

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

ALAN DUCORSKY and BECKY SIKES,	:	
on behalf of themselves and all others	:	
similarly situated,	:	CIVIL ACTION NO. 16-cv-1571
	:	
	:	ECF CASE
Plaintiffs,	:	
vs.	:	
	:	CLASS ACTION COMPLAINT
WAL-MART STORES, INC.,	:	AND DEMAND FOR JURY
	:	TRIAL
	:	
	:	
Defendant.	:	

Plaintiffs Alan Ducorsky and Becky Sikes (“Plaintiffs”), on behalf of themselves and all others similarly situated, by and through their undersigned counsel, bring this Class Action Complaint against Defendant Wal-Mart Stores, Inc. (“Defendant”), and for their Complaint allege, with personal knowledge as to their own actions and upon information and belief as to those of others, as follows:

NATURE OF THE CASE

1. Plaintiffs bring this Class Action on behalf of themselves and two classes of similarly-situated individuals who purchased, in New York and Florida, “Great Value 100% Grated Parmesan Cheese” (the “Product”). “Great Value” is Defendant’s grocery or store brand, and is labeled and sold by Defendant in its stores.

2. Reasonable consumers would expect that a product labeled “100%” parmesan cheese would in fact contain only parmesan cheese. But such consumers would be wrong.

3. Defendant acted deceptively by labeling the Product as containing 100% parmesan because it in fact contains a significant amount of fillers and additives that are not cheese. These additives include cellulose, an artificial chemically-produced byproduct of wood chips, and potassium sorbate, a synthetically produced potassium salt made by chemically neutralizing sorbic acid.

4. The US market for hard Italian cheeses, which includes grated parmesan cheese, is worth hundreds of millions of dollars in sales annually and is highly competitive. Production of US-made parmesan cheese rose to approximately 336 million pounds in 2015.

5. Producing parmesan and other hard Italian cheeses is relatively expensive compared to other cheeses, and producers often add “fillers,” such as other less-expensive cheeses, to reduce costs and increase volume. One such filler is cellulose, an additive extracted from wood pulp by using a highly toxic chemical process. Another additive is potassium sorbate, a substance made from sorbic acid that has been linked to genetic damage in humans.

6. By misrepresenting that the Product contains 100% cheese, Defendant is able to deceptively market its Product in an otherwise highly competitive market, charging a higher price than it could otherwise charge based on the promise that the consumer is purchasing “100%” parmesan cheese.

7. Defendant designed, manufactured, warranted, advertised and sold the Product internationally and throughout New York and Florida.

8. A recent independent investigation of grated parmesan cheese products conducted by Bloomberg News found that many producers, including Defendant, have been deceptively mislabeling the amount of actual cheese present in their products. This investigation found that Defendant’s Product contains 7.8% cellulose, despite being clearly labeled as “100%” parmesan.

9. Plaintiff Alan Ducorsky purchased Defendant's Product on numerous occasions in Westbury, New York, Valley Stream, New York, and Levittown, New York, based on the representations made by Defendant that the product contained 100% parmesan cheese.

10. Plaintiff Becky Sikes purchased Defendant's Product on numerous occasions in the Melbourne, Florida area, based on the representations made by Defendant that the product contained 100% parmesan cheese.

11. Plaintiffs would not have purchased the Product at the price that they paid, if at all, if they had known that the Product was not pure parmesan cheese, but in fact also included cellulose, made from wood pulp, and potassium sorbate, a chemical linked to gene damage, as ingredients.

12. This action seeks, *inter alia*, actual damages and refunds, punitive damages, attorneys' fees, and the costs of this suit.

JURISDICTION AND VENUE

13. Jurisdiction in this civil action is authorized pursuant to 28 U.S.C. § 1332(d), as minimal diversity exists, there are more than 100 class members, and the amount in controversy is in excess of \$5 million. Plaintiff Alan Ducorsky is a citizen of New York; Plaintiff Becky Sikes is a citizen of Florida; for diversity purposes, Defendant is a citizen of Arkansas.

