

CV 15 - 6556

LEE LITIGATION GROUP, PLLC
C.K. Lee (CL 4086)
Anne Seelig (AS 3976)
30 East 39th Street, Second Floor
New York, NY 10016
Tel.: 212-465-1188
Fax: 212-465-1181
Attorneys for Plaintiff and the Class

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U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

KUNTZ, J.

LEVY, M.J.

ALEXANDER TSVETTSIKH, *individually and on behalf of all others similarly situated,*

Plaintiff,

Case No.:

CLASS ACTION COMPLAINT

v.

JURY TRIAL DEMANDED

GOYA FOODS, INC., a New Jersey corporation,

Defendant.

Plaintiff, ALEXANDER TSVETTSIKH (“Plaintiff”), individually and on behalf of all others similarly situated in the United States of America, by and through his undersigned counsel, hereby brings this Class Action Complaint against Defendant, GOYA FOODS, INC. (hereinafter, “GOYA” or “Defendant”), and alleges the following upon his own knowledge, or where he lacks personal knowledge, upon information and belief, including the investigation of his counsel:

NATURE OF THE ACTION

1. Consumers attribute a wide range of benefits to foods made entirely of natural ingredients. Consumers perceive all-natural foods to be higher quality, healthier, safer to eat and less damaging to the environment.

2. In a survey conducted by the Shelton Group in 2009, the most popular food label among consumers was “100% natural.”¹ “All natural ingredients” was the second most popular food label among consumers and both of those labels beat out “Contains natural ingredients.”²

3. While food manufacturers have sought to capitalize on this fast-growing market for natural products, now a multi-billion dollar industry, not all manufacturers truthfully represent the nature and quality of their products. Some manufacturers seek to capture a share of the market by touting their products as “All Natural” when in fact, they are not.

4. GOYA is an example of a manufacturer who has sought to exploit the market for natural products. At all material times hereto, GOYA has unlawfully, fraudulently, unfairly, misleadingly, and/or deceptively represented that it’s GOYA® Salsa Picante Hot Sauce product is “All Natural” when it contains Xanthan gum, a non-natural, chemically processed ingredient.

5. Merriam-Webster’s Dictionary defines “natural”³ as an adjective as follows:

- i. “existing in nature and not made or caused by people : coming from nature”
- ii. “not having any extra substances or chemicals added : not containing anything artificial”

6. Merriam-Webster’s Dictionary defines “artificial”⁴ as an adjective as follows:

- i. “not natural or real : made produced, or done to seem like something natural”
- ii. “not happening or existing naturally : created or caused by people”

7. Merriam-Webster’s Dictionary defines “synthetic”⁵ as an adjective as follows:

¹ See, e.g., Consumers Prefer ‘100% Natural’ Label Over ‘Organic’, Environmental Leader (Jul. 3, 2009), <http://environmentalleader.com/2009/07/03/consumers-prefer-100-natural-label-over-organic> (describing EcoPulse market report by Shelton Group) (last visited March 10, 2014).

² *Id.*

³ See <http://www.merriam-webster.com/dictionary/natural> (last visited October 19, 2015).

⁴ See <http://www.merriam-webster.com/dictionary/artificial> (last visited October 19, 2015).

⁵ See <http://www.merriam-webster.com/dictionary/synthetic> (last visited October 19, 2015).

i. “made by combining different substances : not natural”

8. As demonstrated by the definitions above, and believed by Plaintiff and other reasonable consumers, the term “natural” does not apply to products that contain artificial and/or synthetic ingredients, which are not natural by their very definitions.

9. The term “natural” only applies to those products that contain no artificial or synthetic ingredients and consist entirely of ingredients that are only minimally processed.

10. Defendant however, deceptively used the term “natural” to describe a product containing ingredients that have been either extensively chemically processed or fundamentally altered from their natural state and thus cannot be considered “minimally processed.” The use of the term “natural” to describe such product creates consumer confusion and is misleading.

11. Plaintiff alleges that Defendant dishonestly labels its GOYA® Salsa Picante Hot Sauce product as “All Natural” when, in fact, it is not.

12. At all material times hereto, Defendant has manufactured, marketed and distributed its GOYA® Salsa Picante Hot Sauce product (herein, the “Product”) with a label that claims the product is “All Natural” when the product is certainly not “All Natural.” The presence of Xanthan gum, a synthetic and/or artificial ingredient in Defendant’s GOYA® Salsa Picante Hot Sauce causes it to not be natural, rendering Defendant’s claim false, misleading, and likely to deceive reasonable consumers.

13. By marketing the Product as “All Natural,” Defendant is taking wrongful advantage of consumers’ strong preference for foods made entirely of natural ingredients.

14. As shown in EXHIBIT A, the representation that the GOYA® Salsa Picante Hot Sauce is “All Natural” is central to the marketing of the Product and is clearly and prominently displayed on the front packaging, where it cannot be missed by consumers.

15. Defendant has unjustly profited in the lucrative market for natural foods by misleadingly labeling its Product as “All Natural” and selling it to consumers who sought to purchase products made from ingredients that are naturally occurring and who were willing to pay more for such foods.

16. This lawsuit seeks redress for the deceptive manner in which Defendant has and continues to market its GOYA® Salsa Picante Hot Sauce to the general public. Plaintiff brings this proposed consumer class action individually and on behalf of all other persons similarly situated, who, from the applicable limitations period up to and including the present (“Class Period”), purchased GOYA® Salsa Picante Hot Sauce for consumption and not resale.

17. Plaintiff seeks to secure, among other things, equitable and declaratory relief, restitution, and alternative damages, for similarly situated United States purchasers, against GOYA, for (1) deceptive acts or practices in violation of New York’s Deceptive Acts or Practices Law, Gen. Bus. Law § 349, *et seq.* (“NY GBL”); (2) Breach of Express Warranty; (3) Negligent Misrepresentation and; (4) Unjust Enrichment.

18. In addition to damages, Plaintiff is seeking an Order requiring Defendant to cease using highly processed, synthetic and/or artificial ingredients in its GOYA® Salsa Picante Hot Sauce, and/or Ordering Defendant to cease from representing that it’s Product is “All Natural” on the packaging while it contains synthetic and/or artificial ingredients.

19. Plaintiff expressly does not seek to contest or enforce any state law that has requirements beyond those required by federal laws or regulations.

