

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

**ERIC TAMAYO, individually and on
behalf of all others similarly situated,**

Plaintiff,

v.

PUBLIX SUPER MARKETS, INC.,

Defendant.

Case No.: 6:16-cv-1646-ORL-31KRS

**CLASS ACTION COMPLAINT AND
DEMAND FOR JURY TRIAL**

Plaintiff Eric Tamayo (“Plaintiff”), individually and on behalf of all others similarly situated, alleges those facts as to his own purchases based upon personal knowledge and all other facts based upon the investigation of counsel as follows:

NATURE OF THE ACTION

1. This is a class action arising from Defendant, Publix Super Markets, Inc.’s (“Publix” or “Defendant”), unlawful, deceptive, unfair, and misleading practices regarding the marketing, advertising, packaging, labeling, and sale of Publix private label branded “100% Real Grated Romano Parmesan Cheese” and “100% Real Grated Parmesan Cheese” (together, the “100% Grated Parmesan Cheese Product(s)”). To induce consumers to purchase Defendant’s 100% Grated Parmesan Cheese Products, Publix’s advertising, marketing, and on-label texts prominently feature false and misleading representations claiming that the products consist of “100% Real” grated Parmesan cheese.

2. Independent laboratory testing undertaken by Plaintiff, through his counsel, confirms, however, that Publix's 100% Grated Parmesan Cheese Products are not 100 hundred percent cheese. Rather, contrary to Defendant's representations, its 100% Grated Parmesan Cheese Products contain significant and material quantities of adulterants and fillers, including powdered cellulose (which is not digestible).

3. Cellulose, which is usually derived from wood pulp, can be used as an anti-clumping agent in certain food products, including cheese, because it can absorb water. Powdered cellulose is made by cooking raw plant fiber – often wood chips – in various chemicals to separate the cellulose, and then purified. Modified versions go through extra processing, such as exposing them to acid to further break down the fiber. According to industry standards, only approximately two percent cellulose in cheese products is needed to achieve an anti-clumping or anti-caking effect, and cellulose levels in excess of that percentage are simply cheap filler used to cut manufacturing costs. Cellulose levels present in Publix's 100% Grated Parmesan Cheese Products exceed a percentage that would be reasonably necessary to serve anti-clumping and anti-caking purposes.

4. As a direct and proximate consequence of Publix's unlawful practices and conduct, it has deceived consumers into believing that its 100% Grated Parmesan Cheese Products actually contain "100% Real" grated Parmesan cheese instead of a product containing adulterants and fillers. In purchasing Defendant's 100% Grated Parmesan Cheese Products, consumers have received products with qualities and characteristics that they had not bargained for. Through these deceptive, misleading, and unfair business

practices, Publix has been able to command a price for the 100% Grated Parmesan Cheese Products higher than a fair market price and to induce purchases that otherwise would have not occurred, thereby damaging Plaintiff and members of the classes described herein.

5. This class action is brought on behalf of purchasers of Publix's 100% Grated Parmesan Cheese Products to prevent Defendant from continuing to misleadingly and deceptively market, package, and sell its 100% Grated Parmesan Cheese Products. Plaintiff and members of the classes described herein further seek an award of damages (actual, compensatory, and/or punitive), reasonable attorneys' fees and other litigation costs reasonably incurred, and such other preliminary and equitable relief appropriate under the circumstances to remedy Defendant's wrongdoing alleged herein.

PARTIES

Plaintiff

6. Plaintiff is a natural person and Florida citizen residing in Seminole County. Plaintiff purchased Publix private label branded "100% Real Grated Romano Parmesan Cheese" and "100% Real Grated Parmesan Cheese" from Publix supermarkets within Florida in Apopka and Longwood in 2016 and on numerous occasions in the preceding years. Plaintiff reasonably expected that Publix's 100% Grated Parmesan Cheese Products consisted of "100% Real" cheese, read and relied on Publix's representations, did not know, in fact, that the products contained significant amounts of adulterants and fillers, and was actually deceived. Had the true facts been known, Plaintiff would not have purchased Publix's 100% Grated Parmesan Cheese Products, or

would not have paid the premium demanded therefor. As a result of Defendant's actions and conduct, Plaintiff was overcharged, did not receive the benefit of the bargain, and has suffered out-of-pocket losses.

