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

10 TROY BACKUS, on behalf of himself and
11 all others similarly situated,

12 Plaintiff,

13 v.

14 BISCOMERICA CORPORATION,

15 Defendant.

Case No:
Pleading Type: Class Action

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

DEMAND FOR JURY TRIAL

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1 Plaintiff Troy Backus, on behalf of himself, all others similarly situated, and the general public,
2 by and through his undersigned counsel, hereby sues Defendant Biscoamerica Corporation
3 (“Biscoamerica” or “Defendant”), and upon information and belief and investigation of counsel, alleges
4 as follows:

5 **I. JURISDICTION AND VENUE**

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

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

16 **II. INTRADISTRICT ASSIGNMENT**

17 3. This civil action arises out of the events and omissions of Defendant Biscoamerica
18 Corporation which occurred in Marin County, California. Pursuant to Civil Local Rule 3-2(c), this
19 action should be assigned to the San Francisco or Oakland Division. Plaintiff requests the San Francisco
20 Division as it is closer to his home in Marin County.

21 **III. NATURE OF THE ACTION**

22 4. Biscoamerica manufactures, distributes, and sells a variety of packaged cookies¹ (the
23 “Trans Fat Cookies”), which contain partially hydrogenated oil (“PHO”).

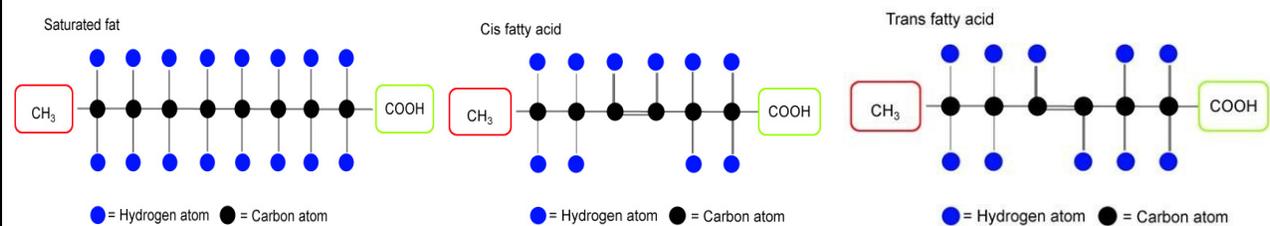
24 5. PHO is a food additive banned in many parts of the world due to its artificial trans fat
25 content.

26
27 _____
28 ¹ The Trans Fats Cookies are more specifically identified in **Appendix A**, attached hereto.

1 rhodium, ruthenium, and nickel.² The resulting product is known as partially hydrogenated oil, or PHO,
2 and it is used in dangerous quantities in the Trans Fat Cookies.

3 14. PHO was invented in 1901 and patented in 1902 by German chemist Wilhelm Normann.
4 Artificial trans fat molecules differ chemically from the natural fat molecules in other food products.³

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



13 16. PHO was initially thought to be a “wonder product” attractive to the processed food
14 industry because it combines the very low cost of unsaturated cis fat with the “mouth feel” and long
15 shelf life of saturated fat. Like processed cis fat, PHO is manufactured from low-cost legumes,⁴ while
16 the saturated fat it replaces in processed food is derived from relatively expensive animal and tropical
17 plant sources.⁵ Given its versatility, ten years ago PHO was used in 40% of processed packaged foods.⁶
18 Now, that its toxic properties are known, few food companies continue to use PHO. Defendant,
19 however, has decided not to follow its more responsible peers and cease using PHO, instead unfairly
20

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

22 ³ See Alberto Ascherio et al., *Trans Fatty Acids & Coronary Heart Disease*, 340 *New Eng. J. Med.* 94,
23 94-8 (1999). See also Walter Willett, *The Scientific Case for Banning Trans Fats*, *Scientific American*,
24 available at www.scientificamerican.com/article/the-scientific-case-for-banning-trans-fats/ (last visited
June 24, 2015).

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

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

27 ⁶ Mary Carmichael, *The Skinny on Bad Fat*, *Newsweek*, Dec. 1, 2003, at 66. See also Kim Severson,
28 *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 placing its profits over public health.

2 **A. There is a Scientific Consensus That Trans Fat is Extremely Harmful**

3 17. As detailed further herein, PHO causes cardiovascular heart disease, diabetes, cancer, and
4 Alzheimer's disease, and accelerates memory damage and cognitive decline.

5 18. There is "no safe level" of PHO or artificial trans fat intake.⁷

6 19. According to the established consensus of scientists, consumers should keep their
7 consumption of trans fat "as low as possible."⁸

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

13 21. Today there is no question about the scientific consensus on trans fat. Dr. Julie Louise
14 Gerberding, who served for both of President Bush's two terms as head of the United States Centers for
15 Disease Control and Prevention, writes:

16 The scientific rationale for eliminating exposure to artificial trans fatty acids in foods
17 is rock solid. There is no evidence that they provide any health benefit, and they are
18 certainly harmful. These compounds adversely affect both low- and high-density
19 lipoprotein cholesterol levels and increase the risk for coronary heart disease, even at
20 relatively low levels of dietary intake. Gram for gram, trans fats are far more potent
21 than saturated fats in increasing the risk for heart disease, perhaps because they also
22 have pro-inflammatory properties and other adverse effects on vascular
23

24 ⁷ Food & Nutrition Bd., Inst. of Med., *Dietary Reference Intakes For Energy, Carbohydrate, Fiber, Fat,*
25 *Fatty Acids, Cholesterol, Protein, and Amino Acids* (2005).

