UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TARA FRANKLIN, individually and on behalf of all others similarly situated, Plaintiff, v. WAL-MART STORES, INC. and KRAFT HEINZ FOODS COMPANY, Defendants.	Case No. 8:16 cv 515T 30 EAJ **CLASS ACTION COMPLAINT** **JURY TRIAL DEMANDED**

Plaintiff Tara Franklin ("Plaintiff"), brings this action on behalf of herself and all others similarly situated against Defendants Wal-Mart Stores, Inc. ("Wal-Mart") and Kraft Heinz Foods Company ("Kraft" and collectively with Wal-Mart, "Defendants"). Plaintiff makes the following allegations pursuant to the investigation of her counsel and based upon information and belief, except as to the allegations specifically pertaining to herself, which are based on personal knowledge.

NATURE OF THE ACTION

1. This is a class action against Defendants for falsely and misleadingly advertising that their grated Parmesan cheese products are 100% Parmesan cheese. On the product packaging of Wal-Mart's Great Value brand "100% Grated Parmesan Cheese" (the "Wal-Mart Product") and Kraft's "100% Grated Parmesan Cheese" (the "Kraft Product" and collectively with the Wal-Mart Product, the "Products"), each Defendant makes this one prominent marketing representation: the Product is "100%" grated Parmesan cheese. This representation is false.

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2. Independent laboratory testing reveals that the Wal-Mart Product and the Kraft Product are not in fact "100%" Parmesan cheese, but rather contain high levels of cellulose wood fiber.[1] Specifically, the Wal-Mart Product was found to include 7.8% cellulose wood fiber and the Kraft Product was found to include 3.8% cellulose wood fiber.[2]

3. Cellulose is a non-digestible byproduct of wood pulp that food manufacturers may add to food as a filler ingredient to cut manufacturing costs. This use of cellulose not only changes the nutritional makeup of the product, it means consumers are not getting a product with the qualities and characteristics that they bargained for.

4. As a direct and proximate result of Defendants' false and misleading advertising claims and marketing practices, Plaintiff and the members of the Class, as defined herein, purchased the Products and paid more for the Products because they were deceived into believing that the Products were comprised of "100%" Parmesan cheese. Because the Products contain significant amounts of filler and are not "100%" Parmesan cheese, Plaintiff and Class members have suffered an ascertainable and out-of-pocket loss.

5. Plaintiff seeks relief in this action individually and on a class-wide basis for breach of express and implied warranties, negligent misrepresentation, fraud, and unjust enrichment.

THE PARTIES

6. Plaintiff Tara Franklin is a resident of the State of Florida, residing in Hillsborough County, Florida. Plaintiff Franklin has purchased Kraft Products and Wal-Mart Products from a Wal-Mart retail store located in Tampa, Florida. Prior to learning of the

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[1] *See* http://www.bloomberg.com/news/articles/2016-02-16/the-parmesan-cheese-you-sprinkle-on-your-penne-could-be-wood (last accessed 2/24/2016).

[2] *See id.*

cellulose content of Defendants' Products, Plaintiff Franklin purchased the Kraft Product approximately two times per year and the Wal-Mart Product approximately two times per year. She paid approximately $4 for each Kraft Product and $3 for each Wal-Mart Product. In purchasing the Products, Plaintiff Franklin read and relied on the prominent representation on the front of the Products' labels – that the Products are "100%" grated Parmesan cheese. She reasonably understood this representation to mean that the Products contained and consisted of only Parmesan cheese, and did not contain other additives or fillers. Plaintiff Franklin would not have purchased Defendants' "100%" grated Parmesan cheese Products or would not have paid as much for the Products, had she known that the "100%" representation is false and misstates the amount, percentage, and quality of Parmesan cheese in the container. Plaintiff Franklin suffered an injury in fact and lost money as a result of Defendants' deceptive, misleading, false, unfair, and fraudulent practices, as described herein.

7. Defendant Wal-Mart Stores, Inc. is a Delaware corporation with its principal place of business at 702 S.W. 8th Street, Bentonville, Arkansas 72716. Defendant Wal-Mart manufactures, sells, and advertises its own line of grated Parmesan cheese labeled as "100% Grated Parmesan Cheese" and/or "100% Parmesan Grated Cheese" under the brand name "Great Value" nationwide, including in Florida. Defendant Wal-Mart has been and still is engaged in the business of manufacturing, selling, and advertising Great Value grated parmesan cheese throughout the United States.