Defendant

7. Defendant is a Florida corporation with its principal place of business located at 3300 Publix Corporate Parkway, Lakeland, Florida 33811. Publix owns and operates a chain of retail food supermarkets. As of September 16, 2016, Publix operated 1,128 supermarkets in six states (Florida, Georgia, Alabama, South Carolina, Tennessee, and North Carolina), with plans to expand retail operations into Virginia in 2017. Of its 1,128 supermarkets, 771 are located in Florida. In 2015, Publix's retail sales reached approximately \$32.4 billion. Publix directs all of its operations, including the promotion, marketing, and advertising of its merchandise, from within Florida.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d), because: (i) at least one class member is a citizen of a state other than that of Defendant; (ii) there are more than 100 class members; and (iii) the aggregate amount in controversy exceeds \$5,000,000, exclusive of interest and costs.

9. This Court has personal jurisdiction over Defendant because Defendant is incorporated in Florida and has its principal place of business in this District in Lakeland, Florida, where it directs all of its operations.

10. Venue is proper in this District under 28 U.S.C. § 1391(b) because: (i) Defendant is headquartered in this District and conducts significant business in this

District; and (ii) a substantial part of the events giving rise to this action, including Plaintiff's purchases of the 100% Grated Parmesan Cheese Products, occurred (and continue to occur) in this District.

INTRA-DISTRICT ASSIGNMENT

11. Assignment to the Orlando Division of this Court is appropriate because Plaintiff's purchases of the 100% Grated Parmesan Cheese Products occurred within Florida in Apopka and Longwood. Because this action arises in Orange County and Seminole County, and Plaintiff resides in Seminole County, assignment to the Orlando Division is proper pursuant to Middle District of Florida Local Rule 1.02.

FACTUAL BACKGROUND

12. Publix is one of the largest regional grocery chains in the United States and controls over 40 percent of Florida's retail grocery market. In 2015, Publix generated approximately \$2 billion in net earnings from its approximately \$32.4 billion in retail sales. To generate revenues, Publix sells a variety of merchandise, including grocery (dairy, produce, deli, bakery, meat, and seafood), health and beauty care, general merchandise, and other products and services. Publix's merchandise includes a mix of nationally advertised and private label brands. According to Publix's public filings with the Securities and Exchange Commission, its private label brands "play an important role in its merchandising strategy." *See* Form 10-K (filed March 1, 2016). Among Publix's various private label merchandise offerings are its 100% Grated Parmesan Cheese Products.

13. Consumers purchasing Publix's 100% Grated Parmesan Cheese Products are presented with one prominent marketing claim on Defendant's product packaging and labeling: that the products consist of "100% Real" grated Parmesan cheese.

14. This representation is easily visible in the images of Publix's "100% Real Grated Romano Parmesan Cheese" containers, which are available in two sizes (8 oz. and 3 oz.), as depicted below:

100% Real Grated Romano Parmesan Cheese Containers



15. Publix's representation that its "100% Real Grated Parmesan Cheese" containers entirely consist of "100% Real" grated Parmesan cheese is similarly

prominently featured on their packaging (which are also available in 8 oz. and 3 oz. sizes), as depicted below:

100% Real Grated Parmesan Cheese Containers



16. The representations that Publix’s 100% Grated Parmesan Cheese Products consist of “100% Real” Parmesan cheese are central to Defendant’s marketing of the products at issue. These representations were (and are) uniformly communicated to Plaintiff and every member of the classes described herein, who were each exposed to the same “100% Real” Parmesan cheese claim on these products’ packaging.

