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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

BRADLEY BERGERON, Individually  
and On Behalf of All Others Similarly  
Situated,

Plaintiff,

v.

MONEX DEPOSIT COMPANY,  
MONEX CREDIT COMPANY,  
NEWPORT SERVICES  
CORPORATION, LOUIS CARABINI,  
and MICHAEL CARABINI,

Defendants.

No.

**CLASS ACTION COMPLAINT  
DEMAND FOR JURY TRIAL**

1 Plaintiff Bradley Bergeron, on behalf of himself and all others similarly  
2 situated (“Plaintiff”), brings this putative class action against Defendants Monex  
3 Deposit Company (“MDC”), Monex Credit Company (“MCC”), and Newport  
4 Services Corporation (“NSC”) (together, “Monex” or the “Company”); and Louis  
5 Carabini and Michael Carabini (together, the “Individual Defendants”)  
6 (collectively, “Defendants”). The claims alleged herein arise from Defendants’  
7 false and misleading advertisements and other marketing communications made  
8 from July 16, 2011, through March 31, 2017 (the “Class Period”), which  
9 misrepresented the purported benefits and downplayed or concealed the significant  
10 risks associated with investing in precious metals through Monex’s off-exchange  
11 “Atlas” trading platform.

12 Plaintiff alleges the following upon personal knowledge as to himself and  
13 his own acts, and upon information and belief as to all other matters. Plaintiff’s  
14 information and belief is based on the independent investigation of the undersigned  
15 counsel, which included, among other things, a review and analysis of: (1)  
16 information publicly disclosed on Monex’s website; (2) public reports and news  
17 articles about Monex; (3) the public court filings in the matter captioned  
18 *Commodity Futures Trading Commission v. Monex Deposit Co., et al.*, No. 1:17-  
19 cv-06416 (N.D. Ill.) (the “CFTC Action”); and (4) other publicly available material  
20 and data identified herein. Plaintiff’s counsel’s investigation into the factual  
21 allegations contained herein is continuing, and many of the facts supporting the  
22 allegations contained herein are known only to Defendants, or are exclusively  
23 within their custody or control. Plaintiff believes, and heretofore alleges, that  
24 further substantial evidentiary support will exist for the allegations contained  
25 herein after a reasonable opportunity for discovery.

1 **I. INTRODUCTION**

2 1. This action arises from Defendants’ multi-year scheme to deceive  
3 thousands of retail customers nationwide, including Plaintiff and other members of  
4 the proposed Class (defined below), out of hundreds of millions of dollars, while  
5 executing tens of thousands of off-exchange retail commodity transactions directly  
6 with their customers.

7 2. During the Class Period, Plaintiff and other members of the proposed  
8 Class invested in precious metals through Monex’s off-exchange “Atlas”  
9 commodities trading platform. As part of its scheme to falsely advertise the  
10 benefits (and underplay or conceal the substantial risks) of Atlas investments,  
11 Monex falsely touted the Atlas program as a safe and profitable way for customers  
12 to invest in precious metals. In truth, however, the Atlas program is neither safe  
13 nor profitable, as the vast majority of Atlas customers suffer substantial and  
14 sometimes devastating, life-altering losses.

15 3. Through the Atlas program, Monex offers customers the opportunity  
16 to open leveraged trading positions in gold, silver, platinum, and palladium on its  
17 off-exchange, unregulated trading platform. The Atlas program is not for persons  
18 who simply wish to acquire precious metals for cash at the market price. Instead, it  
19 is a program through which customers make numerous trades and seek to increase  
20 their returns by trading on margin (*i.e.*, having a substantial portion—sometimes  
21 75 percent or more—of their purchases made with funds they have borrowed from  
22 Monex).

23 4. For each transaction, Monex serves as the counterparty (*i.e.*, it sells or  
24 leases the metals to Atlas customers and purchases metals from them). There are  
25 no third parties involved in these transactions—just Monex and its customers.

26 5. Monex controls all aspects of its Atlas trading platform, including the  
27 price for each trade. Thus, rather than set prices based upon trades in an open  
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1 market, Monex sets the bid price (the price at which it will purchase metals from  
2 its customers), and the ask price (the price at which it sells metals to those  
3 customers). Monex, as the counterparty to every transaction, earns substantial  
4 revenue from the bid/ask spread (*i.e.*, it buys low and sells high), as well as from  
5 commissions, service fees, and interest on loans.

6 6. Despite the volatility of precious metals markets and the inherent risks  
7 of leveraged trading, Monex aggressively markets the Atlas program to potential  
8 customers as a secure and profitable investment opportunity. For example, Monex  
9 claims, among other things, that: (1) precious metals investments offer a form of  
10 “wealth insurance” due to their “true intrinsic value;” (2) Atlas customers have  
11 exclusive control over their precious metals investments; and (3) Monex account  
12 representatives are trained and experienced investment professionals who  
13 specialize in precious metals markets and whose function is to provide Atlas  
14 customers with reliable investment advice.

15 7. Contrary to these representations, Monex operates the Atlas program  
16 with the intent to exploit all Atlas customers, especially those who lack  
17 commodities trading experience or familiarity with precious metals markets.  
18 Indeed, the Atlas program is structured in such a way that it is virtually impossible  
19 for Atlas customers to reap the purported wealth-protection and profit-potential  
20 benefits of their precious metals investments. For example, because Monex stands  
21 to profit from larger price spreads, rather than set prices based on the precious  
22 metals markets, the Company can—and does—utilize its unilateral power to  
23 impose bid and ask prices, such that the bid/ask spreads it quotes to its customers  
24 can be *up to 100 times greater* than price spreads for similar trades on a regulated  
25 exchange. Moreover, any potential gains that Atlas customers may realize from  
26 their leveraged Atlas trades are typically offset by the substantial commissions,  
27 service fees, and interests on loans that Monex charges in connection with the  
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1 Atlas program. Finally, Atlas customers are commonly subject to margin calls  
2 (requiring the customer to deposit additional money if the equity in the customer’s  
3 account falls below a specified level) or forced liquidation of their trading  
4 positions (for failure to meet a margin call or where the equity falls below a  
5 specified level) as a result of the constant erosion of their account equity by  
6 Monex’s interest and service-fee charges.

7 8. Not only is the Atlas program specifically designed to enrich Monex  
8 at the direct expense of unwitting Atlas customers, but also Monex account  
9 representatives are trained and incentivized—through compensation tied directly to  
10 account volume and trading activity, rather than account performance—to engage  
11 in high-pressure sales tactics aimed at encouraging customers to open leveraged  
12 Atlas trading accounts and place frequent trade orders. Thus, despite portraying  
13 themselves as fiduciaries for Atlas customers, Monex account representatives  
14 provide misleading and unsound investment advice, and downplay or conceal the  
15 risks associated with leveraged Atlas account trading.

16 9. The goal of Monex’s misrepresentations regarding the safety and  
17 profitability of the Atlas program is to convince Atlas customers, including  
18 Plaintiff and other members of the proposed Class, that they reasonably can be  
19 expected to earn positive returns on their Atlas accounts with limited downside  
20 risks.

21 10. Based on this reasonable expectation, and absent knowledge of the  
22 risks associated with leveraged Atlas account trading, which Defendants actively  
23 concealed throughout the Class Period, Plaintiff and other members of the  
24 proposed Class invested in the Atlas program and inevitably sustained significant  
25 losses.

26 11. Accordingly, this action asserts claims against Defendants for  
27 violations of the Commodity Exchange Act (“CEA”), 7 U.S.C. § 1, *et seq.*,  
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1 violation of the California Consumers Legal Remedy Act (“CLRA”), Cal. Civ.  
2 Code § 1750, *et seq.*, violation of the California Unfair Competition Law (“UCL”),  
3 Cal. Bus. & Prof. Code § 17200, *et seq.*, fraudulent concealment, and unjust  
4 enrichment.

5 **II. JURISDICTION AND VENUE**

6 12. This Court has jurisdiction over this action pursuant to 28 U.S.C. §  
7 1331 and 7 U.S.C. § 25(c). This Court has jurisdiction over supplemental state law  
8 claims pursuant to 28 U.S.C. § 1367. This Court also has jurisdiction over this  
9 action pursuant to the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. §  
10 1332(d)(2). If a class is certified in this action, the matter in controversy, exclusive  
11 of interests and costs, exceeds the sum or value of \$5,000,000. In addition, there  
12 are more than 100 members of the Class, members of the Class are citizens of  
13 states different from any Defendant, and greater than two-thirds of the members of  
14 the Class are citizens of states other than California.

15 13. Venue properly lies in this District pursuant to 28 U.S.C. § 1391(b)  
16 and 7 U.S.C. § 25(c). Acts giving rise to the claims alleged herein, including  
17 Defendants’ scheme to deceive Plaintiff and other Class members, occurred in this  
18 District. In addition, the Company is headquartered in this District with its  
19 principal executive offices in Newport Beach, California. Further, Defendants  
20 conduct a substantial amount of business in this District. Finally, Defendants’  
21 agreements governing customers’ accounts provide for venue in Orange County,  
22 California with regard to the claims alleged herein.

