

BURSOR & FISHER, P.A.

L. Timothy Fisher (State Bar No. 191626)
Julia A. Luster (State Bar No. 295031)
1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-Mail: ltfisher@bursor.com
jluster@bursor.com

BURSOR & FISHER, P.A.

Scott A. Bursor (State Bar No. 276006)
888 Seventh Avenue
New York, NY 10019
Telephone: (212) 989-9113
Facsimile: (212) 989-9163
E-Mail: scott@bursor.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EHDER SOTO, individually and on behalf of all
others similarly situated,

Plaintiff,

v.

SAFEWAY INC.,

Defendant.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiff Ehder Soto (“Plaintiff”) brings this action on behalf of himself and all others
2 similarly situated against Defendant Safeway Inc. (“Safeway” or “Defendant”). Plaintiff makes the
3 following allegations pursuant to the investigation of his counsel and based upon information and
4 belief, except as to the allegations specifically pertaining to himself, which are based on personal
5 knowledge.

6 NATURE OF ACTION

7 1. This is a class action lawsuit on behalf of purchasers of 5-ounce cans of Safeway
8 Chunk Light Tuna in Water and 5-ounce cans of Safeway Solid White Albacore Tuna in Water
9 (collectively, “Safeway Tuna”). Safeway Tuna is underfilled and thus substantially underweight.
10 Safeway is cheating purchasers by providing less tuna than they are paying for. As will be
11 discussed below, government testing revealed that 6 of 6 lots tested – and 106 of 108 individual
12 cans tested – failed to meet the federally mandated minimum standard of fill.

13 2. Independent testing by the U.S. National Oceanic and Atmospheric Administration
14 (“NOAA”)¹ determined that, over a sample of 5 cans, 5-ounce cans of Safeway Chunk Light Tuna
15 in Water contain an average of only 2.29 ounces of pressed cake tuna when measured precisely
16 according to the methods specified by 21 C.F.R. § 161.190(c). This is 19.4% below the federally
17 mandated minimum standard of fill of 2.84 ounces for these cans. *See* 21 C.F.R.
18 § 161.190(c)(2)(i)-(xii). Similarly, another test by NOAA determined that, over a sample of 7
19 cans, 5-ounce cans of Safeway Solid White Albacore Tuna in Water contain an average of only
20 2.83 ounces of pressed cake tuna, which is 12.4% below the federally mandated minimum standard
21 of fill of 3.23 ounces for these cans. *Id.* Of these tests, every individual can was below the
22 minimum standard of fill.

23 3. These results are corroborated by additional rounds of testing. Another test by
24 NOAA determined that, over a sample of 24 cans, 5-ounce cans of Safeway Chunk Light Tuna in
25 Water contain an average of only 2.55 ounces of pressed cake tuna, which is 10.2% below the
26 federally mandated minimum standard of fill of 2.84 ounces for these cans. Yet another test by

27 _____
28 ¹ NOAA is an agency of the U.S. Department of Commerce with responsibility for regulating the
nation’s fisheries.

1 NOAA determined that, over a sample of 24 cans, 5-ounce cans of Safeway Chunk Light Tuna in
2 Water contain an average of only 2.57 ounces of pressed cake tuna, which is 9.5% below the
3 federally mandated minimum standard of fill 2.84 ounces for these cans. And yet another test by
4 NOAA determined that, over a sample of 24 cans, 5-ounce cans of Safeway Chunk Light Tuna in
5 Water contain an average of only 2.67 ounces of pressed cake tuna, which is 6.0% below the
6 federally mandated minimum standard of fill of 2.84 ounces for these cans. Lastly, yet another test
7 by NOAA determined that, over a sample of 24 cans, 5-ounce cans of Safeway Chunk Light Tuna
8 in Water contain an average of only 2.54 ounces of pressed cake tuna, which is 10.6% below the
9 federally mandated minimum standard of fill of 2.84 ounces for these cans. Of these tests, 94 of 96
10 cans (97.9%) were below the minimum standard of fill.

11 4. Plaintiff asserts claims on behalf of himself and a nationwide class of purchasers of
12 Safeway Tuna for breach of express warranty, breach of the implied warranty of merchantability,
13 breach of the implied warranty of fitness for a particular purpose, unjust enrichment, violation of
14 California's Consumers Legal Remedies Act ("CLRA"), violation of California's Unfair
15 Competition Law ("UCL"), violation of California's False Advertising Law ("FAL"), negligent
16 misrepresentation, and fraud.