17. Plaintiff and other consumers rely on Publix's claims that the 100% Grated Parmesan Cheese Products consist of "100% Real" Parmesan cheese in deciding to purchase these products, and these representations are material to their purchasing decisions. They reasonably interpret and understand these claims to mean that the 100% Grated Parmesan Cheese Products contain one simple ingredient – grated Parmesan cheese – and no substitutes, additives, or fillers.

18. However, as confirmed by independent laboratory testing undertaken by Plaintiff, through his counsel, Defendant's claims are untrue. Publix's 100% Grated Parmesan Cheese Products are not and do not contain 100 percent Parmesan cheese. Rather, Defendant's 100% Grated Parmesan Cheese Products contain substantial amounts of cellulose, a non-digestible filler and additive derived from wood pulp. Accordingly, Defendant's representations regarding the composition, contents, characteristics, and quality of its 100% Grated Parmesan Cheese Products are literally false, as well as substantially misleading. Publix's false and misleading representations and omissions are likely to deceive Plaintiff and other reasonable consumers.

19. Cellulose is a synthetic ingredient used as an anti-caking agent and filtering aid. *See* 7 C.F.R. 205.605(b). An anti-caking agent is a food additive that prevents ingredients from clumping together after being packaged. Powdered cellulose is made by cooking raw plant fiber – typically wood chips – in various chemicals to separate the cellulose, and then purified.

20. Not only are Publix's "100% Real" Parmesan cheese claims false, but Defendant's use of powdered cellulose in its 100% Grated Parmesan Cheese Products is

particularly egregious and also deceptive and fraudulent because the amount of cellulose contained therein well exceeds any amount needed to achieve anti-caking or anti-clumping effects, according to industry standards. Instead, the cellulose in Publix's 100% Grated Parmesan Cheese Products serves primarily as a filler and a means of cheating consumers, in violation of the Federal Food, Drug, and Cosmetic Act ("FDCA"). *See* 21 U.S.C. §§ 331, 342(b)(4). Specifically, FDCA section 301 (21 U.S.C. § 331) prohibits the adulteration of food, which occurs where "any substance has been added thereto or mixed or packaged therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is." 21 U.S.C. § 342(b)(4). Because cellulose is cheaper than actual Parmesan cheese, Publix reduces its costs and increases its profits by adulterating its 100% Grated Parmesan Cheese Products in this way.

21. Publix's conduct further violates FDCA section 301 (21 U.S.C. § 331), which also prohibits food misbranding. Such misbranding occurs where a food's "labeling is false or misleading in any particular." 21 U.S.C. § 343(a).

22. Florida's consumer protection and food labeling laws impose substantially identical requirements that mirror the federal prohibitions on adulterated and misbranded food. The purpose of Florida's Food Safety Act ("FFSA") is to "[s]afeguard the public health and promote the public welfare by protecting...the purchasing public from injury by merchandising deceit." Fla. Stat. § 500.02(1). Like the FDCA, the FFSA specifically prohibits the adulteration or misbranding of any food (Fla. Stat. § 500.04(2)), as well as the dissemination of any false food advertisement (Fla. Stat. § 500.04(5)). Under the

FFSA, prohibited food adulteration occurs where “any substance has been added thereto or mixed or packaged therewith so as to increase its bulk or weight, or reduce its quality or strength or make it appear better or of greater value than it is.” Fla. Stat. § 500.10(2)(d). The FFSA deems a food “misbranded” where “its labeling is false or misleading in any particular.” Fla Stat. § 500.11(1)(a). Similarly, under the FFSA, “[a]n advertisement of a food is deemed to be false if it is false or misleading in any particular.” Fla. Stat. § 500.115. Accordingly, Publix’s conduct violates the FFSA.

