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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STEPHANIE MILLER, an individual, on behalf of herself and all others similarly situated,

Plaintiff,

v.

LIVING HARVEST FOODS INC. n/k/a LIVING HARVEST, INC., an Oregon corporation, and LIVING HARVEST, INC. an Delaware corporation

Defendants.
_____/

CASE NO.:

CLASS ACTION COMPLAINT

Plaintiff Stephanie Miller ("Plaintiff") hereby sues for herself and all others similarly situated, Defendants Living Harvest Foods, Inc. n/k/a Living Harvest, Inc. and Living Harvest, Inc. (collectively "Defendant") and alleges as follows:

INTRODUCTION

1. Plaintiff brings this consumer class action on behalf of herself and all other persons who, from October 22, 2009 up to and including the present (the "Class Period"), purchased in Florida for consumption and not resale Defendants' Products[1] listing Evaporated Cane Juice ("ECJ") in the ingredients.

2. During the Class Period, Defendants engaged in a uniform campaign through which it purposefully misrepresented and continues to purposefully misrepresent to consumers that its Products contain ECJ even though "evaporated cane juice" is not "juice" at all—it is

[1] The term "Products" is defined as Living Harvest's Tempt Hempmilk – Original, Tempt Hempmilk – Vanilla, and Tempt Hempmilk – Chocolate.

nothing more than sugar, cleverly disguised. Defendant conceals the fact that its Products have added sugar by referring to the sugar as ECJ, a "healthy" sounding name made up by the sugar industry years ago to sell sugar to "healthy" food manufacturers for use in their consumer products. ECJ is not the common or usual name of any type of sweetener, or even any type of juice, and the use of such a name is false and misleading. Defendants uniformly lists ECJ as an ingredient on its Products, as well as on its website and other promotional material.

3. Defendants' actions constitute violations of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201-501.2101. Defendants has also been unjustly enriched as a result of its conduct.

4. As a result of these unfair and deceptive practices, Defendants has collected millions of dollars from the sale of its Products with ECJ that it would not have otherwise earned.

PARTIES, JURISDICTION, AND VENUE

5. This is an action for injunctive relief and damages, and the amount in controversy exceeds this Court's minimum jurisdiction amount ($15,000 exclusive of interest, costs, and attorney fees).

6. Defendant Living Harvest Foods, Inc. n/k/a Living Harvest, Inc. is an Oregon corporation. Living Harvest's principal place of business is in Portland, Oregon.

7. Defendant Living Harvest, Inc. is an Delaware Corporation. Upon information and belief, Living Harvest, Inc. has purchased all of the assets and liabilities of Defendant Living Harvest Foods.

8. The Court has jurisdiction over Defendants because it is a foreign corporation authorized to do business in the State of Florida, and is regularly and systematically engaging in

business in Miami-Dade County. By conducting business in Miami-Dade County, Defendant has sufficient minimum contacts with the State of Florida, and Miami-Dade County in particular, or otherwise intentionally availed itself of the Miami-Dade County consumer market through the systematic sale of its products to Florida citizens in satisfaction of Fla. Stat. § 48.193 et seq. This purposeful availment renders the exercise of jurisdiction by this Court over Defendant permissible under traditional notions of fair play and substantial justice.

9. Venue is proper in this forum because Defendants regularly and systematically transacts business and may be found in Miami-Dade County. Venue is also proper here because at all times relevant to this action, many of the practices complained of in this Complaint occurred in Miami-Dade County in addition to other areas of Florida.

10. All conditions precedent to this action have occurred, been performed, or have been waived.

FACTUAL ALLEGATIONS

11. Defendants advertises and markets many of its Products as having ECJ, an unlawful term that is merely a false and misleading name for another less healthy food or ingredient that has a common or usual name, namely sugar. By using the term ECJ, Defendants is concealing the fact that it is adding sugar to its Products.

12. Defendants uses the term “Evaporated Cane Juice” on its packaging.

13. Defendants uses the term ECJ to make its Product appear healthier and to increase sales and to charge a premium.

14. Defendants’ labeling of its Products identifies “Evaporated Cane Juice” as an ingredient, despite the fact that the FDA has specifically warned companies not to use the term “Evaporated Cane Juice” because (1) it is “false and misleading;” (2) its use is in violation of a

number of labeling regulations designed to ensure that manufacturers label their products with the common and usual names of the ingredients they use and accurately describe the ingredients they utilize; and (3) the ingredient in question is not a juice.

