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8 Attorneys for Defendant
 9 SAFEWAY INC.

10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 (San Francisco)

12 MICHAEL RODMAN, on behalf of himself and
 13 all others similarly situated,

14 Plaintiff,

15 v.

16 SAFEWAY INC.,

17 Defendant.

Case No. CV 11-03003 JSW

**SAFEWAY'S ANSWER TO
 PLAINTIFF'S FIRST AMENDED
 COMPLAINT**

Trial Date: None Set
 Judge: Hon. Jeffrey S. White
 [Complaint filed June 17, 2011]

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1 Defendant Safeway Inc. ("**Safeway**") hereby Answers Plaintiff Michael Rodman's
2 ("**Plaintiff**") Class Action Complaint as follows:

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4 **NATURE OF THE ACTION**

5 1. Paragraph 1 contains conclusions of law that Safeway need not answer.
6 Should this Court require Safeway to answer, Safeway denies the allegations of paragraph
7 1 for lack of information sufficient to form a belief.

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9 2. Safeway admits that the grocery business in well-populated areas is highly
10 competitive. Safeway admits that it offers home delivery service in select metropolitan
11 areas for groceries ordered online through Safeway.com, Genuardis.com, and Vons.com
12 (collectively "Safeway.com"). Safeway admits that it operates retail grocery stores under
13 the brand names Safeway, Vons, and Genuardi's. Safeway admits that it charges fees for
14 this service. Safeway admits that it advertises "Better prices than you ever thought
15 possible" in connection with its "Just For U" promotional offers, but denies that it
16 advertises this statement in connection with its online grocery delivery service. Safeway
17 denies the remaining allegations of paragraph 2 for lack of information sufficient to form a
18 belief.

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20 3. Safeway denies the allegations of paragraph 3.

21
22 4. Safeway denies the allegations of paragraph 4.

23
24 5. Paragraph 5 contains conclusions of law that Safeway need not answer.
25 Should this Court require Safeway to answer, Safeway denies the allegations of paragraph
26 5.

1 conclusions of law that Safeway need not answer. Should this Court require Safeway to
2 answer, Safeway denies the remaining allegations of paragraph 10 for lack of information
3 sufficient to form a belief.

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5 **SUBSTANTIVE ALLEGATIONS**

6 11. Safeway admits the allegations of paragraph 11.

7
8 12. Safeway admits the allegations of paragraph 12.

9
10 13. Safeway admits that it charges fees for its grocery delivery service, including
11 a fuel surcharge. Safeway denies the remaining allegations of paragraph 13.

12
13 14. Safeway admits that at the time Plaintiff alleges to have made a purchase,
14 Safeway.com provided in part:

15
16 **Where do my products come from, and how do you deliver
17 them**

18 We hand-select all your groceries from a Safeway store local to
19 your area. Products are placed in temperature-controlled trucks
20 to keep them fresh. Our drivers will deliver your order to your
doorstep at the time you select.

21 Safeway denies the remaining allegations of paragraph 14.

22
23 15. Safeway admits that in order to make an online purchase for home delivery
24 consumers must first register for an account online. Safeway admits that, to do so,
25 customers must check a box indicating they agree to Safeway's terms and conditions,
26 referred to as the "Special Terms" by Safeway, which at the time Plaintiff alleges to have
27 registered, included in part:

1 This Agreement (the "Agreement") is a legal agreement
2 between you and Safeway Inc., its subsidiaries and affiliates
3 ("Safeway") that states the terms and conditions under which
4 you may receive Safeway online services and use the
Safeway.com Web site (the "Site"). Your use of the Safeway
online service and the Site constitutes your agreement to the
terms and conditions set forth below.

5 [...]

6
7 Notwithstanding any statements on the Safeway.com web
8 pages or elsewhere, these Terms and Conditions are the
agreement between you and Safeway.

9 [...]

10 11 **4. Product Pricing and Service Charges.**

12 The prices quoted on our Web site at the time of your order are
13 estimated prices only. You will be charged the prices quoted
14 for Products you have selected for purchase at the time your
order is processed at checkout. The actual order value cannot
15 be determined until the day of delivery because the prices
quoted on the Web site are likely to vary either above or below
16 the prices in the store on the date your order is filled and
delivered.

