

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

<p>SAMARA DALY and ZARA PAKROO, on behalf of themselves and all others similarly situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>XOCHITL, INC.,</p> <p style="text-align: center;">Defendant.</p>	<p>Case No. _____</p> <p>CLASS ACTION COMPLAINT</p> <p><u>DEMAND FOR JURY TRIAL</u></p> <p>ECF CASE</p>
---	---

Plaintiffs Samara Daly and Zara Pakroo, on behalf of themselves and all others similarly situated, by and through their undersigned counsel, allege the following based upon their own personal knowledge and the investigation of their counsel.

NATURE OF THE ACTION

1. This is a proposed class action against Xochitl, Inc. (“Xochitl”) for misrepresenting that its corn chips (the “Chips”) are all natural and contain no genetically modified organisms (“GMO”), when, in fact, 75% of the corn used in the Chips is genetically modified.

2. Through its deceptive practice of marketing and selling its Chips as all natural and not containing GMOs when the majority of the corn used in the Chips is genetically modified, Defendant is able to command a premium price by deceiving consumers about the nature of the Chips. Defendant’s deception also allows it to distinguish its Chips from the numerous other similar and otherwise indistinguishable corn chips available in the market.

3. Were it not for Defendant’s unfair and deceptive practices, Plaintiffs and the members of the Classes would not have purchased Defendant’s Chips or paid a price premium to purchase them. Plaintiffs bring this action to stop Defendant’s deceptive practice of representing that its Chips do not contain GMOs when they do.

JURISDICTION AND VENUE

4. This court has jurisdiction over all causes of action asserted herein, pursuant to 28 U.S.C. § 1332(d), because the aggregate claims of the Classes (as defined below) exceed the sum or value of \$5,000,000.00, exclusive of interest and costs, and there is diversity of citizenship between members of the proposed Classes and Defendant.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391. A substantial part of the events or omissions giving rise to Plaintiff Daly’s claims, including the dissemination of false

information regarding the Chips and Plaintiff Daly's purchases, occurred within this District.

PARTIES

6. Plaintiff Samara Daly is a citizen of New York residing in Brooklyn. Prior to the commencement of this action, Ms. Daly bought Defendant's Chips on a regular basis from retail locations in Brooklyn. Plaintiff purchased the Chips, for which she paid a price premium over otherwise similar chips that did not claim to be GMO free or all natural, because she wanted chips that were not made from GMOs. Had Plaintiff known at the time that the Chips did, in fact, contain corn derived from GMOs, Plaintiff would not have purchased the Chips or paid a price premium to purchase them. Further, if Ms. Daly knew the Chips' labels were truthful and non-misleading, she would continue to purchase the Chips in the future. At present, however, Ms. Daly cannot be confident that the labeling of the Chips is, and will be, truthful and non-misleading.

7. Plaintiff Zara Pakroo is a citizen of Wisconsin residing in Bayside. Prior to the commencement of this action, Ms. Pakroo bought Defendant's Chips on a regular basis from retail locations in Wisconsin. Plaintiff purchased the Chips, for which she paid a price premium over otherwise similar chips that did not claim to be GMO free or all natural, because she wanted chips that were not made from GMOs. Had Plaintiff known at the time that the Chips did, in fact, contain corn derived from GMOs, Plaintiff would not have purchased the Chips or paid a price premium to purchase them. Further, if Ms. Pakroo knew the Chips' labels were truthful and non-misleading, she would continue to purchase the Chips in the future. At present, however, Ms. Pakroo cannot be confident that the labeling of the Chips is, and will be, truthful and non-misleading.

8. Defendant Xochitl, Inc., is a corporation with its principal place of business in Irving, Texas. On information and belief, Defendant is incorporated under the laws of the State of Texas. Defendant markets its Chips to consumers and sells them to distributors throughout the

United States, including in New York and Wisconsin.

SUBSTANTIVE ALLEGATIONS

9. Many consumers are seriously concerned about the prevalence of GMOs in food products, and they make their purchasing decisions accordingly. In fact, many reasonable consumers choose to purchase, and pay a price premium, for products that do not contain GMOs.