JURISDICTION AND VENUE

20. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332, because this is a class action, as defined by 28 U.S.C § 1332(d)(1)(B), in which a member of the putative

class is a citizen of a different state than Defendant, and the amount in controversy exceeds the sum or value of \$5,000,000, excluding interest and costs. *See* 28 U.S.C. § 1332(d)(2).

21. The Court has jurisdiction over the federal claims alleged herein pursuant to 28 U.S.C. § 1331 because it arises under the laws of the United States.

22. The Court has jurisdiction over the state law claims because they form part of the same case or controversy under Article III of the United States Constitution.

23. Alternatively, the Court has jurisdiction over all claims alleged herein pursuant to 28 U.S.C. § 1332 because the matter in controversy exceeds the sum or value of \$75,000 and is between citizens of different states.

24. This Court has personal jurisdiction over Plaintiff because Plaintiff submits to the Court's jurisdiction. This Court has personal jurisdiction over Defendant, pursuant to New York Statute N.Y. CVP. Law § 302, because it conducts substantial business in this District, some of the actions giving rise to the Complaint took place in this District, and some of Plaintiff's claims arise out of Defendant operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state; committing a tortious act in this state; and causing injury to person or property in this state arising out of Defendant's acts and omissions outside this state. Additionally, this court has personal jurisdiction over Defendant because its Product is advertised, marketed, distributed, and sold throughout New York State; Defendant engaged in the wrongdoing alleged in this Complaint throughout the United States, including in New York State; and Defendant has sufficient minimum contacts with New York and/or otherwise have intentionally availed itself of the markets in New York State, rendering the exercise of jurisdiction by the Court permissible under traditional notions of fair play and

substantial justice. Moreover, Defendant is engaged in substantial and not isolated activity within New York State.

25. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) because a substantial part of the events or omissions giving rise to these claims occurred in this District, the Defendant has caused harm to class members residing in this District, and the Defendant is residents of this District under 28 U.S.C. 1391(c)(2) because it is subject to personal jurisdiction in this district.

PARTIES

Plaintiff

26. Plaintiff ALEXANDER TSVETTSIKH is, and at all times relevant hereto has been, a citizen of the State of New York and resides in Kings County. During the Class Period, Plaintiff TSVETTSIKH purchased GOYA® Salsa Picante Hot Sauce for personal consumption within the State of New York. Plaintiff purchased the Product from stores located in Kings County, including but not limited to Pathmark. The purchase price was approximately \$1.39 (or more) for an individual bottle of the Product. Plaintiff TSVETTSIKH purchased the Product at a premium price and was financially injured as a result of Defendant's deceptive conduct as alleged herein.

Defendant

27. Defendant GOYA FOODS, INC. is a corporation organized under the laws of New Jersey with its headquarters at 100 Seaview Drive, Secaucus, New Jersey 07096. Defendant develops, markets and sells food products under the "GOYA®" brand name throughout the United States.

28. Defendant owns, manufactures and distributes GOYA® Salsa Picante Hot Sauce, and created and/or authorized the unlawful, fraudulent, unfair, misleading and/or deceptive labeling and advertising for the Product. The product label for GOYA® Salsa Picante Hot Sauce, relied

upon by Plaintiff, was prepared and/or approved by Defendant and its agents, and was disseminated by Defendant and its agents with the “All Natural” misrepresentation alleged herein. The Product label was designed to encourage consumers to purchase GOYA® Salsa Picante Hot Sauce and reasonably misled Plaintiff and the Classes into purchasing the Product.

29. Plaintiff alleges that, at all times relevant herein, GOYA FOODS, INC. and its subsidiaries, affiliates, and other related entities, as well as its respective employees, were the agents, servants and employees of GOYA FOODS, INC., and at all times relevant herein, each was acting within the purpose and scope of that agency and employment. Plaintiff further alleges on information and belief that at all times relevant herein, the distributors who delivered and sold the Product, as well as their respective employees, also were GOYA FOODS, INC.’s agents, servants and employees, and at all times herein, each was acting within the purpose and scope of that agency and employment. In addition, Plaintiff alleges that, in committing the wrongful acts alleged herein, GOYA FOODS, INC., in concert with its subsidiaries, affiliates, and/or other related entities and their respective employees, planned, participated in and furthered a common scheme to induce members of the public to purchase the Product by means of untrue, misleading, deceptive, and/or fraudulent representations, and that GOYA FOODS, INC. participated in the making of such representations in that it disseminated those misrepresentations and/or caused them to be disseminated.

30. Whenever reference in this Complaint is made to any act by GOYA FOODS, INC. or its subsidiaries, affiliates, distributors, and other related entities, such allegation shall be deemed to mean that the principals, officers, directors, employees, agents, and/or representatives of GOYA FOODS, INC. committed, knew of, performed, authorized, ratified and/or directed that

act or transaction on behalf of GOYA FOODS, INC. while actively engaged in the scope of their duties.

FACTUAL ALLEGATIONS

Defendant's Advertising of Goya® Salsa Picante Hot Sauce

31. GOYA FOODS, INC. manufactures, distributes, markets, advertises and sells Goya® Salsa Picante Hot Sauce with a claim that it is "All Natural." The Product is available at grocery stores, food chains, convenience stores, drug stores and other retail outlets throughout the United States as well as on Defendant's "Goya e-store" (<http://eyelevellink.com/products/goya-salsa-picante-hot-sauce-6-oz-pack-of-24>).

32. Defendant's "All Natural" statement, displayed on the front of the GOYA® Salsa Picante Hot Sauce packaging for the Product, is untrue, misleading, and likely to deceive reasonable consumers, such as Plaintiff and members of the Class, because the Product is not "All Natural," due to the presence of Xanthan gum, a heavily processed, synthetic and/or artificial ingredient in the Product.

33. As the "All Natural" statement on the Product is clearly and prominently displayed on the front of each individual bottle of GOYA® Salsa Picante Hot Sauce, Plaintiff and all consumers within the Classes who purchased the Product were exposed to the same misleading "All Natural" claim.

34. Defendant's "All Natural" representation conveys a series of express claims which Defendant knows are material to the reasonable consumer, and which Defendant intends for consumers to rely upon when choosing to purchase Goya® Hot Sauce.