17 Safeway denies the remaining allegations of paragraph 15, including that all customers
18 actually read the Special Terms.

19
20 16. Paragraph 16 contains conclusions of law and argument that Safeway need
21 not answer. Should this Court require Safeway to answer, Safeway denies the allegations
22 of paragraph 16.

23
24 17. Safeway admits that at the time Plaintiff alleges to have registered, the
25 Special Terms stated in part:

26 27 **20. Applicable Law**

1 These Terms and Conditions and the order form, collectively
2 constituting the sole and entire agreement between Safeway
3 and you regarding the online shopping services, are governed
4 by laws of the State of California without regard to conflict of
5 laws and rules. The parties agree to jurisdiction and venue for
6 any dispute hereunder solely in Pleasanton, California and
7 Alameda County, California.

8 Safeway denies the remaining allegations of paragraph 17.

9 18. Safeway denies the allegations of paragraph 18.

10 19. Safeway denies the allegations of paragraph 19.

11 20. Paragraph 20 contains conclusions of law and argument that Safeway need
12 not answer. Should this Court require Safeway to answer, Safeway admits that its website
13 contains a "frequently asked questions" ("FAQ") section, and denies the remaining
14 allegations of paragraph 20.

15 21. Safeway admits that at the time Plaintiff alleges to have registered, the
16 Special Terms provided in part:

17 **10. Delivery**

18 ... We reserve the right not to deliver items that your local
19 store, where your groceries are selected, deem to be excessive
20 in quantity.

21 Safeway denies that the Special Terms specifically provide that "You will be charged the
22 prices charged in the store on the day your order is picked and delivered." The remaining
23 allegations of paragraph 21 contain conclusions of law and argument that Safeway need
24 not answer. Should this Court require Safeway to answer, Safeway denies the remaining
25 allegations of paragraph 21.

1 22. Safeway admits that during the time period Plaintiff alleges to have made
2 online purchases, the "FAQ" section of its website under the heading "Payment & Receipt"
3 provided in part:

4
5 **Why does my order confirmation say that the prices are**
6 **estimates only**

7 Prices on our web site are estimated due to a number of
8 reasons. Products sold by weight (For example: produce, meat,
9 etc.) have estimated prices. The price you pay will be based on
10 the actual weight of those items at the time your order is picked
11 for delivery. The order confirmation shows estimated prices
12 only and does not include sales tax, CRV and other charges.
13 Depending upon the delivery date you select, prices could vary
14 from the time you place your order and the time your order is
15 delivered, due to sales changes. You will be charged the prices
16 charged in the store on the day your order is picked and
17 delivered.

18 The remaining allegations of paragraph 22 contain conclusions of law and argument that
19 Safeway need not answer. Should this Court require Safeway to answer, Safeway denies
20 the remaining allegations of paragraph 22.

21 23. Safeway admits that during the time period Plaintiff alleges to have made
22 online purchases, the "FAQ" section of its website under the heading "Prices &
23 Promotions" provided:

24 **Will I pay the same prices online that are in your stores**

25 Except for certain items, you'll find most of the same great
26 promotions online as in your local store. Our goal is to keep
27 our prices low while giving you choices in how you shop.
28 Some special offers and promotions, such as manager specials,
etc., are limited to in-store purchases only and are not available
for online purchases. Safeway Club Card specials vary from
store to store and Club Card prices may not apply to certain
products offered online. You will receive the prices and
promotions applicable from your online store on the day of
delivery as noted next to each item.

1 The remaining allegations of paragraph 23 contain conclusions of law and argument that
2 Safeway need not answer. Should this Court require Safeway to answer, Safeway denies
3 the remaining allegations of paragraph 23.

4
5 24. The allegations of paragraph 24 contain conclusions of law that Safeway
6 need not answer. Should this Court require Safeway to answer, Safeway denies the
7 allegations of paragraph 24.

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9 25. Safeway denies the allegations of paragraph 25.

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11 26. The allegations of paragraph 26 contain conclusions of law that Safeway
12 need not answer. Should this Court require Safeway to answer, Safeway denies the
13 remaining allegations of paragraph 26 for lack of information sufficient to form a belief.