23 **III. PARTIES**

24 **A. Plaintiff**

25 14. Plaintiff Bradley Bergeron is an individual and citizen of the state of  
26 Illinois, residing in DeKalb, Illinois. Between April 2016, and the present,  
27 Plaintiff traded in precious metal commodities through the Atlas program and  
28

1 suffered approximately \$7,000 in losses as a result of the misconduct alleged  
2 herein.

3 15. Mr. Bergeron invested a total of \$26,000 in personal funds in the  
4 Atlas program. Mr. Bergeron initially decided to invest these funds in the Atlas  
5 program after seeing Monex's television advertisements touting the program as a  
6 safe and profitable way to invest in precious metals. After opening an Atlas  
7 account, Mr. Bergeron placed several leveraged trade orders based on the  
8 recommendations of his account representative, whom he believed was serving as  
9 his investment advisor and fiduciary. Mr. Bergeron's account representative  
10 would frequently call him to solicit trade orders. Mr. Bergeron did not know that  
11 Monex served as the counterparty and set the price spreads for each of his trades.  
12 In September 2017, Mr. Bergeron sought to engage in a transaction involving units  
13 of silver, but was told by his Monex account representative that his transaction  
14 could not be carried out because the equity in his account did not meet Monex's  
15 margin requirement, which Monex had recently increased without notice to Mr.  
16 Bergeron.

17 **B. Defendants**

18 16. Defendant MDC is a California limited partnership with its principal  
19 place of business at 4910 Birch Street, Newport Beach, California. MDC buys  
20 from and sells precious metals to its customers through sales representatives who  
21 solicit retail customers via telephone and email to enter into Atlas transactions.  
22 MDC acts as a counterparty to each Atlas transaction and accepts funds in  
23 connection with its solicitation and acceptance of orders for Atlas transactions.  
24 MDC is not registered with the Commodity Futures Trading Commission (the  
25 "CFTC") in any capacity.<sup>1</sup>

26  
27 <sup>1</sup> See Declaration of CFTC Senior Investigator Jeffrey Gomberg Pursuant to 28  
28 U.S.C. § 1746 ("Gomberg Decl.") filed in the CFTC Action as Exhibit 1 to

1           17. Defendant MCC is a California limited partnership with its principal  
2 place of business at 4910 Birch Street, Newport Beach, California. MCC provides  
3 loans to Atlas customers who decide to finance their Atlas transactions and sells  
4 and/or leases precious metals to Atlas customers. MCC issues monthly account  
5 statements to customers and accepts funds in connection with its extension of  
6 credit to secure Atlas transactions. MCC acts as the counterparty to some Atlas  
7 transactions. MCC is not registered with the CFTC in any capacity.<sup>2</sup>

8           18. Defendant NSC is a California limited partnership with its principal  
9 place of business at 4910 Birch Street, Newport Beach, California. NSC performs  
10 administrative and accounting services for MCC and MDC, as well as their  
11 affiliates. NSC solicits and accepts orders for Atlas transactions, advertises the  
12 Atlas program on television, and offers Atlas trading through other marketing  
13 practices. NSC accepts funds in connection with its solicitation and acceptance of  
14 orders for Atlas transactions. NSC is not registered with the CFTC in any  
15 capacity.<sup>3</sup>

16           19. Defendant Louis Carabini is the Founder of Monex and was  
17 substantially involved in overseeing all of Monex's operations during the Class  
18 Period. Specifically, throughout the Class Period, Louis Carabini was the  
19 President of MDC's general partner, Comco Management Corporation  
20 ("Comco").<sup>4</sup> In this capacity, Louis Carabini executed contracts on behalf of  
21

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22 Appendix of Exhibits to Plaintiff's Motion for Preliminary Injunction, Vol. I (ECF  
23 No. 8), at ¶ 22.

24 <sup>2</sup> See *id.*

25 <sup>3</sup> See *id.*

26 <sup>4</sup> See *id.*, Ex. 6 (December 2, 2016 Private Placement Memorandum for Scala  
27 Funding Company, L.L.C. ("2016 Scala PPM")), at 26; see also Excerpts of  
28 Investigative Testimony of Michael Carabini ("M. Carabini Tr."), filed in the

1 Comco.<sup>5</sup> Louis Carabini was also a signatory on most of Monex’s bank and other  
2 financial accounts.<sup>6</sup> In addition, Louis Carabini had the authority to hire and fire  
3 Monex employees. Finally, in applications filed by Monex with the State of  
4 California to register the Company as a telemarketing firm, Louis Carabini signed  
5 the applications and described himself as being “in charge” of Monex.<sup>7</sup>

6 20. Throughout the Class Period, Defendant Michael Carabini was the  
7 President of NSC and the self-described “operational overseer” of MDC and MCC  
8 and their affiliated companies.<sup>8</sup> MCC is 80.6% owned by two “personal, family  
9 trusts of Michael A. Carabini and his wife,” with respect to which Michael  
10 Carabini serves as the trustee and a beneficiary.<sup>9</sup> Michael Carabini also owns 5%  
11 of MCC directly.<sup>10</sup> MCC’s general partner, Metco Management Corporation, is  
12 100% owned by Madison Investments (“Madison”), another trust controlled by  
13 Michael Carabini.<sup>11</sup> Likewise, MDC is 80.6% owned by two personal, family  
14 trusts of Michael A. Carabini and his wife,” with respect to which Michael  
15 Carabini serves as the trustee.<sup>12</sup> Michael Carabini also owns 11% of MDC

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16  
17 CFTC Action as Exhibit 15 to Appendix of Exhibits to Plaintiff’s Motion for  
18 Preliminary Injunction, Vol. II (ECF No. 9-12), at 10:3.

19 <sup>5</sup> See M. Carabini Tr. at 9:22-10:7.

20 <sup>6</sup> See Gomberg Decl., Ex. 7 (signature cards for Monex and affiliate bank  
21 accounts).

22 <sup>7</sup> See *id.*, Ex. 8 (2014 California Telephonic Seller Registration Application Form),  
at 7.

23 <sup>8</sup> See M. Carabini Tr. at 7:5-10.

24 <sup>9</sup> See 2016 Scala PPM at 26; *see also* M. Carabini Tr. at 16:1-4.

25 <sup>10</sup> See 2016 Scala PPM at 26; *see also* M. Carabini Tr. at 20:13-17.

26 <sup>11</sup> See 2016 Scala PPM at 26; *see also* M. Carabini Tr. at 9:5-13.

27 <sup>12</sup> See 2016 Scala PPM at 26.

1 directly.<sup>13</sup> MDC's general partner, Comco, is also 100% owned by Madison.<sup>14</sup> As  
2 President of Metco, Michael Carabini executed agreements on Metco's behalf.<sup>15</sup>  
3 Michael Carabini was also a signatory on all of Monex's bank and other financial  
4 accounts.<sup>16</sup> In addition, Michael Carabini had the authority to hire and fire Monex  
5 employees. Finally, Michael Carabini was primarily responsible for Monex's  
6 advertisements and marketing, including the content of the Company's website  
7 located at www.monex.com.

#### 8 **IV. FACTUAL ALLEGATIONS**

##### 9 **A. The Atlas Program**

10 21. Monex's Atlas program offers customers the opportunity to invest in  
11 precious metals by opening an Atlas account, through which they can: (1)  
12 purchase or sell physical metals, such as coins or bars, after full payment for actual  
13 delivery; and (2) use Monex's unregulated, off-exchange trading platform to place  
14 futures-like trades on gold, silver, platinum, and palladium on a leveraged basis,  
15 with Monex serving as the counterparty to each transaction.

##### 16 **1. The Atlas Account Agreements**

17 22. To open an Atlas account, each customer must sign and return two  
18 standardized Atlas Account Agreements setting forth, in small-type legal jargon,  
19 the terms and conditions of the customer's precious metals transactions with MDC,  
20 as well as MCC's financing of same.

21 23. The Atlas Account Agreements include various provisions limiting  
22 Atlas customers' rights to litigate potential claims in connection with the Atlas  
23

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24 <sup>13</sup> *See id.*

25 <sup>14</sup> *See id.*

26 <sup>15</sup> *See M. Carabini Tr. at 15:17-22.*

27 <sup>16</sup> *See Gomberg Decl., Ex. 7.*

1 Program. For example, the Atlas Account Agreements include a choice-of-law  
2 provision stating that the agreements and any legal proceedings related thereto are  
3 governed by California law.<sup>17</sup>

4 24. The Atlas Account Agreements also contain a forum selection clause  
5 that requires all legal proceedings asserting claims arising out of or relating to the  
6 agreements or the Atlas customers' transactions with Monex to be filed in Orange  
7 County, California. To this end, the Atlas Account Agreements expressly provide  
8 that: (1) "for all purposes, [the Atlas customer] entered into this Agreement in  
9 Orange County, California, notwithstanding any events that may occur outside  
10 Orange County, including the manner, timing or location of the delivery or receipt  
11 of the acceptance of this Agreement by either party hereto"; and (2) "the following  
12 events, among others, occurred in Orange County, California: the solicitation,  
13 negotiation, execution, and consummation of this Agreement, as well as the initial  
14 payment of monies and an subsequent Customer payment of monies, and written  
15 confirmation of each transaction."<sup>18</sup>

16 25. In addition, the Atlas Account Agreements include an arbitration  
17 agreement requiring certain Atlas customers "to submit all disputes, claims or  
18 controversies seeking damages in excess of \$50,000, arising out of or relating to  
19 any transactions with [Monex] or to the breach, termination, enforcement,  
20 interpretation, validity, enforceability, or alleged unconscionability of any part of  
21 this Agreement, to final and binding arbitration . . . ." <sup>19</sup> Because the proposed  
22 Class defined below is limited to Atlas customers seeking damages that do not  
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25 <sup>17</sup> See *id.*, Ex. 14 (Monex Atlas Account Agreements), at ¶¶ 15.9, 28.

