

**IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI**

CONNIE NEWMAN, individually and)	
on behalf of all other similarly-situated)	
citizens of Missouri,)	
)	
Plaintiff,)	No. _____
)	
v.)	Div. 1
)	
DIERBERGS MARKETS, INC.,)	JURY TRIAL DEMAND
)	
Defendant.)	

Serve: Dierbergs Markets, Inc.
 Robert J. Dierberg, RAGT
 16690 Swingley Ridge Rd.
 Chesterfield MO 65017

PETITION AND JURY DEMAND

Plaintiff, Connie Newman, individually and on behalf of all other similarly-situated citizens of Missouri alleges the following facts and claims upon personal knowledge, investigation of counsel, and information and belief.

CASE SUMMARY

1. This case arises out of Defendant Dierbergs Markets, Inc.’s (“Dierbergs” or “Defendant”) deceptive, unfair, and false merchandising practices regarding its Dierbergs brand Extra Crunchy “All Natural” Extra Kettle Cooked Potato Chips Mesquite Flavored (the “Chips”).

2. On the label of the Chips, Defendant represents that the Chips are “All Natural,” which leads Missouri consumers to believe that the Chips only consist of natural ingredients.

3. The Chips, however, contain Xanthan Gum (the “Synthetic Ingredient”), which is a synthetic, unnatural substance.

4. Because the Chips contain the Synthetic Ingredient, the representation that the Chips are “All Natural” is false, deceptive, and misleading.

5. In addition, by claiming the Chips are “All Natural,” the label of the Chips creates the false impression and has the tendency and capacity to mislead consumers (*see* 15 CSR 60-9.020) into believing that the Chips are solely comprised of ingredients which are natural, when in fact the Chips contain a synthetic ingredient. Moreover, the overall format and appearance of the label of the Chips has the tendency and capacity to mislead consumers (15 C.S.R. 60-9.030) because it creates the false impression that the Chips are only comprised of natural ingredients.

6. Plaintiff brings this case to recover damages for Defendant’s false, deceptive, and misleading marketing and advertising in violation of the Missouri Merchandising Practices Act (“MMPA”) and Missouri common law.

PARTIES

7. Plaintiff, Connie Newman, is a resident of St. Louis, Missouri. On at least one occasion during the Class Period (as defined below), including in November or December 2017, Plaintiff purchased Defendant’s “All Natural” Chips at Dierbergs Markets for personal, family, or household purposes. The purchase price of the Chips was \$2.00. Plaintiff’s claim is typical of all class members in this regard.

8. Defendant Dierbergs Markets, Inc. is a Missouri corporation with its principal place of business in Chesterfield, Missouri.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action because the amount in controversy exceeds the minimum jurisdictional limits of the Court.

10. Venue is proper in this forum pursuant to Missouri Code § 508.010 because Plaintiff is a resident of St. Louis and her injury occurred in St. Louis.

ALLEGATIONS OF FACT

11. Defendant manufactures, sells, and distributes the Chips.
12. Knowing that consumers like Plaintiff are increasingly interested in purchasing Chips that do not contain potentially harmful synthetic ingredients, Defendant sought to take advantage of this growing market by labeling certain Chips as “All Natural.”
13. By affixing such a label to the packaging of the Chips, Defendant can entice consumers like Plaintiff to pay a premium for the Chips or pay more for them than they otherwise would have had the truth be known.
14. The label of the Chips is deceptive, false, and misleading in that Defendant prominently represents that the Chips are “All Natural” when they are not.
15. The Chips are not “All Natural” because they contain Xanthan Gum.
16. Xanthan Gum is a synthetic thickener that is commercially manufactured by Cargill and others by fermenting bacteria with a carbohydrate (often GMO corn syrup), which is then sterilized and dried with isopropyl alcohol or ethanol before being pressed and ground for distribution.
17. 7 C.F.R. 205.605(b) identifies Xanthan Gum as a synthetic substance.
18. Consistent with FDA guidance, Plaintiff and reasonable consumers reasonably believe and assume that Chips labeled “All Natural” do not contain any synthetic ingredients
19. Neither Plaintiff nor any reasonable consumer would expect to find synthetic ingredients in Chips labeled “All Natural.”
20. Neither Plaintiff nor any reasonable consumer would know nor should know that the Synthetic Ingredient is not natural when reviewing the product label.
21. Because of Defendant’s deceitful label, Defendant could charge and Plaintiff paid a premium for the Chips.

