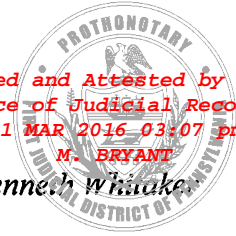


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**THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY—CIVIL ACTION-LAW**

KENNETH WHITAKER, on behalf of himself
and others similarly situated,

Plaintiff,

vs.

HERR FOODS, INC., d/b/a HERR'S, a
Pennsylvania corporation,

Defendant.

) MARCH TERM, 2016

) NO. _____

) CLASS ACTION

) JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff Kenneth Whitaker ("Plaintiff"), on behalf of himself and all others similarly situated, complains of Herr Foods, Inc., d/b/a Herr's ("Defendant" or "Herr's"), a Pennsylvania corporation, as follows:

INTRODUCTION

1. Plaintiff brings this action on behalf of consumers throughout the United States who have purchased one or more of the following misbranded snack products manufactured by Defendant including, but not limited to, Herr's Popped Chips (All Natural with Sea Salt, Sour Cream & Onion, Tangy Barbeque), Herr's "All Natural" Tortilla Chips, Herr's All Natural Sourdough Pretzels, Herr's All Natural Potato Chips (Sea Salt, Russet, Ripples, Crisp n' Tasty, Lattice Cut), and Herr's Potato Chips (Sour Cream & Onion, Salt n' Vinegar) (collectively, the "Misbranded Products").

2. The Misbranded Products are postured to appeal to consumers like Plaintiff who prefer to consume natural products that do not contain artificial, synthetic, highly processed ingredients, color additives or chemical preservatives. The Misbranded Products are marketed as containing "No Preservatives" and "No MSG" and, on certain packages, as being "All Natural." Furthermore, some of the Misbranded Products claim to have "No Trans Fat." These claims are made on the front of the product labels of the Misbranded Products and on Herr's website.

3. These representations are false and deceptive to consumers, who rely on them to make their purchases. In fact, the Misbranded Products are not natural because they contain a host of synthetic, artificial, and highly processed ingredients, chemical preservatives, artificial coloring or flavoring, and genetically modified (GM) material. Moreover, many of the Misbranded Products purporting to be healthy actually contain high levels of fat that disqualify Defendant from making that claim.

4. Plaintiff alleges that Defendant's conduct violates Pennsylvania's Unfair Trade Practices and Consumer Protection Law 73 PS 201-1, *et seq.* Plaintiff also alleges claims for common law fraud, negligent misrepresentation, breach of contract, breach of warranty, and unjust enrichment.

5. Plaintiff seeks damages and restitution stemming from Defendant's false labeling and advertising. Plaintiff also seeks declaratory and injunctive relief to ensure that Defendant removes any and all false or misleading labels and advertisements relating to the Misbranded

Products and to prevent Defendant from making similar representations in the future to the extent they are inaccurate or deceptive as alleged herein.

PARTIES

6. Defendant is a Pennsylvania corporation and sells the Misbranded Products throughout Pennsylvania and the United States, including within this judicial district.

7. Plaintiff is and throughout the facts described in this Complaint was a resident of the Commonwealth of Pennsylvania.

BACKGROUND

8. Herr's sells a variety of chip products bearing deceptive labels, including but not limited to Herr's Popped Chips (All Natural with Sea Salt, Sour Cream & Onion, Tangy Barbeque), Herr's "All Natural" Tortilla Chips, Herr's All Natural Sourdough Pretzels, Herr's All Natural Potato Chips (Sea Salt, Russet, Ripples, Crisp n' Tasty, Lattice Cut), and Herr's Potato Chips (Sour Cream & Onion, Salt n' Vinegar) (again, the "Misbranded Products").

9. The Misbranded Products are postured to appeal to consumers like Plaintiff who prefer to consume natural products that do not contain artificial, synthetic, highly processed ingredients, color additives or chemical preservatives. The Misbranded Products are marketed as containing "No Preservatives" and "No MSG" and, on certain packages, as being "All Natural." Furthermore, some of the Misbranded Products claim to have "No Trans Fat." These claims are made on the front of the product labels of the Misbranded Products and on Herr's website.

10. These representations are false. Section 403(a) of the Food, Drug, and Cosmetic Act prohibits food manufacturers from using labels that contain the terms "natural" when the foods contain artificial ingredients or flavorings or chemical preservatives. *See* 21 U.S.C. § 301, *et seq.* The Food and Drug Administration ("FDA") considers the use of the term "natural" on a food label to be truthful and non-misleading only when "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." *See* 58 FR 2302, 2407, Jan. 6, 1993. Any preservative, flavoring, or coloring can preclude the use of the term "natural" even if the

preservative or flavoring is derived from natural sources. *Id.*; *see also* FDA Compliance Guide CPG § 587.100 (“The use of the words ‘food color added,’ ‘natural color,’ or similar words containing the term ‘food’ or ‘natural’ may be erroneously interpreted to mean the color is a naturally occurring constituent in the food. Since all added colors result in an artificially colored food, we would object to the declaration of any added color as ‘food’ or ‘natural.’”).

