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*Attorneys for Plaintiff*

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JOANN MARTINELLI, individually and on  
behalf of all others similarly situated,

Plaintiff,

v.

JOHNSON & JOHNSON and McNEIL  
NUTRITIONALS, LLC,

Defendants.

Case No. 2:15-cv-01733-JAM-DAD

**FIRST AMENDED CLASS ACTION  
COMPLAINT**

**JURY TRIAL DEMANDED**

1 Plaintiff JoAnn Martinelli (“Plaintiff”) brings this action on behalf of herself and all others  
2 similarly situated against Defendants Johnson & Johnson and McNeil Nutritionals, LLC  
3 (“McNeil”) (collectively, “J&J” or “Defendants”). Plaintiff makes the following allegations  
4 pursuant to the investigation of her counsel and based upon information and belief, except as to the  
5 allegations specifically pertaining to herself, which are based on personal knowledge.

6 **JURISDICTION**

7 1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A)  
8 because this case is a class action where the aggregate claims of all members of the proposed class  
9 are in excess of \$5,000,000.00, exclusive of interest and costs, and Plaintiff, as well as most  
10 members of the proposed class, is a citizen of a state different from Defendants. This Court also  
11 has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

12 2. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because  
13 a substantial part of the events, omissions, and acts giving rise to the claims herein occurred in this  
14 District. Plaintiff Martinelli is a citizen of California, resides in this District, and purchased  
15 Benecol products from Defendants in this District. Moreover, Defendants distributed, advertised,  
16 and sold Benecol products, which are the subject of the present complaint, in this District.

17 **NATURE OF ACTION**

18 3. This is a class action lawsuit regarding Defendants’ false and misleading labeling of  
19 Benecol Regular and Light Spreads (together, “Benecol Spreads”), each of which uniformly claims  
20 that the product (i) contains “No Trans Fats” and “No Trans Fatty Acids,” and (ii) is generally  
21 recognized as safe for human consumption (the “Misrepresentations”). However, Benecol Spreads  
22 contain trans fat through the use of partially hydrogenated oils. Thus, the labels on Benecol  
23 Spreads are false and misleading.

24 4. In June 2015, the FDA concluded that partially hydrogenated oils – the same oils  
25 found in Benecol Spreads – are not “generally recognized as safe” for use in human food due to  
26 “an increased risk of coronary heart disease by contributing to the buildup of plaque inside the  
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1 arteries that may cause a heart attack.” Thus, Benecol Spreads are not generally recognized as safe  
2 for human consumption.

3 5. The false and misleading labels on Benecol Spreads are highly material to  
4 consumers and serve to differentiate Benecol Spreads from comparable butter and margarine  
5 products. These labels allow Defendants to charge a price premium for Benecol Spreads. For  
6 example, Benecol Spreads command more than a 407% price premium, per ounce, over margarine:  
7

Brand	Quantity	Price	Unit Price
Benecol Regular Spread	Net Wt: 8 oz.	\$3.98	\$0.498 per oz.
Land O'Lakes Margarine	Net Wt: 1 lb.	\$1.57	\$0.098 per oz.

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14 6. Plaintiff seeks relief in this action individually, and on behalf of a class of  
15 purchasers for breach of express warranty, breach of the implied warranty of merchantability,  
16 unjust enrichment, violation of California’s Consumers Legal Remedies Act (“CLRA”), violation  
17 of California’s Unfair Competition Law (“UCL”), violation of California’s False Advertising Law  
18 (“FAL”), negligent misrepresentation, and fraud.