8. Defendant Kraft Heinz Foods Company is a Pennsylvania corporation with headquarters in Pittsburgh, Pennsylvania and Chicago, Illinois. Defendant Kraft develops, manufactures, distributes, sells, and advertises its "100% Grated Parmesan Cheese" nationwide, including in Florida. Defendant Kraft has been and still is engaged in the business of

distributing, marketing, and selling "100% Grated Parmesan Cheese" throughout the United States.

JURISDICTION AND VENUE

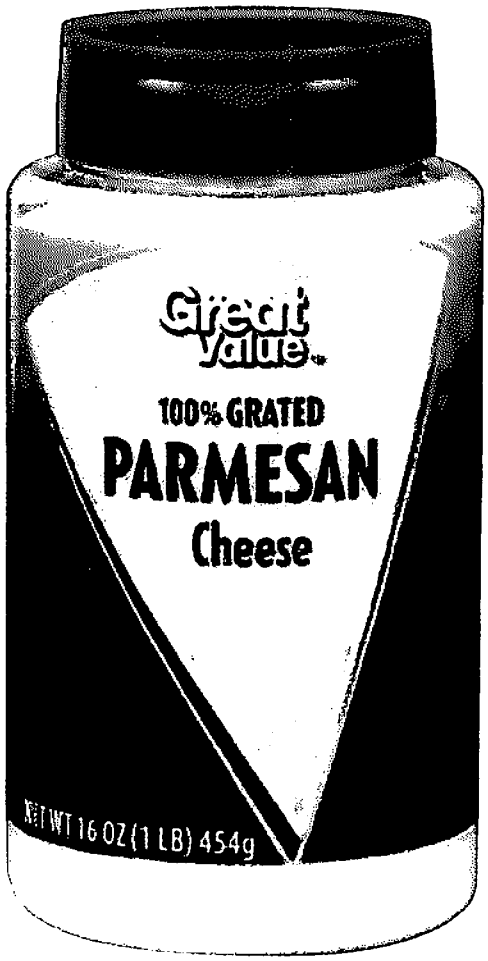
9. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because there are more than 100 Class members, the aggregate amount in controversy exceeds $5,000,000.00, exclusive of interest, fees, and costs, and at least one Class member is a citizen of a state different from at least one Defendant.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District as Defendants do business throughout this District, including selling and distributing the products at issue in this District, and Plaintiff purchased the Products in this District.

FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

11. Consumers purchasing Defendants' grated Parmesan cheese products are presented with one prominent marketing claim on Defendants' Product packaging. Defendants proclaim the Products contain "100%" grated Parmesan cheese.

12. This representation is easily visible in the images of the Wal-Mart Product's packaging reproduced below:



13. This representation is also easily visible in the images of the Kraft Product's packaging reproduced below:

14. Plaintiff and other consumers rely on Defendants' claims that the Products consist of "100%" Parmesan cheese in deciding to purchase the Products. They reasonably interpret and understand the claims to mean that the Products contain one simple ingredient – grated Parmesan – and no substitutes, additives, or fillers.

15. However, Defendants' claims are untrue. Defendants' Products are not and do not contain 100% Parmesan cheese. In fact, independent laboratory testing reveals that the

Products are not "100%" Parmesan cheese and, in fact, are not even 100% cheese. Rather, the Wal-Mart Product contains a substantial amount – at least 7.8% – of cellulose, a filler and additive derived from wood chips, and the Kraft Product contains at least 3.8% cellulose.[3]

16. Defendants' false advertising is not limited to their Product's labels. For example, Defendant Wal-Mart represents on its website that the"100% Grated Parmesan Cheese" contains 100% Parmesan. Specifically, on Walmart.com, Defendant Wal-Mart claims that the Wal-Mart Product "is 100 percent cheese aged for more than 10 months for added flavor"[4] and that "[t]his 100 percent Parmesan grated cheese makes for a wonderful addition to your cooking supplies."[4]

17. Not only is the "100%" grated Parmesan cheese claim false, but Defendant Wal-Mart's use of cellulose in the Product is particularly egregious and also deceptive and fraudulent because the amount of cellulose contained in the Wal-Mart Product is well in excess of any amount used to achieve any anticaking or anti-clumping effects. Instead, the cellulose in Defendant Wal-Mart's Product serves purely as a filler and a means of cheating customers, which is specifically prohibited by the Food, Drug, and Cosmetic Act. *See* 21 U.S.C. § 342(b)(4).

18. Defendant Kraft has represented that the Kraft Product contains 100% Parmesan cheese in its television advertising campaign. In fact, Defendant Kraft has been making this false and misleading claim for decades. For example, in a commercial that aired on television in 1990,

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[3] *See* http://www.bloomberg.com/news/articles/2016-02-16/the-parmesan-cheese-you-sprinkle-on-your-penne-could-be-wood (last accessed 2/25/2016).