11. In like manner, the USDA defines “natural” as meaning (1) the product does not contain any artificial flavor or flavoring, coloring ingredient, or chemical preservative (as defined in 21 C.F.R. § 101.22), or any other artificial or synthetic ingredient; and (2) the product and its ingredients are not more than minimally processed, i.e., the processing does not fundamentally alter the raw product.

12. Although some of the ingredients in the Mislabeled Products may occur naturally in certain foods, they are chemically synthesized and highly processed when manufactured as food additives. For example, citric acid is a preservative and flavoring that, contrary to popular belief, is not fruit-derived and thus not natural but is produced in a highly synthetic process involving certain genetically modified strains of the mold *Aspergillus niger* as well as sulfuric acid, among other chemicals.

13. Similarly, sodium diacetate is a food additive that is used to impart a vinegar flavor. It also serves as a preservative and PH buffer and acts as a preservative by preventing the growth of several strains of molds, as well as acting as an antibacterial agent to extend shelf life in packaged foods. *See* 21 C.F.R. § 184.1444(c).

14. Not only does the existence of chemical preservatives, artificial coloring, and color additives in Herr’s chips render its labels false and deceptive, but Herr’s also shirks its obligation to affirmatively inform consumers of the presence of chemical preservatives and artificial and flavoring coloring in Defendant’s products, as required by law.

15. The federal regulations require “[a] statement of artificial flavoring, artificial coloring, or chemical preservative shall be placed on the food or on its container or wrapper, or on any two or all three of these, as may be necessary to render such statement likely to be read

by the ordinary person under customary conditions of purchase and use of such food.” 21 C.F.R. § 101.22(c).

16. But the labels of Herr’s chips do not state that products contain artificial coloring or chemical preservatives, and many of the products (e.g., Herr’s Popped Sour Cream & Onion Chips) fail to disclose the presence of artificial flavoring, as required under the federal regulations. To the contrary, as discussed above, Defendant’s labels affirmatively represent that Herr’s chips are preservative-free.

Defendant Falsely Labels the Misbranded Products as “All Natural.”

17. Defendant’s representations that the Misbranded Products are “All Natural” are false, deceptive, and misleading.

18. Section 403(a) of the Food, Drug, and Cosmetic Act prohibits food manufacturers from using labels that contain the terms “natural” when the foods contain artificial ingredients or flavorings or chemical preservatives. *See* 21 U.S.C. §§ 301, *et seq.* The FDA considers the use of the term “natural” on a food label to be truthful and non-misleading when “nothing artificial or synthetic ... has been included in, or has been added to, a food that would not normally be expected to be in the food.” *See* FR 2302, 2407, Jan. 6, 1993. Any preservative or flavoring can preclude the use of the term “natural” even if the preservative or flavoring is derived from natural sources. *See also* FDA Compliance Guide CPG Sec. 587.100.

19. The FDA’s policy is also consistent with the common acceptance of the words “all natural.” Webster’s New World Dictionary defines “natural” as “produced or existing in nature; not artificial or manufactured.”¹ Moreover, “all” is defined as “the whole extent or quantity of[.]” (*Id.*, “all,” definition no. 1 at p. 36.) Thus the use of “all” and “natural” on the labels of the Mislabeled Products represents to the average reasonable person that “the entire extent or quantity of” the ingredients contained in the food products are “produced or existing in nature; not artificial or manufactured.”

¹ *Webster’s New World Dictionary of the American Language*, 2nd College Ed. (Simon & Schuster, 1984), “natural,” definition no. 2 at p.947.

20. The FDA's policy is also consistent with consumers' understanding of the word "natural." Consumers understand "natural" to exclude synthetic ingredients, food additives, or chemical preservatives. In a 2007 survey conducted by the Natural Marketing Institute the majority of respondents believed that the term "natural" in a product label meant that the product contained 100 percent natural ingredients, no artificial flavors, no artificial colors, no preservatives, no chemicals, and a substantial percentage thought that it meant that the product was not highly processed. Moreover, 81 percent of respondents found products claiming to be "natural" very/somewhat important when purchasing food or beverage products. And large majorities also found that products containing no preservatives, no artificial ingredients, no artificial flavors, and no artificial colors to be very/somewhat important when purchasing food and beverage products. These percentages are even greater among the health-conscious segments of the U.S. population, which are large—approximately 40 percent. What is more, the survey found that these trends have increased from previous years, and consequently the subject labeling statements are probably far more important to consumers today. Significantly, the survey also found that package labeling was by far the most important source of information influencing consumers' purchasing decisions, especially among the health-conscious segment of the population.

21. Moreover, like 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." The USDA's Food Safety and Inspection Service states that the term "natural" may be used on labeling of meat and poultry products so long as "(1) the product does not contain any artificial flavor or flavorings, color ingredient, or chemical preservative . . . or any other artificial or synthetic ingredient, and (2) the product and its ingredients are not more than minimally processed."

22. 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.”² However, “[r]elatively severe processes, e.g., solvent extraction, acid hydrolysis, and chemical bleaching would clearly be considered more than minimal processing.”³

23. Under USDA policy, a product cannot be labeled as being “natural” if an ingredient would significantly change the character of the product to the point that it could no longer be considered a natural product. Moreover, any product purporting to be “natural” must conspicuously identify any synthetic ingredients used on the label (e.g., “all natural ingredients except dextrose, modified food starch, etc.”). For example, a “turkey roast” cannot be called a “natural” product if it contains beet coloring but can still bear the statement “all natural ingredients modified by beet coloring.”⁴ Defendant does not, however, include any such limiting language on the Misbranded Products.