### 19 PARTIES

20 7. Plaintiff JoAnn Martinelli is a citizen of California, residing in Auburn, California.  
21 During the class period, Plaintiff Martinelli purchased Benecol Spreads for personal use and not for  
22 resale from Safeway and Raley’s stores located in Roseville, California. Prior to her purchase of  
23 Benecol Spreads, Ms. Martinelli reviewed the products’ labeling and packaging and saw that  
24 Benecol Spreads were labeled as having “No Trans Fats” and “No Trans Fatty Acids.” Plaintiff  
25 Martinelli saw these representations prior to and at the time of purchase, and understood them as  
26 representations and warranties that Benecol Spreads (i) do not contain trans fats and (ii) are  
27 generally recognized as safe for human consumption. Plaintiff Martinelli relied on these  
28 representations and warranties in deciding to purchase Benecol Spreads. Accordingly, these

1 representations and warranties were part of the basis of the bargain, in that she would not have  
2 purchased Benecol Spreads had she known that the products (i) do contain trans fats and (ii) are not  
3 generally recognized as safe for human consumption. In reliance on these representations and  
4 warranties, Plaintiff Martinelli paid a tangible increased cost for Benecol Spreads, which were  
5 worth less than represented because Benecol Spreads do, in fact, contain trans fats and are not  
6 generally recognized as safe for human consumption. Plaintiff Martinelli also understood that in  
7 making the sale, her retailer was acting with the knowledge and approval of the Defendants and/or  
8 as the agent of the Defendants. Plaintiff Martinelli further understood that the purchase involved a  
9 direct transaction between herself and Defendants, because the purchase came with Defendants'  
10 representations and warranties that Benecol Spreads do not contain trans fats, and are generally  
11 recognized as safe for human consumption.

12 8. Defendant Johnson & Johnson is a New Jersey corporation with its principal place  
13 of business at One Johnson & Johnson Plaza, New Brunswick, New Jersey. Johnson & Johnson is  
14 an international medical device, pharmaceutical, and consumer goods manufacturer founded in  
15 1886. Its common stock is a component of the Dow Jones Industrial Average, and the company is  
16 listed in the Fortune 500. Johnson & Johnson has manufactured, marketed, and sold Benecol  
17 Spreads widely throughout California and other states during the class period.

18 9. Defendant McNeil Nutritionals, LLC is a Delaware corporation with its principal  
19 place of business in Pennsylvania, and is a wholly-owned subsidiary of Johnson & Johnson.  
20 McNeil is subject to Johnson & Johnson's control, and the companies share employees, resources,  
21 and accounts. McNeil represents that it "is a global marketer of innovative nutritional products,"  
22 as it markets Splenda sweetener products, Viactiv dietary supplements, and Lactaid milk  
23 supplements. McNeil has manufactured, marketed, and sold Benecol Spreads widely throughout  
24 California and other states during the class period.

25 10. Plaintiff reserves the right to amend this Complaint to add different or additional  
26 defendants, including without limitation any officer, director, employee, supplier, or distributor of  
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1 Defendants who has knowingly and willfully aided, abetted, or conspired in the false and deceptive  
2 conduct alleged herein.

3 11. Whenever reference is made in this Complaint to any representation, act, omission,  
4 or transaction of a defendant, that allegation shall mean that the defendant did the act, omission, or  
5 transaction through its officers, directors, employees, agents, and/or representatives while they  
6 were acting within the actual or ostensible scope of their authority.

7 **FACTS COMMON TO ALL CAUSES OF ACTION**

8 **Benecol Spreads Are Labeled As Having “No Trans Fats” And “No Trans Fatty Acids,”**  
9 **Despite Containing Partially Hydrogenated Soybean Oil**

10 12. There are two versions of Benecol Spreads – Benecol Regular Spread and Benecol  
11 Light Spread. During the class period, both the Regular and Light Spreads were labeled as  
12 containing “No Trans Fats” and “No Trans Fatty Acids.” However, this is false because each  
13 variety of Benecol Spreads contain partially hydrogenated oils, which always contains trans fats.