26 ⁸ *Id.*

27 ⁹ Food Labeling; Health Claim; Phytosterols and Risk of Coronary Heart Disease; Proposed Rule, 75
28 Fed. Reg. 76526, 76542 (Dec. 8, 2010).

¹⁰ *Id.* (emphasis added).

1 endothelium Eliminating exposure to these dangerous fats could have a powerful
2 population impact—potentially protecting 30,000 to 100,000 Americans from death
3 related to heart disease each year.¹¹

4 22. Dr. Mozaffarian of Harvard Medical School writes in the New England Journal of
5 Medicine:

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

13 23. Given its nature as an artificial chemical not naturally found in any food and the
14 considerable harm that it causes to human health, Dr. Walter Willett, also at Harvard Medical School,
15 finds the most direct analogue of trans fat to be not any natural fat but contaminants such as pesticides.
16 He states that the addition of artificial trans fat to food by companies like Biscoamerica “is a food safety
17 issue . . . this is actually contamination.”¹³

18 **B. The Artificial Trans Fat in the Trans Fat Cookies Causes Cardiovascular Disease**

19 24. Trans fat raises the risk of CHD more than any other known consumed substance.¹⁴

20 25. Removing trans fat equivalent to 2% of total calories from the American diet “would
21 prevent approximately 30,000 premature coronary deaths per year, and epidemiologic evidence suggests
22
23

24 ¹¹ Julie Louise Gerberding, *Safer Fats for Healthier Hearts: The Case for Eliminating Dietary Artificial*
25 *Trans Fat Intake*, 151 Ann. Intern. Med., 137-38 (2009).

26 ¹² Dariush Mozaffarian et al., *Trans Fatty Acids and Cardiovascular Disease*, 354 N. Engl. J. Med.
1601-13 (2006).

27 ¹³ Rebecca Coombes, *Trans fats: chasing a global ban*, 343 British Med. J. (2011).

28 ¹⁴ Mozaffarian, 354 New Eng. J. Med. at 1603.

1 this number is closer to 100,000 premature deaths annually.”¹⁵

2 26. From “10 to 19 percent of CHD events in the United States could be averted by reducing
3 the intake of trans fat.”¹⁶

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

6 28. In a joint Dietary Guidelines Advisory Committee Report, the Department of Health and
7 Human Services and the U.S. Department of Agriculture recognized “[t]he relationship between trans
8 fatty acid intake and LDL cholesterol is direct and progressive, increasing the risk of cardiovascular
9 disease.”¹⁷

10 29. The American Heart Association warns, “trans fats raise your bad (LDL) cholesterol
11 levels and lower your good (HDL) cholesterol levels. Eating trans fats increases your risk of developing
12 heart disease.”¹⁸

13 30. After a review of literature on the connection between the consumption of artificial trans
14 fat and coronary heart disease, the FDA concluded:

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

20 31. The FDA further found “[t]o date, there have been no reports issued by authoritative

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22 ¹⁵ Alberto Ascherio et al., *Trans Fatty Acids & Coronary Heart Disease*, 340 *New Eng. J. Med.* 94, 94-8 (1999).

23 ¹⁶ Mozaffarian, 354 *New Eng. J. Med.* at 1611.

24 ¹⁷ Dep’t of Health & Human Serv. & U.S. Dep’t of Agric., 2005 Dietary Guidelines Advisory
25 Committee Report, Section 10 (2005).

26 ¹⁸ Am. Heart Ass’n., *Trans Fat Overview*, available at
http://www.heart.org/HEARTORG/GettingHealthy/FatsAndOils/Fats101/Trans-Fats_UCM_301120_Article.jsp (last visited June 24, 2015).

27 ¹⁹ Ctr. for Food Safety & Applied Nutrition, U.S. Food & Drug Admin., *Questions & Answers About*
28 *Trans Fat Nutrition Labeling*.

1 sources that provide a level of trans fat in the diet . . . below which there is no risk of [Coronary Heart
2 Disease].”²⁰ Rather, there “is a positive linear trend between trans fatty acid intake and LDL cholesterol
3 concentration, and therefore there is a positive relationship between trans fatty acid intake and the risk of
4 CHD.”²¹

5 32. This evidence of trans fat’s horrific impact on the health of Americans is more than 20
6 years old. Dr. Walter Willett of Harvard Medical School found in 1994:

7 [E]ven the lower estimates from the effects [of PHO] on blood lipids would suggest
8 that more than 30,000 deaths per year may be due to the consumption of partially
9 hydrogenated vegetable fat. Furthermore, the number of attributable cases of nonfatal
10 coronary heart disease will be even larger.²²

