

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

**BURSOR & FISHER, P.A.**  
L. Timothy Fisher (State Bar No. 191626)  
Neal J. Deckant (State Bar No. 322946)  
1990 North California Boulevard, Suite 940  
Walnut Creek, CA 94596  
Telephone: (925) 300-4455  
Facsimile: (925) 407-2700  
E-Mail: ltfisher@bursor.com  
ndeckant@bursor.com

**O'MELVENY & MYERS LLP**  
Richard B. Goetz (State Bar No. 115666)  
Carlos M. Lazatin (State Bar No. 229650)  
400 South Hope Street  
Los Angeles, CA 90071  
Telephone: (213) 430-6000  
Facsimile: (213) 430-6407  
Email: rgoetz@omm.com  
clazatin@omm.com

**BURSOR & FISHER, P.A.**  
Joseph I. Marchese (admitted *pro hac vice*)  
Frederick J. Klorczyk III (State Bar. No. 320783)  
888 Seventh Avenue  
New York, NY 10019  
Telephone: (646) 837-7150  
Facsimile: (212) 989-9163  
E-Mail: jmarchese@bursor.com  
fklorczyk@bursor.com

**O'MELVENY & MYERS LLP**  
Hannah Chanoine (*Pro Hac Vice*)  
Times Square Tower  
7 Times Square  
New York, NY 10036  
Telephone: (212) 326-2000  
Facsimile: (212) 326-2061  
E-mail: hchanoine@omm.com

*Attorneys for Defendants*

**BURSOR & FISHER, P.A.**  
Scott A. Bursor (State Bar No. 276006)  
701 Brickell Ave., Suite 1420  
Miami, FL 33131  
Tel: (305) 330-5512  
Fax: (305) 676-9006  
E-Mail: scott@bursor.com

*Class Counsel*

**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-MCE-DB

Hon. Morrison C. England, Jr.

**STIPULATION OF CLASS ACTION  
SETTLEMENT**

1 This Stipulation of Settlement (the “Stipulation”) is made by JoAnn Martinelli (the  
2 “Plaintiff” or “Class Representative”), on behalf of herself and the Settlement Class (defined  
3 below), on the one hand, and Defendants Johnson & Johnson and McNeil Nutritionals, LLC  
4 (collectively, “Defendants”) (together with Plaintiff, the “Parties”), on the other hand, subject to  
5 and conditioned upon Court approval of the terms and conditions hereof.

6 **RECITALS**

7 A. On August 14, 2015, Plaintiff JoAnn Martinelli commenced a putative Rule 23 class  
8 action captioned *Martinelli v. Johnson & Johnson et al.*, Case No. 2:15-cv-01733-MCE-DB (E.D.  
9 Cal.) (the “Action”), asserting claims for breach of express warranty, breach of the implied warranty  
10 of merchantability, unjust enrichment, violation of California’s Consumers Legal Remedies Act  
11 (“CLRA”), Cal. Civ. Code § 1750, *et seq.*, violation of California’s Unfair Competition Law  
12 (“UCL”), California Business and Professions Code § 17200, *et seq.*, violation of California’s False  
13 Advertising Law (“FAL”), California Business and Professions Code § 17500, *et seq.*, negligent  
14 misrepresentation, and fraud. Plaintiff alleges, *inter alia*, that the labeling of Benecol Spreads  
15 uniformly claims that the product contains “No Trans Fats” and “No Trans Fatty Acids,” but that  
16 Benecol Spreads contain trans fat through the use of partially hydrogenated oils, and as such the  
17 labels on Benecol Spreads are false and misleading.

18 B. On October 16, 2015, Plaintiff filed a First Amended Complaint (“FAC”) asserting  
19 the same claims. Dkt. No. 9.

20 C. Defendants answered the FAC on October 30, 2015, denying liability. Dkt. No. 11.  
21 Defendants contend that the labeling of Benecol Spreads is not misleading because, among other  
22 reasons, the labels clearly disclosed that the product contained partially hydrogenated oils and a  
23 resulting clinically insignificant amount of Trans Fats.

24 D. The Parties then engaged in extensive discovery, including a number of fact and  
25 expert depositions, and exchanged multiple rounds of written discovery, resulting in the production  
26 of tens of thousands of pages of documents.

27 E. On April 28, 2018, Plaintiff filed a Motion for Class Certification. Dkt. Nos. 171,  
28 182. Defendants opposed Plaintiff’s Motion. Dkt. Nos. 175. The Parties also filed motions to

1 exclude expert testimony and other evidence. Dkt. Nos. 176, 183, 184, 193, 195, 204. On March  
2 29, 2019, the Court granted Plaintiff's motion for class certification and certified two classes: (1)  
3 the "Multi-State Express Warranty Class," consisting of all Benecol purchasers between January 1,  
4 2008 and December 31, 2011 in California, and all Benecol purchasers between August 24, 2011  
5 and December 31, 2011 in Delaware, D.C., Kansas, Missouri, New Jersey, Ohio, Utah, Virginia,  
6 and West Virginia; and (2) the "California Class," consisting of all Benecol purchasers between  
7 January 1, 2008 and December 31, 2011 in California. Dkt. No. 216.

8 F. On March 20, 2020, Plaintiff filed a Motion for Entry of the Proposed Notice Plan.  
9 Dkt. No. 221, 229. Defendants opposed this motion. Dkt. No. 226. Defendants also filed a Motion  
10 to Modify the Class Definition on April 2, 2020, which Plaintiff opposed. Dkt. Nos. 227, 230, 232.  
11 These motions are currently pending. The Parties also continued to engage in merits discovery.

12 G. On October 15, 2020, Defendants filed a Motion to Decertify the Classes. Dkt. No.  
13 247. Plaintiff has not yet filed an opposition to this motion.