26 <sup>18</sup> See *id.* at ¶¶ 15.10, 30.

27 <sup>19</sup> See *id.* at ¶¶ 16(a), 30.1.

1 exceed \$50,000, the arbitration agreement does not apply to the claims alleged  
2 herein.

3 26. For those Atlas customers whose claims for damages exceed \$50,000,  
4 the arbitration agreement included within the Atlas Account Agreements has  
5 additional provisions that further restrict such customers' rights and available  
6 remedies. For example, the arbitration agreement includes a class action waiver  
7 clause requiring such Atlas customers to "bring claims against [Monex] only in  
8 his/her/its individual capacity, and not as a plaintiff or class member in any  
9 purported class representative proceeding."<sup>20</sup> Because this class action waiver  
10 clause is contained within the arbitration agreement and not an independent  
11 provision of the Atlas Account Agreements, it does not apply to the claims alleged  
12 herein.

## 13 2. Atlas Account Transactions

14 27. Approximately 25% of Atlas account transactions involve the use of  
15 margin purchases, whereby Atlas customers may purchase precious metals on  
16 credit.<sup>21</sup> To obtain such financing, Atlas customers generally must deposit an  
17 initial margin of 22-25% of their open trading positions. MCC then finances the  
18 balance of the customer's purchase through a loan. MDC receives the full  
19 purchase cost by receiving funds from the customer and the customer's loan  
20 advance from MCC. The loans are payable on demand and bear variable interest  
21 rates that are determined by MCC. The purchased precious metals serve as  
22 collateral for the customer's loan and are stored at a depository pursuant to a  
23 contract between Monex and the depository.<sup>22</sup>

24 <sup>20</sup> See *id.* at ¶¶ 16(g), 30.7.

25 <sup>21</sup> See Gomberg Decl., Ex. 2 (March 22, 2013 Private Placement Memorandum for  
26 Concord Funding Company, L.L.C.) ("2013 Concord PPM"), at 25.

27 <sup>22</sup> See *id.*, Ex. 25 (MCC Loan Pool and MDC Inventory Borrowing Base), at 1-2.

1           28. During the Class Period, Monex executed approximately 140,000  
2 trades for more than 12,000 Atlas customer accounts engaged in leveraged  
3 precious metals trading through the Atlas program. Approximately 25% of these  
4 trading positions opened by leveraged Atlas customer accounts were short-term  
5 (*i.e.*, opened and closed within two weeks).

6           29. Atlas customers do not make monthly interest or service fee payments  
7 on the loans they take out to finance their trading positions. Rather, Monex  
8 deducts these charges from each customer's account equity—which is the value of  
9 the customer's metal, less the customer's loan balance—and then adds it to the  
10 loan balance on the account. As a result, an Atlas customer's account equity is  
11 constantly eroded by the addition of Monex's interest and service fee charges to  
12 the customer's loan balance.

13           30. If the equity in an Atlas account declines to a specified level of the  
14 total account value—the “call” or “margin” level (which is unilaterally set by  
15 Monex and can be changed at will)<sup>23</sup>—Monex may issue a margin call and require  
16 the customer to immediately deposit additional funds into the trading account or  
17 offset an open position to raise the equity level above Monex's margin  
18 requirement. A customer's failure to meet a margin call within a specified time  
19 period (which can be as short as 24 hours) allows Monex to forcibly liquidate a  
20 portion of the customer's metal holdings to satisfy the margin requirement. Monex  
21 may change its margin requirements at any time in its sole discretion, and failure to  
22 meet the increased required level can result in a forced sale of metals.

23  
24  
25 \_\_\_\_\_  
26 <sup>23</sup> A call or margin level of 50% percent would mean that half of all of the metals  
27 in an account had been acquired with money borrowed from Monex, while a  
28 margin or call requirement of 25%, would mean that 75% of the account assets  
were acquired with borrowed money.

1           31. Monex also is authorized to automatically force-liquidate an Atlas  
2 customer's trading positions (without a margin call or any notification to the  
3 customer) if the customer's account equity declines to 7%. To this end, Monex's  
4 system has an "auto-force sell" feature that automatically liquidates Atlas  
5 customers' trading positions if there is a sudden price movement in the precious  
6 metals markets causing the equity in their Atlas accounts to drop below this equity  
7 level. When an Atlas customer's account is subject to automatic force-liquidation,  
8 Monex books the liquidation order to the customer's account based on the cash  
9 value of the metals sold back to Monex, less commissions, and applies the  
10 proceeds from the sale to the customer's loan balance. Monex can execute the  
11 automatic force-liquidation of multiple Atlas accounts on a "pool-wide" or "batch"  
12 basis. Historically, this system has allowed Monex to earn revenues from  
13 commissions on forced sales that far exceed the losses it has sustained from loan  
14 defaults.<sup>24</sup>

15           32. During the Class Period, more than 3,000 out of 12,000 leveraged  
16 Atlas trading accounts were subject to a margin call, and at least 1,850 of these  
17 accounts had trading positions force-liquidated. Thus, approximately 30% of  
18 leveraged Atlas accounts were subject to a margin call and/or forced liquidation of  
19 trading positions during the Class Period.

20           33. Monex has complete control over its Atlas trading platform, including  
21 the price for every trade. Monex generally sets prices by tracking the spot prices  
22 of precious metals traded on other regulated commodity exchanges and then  
23 quoting the price at which it will sell (the "ask" price) and the price at which it will  
24 buy (the "bid" price). The midpoint between Monex's bid and ask price is referred

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25 <sup>24</sup> See Gomberg Decl., Ex. 25 (MCC Historical Loan Performance Summary, Oct.  
26 7, 2011), at 7 (noting that between 1987 and 2011, "aggregate commission gains  
27 on foreclosures far exceed[ed] the miniscule loan losses" experienced).

1 to as the “spot” price, which the Company publishes on the internet during regular  
2 business hours. Monex then charges a “spread,” or the difference between the bid  
3 and ask prices, on each transaction.

4 34. During the Class Period, Monex generally charged a 3% spread  
5 between its bid and ask prices for Atlas program trades, which far exceeds the  
6 price spreads charged for trades of equivalent size on regulated commodity  
7 exchanges. For example, the spread between bid and ask prices for 5,000 ounces  
8 of silver on the CME Group’s COMEX contract market is equivalent to \$25, while  
9 the spread for the same amount of silver on Monex’s Atlas trading platform with a  
10 spot price of \$17 would incur a spread charge of approximately \$2,550, or more  
11 than 100 times the spread cost of equivalent COMEX transactions.

12 35. Monex generates a substantial portion of its revenue from the price  
13 spread charged on each trade. During the Class Period, Monex’s revenue from the  
14 wide price spreads it charged totaled approximately \$95 million.

15 36. Monex also has complete control over the metals traded on the Atlas  
16 trading platform. For example, Atlas customers with leveraged open trading  
17 positions do not take physical delivery of the precious metals underlying their  
18 trading positions because most of the metals they purportedly own are held as  
19 collateral for the loans from Monex used to purchase those metals. Instead, such  
20 metals are stored in depositories pursuant to contracts, which authorize Monex to  
21 control the disposition of the stored metals, between Monex and such depositories.

22 37. Following the execution of an Atlas account trade, Monex generates a  
23 “Commodity Title Transfer Notices” (“CTTN”) that is mailed from the depository  
24 to the Atlas customer stating that the depository “is authorized to transfer or deliver  
25 the described commodities to [Monex] upon receipt by [the depository] of written  
26 or oral instructions from [Monex] . . . and upon so doing, [the depository] is free  
27  
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1 of all liability to [the Atlas customer] or other parties.”<sup>25</sup> The CTTN further states  
2 that the customer “shall not grant a security interest or other right in or otherwise  
3 pledge any commodities held by [the depository] to any party other than [Monex]  
4 or [the depository], and [the depository] will not recognize any such interest, right  
5 or pledge.”<sup>26</sup>

6 38. In fact, the only way for Atlas customers to take possession of metals  
7 from Monex is to make full payment for the metals (*i.e.*, completely pay off any  
8 loans from Monex), request actual delivery of specific physical metals, and have  
9 Monex ship the metals to them, to a pick-up location, or to the customer’s agent.

10 39. Atlas customers can place long or short trades with the option to place  
11 stop or limit orders<sup>27</sup> to manage their trading positions. When an Atlas customer  
12 opens a long position, Monex purportedly transfers to the customer ownership of  
13 the metals underlying the customer’s trading position, including the financed  
14 portion of the position. In reality, however, this so-called “transfer” is merely a  
15 book entry in Monex’s records. In certain situations, Monex can close out the  
16 customer’s long position at any time in its sole discretion, at a price of its choosing,  
17 and without any prior notice to the customer.

