

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DERRICK SIMS, Individually and On
Behalf of All Others Similarly Situated,

Plaintiff,

v.

ALBERTSONS, LLC and
SUPERVALU, INC.,

Defendants.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff, DERRICK SIMS, individually and on behalf of all others similarly situated throughout the country, by his attorneys, alleges the following upon information and belief, except for those allegations pertaining to Plaintiff, which are based on personal knowledge:

NATURE OF THE ACTION

1. This action seeks to remedy the unlawful, deceptive, and misleading business practices of Albertsons, LLC (“Albertsons”) and Super-Valu, Inc., (“Super-Valu”) (collectively, “Defendants”), with respect to the manufacture, distribution, marketing, and sale of Essential Everyday 100% Grated Parmesan Cheese (the “Product”). In order to induce consumers to purchase the Product,

Defendants' advertising, marketing, and on-label texts prominently feature the warranty and representation: "100% Grated Parmesan Cheese."

2. Notwithstanding Defendants' warranty and representation, independent laboratory testing shows that the product is not in fact "100%" grated parmesan, but rather contains significant quantities of adulterants and fillers. In fact, testing shows that at least 8.8% of the purportedly "100%" parmesan cheese consists of cellulose, a filler and anti-clumping agent derived from *wood pulp*.

3. Plaintiff brings this action against Defendants on behalf of himself and a nationwide class of consumers who purchased the Product during the applicable limitations period (the "Class Period").

PARTIES

4. Plaintiff Derrick Sims is an individual consumer who, at all times material hereto, was a resident and citizen of Massachusetts, residing in Norfolk County. During the Class Period Plaintiff purchased the Product at the Shaw's store at 134 Nahaton Street, Norwood, Massachusetts.

5. Plaintiff was induced to purchase the Product based upon the statement appearing on the front of the label, i.e., "100% Grated Parmesan Cheese." Plaintiff would not have purchased the product, and/or would have paid significantly less for the product, had he known that the "100%" representation is false and mischaracterizes the amount and percentage of Parmesan Cheese in the

container. Plaintiff suffered injury in fact as a result of Defendants' deceptive, misleading, false, and unfair practices, as described herein.

6. Albertsons, LLC is a Delaware limited liability company with its principal place of business at 250 Parkcenter Blvd., Boise, Idaho 83706.

Albertsons is among the largest food and drug retailers in the United States, with more than 2,200 retail locations in 33 states and the District of Columbia.

Albertsons operates food and drug stores under a number of banners, including Albertsons, Albertsons Market, Acme Markets, Amigos, Carrs, Jewel-Osco, Market Street, Pavillions, Randalls, Safeway, Shaw's/Star Market, Super Saver, Tom Thumb, United Supermarkets, and Vons¹ (sometimes referred to herein collectively as the "Albertsons Family of Stores").

7. SuperValu is a Delaware corporation with a principal place of business at 11840 Valley View Road, Eden Prairie, Minnesota, and is a publicly traded corporation under the symbol "SVU" on the New York Stock Exchange. SuperValu is one of the largest grocery wholesalers and retailers in the United States, with annual sales of approximately \$18 billion. Among other operations, Super-Valu owns and operates approximately 200 supermarkets and retail grocery stores in 18 states. Super-Valu owns and operates stores under several banners, including Cub Foods, Farm Fresh, Hornbacher's, Shop 'n Save, Shoppers and

¹ <http://www.albertsons.com/our-company/traditions-history/> (last visited 3/11/16).

SuperValu (sometimes referred to herein collectively as the Super-Valu Family of Stores”).

8. Albertsons, pursuant to an agreement with Super-Valu, licenses the trademark, “Essential Everyday,” a house brand line of 2,700 grocery products (consisting of food, household and cleaning and laundry products), including Essential Everyday 100% Grated Parmesan Cheese—the Product. Essential Everyday products, including the Product, are sold as house brands at stores within the Albertsons Family of Stores, including Acme Markets, Albertsons stores, Jewel-Osco stores, and Shaw’s/Star Market stores. This includes stores in the Commonwealth of Massachusetts, such as Shaw’s and Star Market. Essential Everyday products are also sold as house brands at stores within the Super-Valu family of stores, including Cub Foods, Farm Fresh, Hornbacher’s, Shop ‘n Save and Shoppers.

9. Super-Valu owns the trademark “Essential Everyday,” and distributes the Essential Everyday products, including the Product, to retailers across the country, including stores within the Super-Valu Family of Stores and the Albertsons Family of Stores. The label on the Product container states that it is “distributed by SuperValu, Inc.”