11 33. By taking blood samples from 179 survivors of cardiac arrest and 285 randomly-selected
12 control patients and comparing the top fifth with the bottom fifth of participants by trans fat intake,
13 another study published in the American Heart Association’s *Circulation* found that the largest
14 consumers of trans fat have three times the risk of suffering primary cardiac arrest, even after controlling
15 for a variety of medical and lifestyle risk factors.²³

16 34. Australian researchers observed that heart attack patients possess elevated amounts of
17 trans fat in their adipose tissue compared to controls, strongly linking heart disease with long-term
18 consumption of trans fat.²⁴

19 35. While cholesterol dysregulation and pro-inflammatory effects are the best-documented
20 pathways through which trans fat causes heart disease and death, another study isolated an additional
21 method by which trans fat causes atherosclerosis, namely by degrading the function of TGF- β , a protein

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23 ²⁰ 75 Fed. Reg. 76526, 76542 (Dec. 8, 2010).

24 ²¹ *Id.*

25 ²² W.C. Willett et al., *Trans Fatty Acids: Are the Effects only Marginal?* 84 Am. J. Pub. Health 722, 723
(1994).

26 ²³ Rozenn N. Lemaitre et al., *Cell Membrane Trans-Fatty Acids and the Risk of Primary Cardiac Arrest*,
105 *Circulation* 697, 697-701 (2002).

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

1 responsible for preventing the development of atherosclerotic lesions.²⁵

2 36. TGF- β also functions to suppress cancerous tumors. The same scientists suggest that the
3 degradation of TGF- β may be the reason that trans fat consumption is strongly linked to multiple forms
4 of cancer.²⁶

5 **C. The Artificial Trans Fat in the Trans Fat Cookies Causes Type-2 Diabetes**

6 37. Artificial trans fat also causes type-2 diabetes.²⁷

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

10 39. Researchers at Northwestern University's medical school found that mice show multiple
11 markers of type-2 diabetes after eating a high trans fat diet for only four weeks.²⁸

12 40. By the eighth week of the study, mice fed the diet high in trans fat showed a 500%
13 increase compared to the control group in hepatic interleukin-1 β gene expression, one such marker of
14 diabetes, indicating the extreme stress even short-term exposure to artificial trans fat places on the
15 body.²⁹

16 41. A 14-year study of 84,204 women found that for every 2 percent increase in energy
17 intake from artificial trans fat, the relative risk of type-2 diabetes was increased by 39 percent.³⁰

18 **D. The Artificial Trans Fat in the Trans Fat Cookies Causes Breast, Prostate, and**
19 **Colorectal Cancer**

20 42. Trans fat is a carcinogen which causes breast, prostate, and colorectal cancer.

21 ²⁵ Chen, C.L. et al., *A mechanism by which dietary trans fats cause atherosclerosis*, J. of Nutr.
22 Biochemistry 22(7) 649-655 (2011).

23 ²⁶ *Id.*

24 ²⁷ Am. Heart Ass'n., *Trans Fat Overview*.

25 ²⁸ Sean W. P. Koppe et al., *Trans fat feeding results in higher serum alanine aminotransferase and*
26 *increased insulin resistance compared with a standard murine high-fat diet*, 297 Am. J. Physiol.
27 Gastrointest Liver Physiol. 378 (2009).

28 ²⁹ *Id.*

³⁰ Jorge Salmeron et al., *Dietary Fat Intake and Risk of Type 2 Diabetes in Women*, 73 Am. J. Clinical
Nutrition 1019, 1023 (2001).

1 43. A 13-year study of 19,934 French women showed 75 percent more women contracted
2 breast cancer in the highest quintile of trans fat consumption than did those in the lowest.³¹

3 44. In a 25-year study of 14,916 American physicians, those in the highest quintile of trans
4 fat consumption had more than double the risk of developing prostate cancer than the doctors in the
5 lowest quintile.³²

6 45. A study of 1,012 American males observing trans fat intake and the risk of prostate
7 cancer found “[c]ompared with the lowest quartile of total trans-fatty acid consumption, the higher
8 quartiles gave odds ratios (ORs) equal to 1.58,” meaning those in the highest quartile are 58% more
9 likely to contract prostate cancer than those in the lowest.³³

10 46. A 600-person study found an 86 percent greater risk of colorectal cancer in the highest
11 trans fat consumption quartile.³⁴

12 47. A 2,910-person study found “trans-monounsaturated fatty acids . . . were dose-
13 dependently associated with colorectal cancer risk,” which showed “the importance of type of fat in the
14 etiology and prevention of colorectal cancer.”³⁵

15 **E. The Artificial Trans Fat in the Trans Fat Cookies Causes Alzheimer’s Disease and**
16 **Cognitive Decline**

17 48. Trans fat causes Alzheimer’s Disease and cognitive decline.

18 49. In a study examining 815 Chicago area seniors, researchers found “increased risk of
19
20

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22 ³¹ 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).

23 ³² 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).

24 ³³ 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).

25 ³⁴ L.C. Vinikoor et al., *Consumption of Trans-Fatty Acid and its Association with Colorectal Adenomas*,
26 168 *Am. J. of Epidemiology* 289, 294 (2008).