18 40. Similarly, when an Atlas customer opens a short position, Monex  
19 purports to loan the Atlas customer the precious metals, which the Atlas customer  
20 immediately sells back to Monex. Again, however, no such transfer of physical  
21 assets actually occurs. Rather, Monex makes a book entry in its records that can be  
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23 <sup>25</sup> Gomberg Decl., Ex. 21 (Sample CTTN).

24 <sup>26</sup> *Id.*

25 <sup>27</sup> A stop order, also referred to as a stop-loss order, is an order to buy or sell a  
26 particular metal once the price of the metal reaches a specified price, known as the  
27 stop price. When the stop price is reached, a stop order becomes a market order. A  
28 limit order is an order to buy or sell a metal at a specific price or better.

1 closed out under certain circumstances in Monex's sole discretion and at a price of  
2 its choosing.

3 **B. Monex's Inventory and Financing Structure**

4 41. Monex finances a significant portion of its precious metals inventory  
5 through two investment vehicles controlled by Monex: Concord Funding  
6 Company, L.L.C. ("Concord") and Scala Funding Company, L.L.C. ("Scala"),  
7 each of which is owned by affiliates of MCC and MDC.<sup>28</sup> Through both of these  
8 investment vehicles, Monex sells asset-backed notes to investors and uses the  
9 proceeds from these sales to purchase metals and fund Monex's business  
10 operations.<sup>29</sup> The notes are secured by a trust estate that includes all of Monex's  
11 interests in a pool of loans originated by MCC to finance Atlas customers' trading  
12 positions.

13 42. Monex's agreements with Concord and Scala require that Monex have  
14 the ability to liquidate its customers' trading positions at any time in order to pay  
15 down its financing obligations.<sup>30</sup> If Monex falls short in repaying the Concord and  
16 Scala notes, it will liquidate customer trading positions to pay back investors.

17 43. Specifically, the agreements provide that if a funding deficiency exists  
18 for five consecutive days, Monex must increase the required equity levels for Atlas  
19 accounts and issue and enforce margin calls to the extent necessary to rectify this  
20 deficiency.<sup>31</sup> Likewise, if Monex fails to maintain funds at the levels required  
21 under its agreements with Concord and Scala, it must issue a written demand for  
22 repayment in full of Atlas customers' loans, and, if necessary, liquidate the related  
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24 <sup>28</sup> See 2016 Scala PPM, 1.

25 <sup>29</sup> See *id.* at 3-4; 2013 Concord PPM, 3-4.

26 <sup>30</sup> See 2013 Concord PPM, 18; Scala PPM, 17

27 <sup>31</sup> See 2016 Scala PPM, 8; 2013 Concord PPM, 9, 41.

1 metals collateral to an extent sufficient to generate collections to meet these  
2 required levels.<sup>32</sup>

3 44. In addition to using the Scala and Concord investment vehicles to  
4 finance its operations, Monex has a \$25 million line of credit from Wells Fargo  
5 Bank (“Wells Fargo”), and a \$50 million revolving credit line through Farmers &  
6 Merchants Bank (“F&M”).<sup>33</sup> As with Monex’s other financing arrangements, the  
7 collateral for these lines of credit include Atlas customer loans and inventory.<sup>34</sup>  
8 Moreover, in the event of a default by Monex, both creditors may require Monex  
9 to immediately liquidate Atlas customers’ trading positions.<sup>35</sup>

10 45. Monex and Wells Fargo also entered into a depository agreement with  
11 Delaware Depository Services Company (“DDSC”) for the storage of metals  
12 subject to their credit agreement. According to the depository agreement, Monex  
13 has control over the metals, while Wells Fargo is authorized to direct the release of  
14 the metals in accordance with its instructions.<sup>36</sup> The agreement does not contain  
15 any provisions authorizing Atlas customers to exercise control over the stored  
16 metals.<sup>37</sup>

17 46. Similarly, the metals purchased by Atlas customers that have been  
18 designated as collateral for Monex’s line of credit with F&M are held primarily at  
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21 <sup>32</sup> See 2016 Scala PPM, 9; 2013 Concord PPM, 9.

22 <sup>33</sup> See Gomberg Decl., Ex. 36 (April 20, 2012 Monex-Wells Fargo Credit  
23 Agreement); Ex. 38 (F&M September 3, 2013 Monex Loan Approval Memo).

24 <sup>34</sup> See *id.*

25 <sup>35</sup> See *id.*

26 <sup>36</sup> See *id.*, Ex. 37 (April 20, 2012 Monex-Wells Fargo-DDSC Depository  
27 Agreement).

28 <sup>37</sup> See *id.*

1 an F&M vault, or at a DDSC vault, where F&M has its own depository account.<sup>38</sup>  
2 F&M monitors the Atlas account metals within its possession and control and  
3 prepares a memorandum to its senior management tracking the amount of metal  
4 held by F&M as collateral for Monex's line of credit.<sup>39</sup>

5 **C. Monex Data Management System**

6 47. Monex actively monitors Atlas customers' transactional data. This  
7 data, which is stored in an internal database, is used to generate reports  
8 summarizing information related to the performance of each Atlas account for  
9 Company management, including Defendants Louis and Michael Carabini.

10 48. These reports include, among others: (1) a daily "Position Report"  
11 summarizing each Atlas trading account's equity, cushion before a margin call,  
12 available cash, trading position value, and profit or loss on trading positions; (2) a  
13 "Position Report Summary," which tracks additional information for each Atlas  
14 account, including the number of trades executed by the account, profits or losses,  
15 the number of long versus short trades, the total market value of trading positions  
16 for each account, and available equity for additional trades; (3) a "Customer  
17 Unrealized Loss" report showing unrealized losses, realized profits or losses, and  
18 the market value of open trading positions for each Atlas customer account; and (4)  
19 "Forced Liquidations" and "Equity Calls" reports detailing the number of forced  
20 liquidations and margin calls issued each month.

21 49. Based on the CFTC's analysis of transactional data for 2,185  
22 leveraged Atlas accounts during the Class Period, approximately 90% of these  
23 accounts realized net losses, including losses from trading, interest charges, and  
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25 <sup>38</sup> See *id.*, Ex. 39 (F&M Loan Approval File), 9.

26 <sup>39</sup> See *id.*, Ex. 41 (June 17, 2016 Memorandum re: Commodity Audit of Monex  
27 Collateral as of May 31, 2016),  
28

1 other fees, and excluding profits and losses from metals sold back to Monex.<sup>40</sup>  
2 According to the CFTC’s estimates, total net realized losses from leveraged trading  
3 positions opened and closed during the Class Period, including interest charges and  
4 fees, were at least \$290 million. Moreover, unrealized profits or losses on open  
5 trading positions during the same period were at least \$40 million.<sup>41</sup>

6 50. According to an expert report analyzing the performance of Atlas  
7 trading accounts submitted in the CFTC Action, a substantial portion of these  
8 losses was caused by the fees and charges imposed by Monex.<sup>42</sup> Specifically, the  
9 Expert Report compares the risk-return profiles for each account achieved with  
10 Atlas account trades (the “Atlas Account Execution”), and those achieved with  
11 futures contracts (the “Futures Market Execution”) and Exchange Traded Funds  
12 (the “ETFs Execution”), both of which are more standard but functionally  
13 equivalent investment vehicles.<sup>43</sup> Based on this analysis, the Expert Report finds  
14 that, among other things: (1) “[a]n investor can always expect to earn a higher  
15 return with lower risk by choosing one of these functionally equivalent trading  
16 alternatives to the Atlas program”; and (2) “the results [of this analysis] flow from  
17 the cost structure of the Atlas Account itself, and not from any particular  
18 idiosyncratic features of the ten sample accounts.”<sup>44</sup> With respect to this latter  
19 finding, the Expert Report further notes that “fees, commissions and charges  
20 account for a large drag on the cumulative returns in these accounts” and “are  
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22 <sup>40</sup> See Gomberg Decl. at ¶ 141; see also *id.*, Ex. 63, Table E.

23 <sup>41</sup> See *id.*, Ex. 63, Table E.

24 <sup>42</sup> See Expert Report from Rutter Group, Appendix Vol. II, Ex. 3 (ECF No. 8-6)  
25 (“Expert Report”),

26 <sup>43</sup> See *id.* at 1.

27 <sup>44</sup> *Id.*

1 substantially elevated above levels charged in alternative models of executing what  
2 are fundamentally the same trades.”<sup>45</sup>

3 **D. Defendants’ False Information Regarding The Risks And Benefits**  
4 **Of The Atlas Program**

5 51. Despite Defendants’ actual review of and/or access to reports  
6 containing detailed information about Atlas customers’ transactional data,  
7 including data indicating that the vast majority of leveraged Atlas accounts suffer  
8 massive losses, Monex does not disclose the significant risk of loss associated with  
9 leveraged Atlas account trading.

10 52. To the contrary, Monex falsely claims in its advertisements and other  
11 marketing communications that the Atlas program is a safe and profitable way to  
12 invest in precious metals. Monex targets its deceptive advertisements and other  
13 marketing communications at retail investors—many of whom lack significant  
14 experience in commodities trading—to induce them to invest in Atlas accounts,  
15 and with the intent that they rely upon the deceptive advertisements and marketing  
16 communications in making their investments.