14. The Court has personal jurisdiction over the Defendant because a substantial portion of the wrongdoings alleged herein occurred in New York. Defendant also has sufficient minimum contacts with New York, and has otherwise purposely availed itself of the markets in New York, through the promotion, marketing, and sale of products sufficient to render the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice. Defendant also owns and operates stores in this judicial district.

15. Venue is authorized pursuant to 28 U.S.C. § 1391 because Defendant has marketed and sold the Product at issue in this action within this judicial district and has done business within this judicial district. Venue is also appropriate under 28 U.S.C. § 1391(d), because Defendant is a corporation subject to personal jurisdiction in this district, owing to its extensive contacts in this district.

PARTIES

16. Plaintiff Alan Ducorsky resides in Island Park, New York in Nassau County. Prior to learning of the cellulose and potassium sorbate content of Defendant's Product, Plaintiff Ducorsky purchased in the last three years containers of Great Value 100% Grated Parmesan Cheese in Westbury, New York, Valley Stream, New York, and Levittown, New York, that included the prominent representation on the front of the label that the Product was "100%" parmesan cheese. In all instances, Plaintiff Ducorsky read and reviewed the representations made on the label when he made the decision to purchase the Product. Plaintiff Ducorsky paid more than he otherwise would have been willing to pay had Defendant not deceptively labeled the Product as "100%" parmesan cheese.

17. Plaintiff Becky Sikes resides in Melbourne, Florida. Prior to learning of the cellulose and potassium sorbate content of Defendant's Product, Plaintiff Sikes purchased in the last three years containers of Great Value 100% Grated Parmesan Cheese in the Melbourne, Florida area that included the prominent representation on the front of the label that the Product was "100%" parmesan cheese. In all instances, Plaintiff Sikes read and reviewed the representations made on the label when she made the decision to purchase the Product. Plaintiff Sikes paid more than she otherwise would have been willing to pay had Defendant not deceptively labeled the Product as "100%" parmesan cheese.

18. Wal-Mart Stores, Inc. is incorporated in Delaware with its headquarters in Bentonville, Arkansas. Defendant is the largest grocery retailer in the United States and does extensive business throughout New York, including in this district. Defendant distributes, sells and advertises “Great Value 100% Grated Parmesan Cheese” nationwide, including in New York, as part of its “Great Value” brand.

FACTUAL BACKGROUND

19. Defendant uniformly labels, markets, and advertises its Product as “100% Grated Parmesan Cheese.” As can be seen on the images below, this is the primary text on the front of the Product and the core representation being made to consumers.



20. Reasonable consumers, including Plaintiffs, understand and expect that the Product will in fact contain 100% parmesan cheese based on that explicit prominent promise on each of the Product labels.

21. Consumers pay a premium price and are willing to pay more for the Product based on Defendant's representation that the Product is, in fact, 100% parmesan cheese.

22. Unfortunately for consumers, the "100%" parmesan claim is objectively false. Independent testing of Defendant's Product shows that at least 7.8% of the Product is not parmesan cheese, or cheese of any kind, but instead is cellulose, a substance produced from wood chips.¹

23. Indeed, Defendant cannot contest that its Products contain cellulose and potassium sorbate because the small and hard to read print on the back of the label concedes that the prominent 100% parmesan representation on the front is false because the Product contains cellulose and potassium sorbate. Of course, reasonable consumers should not be required to read the small print on the back of a label to determine whether the main claim on the front is true.

24. Cellulose is a non-digestible plant fiber that is used in plastics, cleaning detergents, pet litter, brake pads, and construction materials. To cut costs, this inexpensive "filler" is also used in some food products. Producers grind up wood pulp and other plant matter and then typically the pulp is cooked in an assortment of chemicals, which may include sulfurous acid or lye, to extract cellulose fibers. These cellulose fibers are then used in asphalt, emulsion paints, and Defendant's Product. Byproducts of this process can also include turpentine and various polymers that are used in tanning leather and making drywall. No reasonable consumer would expect 100% cheese to contain a wood pulp byproduct that is created using noxious and toxic chemicals.

