

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

LYRON ARTHUR,
Individually and on behalf of all others
similarly situated in Missouri,

Plaintiff,

v.

WONDER NATURAL FOODS CORP.

Defendant.

Serve Registered Agent by Mail:

Wonder Natural Foods Corp.
c/o Corporation Service Company,
2711 Centerville Rd.
Wilmington, DE 19808

Case No. ____

Division ____

CLASS ACTION PETITION

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

NATURE OF THE CASE

1. This case under the Missouri Merchandising Practices Act and Missouri common law arises out of Defendant Wonder Natural Foods Corp.'s ("Defendant") deceptive, unfair, and false merchandising practices regarding its Better'n Peanut Butter product (the "Product").

2. Defendant advertises and sells the Product as "peanut butter" and claims

that the product is made using peanuts, but the Product is not in fact peanut butter and is not made using peanuts.

3. Plaintiff brings this as a result of 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, Lyron Arthur, is a citizen and resident of Jackson County, Missouri, and on at least one occasion during the Class Period (as defined below), including September 2015, Plaintiff purchased the Product at Target in Blue Springs, Missouri, for personal, family, or household purposes. The purchase price of the Product was \$5.45.

5. Defendant Wonder Natural Foods Corp. is a Delaware corporation that manufacturers and sells food products in Missouri and elsewhere, including the Product at issue in this litigation.

JURISDICTION AND VENUE

6. This Court has personal jurisdiction over Defendant pursuant to Missouri Supreme Court Rule 54.06 and Mo. Rev. Stat. § 506.500 because Defendant has had more than minimum contact with the State of Missouri and has purposefully availed itself of the privilege of conducting business in this state. In addition, as explained below, Defendant has committed affirmative acts within the State of Missouri that give rise to civil liability, including distributing the fraudulent Product for sale throughout the State of Missouri.

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

8. Total damages in this case, including but not limited to all fees, statutory penalties, and all other damages, will not exceed \$5,000,000.

9. Venue is proper in this Court pursuant to Missouri Rev. Stat. § 508.010

because plaintiff's injury occurred in Jackson County and because Defendant is not a resident of this State. Venue is also proper pursuant to Mo. Rev. Stat. § 407.025.1 because Plaintiff first purchased the product in Jackson County, Missouri.

BACKGROUND AND FACTUAL ALLEGATIONS

10. The Federal Food, Drug, and Cosmetic Act ("FDCA") gives the FDA the responsibility to protect the public health by ensuring that "foods are safe, wholesome, sanitary, and properly labeled," 21 U.S.C. § 393(b)(2)(A), and the FDA has promulgated regulations pursuant to this authority. *See e.g.*, 21 C.F.R. §§ 101.1 *et seq.*

11. Under FDCA section 403(g), a food is misbranded if "it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 341 of this title, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food."

12. Under FDCA section 403(i), a food is also misbranded "unless its label bears (1) the common or usual name of the food, if any there be, and (2) in case it is fabricated from two or more ingredients, the common or usual name of each such ingredient. . . ."

13. While there is no private right of enforcement under the FDCA, and the above information is outlined by way of background only, conduct that violates the FDCA is actionable under state law if it also violates state consumer protection statutes.

14. According to 21 CFR 164.150, the standard for peanut butter, "peanut butter is the food prepared by grinding one of the shelled and roasted peanut ingredients provided for in paragraph (b) of this section, to which may be added safe and suitable seasoning and stabilizing ingredients provided for in section (c) of this section, but such seasoning and stabilizing ingredients do not in the aggregate exceed 10 percent of the weight of the

finished food.”

15. Paragraph (b) of that section requires that peanut butter be made by grinding either: (1) blanched peanuts, in which the germ may or may not be included, or (2) unblanched peanuts, including the skins and germ.

16. Thus, under 21 CFR 164.150, any product that is not made by grinding either blanched peanuts or unblanched peanuts and does not contain at least 90 percent peanut ingredients cannot be called “peanut butter.”

17. Because the Product is advertised, marketed, and labeled as “peanut butter” it is misbranded within the meaning of FDCA 403(g) because it “purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulation.