17 **3. Monex Falsely Touts The Atlas Program As A Way For**  
18 **Prospective Customers To Benefit From The Purported**  
19 **Intrinsic Value, Security, And Profitability Of Precious**  
**Metals Investments**

20 53. As part of Defendants’ business model, Monex first encourages  
21 prospective customers to open an Atlas account through advertisements and other  
22 communications touting the purported benefits of investing in precious metals as a  
23 hedge against inflation. For example, on Monex’s website, the Company claims in  
24 relevant part:

25 For thousands of years, in good times and bad, precious  
26 metals have offered investors a solid, long-term and

27 <sup>45</sup> *Id.* at 11.

1 tangible way to hold and protect wealth with relative  
2 safety. Unlike paper investments (like stocks, bonds and  
3 currencies) that can and have become worthless  
overnight, precious metals have true intrinsic value . . .  
and, hence, will always be valuable.<sup>46</sup>

4 54. Similarly, Monex describes precious metals investments as a form of  
5 “wealth insurance” in unstable financial markets, stating in relevant part:

6 Today’s financial markets are increasingly at risk from  
7 terrorism, political instability and war. As we saw so  
8 after the 9/11 tragedy, financial markets can be closed  
9 down, and remain closed down, for extended periods of  
10 time. As terrorism incidents continue to increase around  
11 the world, it is not unreasonable to expect further (and  
12 potentially more severe) disruptions in financial markets,  
13 banking and commerce in the future. Whenever and  
14 wherever tension or hostilities break out, people  
15 everywhere quite naturally gravitate toward the assets  
16 they trust most. And today, even in our high-tech-driven  
17 21st century, the asset class millions rely on in times of  
18 trouble is gold and silver. Precious metals have always  
19 been, and likely will continue to be, a valued form of  
20 “wealth insurance” in good times and bad.<sup>47</sup>

21 55. In addition to highlighting the intrinsic value and security of precious  
22 metals investments, Monex also emphasizes their profitability, stating that “in  
23 recent years, precious metals have also proven to be outstanding short-term trading  
24 vehicles, offering traders periods of outstanding profit potential as metals prices  
25 fluctuate, sometimes dramatically, on world markets.”<sup>48</sup>

26 56. After touting the intrinsic value, security, and profitability of precious  
27 metals investments, Monex goes on to pitch its Atlas program as a way for  
28 prospective customers to reap these putative benefits. For example, Monex’s

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23 <sup>46</sup> Monex Precious Metals, Uncertainty in the Markets,  
24 <http://www.monex.com/why/mktuncertainty.html>.

25 <sup>47</sup> Monex Precious Metals, Three Good Reasons to Own Precious Metals Now,  
<http://www.monex.com/why/3goodreasons.html>.

26 <sup>48</sup> Monex Precious Metals, Uncertainty in the Markets,  
27 <http://www.monex.com/why/mktuncertainty.html>.

1 website describes the Atlas trading account as “a way to buy, sell and trade  
2 precious metals using up to 4-to-1 investment leverage” and “a powerful short-  
3 term trading vehicle during periods of rapidly changing metals prices.”<sup>49</sup>

4 57. In addition, the Atlas program brochure distributed to prospective  
5 Atlas customers claims, among other things, that:

6 (1) the Atlas program is a “unique and powerful way to  
7 acquire precious metals with the strength of investment  
8 leverage combined with the safekeeping security of  
9 independent depository storage”;

10 (2) investing in precious metals through the Atlas  
11 program allows Atlas customers to “protect [themselves]  
12 from further declines in the value of the U.S. dollar”;

13 (3) the Atlas program provides a way for Atlas customers  
14 to “shield [their] wealth against the ravaging effects of  
15 inflation, deflation and other economic calamities”; and

16 (4) “right now may be an ideal time to invest in precious  
17 metals with the power and built-in security of the Atlas  
18 Account.”<sup>50</sup>

19 58. Likewise, Monex’s sales training materials instruct account  
20 representatives to pitch the Atlas program to prospective Atlas customers as a safe  
21 and profitable investment opportunity. For example, Monex account  
22 representatives are trained to use the following phrases, among others, on sales  
23 calls with potential clients:

24 (1) “If gold were to increase in value by \$100 per ounce  
25 in the next year, and you had a 30% to 40% net gain,  
26 you’d feel pretty good, wouldn’t you?”<sup>51</sup>

27 <sup>49</sup> Monex Precious Metals, Three Good Reasons to Own Precious Metals Now,  
28 <http://www.monex.com/why/3goodreasons.html>.

<sup>50</sup> Monex Deposit Company and Monex Credit Company, *The Atlas Account: A  
Precious Metals Investment Program*, 1-2 (2017), [http://www.monex.com/atlas-  
brochure.pdf](http://www.monex.com/atlas-brochure.pdf).

<sup>51</sup> Gomberg Decl., Ex. 28 (Monex “Blueprint for Success” Sales Training Guide),  
at 4.

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- (2) “I’d like to show you some ways that you might earn a very positive return on investments in precious metals today”;<sup>52</sup>
- (3) “[D]iscover an opportunity to invest with defined risk, while enjoying the possibility of unlimited upside potential”;<sup>53</sup> and
- (4) “Since you’re looking for short term profit, but with defined risk, I think you’re going to love the proposal I have for you.”<sup>54</sup>

59. Monex account representatives also tell prospective Atlas customers on sales calls that investing in precious metals through the Atlas program has limited downside risk because precious metals always maintain their intrinsic value, even as market prices fluctuate.<sup>55</sup>

60. Contrary to these representations, Defendants knew or recklessly disregarded that leveraged Atlas account trading did not provide a way for Atlas customers to benefit from the purported security, intrinsic value, and profitability of precious metals investments because: (1) the vast majority of leveraged Atlas trading accounts sustain losses due, in large part, to the commissions, spreads, service fees, and interest on loans that Monex charges; and (2) the “intrinsically valuable” physical metals that Atlas customers supposedly “own” are never actually delivered to them and can be force-liquidated by Monex at any time, without notice.

**4. Monex Misleadingly Assures Customers That They Have Exclusive Control Over Their Precious Metals Investments**

61. The Atlas program brochure also assures existing and prospective customers that their precious metals investments are exclusively within their control, stating that:

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<sup>52</sup> *Id.* at 16.  
<sup>53</sup> *Id.* at 18.  
<sup>54</sup> *Id.* at 24.  
<sup>55</sup> *See id.*

1 (1) “[t]he depository custodian will maintain the  
2 safekeeping of your precious metals until you decide to  
3 sell them or take personal possession”;

4 (2) “[y]our metals are your sole assets”; and

5 (3) “[y]ou are the sole owner of your metals and the sole  
6 decision maker on when to buy and sell them.”<sup>56</sup>

7 62. Contrary to these representations, Defendants knew or recklessly  
8 disregarded that Atlas customers did not have exclusive control over their precious  
9 metals investments because: (1) Monex can issue margin calls on Atlas accounts  
10 that will result in the liquidation of Atlas customers’ metals if additional funds are  
11 not deposited into their accounts; (2) Monex can force-liquidate Atlas customers’  
12 trading positions without notice if certain minimum equity requirements (set by  
13 Monex) are not met; and (3) in fact, a significant number of Atlas customers were  
14 subject to margin calls and/or forced liquidation of their trading positions during  
15 the Class Period.

### 16 **5. Monex Account Representatives Falsely Describe** 17 **Themselves As “Fiduciaries” To Atlas Customers**

18 63. Monex’s sales training materials also instruct account representatives  
19 to make statements to prospective Atlas customers designed to earn their trust.  
20 Specifically, Monex’s sales training videos direct account representatives to tell  
21 prospective Atlas customers who seem reluctant to open an Atlas account that the  
22 account representatives will be serving as the Atlas customers’ fiduciaries and, as  
23 such, will be acting in the customers’ best interests.

24 64. In one sales training video, for example, Monex sales staff are  
25 instructed to state the following to prospective Atlas customers: “I want to give  
26 you the best possible chances of success in the markets that we deal with. And  
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28 <sup>56</sup> Monex Deposit Company and Monex Credit Company, *The Atlas Account: A  
Precious Metals Investment Program*, 5-6 (2017), [http://www.monex.com/atlas-  
brochure.pdf](http://www.monex.com/atlas-brochure.pdf).

1 everything that I ask will always be in your best interests.”<sup>57</sup> The video further  
2 trains Monex sales staff to state: “Or I might even use the analogy where if you go  
3 to your lawyer and you hold back any information, what is he going to tell you?  
4 Take a walk, I can’t help you. Okay. We have a fiduciary relationship, a  
5 relationship of trust, okay. And I do want to help you. And, again, everything that  
6 I do—and I tell them this on a pretty consistent basis, that everything I do will  
7 always be in your best interests, and I mean that.” And in another sales training  
8 video, a Monex sales trainer calls a prospective Atlas customer in front of the sales  
9 training class and says that “my job is to do the best that I can do and do what’s in  
10 the best interests that I talk to . . . . [I]f I am going to make a recommendation, I  
11 want to make sure that I do what’s in your best interests.”

12 65. Having been trained in this manner, Monex account representatives go  
13 on to assure prospective Atlas customers on sales calls that they will provide  
14 investment advice, closely monitor their accounts, and take appropriate steps to  
15 protect their investments.