14 ***Benecol Regular Spread***

15 13. The front label and top of Benecol Regular Spread represents that it has “No Trans  
16 Fat”:



1           14.       Additionally, the back label of Benecol Regular Spread represents that it has “No  
2 Trans Fatty Acids.” However, the ingredients list on the back of Benecol Regular Spread also  
3 represents that it contains “Partially Hydrogenated Soybean Oil,” which always contains trans fats:  
4

No Trans Fatty Acids

Nutrition Facts		Amount/Serving	% DV*	Amount/Serving	% DV*
Serv. Size 1 Tbsp. (14g)		Total Fat	8g 12%	Cholest.	0mg 0%
Servings 16		Sat. Fat	1g 5%	Sodium	110mg 5%
Calories 70		Trans Fat	0g 0%	Total Carb.	0g 0%
Fat Cal. 70		Polyunsat. Fat	2g	Protein	0g
		Monounsat. Fat	4.5g		
		Vitamin A 10%		Vitamin E 20%	

\* Percent Daily Values (DV) are based on a 2,000 calorie diet. Not a significant source of dietary fiber, sugars, vitamin C, calcium and iron.

Ingredients: Liquid Canola Oil, Water, Partially Hydrogenated Soybean Oil, Plant Stanol Esters, Salt, Emulsifiers (Vegetable Mono- and Diglycerides, Soy Lecithin), Hydrogenated Soybean Oil, Potassium Sorbate, Citric Acid and Calcium Disodium EDTA to Preserve Freshness, Artificial Flavor, dl- $\alpha$ -Tocopheryl Acetate, Vitamin A Palmitate, Colored with Beta Carotene.

Distributed by McNeil Nutritionals, LLC FORT WASHINGTON, PA 19034 USA      © McNeil Nutritionals, LLC 2005 U.S. Patent No. 5502045.

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12 ***Benecol Light Spread***

13           15.       The front label and top of the Benecol Light Spread represents that it has “No Trans  
14 Fat”:



26           16.       Additionally, the back label of Benecol Light Spread represents that it has “No  
27 Trans Fatty Acids.” However, the ingredients list on the back of Benecol Light Spread also  
28 represents that it contains “Partially Hydrogenated Soybean Oil,” which always contains trans fats.

No Trans Fatty Acids

<b>Nutrition Facts</b>		Amount/Serving	% DV*	Amount/Serving	% DV*
Serv. Size 1 Tbsp. (14g)		<b>Total Fat</b> 5g	8%	<b>Cholest.</b> 0mg	0%
Servings 16		Sat. Fat 0.5g	3%	<b>Sodium</b> 110mg	5%
<b>Calories</b> 50		<i>Trans Fat</i> 0g		<b>Total Carb.</b> 0g	0%
Fat Cal. 50		Polyunsat. Fat 2g		<b>Protein</b> 0g	
		Monounsat. Fat 2.5g			
		<b>Vitamin A 10%</b>		<b>Vitamin E 20%</b>	
* Percent Daily Values (DV) are based on a 2,000 calorie diet.		Not a significant source of dietary fiber, sugars, vitamin C, calcium and iron.			

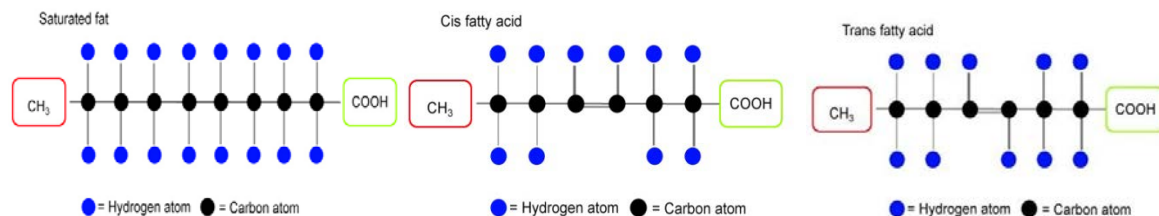
**Ingredients:** Water, Liquid Canola Oil, Liquid Soybean Oil, Partially Hydrogenated Soybean Oil, Plant Stanol Esters, Salt, Emulsifiers (Vegetable Mono- and Diglycerides, Soy Lecithin, Polyglycerol Esters of Fatty Acids), Potassium Sorbate, Citric Acid and Calcium Disodium EDTA to Preserve Freshness, Artificial Flavor, dl- $\alpha$ -Tocopheryl Acetate, Vitamin A Palmitate, Colored with Beta Carotene.  
 Distributed by McNeil Nutritionals, LLC © McNeil Nutritionals, LLC 2005  
 FORT WASHINGTON, PA 19034 USA U.S. Patent No. 5502045.