[4] *See* http://www.walmart.com/ip/Great-Value-100-Parmesan-Grated-Cheese-8-oz/10315402 (last accessed 2/25/2016).

Kraft boasts that "some grated toppings are 1/3 fats and fillers, but Kraft is 100% grated Parmesan."[5] Below is a screenshot from the commercial:

19. Defendants continue to make this false and misleading labeling claim regarding the composition, contents, and quality of their Products. In doing so, Defendants have misled and continue to mislead consumers throughout the United States and are able to charge more for their Products than they otherwise could.

CLASS ACTION ALLEGATIONS

20. Plaintiff brings this action as a class action under Federal Rule of Civil Procedure 23 on behalf of all persons in the United States who, within the relevant statute of limitations period, purchased the Products (the "Class").

21. Plaintiff seeks to represent a subclass defined as all members of the Class who purchased the Products in Florida (the "Florida Subclass").

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[5] *See* https://www.youtube.com/watch?v=FIImRTxvvMk (last accessed 2/25/2016).

22. Excluded from the Class and Florida Subclass are the Defendants, the officers and directors of the Defendants at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest.

23. Also excluded from the Class and Florida Subclass are persons or entities that purchased the Products for purposes of resale.

24. Plaintiff is a member of the Class and Florida Subclass she seeks to represent.

25. The Class and Florida Subclass are so numerous that joinder of all members is impractical. Although Plaintiff does not yet know the exact size of the Class, the Products are sold in retail locations throughout the United States, and on information and belief, members of the Class number in the hundreds of thousands.

26. The Class and Florida Subclass are ascertainable because their members can be identified by objective criteria – the purchase of Defendants' Products in the United States during the statute of limitations period. Individual notice can be provided to Class members "who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).

27. There are numerous questions of law and fact common to the Class which predominate over any individual actions or issues, including but not limited to whether the labeling and marketing of the Products was false and misleading.

28. Plaintiff's claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by Defendants' wrongful conduct. Plaintiff has no interests antagonistic to the interests of the other members of the Class. Plaintiff and all members of the Class have sustained economic injury arising out of Defendants' violations of common and statutory law as alleged herein.

29. Plaintiff is an adequate representative of the Class because her interests do not conflict with the interests of the Class members she seeks to represent, she has retained counsel that is competent and experienced in prosecuting class actions, and she intends to prosecute this action vigorously. The interests of the Class members will be fairly and adequately protected by Plaintiff and her counsel.

30. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Plaintiff and Class members. Each individual Class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendants' liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court on the issue of Defendants' liability. Class treatment of the liability issues will ensure that all claims are consistently adjudicated.

COUNT I

(Breach of Express Warranty)

31. Plaintiff repeats the allegations contained in the paragraphs above as if fully set forth herein.

32. Plaintiff brings this Count individually and on behalf of the members of the Class and Florida Subclass.

33. In connection with the sale of the Products, Defendants issued express warranties that the Products consisted of "100%" Parmesan cheese.

34. Defendants' affirmations of fact and promises made to Plaintiff and the Class on the Product labels became part of the basis of the bargain between Defendants on the one hand, and Plaintiff and the Class members on the other, thereby creating express warranties that the Products would conform to Defendants' affirmations of fact, representations, promises, and descriptions.

35. Defendants breached their express warranties because the Products are not, in fact, 100% Parmesan cheese, or even 100% cheese. Rather, they are comprised of a substantial amount of additives and fillers, including cellulose.

36. As the manufacturers of the Products, Defendants had actual knowledge of the breach and given the nature of the breach, i.e. false representations regarding the Products, Defendants necessarily had knowledge that all Products sold, including the specific Products purchased by the Plaintiff, were defective in that they were not 100% parmesan cheese as Defendants falsely warrantied. Additionally, the results of the independent laboratory tests that revealed that the Products were comprised of a substantial amount of additives and fillers, including cellulose, were made public prior to the filing of this Complaint.

37. Plaintiff and Class members were injured as a direct and proximate result of Defendants' breach because: (a) they would not have purchased the Products or would not have paid as much for the Products if they had known the true facts; (b) they purchased and paid more for the Products due to the mislabeling; and (c) the Products did not have the characteristics, quality, or value as promised.