15. In October of 2009, the FDA issued Guidance for Industry: Ingredients Declared as Evaporated Cane Juice, which advised industry that:

> [T]he term "evaporated cane juice" has started to appear as an ingredient on food labels, most commonly to declare the presence of sweeteners derived from sugar cane syrup. **However, FDA's current policy is that sweeteners derived from sugar cane syrup should not be declared as "evaporated cane juice" because that term falsely suggests that the sweeteners are juice…**
>
> "Juice" is defined by 21 CFR 120.1(a) as "the aqueous liquid expressed or extracted from one or more fruits or vegetables, purees of the edible portions of one or more fruits or vegetables, or any concentrates of such liquid or puree." …
>
> As provided in 21 CFR 101.4(a)(1), "Ingredients required to be declared on the label or labeling of a food . . . shall be listed by common or usual name . . . ." The common or usual name for an ingredient is the name established by common usage or by regulation (21 CFR 102.5(d)). The common or usual name must accurately describe the basic nature of the food or its characterizing properties or ingredients, and may not be "confusingly similar to the name of any other food that is not reasonably encompassed within the same name" (21 CFR 102.5(a))…
>
> Sugar cane products with common or usual names defined by regulation are sugar (21 CFR 101.4(b)(20)) and cane sirup (alternatively spelled "syrup") (21 CFR 168.130). Other sugar cane products have common or usual names established by common usage (e.g., molasses, raw sugar, brown sugar, turbinado sugar, muscovado sugar, and demerara sugar)…
>
> **The intent of this draft guidance is to advise the regulated industry of FDA's view that the term "evaporated cane juice" is not the common or usual name of any type of sweetener, including dried cane syrup. Because cane syrup has a standard of identity defined by regulation in 21 CFR 168.130, the common or usual name for the solid or dried form of cane syrup is "dried cane syrup."…**
>
> **Sweeteners derived from sugar cane syrup should not be listed in the ingredient declaration by names which suggest that the ingredients are juice, such as "evaporated cane juice." FDA considers such representations to be false and misleading under section 403(a)(1) of the Act (21 U.S.C. 343(a)(1)) because they fail to reveal the basic nature of the food and its characterizing**

> **properties (i.e., that the ingredients are sugars or syrups) as required by 21 CFR 102.5.** Furthermore, sweeteners derived from sugar cane syrup are not juice and should not be included in the percentage juice declaration on the labels of beverages that are represented to contain fruit or vegetable juice (see 21 CFR 101.30).

http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm181491.html (emphasis added).

16. In 2012, the FDA followed up by sending two "warning letters" to the food industry telling them in no uncertain terms that their products are "misbranded" because their ingredient statements include "evaporated cane juice" which is "not the common or usual name of any type of sweetener." *See* Exhibit 1

17. Despite the issuance of the 2009 FDA Guidance and the 2012 warning letters, Defendants has not removed the unlawful and misleading reference to "evaporated cane juice" from its ingredient labels and continues to sell these misbranded Products to the consuming public.

18. Such Products mislead consumers into paying a premium price for products that do not satisfy the minimum standards established by law for those products and for inferior or undesirable ingredients or for products that contain ingredients not accurately listed on the label by its common name.

19. Defendants' false, unlawful, and misleading product descriptions and ingredient listings render these Products misbranded under Florida law. Specifically, Section 500.04 of the Florida Food Safety Act prohibits the manufacture, sale or delivery of "misbranded food." Food is "misbranded" when "its labeling is false or misleading in any particular" or when a food is "offered for sale under the name of another food." Fla. Stat. § 500.11(1)(a) & (b); Fla. Admin Code 5k-4.002. Misbranded products cannot be legally sold and are legally worthless.

20. Plaintiff and the class paid a premium price for their Defendants Products with ECJ.

21. Plaintiff and the Class have been damaged by Defendants' deceptive and unfair conduct in that they purchased a misbranded and worthless Product or paid prices they otherwise would not have paid had Defendants not misrepresented the Products' ingredients.

CLASS ACTION ALLEGATIONS

22. Plaintiff brings this case as a class action pursuant to Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. §§501.201-501.213. Plaintiff seeks certification of the following Class: All individuals who purchased any Defendants Product with ECJ for consumption and not resale in Florida after September 9, 2009 up to and including the present (the "Class"). Excluded from the Class are employees, officers, and directors of Defendants.

23. This action is proper for class treatment under Rule 1.220 of the Florida Rules of Civil Procedure. While the exact number and identities of other Class members are unknown to Plaintiff at this time, Plaintiff is informed and believes that there are thousands of Class members. Thus, the Class is so numerous that individual joinder of all Class members is impracticable.

24. Questions of law and fact arise from Defendant's conduct described herein. Such questions are common to all Class members and predominate over any questions affecting only individual Class members and include:

a. whether listing sugar as ECJ on its Products is false and misleading;

b. whether listing the ingredient "evaporated cane juice" is misleading because it is not "juice;"

c. whether identifying sugar as ECJ renders the Products at issue misbranded;

d. whether Defendants failed to disclose to consumers that ECJ is an unlawful term that is merely sugar;

e. whether Defendants engaged in a marketing practice intended to deceive consumers by substituting the term ECJ for sugar in its Products;

f. whether Defendants' marketing practices violate FDUTPA;

g. whether Defendants has been unjustly enriched at the expense of Plaintiff and the other Class members by its misconduct;

h. whether Defendants must disgorge any and all profits it has made as a result of its misconduct; and

i. whether Defendants should be barred from marketing its Products as listing ECJ as an ingredient.