14
15 **PLAINTIFF'S TRANSACTION**

16 27. Safeway denies the allegations of paragraph 27 for lack of information
17 sufficient to form a belief.

18
19 28. Safeway denies the allegations of paragraph 28 for lack of information
20 sufficient to form a belief.

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22 29. Safeway denies the allegations of paragraph 29 for lack of information
23 sufficient to form a belief.

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25 30. The allegations of paragraph 30 contain conclusions of law that Safeway
26 need not answer. Should this Court require Safeway to answer those allegations, Safeway
27 denies those allegations of paragraph 30 for lack of information sufficient to form a belief.

1 Safeway further denies the remaining allegations of paragraph 30 for lack of information
2 sufficient to form a belief.

3
4 31. The allegations of paragraph 31 contain argument and conclusions of law
5 that Safeway need not answer. Should this Court require Safeway to answer those
6 allegations, Safeway denies those allegations of paragraph 31 for lack of information
7 sufficient to form a belief. Safeway further denies the remaining allegations of paragraph
8 31 for lack of information sufficient to form a belief.

9
10 32. Safeway denies the allegations of paragraph 32 for lack of information
11 sufficient to form a belief.

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13 33. Safeway denies the allegations of paragraph 33 for lack of information
14 sufficient to form a belief.

15
16 34. Safeway denies the allegations of paragraph 34 for lack of information
17 sufficient to form a belief.

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19 35. Safeway denies the allegations of paragraph 35 for lack of information
20 sufficient to form a belief.

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22 36. Safeway denies the allegations of paragraph 36.

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24 37. The allegations of paragraph 37 contain conclusions of law that Safeway
25 need not answer. Should this Court require Safeway to answer, Safeway denies the
26 allegations of paragraph 37 for lack of information sufficient to form a belief.

CLASS ACTION ALLEGATIONS

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2 38. Safeway admits that Plaintiff purports to bring this lawsuit, both individually
3 and as a class action, on behalf of all persons in the United States who have purchased
4 groceries from Safeway.com ("Class"), pursuant to Federal Rule of Civil Procedure
5 23(b)(2) and (3). Except as expressly admitted, Safeway denies the remaining allegations
6 of paragraph 38 for lack of information sufficient to form a belief.

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8 39. Paragraph 39 contains conclusions of law that Safeway need not answer.
9 Should this Court require Safeway to answer, Safeway denies the allegations of paragraph
10 39 for lack of information sufficient to form a belief.

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12 40. Paragraph 40 contains conclusions of law that Safeway need not answer.
13 Should this Court require Safeway to answer, Safeway denies the allegations of paragraph
14 40 for lack of information sufficient to form a belief.

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16 41. Paragraph 41 contains conclusions of law that Safeway need not answer.
17 Should this Court require Safeway to answer, Safeway denies the allegations of paragraph
18 41 for lack of information sufficient to form a belief.

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20 42. Paragraph 42 contains conclusions of law that Safeway need not answer.
21 Should this Court require Safeway to answer, Safeway denies the allegations of paragraph
22 42 for lack of information sufficient to form a belief.

23
24 43. Paragraph 43 contains conclusions of law that Safeway need not answer.
25 Should this Court require Safeway to answer, Safeway denies the allegations of paragraph
26 43 for lack of information sufficient to form a belief.

1 71. Paragraph 71 contains conclusions of law that Safeway need not answer.
2 Should this Court require Safeway to answer, Safeway denies the allegations of paragraph
3 71 for lack of information sufficient to form a belief.

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5 72. Paragraph 72 contains conclusions of law that Safeway need not answer.
6 Should this Court require Safeway to answer, Safeway denies the allegations of paragraph
7 72 for lack of information sufficient to form a belief.

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9 73. Paragraph 73 contains conclusions of law that Safeway need not answer.
10 Should this Court require Safeway to answer, Safeway denies the allegations of paragraph
11 73 for lack of information sufficient to form a belief.

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13 74. Paragraph 74 contains conclusions of law that Safeway need not answer.
14 Should this Court require Safeway to answer, Safeway denies the allegations of paragraph
15 74 for lack of information sufficient to form a belief.