JURISDICTION and VENUE

10. Jurisdiction is proper pursuant to 28 U.S.C. § 1332(d)(2). Upon information and belief, the amount in controversy is in excess of \$5,000,000, exclusive of interests and costs.

11. Venue is proper because Plaintiff and many Class Members reside in this District, many transactions that are the subject of this action took place in this District, Defendants own and/or operate retail stores in this District, and Plaintiff resides in this District.

9. This Court has personal jurisdiction over Defendants because Defendants conduct and transact business in the Commonwealth of Massachusetts, contract to supply goods within the Commonwealth of Massachusetts, and supply goods within the Commonwealth of Massachusetts.

FACTS COMMON TO ALL CAUSES OF ACTION

10. As can be seen in the image below, Defendants boldly represent on the label that the Product is “100%” Grated Parmesan Cheese. To emphasize that point, the label contains a picture of what appears to be a solid wedge and two solid chunks of parmesan cheese. Consumers, including Plaintiff, reasonably rely on the label and believe Defendants’ statement that the Product consists of “100%” Parmesan Cheese means no substitutes or fillers are present in the container.

Because the Product does in fact contain fillers and substitutes, the “100%”
Parmesan claim is literally false and is also misleading to consumers, including
Plaintiff.



11. Independent testing shows that at least 8.8% of the Product is not
Parmesan Cheese. Indeed, at least 8.8% of the Product is not even cheese of any
kind, but is rather comprised of fillers and additives--at least 8.8% of the Product is
cellulose, an anti-clumping agent derived from *wood pulp*. These facts were
discussed in a February 16, 2016 BloombergBusiness article by Lydia Mulvaney,
The Parmesan Cheese You Sprinkle on Your Penne Could be Wood. According to
the February 16 Bloomberg article, Bloomberg News had various grated cheese

brands tested for wood pulp content by an independent laboratory, and the test results showed that the Product contained 8.8% cellulose. As stated above, this shows the “100% Grated Parmesan” representation to be false. The presence of cellulose, a filler, shows that the Product is not 100% Grated Parmesan,” as represented.

12. As reported by BloombergBusiness on February 19, 2016, in response to the February 16 Bloomberg article and the investigation cited therein, the Jewel-Osco supermarket chain recalled the Product and removed it from the shelves at all of its 185 stores nationwide.²

13. However, the Product is still available in some stores. As recently as March 10, 2016, the Product was available at Star Market stores in Massachusetts, with an 8 ounce container selling for \$3.49 (\$2.99, with a discount labeled as “promotional savings”).

CLASS ALLEGATIONS

14. Plaintiff brings this matter on behalf of himself and those similarly situated. As detailed at length in this Complaint, Defendants orchestrated deceptive marketing, advertising, and labeling practices. Defendants’ customers were uniformly impacted by and exposed to this misconduct. Accordingly, this

² The Jewel-Osco stores are part of the Albertsons Family of Stores.

Complaint is uniquely situated for class-wide resolution, including injunctive relief.

15. The Class is defined as all consumers who purchased the Product anywhere in the United States during the period from March 21, 2012 through the present.

16. Plaintiff also seeks certification, to the extent necessary or appropriate, of a subclass of individuals who purchased the product in the Commonwealth of Massachusetts at any time during the period from March 21, 2012 through the present (the “Massachusetts Subclass”).

17. The Class and Massachusetts Subclass shall be referred to collectively throughout the Complaint as “the Class.”

18. Excluded from the Class are Defendants, the officers and directors of Defendants at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest. Any judge and/or magistrate judge to whom this action is assigned and any members of such judges’ staffs and immediate families are also excluded from the Class. Also excluded from the Class are persons or entities that purchased the Product for purposes of resale.

19. This action is properly brought and should be maintained as a class action under Rule 23(a), satisfying the class action prerequisites of numerosity, commonality, typicality, and adequacy because:

20. Numerosity: Class Members are so numerous that joinder of all members is impracticable. Plaintiff believes that there are thousands of consumers who are Class Members described above who have been damaged by Defendants' deceptive and misleading practices.

21. Commonality: The questions of law and fact common to the Class Members which predominate over any questions which may affect individual Class Members include, but are not limited to:

- a. Whether Defendants are responsible for the conduct alleged herein which was uniformly directed at all consumers who purchased the Product;
- b. Whether Defendants' misconduct set forth in this Complaint demonstrates that Defendants have engaged in illegal, unfair, fraudulent, or unlawful business practices with respect to the advertising, marketing, and sale of the Product;
- c. Whether Defendants made false and/or misleading statements to the Class and the public concerning the Product.