18. And the Product is misbranded within the meaning of FDCA 403(i)(1) because the Product is labeled as peanut butter when it is actually fabricated from two or more ingredients and is not actually peanut butter.

19. On July 13, 2015, the FDA sent a letter to Defendant confirming that the Product is misbranded and misleading:

“Your product is misbranded within the meaning of 403(i)(2) of the Act in that the ingredients are not declared in accordance with 21 CFR 101.4. Ingredients must be listed by their common or usual name in descending order of predominance by weight. Specifically:

The ingredient list declares “peanuts (as defatted peanut flour, peanut butter and natural peanut oils).” As stated above, according to the ingredient statement, this product does not appear to be made using peanuts as an ingredient. The referenced ingredient declaration is not allowed under 21 CFR 101.4(a)(1), which requires that ingredients are listed by common or usual name in descending order of predominance. Sub-ingredients of multi-component foods can be declared parenthetically under 21 CFR 101.4(b)(2). However, defatted peanut flour, peanut butter and natural peanut oils are not sub-ingredients of peanuts. The common or usual names of the ingredients actually used to make this product appear to be defatted peanut flour, peanut butter

and peanut oil. Furthermore, if any of these ingredients are multi-component ingredients (e.g., peanut butter), the sub-ingredients must be declared in accordance with 21 CFR 101.4(b)(2)."

....

Your product is misbranded under 403(i)(1) and 403(g)(1) of the Act because it purports to be and is represented as peanut spread and peanut butter, in the labeling. The website at www.betternpeanutbutter.com/nutrition.php characterizes the product as "an all-natural, delicious peanut butter spread," and "diet peanut butter." The product does not meet the description for peanut spread or the requirements in the standard of identity for peanut butter. Peanut spread must meet certain requirements for protein content as described in 21 CFR 102.23(b)(1)(i) or (ii). Section 102.23(b)(1)(i) requires protein content of at least 24 percent by weight (if the overall biological quality of the protein contained in the product is at least 68 percent that of casein). For a 32 gram serving, the protein content would be between 7 to 8 grams. Better'n Peanut Butter lists 4 grams of protein per 32 gram serving. Section 102.23(b)(1)(ii) requires a minimum of 16.6 percent by weight of protein (if the overall biological quality of the protein contained in the product is equal to or greater than that of casein). For a 32 gram serving, this protein content would be 5 grams. The standard for peanut butter in 21 CFR 164.150 requires the food to contain at least 90 percent peanut ingredients, which are specified in 21 CFR 164.150(b). Defatted peanut flour, which appears to be the most predominant ingredient, is not an acceptable peanut ingredient under the standard.

....

The "made with real peanuts" statement is potentially misleading to consumers because it may suggest that peanuts are directly added to the product or that you use peanuts as starting ingredients to manufacture this product. Based on the ingredient declaration, it appears that this is not the case. It appears that you are starting with processed ingredients derived from peanuts such as defatted peanut flour, peanut butter and peanut oil. Therefore, we suggest that the statement be clarified."

20. The FDA also noted that the Product was misbranded because Defendant's website represents the Product as being "healthy" and "low calorie," even though the Product does not satisfy the regulatory requirements to support those representations.

21. Furthermore, the FDA stated that the Product's inclusion of the phrase "No Cholesterol" on its label is misleading because the Product's label does not disclose that cholesterol normally is not present in peanut butter and peanut spread products; again, a violation of the applicable regulations.

22. 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.

23. Defendant violated the MMPA because its representations, advertising, and labeling is false, deceptive and misleading.

24. As the FDA noted, a reasonable consumer would be misled by the Product name, advertising, and the Defendant's representations that this Product is peanut butter, with its most predominate listed ingredient being peanuts.

25. As a result of Defendant's deception, the Product as sold was worth less than the Product as represented, and Plaintiff paid a premium for it.

26. Plaintiff and members of the Class would not have purchased the Product had they known that the Product was not actually peanut butter made primarily with peanuts, or would not have paid what they did for the Product.

CLASS ALLEGATIONS

27. Pursuant to Missouri Rule of Civil Procedure 52.08 and § 407.025.2 of the MMPA, Plaintiff brings this action on his own behalf and on behalf of a proposed class of all other similarly situated persons ("Class Members" or the "Class") consisting of:

Missouri citizens who purchased Better'n Peanut Butter in the five years preceding the filing of this Petition (the "Class Period").