27 ³⁵ Evropi Theodoratou et al., *Dietary Fatty Acids and Colorectal Cancer: A Case-Control Study*, 166
28 *Am. J. Epidemiology* 181 (2007).

1 incident Alzheimer disease among persons with high intakes of . . . trans-unsaturated fats.”³⁶

2 50. The study “observed a strong increased risk of Alzheimer disease with consumption of
3 trans-unsaturated fat.”³⁷

4 51. In a study of 1,486 women with type-2 diabetes, researchers found “[h]igher intakes of . .
5 . trans fat since midlife . . . were [] highly associated with worse cognitive decline”³⁸

6 52. The study cautioned “[d]ietary fat intake can alter glucose and lipid metabolism and is
7 related to cardiovascular disease risk in individuals with type 2 diabetes. Because insulin, cholesterol,
8 and vascular disease all appear to play important roles in brain aging and cognitive impairments, dietary
9 fat modification may be a particularly effective strategy for preventing cognitive decline, especially in
10 individuals with diabetes.”³⁹ (citations omitted).

11 53. Artificial trans fat also damages the brains of those who consume it. A study conducted
12 by UCSD School of Medicine of 1,018 men, mostly younger men, found trans fat consumption to be
13 strongly correlated with impaired memory.⁴⁰ The authors of the study, appearing last year in
14 *Circulation*, the American Heart Association’s peer-reviewed journal, conclude that “Greater dTFA
15 [dietary trans fatty acid] was significantly associated with worse word memory in adults aged 20-45
16 years, often critical years for career building.”

17 54. Performing a word memory test, each additional gram per day of trans fat consumed was
18 associated with 0.76 fewer words correctly recalled. The authors suggest trans fat’s well-established pro-
19 oxidant effect and its damage to cell energy processes is the pathway by which trans fat consumption
20 damages memory ability. The young men with the highest trans fat consumption scored 12 fewer
21

22 _____
23 ³⁶ Martha Clare Morris et al., *Dietary Fats and the Risk of Incident Alzheimer Disease*, 60 Arch. Neurol.
194, 198-9 (2003).

24 ³⁷ *Id.*

25 ³⁸ Elizabeth E. Devore et al., *Dietary Fat Intake and Cognitive Decline in Women with Type 2 Diabetes*,
32 Diabetes Care 635 (2009).

26 ³⁹ *Id.*

27 ⁴⁰ Golomb, B. et al., *Trans Fat Consumption is Adversely Linked to Memory in Working-Age Adults*, J. of
28 Am. Hearth Assoc. 130:A15572 (2014).

1 recalled words on the 104-word test.⁴¹

2 **F. The Artificial Trans Fat in the Trans Fat Cookies Causes Organ Damage**

3 55. Artificial trans fat damages vital organs, including the heart, by causing chronic systemic
4 inflammation, where the immune system becomes persistently overactive, damages cells, and causes
5 organ dysfunction.⁴²

6 **G. Artificial Trans Fat Is So Inherently Dangerous It Has Been Banned by an**
7 **Increasing Number of American and European Jurisdictions**

8 56. In 2008, California became the first state to ban all restaurant food with artificial trans
9 fat. Trans fats now may not be served in California's schools or restaurants in an amount greater than
10 half a gram per serving, nor contain any ingredient with more than this amount.⁴³

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

13 58. A 2004 Danish law restricted all foods to fewer than 2 percent of calories from artificial
14 trans fat. Switzerland made the same restriction in 2008.⁴⁴

15 59. After conducting a surveillance study of Denmark's 2004 trans fat ban, researchers
16 concluded the change "did not appreciably affect the quality, cost or availability of food" and did not
17 have "any noticeable effect for the consumers."⁴⁵

18 60. Similar bans have been introduced in Austria and Hungary. Brazil, Argentina, Chile, and
19

20 ⁴¹ *Id.*

21 ⁴² See Lopez-Garcia et al., *Consumption of Trans Fat is Related to Plasma Markers of Inflammation and*
22 *Endothelial Dysfunction*, 135 J. Nutr. 562-66 (2005); see also Baer et al., *Dietary fatty acids affect*
23 *plasma markers of inflammation in healthy men fed controlled diets; a randomized crossover study*, 79
24 *Am. J. Clin. Nutr.* 969-73 (2004); Mozaffarian & Clarke, *Quantitative effects on cardiovascular risk*
25 *factors and coronary heart disease risk of replacing partially hydrogenated vegetable oils with other fats*
26 *and oils*, 63 *Euro. J. of Clin. Nutr.* S22-S33 (2009); Mozaffarian et al., *Trans Fatty acids and systemic*
27 *inflammation in heart failure*, 80 *Am. J. Clin. Nutr.* 1521-25 (2004).

28 ⁴³ Cal. Educ. Code § 49431.7; Cal. Health & Saf. Code § 114377.

⁴⁴ Andrew Collier, *Deadly Fats: Why Are We still Eating Them?*, The Independent (UK), June 10, 2008.

⁴⁵ Mozaffarian, 354 *New Eng. J. Med.* at 1610; see also Steen Stender, *High Levels of Industrially*
Produced Trans Fat in Popular Fast Food, 354 *New Eng. J. Med.* 1650, 1652 (2006).