- d. Whether Defendants' false and misleading statements concerning the Product were likely to deceive the public;
- e. Whether Plaintiff and the Class are entitled to injunctive relief;
- f. Whether Plaintiff and the Class are entitled to money damages under the same causes of action as the other Class Members.

22. Typicality: Plaintiff is a member of the Class. Plaintiff's claims are typical of the claims of each Class Member in that every member of the Class was susceptible to the same deceptive and misleading conduct and purchased the Defendants' Product. Plaintiff is entitled to relief under the same causes of action as the other Class Members.

23. Adequacy: Plaintiff is an adequate Class representative because his interests do not conflict with the interests of the Class Members he seeks to represent; his consumer fraud claims are common to all members of the Class and he has a strong interest in vindicating his rights; he has retained counsel competent and experienced in complex class action litigation and they intend to vigorously prosecute this action. Plaintiff has no interests which conflict with those of the Class. The Class Members' interests will be fairly and adequately protected by Plaintiff and his counsel. Defendants have acted in a manner generally applicable to the Class, making relief appropriate with respect to Plaintiff and the Class

Members. The prosecution of separate actions by individual Class Members would create a risk of inconsistent and varying adjudications.

24. This action is properly brought and should be maintained as a class action under Rule 23(b) because a class action is superior to traditional litigation of this controversy. Pursuant to Rule 23(b)(3), common issues of law and fact predominate over any other questions affecting only individual members of the Class. The Class issues fully predominate over any individual issue because no inquiry into individual conduct is necessary; all that is required is a narrow focus on Defendants' illegal, deceptive, and misleading marketing and labeling practices. In addition, class treatment is superior to other methods for fair and efficient adjudication of this controversy.

25. Superiority: A class action is superior to the other available methods for the fair and efficient adjudication of this controversy because:

- a. The joinder of thousands of individual Class Members is impracticable, cumbersome, unduly burdensome, and a waste of judicial and/or litigation resources;
- b. The individual claims of the Class Members may be relatively modest compared with the expense of litigating the claim, thereby making it impracticable, unduly burdensome, and expensive—if not totally impossible—to justify individual actions;

- c. When Defendants' liability has been adjudicated, all Class Members' claims can be determined by the Court and administered efficiently in a manner far less burdensome and expensive than if it were attempted through filing, discovery, and trial of all individual cases;
- d. This class action will promote orderly, efficient, expeditious, and appropriate adjudication and administration of Class claims;
- e. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action;
- f. This class action will assure uniformity of decisions among Class Members;
- g. The Class is readily definable and prosecution of this action as a class action will eliminate the possibility of repetitious litigation;
- h. Class Members' interests in individually controlling the prosecution of separate actions is outweighed by their interest in efficient resolution by a single class action; and
- i. It would be desirable to concentrate in this single venue the litigation of all plaintiffs who were induced by Defendants' uniform false and illegal advertising to purchase the Product.

26. Accordingly, this action is properly brought and should be maintained as a class action under Rule 23(b)(3) because questions of law or fact common to Class Members predominate over any questions affecting only individual members, and because a class action is superior to other available methods for fairly and efficiently adjudicating this controversy.

INJUNCTIVE CLASS RELIEF

27. Rules 23(b)(1) and (2) contemplate a class action for purposes of seeking class-wide injunctive relief. Defendants have engaged in illegal conduct resulting in misleading consumers about their “100%” Grated Parmesan Cheese. Since Defendants’ conduct has been uniformly directed at all consumers in the United States, and the conduct continues presently, injunctive relief on a class-wide basis is a viable and suitable solution to remedy Defendants’ continuing illegal misconduct.

28. This action is properly brought as an injunctive class action and should be maintained as a class action under Rule 23(a), satisfying the class action prerequisites of numerosity, commonality, typicality, and adequacy because:

- a. Numerosity: Individual joinder of the injunctive Class Members would be wholly impracticable. Defendants’ Product has been purchased by thousands of people throughout the United States.