23. Defendant continues to make false and misleading claims regarding the composition, contents, characteristics, and quality of its 100% Grated Parmesan Cheese Products. In so doing, Publix has misled (and continues to mislead) consumers in Florida and the other five states in which it operates supermarkets, and is able to charge more for these products than it otherwise could.

CLASS ACTION ALLEGATIONS

24. Plaintiff brings this action pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) on behalf of himself and classes of similarly situated individuals defined as follows:

- a. “Nationwide Class”: All persons who purchased a Publix-branded 100% Grated Parmesan Cheese Product within the United States (including its states, districts, and territories) for personal or household use during the applicable statute of limitations period; and
- b. “Florida Sub-Class”: All persons who purchased a Publix-branded 100% Grated Parmesan Cheese Product within the State of Florida

for personal or household use during the applicable statute of limitations period.

25. Excluded from the Nationwide Class and Florida Sub-Class (collectively, “Class” or “Classes”) are governmental entities, Defendant, any entity in which Defendant has a controlling interest, and Defendant’s officers, directors, affiliates, legal representatives, employees, co-conspirators, successors, subsidiaries, and assigns. Also excluded from the Nationwide Class and Florida Sub-Class are any judges, justices, or judicial officers presiding over this matter and the members of their immediate families and judicial staff.

26. This action is brought and may be properly maintained as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3), and satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of these rules.

27. ***Numerosity Under Rule 23(a)(1).*** The Nationwide Class and Florida Sub-Class are so numerous that the individual joinder of all members is impracticable. While the exact number of Class members is currently unknown, such information can be ascertained through appropriate discovery and investigation. Due to the nature of the trade and commerce involved, however, Plaintiff believes that the total number of Class members exceeds one million.

28. ***Commonality Under Rule 23(a)(2).*** Common legal and factual questions exist that predominate over any questions affecting only individual Class members. These common questions, which do not vary among Class members and which may be

determined without reference to any Class member's individual circumstances, include, but are not limited to:

- a. Whether Publix's 100% Grated Parmesan Cheese Products contain, in fact, "100% Real" grated Parmesan cheese and are free from substitutes, additives, adulterants, and fillers;
- b. Whether Defendant labeled, packaged, marketed, advertised, and/or sold Publix-branded 100% Grated Parmesan Cheese Products to Plaintiff and members of the Nationwide Class and Florida Sub-Class using false, misleading, and/or deceptive packaging and labeling;
- c. Whether Defendant omitted and/or misrepresented material facts in connection with the labeling, packaging, marketing, advertising, and/or selling of its Publix-branded 100% Grated Parmesan Cheese Products;
- d. Whether Defendant's labeling, packaging, marketing, advertising, and/or selling of its Publix-branded 100% Grated Parmesan Cheese Products constituted an unfair, unlawful, or deceptive practice;
- e. Whether Publix's failure to disclose that its 100% Grated Parmesan Cheese Products contained significant and material quantities of adulterants and fillers would mislead or likely deceive a reasonable consumer;

- f. Whether Defendant's conduct described herein constitutes a violation of the Florida Deceptive and Unfair Trade Practices Act (Fla. Stat. §§ 501.201, *et seq.*);
- g. Whether Defendant's conduct described herein constitutes a violation of FDCA section 301 (21 U.S.C. § 331);
- h. Whether Defendant's conduct described herein constitutes a violation of the FFSA (Fla. Stat. § 500.04);
- i. Whether Defendant's conduct described herein constitutes a violation of Florida's misleading advertising statute (Fla. Stat. § 817.41);
- j. Whether Publix's disclosures regarding its 100% Grated Parmesan Cheese Products were committed knowingly;
- k. Whether Publix's conduct described herein was willful;
- l. Whether Publix's conduct described herein has caused it to be unjustly enriched;
- m. Whether Plaintiff and the members of the Nationwide Class and Florida Sub-Class have been injured as a result of Publix's conduct;
- n. Whether Plaintiff and the members of the Nationwide Class and Florida Sub-Class overpaid for the Publix-branded 100% Grated Parmesan Cheese Products;

- o. Whether Plaintiff and the members of the Nationwide Class and Florida Sub-Class are entitled to equitable relief, including, but not limited to, restitution or injunctive relief; and
- p. Whether Plaintiff and the members of the Nationwide Class and Florida Sub-Class are entitled to damages or other monetary relief, and, if so, in what amount.