10. Indeed, GMOs have created widespread controversy due to concerns about food safety, the effect on natural ecosystems, gene flow (a/k/a “gene migration” or “genetic drift”) into non-GMO crops, and other issues. One consumer response to such concerns has been to purchase products that do not contain GMOs but that are instead “all natural.”

11. Xochitl takes advantage of consumers’ preference for products that do not contain GMOs by intentionally and prominently labeling its packages in a manner that causes consumers to reasonably believe that its Chips do not contain genetically modified corn.

12. To that end, Xochitl explicitly and prominently represents to consumers on the front and side of the Chips package that the product contains “No GMO.” Consequently, all purchasers of the Chips are exposed to Defendant’s false and misleading “No GMO” representation.

13. That representation is false. In fact, according to an October 2014 report from Consumer Reports, who conducted independent tests on the Chips, “the amount of genetically modified corn in the six samples we tested averaged more than 75 percent.”¹

14. As a result of its “No GMO” representation, Defendant is able to, and does, charge a substantial price premium for its Chips as compared to products that are comparable but for Defendant’s deception.

¹ See <http://consumerreports.org/cro/2014/10/where-gmos-hide-in-your-food/index.htm>.

15. Xochitl also prominently and uniformly represents that its Chips are “All Natural” on the front and sides of the Chips’ packaging. Consequently, all purchasers of the Chips are exposed to Defendant’s false and misleading “All Natural” representation.

16. However, the representation that the Chips are all natural is false because they are in fact made with man-made, unnatural, genetically modified corn.

17. A product that is derived from GMOs is unnatural by definition, and consumers reasonably view GMOs as unnatural.

18. Natural breeding can take place only between closely related life forms -- *e.g.*, wheat plants with other wheat plants. Natural breeding techniques cannot add the genes of a different organism -- *e.g.*, adding fish genes to wheat plants. Instead, to add genes of an organism to a different organism, scientists must use genetic engineering, producing an organism that could not otherwise exist in nature.

19. Genetically modified ingredients are fundamentally different from naturally existing ingredients. Inserting foreign genes will alter even the original genes, just as inserting a new letter can alter the meaning of a word. The foreign genes will reduce or increase the natural gene’s function, sometimes blocking the natural gene’s expression altogether. These unexpected consequences can yield alterations in the nutritional content of the food, toxic and allergenic effects, poor crop performance, and generations of environmental damage.

20. Indeed, “unnatural” is a defining characteristic of GMO foods. For example, the Monsanto Company, an agricultural company that pioneered GMO seeds, defines GMOs as “[p]lants or animals that have had their **genetic makeup altered to exhibit traits that are not naturally theirs**. In general, genes are taken (copied) from one organism that shows a desired

trait and transferred into the genetic code of another organism.”² Additionally, the World Health Organization defines GMOs as “organisms in which the genetic material (DNA) has been **altered in a way that does not occur naturally**. It allows selected individual genes to be transferred from one organism into another, also between non-related species.”³

21. Indeed, research shows that a majority of consumers expect “natural” foods to be free of GMOs.⁴ Research also shows that many consumers consider the absence of GMOs from food to be important.⁵ Indeed, “it is not unreasonable, as a matter of law, for a consumer to believe that non-organic foods labeled as ‘All Natural’ do not possess GMOs.” *Ault v. J.M. Smucker Co.*, No. 13-3409, 2014 WL 1998235, at * 6 (S.D.N.Y. May 15, 2014).

22. As a result of its “all natural” representation, Defendant is able to, and does, charge a substantial price premium for its Chips as compared to products that are comparable but for Defendant’s deception.

CLASS ALLEGATIONS

23. Plaintiff Samara Daly brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the following subclass (the “New York Class”):

All persons who purchased Defendant’s Chips in New York during the

² Monsanto | Glossary, <http://www.monsanto.com/newsviews/Pages/glossary.aspx#g> (last visited Feb. 10, 2014) (emphasis added).