Goya® Salsa Picante Hot Sauce Is Not Natural

35. The United States Food and Drug Administration (“FDA”), which has responsibility for regulating the labeling of food products such as the GOYA® Salsa Picante Hot Sauce sold by Defendant, has not promulgated a regulation defining the terms “natural” or “All Natural.” Courts and trade members have requested that the FDA provide a regulatory definition of the term, but, the FDA has declined to provide a determination because the time required to conduct a public hearing “would take two to three years to complete,” and the agency’s resources are currently devoted to other, higher priorities.⁶ However, the agency has established a policy defining the outer boundaries of the use of the term “natural” by clarifying when a product is not natural.

36. With regard to the meaning of “natural” on a food label, the agency has said as follows: “FDA has not developed a definition for use of the term natural or its derivatives. However, the agency has not objected to the use of the term **if the food does not contain added color, artificial flavors, or synthetic substances.**”⁷ Other informal guidance issued by the FDA on the term “natural” in the context of food has also understood it “as meaning that nothing artificial or synthetic (including all color additives regardless of source) has been included in , or has been added to, a food that would not normally be expected to be in the food.”⁸

37. Thus, although there is not an exacting definition of “natural” in reference to food, there is no reasonable definition of “natural” that includes ingredients that, even if sourced from

⁶ See Letter from Michael M. Landa, Acting Director, Center for Food Safety and Applied Nutrition to Judge Jerome B. Simandle dated September 16, 2010, filed in *Ries et al., v. Hornell Brewing Co., Inc.*, Case No. 10-1139 (N.D. Cal.), Docket No. 54.

⁷ <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214868.htm>

⁸ See Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993), available at <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/FoodAdvisoryCommittee/UCM248504.pdf>.

“nature” (as all product ingredients must be), are subjected to extensive transformative chemical processing before their inclusion in a product. For example, the National Advertising Division of the Better Business Bureau (“NAD”) has found that a “natural” ingredient does *not* include one that, while “literally sourced in nature (as is every chemical substance), . . . is, nevertheless subjected to extensive processing before metamorphosing into the” ingredient that is included in the final product. *Tom’s of Maine (Tom’s of Maine Natural Mouthwash)*, Report #3470, NAD/CARU Case Reports 4 (June 1998).

38. Similar to the FDA, the United States Department of Agriculture (“USDA”), which regulates the labeling of meat and poultry, has also set limits on the use of the term “natural.”

39. The USDA has issued a Foods Standards and Labeling Policy Book (Aug. 2005) for products it regulates, which states that the term “natural” may be used on labeling for products that contain processed ingredients only where such ingredients are subjected to “minimal” processing. See Office of Pol’y, Program & Emp. Dev. Food Safety & Inspection Serv., U.S. Dep’t of Agric., *Food Standards and Labeling Policy Book* (2005).⁹ According to the USDA, “[m]inimal processing may include: (a) those traditional processes used to make food edible or to preserve it or to make it safe for human consumption, e.g., smoking, roasting, freezing, drying, and fermenting, or (b) those physical processes which do not fundamentally alter the raw product and/or which only separate a whole, intact food into component parts, e.g., grinding meat, separating eggs into albumen and yolk, and pressing fruits to produce juices.”¹⁰ However, “[r]elatively severe processes, e.g., solvent extraction, acid hydrolysis and chemical bleaching would clearly be considered more than minimal processing.”¹¹

⁹ See *United States Department of Agriculture Food Standards and Labeling Policy book* available at http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf (last visited October 26, 2015).

¹⁰ *Id.*

¹¹ *Id.*

40. Under the USDA's guidelines, if a product is severely processed, the product can be labeled "All Natural" if the ingredient would not significantly change the character of the product to the point that it could no longer be considered a natural product. However, even in that case, "*the natural claim must be qualified to clearly and conspicuously identify the ingredient, e.g., all natural or all natural ingredients except dextrose, modified food starch, etc.*"¹² (emphasis added).

41. The terms "synthetic" and "artificial" closely resemble each other and in common parlance are taken as synonymous. The scientific community defines "artificial" as something not found in nature, whereas a "synthetic" is defined as something man-made, whether it merely mimics nature or is not found in nature.¹³

42. Congress has defined "synthetic" to mean "a substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources, except that such term shall not apply to substances created by naturally occurring biological processes." 7 U.S.C. § 6502(21). *See also* C.F.R. § 205.1, *et seq.* defining, in USDA's National Organic Program regulations, a "nonsynthetic (natural)" as "[a] substance that is derived from mineral, plant or animal matter and does not undergo a synthetic process as defined in section 6502(21) of the Act (7 U.S.C. § 6502(21))".

43. In addition to defining "synthetic," federal authorities have also expressly recognized certain chemicals as synthetics.

¹² United States Department of Agriculture Food Standards and Labeling Policy book, available at http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf (last visited October 23, 2015).

¹³ Peter E. Nielsen, *Natural-synthetic-artificial!*, *Artificial DNA: PNA & XNA*, Volume 1, Issue 1 (July/August/September 2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3109441/>

44. Xanthan Gum is a polysaccharide derived from the bacterial coat of the *Xanthomonas campestris* bacterium. Although derived from a natural bacterium, Xanthan gum is commercially manufactured as a sodium, potassium or calcium salt and is listed as a synthetic ingredient under federal regulation. 7 C.F.R. § 205.605(b). Xanthan gum is used in food products such as beverages as a thickening or stabilizing agent, and as an emulsifier in salad dressings.

45. As GOYA® Salsa Picante Hot Sauce contains Xanthan gum, a chemically processed synthetic and/or artificial ingredient, the claim that it is “All Natural” is both literally false and misleading under any reasonable definition of “natural.”

