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Attorneys for Plaintiffs and the Proposed Class

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ERIN ALLEN, et al, on behalf of herself
and all others similarly situated,

Plaintiff,

v.

CONAGRA FOODS INC. a Delaware
corporation,

Defendant.

Case No. 3:13-CV-01279-WHO

**JOINT STATEMENT AND
STIPULATED REQUEST
REGARDING CLASS
NOTICE PLAN**

1 The parties, Erin Allen (“Plaintiff”) and Conagra Brands, Inc.
 2 (“Defendant”), submit this Joint Statement and Stipulated Request regarding class
 3 notice pursuant to this Court’s February 18, 2020 Order (Dkt.# 286).

4 **I. Legal Standards**

5 Rule 23(c)(2) provides that “[f]or any class certified under Rule 23(b)(3),
 6 the court must direct to class members the best notice that is practicable under the
 7 circumstances, including individual notice to all members who can be identified
 8 through reasonable effort.” Fed. R. Civ. P. 23(c)(2). The rule continues:

9 The notice must clearly and concisely state in plain,
 easily understood language:

- 10 (i) the nature of the action;
 11 (ii) the definition of the class certified;
 12 (iii) the class claims, issues, or defenses;
 13 (iv) that a class member may enter an appearance
 through an attorney if the member so desires;
 14 (v) that the court will exclude from the class any
 15 member who requests exclusion;
 16 (vi) the time and manner for requesting exclusion;
 and
 17 (vii) the binding effect of a class judgment on
 18 members under Rule 23(c)(3).

19 *Id.*

20 The Federal Judicial Center has issued guidelines recommending that notice
 21 reach at least 70% of class members. *See* Notice Checklist and Plain Language
 22 Guide (2010) (“Judges’ Class Action Notice and Claims Process Checklist and
 Plain Language Guide”), at 1.

23 The California Legal Remedies Act (“CLRA”) sets forth additional notice
 24 requirements. It provides as follows:

- 25 (d) If the action is permitted as a class action, the
 26 court may direct either party to notify each

1 member of the class of the action. The party
2 required to serve notice may, with the consent of
3 the court, if personal notification is unreasonably
4 expensive or it appears that all members of the
5 class cannot be notified personally, give notice as
6 prescribed herein by publication in accordance
7 with Section 6064 of the Government Code in a
8 newspaper of general circulation in the county in
9 which the transaction occurred.

10 (e) The notice required by subdivision (d) shall
11 include the following:

12 (1) The court will exclude the member
13 notified from the class if he so requests by
14 a specified date.

15 (2) The judgment, whether favorable or not,
16 will include all members who do not
17 request exclusion.

18 (3) Any member who does not request
19 exclusion, may, if he desires, enter an
20 appearance through counsel.

21 Cal. Civ. Code 1780(d)-(e).

22 Government Code section 6064, which is referenced in the CLRA notice
23 provision, provides that “[p]ublication of notice pursuant to this section shall be
24 once a week for four successive weeks. Four publications in a newspaper regularly
25 published once a week or oftener, with at least five days intervening between the
26 respective publication dates not counting such publication dates, are sufficient.”

Cal. Gov’t Code § 6064.

27 **II. Proposed Forms And Methods Of Class Notice**

28 **A. Notice Administrator And Summary Of Plan.**

29 Class counsel has solicited a proposal from the well-known class action
30 administration firm Angeion Group (“Angeion”). Angeion has designed a plan that
31 will reach at least 70% of class members in California, at a frequency of 3 times
32 each. The parties are continuing to discuss aspects of a declaration of a partner
33 from Angeion describing the design and implementation of the Notice Plan and will

1 supplement this filing with the declaration as soon as possible. The plan does not
2 contemplate notice to members of the Hawaii class as that class has been certified
3 for injunctive relief only and thus notice is not required under Rule 23.

4 The notice plan will include construction of a notice website where class
5 members can obtain information about the case and fill out a simple form to exclude
6 themselves from the class. The notice website will include the detailed notice
7 substantially in the form of Exhibit A, which covers all issues set forth in Rule
8 23(c)(2) and the CLRA.