³ See WHO | 20 questions on genetically modified foods, <http://www.who.int/foodsafety/publications/biotech/20questions/en/> (last visited Feb. 10, 2014) (emphasis added).

⁴ See Cornucopia Institute, *Cereal Crimes: How “Natural” Claims Deceive Consumers and Undermine the Organic Label – A Look Down the Cereal and Granola Aisle*, at 29 (2011), available at <http://www.cornucopia.org/2011/10/natural-vs-organic-cereal/> (“Cornucopia Cereal Report”); The Hartman Group, *Beyond Organic and Natural* (2010), available at <http://www.hartman-group.com/publications/reports/beyond-organic-and-natural/> (“Beyond Organic Report”).

⁵ See Cornucopia Cereal Report at 29; see also Beyond Organic Report at 4 (showing that a significant percentage of consumers consider “GMO-free” to be an “important” or “very important” claim on food packaging or menus).

applicable limitations period. Excluded from the New York Class are current and former officers and directors of Defendant, members of the immediate families of the officers and directors of Defendant, Defendant's legal representatives, heirs, successors, or assigns, and any entity in which they have or have had a controlling interest. Also excluded from the New York Class is the judicial officer to whom this lawsuit is assigned.

24. Plaintiff Zara Pakroo brings this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the following subclass (the "Wisconsin Class"):

All persons who purchased Defendant's Chips in Wisconsin during the applicable limitations period. Excluded from the Wisconsin Class are current and former officers and directors of Defendant, members of the immediate families of the officers and directors of Defendant, Defendant's legal representatives, heirs, successors, or assigns, and any entity in which they have or have had a controlling interest. Also excluded from the Wisconsin Class is the judicial officer to whom this lawsuit is assigned.

25. Herein, Plaintiffs refer to the New York Class and the Wisconsin Class, together, as the "Class" or the "Classes."

26. Plaintiffs reserve the right to revise the Class definitions based on facts learned in the course of litigating this matter.

27. At this time, Plaintiffs do not know the exact number of the members of the Classes; however, given the nature of the claims and the number of retail stores selling Defendant's Chips in New York and Wisconsin, Plaintiff believes the Class members are so numerous that joinder of all members is impracticable.

28. Questions of law and fact common to the members of the Class that predominate over questions that may affect individual Class members include but are not limited to:

- a. Whether Defendant labeled, marketed, and/or advertised Chips to Plaintiffs and those similarly situated using false, misleading, and/or deceptive statements or representations, including statements or

representations concerning whether the corn in Chips is genetically modified;

- b. Whether Defendant omitted and/or misrepresented material facts in connection with the sales of Chips;
- c. Whether Defendant's labeling, marketing, advertising, and/or selling of the Products with the representation "Active Naturals" herein constitutes a deceptive consumer sales practice;
- d. Whether Defendant warranted that its Chips did not contain GMOs but were instead "all natural" and whether Defendant breached that warranty; and
- e. Whether Defendant has been unjustly enriched.

29. Plaintiffs' claims are typical of those of the members of the Classes because Plaintiffs and the other members of the Classes sustained damages arising out of the same wrongful conduct, as detailed herein.

30. Plaintiffs will adequately protect the interests of the members of the Classes. Plaintiffs have retained counsel that are experienced in litigating complex class actions, including litigation related to false and deceptive labeling. Neither Plaintiffs nor their counsel have any interests adverse to those of the other members of the Classes.

31. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The damages suffered by any individual class member are too small to make it economically feasible for an individual class member to prosecute a separate action, and it is desirable for judicial efficiency to concentrate the litigation of the claims in this forum. Furthermore, the adjudication of this controversy through a class action will avoid the

potentially inconsistent and conflicting adjudications of the claims asserted herein. There will be no difficulty in the management of this action as a class action.

32. The prerequisites to maintaining a class action for injunctive or equitable relief pursuant to Rule 23(b)(2) are met, as Defendant has acted or refused to act on grounds generally applicable to the Classes, thereby making appropriate final injunctive or equitable relief with respect to the Classes as a whole.