“All Natural” Claims Are Material to Reasonable Consumers

46. American consumers are health conscious and look for wholesome, natural foods to keep a healthy diet, so they frequently take nutrition information into consideration in selecting and purchasing food items. Product package labels, including nutrition labels, are vehicles that convey nutrition information to consumers that they can and do use to make purchasing decisions. As noted by FDA commissioner Margaret Hamburg during an October 2009 media briefing, “[s]tudies show that consumers trust and believe the nutrition facts information and that many consumers use it to help them build a healthy diet.”¹⁴

47. The prevalence of claims about nutritional content on food packaging in the United States has increased in recent years as manufacturers have sought to provide consumers with nutrition information and thereby influence their purchasing decisions. The results of a recent FDA Food Label and Package Survey found that approximately 4.8% of food products sold in the United States had either a health claim or a qualified health claim on the food package, and

¹⁴ Transcript for FDA’s Media Briefing on Front-of-Pack Labeling, October 20, 2009, available at <http://www.fda.gov/downloads/NewsEvents/Newsroom/MediaTranscripts/UCM187809.pdf>.

that more than half (53.2%) of the food products reviewed had nutrient content claims on the packaging.¹⁵

48. American consumers are increasingly seeking “All Natural” ingredients in the foods they purchase. Although this segment of the health food market was once a niche market, natural foods are increasingly becoming part of the mainstream food landscape. According to *Natural Foods Merchandiser*, a leading information provider for the natural, organic and healthy products industry, the natural food industry enjoyed over \$81 billion in total revenue in 2010, and grew over 7% in 2009.¹⁶ The market for all natural and organic foods grew 9% in 2010 to \$39 billion, and 2010 sales were 63% higher than sales in 2005.¹⁷ Consumer demand for all natural foods was predicted to grow 103% between 2010 and 2015 with annual sales exceeding \$78 billion in 2015.¹⁸

49. Consumers desire “All Natural” ingredients in food products for a myriad of reasons, including wanting to live a healthier lifestyle, perceived benefits in avoiding disease and other chronic conditions, as well as to increase weight loss and avoid chemical additives in their food. The “All Natural” branding also appears to appeal to individual consumers’ interest in supporting sustainable living and environmentally sensitive food consumption, helping the environment, assisting local farmers, assisting factory workers who would otherwise be exposed to synthetic and hazardous substances, and financially supporting the companies that share these values. As a result, consumers are willing to pay a higher price for “All Natural” food and beverages.

¹⁵ FDA Front of Package Claims Survey.

¹⁶ See *Natural and Organic Products Industry Sales Hit \$81 Billion*, Natural Foods Merchandiser, (June 1, 2011), available at: <http://www.prnewswire.com/news-releases/natural-and-organic-products-industry-sales-hit-81-billion-122958763.html>

¹⁷ <http://www.marketwired.com/press-release/natural-and-organic-food-and-beverage-market-to-double-by-2015-1525854.htm> (last visited October 26, 2015).

¹⁸ *Id.*

50. According to an article in *The Economist*, “natural” products are a fast growing market because of the power of “mother nature” in the hands of marketers, which conjures up images of heart-warming wholesomeness and rustic simplicity.¹⁹

The “All Natural” Claim on Goya® Salsa Picante Hot Sauce Was Material to Plaintiff and the Class

51. A reasonable consumer’s understanding of the term “natural” comports with federal regulators and common meaning. That is, a reasonable consumer understands the term “natural” to mean that the ingredients are neither synthetic nor artificial. When the term “natural” is broadened to “All Natural” as on Defendant’s Product labels, there is no question that a reasonable consumer understands the term “All Natural” to mean that none of the ingredients are synthetic or artificial.

52. According to Consumers Union, “Eighty-six percent of consumers expect a ‘natural’ label to mean processed foods do not contain any artificial ingredients....”²⁰

53. A representation that a product is “All Natural” is material to a reasonable consumer, and whether a food product is labeled “All Natural” on its front packaging is material to reasonable consumers in their decision to purchase the food product.

54. The “All Natural” labeling on Defendant’s Product conveys inherent health benefits that are important to consumers – benefits that consumers are willing to pay a premium price for over comparable products that are not labeled “All Natural.”

55. Commercial marketing studies are replete with evidence of the materiality of “All Natural” claims to purchasers. A 2010 study by the marketing organization *Mintel* reported that

¹⁹ *Chemical Blessings: What Rousseau got Wrong*, *The Economist*, (October 26, 2015) available at: <http://www.economist.com/node/10633398>

²⁰ Notice of the Federal Trade Commission, Comments of Consumers Union on Proposed Guides for Use of Environmental Marketing Claims, 16 CFR § 260, Dec. 10, 2010, available at https://www.ftc.gov/sites/default/files/documents/public_comments/guides-use-environmental-marketing-claims-project-no.p954501-00289%C2%A0/00289-57072.pdf (last visited November 9, 2015)

75% of 25-34 year-olds, 74% of 18-24 year-olds, and 55% of 55-64 year olds are either very or somewhat interested in consuming all natural foods, that more than 6 in 10 users of natural/organic products “agree that it’s worth paying more for natural products,” and that “demand for all-natural products is high among young adults and will remain relatively strong in years to come, as these young people mature, start families, and gain greater influence.”²¹ Indeed, sales of food products with “natural” claims exceed \$20 billion dollars annually.²²

56. Numerous studies further show the materiality of “natural” label claims. In 2008, market research group Packaged Facts reported “[t]he overall trend is clear... [n]atural and organic products are flying high in segments that are otherwise flat.”²³ By 2009, “Natural” had become the most popular claim when launching new foods and beverages in the United States.²⁴ A 2009 study reported 50% of consumers rated a “Natural” claim on a food package as either “Very Important” or “Important.”²⁵ In fact, as a 2011 study reports, 25% of consumers rated “100 percent natural” or “all natural” as “the best description to read on a food label.”²⁶

57. Defendant’s deceptive representations and omissions are material in that a reasonable person would attach importance to such information and would be induced to act upon such information in making purchase decisions. Thus, Plaintiff’s and the other Class members’ reliance upon Defendant’s misleading and deceptive representations may be presumed. The

²¹ *Consumer Attitudes Toward Natural and Organic Food and Beverages*, Mintel, March 2010 at 52.

²² *U.S. Health Eating Trends*, Tom Pirovano, January 26, 2010, available at <http://www.nielsen.com/us/en/insights/news/2010/healthy-eating-trends-pt-1-commitment-trumps-the-economic-pinch.html>

²³ *Natural and Organic Food and Beverage Trends in the U.S.*, Packaged Facts, September 2008, at 3-5.

²⁴ *National Survey: Green is Officially Mainstream – But Consumers Are Confused, Skeptical About Products*, Shelton Group, June 29, 2009, at p 2.