14 H. On October 27, 2020, the Parties filed a Stipulation and Proposed Order requesting  
15 that the Court stay the Action so that the Parties could engage in settlement negotiations. Dkt. No.  
16 254. On November 6, 2020, the Court granted the stipulation. Dkt. No. 255.

17 I. Class Counsel (defined below) conducted an examination and investigation of the  
18 facts and law relating to the matters alleged in this Action, including, but not limited to, engaging in  
19 discovery, review and analysis of Defendants' documents and data, and the retention of expert  
20 witnesses. Class Counsel also evaluated the merits of the Parties' contentions and evaluated this  
21 Settlement, as it affects all parties, including Settlement Class Members. The Class Representative  
22 and Class Counsel, after taking into account the foregoing, along with the risks and costs of further  
23 litigation, and the desire to provide prompt and effective relief to the Settlement Class Members,  
24 represent that they are satisfied that the terms and conditions of this Settlement are fair, reasonable,  
25 and adequate, and that this Settlement is in the best interest of the Settlement Class Members  
26 (defined below).

27 J. Defendants have expressly denied and continue to deny all claims, contentions and  
28 charges of wrongdoing or liability against them arising out of any of the conduct, statements, acts

1 and/or omissions alleged, or that could have been alleged in the Action. Defendants contend that  
2 Plaintiff's claims are without merit and deny all allegations of wrongdoing and liability with respect  
3 to all claims. In addition, Defendants do not concede that this case can be maintained as a class  
4 action under Rule 23 other than for settlement purposes. Any certification of a conditional,  
5 preliminary or final settlement class pursuant to the terms of this Settlement shall not constitute, and  
6 shall not be construed as, an admission on the part of Defendants that this Action, or any other  
7 proposed or certified class action, is appropriate for class treatment pursuant to Federal Rule of  
8 Civil Procedure 23 or any similar state or federal class action statute or rule. Defendants however  
9 consider it desirable to resolve the action to avoid further expense, inconvenience, and burden, and  
10 therefore have determined that this settlement on the terms set forth herein is appropriate. Neither  
11 the Stipulation nor any actions taken to carry out the Settlement are intended to be, nor may they be  
12 deemed or construed to be, an admission or concession of liability, or of the validity of any claim,  
13 defense, or of any point of fact or law on the part of any party. Defendants deny the material  
14 allegations of the complaint in this action. Neither the Stipulation, nor the fact of settlement, nor  
15 settlement proceedings, nor the settlement negotiations, nor any related document, shall be used as  
16 an admission of any fault or omission by Defendants, or be offered or received in evidence as an  
17 admission, concession, presumption, or inference of any wrongdoing by Defendants in any  
18 proceeding.

19 K. Substantial, arm's-length settlement negotiations have occurred between the Parties,  
20 spanning several years. The Parties engaged in three rounds of mediation before this Stipulation  
21 was reached. In 2017, the Parties participated in their first mediation with Judge Garrett E. Brown,  
22 Jr. (Ret.) at JAMS. But that mediation did not result in a resolution. Then, on July 6, 2018, the  
23 Parties engaged in their second mediation with Judge Wayne R. Andersen (Ret.) at JAMS. This  
24 mediation also failed to result in settlement. On November 16, 2020, the Parties attended a virtual  
25 mediation with Judge Wayne R. Andersen (Ret.) at JAMS. Although the Parties did not reach a  
26 settlement that day, the Parties continued settlement negotiations for several months thereafter with  
27 the assistance of Judge Andersen. The Parties' post-mediation negotiations with Judge Andersen  
28 resulted in the settlement memorialized herein.

1 L. In consideration of the covenants and agreements set forth herein, and of the releases  
2 and dismissals of claims as described below, and other good and valuable consideration, the receipt  
3 and sufficiency of which hereby is acknowledged by each of the Parties, the Class Representative,  
4 on behalf of herself and the Settlement Class Members, and Defendants, agree for settlement  
5 purposes only to the Settlement described herein, subject to Court approval, under the following  
6 terms and conditions:

7 **I. DEFINITIONS**

8 1.1 “Benecol Spreads” means Benecol Regular and Benecol Light Spreads that included  
9 the language “No Trans Fats” on the product packaging.

10 1.2 “Claim Form” means the document to be submitted by Settlement Class Members  
11 seeking cash payment pursuant to this Stipulation. The Claim Form will be available online at the  
12 Settlement Website (defined below) and the contents of the Claim Form will be approved by the  
13 Court. The Parties shall request the Court approve the Claim Form substantially in the form  
14 attached hereto and made a part hereof as Exhibit A.

15 1.3 “Claim Fund” means the total sum of money that Defendants shall make available  
16 for payment of Valid Claims, attorneys’ fees and expenses, administration costs, and the Incentive  
17 Award up to \$2 million (\$2,000,000.00).

18 1.4 “Claimant” means a Settlement Class Member who submits a claim for cash  
19 payment as described in Section II of this Stipulation.

20 1.5 “Class Counsel” means Scott A. Bursor and the law firm of Bursor & Fisher, P.A.

21 1.6 “Class Notice” means the Court-approved notice plan described in Section IV below.

22 1.7 “Class Representative” means Plaintiff JoAnn Martinelli.

23 1.8 “Court” means the United States District Court, Eastern District of California.

24 1.9 “Defendants’ Counsel” means the law firm of O’Melveny & Myers LLP.

25 1.10 “District Court Final Approval Date” means the day on which the Court’s Settlement  
26 Approval Order and Final Judgment (defined below) is entered.

27 1.11 “Fee and Expense Award” means the amount that may be awarded to Class Counsel  
28 by the Court for attorneys’ fees, costs, and expenses.