28. 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) any class counsel, judicial officer in the lawsuit and/or persons within the third degree of consanguinity to such judge.

29. Numerosity – Mo. R. Civ. P. 52.08(a)(1). Class members are so numerous that their individual joinder is impracticable. The precise number of Class members and their addresses can be obtained from information and records in Defendant's possession and control. Class members may be notified of the pendency of this action by mail or by published notice or other appropriate methods.

30. Existence and Predominance of Common Questions of Law and Fact – Mo. R. Civ. P. 52.08(a)(2); 52.08(b)(3). Common questions of law and fact exist as to all members of the Class and predominate over questions affecting only individual Class members. These common legal and factual questions, each of which may also be certified under Rule 52.08(c)(4), include the following:

- a. Whether the Product's label is false, misleading, and deceptive;
- b. Whether Defendant's other representations (including advertisements and/or

- websites) concerning the Product are false, misleading, and deceptive;
- c. Whether Defendant violated the MMPA by selling the Product with false, misleading, and deceptive representations;
- d. Whether Defendant's acts constitute deceptive and fraudulent business acts and practices or deceptive, untrue, and misleading advertising;
- e. Whether this case may be maintained as a class action under Mo. R. Civ. P. 52.08;
- f. Whether and to what extent Class members are entitled to damages and other monetary relief;
- g. Whether and to what extent Class members are entitled to equitable relief, including declaratory relief, restitution, rescission, a preliminary and/or a permanent injunction; and
- h. Whether and to what extent Class members are entitled to attorneys' fees and costs.

31. **Typicality – Mo. R. Civ. P. 52.08(a)(3).** The claims of the Plaintiff are typical of the claims of Class Members, in that he shares 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 of other Class Members.

32. **Adequacy of Representation – Mo. R. Civ. P. 52.08(a)(4).** Plaintiff will fairly and adequately protect the interests of Class Members and has retained counsel experienced and competent in the prosecution of complex class actions including complex questions that arise in consumer protection litigation. Plaintiff will prosecute this action vigorously, and he has no interests adverse or antagonistic to those of the Class.

33. **Superiority – Rule 52.08(b)(3).** A class action is superior to all other

available means for the fair and efficient adjudication of this controversy. The damages or other financial detriment suffered by individual Class members are small compared with the burden and expense that would be entailed by individual litigation of their claims against Defendant. It would thus be virtually impossible for the Class members, on an individual basis, to obtain effective redress for the wrongs done them. Furthermore, even if Class members could afford such individualized litigation, the court system could not. Individualized litigation would create the danger of inconsistent or contradictory judgments arising from the same set of facts. Individualized litigation would also increase the delay and expense to all parties and the court system from the issues raised by this action. By contrast, the class action device provides the benefits of adjudication of these issues in a single proceeding, economies of scale, and comprehensive supervision by a single court, and presents no unusual management difficulties under the circumstances here.

34. In the alternative, the Class may be certified under Rule 52.08(b)(1) and/or (b)(2) because:

- a. The prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudication with respect to individual Class members that would establish incompatible standards of conduct for Defendant;
- b. The prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them which would, as a practical matter, be dispositive of the interests of other Class members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and/or
- c. Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final and injunctive relief with respect to

the Class members as a whole.

CLAIMS FOR RELIEF

COUNT ONE

VIOLATION OF MISSOURI MERCHANDISING PRACTICES ACT

35. Plaintiff repeats and re-alleges the allegations of the preceding paragraphs as if fully set forth herein. Plaintiff brings this Count on behalf of himself and the Class against Defendant.

36. The Missouri Merchandising Practices Act ("the Act") provides that "[t]he act, use or employment by any person of any deception . . . [or] unfair practice, or the concealment . . . of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . is declared to be an unlawful practice." Mo. Rev. Stat. § 407.020.1.

37. The enabling regulations for the Act further define an "unfair practice" as conduct that (1) offends public policy; (2) is unethical, oppressive, and unscrupulous; (3) causes a risk of substantial injury to consumers; (4) was not in good faith; (5) is unconscionable; or (6) is unlawful. *See* Mo. Code Regs. Ann. tit. 15, § 60-8.