17 **PARTIES**

18 5. Plaintiff Ehder Soto is a citizen of California who resides in Aptos, California.
19 From approximately 2012 through the end of 2014, Plaintiff Soto purchased 5-ounce canned
20 Safeway Chunk Light Tuna in Water at a Safeway store in the Santa Cruz, California area. During
21 this period, Plaintiff Soto purchased approximately five cans of Safeway Chunk Light Tuna in
22 Water every two weeks, which were underfilled and thus substantially underweight.

23 6. Defendant Safeway Inc. is a Delaware corporation with its principal place of
24 business in Pleasanton, California. Safeway is an American supermarket chain. With over 2,200
25 stores and over 250,000 employees, Safeway is the second largest supermarket chain in North
26 America. In 2013, Safeway realized approximately \$36.139 billion in revenue and \$3.507 billion
27 in net income. In 2009, Safeway was estimated to be the eleventh largest retailer in the United
28 States. Safeway's primary base of operations is in the western and central United States, with

1 some stores located in the Mid-Atlantic region of the Eastern Seaboard. As part of its operations,
2 Safeway is engaged in the processing, packaging, and distribution of Safeway-brand canned tuna
3 products, which it sells in its retail locations.

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

8 **JURISDICTION AND VENUE**

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

14 9. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because
15 a substantial part of the events, omissions, and acts giving rise to the claims herein occurred in this
16 District. Plaintiff Soto is a citizen of California, resides in this District, and purchased Safeway
17 Tuna from Defendant in this District. Moreover, Safeway distributed, advertised, and sold
18 Safeway Tuna, which is the subject of the present complaint, in this District. Furthermore,
19 Safeway's principal place of business is in this District.

20 **CLASS REPRESENTATION ALLEGATIONS**

21 10. Plaintiff seeks to represent a class defined as all persons in the United States who
22 purchased Safeway Tuna (the "Class"). Excluded from the Class are persons who made such
23 purchase for purpose of resale.

24 11. Plaintiff also seeks to represent a subclass of all Class members who purchased
25 Safeway Tuna in California (the "Subclass").

26 12. Members of the Class and Subclass are so numerous that their individual joinder
27 herein is impracticable. On information and belief, members of the Class and Subclass number in
28 the millions. The precise number of Class members and their identities are unknown to Plaintiff at

1 this time but may be determined through discovery. Class members may be notified of the
2 pendency of this action by mail and/or publication through the distribution records of Defendant
3 and third party retailers and vendors.

4 13. Common questions of law and fact exist as to all Class members and predominate
5 over questions affecting only individual Class members. Common legal and factual questions
6 include, but are not limited to: whether Safeway Tuna is underfilled and thus substantially
7 underweight; whether Defendant warranted that Safeway Tuna contained an adequate amount of
8 tuna for a 5-ounce can; whether Defendant warranted that Safeway Tuna is legal for sale in the
9 United States; whether Defendant breached these warranties; and whether Defendant committed
10 statutory and common law fraud by doing so.

11 14. The claims of the named Plaintiff are typical of the claims of the Class in that the
12 named Plaintiff purchased Safeway Tuna in reliance on the representations and warranties
13 described above and suffered a loss as a result of that purchase.

14 15. Plaintiff is an adequate representative of the Class and Subclass because his interests
15 do not conflict with the interests of the Class members he seeks to represent, he has retained
16 competent counsel experienced in prosecuting class actions, and he intends to prosecute this action
17 vigorously. The interests of Class members will be fairly and adequately protected by Plaintiff and
18 his counsel.

19 16. The class mechanism is superior to other available means for the fair and efficient
20 adjudication of the claims of Class and Subclass members. Each individual Class member may
21 lack the resources to undergo the burden and expense of individual prosecution of the complex and
22 extensive litigation necessary to establish Defendant's liability. Individualized litigation increases
23 the delay and expense to all parties and multiplies the burden on the judicial system presented by
24 the complex legal and factual issues of this case. Individualized litigation also presents a potential
25 for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer
26 management difficulties and provides the benefits of single adjudication, economy of scale, and
27 comprehensive supervision by a single court on the issue of Defendant's liability. Class treatment
28

1 of the liability issues will ensure that all claims and claimants are before this Court for consistent
2 adjudication of the liability issues.