33. The prosecution of separate actions by members of the Classes would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. Additionally, individual actions may be dispositive of the interests of all members of the Classes, although certain members of the Classes are not parties to such actions.

34. Defendant's conduct is generally applicable to the Classes as a whole and Plaintiffs seek, *inter alia*, equitable remedies with respect to the Classes as a whole. As such, Defendant's systematic policies and practices make declaratory relief with respect to the Classes as a whole appropriate.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Violation of the New York General Business Law § 349) (By Plaintiff Daly, On Behalf of the New York Class)

35. Plaintiff Daly repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

36. As detailed more fully herein, Defendant engaged in deceptive acts and practices by falsely and misleadingly marketing its Chips to consumers, including through the use of false and misleading labeling.

37. As fully alleged above, by advertising, marketing, distributing, and/or selling Chips

to Plaintiff and the other members of the New York Class, Defendant engaged in and continues to engage in deceptive acts, practices, and omissions.

38. Plaintiff Daly and the other members of the New York Class further seek to enjoin such unlawful deceptive acts and practices as described above. Each of the Class members will be irreparably harmed unless the unlawful actions of the Defendant are enjoined in that Defendant will continue to falsely and misleadingly advertise that the Chips do not contain GMOs and are “all natural” when in fact the Chips are made with genetically modified corn. Absent injunctive relief, Defendant will continue to manufacture and sell Chips by representing that they are “all natural” and do not contain GMOs when they in fact do, to the detriment of consumers.

39. By reason of the foregoing, Defendant’s conduct, as alleged herein, constitutes deceptive acts and practices in violation of New York General Business Law § 349, and Defendant is liable to Plaintiff Daly and the other members of the New York Class for the actual damages that they have suffered as a result of Defendant’s actions. The amount of such damages is to be determined at trial, but will not be less than \$50.00. Therefore, Plaintiff Daly prays for relief as set forth below.

SECOND CAUSE OF ACTION

**(Violation of the W.S.A. 100.18)
(By Plaintiff Pakroo, On Behalf of the Wisconsin Class)**

40. Plaintiff Pakroo repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

41. As detailed more fully herein, Defendant, with the intent to sell or increase the consumption of Chips, makes, publishes, disseminates, circulates and places before the public in Wisconsin an advertisement in the form of package labeling which contains the representation and statement that the Chips are “all natural” and do not contain GMOs, which is untrue, deceptive,

and misleading.

42. Defendant made its “No GMO” and “All Natural” representations with the intent that consumers would be induced to purchase its Chips at a premium price.

43. That representation was untrue because the Chips contain genetically modified corn and are not all natural.

44. Defendant’s “No GMO” and “All Natural” misrepresentations caused pecuniary injury to Plaintiff Pakroo and the Wisconsin Class because Defendant is able to and does charge a price premium for its Chips as a direct result of these misrepresentations, and Plaintiff Pakroo and the Wisconsin class paid that price premium because they believed that the Chips did not contain GMOs. Plaintiff Pakroo and the Wisconsin Class also suffered pecuniary injury because they paid for a product that purportedly had a material characteristic (namely, being made from natural, rather than genetically modified, corn) when it did not, and thus Plaintiff Pakroo and the Wisconsin Class were deprived of the benefit of their bargain. Plaintiff Pakroo and the Wisconsin Class also suffered pecuniary injury because they would not have purchased the Chips had they not been deceived as to the natural nature of the Chips.

45. Plaintiff Pakroo and the other members of the Wisconsin Class further seek to enjoin such unlawful deceptive acts and practices as described above. Each of the Class members will be irreparably harmed unless the unlawful actions of the Defendant are enjoined in that Defendant will continue to falsely and misleadingly advertise that the Chips do not contain GMOs and are “all natural” when in fact the Chips are made with genetically modified corn. Absent injunctive relief, Defendant will continue to manufacture and sell Chips by representing that they are “all natural” and do not contain GMOs when they in fact do, to the detriment of Wisconsin consumers.