1 South Africa have all taken steps to reduce or eliminate artificial trans fats from food.⁴⁶

2 61. In 2006, a trans fat task force co-chaired by Health Canada and the Heart and Stroke
3 Foundation of Canada recommended capping trans fat content at 2 percent of calories for tub margarines
4 and spreads and 5 percent for all other foods. On September 30, 2009, British Columbia became the first
5 province to impose these rules on all restaurants, schools, hospitals, and special events.⁴⁷

6 62. In its European Food and Nutrition Action Plan 2015-2020, the World Health
7 Organization identified one of its goals as “making the European Region trans fat-free.”⁴⁸ The European
8 Commission is preparing legislation to ban the use of trans fats in 28 nations in the European Union.⁴⁹

9 63. On June 17, 2015, the FDA released its Final Determination Regarding Partially
10 Hydrogenated Oils, in which it declared “PHOs are not GRAS [Generally Recognized as Safe] for any
11 use in human food.”⁵⁰

12 64. The FDA will begin filing its own enforcement actions against companies that use PHOs
13 in 2018.

14 **VI. PLAINTIFF’S PURCHASES OF THE TRANS FAT COOKIES**

15 65. Plaintiff Troy Backus repeatedly purchased the Trans Fat Cookies during the Class
16 Period.

17 66. Mr. Backus purchased the Trans Fat Cookies approximately once a month from various
18 California stores in this District.

19 67. Mr. Backus’ most recent purchase was in late 2015.

20 **VII. THE TRANS FAT COOKIES UNNECESSARILY CONTAIN PHO AND ARTIFICIAL**
21 **TRANS FAT**

22 68. Biscomerica’s use of PHO in the Trans Fat Cookies is unnecessary. There are several safe
23

24 ⁴⁶ Coombes, *Trans fats: chasing a global ban*, 343 *British Med. J.* 5567 (2011).

25 ⁴⁷ *Province Restricts Trans Fat in B.C.*, British Columbia Ministry of Healthy Living and Sport Press
26 Release (2009), available at <http://tinyurl.com/betty15>

27 ⁴⁸ Regional Committee for Europe, *European Food and Nutrition Action Plan 2015-2020*, 64th session.

28 ⁴⁹ Basu, J. *European trans fat report ‘could lead to ban’*, Food Navigator.com, April 15, 2015.

⁵⁰ FDA Final PHO Determination, 80 Fed. Reg. 34650, 34651 (June 17, 2015).

1 substitutes for PHO and artificial trans fat.

2 69. Most manufacturers of competing cookie products have responsibly decided to refrain
3 from adding artificial trans fat to their products. Such brands sold in the United States include: Oreo,
4 Famous Amos Chocolate Chip Cookies, Keebler Simple Sandies, Loaker Quadratini Hazelnut Wafer
5 Cookies, and Pepperidge Farm Milano Cookies.

6 70. Although commercially viable alternative formulations and substitutes for PHO were and
7 are available, Defendant elects not to use them in the Trans Fat Cookies in order to increase its profits at
8 the expense of consumers' health.

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

11 71. Defendant's practices as described herein are "unfair" within the meaning of the
12 California Unfair Competition Law because its conduct is immoral, unethical, unscrupulous, or
13 substantially injurious to consumers, and the utility of the conduct to Defendant does not outweigh the
14 gravity of the harm to Biscomerica's victims.

15 72. In particular, while Defendant's use of PHO in the Trans Fat Cookies may have some
16 utility to Defendant in that it allows Defendant to realize higher profit margins than if it used safer PHO
17 substitutes, this utility is small and far outweighed by the gravity of the serious health harm Biscomerica
18 inflicted upon consumers.

19 73. Defendant's conduct injures competing manufacturers of similar products that do not
20 engage in its unfair, immoral behavior, especially given Biscomerica's large market share and the
21 limited retail shelf space.

22 74. Moreover, Defendant's practices violate public policy as declared by specific
23 constitutional, statutory, or regulatory provisions, including the California Health & Safety Code §
24 114377 and California Education Code § 49431.7.

25 75. Defendant's actions also violate public policy by causing the United States, California,
26 and every other state to pay—via Medicare, Medicaid, Affordable Care Act Exchange subsidies,
27 veterans' health programs, public employee and retiree health insurance—for treatment of trans fat-
28 related illnesses.

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

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

6 77. Biscomerica’s practices as described herein are “unlawful” within the meaning of the
7 California Unfair Competition Law because PHO is not Generally Recognized as Safe (GRAS).
8 Therefore, Defendant’s use of PHO renders its products adulterated within the meaning of 21 U.S.C. §
9 342(a)(2)(C).

10 78. The PHO used in the Trans Fat Cookies appears nowhere on the FDA’s list of the
11 hundreds of substances it considers GRAS.⁵¹

12 79. PHO also fails to meet the fundamental requirement for GRAS status—that the substance
13 is safe. In fact, the FDA has explicitly recognized that there is no safe level of artificial trans fat
14 consumption.