9 In addition, the notice administrator will (1) send individual email or mailed
10 notice to class members who are identified by Defendant, and (2) publish notice in
11 the form of online banner advertisements on websites chosen using an individual-
12 targeted plan that uses search term and keyword targeting to publish notice to
13 individuals who are looking for information related to product and issues in this
14 case (e.g., margarine, butter, Parkay, etc.). This plan for notice is typical in
15 consumer class actions uses standard best practices, and focuses on online media,
16 which is the most efficient and effective means for giving notice. It is described in
17 more detail below.

18 **1. Individual Notice.**

19 Defendant did not directly sell any of the Parkay Spray product to end
20 consumers (i.e., class members.) Instead, the products were sold by third-party
21 retailers. While some retailers may have “loyalty card” data identifying some class
22 members, it is not likely that this information can be used to provide timely,
23 effective class notice in this case. The retailers would also likely object to
24 subpoenas for the information on grounds of burden and consumer privacy. Even
25 were records obtained, they might not be reliable. Retailers typically do not verify
26 the contact information that consumers provide when subscribing to loyalty
programs, nor do they require that consumers update their contact information.

1 Retailers also do not require that the person making the purchase is using his or her
2 own loyalty card. *See generally* Declaration of Adam Gutride, filed herewith, ¶ 3
3 and Ex. A (attaching Declaration of James Rocha of Safeway, Inc.)

4 Nevertheless, Defendant may have a very limited number of records
5 identifying consumers who may have purchased the subject products if those
6 persons communicated to Defendant about the purchases. Defendant will search for
7 such records and, to the extent they exist, provide contact information to the notice
8 administrator. If Defendant's records show an email address for the consumer, the
9 notice administrator will provide an email in the form of Exhibit B. The email
10 addresses all the issues in Rule 23(c)(2) and the CLRA, and it will link to the notice
11 website, where class members can opt out. If Defendant's records show a mailing
12 address but not an email address for the consumer, the notice administrator will
13 provide notice by first class mail in the form of Exhibit C. The text of the mailed
14 notice is identical to the email notice.

15 2. Online Notice.

16 The notice administrator will publish online notice in the form of Exhibit
17 D, with a target of 657,000 impressions in California on a variety of websites.
18 Because of the limited space available in online advertising, the notices urge the
19 viewer to "click here" to obtain additional information, which links to the notice
20 website.

21 B. Proposed Opt-Out Deadline

22 All notices will be distributed within four weeks from the date notice is first
23 initiated. Accordingly, the parties suggest that class members' deadline to opt out
24 be seven weeks from the date on which notice is initiated, or three weeks after the
25 final notice is published.
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C. Costs.

Defendant will bear their own costs of searching their records and providing contact information of potential class members to Angeion.

Class counsel will bear the other costs of notice as a litigation expense. Angeion has estimated the costs of the above notice plan at \$40,979. In the event of a settlement or judgment in favor of Plaintiff or the class, class counsel will seek reimbursement of these costs. In the event of a judgment in favor of Defendant, Plaintiff will be responsible for these costs.

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III. Timing Of Class Notice

The Court certified the class on July 22, 2019. At the February 18, 2020, CMC, the Court directed the parties to jointly submit a proposal for class notification by March 4, 2020. The Court has not yet set a date for distribution of notice.

The parties respectfully request that the Court set the date for initiation of class notice as 30-days after approval of the class notice plan, with an opt-out deadline 60 days after initiation of class notice.

If notice is initiated by April 20, 2020, the opt-out deadline can be set for 60-days thereafter, or June 19, 2020. That is before the anticipated June 24, 2020 hearing on dispositive motions (if any such motions are filed), as the filing deadline for such motions is May 20, 2020. Thus, all exclusion requests will be complete before hearing or decision on a dispositive motion.

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Dated: March 4, 2020

By: /s/ Anthony J. Patek

By: /s/ Angela Spivey

GUTRIDE SAFIER LLP

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Counsel for Defendant

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Local Rule 5-1(i)(3) Certification

I, Anthony J. Patek, attest that I have received authority from each other signatory to file this document.