22. The Chips, moreover, were worth less than they were represented to be, and Plaintiff and Class Members paid extra for them due to the “All Natural” label.

23. Defendant’s misrepresentations violate the MMPA’s prohibition of the act, use, or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact about the sale or advertisement of any merchandise in trade or commerce. § 407.020, RSMo.

CLASS ALLEGATIONS

24. Pursuant to Missouri Rule of Civil Procedure 52.08 and § 407.025.2 of the MMPA, Plaintiff brings this action on her own behalf and on behalf of a proposed class of (“Class Members” of the “Class”):

All citizens of Missouri who purchased Dierbergs brand Extra Crunchy “All Natural” Extra Kettle Cooked Potato Chips Mesquite Flavored from January 30, 2013, through the Present (the “Class Period”).

25. Excluded from the Class are: (a) federal, state, and/or local governments, including, but not limited to, their departments, agencies, divisions, bureaus, boards, sections, groups, counsels, and/or subdivisions; (b) any entity in which Defendant has a controlling interest, to include, but not limited to, their legal representative, heirs, and successors; (c) all persons who are presently in bankruptcy proceedings or who obtained a bankruptcy discharge in the last three years; and (d) any judicial officer in the lawsuit and/or persons within the third degree of consanguinity to such judge.

26. Upon information and belief, the Class consists of hundreds of purchasers.

27. Accordingly, it would be impracticable to join all Class Members before the Court.

28. There are numerous and substantial questions of law or fact common to all the members of the Class and which predominate over any individual issues. Included within the

common question of law or fact are:

- a. Whether the “All Natural” claim on the Chips’ label is false, misleading, and deceptive;
- b. Whether Defendant violated the MMPA by selling the Chips with false, misleading, and deceptive representations;
- c. Whether Defendant’s acts constitute deceptive and fraudulent business acts and practices or deceptive, untrue, and misleading advertising;
- d. Whether the label of the Chips creates false impressions and has the tendency and capacity to mislead consumers;
- e. Whether Defendant was unjustly enriched; and
- f. The proper measure of damages sustained by Plaintiff and Class Members.

29. The claims of the Plaintiff are typical of the claims of Class Members, in that they share the above-referenced facts and legal claims or questions with Class Members, there is a sufficient relationship between the damage to Plaintiff and Defendant’s conduct affecting Class Members, and Plaintiff has no interests adverse to the interests other Class Members.

30. Plaintiff will fairly and adequately protect the interests of Class Members and have retained counsel experienced and competent in the prosecution of complex class actions including complex questions that arise in consumer protection litigation.

31. A class action is superior to other methods for the fair and efficient adjudication of this controversy, since individual joinder of all Class Members is impracticable and no other group method of adjudication of all claims asserted herein is more efficient and manageable for at least the following reasons:

- a. The claim presented in this case predominates over any questions of law or fact, if any exists at all, affecting any individual member of the Class;
- b. Absent a Class, the Class Members will continue to suffer damage and Defendant's unlawful conduct will continue without remedy while Defendant profits from and enjoys its ill-gotten gains;
- c. Given the size of individual Class Members' claims, few, if any, Class Members could afford to or would seek legal redress individually for the wrongs Defendant committed against them, and absent Class Members have no substantial interest in individually controlling the prosecution of individual actions;
- d. When the liability of Defendant has been adjudicated, claims of all Class Members can be administered efficiently and/or determined uniformly by the Court; and
- e. This action presents no difficulty that would impede its management by the court as a class action, which is the best available means by which Plaintiff and members of the Class can seek redress for the harm caused to them by Defendant.