24. 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” substance is defined as something man-made, whether it merely mimics nature or is not found in nature.⁵ In the scientific community, “synthetic” includes substances that are also “artificial,” but a synthetic substance also can be artificial or non-artificial.⁶ However, the common understanding of “artificial” resembles the scientific

² See The 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 December 18, 2013).

³ *Ibid.*

⁴ *Ibid.*

⁵ 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/> (last visited December 18, 2013).

⁶ *Ibid.*

corn, sunflower, soybean, or cottonseed oil—all of which are typically genetically modified),⁹ whey,¹⁰ natural flavor, autolyzed yeast extract/monosodium glutamate,¹¹ maltodextrin,¹²

crushing sunflower seeds, heating them in steam, and putting the seeds through a high volume press using heat and friction to press oil from seeds, after which seed pulp and oil are put through a hexane solvent bath (hexane is derived from crude petroleum) and steamed again. The seed and oil mix then is put through a centrifuge where phosphate is added to separate seed and oil. The extracted oil is then further refined by degumming (adding water to extract the solvent by decanting or centrifuge), neutralization (removing impurities with caustic soda (sodium hydroxide) or soda ash (sodium carbonate), bleaching (harmonizing color by treatment with bleaching agents such as fuller's earth, activated carbon, or activated clays), and deodorization (using high pressure steam). Citric acid also may be added to remove any metals present. After the oil is removed from the proteins (commonly through solvent extraction using hexane), all oils are further processed before they can be added as a food ingredient. Such processing can include bleaching, deodorization, degumming to remove phosphatides, and alkali refining to remove free fatty acids, colorants, insoluble matter and gums. Each of these processing steps may use additional synthetic and hazardous compounds.

⁹ GMOs are not natural, let alone “all natural.” Monsanto, one of the companies that makes GMOs, defines GMOs as “[p]lants or animals that have had their genetic makeup altered to exhibits traits that are not naturally theirs. In general, genes are taken (copies) from one organism that shows a desired trait and transferred into the genetic code of another organism.” In short, GMOs are created artificially in a laboratory through genetic engineering, and a product that contains GMOs like canola oil is therefore not natural.

¹⁰ Whey protein cannot be considered natural because it is highly processed using harsh chemicals. The ion-exchange process uses chemical reagents (hydrochloric acid and sodium hydroxide) to positively and negatively charge the ions so that the protein molecules will magnetically attach themselves to the resins in a reaction vessel. This process heavily denatures some of the vital components of the proteins such as glycomacropptide (which are the biologically active proteins that aid protein digestion, improve the ability to absorb calcium, and have a positive effect on the immune system) and alpha lactalbumin (which contains a large amount of essential amino acids). In sum, though the ion-exchange process increases protein content, some of the most valuable and health promoting components are depleted.

¹¹ Monosodium glutamate (MSG), which is also called autolyzed yeast, yeast extract, spice extracts, caseinate, natural and artificial flavor, hydrolyzed protein, and soy protein concentrate, is a synthetic chemical that is added to manufactured and processed foods to enhance the flavor. It is derived from glutamic acid, an amino acid, however, the manufacturing process results in the addition of chemical by-products or contaminants. MSG is an excitotoxin that may damage the brain functions responsible for the autonomic nervous system and endocrine system. It potentially may cause sleep problems, food cravings, headaches, asthma, behavioral disorders, depression, heart irregularities, restless leg syndrome, arthritis, sinus problems and digestive disorders.

¹² Maltodextrin is saccharide polymer that is produced through the non-kitchen-chemistry process of partial acid and enzymatic hydrolysis of starch. 21 C.F.R. § 184.1444(c). Synthetic chemicals are often used to extract and purify the enzymes used to produce maltodextrin and dextrose. The microorganisms, fungi, and bacteria used to produce these enzymes are also often synthetically produced.

dextrose,¹³ sodium diacetate,¹⁴ enriched wheat flour (containing riboflavin,¹⁵ folic acid,¹⁶ niacin¹⁷, reduced iron, thiamine mononitrate¹⁸), canola oil,¹⁹ whey protein concentrate, paprika

¹³ Dextrose is enzymatically synthesized in a similar manner as the foregoing, crystallizing D-glucose 5 with one molecule of water.

¹⁴ Sodium diacetate is a recognized chemical preservative used to control mold and bacteria in foods. *See* 21 C.F.R. § 184.1754(c). It is also an artificial flavor. *Id.*

¹⁵ Riboflavin is a synthetic compound. U.S. International Trade Commission, Synthetic Organic Chemical Index, USTIC Pub. 2933 (Nov. 1995). It is also a food coloring agent. E101.

¹⁶ Folic acid is the synthetically-created chemical N-[4-[[[(2-amino-1,4-dihydro-4-oxo-6pteridiny)methyl]amino]benzoyl]-L-glutamic acid. 21 C.F.R. § 172.345(a). Folic acid differs from natural folate in numerous respects, including shelf-life and bioavailability. Even the molecular structure of folic acid is different from that of natural folate.