²⁵ *Beyond Organic: How Evolving Consumer Concerns Influence Food Purchases*, Context Marketing, October 2009, at p. 4.

²⁶ *Survey Finds ‘Grown in the USA’ Surging in Popularity, Right Behind ‘Natural’ and ‘Organic,’* Shelton Group, 2011.

materiality of those representations and omissions also establishes causation between Defendant's conduct and the injuries sustained by Plaintiff and the Class.

58. Reasonable consumers, such as Plaintiff and the Class, rationally expect food products that claim to be "All Natural" on the front of their packaging to not contain unnatural, synthetic, and/or artificial ingredients.

59. The presence of Xanthan gum, an unnatural, synthetic, and/or artificial ingredient in Goya® Salsa Picante Hot Sauce, causes the "All Natural" statement on the labeling to be false, misleading and likely to deceive a reasonable consumer.

60. Plaintiff and the Class reasonably relied to their detriment on Defendant's false and misleading "All Natural" misrepresentation.

61. Plaintiff and the Class lack the meaningful ability to test or independently ascertain the truthfulness of food labeling claims such as "All Natural," especially at the point of sale. Plaintiff and the Class would not know the true nature of the ingredients merely by reading the ingredient label; its discovery requires investigation beyond the grocery store and knowledge of food chemistry beyond that of the average consumer. Thus, reasonable consumers (including Plaintiff and the Class) must and do rely on food companies such as Defendant to honestly report the nature of a food's ingredients, and food companies such as Defendant intend and know that consumers rely upon food labeling statements in making their purchasing decisions. Such reliance by consumers is also eminently reasonable, since food companies are prohibited from making false or misleading statements on their products under federal and New York state law. *See* 21 U.S.C. § 343(a)(1) (providing food is misbranded if its labeling is false and misleading); N.Y. Agric. & Mkts. Law § 201 (same).

62. While Defendant labeled and advertised its Product as “All Natural,” the Product contained the synthetic, non-natural and extensively processed ingredient Xanthan Gum. While the Product label did disclose that it contained Xanthan gum, the label did not disclose that this ingredient is artificial and/or synthetic. This omission was significant and material given the prominent “All Natural” statement on the front of the Product packaging.

63. Defendant knew that it made the “All Natural” representation in regard to the Goya® Salsa Picante Hot Sauce, as the statement appears on the Product’s packaging. Defendant also knew that the claim was false and misleading, because it knew Xanthan gum is a non-natural ingredient. Upon information and belief, Defendant retains expert nutritionists, food chemists, other scientists, regulatory compliance personnel, and attorneys, and thus had the ability to know, and did know, that Xanthan gum in the Goya® Salsa Picante Hot Sauce is synthetic and/or artificial.

64. As a result of Defendant’s deception, consumers – including Plaintiff and members of the proposed Class – have purchased a Product that contains synthetic and/or highly chemically processed ingredients in reliance on Defendant’s “All-Natural” claim. Moreover, Plaintiff and Class members have paid a premium for the Product over other similar food products sold on the market.

Plaintiff Relied on Defendant’s “All Natural” Claim and Were Injured

65. Within the last twelve months, Plaintiff was attracted to Goya® Salsa Picante Hot Sauce because he preferred to consume and use natural products for health reasons. Plaintiff believed that all natural products contain only ingredients that occur in nature or are minimally processed. As a result, the Goya® Salsa Picante Hot Sauce with its deceptive “All Natural” claim on the Product packaging, had no value to Plaintiff.

66. Under the FDCA, the term “false” has its usual meaning of “untruthful,” while the term “misleading” is a term of art. Misbranding reaches not only false claims, but also those claims that might be technically true, although still misleading. If any one representation in the labeling is misleading, the entire food is misbranded. No other statement in the labeling cures a misleading statement. “Misleading” is judged in reference to “the ignorant, the unthinking and the credulous who, when making a purchase, do not stop to analyze.” *United States v. El-Pathic Pharmacy*, 192 F.2d 62, 75 (9th Cir. 1951). Under the FDCA, it is not necessary to prove that anyone was actually misled. New York law similarly does not require proof of actual reliance. *See Pelman ex rel. Pelman v. McDonald's Corp.*, 396 F. Supp. 2d 439, 445 (S.D.N.Y. 2005).

67. New York and federal law have placed similar requirements on food companies that are designed to ensure that the claims companies are making about their products to consumers are truthful and accurate.

68. Defendant’s labeling and advertising of the Product violates various state laws against misbranding. New York State law broadly prohibits the misbranding of food in language identical to that found in regulations promulgated pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*:

Pursuant to N.Y. State Education Law § 6815, “[f]ood shall be deemed to be misbranded: 1. If its labeling is false or misleading in any particular...”

69. Defendant’s Product is misbranded under New York law because it misled Plaintiff and Class members about the naturalness of the Product.

70. Although Defendant marketed the Product as “All Natural,” it failed to also disclose material information about the Product; the fact that it contained unnatural, synthetic, and/or

artificial ingredients. This non-disclosure, while at the same time branding the Product as “All Natural” was deceptive and likely to mislead a reasonable consumer.

71. Plaintiff did, and a reasonable consumer would, attach importance to whether Defendant’s Product is “misbranded,” i.e., not legally salable, or capable of legal possession, and/or contain highly processed ingredients.

72. Plaintiff did not know, and had no reason to know, that the Product was not “All Natural.”

73. Defendant’s Product labeling was a material factor in Plaintiff’s and Class members’ decisions to purchase the Product. Relying on Defendant’s Product labeling and misleading website, Plaintiff and Class members believed that they were getting a Product that was “All Natural.” Had Plaintiff and the Class known Defendant’s Product was highly processed, they would not have purchased them.

74. Defendant’s Product labeling as alleged herein is deceptive and misleading and was designed to increase sales of the Product. Defendant’s misrepresentations are part of its systematic Product packaging practice.

75. At the point of sale, Plaintiff and Class members did not know, and had no reason to know, that the Product was misbranded as set forth herein, and would not have bought the Product had they known the truth about it.

76. Defendant’s false and deceptive labeling is misleading, in violation of the FDCA and consumer protection laws of New York, and as such, the Product at issue are misbranded as a matter of law. Misbranded products cannot be legally manufactured, advertised, distributed, held or sold in the United States. Plaintiff and Class members would not have bought the Product had they known they were misbranded and illegal to sell or possess.