¹ Lydia Mulvany, *The Parmesan Cheese You Sprinkle on Your Penne Could Be Wood*, BLOOMBERG BUSINESS, Feb. 16, 2016, available at <http://www.bloomberg.com/news/articles/2016-02-16/the-parmesan-cheese-you-sprinkle-on-your-penne-could-be-wood>

25. Potassium sorbate is a potassium salt derived from sorbic acid and is an eye, skin and respiratory irritant. Scientific studies have indicated potassium sorbate can damage human DNA and white blood cells. Producers combine sorbic acid, which is itself produced artificially, with the caustic substance potassium hydroxide to neutralize the acid and create potassium sorbate.

CLASS ACTION ALLEGATIONS

26. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff Alan Ducorsky brings this class action on behalf of himself and the following Class of similarly situated individuals:

All persons who purchased in New York a “Great Value 100% Grated Parmesan Cheese” product from March 2010 to the present.

(the New York Class).

27. The New York Class specifically excludes Defendant and its officers, directors, agents and/or employees.

28. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff Becky Sikes brings this class action on behalf of herself and the following Class of similarly situated individuals:

All persons who purchased in Florida a “Great Value 100% Grated Parmesan Cheese” product from March 2012 to the present.

(the “Florida Class”).

29. The Florida Class specifically excludes Defendant and its officers, directors, agents and/or employees.

30. Members of each putative Class are so numerous that joinder of all members is impracticable. Disposition of this matter as a class action will provide substantial benefits and efficiencies to the Parties and the Court. While the exact number of Class Members is not

known at this time, it is generally ascertainable by appropriate discovery.

31. The rights of each Class Member were violated in an identical manner as a result of Defendant's deceptive, willful, reckless and/or negligent actions and/or inaction.

32. Questions of law and fact common to all New York Class Members exist and predominate over any questions affecting only individual Class Members including, *inter alia*:

- a) Whether Defendant made representations regarding the contents of the Product, which it produced and sold;
- b) Whether the representations Defendant made in its labeling, marketing, and promotion of the Product were false, misleading, and/or deceptive;
- c) Whether, by its misconduct as set forth here, Defendant has engaged in unlawful or deceptive business practices under New York law;
- d) Whether Defendant breached its express warranty;
- e) Whether Plaintiff Ducorsky and Class Members sustained damages as a result of Defendants' conduct alleged herein; and,
- f) Whether Plaintiff Ducorsky and Class Members are entitled to restitution and, if so, what is the proper measure of restitution.

33. Questions of law and fact common to all Florida Class Members exist and predominate over any questions affecting only individual Class Members including, *inter alia*:

- a) Whether Defendant made representations regarding the contents of the Product, which it produced and sold;
- b) Whether the representations Defendant made in its labeling, marketing, and promotion of the Product were false, misleading, and/or deceptive;

- c) Whether, by its misconduct as set forth here, Defendant has engaged in unlawful or deceptive business practices under Florida law;
- d) Whether Defendant breached its express warranty;
- e) Whether Plaintiff Sikes and Class Members sustained damages as a result of Defendants' conduct alleged herein; and,
- f) Whether Plaintiff Sikes and Class Members are entitled to restitution and, if so, what is the proper measure of restitution.

34. Plaintiffs' claims are typical of Class Members' claims in that Plaintiffs' claims and Class Members' claims all arise from Defendant's wrongful conduct. Plaintiffs and each of the other Class Members have been injured by the same wrongful practices of Defendant. Plaintiffs' claims arise from the same practices and course of conduct that give rise to the other Class Members' claims and are based on the same legal theories.

35. Plaintiffs will fully and adequately assert and protect the interests of the other Class Members. In addition, Plaintiffs have retained class counsel who are experienced and qualified in prosecuting class action cases similar to this one. Neither Plaintiffs nor their attorneys have any interests contrary to or conflicting with other Class Members' interests.