¹⁷ Niacin is “is the chemical 3-pyridinecarboxylic acid amide (nicotinamide).” 21 C.F.R. § 184.1535. It is federally recognized as a synthetic substance. U.S. International Trade Commission, Synthetic Organic Chemical Index, USTIC Pub. 2933 (Nov. 1995).

¹⁸ Thiamine mononitrate (C₁₂H₁₇N₅O₄S, CAS Reg. No. 532-43-4) is the mononitrate salt of thiamine. It occurs as white crystals or a white crystalline powder and is prepared from thiamine hydrochloride by dissolving the hydrochloride salt in alkaline solution followed by precipitation of the nitrate half-salt with a stoichiometric amount of nitric acid. *See* 21 C.F.R. § 184.1878(a). Synthetically thiamin is usually marketed as thiamin hydrochloride or thiamin mononitrate and is made from Grewe diamine (a coal tar derivative) processed with ammonia and other chemicals. No thiamin hydrochloride (often listed as thiamin HCL) or thiamin mononitrate is naturally found in food or the body (thiamin pyrophosphate is the predominant form in the body).

¹⁹ Canola oil is not natural. After the oil is removed from the proteins (commonly through solvent extraction), all oils are further processed before they can be added as a food ingredient. *See, e.g.*, 21 C.F.R. § 184.1555(c)(1) (requiring all canola oil to be “fully refined, bleached, and deodorized”). Such processing can include bleaching, deodorization, degumming to remove phosphatides, and alkali refining to remove free fatty acids, colorants, insoluble matter and gums. Each of these processing steps may use additional synthetic and hazardous compounds. Canola oil must be specially processed because it is derived from rapeseed, a toxic plant. Moreover, the vast majority of canola crops are genetically modified (GM). Consumers, especially those shopping for natural products, avoid genetically modified organisms (GMOs).

and annatto extracts (color additives),²⁰ soda,²¹ and modified food starch.²²

29. The presence of the foregoing ingredients in products labeled “All Natural” is false and deceptive.

Defendant Failed to Disclose the Presence of Chemical Preservatives and/or Artificial Flavoring or Coloring on the Product Labels.

30. Not only does the existence of chemical preservatives, artificial coloring, and color additives in Defendant’s chips render its labels false and deceptive, but Defendant also fails to affirmatively inform consumers of the presence of chemical preservatives and artificial and flavoring coloring in Defendant’s products, as required by law.

31. Pursuant to 21 C.F.R. § 101.22(c), a statement of artificial flavoring, artificial coloring, or chemical preservative shall be placed on the food or on its container or wrapper, or on any two or all three of these, as may be necessary to render such statement likely to be read by the ordinary person under customary conditions of purchase and use of such food.

32. Pursuant to 21 C.F.R. § 101.22(j), a food to which a chemical preservative is added shall, except when exempt pursuant to 101.100, bear a label declaration stating both the common or usual name of the ingredient and a separate description of its function, e.g., “preservative,” “to retard spoilage,” “a mold inhibitor,” “to help protect flavor,” or “to promote color retention.”

33. The Misbranded Products fail to comply with the requirements of 21 C.F.R. § 101.22. Although they contain numerous chemicals, including for example citric acid and

²⁰ Annatto and paprika are used to color foods. Their processing may involve extraction with oil or lard.

²¹ Sodium bicarbonate, or baking soda, is mainly prepared by the Solvay process, which is the reaction of sodium chloride, ammonia, and carbon dioxide in water. Calcium carbonate is used as the source of CO₂ and the resultant calcium oxide is used to recover the ammonia from the ammonium chloride.

²² Modified food starch is used as an emulsifier and thickening agent. To create the product, starch is treated with inorganic acids such as hydrochloric acid, maltodextrin, cyclodextrin, sodium or potassium phosphate, sodium or potassium hydroxide, acetic anhydride, or many other compounds. Cold water soluble starches may be dried by extrusion, drum drying, spray drying, or dextrinization. It also may contain MSG.

sodium diacetate, the labels fail to describe the function of these chemical preservatives, thus violating the law and concealing their presence.

34. 21 C.F.R. § 101.22(a)(5) provides that, “The term *chemical preservative* means any chemical that, when added to food, tends to prevent or retard deterioration thereof, but does not include common salt, sugars, vinegars, spices, or oils extracted from spices, substances added to food by direct exposure thereof to wood smoke, or chemicals applied for their insecticidal or herbicidal properties.”

35. The foregoing additives, however, are not types of common salt, sugar, vinegar, spice, or oil extracted from spices, nor are they substances added to food by direct exposure thereof to wood smoke, or chemicals applied for their insecticidal or herbicidal properties. As used by Defendant in its products, these chemicals prevent or retard deterioration of the products. Therefore, they are “chemical preservatives” in Defendant’s products, as defined in 21 C.F.R. § 101.22(a)(5).

36. Similarly, Defendant violated the requirement of 21 C.F.R. § 101.22(c) to place a statement of artificial flavoring on its product labels as may be necessary to render such statement likely to be read by the ordinary person under customary conditions of purchase and use of such food.