77. By representing that the Product was “All Natural,” Defendant sought to capitalize on consumers’ preference for natural products and the association between such products and a wholesome way of life. Consumers are willing to pay more for natural products because of this association as well as the perceived higher quality, health and safety benefits and low impact on the environment associated with products labeled as “Natural.”

78. As a result of Defendant’s misrepresentations, Plaintiff and thousands of others throughout the United States purchased the Product.

79. Plaintiff and the Classes (defined below) have been damaged by Defendant’s deceptive and unfair conduct in that they purchased a Product with false and deceptive labeling and paid premium prices they otherwise would not have paid over other comparable products that did not claim to be “All Natural.”

CLASS ACTION ALLEGATIONS

80. Plaintiff seeks relief in his individual capacity and as representative of all others who are similarly situated. Pursuant to Rule 23(a), 23(b)(2) and/or 23(b)(3) of the Federal Rules of Civil Procedure, Plaintiff seeks certification of the following classes:

- i. The Nationwide Class
All persons in the United States who have made retail purchases of the Goya® Salsa Picante Hot Sauce that was labeled “All Natural” but which contained a non-natural ingredient, as set forth herein, during the applicable limitations period, and/or such subclasses as the Court may deem appropriate.
- ii. The New York Class
All persons in New York who have made retail purchases of the Goya® Salsa Picante Hot Sauce that was labeled “All Natural” but which contained a non-natural ingredient, as set forth herein, during the applicable limitations period, and/or such subclasses as the Court may deem appropriate.

81. Excluded from these Classes 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, assigns, and any entity in which they have or have had a controlling interest. Also excluded from the Class is the judicial officer to whom this lawsuit is assigned.

82. Plaintiff reserves the right to revise the Class definitions based on facts learned in the course of litigating this matter.

83. Certification of Plaintiff's claims for class-wide treatment is appropriate because Plaintiff can prove the elements of his claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claims.

84. **Numerosity:** Each Class is so numerous that individual joinder of all class members is impracticable. The precise number of members of the Classes is unknown to Plaintiff, but it is clear that the number greatly exceeds the number that would make joinder practicable, particularly given Defendant's comprehensive nationwide distribution and sales network. Members of the Classes may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. mail, electronic mail, Internet postings, and/or published notice.

85. **Commonality and Predominance:** This action involves common questions of law and fact, which predominate over any questions affecting individual members of the Classes. All members of the Classes were exposed to Defendant's deceptive and misleading advertising and marketing claim that Goya® Salsa Picante Hot Sauce is "All Natural" because that claim was on the front of every bottle. Furthermore, common questions of law or fact include:

- a. whether “All Natural” labeling on a Product containing Xanthan Gum was false and misleading;
- b. whether Defendant engaged in a marketing practice intended to deceive consumers;
- c. whether Defendant deprived Plaintiff and the other members of the Classes of the benefit of the bargain because the Product purchased was different than what Defendant warranted;
- d. whether Defendant deprived Plaintiff and the other members of the Classes of the benefit of the bargain because the Product they purchased had less value than what was represented by Defendant;
- e. whether Defendant caused Plaintiff and the other members of the Classes to purchase a substance that was other than what was represented by Defendant;
- f. whether Defendant caused Plaintiff and the other members of the Classes to purchase a Product that was artificial, synthetic, and/or otherwise unnatural;
- g. whether Defendant has been unjustly enriched at the expense of Plaintiff and other Class members by its misconduct;
- h. whether Defendant must disgorge any and all profits it has made as a result of its misconduct; and
- i. whether Defendant should be barred from marketing the Product as “All Natural.”

86. Defendant engaged in a common course of conduct in contravention of the laws sought to be enforced by Plaintiff individually and on behalf of the other members of the Classes. Similar or identical statutory and common law violations, business practices, and

injuries are involved. Individual questions, if any, pale by comparison, in both quality and quantity, to the numerous common questions that dominate this action. Moreover, the common questions will yield common answers.

87. **Typicality:** Plaintiff's claims are typical of those of the members of the Classes because Plaintiff and the other Class members sustained damages arising out of the same wrongful conduct, as detailed herein. Plaintiff purchased Defendant's Product and sustained similar injuries arising out of Defendant's conduct in violation of New York State law. Defendant's unlawful, unfair and fraudulent actions concern the same business practices described herein irrespective of where they occurred or were experienced. The injuries of the Classes were caused directly by Defendant's wrongful misconduct. In addition, the factual underpinning of Defendant's misconduct is common to all Class members and represents a common thread of misconduct resulting in injury to all members of the Classes. Plaintiff's claims arise from the same practices and course of conduct that give rise to the claims of the members of the Classes and are based on the same legal theories.

88. **Adequacy:** Plaintiff will fairly and adequately represent and pursue the interests of the Class and has retained competent counsel experienced in prosecuting nationwide class actions. Plaintiff understands the nature of his claims herein, has no disqualifying conditions, and will vigorously represent the interests of the Classes. Neither Plaintiff nor Plaintiff's counsel have any interests that conflict with or are antagonistic to the interests of the Classes. Plaintiff has retained highly competent and experienced class action attorneys to represent their interests and those of the Classes. Plaintiff and Plaintiff's counsel have the necessary resources to adequately and vigorously litigate this class action, and Plaintiff and counsel are aware of their

fiduciary responsibilities to the Classes and will diligently discharge those duties by vigorously seeking the maximum possible recovery for the members of the Classes.

89. **Superiority:** A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The damages or other financial detriment suffered by Plaintiff and the other members of the Classes are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendant, so it would be impracticable for members of the Classes to individually seek redress for Defendant's wrongful conduct. Even if the members of the Classes could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court. Given the similar nature of the members of the Classes' claims and the absence of material or dispositive differences in the statute and common laws upon which the claims are based when such claims are grouped as proposed above and below, the Nationwide Class and New York Class will be easily managed by the Court and the parties.

90. **Declaratory and Injunctive Relief:** The prerequisites to maintaining a class action for injunctive relief 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.

91. The prerequisites to maintaining a class action for injunctive relief or equitable relief pursuant to Rule 23(b)(3) are met, as questions of law or fact common to the Classes

predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

92. Defendant's conduct is generally applicable to the Classes as a whole and Plaintiff seeks, *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 Class as a whole appropriate.