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17 75. Paragraph 75 contains conclusions of law that Safeway need not answer.
18 Should this Court require Safeway to answer, Safeway denies the allegations of paragraph
19 75 for lack of information sufficient to form a belief.

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21 76. Paragraph 76 contains conclusions of law that Safeway need not answer.
22 Should this Court require Safeway to answer, Safeway denies the allegations of paragraph
23 76 for lack of information sufficient to form a belief.

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25 77. Paragraph 77 contains conclusions of law that Safeway need not answer.
26 Should this Court require Safeway to answer, Safeway denies the allegations of paragraph
27 77 for lack of information sufficient to form a belief.

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1 Any damages to which Plaintiff and/or the members of the putative class may be
2 found entitled to in this action, if any, were not directly or proximately caused, in whole or
3 in part, by Safeway, and must be decreased to the extent the acts of omissions of Plaintiff,
4 the members of the putative class, or any other third party were a cause of those damages.

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6 **FIFTH AFFIRMATIVE DEFENSE**

7 **(Privilege)**

8 The FAC, and each purported cause of action therein, is barred because Safeway's
9 acts were privileged under the law and by virtue of all parties' mutual understandings.

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13 **SIXTH AFFIRMATIVE DEFENSE**

14 **(Unjust Enrichment)**

15 Plaintiff and/or the members of the putative class would be unjustly enriched if they
16 recovered from Safeway any of the damages alleged in the FAC.

17
18 **SEVENTH AFFIRMATIVE DEFENSE**

19 **(Consent)**

20 Plaintiff and/or the members of the putative class consented and/or acquiesced to all
21 of Safeway's acts and conduct; thus, the FAC, and each purported cause of action therein,
22 is barred.

23
24 **EIGHTH AFFIRMATIVE DEFENSE**

25 **(Statute of Limitations)**

26 The FAC, and each purported cause of action therein, is barred in whole or in part
27 by the applicable statutes of limitation.

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NINTH AFFIRMATIVE DEFENSE

(Laches)

The claims of Plaintiff and/or the members of the putative class are barred by the doctrine of laches.

TENTH AFFIRMATIVE DEFENSE

(Waiver)

Plaintiff and/or the members of the putative class, by reason of their own acts, omissions, representations, and/or course of conduct, are estopped from asserting, and have waived any right to assert, each of their respective claims against Safeway.

ELEVENTH AFFIRMATIVE DEFENSE

(Unclean Hands)

The claims of Plaintiff and/or the members of the putative class are barred by the doctrine of unclean hands.

TWELFTH AFFIRMATIVE DEFENSE

(Reasonableness and Good Faith of Defendant)

The claims of Plaintiff and/or the members of the putative class are barred by the fact that Safeway acted reasonably and in good faith at all times material herein, based on the relevant facts and circumstances known by Safeway at the time Safeway so acted.

THIRTEENTH AFFIRMATIVE DEFENSE

(Bad Faith of Plaintiff)

The claims of Plaintiff and/or the members of the putative class are barred by the fact that they are frivolous, designed to harass and annoy Safeway, and are not brought in good faith.

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FOURTEENTH AFFIRMATIVE DEFENSE

(Estoppel)

The claims of Plaintiff and/or the members of the putative class are barred by the doctrine of estoppel to the extent Safeway detrimentally relied on Plaintiff's and/or the putative class members' representations, actions and/or failure to act.

FIFTEENTH AFFIRMATIVE DEFENSE

(Due Process)

The relief and remedies sought by Plaintiff and the putative class members violate Safeway's rights to due process under the California and United States constitutions.

SIXTEENTH AFFIRMATIVE DEFENSE

(Non-Certifiable Class)

The FAC does not state facts sufficient to certify a class pursuant to Rule 23 of the Federal Rules of Civil Procedure and, therefore, this action is not properly brought as a class action.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Inadequacy of Class Representative)

Plaintiff is not a proper representative of the class he purports to represent and, therefore, this action is not properly brought as a class action.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Lack of Standing)

Plaintiff and/or the members of the putative class lack standing to bring any of the claims alleged in the FAC against Safeway.