37. Defendant was required to disclose that citric acid functions as artificial flavor and place a statement to this effect on Defendant’s products. This chemical meets the definition of an artificial flavor under federal law and does not meet the definition of natural flavors under federal law.

38. Defendant also fails to place a statement of artificial coloring on the product labels. “The term artificial color or artificial coloring means any ‘color additive’ as defined in 70.3(f) of this chapter.” 21 C.F.R. § 101.22(a)(4). Section 70.3(f) in turn defines “color additive” as any “dye, pigment, or other substance ... or extracted, isolated, or otherwise derived, with or without intermediate or final change of identity, from a vegetable, animal, mineral, or other source and that, when added or applied to a food, drug, or cosmetic or to the human body

or any part thereof, is capable (alone or through reaction with another substance) of imparting a color thereto.”

39. Defendant avowedly uses paprika and annatto extracts to impart color to the Misbranded Products but does not place a statement of artificial coloring on its product labels.

40. In sum, labeling products as “All Natural” and containing “No Preservatives,” “No Trans Fat,” and “No MSG,” carries implicit health benefits important to consumers—benefits that consumers are willing to pay a premium for over comparable products that are not so labeled and marketed. Defendant has cultivated and reinforced a corporate image based on this theme, which it has placed on each and every one of the Misbranded Products, despite the fact Defendant uses synthetic, artificial, highly processed ingredients, chemical preservatives, and artificial flavors and color additives. The use of these ingredients in the Misbranded Products renders Defendant’s labels false and misleading.

Defendant Falsely Labels Its Chips as Containing “No MSG.”

41. The Misbranded Products also deceptively purport not to contain MSG.

42. Monosodium glutamate, or MSG, is the processed sodium salt of the common amino acid glutamic acid, an amino acid that is naturally present in many foods and food additives.

43. MSG is a discredited flavor enhancer that can reportedly cause headaches, flushing, sweating, facial pressure or tightness, numbness, tingling or burning in the face, neck and other areas, rapid, fluttering heartbeats, chest pain, nausea and weakness.

44. Manufacturers understand that people avoid MSG. Instead of removing MSG from their products, however, some manufacturers obscure the fact that their food products contain MSG by using ingredients that contain MSG but have names that consumers do not recognize as being associated with MSG because the FDA requires manufacturers to list the ingredient “monosodium glutamate” on food labels but does not require food labels to specify that the food naturally contains MSG. *See* 21 C.F.R. § 101.22 (h)(5).

45. Foods containing ingredients with naturally occurring MSG, however, cannot be labeled “No MSG.” There are more than 40 ingredients containing glutamic acid. Whether an

ingredient contains glutamic acid cannot be readily determined by consumers based on the names of the ingredients alone. Additionally, in some foods glutamic acid is formed during processing, a fact that food labels fail to disclose.

46. Although many of Defendant's products claim to contain "No MSG," these products use several ingredients that either contain glutamic acid or create MSG during processing, including but not limited to the natural flavors and flavoring, seasoning, citric acid, maltodextrin, and autolyzed yeast extract. Consequently, the "No MSG" representation is false and deceptive to consumers.

Defendant Falsely Labels Its Chips as Containing "No Trans Fat."

47. Finally, some of Defendant's products claim to have "No Trans Fats" but actually contain partially hydrogenated oils (e.g., Herr's Sour Cream & Onion Chips, Salt n' Vinegar Potato Chips), a recognized form of trans fat.

48. Trans fat intake has been linked to an increased risk of coronary heart disease by contributing to the buildup of plaque inside the arteries that may cause a heart attack. For this reason, FDA requires that the trans fat content of food be declared on the Nutrition Facts label to help consumers determine how each food contributes to their overall dietary intake of trans fat. Indeed the FDA has recently recognized that partially hydrogenated oils are no longer safe.²³

49. Yet not only do the Misbranded Products contain this dangerous ingredient, but the product labels actually claim not to contain any trans fat. Because of the presence of partially hydrogenated oils, this representation is false and deceptive.

Allegations as to the Named Plaintiff

50. Plaintiff is and, throughout the entire class period, was a resident of the Commonwealth of Pennsylvania. Throughout the class period Plaintiff has been concerned about and tries to avoid consuming foods that are not natural, such as foods containing synthetic, artificial, chemical, or highly processed ingredients, chemical preservatives, and artificial flavors

²³ See "FDA Cuts *Trans* Fat in Processed Foods," available at <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm372915.htm> (last accessed December 12, 2015)

and colors. Plaintiff also prefers to consume foods that are healthy, wholesome, and nutritious, especially foods that do not contain trans fats and that are made from natural ingredients. Plaintiff is willing to buy and pay a premium for and has bought and paid a premium for foods that are natural, that do not contain chemical preservatives and/or artificial flavors and colors, that purport to be wholesome and healthy, and that do not contain preservatives, trans fat, or MSG.

51. During the class period Plaintiff purchased the Misbranded Products on many occasions. Before purchasing the Misbranded Products, Plaintiff read and relied on Defendant's labels claiming that the products are "All Natural" and contain "No Preservatives," "No Trans Fat," and "No MSG."