38. Plaintiff, members of the Class, and Defendant are "persons" within the meaning of section 407.010(5) of the Act.

39. Plaintiff purchased the product for personal, family, or household purposes within the scope of the Act.

40. Under the Act, the term "merchandise" is broadly defined to include "any objects . . . or services." Mo. Rev. Stat. § 407.020.4. In this case, the Product is "merchandise" within the meaning of section 407.010(4).

41. Accordingly, Defendant's activities constitute the sale of "merchandise" within the meaning of section 407.010(4).

42. The Act authorizes private causes of action, and class actions. Mo. Rev. Stat. §§ 407.025.1; 407.025.2.

43. As set forth herein, 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.

44. Specifically, Defendant's unfair, unlawful and deceptive acts, practices, and conduct include, but are not limited to, the following: (1) Defendant conceals and fails to disclose material information about the true nature of its products from consumers; (2) Defendant misrepresents that the Product is "peanut butter" with its predominate ingredient being "peanuts" and conceals the fact the Product is not "peanut butter" and it is not made with peanuts; (3) Defendant misrepresents the product as being "healthy" and "low calorie" and conceals the fact, the Product does not have the attributes that entitle it to those representations; and (4) Defendant misrepresents the product as containing "No Cholesterol" without disclosing that cholesterol normally is not present in peanut butter or peanut spread products.

45. As set forth herein, Defendant's conduct also violates the enabling regulations for the MMPA because it: (1) offends public policy; (2) is unethical, oppressive, and unscrupulous; (3) causes substantial injury to consumers; (4) was not in good faith; (5) is unconscionable; and (6) is unlawful. *See* Mo. Code Regs. Ann. tit. 15, § 60-8.

46. As a direct and proximate result of Defendant's unfair and deceptive acts, Plaintiff and Class members have suffered damages in that they paid more for the Product than they otherwise would have. In this respect, Plaintiff and members of the Class have not received the benefit of their bargain, and have suffered an ascertainable loss.

47. Plaintiff and Class members seek actual damages; a declaration that

Defendant's methods, acts and practices violate the Missouri Merchandising Practices Act, Mo. Rev. Stat. §§ 407.010 *et seq.*; corrective notice to the Class; an injunction prohibiting Defendant from continuing to engage in such unlawful methods, acts, and practices; restitution; rescission; disgorgement of all profits obtained from Defendant's unlawful conduct; pre and post-judgment interest; attorneys' fees and costs; and any other relief available to them.

COUNT TWO UNJUST ENRICHMENT

48. Plaintiff repeats and re-alleges the allegations of the preceding paragraphs as if fully set forth herein. Plaintiff brings this Count on behalf of himself and the Class against Defendant.

49. By purchasing the Product, Plaintiff and the Class members conferred a benefit on Defendant in the form of the purchase price of the fraudulent Product and/or paid more than the product was worth as represented.

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

51. Defendant's acceptance and retention of the benefit is inequitable and unjust because the benefit was obtained by Defendant's concealment, failure to disclose and fraudulent and misleading representations about the Product as set forth herein.

52. 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 under Missouri Supreme Court Rule 52.08;
- 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, is far less than \$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 be far less than \$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 be far less than \$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 be far less than \$4,999,999 for the entire Class; and
- F. For all such other and further relief as may be just and proper.

REQUEST FOR JURY TRIAL

Plaintiff requests a jury trial on all issues so triable.

Respectfully submitted,



Jared A. Rose, Mo. Bar #60128
The Law Office of Jared A. Rose
919 West 47th Street
Kansas City, MO 64112
Phone: 816.221.4335
Fax: 816.471.4321
jared@roselawkc.com

- and -

Matthew L. Dameron, Mo. Bar # 52093
Williams Dirks Dameron LLC
1100 Main Street, Suite 2600
Kansas City, Missouri 64105
Phone: (816) 876-2600
Fax: (816) 221-8763
Email: matt@williamsdirks.com

ATTORNEYS FOR PLAINTIFF AND
THE PUTATIVE CLASS