1           1.12 “Final Settlement Approval Date” means the later of thirty (35) days after entry of  
2 the Settlement Approval Order and Final Judgment or expiration of the time to appeal from the  
3 Settlement Approval Order and Final Judgment without any appeal being taken, or if an appeal or  
4 request for review (including but not limited to a request for reconsideration or rehearing, or a  
5 petition for a writ of certiorari) has been taken, the date on which the Settlement Approval Order  
6 and Final Judgment has been affirmed by the court of last resort to which an appeal or request for  
7 review has been taken and such affirmance is no longer subject to further appeal or review, or the  
8 date of denial of review after exhaustion of all appellate remedies.

9           1.1 “Household” means all persons or entities who share a physical address. For all  
10 corporations, partnerships, business organizations or associations, or other type of legal entity, there  
11 can be only one physical address used even if there are multiple locations.

12           1.2 “Incentive Award” means any award not to exceed \$7,500, sought by application to  
13 and approved by the Court for payment to the Class Representative.

14           1.3 “Long Form Notice” means the Court-approved long form of notice to be posted to  
15 the Settlement Website (defined below), pursuant to the Media Plan (defined below). The Parties  
16 shall request the Court approve the Long Form Notice substantially in the form attached hereto and  
17 made a part hereof as Exhibit B.

18           1.4 “Media Plan” means the Settlement Administrator’s plan to disseminate Class Notice  
19 to Settlement Class Members, attached hereto as Exhibit C. The Media Plan will be designed to  
20 have a reach of at least seventy (70) percent for Settlement Class Members.

21           1.5 “Notice and Other Administrative Costs” means all costs and expenses actually  
22 incurred by the Settlement Administrator (defined below) in the publication of Class Notice,  
23 establishment of the Settlement Website (defined below) and the processing, handling, reviewing,  
24 and paying of claims made by Claimants.

25           1.6 “Parties” means JoAnn Martinelli, Johnson & Johnson, and McNeil Nutritionals,  
26 LLC.

27           1.7 “Preliminary Approval” means that the Court has entered an order preliminarily  
28 approving the terms and conditions of this Stipulation, including the manner of providing and

1 content of notice to Settlement Class Members. The Parties shall request that the Court enter the  
2 proposed Preliminary Settlement Approval Order substantially in the form attached hereto and  
3 made a part hereof as Exhibit D.

4 1.8 “Preliminary Approval Date” means the date on which the Court enters an Order  
5 granting Preliminary Approval.

6 1.9 “Proof of Purchase” shall mean documentary evidence (*e.g.*, a receipt, a transaction  
7 on a store loyalty card) establishing a specifically itemized purchase of Benecol Spreads, the date of  
8 purchase, and the purchase price. To constitute a purchase for which a Claimant is eligible to  
9 submit a Claim, all payments must have been made in full.

10 1.10 “Released Persons” means and includes Defendants and all of Defendants’ past and  
11 present respective parents, subsidiaries, divisions, affiliates, persons and entities directly or  
12 indirectly under its or their control in the past or in the present, Defendants’ respective assignors,  
13 predecessors, successors, and assigns, and all past or present partners, shareholders, managers,  
14 members, directors, officers, employees, agents, attorneys, insurers, accountants, and  
15 representatives of any and all of the foregoing.

16 1.11 “Settlement Administrator” means JND and its successors and assigns.

17 1.12 “Settlement Class Members” or “Settlement Class” means:

18 All individuals who purchased Benecol Spreads in the United States from  
19 January 1, 2008 through December 31, 2011 for personal use. Excluded  
20 from this definition are the Released Persons. Settlement Class Members  
21 who exclude themselves from the Settlement, pursuant to the procedures set  
22 forth in Section V of the Stipulation, shall no longer thereafter be Settlement  
23 Class Members and shall not be bound by this Stipulation and shall not be  
24 eligible to make a claim for any benefit under the terms of this Stipulation.

25 1.13 “Settlement Class Period” means the period of time from January 1, 2008 through  
26 December 31, 2011.

27 1.14 “Settlement Approval Order and Final Judgment” means an order and judgment  
28 issued and entered by the Court, substantially in the form as that attached hereto and made a part  
hereof as Exhibit E, approving this Stipulation as binding upon the Parties and the Settlement Class  
Members and dismissing the Action with prejudice, and setting the amount for an award of  
attorneys’ fees, costs, and expenses, all to be determined by the Court, not to exceed one-third of the

1 total value of the Settlement. The Settlement Approval Order and Final Judgment shall constitute a  
2 judgment within the meaning and for purposes of Rule 54 of the Federal Rules of Civil Procedure.  
3 The Parties shall request the Court to enter the proposed Settlement Approval Order and Final  
4 Judgment substantially in the form attached hereto and made a part hereof as Exhibit E.

5 1.15 “Settlement Website” means a website operated and maintained by the Settlement  
6 Administrator solely for purposes of making available to the Settlement Class Members the  
7 documents, information, and online claims submission process referenced in paragraphs 2.4 through  
8 2.6 below.

9 1.16 “Short Form Notice” means the Court-approved form of notice for publication to  
10 Settlement Class Members, pursuant to the Media Plan. The Parties shall request the Court approve  
11 the Short Form Notice substantially in the form attached hereto and made a part hereof as Exhibit F.

12 1.17 “Valid Claim” means a Claim Form that (i) is timely submitted by a Class Member  
13 in accordance with the requirements of the Preliminary Approval Order, (ii) is signed with a  
14 certification that the information is true and correct to the Class Member’s knowledge and  
15 recollection, and (iii) contains all of the information and/or documentation necessary for that Class  
16 Member to be eligible to receive a monetary benefit pursuant to this Settlement.

17 1.18 As used herein, the plural of any defined term includes the singular thereof and the  
18 singular of any defined term includes the plural thereof, as the case may be.

## 19 **II. SETTLEMENT CONSIDERATION**

20 2.1 Monetary Relief. Defendants shall make available a total Claim Fund of up to two  
21 million dollars (\$2,000,000) for payment of Valid Claims, attorneys’ fees and expenses,  
22 administration costs, and the Incentive Award.