32. Because Plaintiff seeks relief for the entire Class, the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual member of the Class, which would establish incompatible standards of conduct for Defendant.

33. Further, bringing individual claims would overburden the Courts and be an inefficient method of resolving the dispute, which is the center of this litigation. Adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interest

of other members of the Class who are not parties to the adjudication and may impair or impede their ability to protect their interests. Therefore, class treatment is a superior method for adjudication of the issues in this case.

CLAIMS FOR RELIEF

COUNT I

Violation of Missouri's Merchandising Practices Act

34. Plaintiff repeats and re-alleges the allegations of the preceding paragraphs as if fully set forth herein.

35. Missouri's Merchandising Practices Act (the "MMPA") prohibits the act, use, or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact about the sale or advertisement of any merchandise in trade or commerce § 407.020, RSMo.

36. Defendant's conduct constitutes the act, use or employment of deception, fraud, false pretenses, false promises, misrepresentation, unfair practices and/or the concealment, suppression, or omission of any material facts about the sale or advertisement of any merchandise in trade or commerce because Defendant misrepresents that the Chips are "All Natural" when they in fact contains the Synthetic Ingredient.

37. In addition, by claiming the Chips are "All Natural," the label of the Chips creates the false impression and has the tendency and capacity to mislead consumers (*see* 15 CSR 60-9.020) into believing that the Chips are solely comprised of ingredients which are natural, when in fact the Chips contain a Synthetic Ingredient. Moreover, the overall format and appearance of the label of the Chips has the tendency and capacity to mislead consumers (15 C.S.R. 60-9.030) because it creates the false impression that the Chips are only comprised of natural ingredients.

38. The Chips were therefore worth less than the Chips as represented, and Plaintiff

and Class Members paid extra or a premium for them.

39. Neither Plaintiff nor any reasonable consumer would expect the Synthetic Ingredient to be in Chips labeled “All Natural.”

40. Neither Plaintiff nor any reasonable consumer would know nor should know that the Synthetic Ingredient is not natural.

41. Plaintiff and Class Members purchased the Chips for personal, family, or household purposes and thereby suffered an ascertainable loss because of Defendant’s unlawful conduct as alleged herein, including the difference between the actual value of the product and the value of the product if it had been as represented.

42. Defendant’s unlawful practices have caused similar injury to Plaintiff and numerous other persons. § 407.025.2.

COUNT II

Unjust Enrichment

43. Plaintiff repeats and re-alleges the allegations of the preceding paragraphs as if fully set forth herein.

44. By purchasing the Chips, Plaintiff and the class members conferred a benefit on Defendant in the form of the purchase price of the misrepresented Chips.

45. Defendant appreciated the benefit because, were consumers not to purchase the Chips, Defendant would have no sales and make no money.

46. Defendant’s acceptance and retention of the benefit is inequitable and unjust because the benefit was obtained by Defendant’s fraudulent and misleading representations about the Chips.

47. Equity cannot in good conscience permit Defendant to be economically enriched for such actions at Plaintiff and Class Members’ expense and in violation of Missouri law, and

therefore restitution and/or disgorgement of such economic enrichment is required.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all similarly situated persons, prays the Court:

- a. Grant certification of this case as a class action;
- b. Appoint Plaintiff as Class Representative and Plaintiff's counsel as Class Counsel;
- c. Award compensatory damages to Plaintiff and the proposed Class, or, alternatively, require Defendant to disgorge or pay restitution of its ill-gotten gains;
- d. Award pre- and post-judgment interest;
- e. Award reasonable and necessary attorneys' fees and costs; and
- f. For all such other and further relief, as may be just and proper.

Dated: January 30, 2018

Respectfully submitted,

By: /s/ Matthew H. Armstrong
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