 i. Whether the injury to consumers from Defendant's practices is one  
10 consumers themselves could reasonably have avoided;

11 j. Whether Class members are entitled to restitution and, if so, the correct  
12 measure of restitution;

13 k. Whether Class members are entitled to an injunction and, if so, its  
14 terms; and

15 l. Whether Class members are entitled to any further relief.

16 74. By purchasing and/or using the Trans Fat Popcorns, all Class members were  
17 subjected to the same wrongful conduct.

18 75. Plaintiff's claims are typical of the Class' claims. Plaintiff will fairly and  
19 adequately protect the interests of the Class, has no interests that are incompatible with  
20 the interests of the Class, and has retained counsel competent and experienced in class  
21 litigation.

22 76. The Class is sufficiently numerous, as it includes hundreds of thousands of  
23 individuals who purchased the Trans Fat Popcorns throughout the United States during  
24 the Class Period.

25 77. Class representation is superior to other options for the resolution of the  
26 controversy. The relief sought for each Class member is small, as little as three or four  
27 dollars for some Class members. Absent the availability of class action procedures, it  
28 would be infeasible for Class members to redress the wrongs done to them.

1 78. Defendant has acted on grounds applicable to the Class, thereby making  
2 final injunctive relief or declaratory relief appropriate concerning the Class as a whole.

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

5 80. Class treatment is appropriate under Fed. R. Civ. P. 23(a) and both Fed. R.  
6 Civ. P. 23(b)(2) and 23(b)(3). Plaintiff does not contemplate class notice if the class is  
7 certified under Fed. R. Civ. P. 23(b)(2), which does not require notice. Plaintiff  
8 contemplates notice via publication if the class is certified under Fed. R. Civ. P. 23(b)(3)  
9 or if the Court determines class notice is required notwithstanding that notice is not  
10 required under Fed. R. Civ. P. 23(b)(2). Plaintiff will, if notice is required, confer with  
11 Defendant and seek to present the Court with a stipulation and proposed order on the  
12 details of a class notice plan.

13 **X. CAUSES OF ACTION**

14 **A. FIRST CAUSE OF ACTION**

15 **California Unfair Competition Law, Unfair Prong**

16 **Cal. Bus. & Prof. Code §§ 17200 et seq.**

17 81. Plaintiff realleges and incorporates the allegations elsewhere in the  
18 Complaint as if set forth in full herein.

19 82. Cal. Bus. & Prof. Code § 17200 prohibits any “unlawful, unfair or  
20 fraudulent business act or practice.”

21 83. The business practices and omissions of Defendant as alleged herein  
22 constitute “unfair” business acts and practices in that their conduct is immoral, unethical,  
23 unscrupulous, or substantially injurious to consumers and the utility of their conduct, if  
24 any, does not outweigh the gravity of the harm to Defendant’s victims.

25 84. Further, Defendant’s practices are unfair because they violate public policy  
26 as declared by specific constitutional, statutory, or regulatory provisions, including the  
27 California Health and Safety Code and California Education Code.

28

1 85. Further, Defendant's practices are unfair because the injury to consumers  
2 from Defendant's practices is substantial, not outweighed by benefits to consumers or  
3 competition, and not one consumers themselves could reasonably have avoided.

4 86. In accordance with Cal. Bus. & Prof Code § 17203, Plaintiff seeks an order  
5 enjoining Defendant from continuing to conduct business through unfair acts and  
6 practices and to commence a corrective advertising campaign.

7 87. Plaintiff also seeks an order for the disgorgement and restitution of all monies  
8 from the sale of the Trans Fat Popcorns, which were acquired through acts of unfair  
9 competition.

10 **B. SECOND CAUSE OF ACTION**

11 **Cal. Civ. Code §§ 3479-3493**

12 88. Plaintiff realleges and incorporates the allegations elsewhere in the  
13 Complaint as if set forth in full herein.

14 89. The Public has a common right to a safe food supply and a common interest  
15 in ensuring that only safe foods are allowed for sale.

16 90. Trans fat is a dangerous ingredient that is harmful when consumed by  
17 humans in any amount. Defendant actively promotes and sells its Trans Fat Popcorns,  
18 which contain dangerous amounts of Trans Fat. Defendant sells its Trans Fat Popcorns to  
19 the public at large.