23 **2.1.1** Defendants shall not be required to make any part of the Claim Fund available to the  
24 Settlement Administrator for payment of Valid Claims until after the Final  
25 Settlement Approval Date. Defendants shall effect the transfer of sufficient funds to  
26 satisfy the payment of Valid Claims to an escrow account within 90 days after the  
27 Final Settlement Approval Date.

28 **2.1.2** The amount of the refund for any claim shall be determined as follows:



1           **2.1.2.1** For any Settlement Class Member who provides a Proof of Purchase, the  
2           Settlement Class Member shall be entitled to a full monetary refund of the  
3           amount(s) shown on the Proof of Purchase, for as many units of the Benecol  
4           Spreads as he or she has a Proof of Purchase.

5           **2.1.2.2** For any Settlement Class Member who does not provide a Proof of Purchase, but  
6           who submits a Claim Form, either online or via mail, attesting, swearing or  
7           affirming under penalty of perjury that he or she purchased Benecol Spreads  
8           during the Settlement Class Period, the amount paid to each Settlement Class  
9           Member will be \$5 per unit of Benecol Spreads, with a cap of 4 units per  
10          Settlement Class Member (i.e., up to \$20 per Settlement Class Member).

11          **2.1.2.3** Payments to Claimants may be subject to pro rata reduction if the total value of  
12          all Valid Claims exceeds the \$2 million Claim Fund after reduction of the Claim  
13          Fund by the payment of attorneys' fees and expenses, administration costs, and  
14          the Incentive Award.

15          **2.1.2.4** Every Claimant will have the option of receiving payment by check or by  
16          electronic payment. Claimants may select an electronic payment option on the  
17          Claim Form for payment of a claim. If the Claimant does not select any payment  
18          option, the Claimant will be sent payment by check. All settlement checks issued  
19          to Claimants will be valid and negotiable for a period of one hundred twenty  
20          (120) days.

21          **2.1.2.5** Adequate and customary procedures and standards will be used by the Settlement  
22          Administrator to prevent the payment of fraudulent claims and to pay only  
23          legitimate claims. The Settlement Administrator shall have the right to audit  
24          claims to prevent payment of fraudulent claims and shall have the right to request  
25          additional information from Claimants (beyond the online claim form), including  
26          speaking with Claimants, if necessary. The Settlement Administrator shall have  
27          sole discretion to determine what is a Valid Claim, and shall only make payment  
28          of what it deems to be a Valid Claim and may reject claims that it deems to be

1 invalid or evidence of fraud or abuse. The determination of validity of claims  
2 shall occur within sixty (60) days after the Final Settlement Approval Date.

3 **2.1.2.6** The Settlement Administrator shall approve or deny all claims, and its decision  
4 shall be final, binding, and non-appealable by either Party or by Settlement Class  
5 Members except that Plaintiffs' counsel and Defendants shall have the right to  
6 audit claims and to challenge the Settlement Administrator's decision by motion  
7 to the Court. Defendants' choice not to audit the validity of any one or more  
8 Claim Form(s) shall not constitute or be construed as a waiver or relinquishment  
9 of any audit or other rights as to any other Claim Form, individually or as a  
10 group, and similarly shall not be construed as a waiver or relinquishment by the  
11 Party as to any of its audit and other rights under this Agreement. Nothing in this  
12 Agreement or claims process creates a claim by any person against the Class  
13 Representative, Defendants, Defendants' Counsel, or the Settlement  
14 Administrator based on any determination of a valid claim, distributions, or  
15 awards made in accordance with this Agreement and the Exhibits hereto, and all  
16 relief shall be solely as provided in this Agreement and by its Claims process.  
17 Neither the Parties nor their counsel, shall have any liability whatsoever for any  
18 act or omission of the Settlement Administrator.

19 **2.2** Other Payments. Defendants shall pay for the following costs and expenses from the  
20 Claim Fund in accordance with the following schedule:

21 a. *Notice and Other Administrative Costs.* Amounts equal to the cost of  
22 publishing the Class Notice and other administrative costs, to be paid within ninety (90) days of  
23 when such amounts are invoiced to Defendants for work completed and become due and owing.

24 b. *Fee and Expense Award.* An amount equal to the Fee and Expense Award, to  
25 be paid as described at paragraph 3.1, below.

26 c. *Incentive Award.* An amount equal to any Incentive Award, not to exceed  
27 \$7,500, as may be ordered by the Court and as described at paragraph 3.2, below.

28 **2.3** Notice to Attorneys General. Not later than ten (10) days after the Motion for

1 Preliminary Approval of the Settlement is filed in court, the Settlement Administrator shall in  
2 consultation with Defendants' Counsel provide notice of the proposed class action settlement to the  
3 appropriate state officials (*i.e.*, each state attorney general) and the Attorney General of the United  
4 States pursuant to 28 U.S.C. § 1715, and the costs of such notice shall be paid from the Settlement  
5 Fund.

6 2.4 Claims per Household. Only one claim form per Household is eligible.

7 **III. CLASS COUNSEL ATTORNEYS' FEES AND EXPENSES AND CLASS**  
8 **REPRESENTATIVE INCENTIVE AWARD**

9 3.1 Attorneys' Fees, Costs and Expenses. Class Counsel shall apply to the Court for  
10 payment of an award of attorneys' fees, costs and expenses of up to one-third of the total value of  
11 the Settlement. Such fees, costs and expenses, if approved by the Court, shall be payable within 90  
12 days following the District Court's fee award, which shall under no circumstances occur prior to  
13 the Settlement Approval Order and Final Judgment, subject to Class Counsel executing the  
14 Undertaking Regarding Attorneys' Fees and Costs (the "Undertaking") attached hereto as Exhibit  
15 G, and providing all payment routing information and tax I.D. numbers for Class Counsel.