3 **COUNT I**

4 **Breach Of Express Warranty**

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

7 18. Plaintiff brings this claim individually and on behalf of the proposed Class against
8 Defendant.

9 19. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller,
10 expressly warranted that Safeway Tuna contained an adequate amount of tuna for a 5-ounce can
11 and that Safeway Tuna is legal for sale in the United States.

12 20. In fact, Safeway Tuna is not fit for such purposes because each of these express
13 warranties is false. Particularly, Safeway Tuna is underfilled and thus substantially underweight,
14 does not contain an adequate amount of tuna for a 5-ounce can, and is illegal for sale in the United
15 States.

16 21. As a direct and proximate cause of Defendant's breach of express warranty, Plaintiff
17 and Class members have been injured and harmed because: (a) they would not have purchased
18 Safeway Tuna on the same terms if the true facts were known concerning its quantity and failure to
19 comply with FDA regulations; (b) they paid a price premium for Safeway Tuna due to Defendant's
20 promises that it contained an adequate amount of tuna for a 5-ounce can; and (c) Safeway Tuna did
21 not have the characteristics, ingredients, uses, benefits, or quantities as promised.

22 **COUNT II**

23 **Breach Of The Implied Warranty Of Merchantability**

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

26 23. Plaintiff brings this claim individually and on behalf of the proposed Class against
27 Defendant.

1 24. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller,
2 impliedly warranted that Safeway Tuna contained an adequate amount of tuna for a 5-ounce can
3 and that Safeway Tuna is legal for sale in the United States.

4 25. Defendant breached the warranty implied in the contract for the sale of Safeway
5 Tuna because it could not pass without objection in the trade under the contract description, the
6 goods were not of fair average quality within the description, and the goods were unfit for their
7 intended and ordinary purpose because Safeway Tuna is underfilled and thus substantially
8 underweight, does not contain an adequate amount of tuna for a 5-ounce can, and is illegal for sale
9 in the United States. As a result, Plaintiff and Class members did not receive the goods as
10 impliedly warranted by Defendant to be merchantable.

11 26. Plaintiff and Class members purchased Safeway Tuna in reliance upon Defendant's
12 skill and judgment and the implied warranties of fitness for the purpose.

13 27. Safeway Tuna was not altered by Plaintiff or Class members.

14 28. Safeway Tuna was defective when it left the exclusive control of Defendant.

15 29. Defendant knew that Safeway Tuna would be purchased and used without
16 additional testing by Plaintiff and Class members.

17 30. Safeway Tuna was defectively designed and unfit for its intended purpose, and
18 Plaintiff and Class members did not receive the goods as warranted.

19 31. As a direct and proximate cause of Defendant's breach of the implied warranty,
20 Plaintiff and Class members have been injured and harmed because: (a) they would not have
21 purchased Safeway Tuna on the same terms if the true facts were known concerning its quantity
22 and failure to comply with FDA regulations; (b) they paid a price premium for Safeway Tuna due
23 to Defendant's promises that it contained an adequate amount of tuna for a 5-ounce can; and
24 (c) Safeway Tuna did not have the characteristics, ingredients, uses, benefits, or quantities as
25 promised.

COUNT III

Breach Of The Implied Warranty Of Fitness For A Particular Purpose

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

33. Plaintiff brings this claim individually and on behalf of the proposed Class against Defendant.

34. Defendant marketed, distributed, and/or sold Safeway Tuna with implied warranties that it was fit for its intended purposes in that it contained an adequate amount of tuna for a 5-ounce can and that Safeway Tuna is legal for sale in the United States. At the time that Safeway Tuna was sold, Defendant knew or had reason to know that Plaintiff and Class members were relying on Defendant's skill and judgment to select or furnish a product that was suitable for sale.

35. Plaintiff and Class members purchased Safeway Tuna in reliance upon Defendant's implied warranties.

36. Safeway Tuna was not altered by Plaintiff or Class members.

37. As a direct and proximate cause of Defendant's breach of the implied warranty, Plaintiff and Class members have been injured and harmed because: (a) they would not have purchased Safeway Tuna on the same terms if the true facts were known concerning its quantity and failure to comply with FDA regulations; (b) they paid a price premium for Safeway Tuna due to Defendant's promises that it contained an adequate amount of tuna for a 5-ounce can; and (c) Safeway Tuna did not have the characteristics, ingredients, uses, benefits, or quantities as promised.