16 66. Contrary to these claims, Defendants knew or recklessly disregarded  
17 that Monex account representatives did not serve as fiduciaries for Atlas customers  
18 because Monex trains and incentivizes its account representatives—through  
19 compensation tied directly to account volume and trading activity, rather than  
20 account performance—to engage in high-pressure sales tactics aimed at  
21 encouraging customers to open Atlas accounts and place frequent leveraged trade  
22 orders.

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27 <sup>57</sup> See Gomberg Decl., Ex. 29 (Transcript of Monex Sales Training Video, Part 1),  
28 at 14-15.

1           **E. Plaintiff And Other Class Members Invested In The Atlas**  
2           **Program And Suffered Losses**

3           67. After being solicited by Monex through advertisements, marketing  
4 materials, and/or phone calls conveying the foregoing misrepresentations, Plaintiff  
5 and other Class members invested in the Atlas program, as Defendants intended,  
6 and invariably suffered financial losses as a result thereof.

7           68. To the extent the Atlas Account Agreements contained boilerplate  
8 disclosures vaguely describing the risks associated with precious metals  
9 investments and leveraged trading, such generalized disclosures buried within  
10 thirty-five pages of small-type legal jargon were insufficient to dispel the false  
11 impression created by Monex's affirmative misrepresentations, which concealed  
12 the true nature, design, structure, and operation of the Atlas program.

13           69. For example, Monex's statements touting the Atlas program's  
14 purported security were designed to assure Atlas customers that leveraged Atlas  
15 account trading involved limited downside risk. Monex account representatives  
16 reinforced this impression by promising Atlas customers that their investments  
17 were safe and downplaying or concealing the risks associated with precious metals  
18 investments or leveraged trading.

19           70. Additionally, Monex's claims regarding the intrinsic value of precious  
20 metals investments were aimed at making Atlas customers think they "owned" the  
21 physical metals. Atlas customers had no way of knowing that, in fact, they would  
22 never have actual possession of these assets, or that Monex could force-liquidate  
23 their trading positions.

24           71. Moreover, by pitching the Atlas program as a profitable investment  
25 opportunity, Monex sought to convince Atlas customers that they would earn  
26 returns on their investments sufficient to offset any fees charged by Monex. Atlas  
27 customers were therefore unaware of the strong likelihood that they would  
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1 experience margin calls and/or forced-liquidation of their trading positions as a  
2 result of such fees eroding the equity in their Atlas accounts.

3 72. Finally, Monex directed its account representatives to falsely portray  
4 themselves as fiduciaries in order to lead Atlas customers to believe that Monex  
5 served as a brokerage house, rather than a market maker, and that precious metals  
6 markets, rather than Monex itself, determined the prices of their trades. Atlas  
7 customers did not understand that, in fact, Monex served as a counterparty (*i.e.*, the  
8 seller and/or purchaser) for each transaction and had the authority to impose  
9 outsized price spreads on every trade. Thus, Atlas customers had no reason to  
10 know that Monex stood to profit at their direct expense.

11 **V. TOLLING OF THE STATUTE OF LIMITATIONS AND ESTOPPEL**

12 73. Plaintiff and members of the Class had no way of knowing about  
13 Defendants' scheme and deception with respect to the Atlas program until the  
14 CFTC Action was filed on September 6, 2017.

15 74. Any applicable statute of limitations has been tolled by Defendants'  
16 knowing, active concealment and denial of the facts alleged herein throughout the  
17 Class Period. Through no fault or lack of diligence, Plaintiff and members of the  
18 Class were deceived by Defendants and could not reasonably discover that  
19 Defendants were concealing the misconduct complained of herein and  
20 misrepresenting the true facts related to the Atlas program, including the  
21 significant risk of loss associated therewith.

22 75. Plaintiff and members of the Class did not discover and did not know  
23 of any facts that would have caused a reasonable person to suspect that Defendants  
24 were engaged in the deceptive scheme and were misrepresenting the significant  
25 risk of loss associated with the Atlas program, nor would a reasonable and diligent  
26 investigation disclosed the true facts.

1           76. As alleged herein, the true facts regarding the Atlas program,  
2 including the significant risk of loss associated therewith, were material to Plaintiff  
3 and members of the Class at all relevant times. Within the time period of any  
4 applicable statutes of limitations, Plaintiff and members of the Class could not  
5 have discovered through the exercise of reasonable diligence that Defendants were  
6 concealing the true facts regarding the Atlas program, including the significant risk  
7 of loss associated therewith.

8           77. At all times, Defendants are and were under a continuous duty to  
9 disclose to Plaintiff and members of the Class the true facts regarding the Atlas  
10 Program, including the significant risk of loss associated therewith.

11           78. Defendants knowingly, actively, and affirmatively concealed the facts  
12 alleged herein, including Defendants' true nature, design, structure, and operation  
13 of the Atlas program and the significant risk of loss associated therewith. Plaintiff  
14 and members of the Class reasonably relied on Defendants' knowing, active, and  
15 affirmative concealment.

16           79. For these reasons, all applicable statutes of limitation have been tolled  
17 based on the discovery rule and Defendants' active concealment, and Defendants  
18 are estopped from relying on any statutes of limitations in defense of this action.

19 **VI. CLASS ACTION ALLEGATIONS**

20           80. Plaintiff brings this action pursuant to Federal Rules of Civil  
21 Procedure 23(a) and 23(b)(1), (b)(2) and/or (b)(3) on behalf of the following Class:

22                   All persons in the United States who opened an Atlas  
23                   account with Monex and sustained losses in connection  
24                   therewith, and who seek damages not exceeding  
                      \$50,000.00 (the "Class").

25           81. Excluded from the Class are Defendants and any entities in which  
26 they have a controlling interest, and their legal representatives, officers, directors,  
27 assignees, and successors. Plaintiff reserves the right to revise the definition of the  
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1 Class based upon subsequently discovered information and reserves the right to  
2 establish additional Sub-Classes where appropriate.

3 82. The Class is so numerous that joinder of all members is impracticable.  
4 Plaintiff believes that there are at least thousands of members of the proposed  
5 Class throughout the United States.

6 83. Common questions of law and fact exist as to all members of the  
7 Class and predominate over any issues solely affecting individual members of the  
8 Class. The common and predominating questions of law and fact include, but are  
9 not limited to:

- 10 (1) Whether Defendants violated the CEA, 7 U.S.C. § 1, *et seq.*;
- 11 (2) Whether Defendants violated the CLRA, Cal. Civ. Code § 1750, *et*  
12 *seq.*;
- 13 (3) Whether Defendants violated the UCL, Cal. Bus. & Prof. Code §  
14 17200, *et seq.*;
- 15 (4) Whether Defendants fraudulently induced consumers to invest in the  
16 Atlas program;
- 17 (5) Whether the Atlas program exposes consumers to a significant risk of  
18 loss;
- 19 (6) Whether Defendants knew or should have known that the Atlas  
20 program exposes consumers to a significant risk of loss;
- 21 (7) Whether Defendants had a duty to disclose the significant risk of loss  
22 associated with the Atlas program;
- 23 (8) Whether Defendants breached their duty to disclose the significant  
24 risk of loss associated with the Atlas program;
- 25 (9) Whether Defendants intentionally and knowingly falsely  
26 misrepresented, concealed, suppressed and/or omitted material facts  
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1 concerning the Atlas program, including the significant risk of loss  
2 associated therewith;

3 (10) Whether Defendants made material misrepresentations and/or  
4 omissions concerning the true nature, structure, design, and operation  
5 of the Atlas program and the significant risk of loss associated  
6 therewith;

7 (11) Whether members of the Class were exposed to Defendants' material  
8 misrepresentations and/or omissions;

9 (12) Whether members of the Class would have invested in precious  
10 metals through the Atlas program if Defendants had disclosed the true  
11 nature, structure, design, and operation of the Atlas program and the  
12 significant risk of loss associated therewith;

13 (13) Whether Defendants actively concealed material facts from Plaintiff  
14 and members of the Class in order to, *inter alia*, generate more  
15 revenue for the Company;

16 (14) Whether Defendants were unjustly enriched by their conduct; and

17 (15) Whether damages, restitution, equitable, injunctive, compulsory, or  
18 other relief is warranted.

19 84. Plaintiff's claims are typical of the claims of the Class Plaintiff seeks  
20 to represent. As alleged herein, Plaintiff and the Class sustained damages arising  
21 out of the same illegal actions and conduct by Defendant.

22 85. Plaintiff is willing and prepared to serve the Class in a representative  
23 capacity with all of the obligations and duties material thereto. Plaintiff will fairly  
24 and adequately protect the interests of the Class and has no interests adverse to or  
25 in conflict with the interests of the other members in the Class.

26 86. Plaintiff's interests are co-extensive with and are not antagonistic to  
27 those of absent members within the Class. Plaintiff will undertake to represent and  
28

1 protect the interests of absent members within the Class and will vigorously  
2 prosecute this action.

3 87. Plaintiff has engaged the services of the undersigned counsel.  
4 Counsel is experienced in complex litigation, will adequately prosecute this action,  
5 and will assert and protect the rights of, and otherwise represent, Plaintiff and  
6 absent members of the Class.