93. Further, in the alternative, the Classes may be maintained as class actions with respect to particular issues, pursuant to Fed.R.Civ.P. 23(c)(4).

CAUSES OF ACTION

COUNT I

INJUNCTION FOR VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 349 (DECEPTIVE AND UNFAIR TRADE PRACTICES ACT) (Brought on Behalf of the New York Class)

94. Plaintiff TSVETTSIKH realleges and incorporates by reference the allegations contained in all preceding paragraphs of this Complaint and further alleges as follows:

95. Plaintiff TSVETTSIKH brings this claim on behalf of himself and the other members of the New York Class for an injunction for violations of New York's Deceptive Acts or Practices Law, Gen. Bus. Law § 349 ("NY GBL").

96. NY GBL § 349 provides that "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are . . . unlawful."

97. To establish a claim under NY GBL § 349, it is not necessary to prove justifiable reliance. ("To the extent that the Appellate Division order imposed a reliance requirement on General Business Law [§] 349 ... claims, it was error. Justifiable reliance by the plaintiff is not an element of the statutory claim." *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941 (N.Y. App. Div. 2012) (internal citations omitted)).

98. Any person who has been injured by reason of any violation of the NY GBL may bring an action in their own name to enjoin such unlawful act or practice, an action to recover their actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

99. The practices employed by Defendant, whereby Defendant advertised, promoted, and marketed that its Product was “All Natural” when it contained Xanthan gum was unfair, deceptive, and misleading to Plaintiff and other New York Class members and in violation of NY GBL § 349 for, inter alia, one or more of the following reasons:

- a. Defendant engaged in deceptive, unfair and unconscionable commercial practices in failing to reveal material facts and information about the Product, which did, or tended to, mislead Plaintiff and the New York Class about facts that could not reasonably be known by them;
- b. Defendant knowingly and falsely represented and advertised that the Product has “All Natural” ingredients with an intent to cause Plaintiff and members of the New York Class to believe that they are made with unadulterated, unprocessed ingredients, even though they are not;
- c. Defendant failed to reveal facts that were material to the transactions in light of representations of fact made in a positive manner;
- d. Defendant caused Plaintiff and the New York Class to suffer a probability of confusion and a misunderstanding of legal rights, obligations and/or remedies by and through its conduct;

- e. Defendant failed to reveal material facts to Plaintiff and the New York Class with the intent that Plaintiff and the New York Class members rely upon the omission;
- f. Defendant made material representations and statements of fact to Plaintiff and the New York Class that resulted in Plaintiff and the New York Class reasonably believing the represented or suggested state of affairs to be other than what they actually were; and
- g. Defendant intended that Plaintiff and the members of the New York Class rely on its misrepresentations and omissions, so that Plaintiff and New York Class members would purchase the Product.

100. The foregoing deceptive acts and practices were directed at customers.

101. Under all of the circumstances, Defendant's conduct in employing these unfair and deceptive trade practices was malicious, willful, wanton and outrageous such as to shock the conscience of the community and warrant the imposition of punitive damages.

102. Defendant's actions impact the public interest because Plaintiff and members of the New York Class were injured in exactly the same way as thousands of others purchasing the Product as a result of and pursuant to Defendant's generalized course of deception.

103. Plaintiffs and other Class members seek to enjoin such unlawful, deceptive acts and practices as described above. Each of the Class members will be irreparably harmed unless the unlawful, deceptive actions of Defendant are enjoined in that Defendant will continue to falsely and misleadingly advertise the "All Natural" nature of the Product.

104. Plaintiff TSVETTSIKH believed Defendant's representation that the Product he purchased was "All Natural." Plaintiff TSVETTSIKH would not have purchased the Product had he known that it was not "All Natural."

105. Plaintiff TSVETTSIKH was injured in fact and lost money as a result of Defendant's conduct of improperly describing the Product as "All Natural." Plaintiff TSVETTSIKH paid for an "All Natural" product, but did not receive such Product. The product he received was worth less than the product for which he paid.

106. Plaintiff TSVETTSIKH and New York Class members seek declaratory relief, restitution for monies wrongfully obtained, disgorgement of ill-gotten revenues and/or profits, injunctive relief, enjoining Defendant from continuing to disseminate its false and misleading statements, and other relief allowable under NY GBL § 349.

COUNT II

BREACH OF EXPRESS WARRANTIES (Brought on Behalf of the New York Class)

107. Plaintiff TSVETTSIKH realleges and incorporates by reference the allegations contained in all preceding paragraphs and further allege as follows:

108. Plaintiff TSVETTSIKH brings this claim on behalf of himself and the other members of the New York Class for breach of express warranty under New York law.

109. Defendant provided Plaintiff TSVETTSIKH and other members of the New York Class with written express warranties, including, but not limited to, a warranty that its Goya® Salsa Picante Hot Sauce was "All Natural." The "All Natural" claim made by Defendant was an affirmation of fact that became part of the basis of the bargain and created an express warranty that the good would conform to the stated promise.

110. Plaintiff TSVETTSIKH and other members of the New York Class placed importance on Defendant's "All Natural" claim in deciding to purchase the Product.

111. Defendant breached its warranties by manufacturing, selling and/or distributing a Product to consumers that is prominently labeled “All Natural” but that contains Xanthan gum, a heavily processed, synthetic and/or artificial ingredient that is thus, not natural.

112. Defendant previously knew or should have known of the falsity of its “All Natural” claim as manufacturer of the Product. Thus, Defendant had actual and/or constructive notice that its “All Natural” claim was and are false and to date has taken no action to remedy its breach of express warranty.

113. As a proximate result of Defendant’s breach of warranties, Plaintiff TSVETTSIKH and the New York Class members 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 products that did not conform to what Defendant promised in its promotion, marketing, advertising, packaging and labeling, and they were deprived of the benefit of their bargain and spent money on a product that did not have any value or had less value than warranted or a product that they would not have purchased and used had they known the true facts about it.

114. As a result of the breach of these warranties, Plaintiff TSVETTSIKH and the New York Class members are entitled to legal and equitable relief including damages, costs, attorneys’ fees, rescission, and/or other relief as deemed appropriate by the Court.