GUTRIDE SAFIER LLP

/s/ Anthony J. Patek
Anthony J. Patek

Counsel for Plaintiffs

EXHIBIT A

**Attention All Persons Who Purchased
Parkay Spray products since January 1, 2008:
This notice may affect your rights. Please read it carefully.**

A court authorized this notice. This is not a solicitation from a lawyer.

A class action has been certified against Conagra Brands, Inc. (“Conagra”) regarding the sale of Parkay Spray products in California and Hawaii. You are a class member if you purchased any Parkay Spray products in the state of California or Hawaii between January 1, 2008 to the present.

In the class action, plaintiff contends that Parkay Spray products should not have been labeled “0 g Fat,” “0 Calories,” “0 g Fat per serving,” or “0 calories per serving,” and should not have been labeled with a serving size of “1 spray” or “5 sprays.” Plaintiff seeks to obtain partial refunds for California purchasers only. Plaintiff also seeks a court order requiring Conagra to change the labels of products sold in California and Hawaii. Conagra denies any misconduct and denies that plaintiff is entitled to relief. The Court has not determined whether plaintiff or Conagra is correct.

YOUR OPTIONS		DEADLINE
DO NOTHING	You will remain a class member and be bound by the final judgment in the case. If plaintiff succeeds in obtaining monetary damages, California class members may be able to obtain a share of the money. If plaintiff loses the case, you will not be able to bring a separate lawsuit against Conagra for the same issue.	
EXCLUDE YOURSELF	You will not be a class member. You will not share in any money recovered. Exclude yourself if you want to be able to bring or join a separate lawsuit against Conagra that raises the same claims as this case.	[Date]

Please read the remainder of this notice for more detailed information about how to exercise your rights.

How Do I Know If I Am Affected By The Case?

The Court has certified a class of “ All class members who purchased the product in California or Hawaii at any time from January 1, 2008 to the present.”

If you are a member of the class, you will be bound by the judgment in this case, unless you request to be excluded.

What Is The Lawsuit About?

A lawsuit was brought against Conagra. The plaintiff in the suit claims that Conagra mislabels its Parkay Spray sold in California and Hawaii as “0 g Fat [Per Serving],” “0 Calories [Per Serving],” and as having an improperly small serving size of “1 spray [for cooking spray]” and “5 sprays [for topping]” in violation of controlling FDA regulations.

Plaintiff contends that the challenged claims caused Parkay Spray to sell at a higher market price (a “premium”) than it would have without them. Plaintiff seeks a refund of the alleged premiums to all California purchasers during the time periods stated above. Plaintiff also seeks an injunction preventing Conagra from selling its product using the challenged claims in California or Hawaii.

Conagra contends that its Parkay Spray products are, and always have been, properly labeled. It also denies that there was any “premium” price attributable to the labelling claims.

The Court has not determined whether plaintiff or Conagra is correct.

What Will Happen Next In the Case?

The case is set for trial on November 2, 2020 in U.S. District court in San Francisco. The parties may seek to have the case decided by the Court before trial. If there is a settlement that affects your rights, additional notice will be distributed.

How Do I Exclude Myself From The Case?

If you want to be able to sue Conagra separately for the claims being litigated as described above, you must exclude yourself. If you exclude yourself, you cannot share in any money that may be awarded to the class.

To exclude yourself, you must complete and submit the online form at www._____.com or mail a request to exclude yourself to the notice administrator at [address]. If mailed, the exclusion request must contain your name, address, the words “I wish to be excluded from the Parkay Spray Class Action,” and your signature.

Exclusion requests must be made or postmarked by [date].

EXHIBIT A: LONG FORM NOTICE

How Do I Get More Information?

Additional information is available at the website maintained by the court-appointed notice administrator, at www._____.com.

You can contact plaintiff's counsel, Gutride Safier LLP, at [https://www.gutridesafier.com/cases/Parkay Spray Margarine/65](https://www.gutridesafier.com/cases/Parkay%20Spray%20Margarine/65). You can also write to Gutride Safier at 100 Pine Street, Suite 1250, San Francisco, CA 94111, call at 415-639-9090, or email info@gutridesafier.com.