- b. Commonality: Questions of law and fact are common to members of the Class. Defendants' misconduct was uniformly directed at all consumers. Thus, all members of the Class have a common cause against Defendants to stop their misleading and illegal conduct through an injunction. Since the issues presented by this injunctive Class deal exclusively with Defendants' misconduct, resolution of these questions would necessarily be common to the entire Class. Moreover, there are common questions of law and fact inherent in the resolution of the proposed injunctive class, including, *inter alia*:
- i. Resolution of the issues presented in the 23(b)(3) class; and
 - ii. Whether members of the Class will continue to suffer harm by virtue of Defendants' illegal and deceptive product marketing and labeling.
- c. Typicality: Plaintiff's claims are typical of the claims of the injunctive Class because his claims arise from the same course of conduct (i.e. Defendants' illegal, deceptive and misleading marketing, labeling, and advertising practices concerning "100%" Grated Parmesan Cheese). Plaintiff is a typical representative of the Class because, like all members of the injunctive Class, he purchased Defendants' Product

which was sold illegally, unfairly, and deceptively to consumers throughout the United States.

- d. Adequacy: Plaintiff will fairly and adequately represent and protect the interests of the injunctive Class. His claims are common to all members of the injunctive Class and he has a strong interest in vindicating his rights. In addition, Plaintiff and the Class are represented by counsel who are competent and experienced in both consumer protection and class action litigation.

29. The injunctive Class is properly brought and should be maintained as a class action under Rule 23(b)(2) because Plaintiff seeks injunctive relief on behalf of the Class Members on grounds generally applicable to the entire injunctive Class. Certification under Rule 23(b)(2) is appropriate because Defendants have acted or refused to act in a manner that applies generally to the injunctive Class (i.e. Defendants have marketed the Product using the same misleading and deceptive labeling to all of the Class Members). Any final injunctive relief or declaratory relief would benefit the entire injunctive Class as Defendants would be prevented from continuing their illegal, misleading, and deceptive marketing practices.

FIRST CAUSE OF ACTION
BREACH OF EXPRESS WARRANTY
(On Behalf of Plaintiff and All Class Members)

53. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

54. Defendants provided Plaintiff and Class Members with an express warranty in the form of written affirmations of fact promising and representing that the Product is “100%” Grated Parmesan Cheese.

55. The above affirmations of fact were not couched as “belief” or “opinion,” and were not “generalized statements of quality not capable of proof or disproof.”

56. These affirmations of fact became part of the basis for the bargain and were material to Plaintiff’s and Class Members’ transactions.

57. Plaintiff and Class Members reasonably relied upon Defendants’ affirmations of fact and justifiably acted in ignorance of the material facts omitted or concealed when they decided to buy the Product.

58. Within a reasonable time after they knew or should have known of Defendants’ breach, Plaintiff and Class Members placed Defendants on notice of their breach. Alternatively, this pleading constitutes sufficient notice of breach. Alternatively, to the extent that it is determined that notice of breach was not given, Defendants did not suffer any prejudice thereby.

59. Defendants breached the express warranty because the Product does not contain “100%” Grated Parmesan Cheese.

60. Defendants thereby breached the following state warranty laws:

- a. Code of Ala. § 7-2-313;
- b. Alaska Stat. § 45.02.313;
- c. A.R.S. § 47-2313;
- d. A.C.A. § 4-2-313;
- e. Cal. Comm. Code § 2313;
- f. Colo. Rev. Stat. § 4-2-313;
- g. Conn. Gen. Stat. § 42a-2-313;
- h. 6 Del. C. § 2-313;
- i. D.C. Code § 28:2-313;
- j. Fla. Stat. § 672.313;
- k. O.C.G.A. § 11-2-313;
- l. H.R.S. § 490:2-313;
- m. Idaho Code § 28-2-313;
- n. 810 I.L.C.S. 5/2-313;
- o. Ind. Code § 26-1-2-313;
- p. Iowa Code § 554.2313;
- q. K.S.A. § 84-2-313;

- r. K.R.S. § 355.2-313;
- s. 11 M.R.S. § 2-313;
- t. Md. Commercial Law Code Ann. § 2-313;
- u. 106 Mass. Gen. Laws Ann. § 2-313;
- v. M.C.L.S. § 440.2313;
- w. Minn. Stat. § 336.2-313;
- x. Miss. Code Ann. § 75-2-313;
- y. R.S. Mo. § 400.2-313;
- z. Mont. Code Anno. § 30-2-313;
- aa. Neb. Rev. Stat. § 2-313;
- bb. Nev. Rev. Stat. Ann. § 104.2313;
- cc. R.S.A. 382-A:2-313;
- dd. N.J. Stat. Ann. § 12A:2-313;
- ee. N.M. Stat. Ann. § 55-2-313;
- ff. N.Y. U.C.C. Law § 2-313;
- gg. N.C. Gen. Stat. § 25-2-313;
- hh. N.D. Cent. Code § 41-02-30;
- ii. II. O.R.C. Ann. § 1302.26;
- jj. 12A Okl. St. § 2-313;
- kk. Or. Rev. Stat. § 72-3130;