36. A class action is superior to all other available methods for fairly and efficiently adjudicating Plaintiffs' and Class Members' claims. Plaintiffs and Class Members have been irreparably harmed as a result of Defendant's wrongful actions. Litigating this case as a class action will reduce the possibility of repetitious litigation relating to Defendants' deceptive advertising of the Product.

37. Class certification, therefore, is appropriate pursuant to Fed. R. Civ. P. 23(b)(3) because the above common questions of law or fact predominate over any questions affecting

individual Class Members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

38. Class certification also is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because Defendant has acted on grounds generally applicable to the Class, so that final injunctive relief or corresponding declaratory relief is appropriate as to the Class as a whole.

39. The expense and burden of litigation would substantially impair the ability of Class Members to pursue individual lawsuits in order to vindicate their rights. Absent a class action, Defendant will retain the benefits of its wrongdoing despite its serious violations of the law.

CLAIMS FOR RELIEF

COUNT I – VIOLATION OF NEW YORK GENERAL BUSINESS LAW § 349 (On Behalf of the New York Class)

40. Plaintiff Alan Ducorsky repeats, realleges, and incorporates by reference each of the foregoing allegations as though fully set forth herein.

41. Through its conduct described above, Defendant has engaged in deceptive acts and practices that resulted in injury to Plaintiff Ducorsky and the other members of the New York Class.

42. Representing that the Product contained 100% parmesan cheese, when it in fact contained potassium sorbate and substantial amounts of cellulose, is deceptive, and has the capacity, tendency, and effect of deceiving reasonable consumers who purchase the Product. Reasonable consumers would believe that the Product contains 100% parmesan cheese based upon Defendant's misrepresentations to that effect.

43. Defendant's unfair or deceptive practices are a willing and knowing violation of New York General Business Law § 349 because Defendant knew that its Product did not, in fact, contain 100% parmesan cheese, but instead contained potassium sorbate and 7.8% cellulose.

44. Plaintiff Ducorsky and the New York Class have suffered an ascertainable loss of money or property as a result of Defendant's actions. Plaintiff Ducorsky and the New York Class have been damaged in the amount of the purchase price for the Product that they paid. Plaintiff Ducorsky and New York Class have also or alternatively been damaged because Defendant is able to and does charge a price premium for the Product and Plaintiff and the New York Class are willing to pay more for the Product based on its representation that it is 100% parmesan cheese.

45. By reason of the foregoing, Defendant has willfully and knowingly violated N.Y. Gen. Bus. Law § 349, and should be enjoined from representing that its Product contains "100% grated parmesan." Defendant is also liable to Plaintiff Ducorsky and other members of the New York Class for the damages that they have suffered as a result of Defendant's actions, such damages to be determined at trial but not less than \$50.00 for each purchase of Defendant's Product, such damages to be trebled, plus attorneys' fees.

**COUNT II – VIOLATION OF FLORIDA
DECEPTIVE AND UNFAIR TRADE PRACTICES ACT
(On Behalf of the Florida Class)**

46. Plaintiff Becky Sikes repeats, realleges, and incorporates by reference each of the foregoing allegations as though fully set forth herein.

47. Through its conduct described above, Defendant has engaged in deceptive acts and practices, in violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. § 501.201 *et seq.* ("FDUTPA"), resulting in injury to Plaintiff Sikes and the other members of the Florida Class.

48. In Defendant's marketing of the Product, Defendant engaged in unfair methods of competition and unfair and deceptive acts that were offensive to established public policies of

consumer protection. This deceptive marketing was likely to, and did in fact, mislead reasonable consumers, including Plaintiff Sikes and members of the Florida Class, and materially affected their purchasing decisions.

49. Plaintiff Sikes and the Florida Class have suffered an ascertainable and substantial loss of money as a result of Defendant's actions, which could not be readily or easily avoided. Plaintiff Sikes and the Florida Class have been damaged in the amount of the purchase price for Defendant's Product that they paid. Plaintiff Sikes and the Florida Class have also or alternative been damaged because Defendant is able to and does charge more for the Product and Plaintiff Sikes and the Florida Class are willing to pay more for the Product based on its representation that it is 100% parmesan cheese.