COUNT IV

Unjust Enrichment

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

39. Plaintiff brings this claim individually and on behalf of the proposed Class against Defendant.

1 55. Defendant’s misrepresentations and other conduct, described herein, violated the
2 “unfair” prong of the UCL in that its conduct is substantially injurious to consumers, offends public
3 policy, and is immoral, unethical, oppressive, and unscrupulous, as the gravity of the conduct
4 outweighs any alleged benefits.

5 56. Defendant violated the “fraudulent” prong of the UCL by making
6 misrepresentations about Safeway Tuna, as described herein.

7 57. Plaintiff and the Subclass lost money or property as a result of Defendant’s UCL
8 violations because: (a) they would not have purchased Safeway Tuna on the same terms if the true
9 facts were known concerning its quantity and failure to comply with FDA regulations; (b) they
10 paid a price premium for Safeway Tuna due to Defendant’s promises that it contained an adequate
11 amount of tuna for a 5-ounce can; and (c) Safeway Tuna did not have the characteristics,
12 ingredients, uses, benefits, or quantities as promised.

13 **COUNT VII**

14 **Violation Of California’s False Advertising Law,**
15 **California Business & Professions Code §§ 17500, *et seq.***

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

18 59. Plaintiff brings this claim individually and on behalf of the proposed Subclass
19 against Defendant.

20 60. California’s False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq.*,
21 makes it “unlawful for any person to make or disseminate or cause to be made or disseminated
22 before the public in this state, ... in any advertising device ... or in any other manner or means
23 whatever, including over the Internet, any statement, concerning ... personal property or services,
24 professional or otherwise, or performance or disposition thereof, which is untrue or misleading and
25 which is known, or which by the exercise of reasonable care should be known, to be untrue or
26 misleading.”

27
28

1 Class and Subclass and Plaintiff's attorneys as Class Counsel to represent members
2 of the Class and Subclass;

- 3 b. For an order declaring the Defendant's conduct violates the statutes referenced
4 herein;
- 5 c. For an order finding in favor of Plaintiff, the nationwide Class, and the Subclass on
6 all counts asserted herein;
- 7 d. For compensatory and punitive damages in amounts to be determined by the Court
8 and/or jury;
- 9 e. For prejudgment interest on all amounts awarded;
- 10 f. For an order of restitution and all other forms of equitable monetary relief;
- 11 g. For injunctive relief as pleaded or as the Court may deem proper; and
- 12 h. For an order awarding Plaintiff, the Class, and the Subclass their reasonable
13 attorneys' fees and expenses and costs of suit.

14 **DEMAND FOR TRIAL BY JURY**

15 Plaintiff demands a trial by jury of all issues so triable.

16
17 Dated: November 5, 2015

Respectfully submitted,

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

19
20
21 By: /s/ L. Timothy Fisher
L. Timothy Fisher

22 L. Timothy Fisher (State Bar No. 191626)
23 Julia A. Luster (State Bar No. 295031)
1990 North California Boulevard, Suite 940
24 Walnut Creek, CA 94596
Telephone: (925) 300-4455
25 Facsimile: (925) 407-2700
E-Mail: ltfisher@bursor.com
26 jluster@bursor.com

27 **BURSOR & FISHER, P.A.**
Scott A. Bursor (State Bar No. 276006)
28 888 Seventh Avenue
New York, NY 10019

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

Telephone: (212) 989-9113
Facsimile: (212) 989-9163
E-Mail: scott@bursor.com

Attorneys for Plaintiff

CLRA Venue Declaration Pursuant to California Civil Code Section 1780(d)

I, Ehder A. Soto, declare as follows:

1. I am a plaintiff in this action and a citizen of the State of California. I have personal knowledge of the facts stated herein and, if called as a witness, I could and would testify competently thereto.

2. The complaint in this action is filed in the proper place because I purchased Safeway Chunk Light Tuna in Water in this District and Defendant conducts a substantial amount of business in this District.

3. While living in the Santa Cruz area, I purchased one or more 5-ounce can of Safeway Chunk Light Tuna in Water for my household and my personal use. I purchased Safeway Chunk Light Tuna in Water after I read the label on the can that said it contained an adequate amount of tuna for a 5-ounce can. The representations on the label were substantial factors influencing my decision to purchase Safeway Chunk Light Tuna in Water. I would not have purchased Safeway Chunk Light Tuna in Water if I had known that the cans were underfilled and underweight.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct, executed on October 21, 2015 at Aptos, California.