- ll. 13 Pa. Rev. Stat. § 72-3130;
- mm. R.I. Gen. Laws § 6A-2-313;
- nn. S.C. Code Ann. § 36-2-313;
- oo. S.D. Codified Laws, § 57A-2-313;
- pp. Tenn. Code Ann. § 47-2-313;
- qq. Tex. Bus. & Com. Code § 2.313;
- rr. Utah Code Ann. § 70A-2-313;
- ss. 9A V.S.A. § 2-313;
- tt. Va. Code Ann. § 59.1-504.2;
- uu. Wash. Rev. Code Ann. § 6A.2-313;
- vv. W. Va. Code § 46-2-313;
- ww. Wis. Stat. § 402.313;
- xx. Wyo. Stat. § 34.1-2-313.

61. As a direct and proximate result of Defendant's breach of express warranty, Plaintiff and Class Members were damaged in the amount of the price they paid for the Product, in an amount to be proven at trial.

SECOND CAUSE OF ACTION
BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY
(On Behalf of Plaintiff and All Class Members)

62. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

63. Defendants are in the business of manufacturing, distributing, marketing and advertising “100%” Grated Parmesan Cheese.

64. Under the Uniform Commercial Code’s implied warranty of merchantability, Defendants warranted to Plaintiff and Class Members that the Product contains “100%” Grated Parmesan Cheese.

65. Defendants breached the implied warranty of merchantability in that Defendants’ Product deviates from the product description, and reasonable consumers expecting a product that conforms to its label would not accept the Defendants’ product if they knew it did not contain “100%” Grated Parmesan Cheese.

66. Within a reasonable amount of time after they knew or should have known of Defendants’ breach, Plaintiff and the Class notified Defendants of such breach. Alternatively, this pleading constitutes sufficient notice of breach. Alternatively, to the extent that it is determined that notice of breach was not given, Defendants did not suffer any prejudice thereby

67. The inability of Defendants’ Product to meet the label description was wholly due to Defendants’ fault and without Plaintiff’s or Class Members’ fault or neglect, and was solely due to Defendants’ manufacture, distribution, marketing and sale of the Product to the public.

68. As a result of the foregoing, Plaintiff and Class Members have been damaged in the amount paid for the Product, together with interest thereon from the date of purchase.

THIRD CAUSE OF ACTION
UNJUST ENRICHMENT

(On Behalf of Plaintiff and All Class Members in the Alternative)

69. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

70. Plaintiff, on behalf of himself and consumers nationwide, brings a common law claim for unjust enrichment.

71. Defendants' conduct violated, *inter alia*, state and federal law by manufacturing, advertising, marketing, and selling the Product while misrepresenting and omitting material facts.

72. Defendants' unlawful conduct as described in this Complaint allowed Defendants to knowingly realize substantial revenues from selling the Product at the expense of, and to the detriment or impoverishment of, Plaintiff and Class Members, and to Defendants' benefit and enrichment. Defendants have thereby violated fundamental principles of justice, equity, and good conscience.

73. Plaintiff and Class Members conferred significant financial benefits on Defendants and paid substantial compensation to Defendants for a Product that was not as Defendants represented it to be.

74. Defendants had an appreciation or knowledge of the benefits conferred by their conduct.

75. Under common law principles of unjust enrichment, it is inequitable for Defendants to retain the benefits conferred by Plaintiff's and Class Members' overpayments.

76. Plaintiff and Class Members seek disgorgement of all profits resulting from such overpayments and establishment of a constructive trust from which Plaintiff and Class Members may seek restitution.

JURY DEMAND

Plaintiff demands a trial by jury on all issues.

WHEREFORE, Plaintiff, on behalf of himself and the Class, prays for judgment as follows:

- (a) Declaring this action to be a proper class action and certifying Plaintiff as the representative of the Class under Rule 23 of the Federal Rules of Civil Procedure;
- (b) Entering preliminary and permanent injunctive relief against Defendants, directing Defendants to correct their unfair and deceptive practices;
- (c) Awarding monetary damages;

- (d) Awarding Plaintiff and Class Members their costs and expenses incurred in this action, including reasonable allowance of fees for Plaintiff's attorneys and experts, and reimbursement of Plaintiff's expenses; and
- (e) Granting such other and further relief as the Court may deem just and proper.

Dated: March 21, 2016

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