16 3.2 Incentive Award. Class Counsel will petition the Court for approval of an Incentive  
17 Award payable to the Class Representative in an amount not to exceed \$7,500.00. Defendants  
18 shall pay such award by wire transfer or check to Class Counsel within 90 calendar days after the  
19 Final Settlement Approval Date, subject to the prior delivery to Defendants of the  
20 W-9 for Class Counsel.

21 **IV. NOTICE TO CLASS AND ADMINISTRATION OF SETTLEMENT**

22 4.1 Class Notice. The Class Notice shall consist of the Long Form Notice and the Short  
23 Form Notice. The Class Notice shall conform to all applicable requirements of the Federal Rules  
24 of Civil Procedure, the United States Constitution (including the Due Process Clauses), and any  
25 other applicable law, and shall otherwise be in the manner and form approved by the Court. Class  
26 notice and claims administration will be provided by JND with a media plan designed to achieve  
27 no less than seventy (70) percent reach. Direct notice will be provided to Settlement Class  
28 Members for whom Defendants have contact information.

4.2 General Notice Terms. The Class Notice shall:

- 1 a. inform Settlement Class Members that, if they do not exclude themselves
- 2 from the Class, they may be eligible to receive the relief under the proposed settlement;
- 3 b. contain a short, plain statement of the background of the Action, the class
- 4 certification and the proposed settlement;
- 5 c. describe the proposed settlement relief outlined in this Stipulation; and
- 6 d. state that any relief to Settlement Class Members is contingent on the
- 7 Court's final approval of the proposed settlement.

8 4.3 Notice of Exclusion and Objection Rights. The Class Notice shall inform  
9 Settlement Class Members of their rights to exclude themselves from the Class or object to the  
10 proposed settlement, as described in paragraph 5.3 below. The Class Notice shall further inform  
11 Settlement Class Members that any judgment entered in the Action, whether favorable or  
12 unfavorable to the Class, shall include, and be binding on, all Settlement Class Members who have  
13 not been excluded from the Class, even if they have objected to the proposed settlement and even if  
14 they have any other claim, lawsuit or proceeding pending against Defendants.

15 4.4 Time and Manner of Notice. Class Notice shall be provided as set forth in the  
16 Media Plan; media delivery of Class Notice shall commence within thirty (30) days after the  
17 Preliminary Approval Date. Direct notice will be provided to Settlement Class Members for whom  
18 Defendants have contact information.

19 4.5. Responsibilities of Settlement Administrator. The Parties will retain JND to help  
20 implement the terms of the proposed Stipulation. The Settlement Administrator shall be  
21 responsible for administrative tasks, including, without limitation, (a) notifying the appropriate  
22 state and federal officials about the settlement, (b) arranging for distribution of Class Notice (in the  
23 form approved by the Court) and Claim Forms (in a form ordered by the Court) to Settlement Class  
24 Members, (c) answering inquiries from Settlement Class Members and/or forwarding such written  
25 inquiries to Class Counsel and Defendants' Counsel, (d) receiving and maintaining on behalf of the  
26 Court and the Parties any Settlement Class Member correspondence regarding requests for  
27 exclusion from the settlement, (e) establishing the Settlement Website that posts notices, Claim  
28 Forms and other related documents, (f) receiving and processing claims and distributing payments

1 to Settlement Class Members, and (g) otherwise assisting with implementation and administration  
2 of the Stipulation terms. The actual costs and expenses of the Settlement Administrator, which are  
3 referred to as the Notice and Other Administrative Costs, will be paid from the Settlement Fund.

4 4.6. Performance Standards of Settlement Administrator. The contract with the  
5 Settlement Administrator shall obligate the Settlement Administrator to abide by the following  
6 performance standards:

7 a. The Settlement Administrator shall accurately and neutrally describe, and  
8 shall train and instruct its employees and agents to accurately and objectively describe, the  
9 provisions of this Stipulation in communications with Settlement Class Members;

10 b. The Settlement Administrator shall provide prompt, accurate and objective  
11 responses to inquiries from Class Counsel or their designee, Defendants and/or Defendants'  
12 Counsel, and shall periodically report on claims, objectors, exclusions, and related matters.

13 c. The Settlement Administrator shall seek clarification, instruction or  
14 authorization for performance of its duties and expenditure or disposition of cash from both Class  
15 Counsel and their designee and from Defendants and/or Defendants' Counsel or their designee.

16 **V. CLASS SETTLEMENT PROCEDURES**

17 5.1 Settlement Approval. As soon as practical after the signing of this Stipulation, the  
18 Class Representative shall move for certification of a nationwide class for settlement purposes only  
19 and for entry of the Preliminary Approval Order, conditionally certifying the nationwide  
20 Settlement Class, preliminarily approving the terms and conditions of this Stipulation as fair,  
21 reasonable, and adequate, and in the best interests of the Settlement Class Members, approving  
22 notice to the Settlement Class Members as described in Section IV above, and setting a hearing to  
23 consider final approval of the Settlement and any objections thereto.

24 5.2 Settlement Approval Order and Final Judgment. At or before the final approval  
25 hearing, the Class Representative shall move for entry of a Settlement Approval Order and Final  
26 Judgment substantially in the form as that attached hereto and made a part hereof as Exhibit E,  
27 granting final approval of this Settlement and holding this Stipulation to be fair, reasonable, and  
28 adequate, and in the best interests of the Settlement Class Members, and binding (as of the Final

1 Settlement Approval Date) on all Settlement Class Members who have not excluded themselves as  
2 provided below, and ordering that the Settlement relief be provided as set forth in this Stipulation,  
3 ordering the releases as set forth in Section VI below to be effective on the Final Settlement  
4 Approval Date, and entering judgment in the Action.