15 80. Under the Food Additives Amendment of 1958, which amended the FDCA, all food
16 additives are unsafe unless they (1) fall within a specified exemption to the statute’s definition of food
17 additive, or (2) their use is pursuant to FDA approval. Because the PHO used in the Trans Fat Cookies
18 do not meet either of these exceptions, they are, and long have been, unsafe and unlawful for use in
19 food.

20 81. Biscomerica’s use of PHO in the Trans Fat Cookies thus constitutes adulteration under 21
21 U.S.C. § 342 and Cal. Health & Safety Code § 110545.

22 82. On November 8, 2013, the FDA made its initial determination that PHO is not GRAS.⁵²

23 83. On June 17, 2015, after extensive public comment, the FDA determined trans fat is not
24 GRAS.⁵³

25
26 ⁵¹ See 21 C.F.R. §§ 181, 182, 184 and 186.

27 ⁵² 78 Fed. Reg. 67169 (November 8, 2013).

28 ⁵³ 80 Fed. Reg. 34650 (June 17, 2015).

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

3 **X. INJURY**

4 85. When purchasing the Trans Fat Cookies, Plaintiff was seeking products of particular
5 qualities, including products that did not negatively affect blood cholesterol levels or the health of his
6 cardiovascular system, and products made with safe, lawful ingredients.

7 86. Plaintiff purchased the Trans Fat Cookies believing they had the qualities he sought based
8 on the natural assumption that food sold in stores by large companies would not have unsafe and
9 unlawful ingredients.

10 87. Instead, they were actually unsatisfactory to him for the reasons described herein.

11 88. Plaintiff lost money as a result of Defendant's conduct because he purchased products
12 that were detrimental to his health and 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 Trans Fat Cookies.

15 89. Plaintiff suffered physical injury when he repeatedly consumed Defendant's Trans Fat
16 Cookies, because consuming artificial trans fat in *any* quantity, including the quantity he actually
17 consumed, inflames and damages vital organs and substantially increases the risk of heart disease,
18 diabetes, cancer, and death.

19 90. The Trans Fat Cookies contain an unsafe amount of artificial trans fat which renders them
20 unfit for their ordinary use.

21 91. The Trans Fat Cookies are not fit for human consumption and have a value of \$0.

22 92. Like most consumers, Mr. Backus is a busy person and cannot reasonably inspect every
23 ingredient of every food that he purchases for himself and others, and he was unaware that the Products
24 were dangerous when he purchased them.

25 93. Plaintiff is not a nutritionist, food expert, or food scientist, but rather a lay consumer who
26 did not have the specialized knowledge that Defendant had. Even today, the details of the dangers of
27 artificial trans fat are unknown to millions of Americans.

28 94. Plaintiff lost money as a result of Defendant's unlawful behavior. Plaintiff altered his

1 position to his detriment and suffered loss in an amount equal to the amount he paid for the Trans Fat
2 Cookies.

3 **XI. DELAYED DISCOVERY**

4 95. Plaintiff did not discover that Defendant's behavior was unfair and unlawful until last
5 year, when he learned the true extent of the dangers of consuming trans fat and that Defendant was still
6 selling the Trans Fat Cookies illegally. Until this time, he lacked the knowledge regarding the facts of
7 his claims against Defendant.

8 96. Plaintiff is a reasonably diligent consumer who exercised reasonable diligence in his
9 purchase, use, and consumption of the Products. Nevertheless, he would not have been able to discover
10 Defendant's deceptive practices and lacked the means to discover them given that, like nearly all
11 consumers, he is not an expert on nutrition and does not typically read or have ready access to scholarly
12 journals such as *The Journal of Nutrition*,⁵⁴ *The European Journal of Clinical Nutrition*,⁵⁵ and *The New*
13 *England Journal of Medicine*,⁵⁶ where the scientific evidence of artificial trans fat's dangers was
14 published.

15 **XII. CLASS ACTION ALLEGATIONS**

16 97. Plaintiff brings this action on behalf of himself and all others similarly situated (the
17 "Class"), excluding Defendant's officers, directors, and employees, and the Court, its officers and their
18 families. The Class is defined as:

19 All persons who purchased in the United States, on or after January 1, 2008 (the
20 "Class Period"), for household or personal use, cookie products manufactured or
21 distributed by Defendant containing partially hydrogenated oil.

22
23 ⁵⁴ 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 ⁵⁵ 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 ⁵⁶ 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 98. Questions of law and fact common to Plaintiff and the Class include:

- 2 a. Whether Biscomerica's conduct constitutes a violation of the unfair prong of
3 California's Unfair Competition Law;
- 4 b. Whether Biscomerica's conduct is a nuisance as defined by Cal. Civ. Code §§
5 3479-3493;
- 6 c. Whether Biscomerica's conduct constitutes a violation of the unlawful prong of
7 California's Unfair Competition Law;
- 8 d. Whether Biscomerica's conduct was immoral, unethical, unscrupulous, or
9 substantially injurious to consumers;
- 10 e. Whether the slight utility Biscomerica realizes as a result of its conduct outweighs
11 the gravity of the harm the conduct causes to its victims;
- 12 f. Whether Biscomerica's conduct violates public policy as declared by specific
13 constitutional, statutory, or regulatory provisions;
- 14 g. Whether the injury to consumers from Biscomerica's practices is substantial;
- 15 h. Whether the injury to consumers from Biscomerica's practices is outweighed by
16 benefits to consumers or competition;
- 17 i. Whether Class members are entitled to restitution;
- 18 j. Whether Class members are entitled to an injunction and, if so, its terms; and
- 19 k. Whether Class members are entitled to any further relief.