COUNT II

(Breach of Implied Warranty of Merchantability)

38. Plaintiff repeats the allegations contained in the paragraphs above as if fully set forth herein.

39. Plaintiff brings this Count individually and on behalf of the members of the Class and Florida Subclass.

40. Defendants, as the designers, manufacturers, distributors, and sellers, impliedly warranted that the Products were fit for their intended purpose in that the Products were 100% grated Parmesan cheese. Defendants did so with the intent to induce Plaintiff and proposed Class members to purchase the Products.

41. Defendants breached their implied warranties because the Products do not have the characteristics or benefits as promised.

42. As the manufacturers of the Products, Defendants had actual knowledge of the breach and given the nature of the breach, i.e. false representations regarding the Products, Defendants necessarily had knowledge that all Products sold, including the specific Products purchased by the Plaintiff, were defective in that they were not 100% parmesan cheese as Defendants falsely warrantied. Additionally, the results of the independent laboratory tests that revealed that the Products were comprised of a substantial amount of additives and fillers, including cellulose, were made public prior to the filing of this Complaint.

43. Plaintiff and proposed Class members were injured as a direct and proximate result of Defendants' breach because: (a) they would not have purchased the Products or would not have paid as much for the Products if they had known the true facts; (b) they purchased and

paid more for the Products due to the implied warranties; and (c) the Products did not have the quality or value as implied warranted.

COUNT III

(Negligent Misrepresentation)

44. Plaintiff repeats the allegations contained in the paragraphs above as if fully set forth herein.

45. Plaintiff brings this Count individually and on behalf of the members of the Class and Florida Subclass.

46. As described herein, Defendants misrepresented that their Products consist of 100% Parmesan cheese, when in fact, the Products contain a substantial amount of additives and fillers, including cellulose.

47. At the time Defendants made the misrepresentations, they knew or should have known that their representations were false.

48. At a minimum, Defendants negligently mispresented material facts about the quality and contents of the Products.

49. The negligent misrepresentations made by Defendants, upon which Plaintiff and Class members reasonably and justifiably relied, were intended to induce and actually induced Plaintiff and Class members to purchase the Products.

50. Plaintiff and Class members would not have purchased the Products, or would not have paid as much for the Products, if the true facts had been known.

51. The negligent actions of Defendants caused damage to Plaintiff and Class members, who are entitled to damages and other legal and equitable relief as a result.

COUNT IV

(Fraud)

52. Plaintiff repeats the allegations contained in the paragraphs above as if fully set forth herein.

53. Plaintiff brings this Count individually and on behalf of the members of the Class and Florida Subclass.

54. As described herein, Defendants falsely represented that their Products consist of 100% Parmesan cheese, when in fact, the Products contain a substantial amount of additives and fillers, including cellulose. Defendants' false and misleading representations were made with knowledge of their falsehood.

55. The misrepresentations made by Defendants, upon which Plaintiff and other Class members reasonably and justifiably relied, were intended to induce and did actually induce Plaintiff and Class members to purchase the Products.

56. Defendants' fraudulent actions caused damage to Plaintiff and Class members, who are entitled to damages and other legal and equitable relief as a result.

COUNT V

(Unjust Enrichment)

57. Plaintiff repeats the allegations contained in the paragraphs above as if fully set forth herein.

58. Plaintiff brings this Count individually and on behalf of the members of the Class and Florida Subclass.

59. Plaintiff and members of the Class conferred benefits on Defendants by purchasing the Products.

60. Defendants have been unjustly enriched in retaining revenues derived from Plaintiff's and Class members' purchases of the Products. Retention of that revenue under these circumstances is unjust and inequitable because Defendants misrepresented facts concerning the characteristics, qualities, and value of the Products and caused Plaintiff and Class members to purchase the Products and to pay more for the Products, which they would not have done had the true facts been known.

61. Because Defendants' retention of the non-gratuitous benefits conferred on them by Plaintiff and members of the Class is unjust and inequitable, Defendants must pay restitution to Plaintiff and members of the Class for its unjust enrichment, as ordered by the Court.

WHEREFORE, Plaintiff prays for relief and judgment, as follows:

A. Determining that this action is a proper class action;

B. For an order declaring that the Defendants' conduct violates the statutes referenced herein;

C. Awarding compensatory and punitive damages in favor of Plaintiff, members of the Class, and the Florida Subclass against Defendants for all damages sustained as a result of the Defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;

D. Awarding injunctive relief against Defendants to prevent Defendants from continuing its ongoing unfair, unconscionable, and/or deceptive acts and practices;

E. For an order of restitution and/or disgorgement and all other forms of equitable monetary relief;

F. Awarding Plaintiff and members of the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

G. Awarding such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all claims so triable in this action.

Dated: March 2, 2016

Respectfully submitted,

The Wilner Firm

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