Other papers filed in this lawsuit are available through PACER, the online service for the United States District Courts, at ecf.cacd.uscourts.gov. Alternatively you may visit the office of the Clerk of the Court for the United States District Court for the Northern District of California, 450 Golden Gate Ave, San Francisco, CA from 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays. Please do not write to or call the Court for information or advice.

EXHIBIT B

To: [Consumer email address]
From: Conagra Parkay Spray Class Action Notice Administrator
Subject: Notice of Class Action

Why Am I Receiving This Notice?

According to our records, you purchased Conagra Parkay Spray in California or Hawaii between January 1, 2008 and the present. A class action lawsuit has been certified that may affect you. A court has ordered that this notice be sent to you.

What's this about?

A lawsuit was brought against Conagra Brands, Inc. ("Conagra"), which owns the Parkay brand. The plaintiff in the suit claim the Parkay Spray products should not have been labeled "0 g Fat," "0 Calories," "0 g Fat per serving," or "0 calories per serving," and should not have been labeled with a serving size of "1 spray" or "5 sprays." Conagra denies any misconduct and denies that plaintiff is entitled to relief. The Court has not determined whether plaintiff or Conagra is correct.

How Do I Know If I Am Included?

The Court has certified a class of "All class members who purchased the product in California or Hawaii at any time from January 1, 2008 to the present." If you are a member of the class, you will be bound by the judgment in this case, unless you request to be excluded.

How Will This Affect Me?

As a member of the class, you will bound by the final judgment in the case. If plaintiff succeeds in obtaining money for your class, you will receive further notice about how to obtain your share of the money, if any. If plaintiff loses the case, you will not be able to bring or join a separate lawsuit against Conagra for the same issue. If you do not wish to remain in the class, you must exclude yourself as explained in this notice.

How Do I Make A Claim For Money?

Plaintiff has only sought monetary relief for the California class. No money has yet been awarded. You will receive further notice and instructions if there is a settlement or judgment that awards money to your class.

How Do I Exclude Myself?

If you do not wish to be a member of the class, you must exclude yourself. Excluding yourself is the only way to be able to bring or join a separate lawsuit against Conagra for the claims being litigated. If you exclude yourself, you will not share in any recovery that may be obtained in this case. To exclude yourself, you must complete and submit the online form or mail a request to exclude yourself to the notice administrator at [address]. If mailed, the exclusion request must contain your name, address, the words "I wish to be excluded from the Parkay Spray Class Action," and your signature. Exclusion requests must be made or postmarked by [date].

How Do I Contact The Lawyers Or Get More Information?

Additional information is available at the website maintained by the court-appointed notice administrator, at www._____.com. Other papers filed in this lawsuit are available through PACER, the online service for the United States District Courts, at ecf.cacd.uscourts.gov. Alternatively you may visit the office of the Clerk of the Court for the United States District Court for the Northern District of California, 450 Golden Gate Ave, San Francisco, CA from 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays.

You can contact plaintiff's counsel, Gutride Safier LLP, at [https://www.gutridesafier.com/cases/Parkay Spray Margarine/65](https://www.gutridesafier.com/cases/Parkay_Spray_Margarine/65). You can also write to Gutride Safier at 100 Pine Street, Suite 1250, San Francisco, CA 94111, call at 415-639-9090, or email info@gutridesafier.com. Please do not write to or call the Court for information or advice.

Notice ID Number _____. Control Number _____.

EXHIBIT C

[Notice Administrator]
[Address]
[Date of Notice]

[Class Member Name]
[Class Member Address]
[Class Member City, State Zip]
Notice ID Number _____. Control Number _____.

Re: Conagra Parkay Spray Class Action

Dear [Class Member Name]:

Why Am I Receiving This Notice?

According to our records, you purchased Conagra Parkay Spray in California or Hawaii between January 1, 2008 and the present. A class action lawsuit has been certified that may affect you. A court has ordered that this notice be sent to you.

What's this about?