7 88. A class action is superior to all other available methods for the fair  
8 and efficient adjudication of this controversy. Plaintiff knows of no difficulty to be  
9 encountered in the management of this litigation that would preclude its  
10 maintenance as a class action.

11 89. Class action status is warranted under Rule 23(b)(3) because questions  
12 of law or fact common to the members of the Class predominate over any  
13 questions affecting only individual members, and a class action is superior to other  
14 available methods for the fair and efficient adjudication of this controversy.

15 90. The Class may also be certified under Rule 23(b)(1)(A) and (B)  
16 because the prosecution of separate actions by individual members of the Class  
17 would create a risk of inconsistent or varying adjudications with respect to  
18 individual members of the Class, which would establish incompatible standards of  
19 conduct for Defendants, would be dispositive of the interests of nonparties to the  
20 individual adjudications, and would substantially impair the ability of such  
21 nonparties to protect their interests.

22 91. The Class may also be certified under Rule 23(b)(2) because  
23 Defendants have acted on grounds generally applicable to the Class, thereby  
24 making it appropriate to award final injunctive relief or corresponding declaratory  
25 relief with respect to the Class.

26 92. Likewise, particular issues under Rule 23(c)(4) are appropriate for  
27 certification because such claims present only particular, common issues, the  
28

1 resolution of which would advance the disposition of this matter and the parties'  
2 interests therein. Such particular issues include, but are not limited to, those listed  
3 in ¶ 79 herein.

4 93. The interest of members within the Class in individually controlling  
5 the prosecution of separate actions is theoretical and not practical. Class members  
6 have a high degree of similarity and are cohesive, and Plaintiff anticipates no  
7 difficulty in the management of this matter as a class action.

8 94. The nature of notice to the proposed Class is contemplated to be by  
9 direct mail upon certification of the Class or, if such notice is not practicable, by  
10 the best notice practicable under the circumstance including, *inter alia*, email,  
11 publication in major newspapers and/or on the internet.

12 **VII. CLAIMS FOR RELIEF**

13 **COUNT I**  
14 **Violation of Section 4b(a)(2)(A) and (C) of the Commodity Exchange Act**  
15 **(Against Monex)**

16 95. Plaintiff incorporates and realleges each preceding paragraph as  
17 though fully set forth herein.

18 96. Plaintiff brings this count on behalf of himself and the members of the  
19 Class.

20 97. During the Class Period, Defendants MDC, MCC, and NSC, both  
21 individually and as a common enterprise, and acting through their various officers,  
22 employees, or agents, engaged in a scheme that involved: (1) defrauding or  
23 attempting to defraud retail customers; and (2) willfully deceiving or attempting to  
24 deceive retail customers in connection with the disposition or execution of retail  
25 commodity transactions.

26 98. Monex knowingly and/or recklessly made material misrepresentations  
27 to retail customers about the safety, security, and profitability of investing in  
28 precious metals investments through its Atlas trading program, and concealed,

1 suppressed, and/or omitted material facts necessary to make those representations  
2 not misleading in any material respect.

3 99. Monex knowingly and/or recklessly made material misrepresentations  
4 and omitted material facts regarding the benefits and risks of Atlas program with  
5 the intent to induce Plaintiff and members of the Class into believing that the Atlas  
6 program was a safe and profitable way to invest in precious metals.

7 100. In ignorance of the true nature, structure, operation, and design of the  
8 Atlas program and the significant risk of loss associated therewith, and in reliance  
9 on Monex's materially false and misleading statements regarding the benefits of  
10 the Atlas program, Plaintiff and members of the Class reasonably believed that the  
11 Atlas program was a safe and profitable way to invest in precious metals. Had  
12 Monex disclosed that the Atlas program is structured in such a way that Atlas  
13 customers are highly likely to sustain losses, Plaintiff and members of the Class  
14 would not have invested in precious metals through the Atlas program.

15 101. Pursuant to Section 2(c)(2)(D)(iii) of the CEA, 7 U.S.C. §  
16 2(c)(2)(D)(iii) (2012), the retail commodity transactions alleged herein constitute  
17 contracts of sale of a commodity for future delivery and are therefore subject to  
18 Section 4b of the CEA, 7 U.S.C. § 6b (2012).

19 102. By virtue of the foregoing conduct, Monex has violated Section  
20 4b(2)(A) and (C) of the CEA, 7 U.S.C. § 6b(a)(2)(A), (C) (2012).

21 103. Each act of defrauding or attempting to defraud retail customers,  
22 willfully making or causing to be made to retail customers false reports or  
23 statements, or willfully deceiving or attempting to deceive retail customers in  
24 regard to orders for, or the disposition or execution of, retail commodity  
25 transactions, is alleged as a separate and distinct violation of Section 4b(a)(2)(A)  
26 and (C) of the CEA, 7 U.S.C. § 6b(a)(2)(A), (C).



1 Monex’s account representatives to engage in deceptive sales and marketing  
2 practices.

3 111. As a result, the Individual Defendants are liable for aiding and  
4 abetting Monex’s primary violations of Section 4b(2)(A) and (C) of the CEA  
5 pursuant to Sections 13(a) and 22(a)(1) of the CEA, 7 U.S.C. §§ 13c(a), 25(a).

6 **COUNT III**  
7 **Violation of the CLRA, Cal. Civ. Code § 1750, et seq.**  
8 **(Against Monex)**

9 112. Plaintiff incorporates and realleges each preceding paragraph as  
10 though fully set forth herein.

11 113. Plaintiff brings this count on behalf of himself and the members of the  
12 Class.

13 114. The CLRA “protect[s] consumers against unfair and deceptive  
14 business practices.” Cal. Civ. Code § 1760.

15 115. Plaintiff and members of the Class are consumers within the meaning  
16 of Cal. Civ. Code § 1761(d).

17 116. The conduct complained of herein involves “goods,” “services,” and  
18 “transactions” within the meaning of Cal. Civ. Code § 1761(a), (b) and (e).

19 117. Monex violated and continues to violate the CLRA by engaging in  
20 unfair and deceptive trade practices, including, *inter alia*: (1) representing that the  
21 Atlas program’s precious metals investments and investment services have  
22 characteristics or benefits that they do not have or that Monex account  
23 representatives have a status that they do not have; (2) representing that the Atlas  
24 program’s precious metals investments and investment services are of a particular  
25 standard or quality when they are of another; (3) advertising the Atlas program’s  
26 precious metals investments and investment services with the intent not to sell such  
27 goods or services as advertised; and (4) representing that Atlas customers will  
28

1 receive an economic benefit contingent on an event to occur subsequent to the  
2 consummation of their transactions. *See* Cal. Civ. Code § 1770.

3 118. Monex also violated the CLRA by actively concealing the material  
4 fact that Atlas customers are exposed to significant risk of loss by virtue of the  
5 nature, structure, design, and operation of the Atlas program.

6 119. The fact that Atlas customers are exposed to significant risk of loss by  
7 virtue of the nature, structure, design, and operation of the Atlas program is  
8 material because Plaintiff and members of the Class had a reasonable expectation  
9 that the Atlas program offered a safe and profitable way to invest in precious  
10 metals. Based on Monex's representations, no reasonable consumer would expect  
11 to suffer losses in the manner complained of herein by investing in the Atlas  
12 program.

13 120. When Plaintiff and members of the Class opened their Atlas accounts  
14 or placed leveraged trading orders through the Atlas program, they reasonably  
15 relied on the reasonable expectation that the Atlas program was a safe and  
16 profitable way to invest in precious metals. Had Monex disclosed that the Atlas  
17 program is structured in such a way that Atlas customers are highly likely to  
18 sustain losses, Plaintiff and members of the Class would not have invested through  
19 the Atlas program.

20 121. Monex has knowingly and willfully engaged in the unfair and  
21 deceptive trade practices alleged herein. Further, Monex unconscionably marketed  
22 the Atlas program to uninformed consumers in order to maximize profits by  
23 inducing prospective Atlas customers to open Atlas accounts and place leveraged  
24 trading orders.

25 122. Monex's unlawful acts and practices affect the public interest, and  
26 trade and commerce in the State of California, and present a continuing financial  
27 risk to Plaintiff and members of the Class.



1 upon such concealment, suppression or omission, in connection with the marketing  
2 and operation of the Atlas program. Monex knowingly concealed, suppressed  
3 and/or omitted material facts regarding the Atlas program and significant risk of  
4 loss associated therewith, and misrepresented the benefits of the Atlas program,  
5 which directly caused harm to Plaintiff and members of the Class.

6 132. Monex actively suppressed the fact that Atlas customers are exposed  
7 to significant risk of loss by virtue of the nature, structure, design, and operation of  
8 the Atlas program. Further, Monex employed unfair, unlawful, and fraudulent  
9 business practices to induce Plaintiff and other Class members to open Atlas  
10 accounts and place leveraged trading orders in violation of the UCL.

11 133. Monex's unfair, unlawful, and fraudulent business practices were  
12 likely to deceive a reasonable consumer. Plaintiff and members of the Class had  
13 no reasonable way to know that Atlas customers are exposed to significant risk of  
14 loss by virtue of the nature, structure, design, and operation of the Atlas program.  
15 Monex possessed superior knowledge as to the nature, structure, design, and  
16 operation of the Atlas Program, including the significant risk of loss associated  
17 therewith, and any reasonable consumer would have relied on Monex's  
18 misrepresentations and omissions as Plaintiff and members of the Class did.