52. Plaintiff relied on these representations and believed that he was purchasing products that were all natural and free of synthetic, artificial, and highly processed ingredients, and chemical preservatives, and artificial coloring or flavoring. Based on these representations Plaintiff also believed that he was purchasing products that were free of preservatives, trans fat, and MSG.

53. Plaintiff not only purchased the Misbranded Products because of the identified representations but also paid more money than he would have had to pay for other similar products that were not natural and that contained synthetic, artificial, highly processed ingredients, chemical preservatives, and artificial coloring or flavoring, and that contained trans-fat and MSG.

54. Indeed, had Plaintiff known that Defendant's products did not possess the qualities so advertised, he would have purchased different products that lived up to their labeling claims or, if these were not available, he would have paid less for the purchased products or similar products not making such claims. In this way, Plaintiff did not receive the products he bargained for and lost money as a result in the form of paying a premium for Defendant's products.

55. On September 7, 2015, Plaintiff sent a letter to Defendant informing it of the foregoing unlawful conduct in connection with the sale of the Misbranded Products and requested that it correct, repair, replace, or otherwise rectify its unlawful conduct. Defendant has declined to do so.

CLASS ACTION ALLEGATIONS

56. Plaintiff brings this action on behalf of himself and those similarly situated as a class action pursuant to Pa.R.C.P. § 1701 *et seq.* Plaintiff seeks to represent the following class: All persons in the United States or, alternatively, Pennsylvania who purchased one or more of the Misbranded Products from six (6) years prior to the filing of the Complaint and continuing to the present.

57. The class excludes counsel representing the class, governmental entities, Defendant, any entity in which Defendant has a controlling interest, Defendant's officers, directors, affiliates, legal representatives, employees, co-conspirators, successors, subsidiaries, and assigns; any judicial officer presiding over this matter and the members of their immediate families and judicial staff; and any individual whose interests are antagonistic to other putative class members.

58. Plaintiff reserves the right to amend or modify the class description with greater particularity or further division into subclasses or limitation to particular issues.

59. This action has been brought and may properly be maintained as a class action under the provisions of Pa.R.C.P. § 1701 *et seq.* because there is a well-defined community of interest in the litigation and the class is easily ascertainable.

A. Numerosity

60. The potential members of the class as defined are so numerous that joinder of all members of the class is impracticable. Although the precise number of putative class members has not been determined at this time, Plaintiff is informed and believes that the proposed class includes thousands if not millions of members.

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B. Commonality and Predominance

61. There are questions of law and fact common to the class that predominate over any questions affecting only individual putative class members. These common questions of law and fact include:

- a. Whether Defendant's conduct violated Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.*;
- b. Whether Defendant intentionally marketed the Misbranded Products to deceive consumers into purchasing them;
- c. Whether Defendant advertises or markets the Misbranded Products in a way that is false or misleading;
- d. Whether Plaintiff and members of the putative class are entitled to restitution, injunctive, declaratory and/or other equitable relief;
- e. Whether Defendant knew or should have known that the labeling representations were false;
- f. Whether Defendant negligently misrepresented, concealed, or omitted a material fact regarding the true characteristics of the Misbranded Products;
- g. Whether Defendant's conduct described herein constitutes breach of contract;
and
- h. Whether Defendant has been unjustly enriched through the misrepresentations alleged herein.

C. Adequacy of Representation

62. Plaintiff will fairly and adequately represent and protect the interests of the class and has no conflicts of interest in the maintenance of the class action. Counsel who represent Plaintiff and putative class members are experienced and competent in litigating class actions and have adequate financial resources to assure that the interests of the class will not be harmed.

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D. Typicality

63. Plaintiff's claims are typical of the claims of the other members of the class. Plaintiff and the class sustained damages as a result of Defendant's uniform wrongful conduct during transactions with Plaintiff and the class.

E. Superiority of Class Action

64. A class action is superior to other available means for the fair and efficient adjudication of this controversy under Pa.R.C.P. § 1708. Individual joinder of putative class members is not practicable, and questions of law and fact common to putative class members predominate over any questions affecting only individual putative class members. Each putative class member has been damaged and is entitled to recovery by reason of Defendant's illegal policies or practices; however, the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action. Class action treatment will allow those persons similarly situated to litigate their claims in the manner that is most efficient and economical for the parties and the judicial system. Plaintiff is unaware of any difficulties in managing this case that should preclude class action.

65. A class action is also the most fair and efficient method of adjudication because Defendant has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class.

FIRST CAUSE OF ACTION

**Violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law,
73 P.S. § 201-1, et seq.**

66. Plaintiff incorporates by reference each allegation set forth above.

67. Plaintiff and class members are persons as that term is defined by 73 P.S. § 201-2(2).

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68. Defendant's conduct and omissions alleged herein occurred throughout the United States including within the Commonwealth of Pennsylvania and constitutes deceptive conduct that creates a likelihood of confusion or misunderstanding in connection with the sale of the Misbranded Products.

69. Defendant's conduct constitutes a violation of 73 P.S. § 201-2(4)(v), (vii), (xi), and (xiv).

70. Plaintiff and the putative class seek to purchase healthful snacks that are made from all natural ingredients, and are free from chemical preservatives, artificial colors and flavors, and which are free from harmful trans fats and MSG.