5           5.3     Exclusions and Objections. The Class Notice shall advise all Settlement Class  
6 Members of their right: (a) to be excluded from the Settlement, or (b) to object to the Settlement.  
7 If, within such time as is ordered by the Court and contained in the Class Notice, any Settlement  
8 Class Member wishes to be excluded from the Settlement, he or she must do so by timely mailing a  
9 valid opt-out notice, as described in the Class Notice. Any Settlement Class Member who timely  
10 elects to opt out of the Settlement shall not be permitted to object to the Settlement. Persons falling  
11 within the definition of the Settlement Class who validly and timely request exclusion from the  
12 Settlement effected by this Stipulation, pursuant to the procedures set forth in this paragraph, shall  
13 not be Settlement Class Members, shall not be bound by this Stipulation and shall not be eligible to  
14 make a claim for any benefit under the terms of this Stipulation.

15           5.4     At least seven (7) calendar days prior to the final approval hearing, Class Counsel  
16 shall prepare or cause the Settlement Administrator to prepare a list of the persons who have  
17 excluded themselves in a valid and timely manner from the Settlement Class (the “Opt-Outs”), and  
18 Class Counsel shall file that list with the Court. If, within such time as is ordered by the Court and  
19 contained in the Class Notice, any Settlement Class Member wishes to object to the Settlement  
20 and/or to be heard, he or she must, on or before the deadlines established by the Court, submit to  
21 the Settlement Administrator a written notice of objection and/or request to be heard. Such  
22 communication shall state the name and address of the Settlement Class Member, shall include  
23 information sufficient to demonstrate membership in the Settlement Class, shall state the specific  
24 grounds for each objection asserted, and shall state whether the Settlement Class Member intends  
25 to appear at the final approval hearing.

26           5.5     Defendants shall have the right, but not the obligation, to terminate this Agreement  
27 by providing written notice of their election to do so if the threshold contained in a separate  
28 agreement (which the Parties will seek leave to file under seal with the Court with access to the

1 agreement limited to Settlement Class Counsel and Defendants' Counsel only) is exceeded. Stay of  
2 the Action. The Parties shall request that the Court, in connection with Preliminary Approval,  
3 issue an immediate stay of the Action.

4           5.6    Effect If Settlement Not Approved. This Stipulation is being entered into only for  
5 purposes of settlement, subject to and without waiver of the Parties' respective rights. If the Court  
6 does not enter the order granting Preliminary Approval or does not grant final approval, or if the  
7 Final Settlement Approval Date does not occur, Class Counsel and Defendants' Counsel shall  
8 endeavor, consistent with the Stipulation, to cure any defect identified by the Court; provided,  
9 however, that Defendants shall not be obligated to accept such cure if it materially alters the terms  
10 of this Stipulation, including by increasing the cost or burden of the Stipulation to Defendants or  
11 any of the other Released Persons or reducing or otherwise affecting the scope of the releases  
12 provided by this Stipulation. In the event that the Stipulation is terminated for any reason, final  
13 approval does not occur for any reason, or the Final Settlement Approval Date does not occur, then  
14 no term or condition of the Stipulation, or any draft thereof, or any discussion, negotiation,  
15 documentation, or other part or aspect of the Parties' settlement discussions shall have any effect,  
16 nor shall any such matter be admissible in evidence for any purpose in the Action, or in any other  
17 proceeding, and the Parties shall be restored to their respective positions immediately preceding  
18 execution of this Stipulation. If the final Settlement Approval Order and Final Judgment or any  
19 part of it is vacated, overturned, reversed, or rendered void as a result of an appeal, or the  
20 Stipulation is voided, rescinded, or otherwise terminated for any other reason, then within thirty  
21 (30) days, Class Counsel shall return to Defendants all attorneys' fees, costs, and other payments  
22 received by Class Counsel under the Stipulation, as set forth in paragraph 3.1 above, plus any  
23 accrued interest at a rate of 2.5% per annum. The Parties agree that all drafts, discussions,  
24 negotiations, documentation, or other information prepared in relation to the Stipulation and the  
25 Parties' settlement discussions shall be treated as strictly confidential and may not be disclosed to  
26 any person other than the Parties' counsel, and only for purposes of the settlement of this Action,  
27 and may not be used for any purpose other than for the settlement of this Action.

28           5.7    Termination. The Stipulation shall have no effect unless and until this Stipulation is

1 fully executed by all Parties.

2 **VI. RELEASES**

3 6.1 Release by Settlement Class Members. Effective as of the Final Settlement  
4 Approval Date, each and all of the Settlement Class Members (except any such person who has  
5 filed a proper and timely request for exclusion and any person or entity that purchased Benecol  
6 Spreads for purposes of resale and not for his/her/its own consumption (i.e., “Resellers”), but solely  
7 in such Reseller capacity) shall be deemed to have, and by operation of law shall have, fully,  
8 finally and forever released, relinquished, and discharged, and shall be forever barred from  
9 asserting, instituting, or maintaining against any or all of the Released Persons, any and all claims,  
10 demands, actions, causes of action, lawsuits, arbitrations, damages, or liabilities whether legal,  
11 equitable, or otherwise, relating in any way to the claims asserted or the factual or legal allegations  
12 made in the Action, including without limitation the alleged misrepresentations of the Benecol  
13 Spreads and/or the purchase of any of the Benecol Spreads at any time on or after January 1, 2008  
14 through the December 31, 2011 (collectively, the “Claims”). With respect to the Claims released  
15 pursuant to this paragraph, each Settlement Class Member shall be deemed to have waived,  
16 relinquished and released all claims that have or could have been asserted in the action consistent  
17 with the broadest scope of release permitted under *Hesse v. Sprint Corp.*, 598 F. 3d 581, 590 (9th  
18 Cir. 2010).