19 134. Monex intentionally and knowingly misrepresented and omitted  
20 material facts regarding the nature, structure, design, and operation of the Atlas  
21 program and significant risk of loss associated therewith with the intent to mislead  
22 Plaintiff and members of the Class. Monex knew, or should have known, that the  
23 Atlas program is structured in such a way that Atlas customers invariably sustain  
24 losses.

25 135. Monex owed a duty to disclose the material facts regarding the nature,  
26 structure, design, and operation of the Atlas program and significant risk of loss  
27 associated therewith to Plaintiff and members of the Class because Monex  
28

1 possessed superior and exclusive knowledge regarding the Atlas program and the  
2 performance of Atlas accounts. Rather than disclose these material facts to  
3 Plaintiff and members of the Class, Monex engaged in unfair, unlawful and  
4 fraudulent business practices in order to induce them to open Atlas accounts and  
5 place leveraged trading orders.

6 136. Monex's unfair, unlawful, and fraudulent acts or practices, affirmative  
7 misrepresentations and/or material omissions regarding the Atlas program were  
8 intended to mislead consumers and misled Plaintiff and members of the Class.

9 137. At all relevant times, Monex's unfair and deceptive acts or practices,  
10 affirmative misrepresentations, and/or omissions regarding the Atlas program and  
11 the significant risk of loss associate therewith were material to Plaintiff and  
12 members of the Class. When Plaintiff and members of the Class opened their  
13 Atlas accounts or placed leveraged trading orders through the Atlas program, they  
14 reasonably relied on the reasonable expectation that the Atlas program was a safe  
15 and profitable way to invest in precious metals. Had Monex disclosed that the  
16 Atlas program is structured in such a way that Atlas customers are highly likely to  
17 sustain losses, Plaintiff and members of the Class would not have invested through  
18 the Atlas program.

19 138. Monex had a continuous duty to Plaintiff and members of the Class to  
20 refrain from unfair, unlawful, and fraudulent practices under the UCL and to  
21 disclose the material facts regarding the nature, structure, design, and operation of  
22 the Atlas program and the significant risk of loss associated therewith. Monex's  
23 unfair, unlawful, and fraudulent acts or practices, affirmative misrepresentations,  
24 and/or material omissions regarding the Atlas program and the significant risk of  
25 loss associated therewith are substantially injurious to consumers. As a result of  
26 Monex's knowing, intentional concealment and/or omission of the material facts  
27 regarding the nature, structure, design, and operation of the Atlas program and the  
28

1 significant risk of loss associated therewith, and in violation of the UCL, Plaintiff  
2 and members of the Class have suffered harm and/or continue to suffer harm and  
3 damages to be determined at trial. Atlas customers also suffered ascertainable  
4 injury in the form of, *inter alia*, out-of-pocket losses on their precious metals  
5 investments as a result of Monex's unfair, unlawful, and fraudulent acts and  
6 practices in the course of its business.

7 139. Monex has knowingly and willfully engaged in the unfair, unlawful,  
8 and fraudulent business practices alleged herein. Further, Monex unconscionably  
9 marketed the Atlas program to consumers in order to maximize profits by inducing  
10 prospective Atlas customers to open Atlas accounts and place leveraged trading  
11 orders.

12 140. Monex's unfair, unlawful, and fraudulent acts and practices have  
13 harmed and continue to harm Plaintiff and members of the Class, have negatively  
14 affected the public interest, and present a continuing financial risk to Plaintiff and  
15 members of the Class.

16 141. Plaintiff and members of the Class seek an order enjoining Monex's  
17 unfair, unlawful, and fraudulent practices and awarding costs, attorneys' fees and  
18 restitution, disgorgement of funds, and any other just and proper relief available  
19 under the UCL and California law.

20 **COUNT VI**  
21 **Fraudulent Concealment**  
22 **(Against All Defendants)**

23 142. Plaintiff incorporates and realleges each preceding paragraph as  
24 though fully set forth herein.

25 143. Plaintiff brings this claim on behalf of himself and the members of the  
26 Class.

27 144. Defendants intentionally concealed material facts regarding the  
28 nature, design, structure, and operation of the Atlas program and the significant

1 risk of loss associated therewith, or acted with reckless disregard for the truth, and  
2 denied Plaintiff and the other members of Class information that was highly  
3 relevant to their decision to invest in the Atlas program.

4 145. Defendants had a duty to disclose the material facts regarding the  
5 nature, design, structure, and operation of the Atlas program and the significant  
6 risk of loss associated therewith to Plaintiff and other members of the Class.

7 146. Plaintiff and other members of the Class were ignorant of the truth  
8 that Atlas customers were exposed to significant risk of loss by virtue of the nature,  
9 structure, design, and operation of the Atlas program.

10 147. The aforementioned concealment was material because, had Plaintiff  
11 and members of the Class known about nature, design, structure, and operation of  
12 the Atlas program and the significant risk of loss associated therewith at the time  
13 they opened their Atlas accounts or placed leveraged Atlas trading orders, they  
14 would not have opened such accounts or entered into such transactions.

15 148. Defendants intentionally concealed material facts regarding the  
16 nature, design, structure, and operation of the Atlas program and the significant  
17 risk of loss associated therewith with the intent to mislead Plaintiff and members of  
18 the Class in order to induce them to open Atlas accounts and place leveraged  
19 trading orders.

20 149. As a result of their reliance on Defendants' fraudulent concealment,  
21 Plaintiff and members of the Class are entitled to actual damages, treble damages,  
22 costs, attorneys' fees, and other damages to be determined at trial.

23 **COUNT VII**  
24 **Unjust Enrichment**  
**(Against All Defendants)**

25 150. Plaintiff incorporates and realleges each preceding paragraph as  
26 though fully set forth herein.

1           151. Plaintiff brings this count on behalf of himself and the members of the  
2 Class.

3           152. Plaintiff and members of the Class conferred a benefit on Defendants  
4 by opening Atlas accounts and placing leveraged trading orders. Defendants were  
5 and should have been reasonably expected to have acted in the best interests of  
6 Plaintiff and members of the Class by, *inter alia*, actively monitoring the  
7 performance of their Atlas accounts, providing them with investment advice,  
8 taking appropriate steps to protect their investments, and adequately explaining the  
9 risks associated with the Atlas program.

10           153. Defendants unjustly profited as a result of Monex's false  
11 representations, omissions and concealment of material facts regarding the nature,  
12 structure, design, and operation of the Atlas program and significant risk of loss  
13 associated therewith, which fraudulently induced Plaintiff and other Class  
14 members to open Atlas accounts and place leveraged trading orders.

15           154. As a proximate result of Monex's false representations, omissions and  
16 concealment of material facts regarding the nature, structure, design, and operation  
17 of the Atlas program and significant risk of loss associated therewith, and as a  
18 result of Defendants' ill-gotten gains, benefits and profits, Defendants have been  
19 unjustly enriched at the expense of Plaintiff and members of the Class. It would be  
20 inequitable for Defendants to retain their ill-gotten profits without paying the value  
21 thereof to Plaintiff and members of the Class.

22           155. Plaintiff and members of the Class are entitled to restitution of the  
23 amount of Defendants' ill-gotten gains, benefits and profits, including interest,  
24 resulting from their unlawful, unjust and inequitable conduct.

25           156. Plaintiff and members of the Class seek an order requiring Defendants  
26 to disgorge their gains and profits to Plaintiff and members of the Class, together  
27 with interest, in a manner to be determined by the Court.

1 **VIII. PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff, on behalf of himself and all others similarly  
3 situated, respectfully requests that this Court enter judgment against Defendants  
4 and in favor of Plaintiff and the Class, and award the following relief:

- 5 (1) An order certifying this action as a class action pursuant to Rule 23 of  
6 the Federal Rules of Civil Procedure, declaring Plaintiff as the  
7 representative of the Class, and Plaintiff's counsel as counsel for the  
8 Class;
- 9 (2) An order awarding declaratory relief and enjoining Defendants from  
10 continuing the unlawful, deceptive, fraudulent, harmful, and unfair  
11 business conduct and practices alleged herein;
- 12 (3) Appropriate injunctive and equitable relief;
- 13 (4) A declaration that Defendants are financially responsible for all Class  
14 notice and the administration of Class relief;
- 15 (5) An order awarding costs, restitution, disgorgement, punitive damages,  
16 statutory damages, treble damages, and exemplary damages under  
17 applicable law, and compensatory damages for economic loss,  
18 diminished value, and out-of-pocket costs in an amount to be  
19 determined at trial;
- 20 (6) An order awarding any applicable statutory and civil penalties;
- 21 (7) An order requiring Defendants to pay both pre- and post-judgment  
22 interest on any amounts awarded;
- 23 (8) An award of costs, expenses, and attorneys' fees as permitted by law;  
24 and
- 25 (9) Such other or further relief as the Court may deem appropriate, just,  
26 and equitable.
- 27  
28

1 **IX. DEMAND FOR JURY TRIAL**

2 Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff demands a trial  
3 by jury of any and all issues in this action so triable of right.

4  
5 DATED: November 6, 2017

Respectfully submitted,

6  
7 /s/ Robert G. Loewy  
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