A lawsuit was brought against Conagra Brands, Inc. ("Conagra"), which owns the Parkay brand. The plaintiff in the suit claim the Parkay Spray products should not have been labeled "0 g Fat," "0 Calories," "0 g Fat per serving," or "0 calories per serving," and should not have been labeled with a serving size of "1 spray" or "5 sprays." Conagra denies any misconduct and denies that plaintiff is entitled to relief. The Court has not determined whether plaintiff or Conagra is correct.

How Do I Know If I Am Included?

The Court has certified a class of "All class members who purchased the product in California or Hawaii at any time from January 1, 2008 to the present." If you are a member of the class, you will be bound by the judgment in this case, unless you request to be excluded.

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Plaintiff has only sought monetary relief for the California class. No money has yet been awarded. You will receive further notice and instructions if there is a settlement or judgment that awards money to your class.

How Do I Exclude Myself?

If you do not wish to be a member of the class, you must exclude yourself. Excluding yourself is the only way to be able to bring or join a separate lawsuit against Conagra for the claims being litigated. If you exclude yourself, you will not share in any recovery that may be obtained in this case. To exclude yourself, you must complete and submit the online form or mail a request to exclude yourself to the notice administrator at [address]. If mailed, the exclusion request must contain your name, address, the words "I wish to be excluded from the Parkay Spray Class Action," and your signature. Exclusion requests must be made or postmarked by [date].

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You can contact plaintiff's counsel, Gutride Safier LLP, at https://www.gutridesafier.com/cases/Parkay_Spray_Margarine/65. You can also write to Gutride Safier at 100 Pine Street, Suite 1250, San Francisco, CA 94111, call at 415-639-9090, or email info@gutridesafier.com. Please do not write to or call the Court for information or advice.

Notice ID Number _____. Control Number _____.

Sincerely yours,

/signature/

[Name]

[Notice Administrator]

Court-Appointed Notice Administrator

EXHIBIT D

Online Banner Ad

Attention Parkay Spray Purchasers

**A Class Action May Affect You. Click Here If You Bought Parkay Spray Products
In California or Hawaii Between January 1, 2008 to the Present.**

Mobile Banner Ad

**Parkay Spray Purchasers in California or Hawaii Since January 2008:
A Class Action May Affect You. Click Here**

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Attorneys for Plaintiff and the Proposed Class

19 UNITED STATES DISTRICT COURT
 20 NORTHERN DISTRICT OF CALIFORNIA

21 ERIN ALLEN on behalf of herself and all others
 22 similarly situated,

Plaintiff,

v.

23 CONAGRA FOODS INC. a Delaware
 24 corporation,

Defendant.

No. 3:13-cv-01279-WHO

**DECLARATION OF ADAM J.
 GUTRIDE IN SUPPORT OF JOINT
 STATEMENT AND STIPULATED
 REQUEST REGARDING CLASS
 NOTICE PLAN**

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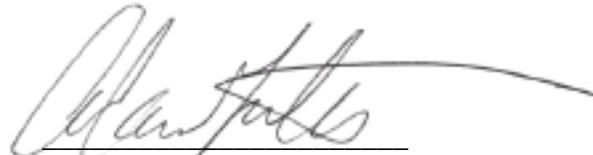
1 I, Adam Gutride, hereby declare as follows:

2 1. I am a partner in the firm Gutride Safier LLP (“GSLLP”), and a member in good
3 standing of the bar of this Court. I am competent to testify to the matters stated herein.

4 2. I submit this declaration in support of the parties’ Joint Statement And Stipulated
5 Request Regarding Class Notice Plan.

6 3. Attached hereto as Exhibit A is a true and correct copy of a declaration filed by
7 Safeway, Inc., which was a defendant in another consumer class action my firm handled. The
8 declaration addresses issues with accuracy and usability of retailer “loyalty club” records maintained
9 by Safeway. Based on my experience in other consumer class action cases, retailers are reluctant to
10 produce such records even when subpoenaed to do so, as they typically claim that doing so is
11 burdensome and infringes on consumer privacy, and they also raise arguments similar to those raised
12 by Safeway in the attached declaration.