19 6.2 Release by Class Representative. Effective as of the Final Settlement Approval  
20 Date, the Class Representative JoAnne Martinelli shall be deemed to have, and by operation of law  
21 shall have, fully, finally and forever released, relinquished, and discharged, and shall be forever  
22 barred from asserting, instituting, or maintaining against any or all of the Released Persons, any  
23 and all claims, demands, actions, causes of action, lawsuits, arbitrations, damages, or liabilities  
24 whether legal, equitable, or otherwise, relating in any way to the claims asserted or the factual or  
25 legal allegations made in the Action, including without limitation the alleged misrepresentations of  
26 the Benecol Spreads and/or the purchase of any of the Benecol Spreads at any time on or after  
27 January 1, 2008 through the December 31, 2011, and all other claims whether fixed or contingent,  
28 whether suspected or claimed, whether legal or equitable, whether based on a tort, contract,



1 warranty, equity, statute or other theory of recovery, and whether for compensatory or punitive  
2 damages that Class Representative has or may have against Defendants (including but not limited  
3 to false advertising, consumer fraud, or unfair deceptive, or unlawful business practice claims)  
4 (“Individually Released Claims”). The Individually Released Claims expressly exclude any future  
5 claims against Defendants for alleged bodily injuries arising after the Effective Date of this  
6 Agreement. The Individually Released Claims also expressly exclude any action or claim to  
7 enforce the terms of this Agreement.

8           6.3     The releases in sections 6.1 and 6.2 above shall be interpreted to the fullest extent  
9 permitted by law, and each Settlement Class Member and the Class Representative shall be deemed  
10 to have waived any and all provisions, rights and benefits conferred by California Civil Code  
11 section 1542 (and equivalent, comparable, or analogous provisions of the laws of the United States  
12 of America or any state or territory thereof, or of the common law or civil law). Section 1542  
13 provides that:

14                   **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**  
15                   **THAT THE CREDITOR OR RELEASING PARTY DOES**  
16                   **NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER**  
17                   **FAVOR AT THE TIME OF EXECUTING THE RELEASE,**  
18                   **AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE**  
19                   **MATERIALLY AFFECTED HIS OR HER SETTLEMENT**  
20                   **WITH THE DEBTOR OR RELEASED PARTY.**

21 Thus, as of the Final Settlement Approval Date, each Settlement Class Member shall be deemed to  
22 have expressly waived and fully, finally, and forever settled and released any known or unknown,  
23 suspected or unsuspected, contingent or noncontingent claim with respect to the Claims, whether or  
24 not concealed or hidden, without regard to subsequent discovery of existence of different or  
25 additional facts, and the Class Representative shall be deemed to have done the same with respect  
26 to Individually Released Claims. Each and every term of sections 6.1 and 6.2 shall inure to the  
27 benefit of each and all of the Released Persons, and each and all of their respective successors and  
28 personal representatives, which persons and entities are intended to be beneficiaries of this  
paragraph. For avoidance of doubt, this Release of Claims does not release any claims of Resellers  
of Benecol Spreads in their capacity as such.



1 part of Defendants that this Action, or any other proposed or certified class action, is appropriate  
2 for class treatment pursuant to Federal Rule of Civil Procedure 23 or any similar state or federal  
3 class action statute or rule. Neither the fact of this settlement nor this Stipulation shall be used in  
4 connection with efforts in any proceeding to seek nationwide or any other certification of any  
5 claims asserted against Defendants.

6 7.3 In the event the Court does not approve the settlement and Stipulation, then this  
7 conditional certification is null and void, shall have no force or effect, and shall not be used or  
8 referred to for any purposes whatsoever in the Action or in any other case or controversy. In such  
9 an event, this Stipulation and all negotiations and proceedings related thereto shall be deemed to be  
10 without prejudice to the right of the Parties, who shall be restored to their respective positions as of  
11 the date of this Stipulation, and Defendants shall not be deemed to have waived any opposition or  
12 defenses it has to any aspect of the claims asserted in the Action or to whether those claims or the  
13 Action may properly be maintained as a class action.

#### 14 **VIII. MISCELLANEOUS PROVISIONS**

15 8.1 Change of Time Periods. The time periods and/or dates described in this Stipulation  
16 with respect to the giving of notices and hearings are subject to approval and change by the Court or  
17 by the written agreement of Class Counsel and Defendants' Counsel, without notice to Settlement  
18 Class Members. The Parties reserve the right, by agreement and subject to the Court's approval, to  
19 grant any reasonable extension of time that might be needed to carry out any of the provisions of  
20 this Stipulation.

21 8.2 Time for Compliance. If the date for performance of any act required by or under  
22 this Stipulation falls on a Saturday, Sunday, or court holiday, that act may be performed on the next  
23 business day with the same effect as if it had been performed on the day or within the period of time  
24 specified by or under this Stipulation.

25 8.3 Governing Law. This Stipulation is intended to and shall be governed by the laws of  
26 the State of California without giving effect to principles of conflicts of laws.

27 8.4 Entire Agreement. The terms and conditions set forth in this Stipulation constitute  
28 the complete and exclusive statement of the agreement between the parties relating to the subject

1 matter of this Stipulation, superseding all previous negotiations and understandings, and may not be  
2 contradicted by evidence of any prior or contemporaneous agreement. The Parties further intend  
3 that this Stipulation constitute the complete and exclusive statement of its terms as between the  
4 parties, and that no extrinsic evidence whatsoever may be introduced in any agency or judicial  
5 proceeding, if any, involving this Stipulation. Any modification of the Stipulation must be in  
6 writing signed by Class Counsel and Defendants.

7 8.5 Advice of Counsel. The determination of the terms and the drafting of this  
8 Stipulation have been by mutual agreement after negotiation, with consideration by and  
9 participation of all parties and their counsel. The presumption found in California Civil Code  
10 section 1654 (and equivalent, comparable, or analogous provisions of the laws of the United States  
11 of America or any state or territory thereof, or of the common law or civil law) that uncertainties in  
12 a contract are interpreted against the party causing an uncertainty to exist is waived by all parties.

13 8.6 Binding Agreement. This Stipulation shall be binding upon and inure to the benefit  
14 of the respective heirs, successors, and assigns of the Parties, the Settlement Class Members, and  
15 the other Released Persons.