20 91. Defendant's actions complained of herein have created a harmful condition  
21 that is injurious to the health of the public, affects a substantial number of people. These  
22 acts substantially and unreasonably interfere with the public's interests in having only  
23 safe foods available for purchase, cause an unreasonable inconvenience to avoid the  
24 condition, and are a menace to the public health and to the safety of children, and  
25 constitute a public nuisance.

26 92. Defendant is liable in public nuisance because by promoting and selling its  
27 Trans Fat Popcorns that contain dangerous amounts of trans fat, they have created and/or  
28 contributed to the creation of a dangerous condition interferes with the public interest.

1 93. Plaintiff suffered specific physical and emotional harm from Defendant's  
2 conduct when she consumed Defendant's Trans Fat Popcorns. Plaintiff continues to  
3 suffer emotional harm from knowing that she injured herself and her family by feeding  
4 them Defendant's Trans Fat Popcorns.

5 94. In accordance with Cal. Civil Code § 3491, Plaintiff seeks an order abating  
6 Defendant's injurious practices, enjoining further acts.

7 **C. THIRD CAUSE OF ACTION**

8 **Breach of Implied Warranty of Merchantability**

9 95. Plaintiff realleges and incorporates the allegations elsewhere in the  
10 Complaint as if set forth in full herein.

11 96. Defendant is a merchant with respect to goods of this kind which were sold  
12 to Plaintiff and other consumers, and there was in the sale to Plaintiff and other  
13 consumers an implied warranty that those goods were merchantable.

14 97. However, Defendant breached that warranty implied in the contract for the  
15 sale of goods in that the Trans Fat Popcorns are not safe for human consumption as set  
16 forth in detail hereinabove.

17 98. As a result of Defendant's conduct, Plaintiff and other consumers did not  
18 receive goods as impliedly warranted by Defendant to be merchantable.

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

21 **XI. Prayer for Relief**

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

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

28 B. An order requiring Defendant to pay restitution to Plaintiff and the Class so

1 that they may be restored any money which may have been acquired by  
2 means of any unfair practice;

3 C. An order requiring Defendant to disgorge any benefits received from  
4 Plaintiff and/or unjust enrichment realized as a result of unfair practices;

5 D. An order declaring the conduct complained of herein violates the Unfair  
6 Competition Law;

7 E. An order requiring Defendant to cease and desist its unfair practices;

8 F. An order requiring Defendant to engage in a corrective advertising  
9 campaign;

10 G. An order abating Defendant's injurious practices;

11 H. An award of prejudgment and postjudgment interest;

12 I. An award of attorneys' fees and costs; and

13 J. Such other and further relief as this Court may deem just, equitable or  
14 proper.

15  
16  
17 DATED: October 14, 2014

Respectfully Submitted,

18  
19 /s/ Gregory S. Weston

20 **THE WESTON FIRM**  
21 GREGORY S. WESTON  
22 MELANIE PERSINGER  
23 PAUL K. JOSEPH  
24 1405 Morena Blvd., Suite 201  
25 San Diego, CA 92110  
26 Telephone: (619) 798-2006  
27 Facsimile: (480) 247-4553

28 *Counsel for Plaintiff and the Proposed  
Class*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**XII. Appendix A: List of Pop Secret Trans Fat Popcorn**

- Butter
- Jumbo Pop Butter
- Homestyle
- Extra Butter
- Movie Theater Butter
- Jumbo Pop Movie Theater Butter
- Cheddar
- Homestyle Snack Bags
- Movie Theater Butter Snack Bags



1 **XIV. Appendix B: Competing Microwave Popcorn Not Made With Artificial**  
2 **Trans Fat**

- 3 • Orville Redenbacher's distributed by ConAgra Foods, Inc. including all of the  
4 following varieties:  
5 ○ Ultimate Butter  
6 ○ Movie Theater Butter  
7 ○ Butter  
8 ○ Pour Over Movie Theater Butter  
9 ○ Movie Theater Mini Bags  
10 ○ Light Butter  
11 ○ Butter Tub  
12 ○ Gourmet White  
13 ○ Butter Mini Bags  
14 ○ Kettle Korn  
15 ○ Kettle Korn Mini Bags  
16 ○ Cheddar Cheese  
17 ○ Caramel  
18 ○ Sea Salt & Vinegar  
19 ○ White Cheddar  
20 ○ Classic Butter & Sea Salt  
21 ○ Garlic Butter & Sea Salt  
22 ○ Zesty Pepper Butter  
23 ○ Simply Salted  
24 ○ SmartPop! Butter  
25 ○ SmartPop! Kettle Korn  
26 ○ Natural Lime & Salt  
27  
28 • Act II manufactured by ConAgra Foods, Inc. including all of the following  
varieties:  
○ 94% Fat Free 12 ct.  
○ 94% Fat Free Butter 3 ct.  
○ 94% Fat Free Butter 6 ct.  
○ Butter 12 ct.  
○ Butter 24 ct.  
○ Butter 3 ct.  
○ Butter 6 ct.  
○ Butter Lovers Mini Bags 8 ct.  
○ Butter Lovers 12 ct.  
○ Butter Lovers 3 ct.  
○ Butter Lovers Club 36 ct.