20 99. By purchasing the Trans Fat Cookies, all Class members were subjected to the same
21 wrongful conduct.

22 100. Plaintiff's claims are typical of the Class' claims because all Class members were
23 subjected to the same economic harm when they purchased the Trans Fat Cookies and suffered
24 economic injury.

25 101. Plaintiff will fairly and adequately protect the interests of the Class, has no interests that
26 are incompatible with the interests of the Class, and has retained counsel competent and experienced in
27 class litigation.

28 102. The Class is sufficiently numerous, as it includes thousands of individuals who purchased

1 the Trans Fat Cookies throughout the United States during the Class Period.

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

6 104. Biscomerica has acted on grounds applicable to the Class, thereby making final
7 injunctive relief or declaratory relief appropriate concerning the Class as a whole.

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

10 106. Class treatment is appropriate under Fed. R. Civ. P. 23(a) and both Fed. R. Civ. P.
11 23(b)(2) and 23(b)(3). Plaintiff will, if notice is required, confer with Defendant and seek to present the
12 Court with a stipulation and proposed order on the details of a class notice plan.

13 **XIII. CAUSES OF ACTION**

14 **First Cause of Action**

15 **California Unfair Competition Law (Unlawful Prong)**

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

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

19 108. Defendant has made and distributed, in interstate commerce and in this District, products
20 that contain unlawful food additives. The Trans Fat Cookies were placed into interstate commerce by
21 Defendant and sold throughout the country and in this District.

22 109. Cal. Bus. & Prof. Code § 17200 prohibits any “unlawful, unfair or fraudulent business act
23 or practice.”

24 110. Defendant’s conduct is “unlawful” because it violates the Federal Food, Drug, and
25 Cosmetic Act (“FDCA”), specifically, the Food Additives Amendment of 1958, which deems a food
26 additive unsafe unless it has met two exceptions, neither of which the PHO used in the Trans Fat
27 Cookies has met. 21 U.S.C. §§ 348, 342.

28 111. Defendant’s conduct also violates the FDCA:

- 1 • 21 U.S.C. § 331(a) (prohibiting the “introduction or delivery for introduction into interstate
2 commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or
3 misbranded”);
- 4 • 21 U.S.C. § 331(b) (prohibiting the “adulteration or misbranding of any food, drug, device,
5 tobacco product, or cosmetic in interstate commerce”);
- 6 • 21 U.S.C. § 331(c) (prohibiting the “receipt in interstate commerce of any food, drug, device,
7 tobacco product, or cosmetic that is adulterated or misbranded, and the delivery or proffered
8 delivery thereof for pay or otherwise”);
- 9 • 21 U.S.C. § 331(k) (prohibiting “the doing of any other act with respect to, a food, drug,
10 device, tobacco product, or cosmetic, if such act is done while such article is held for sale
11 (whether or not the first sale) after shipment in interstate commerce and results in such article
12 being adulterated or misbranded”);
- 13 • 21 U.S.C. § 342(a) (which deems any food adulterated if it “contains any poisonous or
14 deleterious substance which may render it injurious to health”);
- 15 • 21 U.S.C. § 348 (prohibiting the use of any food additive unless it has been deemed GRAS);

16 112. Defendant’s conduct violates other provisions of the FDCA.

17 113. Defendant’s conduct further violates The California Sherman Food, Drug, and Cosmetic
18 Law (“Sherman Law”), Cal. Health & Safety Code § 110100, which adopts all FDA regulations as state
19 regulations. Biscomerica’s conduct also violates the following sections of the Sherman Law:

- 20 • § 110085 (adopting all FDA food additive regulations as state regulations);
- 21 • § 110100 (adopting all FDA regulations as state regulations);
- 22 • § 110398 (“It is unlawful for any person to advertise any food, drug, device, or cosmetic that is
23 adulterated or misbranded.”);
- 24 • § 110620 (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any
25 food that is adulterated.”);

26 114. Defendant’s conduct may violate additional provisions of the Sherman Law.

27 115. The use of artificial trans fat in the Trans Fat Cookies thus constitutes a violation of the
28 FDCA and the Sherman Law and, as such, violated the “unlawful” prong of the UCL.

1 116. Plaintiff suffered injury in fact and lost money or property as a result of Defendant's
2 unlawful acts: he was denied the benefit of the bargain when he decided to purchase the Trans Fat
3 Cookies over competing products that are less expensive and/or contain no artificial trans fat.

4 117. Had Plaintiff been aware of Defendant's unlawful tactics, he would not have purchased
5 the Trans Fat Cookies.

6 118. Defendant's unlawful acts allowed it to sell more units of the Trans Fat Cookies than it
7 would have otherwise, and at a higher price.