25. Plaintiff will fairly and adequately represent and pursue the interests of the Class. Plaintiff's counsel has vast experience in litigating consumer class action cases. Plaintiff understands the nature of her claims herein, has no disqualifying conditions, and will vigorously represent the interests of the Class.

COUNT I- INJUNCTION FOR VIOLATIONS OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

26. Plaintiff realleges and incorporates by reference paragraphs 1 - 25 herein and further alleges as follows:

27. This is a claim for an injunction for violations of Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201-501.2101.

28. FDUTPA provides that unfair methods of competition, unconscionable acts and practices, and unfair or deceptive acts or practices in the conduct "of any trade or commerce" are unlawful. Fla. Stat. §501.204. Under FDUTPA, "trade or commerce" is defined to include any advertisement or solicitation relating to any "thing of value." Fla. Stat. §501.203(8).

29. Plaintiff and the other Class members are consumers as defined and construed under FDUTPA, Fla. Stat. §§501.201-501.213. Further, Plaintiff and the other Class members are "aggrieved" by the sale of Products listing ECJ as an ingredient in that they purchased said Products.

30. The practices employed by Defendant, whereby Defendant sells its Products with the ingredient ECJ is unfair, deceptive, and misleading. In addition, the practice employed by Defendant, whereby Defendant sells Products that contain ECJ constitutes a *per se* violation of FDUTPA under Section 501.203(3)(c) because it is in violation of the Florida Food Safety Act, Fla. Stat. § 500.04 (1) and (2) in that said Products are misbranded. These practices would likely deceive a reasonable consumer.

31. Defendants should be enjoined from marketing its Products as containing ECJ as described above pursuant to Fla. Stat. § 501.211(1).

WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, respectfully demands a judgment enjoining Defendants' conduct, awarding costs of this proceeding and attorney's fees, as provided by Fla. Stat. § 501.2105, and such other relief as this Court deems just and proper.

COUNT II- VIOLATIONS OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

32. Plaintiff realleges and incorporates by reference paragraphs 1 - 25 herein and further alleges as follows:

33. This is a claim for violation of Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201-501.2101.

34. FDUTPA provides that unfair methods of competition, unconscionable acts and practices, and unfair or deceptive acts or practices in the conduct "of any trade or commerce" are

unlawful. Fla. Stat. §501.204. Under FDUTPA, "trade or commerce" is defined to include any advertisement or solicitation relating to any "thing of value." Fla. Stat. §501.203(8).

35. Plaintiff and the other Class members are consumers as defined and construed under FDUTPA, Fla. Stat. §§501.201-501.213.

36. The practices employed by Defendant, whereby Defendant sells its Products with the ingredient ECJ are unfair, deceptive, and misleading. In addition, the practice employed by Defendant, whereby Defendant sold, promoted and marketed that its Products that contain ECJ constitutes a *per se* violation of FDUTPA under Section 501.203(3)(c) because it is in violation of the Florida Food Safety Act, Fla. Stat. § 500.04 (1) and (2) in that said Products are misbranded. These practices would likely deceive a reasonable consumer.

37. Plaintiff and the other Class members suffered a loss as a result of Defendants' deceptive and unfair trade acts. Specifically, as a result of Defendants' deceptive and unfair trade acts and practices, Plaintiff and the other Class members suffered monetary losses associated with the purchase of Defendants Products with ECJ, *i.e.*, the purchase price of the Product and/or the premium paid by Plaintiff and the Class for said Products.

WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, respectfully demands an award against Defendants for actual and/or compensatory damages, in addition to the costs of this proceeding and attorney's fees, as provided by Fla. Stat. § 501.2105, and such other relief as this Court deems just and proper.

COUNT III- UNJUST ENRICHMENT

38. Plaintiff realleges and incorporates the allegations contained in paragraphs 1 - 25 herein and further alleges as follows:

39. Defendants received certain monies as a result of its uniform deceptive marketing of its Products with ECJ that are excessive and unreasonable.

40. Plaintiff and the Class conferred a benefit on Defendants through purchasing its Products with ECJ, and Defendants has knowledge of this benefit and has voluntarily accepted and retained the benefits conferred on it. It would be inequitable for Defendants to retain this benefit.

41. Each Class member is entitled to an amount equal to the amount they enriched Defendants and for which Defendants has been unjustly enriched.

WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, demands an award against Defendants for the amounts equal to the amount each Class member enriched Defendants and for which Defendants has been unjustly enriched, and such other relief as this Court deems just and proper.

DEMAND FOR TRIAL BY JURY

42. Plaintiff, individually and on behalf of all others similarly situated, hereby demands a jury trial on all claims so triable.

Dated: January 30, 2014

Respectfully submitted,

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