46. By reason of the foregoing, Defendant's conduct, as alleged herein, constitutes untrue, deceptive and misleading statements and representations in violation of Wis. Stat. Ann. § 100.18, and Defendant is liable to Plaintiff Pakroo and the other members of the Wisconsin Class for the actual damages that they have suffered as a result of Defendant's actions. The amount of such damages is to be determined at trial. Therefore, Plaintiff Pakroo prays for relief as set forth below.

THIRD CAUSE OF ACTION

**(Violation of the W.S.A. 100.20)
(By Plaintiff Pakroo, On Behalf of the Wisconsin Class)**

47. Plaintiff Pakroo repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

48. Wis. Admin. Code. § ATCP 90.10(1) provides that food sold or distributed for sale in Wisconsin shall be labeled in compliance with applicable rules adopted by the United States food and drug administration under, among other regulations, 21 C.F.R. § 102.

49. 21 C.F.R. § 102.5 provides that the common or usual name of a food shall include the percentages of any characterizing ingredients or components when the proportion of such ingredients or components in the food has a material bearing on price or consumer acceptance or when the labeling or the appearance of the food may otherwise create an erroneous impression that such ingredients or components are present in an amount greater than is actually the case.

50. Defendant's Chip label does not conform with 21 C.F.R. § 102.5 because it fails to identify or disclose the fact that 75% of the characterizing ingredient is genetically modified corn, which has a material bearing on the price of Chips as well as consumer acceptance of tortilla corn chips.

51. Defendant's Chip label also fails to conform with 21 C.F.R. § 102.5 because the

label otherwise creates an erroneous impression that the Chips contain no corn that is genetically modified when 75% of the corn is in fact genetically modified.

52. Defendant's "No GMO" and "All Natural" misrepresentations caused pecuniary injury to Plaintiff Pakroo and the Wisconsin Class because Defendant is able to and does charge a price premium for its Chips as a direct result of these misrepresentations, and Plaintiff Pakroo and the Wisconsin class paid that price premium because they believed that the Chips did not contain GMOs. Plaintiff Pakroo and the Wisconsin Class also suffered pecuniary injury because they paid for a product that purportedly had a material characteristic (namely, being made from natural rather than genetically modified corn) when it did not, and thus Plaintiff Pakroo and the Wisconsin Class were deprived of the benefit of their bargain. Plaintiff Pakroo and the Wisconsin Class also suffered pecuniary injury because they would not have purchased the Chips had they not been deceived as to the natural nature of the Chips.

53. By reason of the foregoing, Defendant's conduct, as alleged herein, violated W.S.A. § 100.20, and Defendant is liable to Plaintiff Pakroo and the other members of the Wisconsin Class for the actual damages that they have suffered as a result of Defendant's actions. The amount of such damages is to be determined at trial. Therefore, Plaintiff Pakroo prays for relief as set forth below.

FOURTH CAUSE OF ACTION

(Breach of Express Warranties under New York and Wisconsin Common Law)

54. Plaintiffs repeat each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

55. Defendant provided Plaintiffs and other members of the Classes with written express warranties, including, but not limited to, warranties that its Chips are "No GMO" and "All

Natural,” as set forth above.

56. Defendant breached these warranties by providing unnatural Chips that contained genetically modified corn and that did not conform to Defendant’s warranties.

57. This breach resulted in damages to Plaintiffs and the other members of the Classes who bought Defendant’s Chips but did not receive the goods as warranted in that the Chips were not natural because they contained genetically modified corn.

58. As a proximate result of Defendant’s breach of warranties, Plaintiffs and the other members of the Classes have suffered damages in an amount to be determined by the Court and/or jury, in that, among other things, they purchased and paid for Chips that did not conform to what Defendant promised on its packaging and labeling, and they were deprived of the benefit of their bargain and spent money on Chips that did not have any value or had less value than warranted or Chips that they would not have purchased and used had they known the true facts about them.