8 119. In accordance with Cal. Bus. & Prof. Code § 17203, Plaintiff seeks an order enjoining
9 Biscomerica from continuing to conduct business through unlawful, unfair, and/or fraudulent acts and
10 practices and to commence a corrective advertising campaign. Plaintiff intends to purchase the Products
11 in the future when Defendant ceases its unfair business practices and removes trans fat.

12 120. Plaintiff also seeks an order for the disgorgement and restitution of all monies from the
13 sale of the Trans Fat Cookies, which were acquired through acts of unfair competition.

14 **Second Cause of Action**

15 **California Unfair Competition Law (Unfair Prong)**

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

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

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

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

25 124. Further, Defendant's practices are unfair because they violate public policy as declared
26 by specific constitutional, statutory, or regulatory provisions, including those policies embodied in the
27 California Health & Safety Code and California Education Code.

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

4 126. In accordance with Cal. Bus. & Prof. Code § 17203, Plaintiff seeks an order enjoining
5 Biscomerica from continuing to conduct business through unfair acts and practices and to commence a
6 corrective advertising campaign. Plaintiff intends to purchase the products in the future when Defendant
7 ceases its unfair business practices and removes trans fat.

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

10 **Third Cause of Action**

11 **Nuisance**

12 **Cal. Civ. Code §§ 3479-3493**

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

15 129. The public has a common right to a safe food supply and a common interest in ensuring
16 that only safe foods are allowed for sale.

17 130. Artificial trans fat is a dangerous and illegal ingredient that is harmful when consumed by
18 humans in any amount. Defendant actively promotes and sells its Trans Fat Cookies, which contain trans
19 fat. Defendant sells its Trans Fat Cookies to the public at large.

20 131. Biscomerica's actions complained of herein have created a harmful condition that is
21 injurious to the health of the public and affects a substantial number of people.

22 132. These acts substantially and unreasonably interfere with the public's interests in having
23 only safe, uncontaminated foods available for purchase, cause an unreasonable inconvenience to avoid,
24 and are a menace to the public health and to the safety of children.

25 133. Biscomerica is liable in public nuisance because by promoting and selling its Trans Fat
26 Cookies that contain dangerous amounts of trans fat, it has created a dangerous condition that interferes
27 with the public interest.

28 134. Plaintiff suffered specific physical and emotional harm from Defendant's conduct when

1 he consumed Defendant's Trans Fat Cookies. Plaintiff continues to suffer emotional harm from knowing
2 that he unwittingly injured himself and others through the consumption of the Trans Fat Cookies.

3 135. In accordance with Cal. Civ. Code § 3491, Plaintiff seeks an order abating Defendant's
4 injurious practices, and enjoining further acts.

5 **Fourth Cause of Action**

6 **Breach of Implied Warranty of Merchantability**

7 136. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if set
8 forth in full herein.

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

12 138. However, Biscomerica breached that warranty implied in the contract for the sale of
13 goods in that the Trans Fat Cookies are not safe for human consumption as set forth in detail herein
14 above.

15 139. As a result of Defendant's conduct, Plaintiff did not receive goods as impliedly warranted
16 by Defendant to be merchantable.

17 140. As a proximate result of this breach of warranty by Defendant, Plaintiff and other
18 consumers have been damaged.

19 141. Plaintiff also seeks damages for the injury he suffered from Biscomerica's breach of the
20 implied warranty.

21 **XIV. PRAYER FOR RELIEF**

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

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

27 B. An order requiring Biscomerica to pay restitution to Plaintiff and the Class so that they
28 may be restored any money which may have been acquired by means of any unfair

1 practice;

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

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

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

7 F. An order requiring Biscomerica to engage in a corrective advertising campaign;

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

9 H. An award of damages, pre-judgment, and post-judgment interest;

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

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

12 **XV. JURY DEMAND**

13 Plaintiff requests a trial by jury.

14 DATED: July 12, 2016

Respectfully Submitted,

15 /s/ Gregory S. Weston

16 **THE WESTON FIRM**

GREGORY S. WESTON

17 DAVID ELLIOT

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18 San Diego, CA 92110

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Facsimile: (313) 293-7071

20 *Counsel for Plaintiff*

XVI. APPENDIX A- TRANS FAT COOKIES

- Checkers Assorted Cookies 12 oz
- Checkers Chocolate Chip Flavored Cookies 12 oz
- Checkers Ginger Snaps 12 oz
- Checkers Oatmeal Cookies 12 oz
- Checkers Raspberry Shortbread 8 oz
- Checkers Strawberry Shortbread 8 oz
- Granny's Oven Strawberry Shortbread 10 oz
- Granny's Oven Blueberry Shortbread 10 oz
- Granny's Oven Chocolate Chip Flavored Cookies 12 oz
- Granny's Oven Oatmeal Cookies 12 oz
- Granny's Oven Raspberry Shortbread 10 oz
- Knotts Apricot Shortbread 2 oz
- Knotts Blueberry Shortbread 2 oz
- Knotts Boysenberry Shortbread 2 oz
- Knotts Strawberry Shortbread 2 oz