Ehder A. Soto

EXHIBIT A



BURSOR & FISHER
P.A.

1990 NORTH CALIFORNIA BLVD.
SUITE 940
WALNUT CREEK, CA 94596-7351
www.bursor.com

L. TIMOTHY FISHER
Tel: 925.300.4455
Fax: 925.407.2700
ltfisher@bursor.com

November 3, 2015

Via Certified Mail – Return Receipt Requested

Safeway Inc.
5918 Stoneridge Mall Road
Pleasanton, CA 94588

Re: Notice and Demand Letter Pursuant to California Civil Code § 1782 and U.C.C. § 2-607

To Whom It May Concern:

This letter serves as a preliminary notice and demand for corrective action by Safeway Inc. (“Safeway”) pursuant to the provisions of California Civil Code § 1782, on behalf of our client, Ehder Soto, and a class of all similarly situated purchasers of 5-ounce canned Safeway Chunk Light Tuna in Water and Safeway Solid White Albacore Tuna in Water (the “Class”). This letter also serves as notice pursuant to U.C.C. § 2-607(3)(a) concerning the breaches of express and implied warranties described herein.

Our client purchased one or more 5-ounce cans of Safeway Chunk Light Tuna in Water, which were underfilled and thus substantially underweight. Independent testing by the U.S. National Oceanic and Atmospheric Administration (“NOAA”)¹ determined that 5-ounce cans of Safeway Chunk Light Tuna in Water contain an average of only 2.54 ounces of pressed cake tuna when measured precisely according to the methods specified by 21 C.F.R. § 161.190(c). This is 10.6% below the federally mandated minimum standard of fill for these 5-ounce cans. *See* 21 C.F.R. § 161.190(c)(2)(i)-(xii). Similarly, NOAA determined that 5-ounce cans of Safeway Solid White Albacore Tuna in Water contain an average of only 2.83 ounces of pressed cake tuna when measured precisely according to the methods specified by 21 C.F.R. § 161.190(c), which is 12.4% below the federally mandated minimum standard of fill for these 5-ounce cans. These results are further corroborated by additional testing by NOAA. In short, Safeway is cheating purchasers by providing less tuna than they are paying for. *See* U.C.C. §§ 2-313, 2-314.

By systematically underfilling and selling short-weighted cans of Safeway Chunk Light Tuna in Water and Safeway Solid White Albacore Tuna in Water (collectively, “Safeway Tuna”), Safeway has violated and continues to violate subsections (a)(5) and (a)(9) of the Consumers Legal Remedies Act, Civil Code § 1770, which prohibits representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities

¹ NOAA is an agency of the U.S. Department of Commerce with responsibility for regulating the nation’s fisheries.

which they do not have, and advertising goods or services with intent not to sell them as advertised.

On behalf of our client and the Class, we hereby demand that Safeway immediately (1) cease and desist from continuing to underfill and sell short-weighted cans of tuna; (2) issue an immediate recall of these underfilled, short-weighted cans; and (3) make full restitution to all purchasers of Safeway Tuna of all purchase money obtained from sales thereof.

We also demand that Safeway preserve all documents and other evidence which refer or relate to any of the above-described practices including, but not limited to, the following:

1. All documents concerning the packaging, canning, and manufacturing process for Safeway Tuna;
2. All documents concerning the measurements of the quantity of tuna in Safeway Tuna;
3. All standard of fill tests conducted on Safeway Tuna;
4. All documents concerning the pricing, advertising, marketing, and/or sale of Safeway Tuna;
5. All communications with customers concerning complaints or comments concerning the underfilling, short-weighting, or otherwise referencing the quantity of tuna in Safeway Tuna.

If Safeway contends that any statement in this letter is inaccurate in any respect, please provide us with your contentions and supporting documents immediately upon receipt of this letter.

This letter also serves as a thirty (30) day notice and demand requirement under § 1782 for damages. Accordingly, should Safeway fail to rectify the situation on a class-wide basis within 30 days of receipt of this letter, we will seek actual damages, plus punitive damages, interest, attorneys' fees and costs.

Please contact me right away if you wish to discuss an appropriate way to remedy this matter. If I do not hear from you promptly, I will take that as an indication that you are not interested in doing so.

Very truly yours,



L. Timothy Fisher