### The Manufacturing And Nature Of Partially Hydrogenated Oils

17. Artificial trans fat is manufactured via an industrial process called partial hydrogenation, in which hydrogen atoms are added to normal vegetable oil by heating the oil to temperatures above 400°F in the presence of metals such as rhodium, ruthenium, and nickel. The resulting product is known as partially hydrogenated oil (“PHO”), which is the main source of trans fat in the American diet and used in Benecol Spreads.

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

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



20. PHO was initially marketed as a “wonder product” that was attractive to the packaged food industry because it combines the low cost of unsaturated cis fat with the flexibility and long shelf life of saturated fat. Like cis fat, PHO is manufactured from low-cost legumes,

1 while saturated fat is derived from relatively expensive animal and tropical plant sources. Given its  
2 versatility, ten years ago PHO was used in 40% of processed packaged foods. Now, given its toxic  
3 properties, few food companies continue to use PHO.

4 **PHOs Always Contain Trans Fats**

5 21. PHOs always contain industrially-produced trans fatty acids.

6 22. Unlike other edible oils, trans fats are an integral component of PHOs and are  
7 purposely produced in these oils to affect the properties of the oils and the characteristics of the  
8 foods to which they are added.

9 23. The two most common PHOs currently used by the food industry – partially  
10 hydrogenated soybean oil and partially hydrogenated cottonseed oil – are not currently listed as  
11 Generally Recognized As Safe (“GRAS”) or as approved food additives.

12 **Trans Fats Are Harmful**

13 24. Since 2003, both controlled trials and observational human studies on trans fatty  
14 acid have consistently confirmed the adverse effects of trans fatty acids on intermediary risk factors  
15 and the increased risk of Coronary Heart Disease (“CHD”).

16 25. There is a progressive and linear cause and effect relationship between trans fatty  
17 acid intake and adverse effects on blood lipids that predict CHD risk, including low-density  
18 lipoprotein cholesterol (“LDL-C”), high-density lipoprotein cholesterol (“HDL-C”), and ratios  
19 such as total cholesterol (“total-C”)/HDL-C and LDL-C/HDL-C.<sup>1</sup>

20 26. Consumption of trans fat increases LDL-C (“bad” cholesterol), decreases HDL-C  
21 (“good” cholesterol), and increases ratios of total-C/HDL-C and LDL-C/HDL-C compared with the  
22 same of amount of energy intake (calories) from cis-unsaturated fatty acids. Increases in LDL-C,  
23 total-C/HDL-C, and LDL-C/HDL-C, as well as decreases in HDL-C, are adversely changed with  
24 respect to CHD risk.

25 \_\_\_\_\_  
26 <sup>1</sup> LDL-C, HDL-C, total-C/HDL-C ratio, and LDL-C/HDL-C ratio are all currently considered to  
27 be risk biomarkers for CHD. A biomarker is a characteristic that can be objectively measured and  
28 indicates physiological processes. A risk biomarker is biomarker that indicates a risk factor for a  
disease. Stated otherwise, a risk biomarker is a biomarker that indicates a component of an  
individual’s level of risk for developing a disease or level of risk for developing complications of a  
disease.



1           27.     The increased risk of CHD from consumption of any amount of trans fat means that  
2 consumption of PHOs, the primary dietary source of trans fat, also lead to increased LDL-C levels  
3 and an increased risk of CHD.

4           28.     Numerous authorities have concluded that there is no threshold intake level for  
5 industrially-produced trans fat that would not increase an individual’s risk of CHD. Stated  
6 otherwise, there is no safe level of artificial trans fat intake. Accordingly, consumption of PHOs  
7 could be harmful (*i.e.*, increased risk for CHD) under any condition and in any amount.