59. Therefore, Plaintiffs prays for relief as set forth below.

FIFTH CAUSE OF ACTION

**(Unjust Enrichment under New York Common Law)
(By Plaintiff Daly, On Behalf of the New York Class)**

60. Plaintiff Daly repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

61. As a result of Defendant’s deceptive, fraudulent, and misleading labeling, advertising, marketing, and sales of the Chips, Defendant was enriched at the expense of Plaintiff Daly and the other members of the New York Class, through the payment of the inflated purchase price for Defendant’s Chips.

62. Under the circumstances, it would be against equity and good conscience to permit Defendant to retain the ill-gotten benefits that it received from Plaintiff Daly and the other

members of the New York Class, in light of the fact that the Chips purchased by Plaintiff Daly and the other members of the New York Class were not what Defendant purported them to be. Thus, it would be unjust or inequitable for Defendant to retain the benefit without restitution to Plaintiff Daly and the other members of the New York Class for the monies paid to Defendant for the Chips.

63. Therefore, Plaintiff Daly prays for relief as set forth below.

SIXTH CAUSE OF ACTION

**(Unjust Enrichment under Wisconsin Common Law)
(By Plaintiff Pakroo, On Behalf of the Wisconsin Class)**

64. Plaintiff Pakroo repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

65. As a result of Defendant's deceptive, fraudulent, and misleading labeling, advertising, marketing, and sales of the Chips, Defendant was enriched at the expense of Plaintiff Pakroo and the other members of the Wisconsin Class, through the payment of the inflated purchase price for Defendant's Chips.

66. Under the circumstances, it would be against equity and good conscience to permit Defendant to retain the ill-gotten benefits that it received from Plaintiff Pakroo and the other members of the Wisconsin Class in light of the fact that the Chips purchased by Plaintiff Pakroo and the other members of the Wisconsin Class were not what Defendant purported them to be. Thus, it would be unjust or inequitable for Defendant to retain the benefit without restitution to Plaintiff Pakroo and the other members of the Wisconsin Class for the monies paid to Defendant for Chips.

67. Therefore, Plaintiff Pakroo prays for relief as set forth below.

PRAYER FOR RELIEF

THEREFORE, Plaintiffs demand judgment as follows:

A. For an order certifying the proposed Class herein under Federal Rules of Civil Procedure 23(a), (b)(2), and (b)(3); appointing Plaintiffs as representatives of the respective Classes as set forth herein; and appointing their undersigned counsel as counsel to the Classes;

B. For a declaration that Defendant is financially responsible for notifying the members of the Classes of the pendency of this suit;

C. For declaratory and injunctive relief pursuant to Section 349 of the New York General Business Law and W.S.A. § 100.18, without limitation;

D. Monetary damages, including but not limited to any compensatory, incidental, or consequential damages in an amount to be determined at trial, together with prejudgment interest at the maximum rate allowable by law with respect to the common law claims alleged;

E. Statutory damages in the maximum amount provided by law;

F. Punitive damages in accordance with proof and in an amount consistent with applicable precedent;

G. For an order awarding Plaintiffs and the other Class members the reasonable costs and expenses of suit, including their attorneys' fees; and

H. For any further relief that the Court may deem appropriate.

JURY TRIAL DEMANDED

Plaintiffs hereby demand a trial by jury.

Dated: New York, New York
October 17, 2014

By: /s/ Kim Richman

Kim E. Richman
Michael R. Reese
George V. Granade
REESE RICHMAN LLP
875 Avenue of the Americas, 18th Floor
New York, New York 10001
(212) 643-0500
krichman@reeserichman.com
mreese@reeserichman.com
ggranade@reeserichman.com

Todd S. Garber
D. Greg Blankinship
**FINKELSTEIN, BLANKINSHIP,
FREI-PEARSON & GARBER, LLP.**
1311 Mamaroneck Avenue
Suite 220
White Plains, New York 10605
(914) 517-5000
tgarber@fbfglaw.com
gblankinship@fbfglaw.com