- 1           ○ Butter Lovers Mini Bags
- 2           ○ Butter Mini Bags
- 3           ○ Butter Popcorn 16.5 oz. International
- 4           ○ Buttery Kettle Corn
- 5           ○ Buttery Kettle Corn 3 ct.
- 6           ○ Buttery Kettle Corn 6 ct.
- 7           ○ Extra Butter 3 ct.
- 8           ○ Extra Butter 6 ct.
- 9           ○ Homestyle Popcorn 3 ct.
- 10          ○ Kettle Corn 6 ct.
- 11          ○ Kettle Corn 28 ct.
- 12          ○ Kettle Corn 36 ct.
- 13          ○ Light Butter 3 ct.
- 14          ○ Light Butter 6 ct.
- 15          ○ Light Butter Mini Bags 8 ct.
- 16          ○ Mexican Queso Jalapeno 3 ct.
- 17          ○ Mexican Queso Jalapeno 15 ct.
- 18          ○ Movie Theater Butter Tub
- 19          ○ Movie Theater Butter 18 ct. Tray
- 20          ○ Movie Theater Butter 3 ct.
- 21          ○ Movie Theater Butter 6 ct.
- 22          ○ Old Fashioned Natural Tray 18 ct.
- 23          ○ Salted Popcorn 18 ct.
- 24          ○ Salted Popcorn 6 ct. 16.5 oz.
- 25          ○ Sweet Cinnamon 3 ct.
  
- 26          ● Newman's Own distributed by Newman's Own, Inc. including all of the following varieties:
  - 27               ○ Butter Boom Microwave Popcorn
  - 28               ○ Butter Microwave Popcorn
  - Light Butter Microwave Popcorn
  - Natural Flavor Microwave Popcorn
  - Natural Flavor Tender White Microwave Popcorn
  
- Black Jewell Popcorn distributed by Black Jewell Popcorn, Inc. including all of the following varieties:
  - Kettle Corn Microwave Popcorn Single Box
  - Kettle Corn Microwave Popcorn Case of Six Boxes
  - Natural Flavor Microwave Popcorn case of Single Box
  - Natural Flavor Microwave Popcorn case of Six Boxes
  - Butter Flavor Microwave Popcorn Single Box

- 1           ○ Butter Flavor Microwave Popcorn Case of Six Boxes
- 2 • Quinn Popcorn distributed by the Quinn Popcorn., including all of the following
- 3 varieties:
- 4           ○ Parmesan & Rosemary
- 5           ○ Maple & Sea Salt
- 6           ○ Butter & Sea Salt
- 7           ○ Hickory Smoked Cheddar
- 8           ○ Olive Oil & Herbs
- 9           ○ Lemon & Sea Salt
- 10           ○ Just Sea Salt
- 11 • Heart Healthy Market Popcorn distributed by Heart Healthy Markets including the
- 12 following variety:
- 13           ○ Heart Healthy Market No Salt Microwave Popcorn
- 14 • Smart Balance Smart ‘N Healthy Microwave Popcorn distributed by Smart Balance,
- 15 Inc. including all of the following varieties:
- 16           ○ Smart Movie Style Popcorn
- 17           ○ Light Butter Flavor Popcorn
- 18           ○ Light Butter Flavor Mini Bags
- 19 • Bearitos Organic Popcorn distributed by The Hain Celestial Group including all of
- 20 the following varieties:
- 21           ○ Organic Microwave Popcorn Lightly Salted
- 22           ○ Organic Microwave Popcorn No Salt No Oil
- 23 • Kirkland Signature Microwave Popcorn distributed by Costco, Inc. including the
- 24 following variety:
- 25           ○ Movie Theater Butter
- 26
- 27
- 28