8           29.     In addition to an increased risk of CHD, trans fat consumption (and, accordingly,  
9 consumption of food products containing PHOs) has also been connected to a number of other  
10 adverse effects on health, including worsening insulin resistance, increased risk of diabetes, and  
11 adverse effects on fetuses and breastfeeding infants, such as impaired growth.

12     **PHOs Are No Longer Generally Recognized As Safe For Human Consumption By The FDA**

13           30.     On June 17, 2015, the Food and Drug Administration (“FDA”) determined “that  
14 there is no longer a general consensus that PHOs, the primary source of industrially-processed  
15 *trans* fat, are generally recognized as safe for use in human food, based on current scientific  
16 evidence.” 80 F.R. 34650, 34669.

17           31.     According to the FDA, “the available, relevant scientific evidence demonstrates an  
18 increased risk of coronary heart disease (CHD) attributable to *trans* fat.”

19           32.     “FDA has considered the available information and concluded that there is a lack of  
20 consensus among qualified experts that PHOs, as the primary dietary source of [industrially-  
21 processed trans fatty acids], are safe for use in human food.”

22           33.     As the FDA detailed, the same PHOs found in Benecol Spreads are not “generally  
23 recognized as safe” for use in human food due to “an increased risk of coronary heart disease by  
24 contributing to the buildup of plaque inside the arteries that may cause a heart attack.”  
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**CLASS REPRESENTATION ALLEGATIONS**

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2 34. Plaintiff seeks to represent a class defined as all persons in the United States who  
3 purchased Benecol Spreads (the “Class”). Excluded from the Class are persons who made such  
4 purchase for the purpose of resale.

5 35. Plaintiff also seeks to represent a subclass of all Class members who purchased  
6 Benecol Spreads in California (the “California Subclass”).

7 36. Members of the Class and Subclass are so numerous that their individual joinder  
8 herein is impracticable. On information and belief, members of the Class and Subclass number in  
9 the hundreds of thousands. The precise number of Class members and their identities are unknown  
10 to Plaintiff at this time but may be determined through discovery. Class members may be notified  
11 of the pendency of this action by mail and/or publication through the distribution records of  
12 Defendants and third-party retailers and vendors.

13 37. Common questions of law and fact exist as to all Class members and predominate  
14 over questions affecting only individual Class members. Common legal and factual questions  
15 include, but are not limited to: whether Benecol Spreads contain trans fats; whether Defendants  
16 warranted that Benecol Spreads do not contain trans fats; whether Benecol Spreads are generally  
17 recognized as safe for human consumption; whether Defendants breached these warranties; and  
18 whether Defendants committed statutory and common law fraud by doing so.

19 38. The claims of the named Plaintiff are typical of the claims of the Class in that the  
20 named Plaintiff purchased Benecol Spreads in reliance on the representations and warranties  
21 described above, and suffered a loss as a result of that purchase.

22 39. Plaintiff is an adequate representative of the Class and Subclass because her  
23 interests do not conflict with the interests of the Class members she seeks to represent, she has  
24 retained competent counsel experienced in prosecuting class actions, and she intends to prosecute  
25 this action vigorously. The interests of Class members will be fairly and adequately protected by  
26 Plaintiff and her counsel.  
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1 Spreads due to Defendants' promises that Benecol Spreads contained "No Trans Fats" and "No  
2 Trans Fatty Acids," and are generally recognized as safe for human consumption; and (c) Benecol  
3 Spreads do not have the characteristics, ingredients, uses, benefits, or quantities as promised.  
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5 **COUNT II**

6 **Breach Of Implied Warranty Of Merchantability**

7 46. Plaintiff hereby incorporates by reference the allegations contained in all preceding  
8 paragraphs of this complaint.

9 47. Plaintiff brings this claim individually and on behalf of the members of the  
10 proposed Class against Defendants.