50. By reason of the foregoing, Defendant has violated FDUTPA and is liable to Plaintiff Sikes and the Florida Class, pursuant to Fla. Stat. Ann. § 501.201 *et seq.*, for the damages that they have suffered as a result of Defendant's actions, the amount of such damages to be determined at trial, attorneys' fees, and court costs, and injunctive relief precluding the Defendant from continuing its deceptive and unfair business practices.

COUNT III – BREACH OF EXPRESS WARRANTIES
(On Behalf of All Classes)

51. Plaintiffs repeat, reallege, and incorporate by reference each of the foregoing allegations as though fully set forth herein.

52. Defendant constituted both a "merchant" and a "seller" in connection with its sale of the Product to the Plaintiffs and the members of each Class, as those terms are defined in the Uniform Commercial Code. Further, Plaintiffs and all members of each Class constituted "buyers" as that term is defined in the Uniform Commercial Code. The Product, itself, constituted "goods," as that term is defined in the Uniform Commercial Code.

53. Under both common law and Section 2-313 of the Uniform Commercial Code, the representations on Defendant's packaging provided Plaintiffs and other members of each Class with written express warranties, including, but not limited to, warranties that the Product contained "100% grated parmesan cheese" and that it therefore contained no fillers.

54. Defendant breached these warranties by providing a product that consisted of potassium sorbate and 7.8% cellulose, filler ingredients.

55. This breach resulted in damages to Plaintiff and the other members of each Class who bought the Product but did not receive the goods as warranted in that the Product did not contain the promised 100% parmesan cheese.

56. As a proximate result of Defendant's breach of warranties, Plaintiffs and all members of each Class have suffered damages in an amount to be determined at trial in that, among other things, they purchased and paid for Defendant's Product which did not conform to what was promised as promoted, marketed, advertised, packaged, and labeled by Defendant and they were deprived of the benefit of their bargain.

COUNT IV – UNJUST ENRICHMENT
(On Behalf of All Classes)

57. Plaintiffs repeat, reallege, and incorporate by reference each of the foregoing allegations as though fully set forth herein.

58. As a result of Defendant's deceptive and misleading labeling, advertising, marketing, and sale of the Product, Defendant was enriched at the expense of Plaintiffs and the members of each Class through the payment of the purchase price for Defendant's Product. Defendant saved on the cost of producing the product because it used fillers that are cheaper than cheese.

59. Under the circumstances, it would be against equity and good conscience to

permit Defendant to retain the ill-gotten benefits that it received from Plaintiffs and Class Members in light of the fact that the Product was not what Defendant purported it to be. Thus, it would be unjust or inequitable for Defendant to retain the benefit without restitution to Plaintiffs and Class Members for the monies paid to Defendant for the purchase of the Product.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that the Court enter judgment against Defendant as follows:

- A. Certifying this action as a class action, with the New York Class and Florida Class as defined above;
- B. Declaring that Defendant is financially responsible for notifying all Class Members about the claims described herein;
- C. Awarding compensatory damages to redress the harm caused to Plaintiffs and Class Members in the form of economic and non-economic harm resulting from Defendant's deceptive advertising of the Product. Plaintiffs and Class Members also are entitled to recover statutory damages and/or nominal damages. Plaintiffs and Class Members' damages were foreseeable by Defendant and exceed the minimum jurisdictional limits of this Court.
- D. Awarding Plaintiffs and Class Members pre-judgment and post-judgment interest;
- E. Awarding Plaintiffs and the Class interest, costs and attorneys' fees;
- F. Granting leave to amend the Complaint to conform to the evidence produced through discovery and/or at trial; and
- G. Awarding Plaintiffs and the Class such other and further relief as this Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Pursuant to Federal Rule of Civil Procedure Rule 38, Plaintiffs hereby demands a trial
by jury.

DATED: March 1, 2016
White Plains, New York

By: /s/ Todd Garber
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