13 Executed at Berkeley California this 4th day of March 4, 2020. I declare under penalty of
14 perjury that the foregoing is true and correct.

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17 Adam J. Gutride, Esq.

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EXHIBIT A

1 **NORTON ROSE FULBRIGHT US LLP**
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7 Attorneys for Defendant SAFEWAY INC.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
 COUNTY OF ALAMEDA

ROHINI KUMAR, individually, and on behalf
of herself, the general public and those
similarly situated,

Plaintiff,

v.

SAFEWAY INC.; and DOES 1 THROUGH
50,

Defendants.

Case No. RG14726707

Assigned For All Purposes To The
Honorable Winifred Y. Smith

**DECLARATION OF JAMES ROCHA IN
SUPPORT OF SAFEWAY INC.'S
STATEMENT REGARDING CLUB CARD
INFORMATION AND AMENDED
NOTICE PLAN**

1 I, James Rocha, declare:

2 1. I am the Manager, Marketing Strategies for Card Marketing of Defendant Safeway
3 Inc. (“Safeway”). I have personal knowledge of the following facts and, if called as a witness, I
4 could and would testify competently thereto.

5 2. As part of my job duties, I have knowledge of the information Safeway collects as
6 part of its Club Card program.

7 3. Of the approximately four million transactions involving sales of Safeway Select
8 olive oil in California, 98.2 percent can be linked to a Club Card. Approximately 11% of the
9 Club Cards used when purchasing Safeway Select olive oil in California have an email address
10 linked to them, and approximately 81 percent have an associated mailing address.

11 4. The process of extracting email and mail addresses associated with Club Card data
12 will likely take several days, as there are more than four million entries for purchases, which must
13 be cross-referenced with consumer data to identify potential contact information.

14 5. The personal information provided to Safeway by Club Card holders is not a
15 reliable means of contacting potential class members for this case because Safeway has no way of
16 knowing whether it is the correct contact information for any particular consumer using the card
17 to make purchases.

18 6. Safeway Club Cards are not “membership cards,” as have been associated with
19 other retailers, like Costco, where members are required to keep their personal information
20 accurate. There is no requirement for a customer to provide personal contact information, and
21 Safeway does not verify that the information used to open a Club Card is correct. Many times,
22 individuals not wanting to give out their personal information will open cards under fictitious
23 names, i.e., Mickey Mouse and Donald Duck, with false contact information. From the very
24 beginning, there is no assurance that any personal contact information associated with a Club
25 Card is accurate or linked to an actual consumer.

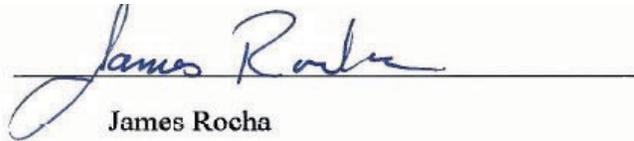
26 7. While consumers have the ability to revise their contact information, Safeway does
27 not take any steps to ensure that contact information linked to the Club Cards is current. Even
28

1 assuming that the information provided to open a Club Card is correct in the first place,
2 consumers rarely update their Club Card information when they get a new email address or move
3 to a new home. This means that even if a consumer supplies correct information in the first
4 instance, a significant percentage of that Club Card contact information is also inaccurate.

5 8. Individuals use other people's Club Cards. There may be multiple individuals in a
6 household using one Club Card, which means that a consumer who actually purchased the
7 product is not the one whose name appears on the card. This problem is compounded by the fact
8 that telephone numbers may be used in place of an actual Club Card to receive discounts,
9 meaning that an account can be used by an individual who never had access to a card if they
10 simply know a friend's phone number. Another scenario that happens quite often is an individual
11 will use the Club Card of another customer in line when they have either forgotten their card, or
12 do not wish to register for one.

13 9. For all of the reasons detailed above, Safeway has no way of knowing what
14 percentage of the email and mail addresses currently associated with the Club Cards used to
15 purchase Safeway Select olive oil are accurate.

16 Executed this 2nd day of August, 2016, at Pleasanton, CA.

17
18 
19 James Rocha
20