11 48. Defendants, as the designers, manufacturers, marketers, distributors, and/or sellers,  
12 impliedly warranted that Benecol Spreads (i) contained "No Trans Fats" and "No Trans Fatty  
13 Acids," and (ii) are generally recognized as safe for human consumption.

14 49. Defendants breached the warranty implied in the contract for the sale of Benecol  
15 Spreads because they could not pass without objection in the trade under the contract description,  
16 the goods were not of fair average quality within the description, and the goods were unfit for their  
17 intended and ordinary purpose because Benecol Spreads contain trans fats, and are not generally  
18 recognized as safe for human consumption. As a result, Plaintiff and Class members did not  
19 receive the goods as impliedly warranted by Defendants to be merchantable.

20 50. Plaintiff and Class members purchased Benecol Spreads in reliance upon  
21 Defendants' skill and judgment and the implied warranties of fitness for the purpose.

22 51. Benecol Spreads were not altered by Plaintiff or Class members.

23 52. Benecol Spreads were defective when they left the exclusive control of Defendants.

24 53. Defendants knew that Benecol Spreads would be purchased and used without  
25 additional testing by Plaintiff and Class members.

26 54. Benecol Spreads were defectively designed and unfit for their intended purpose, and  
27 Plaintiff and Class members did not receive the goods as warranted.  
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**COUNT IV**

**Violation Of California’s Consumers Legal Remedies Act,**

**California Civil Code §§ 1750, *et seq.***

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61. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

62. Plaintiff brings this claim individually and on behalf of the members of the proposed California Subclass against Defendants.

63. California’s Consumers Legal Remedies Act, Cal. Civ. Code § 1770(a)(5), prohibits “[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.”

64. California’s Consumers Legal Remedies Act, Cal. Civ. Code § 1770(a)(7), prohibits “[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.”

65. California’s Consumers Legal Remedies Act, Cal. Civ. Code § 1770(a)(9), prohibits “[a]dvertising goods or services with intent not to sell them as advertised.”

66. Defendants violated these provisions by misrepresenting that Benecol Spreads (i) contained “No Trans Fats” and “No Trans Fatty Acids,” and (ii) are generally recognized as safe for human consumption.

67. Plaintiff and Class members have been injured and harmed because: (a) they would not have purchased Benecol Spreads on the same terms if they knew that the products contained trans fats, and are not generally recognized as safe for human consumption; (b) they paid a price premium for Benecol Spreads due to Defendants’ promises that Benecol Spreads contained “No Trans Fats” and “No Trans Fatty Acids,” and are generally recognized as safe for human consumption; and (c) Benecol Spreads do not have the characteristics, ingredients, uses, benefits, or quantities as promised.











- 1 a. For an order certifying the nationwide Class and the Subclass under Rule 23 of the  
2 Federal Rules of Civil Procedure and naming Plaintiff as representative of the Class  
3 and Subclass and Plaintiff's attorneys as Class Counsel to represent the Class and  
4 Subclass members;
- 5 b. For an order declaring the Defendants' conduct violates the statutes referenced  
6 herein;
- 7 c. For an order finding in favor of Plaintiff, the nationwide Class, and the Subclass on  
8 all counts asserted herein;
- 9 d. For compensatory and punitive damages in amounts to be determined by the Court  
10 and/or jury;
- 11 e. For prejudgment interest on all amounts awarded;
- 12 f. For an order of restitution and all other forms of equitable monetary relief;
- 13 g. For injunctive relief as pleaded or as the Court may deem proper; and
- 14 h. For an order awarding Plaintiff and the Class and Subclass her reasonable attorneys'  
15 fees and expenses and costs of suit.

16 **DEMAND FOR TRIAL BY JURY**

17 Plaintiff demands a trial by jury of all issues so triable.  
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1 Dated: October 16, 2015

Respectfully submitted,

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3 **BURSOR & FISHER, P.A.**

4 By:           /s/ L. Timothy Fisher            
5 L. Timothy Fisher

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