71. Defendant represented on its product packaging and through its marketing and advertising that its snack products satisfied the characteristics described above. In doing so, Defendant induced Plaintiff and other members of the putative class to purchase the Misbranded Products when they otherwise would not have done so and instead would have purchased other products that conformed to the manufacturers' representations.

72. Plaintiff and others similarly situated justifiably relied on Defendant's skill and expertise in developing, manufacturing, and selling the Misbranded Products. Defendant at all times material hereto possessed superior knowledge regarding the ingredients of the Misbranded Products about which Plaintiff and the putative class could not reasonably be expected to learn or discover until after purchasing the Misbranded Products.

73. Plaintiff and the putative class have been damaged by the deceptive acts of Defendant in connection with its marketing, advertising, labeling, and sale of its snack products, and through the purchase of the Misbranded Products.

74. Plaintiff and the class, pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1, *et seq.*, seek to recover either their actual damages or one hundred dollars (\$100), whichever is greater, and seek trebling of actual damages, plus attorneys' fees, expenses and costs, and such other items of damages and equitable relief available.

SECOND CAUSE OF ACTION

Breach of Express Warranty

75. Plaintiff incorporates by reference each allegation set forth above.

76. “Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise” and “[a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.” 13 P.S. § 2313(a)(1) & (2).

77. Plaintiff “read, heard, saw or knew of the advertisement containing the affirmation of facts or promise”²⁴ because he saw and read the labels of the Misbranded Products and viewed the website advertising the Misbranded Products, and thereby knew of the false representations being made by Defendant.

78. The representations regarding the Misbranded Products being all natural, and containing no preservatives, no trans-fat, and no MSG were made to consumers because they were made prominently on the packages of the Misbranded Products and on the website promoting the Misbranded Products and touting their supposed virtues to consumers. The purpose of the representations on the package labels and the website representations promoting the Misbranded Products was to induce consumers to purchase the Misbranded Products by persuading consumers that the products were more healthful than regular snack products.²⁵

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²⁴ *Parkinson v. Guidant Corp.*, 315 F.Supp.2d 741, 752 (W.D. Pa. 2004); *Gross v. Stryker Corp.*, 858 F. Supp. 2d 466, 501 (W.D. Pa. 2012).

²⁵ *See Sowers v. Johnson & Johnson Med.*, 867 F. Supp. 306, 314 (E.D.Pa.1994); *Kenepp v. Am. Edwards Lab.*, 859 F. Supp. 809, 817 (E.D. Pa. 994).

79. By advertising and selling the Misbranded Products at issue here as “All Natural” and containing “No Preservatives,” “No Trans Fat,” and “No MSG,” Defendant made promises and affirmations of fact on the product packaging and through its marketing and advertising, as described above.²⁶

80. This marketing and advertising constitutes an express warranty and became part of the basis of the bargain between Plaintiff and members of the class on the one hand and Defendant on the other.

81. Defendant has breached its express warranties about the Misbranded Products and their qualities because these products do not conform to Defendant’s stated affirmations and promises, as described hereinabove.

82. As a result of Defendant’s breach of express warranty, Plaintiff and members of the class were harmed in the amount of the purchase price they paid for these products. Moreover, Plaintiff and members of the class have suffered and continue to suffer economic losses and other general and specific damages, including but not limited to the amounts paid for the Misbranded Products, and any interest that would have accrued on those monies, all in an amount to be proven at trial.

THIRD CAUSE OF ACTION

Common Law Fraud

83. Plaintiff incorporates by reference each allegation set forth above.

84. Defendant willfully, falsely, and knowingly misrepresented material facts relating to the character and quality of the Misbranded Products. These misrepresentations are contained in various media advertising and packaging disseminated or caused to be disseminated by Defendant, and such misrepresentations were reiterated and disseminated by officers, agents, representatives, servants, or employees of Defendant acting within the scope of their authority and employed by Defendant to merchandise and market the Misbranded Products.

²⁶ See *Gross v. Stryker Corp.*, 858 F. Supp. 2d 466, 501 (W.D. Penn. 2012).

85. Defendant's misrepresentations were the type of misrepresentations that are material (i.e., the type of misrepresentations to which a reasonable person would attach importance and would be induced to act thereon in making purchase decisions).

86. Defendant knew that the misrepresentations alleged herein were false at the time it made them and/or acted recklessly in making such misrepresentations.

87. Defendant intended that Plaintiff and members of the putative class rely on the misrepresentations alleged herein and purchase the Misbranded Products.

88. Plaintiff and members of the putative class reasonably and justifiably relied on Defendant's misrepresentations when purchasing the Misbranded Products and were unaware of the existence of facts that Defendant suppressed or failed to disclose, and had the facts been known would not have purchased the Misbranded Products and/or purchased them at the prices at which they were offered.

89. As a direct and proximate result of Defendant's wrongful conduct, Plaintiff and members of the putative class have suffered and continue to suffer economic losses and other general and specific damages, including, but not necessarily limited to, the monies paid to Defendant, and any interest that would have accrued on those monies, all in an amount to be proven at trial.

90. Moreover, at all times herein mentioned, Defendant intended to cause or acted with reckless disregard of the probability of causing damage to Plaintiff and members of the putative class, and consequently Plaintiff and members of the putative class are entitled to an award of punitive damages against Defendant in an amount adequate to deter such conduct in the future.