COUNT III

NEGLIGENT MISREPRESENTATION

(Brought on Behalf of the Nationwide Class or, Alternatively, the New York Class)

115. Plaintiff TSVETTSIKH realleges and incorporates by reference the allegations contained in all preceding paragraphs and further allege as follows:

116. Plaintiff TSVETTSIKH brings this claim individually, as well as on behalf of members of the Nationwide Class.

117. In the alternative, Plaintiff TSVETTSIKH brings this claim individually as well as on behalf of the New York Class under New York law.

118. Defendant, directly or through its agents and employees, made false representations, concealments, and nondisclosures to Plaintiff TSVETTSIKH and members of the Class. Defendant has negligently represented that the Product is “All Natural,” when in fact, it is not because it contains the heavily processed, synthetic and/or artificial ingredient Xanthan gum.

119. In making the representations of fact to Plaintiff TSVETTSIKH and members of the Classes described herein, Defendant has failed to fulfill its duties to disclose the material facts set forth above. The direct and proximate cause of this failure to disclose was Defendant’s negligence and carelessness.

120. Defendant, in making the misrepresentations and omissions, and in doing the acts alleged above, knew or reasonably should have known that the representations were not true. Defendant made and intended the misrepresentation to induce the reliance of Plaintiff TSVETTSIKH and members of the Classes.

121. Plaintiff TSVETTSIKH and members of the Classes relied upon these false representations and nondisclosures by Defendant when purchasing the Product, which reliance was justified and reasonably foreseeable.

122. As a result of Defendant’s wrongful conduct, Plaintiff TSVETTSIKH and members of the Classes have suffered and continue to suffer economic losses and other general and specific damages, including but not limited to the amounts paid for the Product, and any interest that would have been accrued on those monies, all in an amount to be determined according to proof at time of trial.

COUNT IV

UNJUST ENRICHMENT

**(Brought on Behalf of the Nationwide Class or, Alternatively, the New York Class)
(Pleaded in the Alternative)**

123. Plaintiff TSVETTSIKH realleges and incorporates by reference the allegations contained in all preceding paragraphs and further allege as follows:

124. Plaintiff TSVETTSIKH asserts this claim in the alternative in the event that the Court concludes that Plaintiff TSVETTSIKH lacks an adequate remedy at law.

125. Plaintiff TSVETTSIKH brings this claim individually, as well as on behalf of members of the Nationwide Class. Although there are numerous permutations of the elements of the unjust enrichment cause of action in the various states, there are few real differences. In all states, the focus of an unjust enrichment claim is whether the defendant was unjustly enriched. At the core of each state's law are two fundamental elements – the defendant received a benefit from the plaintiff and it would be inequitable for the defendant to retain that benefit without compensating the plaintiff. The focus of the inquiry is the same in each state. Since there is no material conflict relating to the elements of unjust enrichment between the different jurisdictions from which class members will be drawn, New York law may be applied to the claims of the Nationwide Class.

126. In the alternative, Plaintiff TSVETTSIKH brings this claim individually as well as on behalf of the New York Class under New York law.

127. At all times relevant hereto, Defendant deceptively labeled, marketed, advertised, and sold its “All Natural” Product to Plaintiff TSVETTSIKH and the Classes.

128. Plaintiff TSVETTSIKH and members of the Classes reasonably relied on Defendant's representation that the Product was “All Natural,” and, in reasonable reliance thereon, purchased the Product.

129. Plaintiff TSVETTSIKH and members of the Classes conferred upon Defendant non-gratuitous payments for the Product that they would not have due to Defendant's deceptive labeling, advertising, and marketing. Defendant accepted or retained the non-gratuitous benefits conferred by Plaintiff TSVETTSIKH and members of the Classes, with full knowledge and awareness that, as a result of Defendant's deception, Plaintiff TSVETTSIKH and members of the Classes were not receiving a product of the quality, nature, fitness, or value that had been represented by Defendant and reasonable consumers would have expected.

130. Defendant has been unjustly enriched in retaining the revenues derived from purchases of Defendant's Product by Plaintiff TSVETTSIKH and members of the Classes, which retention under these circumstances is unjust and inequitable because Defendant misrepresented that its Product is "All Natural" when it is not, which caused injuries to Plaintiff TSVETTSIKH and members of the Classes because they paid a price premium due to the mislabeling of the Product.

131. Retaining the non-gratuitous benefits conferred upon Defendant by Plaintiff TSVETTSIKH and members of the Classes under these circumstances made Defendant's retention of the non-gratuitous benefits unjust and inequitable. Thus, Defendant must pay restitution to Plaintiff TSVETTSIKH and members of the Classes for its unjust enrichment, as ordered by the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all other similarly situated, seek judgment against Defendant, as follows:

- a. An Order that this action be maintained as a class action and appointing Plaintiff as representatives of the Nationwide Class and/or the New York Class;

- b. An Order appointing the undersigned attorney as class counsel in this action;
- c. Restitution and disgorgement of all amounts obtained by Defendant as a result of its misconduct, together with interest thereon from the date of payment, to the victims of such violations;
- d. All recoverable compensatory and other damages sustained by Plaintiff and the Classes;
- e. Actual and/or statutory damages for injuries suffered by Plaintiff and the Classes and in the maximum amount permitted by applicable law;
- f. An order (i) requiring Defendant to immediately cease its wrongful conduct as set forth in this Complaint; (ii) enjoining Defendant from continuing to misrepresent and conceal material information and conduct business via the unlawful, unfair and deceptive business acts and practices complained of herein; (iii) ordering Defendant to engage in a corrective advertising campaign; and (iv) requiring Defendant to reimburse Plaintiff and all members of the Classes the amounts paid for the Product;
- g. Statutory pre-judgment and post-judgment interest on any amounts;
- h. Payment of reasonable attorneys' fees and costs; and
- i. Such other relief as the Court may deem just and proper.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff, individually and on behalf of all others similarly situated, demands a trial by jury on all questions of fact raised by the Complaint.

Dated: November 16, 2015

Respectfully submitted,

LEE LITIGATION GROUP, PLLC
C.K. Lee (CL 4086)
Anne Seelig (AS 3976)
30 East 39th Street, Second Floor
New York, NY 10016
Tel.: 212-465-1188
Fax: 212-465-1181
Attorneys for Plaintiff and the Class

By: _____

C.K. Lee