16 8.7 No Waiver. The waiver by any party of any provision or breach of this Stipulation  
17 shall not be deemed a waiver of any other provision or breach of this Stipulation.

18 8.8 Execution in Counterparts. This Stipulation shall become effective upon its  
19 execution by all of the undersigned. The parties may execute this Stipulation in counterparts, and  
20 execution of counterparts shall have the same force and effect as if all parties had signed the same  
21 instrument. The parties further agree that signatures provided by portable document format (PDF)  
22 or other electronic transmission shall have the same force and effect as original signatures.

23 8.9 Enforcement of this Stipulation. The Court shall retain jurisdiction, and shall have  
24 exclusive jurisdiction, to enforce, interpret, and implement this Stipulation, and the terms of any  
25 order entered pursuant to this Stipulation.

26 8.10 Best Efforts. The Parties and their undersigned counsel agree to undertake their best  
27 efforts and mutually cooperate to promptly effectuate this Stipulation and the terms of the  
28 settlement set forth herein, including taking all steps and efforts contemplated by this Stipulation

1 and any other steps and efforts which may become necessary by order of the Court or otherwise.

2 8.11 Destruction of Documents. Within twenty (20) days of the Final Settlement  
3 Approval Date, the Parties shall destroy all non-public documents received from the other party  
4 during the course of this litigation, and serve upon each other a certification that they have done so.

5 8.12 Notices. All notices to the Parties or counsel required by this Stipulation shall be  
6 made in writing and communicated by email and mail to the following address:

7 If to Class Representative, Settlement Class Members, or Class Counsel:

8 Joseph I. Marchese  
9 Bursor & Fisher, P.A.  
10 888 Seventh Avenue, Third Floor  
11 New York, NY 10019  
12 Telephone: (646) 837-7150  
13 E-Mail: [jmarchese@bursor.com](mailto:jmarchese@bursor.com)

14 If to Defendants or Defendants' Counsel:

15 Hannah Y. Chanoine  
16 O'Melveny & Myers LLP  
17 Times Square Tower  
18 7 Times Square  
19 New York, NY, 10036  
20 Telephone: (212) 326-2000  
21 E-Mail: [hchanoine@omm.com](mailto:hchanoine@omm.com)

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

IN WITNESS HEREOF the undersigned, being duly authorized and intending to be legally bound hereby, have caused this Stipulation to be executed on the dates shown below and agree that it shall take effect on the date it is executed by all of the undersigned.

**APPROVED AND AGREED:**

DATED: 07/14, 2021

JoAnn Martinelli  
JoAnn Martinelli (Jul 14, 2021 08:03 PDT)

Plaintiff JoAnn Martinelli

DATED: \_\_\_\_\_, 2021

Johnson & Johnson

\_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Dated: \_\_\_\_\_, 2021

McNeil Nutritionals, LLC

\_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

**APPROVED AS TO FORM AND CONTENT:**

Dated: \_\_\_\_\_, 2021

BURSOR & FISHER, P.A.

\_\_\_\_\_  
Scott A. Bursor  
*Class Counsel*

Dated: \_\_\_\_\_, 2021

O'MELVENY & MYERS LLP

\_\_\_\_\_  
Hannah Y. Chanoine  
*Attorneys for Defendants*

1 IN WITNESS HEREOF the undersigned, being duly authorized and intending to be legally  
2 bound hereby, have caused this Stipulation to be executed on the dates shown below and agree that it  
3 shall take effect on the date it is executed by all of the undersigned.

4 **APPROVED AND AGREED:**

5  
6 DATED: \_\_\_\_\_, 2021

\_\_\_\_\_  
Plaintiff JoAnn Martinelli

7  
8  
9 DATED: \_\_\_\_\_, 2021

Johnson & Johnson

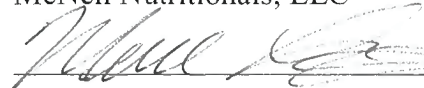
10   
\_\_\_\_\_

11 By: Marc Larkins

12 Title: Assistant Corporate Secretary

13  
14  
15 Dated: \_\_\_\_\_, 2021

McNeil Nutritionals, LLC

16   
\_\_\_\_\_

17 By: Marc Larkins

18 Title: Assistant Corporate Secretary

19  
20 **APPROVED AS TO FORM AND CONTENT:**

21 Dated: \_\_\_\_\_, 2021

BURSOR & FISHER, P.A.

22  
23 \_\_\_\_\_  
24 Scott A. Bursor  
Class Counsel

25  
26 Dated: \_\_\_\_\_, 2021

O'MELVENY & MYERS LLP

27 \_\_\_\_\_  
28 Hannah Y. Chanoine  
Attorneys for Defendants

1 IN WITNESS HEREOF the undersigned, being duly authorized and intending to be legally  
2 bound hereby, have caused this Stipulation to be executed on the dates shown below and agree that it  
3 shall take effect on the date it is executed by all of the undersigned.

4 **APPROVED AND AGREED:**


5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

DATED: \_\_\_\_\_, 2021 \_\_\_\_\_  
Plaintiff JoAnn Martinelli

DATED: \_\_\_\_\_, 2021 Johnson & Johnson  
\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_

Dated: \_\_\_\_\_, 2021 McNeil Nutritionals, LLC  
\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_

**APPROVED AS TO FORM AND CONTENT:**

Dated: July 14, 2021 BURSOR & FISHER, P.A.  
  
\_\_\_\_\_  
Scott A. Bursor  
Class Counsel

Dated: 8/2/2021 | 1:54:35 PM PDT O'MELVENY & MYERS LLP  
\_\_\_\_\_  
DocuSigned by:  
  
\_\_\_\_\_  
Hannah Y. Chanoine  
EE0822B572114E6...  
Attorneys for Defendants