FOURTH CAUSE OF ACTION

Negligent Misrepresentation

91. Plaintiff incorporates by reference each allegation set forth above. Plaintiff pleads this cause of action in the alternative to the foregoing.

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92. Defendant, directly or through its agents and employees, made false representations to Plaintiff and members of the putative class.

93. Defendant owed a duty to Plaintiff and members of the putative class to disclose the material facts set forth above about the Misbranded Products.

94. In making the representations, and in doing the acts alleged above, Defendant acted without any reasonable grounds for believing the representations were true and intended by said representations to induce the reliance of Plaintiff and members of the putative class.

95. Plaintiff and members of the putative class reasonably and justifiably relied on Defendant's misrepresentations when purchasing the Misbranded Products, were unaware of the existence of facts that Defendant suppressed and failed to disclose and, had the facts been known, would not have purchased the Misbranded Products and/or purchased them at the price at which they were offered.

96. As a direct and proximate result of these misrepresentations, Plaintiff and members of the class have suffered and continue to suffer economic losses and other general and specific damages, including but not limited to the amounts paid for the Misbranded Products, and any interest that would have accrued on those monies, all in an amount to be proven at trial.

FIFTH CAUSE OF ACTION

Breach of Contract

97. Plaintiff incorporates by reference each allegation set forth above.

98. Plaintiff and members of the class had a valid contract, supported by sufficient consideration, pursuant to which Defendant was obligated to provide all-natural products, without preservatives, trans-fat, or MSG, as applicable to the particular product, that did not contain any synthetic, artificial, highly processed ingredients, chemical preservatives, artificial flavors, or color additives.

99. Defendant materially breached its contract with Plaintiff and members of the putative class by providing products that did not adhere to these promises.

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100. As a result of Defendant's breach, Plaintiff and members of the putative class were damaged in that they received a product of less value than one for which they paid. Plaintiff and members of the class have suffered and continue to suffer economic losses and other general and specific damages, including but not limited to the amounts paid for the Misbranded Products, and any interest that would have accrued on those monies, all in an amount to be proven at trial.

SIXTH CAUSE OF ACTION

Unjust Enrichment

101. Plaintiff incorporates by reference each allegation set forth above. Plaintiff pleads this cause of action in the alternative to the foregoing.

102. Defendant's conduct in enticing Plaintiff and putative class members to purchase the Misbranded Products through false and misleading advertising and packaging as described throughout this Complaint is unlawful because the statements contained on Defendant's product labels are untrue. Defendant took monies from Plaintiff and members of the putative class for products promised to be bearing the contested labeling representations even though the Misbranded Products did not conform to those representations.

103. Defendant wrongfully secured a benefit from Plaintiff and the putative class – their money to purchase products that they believed had healthful qualities the products actually did not have – and it would be unconscionable for Defendant to retain the funds paid by Plaintiff and the putative class when the products did not provide the advertised benefits.

104. Defendant has been unjustly enriched at the expense of Plaintiff and the putative class as result of Defendant's unlawful conduct alleged herein, thereby creating a quasi-contractual obligation on Defendant to restore these ill-gotten gains to Plaintiff and putative class members.

105. As a direct and proximate result of Defendant's unjust enrichment, Plaintiff and putative class members are entitled to restitution, in an amount to be proven at trial.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and on behalf of the other members of the putative class, prays as follows:

A. For an order certifying that this action is properly brought and may be maintained as a class action, that Plaintiff be appointed the class representative, and that Plaintiff's counsel be appointed counsel for the class;

B. For restitution in such amount that Plaintiff and all putative class members paid to purchase the Misbranded Products, or the premiums paid therefor on account of the misrepresentations as alleged above, or disgorgement of the profits Defendant has obtained from those transactions;

C. For compensatory damages for causes of action for which they are available, including but not limited to 73 P.S. § 201-9.2(a);

D. For statutory damages allowable under 73 P.S. § 201-9.2(a);

E. For treble damages pursuant to 73 P.S. § 201-9.2(a), and punitive damages for causes of action for which they are available;

F. For a declaration and order enjoining Defendant from advertising its products misleadingly in violation of Pennsylvania's Unfair Trade Practices And Consumer Protection Law, and other applicable laws and regulations as specified in this Complaint;

G. For an order awarding reasonable attorneys' fees and the costs of suit herein;

H. For an award of pre- and post-judgment interest;

I. For an order requiring an accounting for, and imposition of, a constructive trust upon all monies received by Defendant as a result of the unfair, misleading, fraudulent and unlawful conduct alleged herein; and

J. Such other and further relief as may be deemed necessary or appropriate.

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JURY DEMAND

Plaintiff hereby demands a jury trial on all issues so triable.

Dated: March 9, 2016

Respectfully submitted,

KENNETH WHITAKER, individually and on
behalf of all others similarly situated,

By: _____

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One of Plaintiff's Attorneys

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** Pro hac vice motions to be filed*

VERIFICATION

I, KENNETH WHITAKER, hereby depose and say that the facts contained in the foregoing Complaint are true and correct to the best of my knowledge, information, and belief, and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsifications to authorities.

Date

02-25-16


Kenneth Whitaker