

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

LINDA KINCAID, individually and)
on behalf of all others similarly situated)
in Missouri,)

Plaintiff,)

No. _____

v.)

XO HEALTH CO.)
d/b/a XO BAKING CO.,)

JURY TRIAL DEMANDED

Defendant.)

Serve by Mail to:)

XO HEALTH CO.)
c/o Lindsey Deitsch, CEO)
21781 Ventura Blvd. Ste. 323)
Woodland Hills CA 91364)

PETITION AND JURY DEMAND

Plaintiff, Linda Kincaid, individually and on behalf of all others similarly situated in Missouri, alleges the following facts and claims upon personal knowledge, investigation of counsel, and information and belief.

NATURE OF THE CASE

1. This case arises out of Defendant XO Health Co. d/b/a XO Baking Co.’s (“XO” or “Defendant”) deceptive, unfair, and false merchandising practices regarding its All Natural Gluten Free Fudge Brownie Gourmet Brownie Mix (the “Mix”), among other “All Natural” products.

2. On the label of the Mix, Defendant prominently represents that the Mix is “All Natural.” It is not. The Mix contains sodium acid pyrophosphate (“SAPP”), a synthetic

chemical that is used to remove iron stains in leather products, is used as an oil drilling fluid, and is used to de-feather poultry—and that the FDA has said has no place in purported “all natural” products.

3. 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

4. Plaintiff, Linda Kincaid is a resident of St. Louis County, Missouri. On at least one occasion during the Class Period (as defined below), including in January 2015, Plaintiff purchased the Mix at Schnucks for personal, family, or household purposes. The purchase price of the Mix was \$6.99. Plaintiff’s claim is typical of all class members in this regard.

5. On information and belief, Defendant XO is a California Corporation with its principal place of business at 21781 Ventura Blvd., Ste. 323, Woodland Hills CA 91364.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action because the amount in controversy exceeds the minimum jurisdictional limits of the Court. The amount in controversy, however, is less than \$75,000 per Plaintiff and Class Member individually and less than \$5,000,000 in the aggregate. Indeed, Plaintiff believes and alleges that the total value of her individual claims is, at most, equal to the refund of the purchase price she paid for the Mix. Moreover, because the value of Plaintiff’s claims is typical of all class members with respect to the value of the claim, the total damages of Plaintiff and Class Members, inclusive of costs and attorneys’ fees, will not exceed \$4,999,999 and is far less than the five million dollar

(\$5,000,000) minimum threshold to create federal court jurisdiction. There is therefore no diversity or CAFA jurisdiction for this case.

7. Defendant cannot plausibly allege that it had sufficient sales of the Mix in Missouri during the Class Period to establish an amount in controversy that exceeds CAFA's jurisdictional threshold.

8. This Court has personal jurisdiction over Defendant pursuant to Missouri Code § 506.500, as Defendant has had more than minimum contact with the State of Missouri and has availed itself of the privilege of conducting business in this state. In addition, as explained below, Defendant has committed affirmative tortious acts within the State of Missouri that gives rise to civil liability, including distributing the fraudulent Mix for sale throughout the State of Missouri.

9. Venue is proper in this forum pursuant to Missouri Code § 508.010 because plaintiff's injury occurred in St. Louis and because Defendant is not a resident of this State.

10. Plaintiff and Class Members do not seek to recover punitive damages or statutory penalties in this case.

11. Pursuant to Missouri Rule of Civil Procedure 8(a), this pleading demands unliquidated damages. Accordingly, it is intended, and shall by rule be interpreted, to limit recovery to an amount less than that required for diversity or CAFA jurisdiction in federal court.

ALLEGATIONS OF FACT

12. Defendant XO manufactures, sells, and distributes baking products, including the Mix.

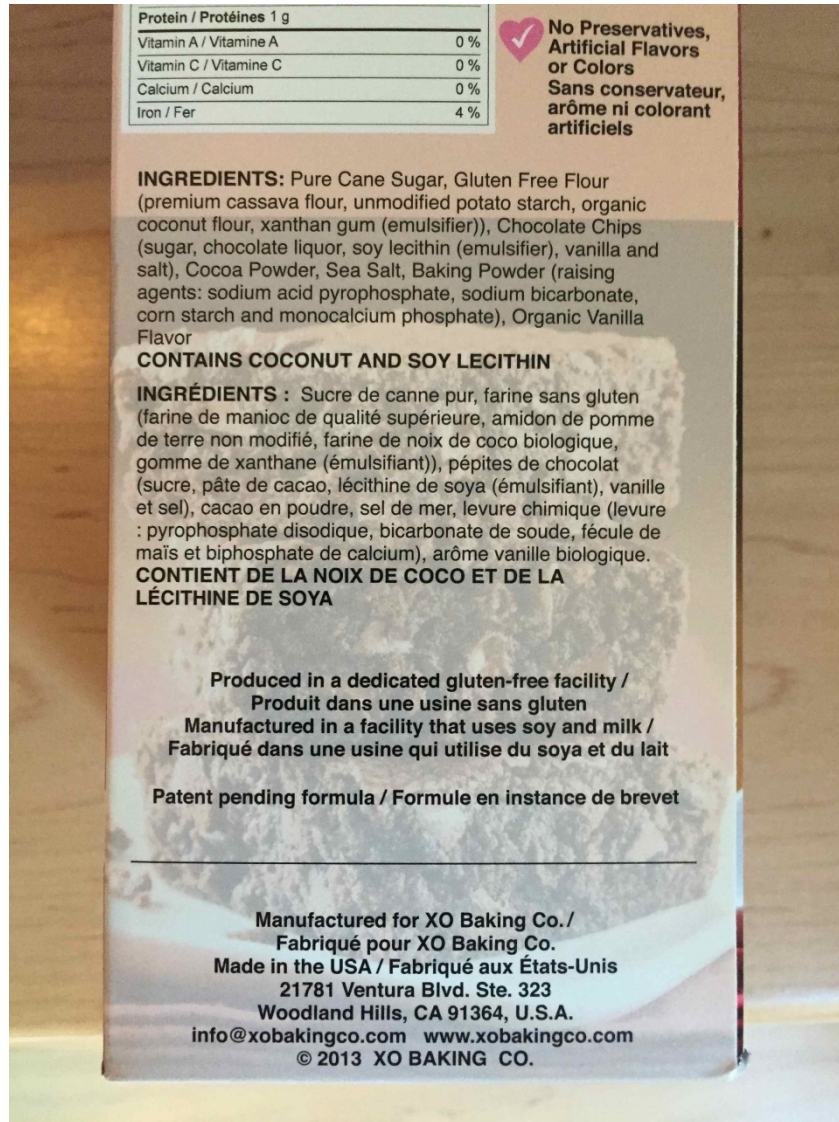
13. Knowing that consumers like Plaintiff are more-and-more interested in purchasing healthy food products that do not contain potentially harmful synthetic ingredients, XO has sought to take advantage of this growing market by labeling certain products as "all natural." By

affixing such a label to the packaging of the Mix, XO is able to entice consumers like Plaintiff to pay a premium for supposed the “all natural” products.

14. The label of the Mix is deceptive, false, and misleading in that XO prominently represents that the Mix is “All Natural”:



15. The Mix, however, is not “All Natural” because it contains SAPP, which is a synthetic leavening chemical. SAPP not only is synthetic, but also excessive intake of SAPP can lead to imbalanced levels of minerals in the body and osteoporosis:



16. Supporting Plaintiff’s case is a recent warning letter sent to Middle East Bakery LLC on September 18, 2014. In that letter, the FDA warned Middle East Bakery that its liveGfree Blueberry Pancakes were misbranded because “it bears the claim ‘ALL NATURAL’ but contains sodium acid pyrophosphate, which is a synthetic substance. FDA considers use of the term ‘natural’ on a food label to be truthful and non-misleading when ‘nothing artificial or

synthetic...has been included in, or has been added to, a food that would not normally be expected to be in the food.’ [58 FR 2302, 2407, January 6, 1993.]”

17. 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 in connection with the sale or advertisement of any merchandise in trade or commerce. § 407.020, RSMo.

CLASS ALLEGATIONS

18. 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 all other similarly situated persons (“Class Members” of the “Class”) consisting of:

All persons in Missouri who purchased XO All Natural Gluten Free Fudge Brownie Gourmet Brownie Mix in the five years preceding the filing of this Petition (the “Class Period”).

19. 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.

20. Upon information and belief, the Class consists of hundreds or thousands of purchasers. Accordingly, it would be impracticable to join all Class Members before the Court.

21. There are numerous and substantial questions of law or fact common to all of 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 product’s label is false, misleading, and deceptive;
- b. Whether Defendant violated the MMPA by selling the Mix 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; and
- d. The proper measure of damages sustained by Plaintiff and Class Members.

22. 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.

23. 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.

24. 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 Defendants' 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.

25. 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.

26. 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. As a consequence, class treatment is a superior method for adjudication of the issues in this case.

CLAIMS FOR RELIEF

First Claim for Relief

Violation of Missouri's Merchandising Practices Act

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

31. 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 in connection with the sale or advertisement of any merchandise in trade or commerce § 407.020, RSMo.

32. 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 in connection with the sale or advertisement of any merchandise in trade or commerce in that Defendant misrepresents that the Mix is "All Natural" when it in fact is not. The product was therefore worth less than the product as represented.

33. Plaintiff and Class Members purchased the Mix for personal, family, or household purposes and thereby suffered an ascertainable loss as a result 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.

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

Second Claim for Relief

Unjust Enrichment

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

36. By purchasing the Mix, Plaintiff and the class members conferred a benefit on Defendant in the form of the purchase price of the fraudulent product.

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

38. 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 Mix.

39. 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 in an amount which, when aggregated with all other elements of damages, costs, and fees, will not exceed \$75,000 per Class Member and/or \$4,999,999 for the entire Class, or,

alternatively, require Defendant to disgorge or pay restitution in an amount which, when aggregated with all other elements of damages, costs, and fees, will not exceed \$75,000 per Class Member and/or \$4,999,999 for the entire Class;

- d. Award pre- and post-judgment interest in an amount which, collectively with all other elements of damages, costs, and fees will not exceed \$75,000 per Class Member and/or \$4,999,999 for the entire Class;
- e. Award reasonable and necessary attorneys' fees and costs to Class counsel, which, collectively with all other elements of damages, costs, and fees will not exceed \$75,000 per Class Member and/or \$4,999,999 for the entire Class; and
- g. For all such other and further relief as may be just and proper.

Dated: September 18, 2015

LINDA KINCAID, Individually, and on Behalf of a Class
of Similarly Situated Individuals, Plaintiff

By: /s/ Matthew H. Armstrong
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