29. **Typicality Under Rule 23(a)(3).** Plaintiff's claims are typical of the Class members' claims. Defendant's course of conduct caused Plaintiff and the Class members the same harm, damages, and losses as a result of Defendant's uniformly unlawful conduct. Likewise, Plaintiff and other class members must prove the same facts in order to establish the same claims.

30. **Adequacy of Representation Under Rule 23(a)(4).** Plaintiff is an adequate representative of the Nationwide Class and Florida Sub-Class because he is a member of the Classes and his interests do not conflict with the interests of the members of the Classes. Plaintiff has retained counsel competent and experienced in complex litigation and consumer protection class action matters such as this action, and Plaintiff and his counsel intend to vigorously prosecute this action for the Classes' benefit, and have the resources to do so. Plaintiff and his counsel have no interests adverse to those of the other members of the Nationwide Class or Florida Sub-Class.

31. **Superiority.** A class action is superior to all other available methods for the fair and efficient adjudication of this controversy because individual litigation of each Class member's claim is impracticable. The damages, harm, and losses suffered by the

individual members of the Nationwide Class and Florida Sub-Class will likely be small relative to the burden and expense of individual prosecution of the complex litigation necessitated by Defendant's wrongful conduct. Even if each Class member could afford individual litigation, the Court system could not. It would be unduly burdensome if thousands of individual cases proceeded. Individual litigation also presents the potential for inconsistent or contradictory judgments, the prospect of a race to the courthouse, and the risk of an inequitable allocation of recovery among those individuals with equally meritorious claims. Individual litigation would increase the expense and delay to all parties and the Courts because it requires individual resolution of common legal and factual questions. By contrast, the class action device presents far fewer management difficulties and provides the benefit of a single adjudication, economies of scale, and comprehensive supervision by a single court.

32. The Nationwide Class and Florida Sub-Class can be properly maintained under Rule 23(b)(2). Defendant has acted, or refused to act, with respect to some or all issues in this Complaint, on grounds generally applicable to the Classes, thereby making final injunctive relief and declaratory relief appropriate with respect to the Nationwide Class and Florida Sub-Class as a whole.

33. Plaintiff reserves the right to amend the foregoing allegations and Class definitions based on facts learned through additional investigation and in discovery.

FIRST CAUSE OF ACTION
Violations of Fla. Stat. §§ 501.201, et seq. (Florida Deceptive and
Unfair Trade Practices Act)
On Behalf of Plaintiff and the Nationwide Class Against Defendant

34. Plaintiff, individually and on behalf of the Nationwide Class, incorporates by reference all of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

35. The stated purpose of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) is “[t]o protect the consuming public...from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.” Fla. Stat. § 501.202(2).

36. Plaintiff and members of the Nationwide Class are “consumers” within the definition, meaning, and construction of Fla. Stat. § 501.203(7).

37. Defendant solicited, advertised, offered, provided, and distributed goods (including the 100% Grated Parmesan Cheese Products) in Florida and is thus engaged in “trade or commerce” within the definition, meaning, and construction of Fla. Stat. § 501.203(8).

38. Plaintiff and the Nationwide Class have standing to pursue this claim because Plaintiff and members of the Nationwide Class have suffered injury in fact and have lost ascertainable money or property as a result of Defendant’s actions set forth above which occurred within, and emanated from, Florida.

39. The FDUTPA broadly prohibits “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.” Fla. Stat. § 501.204(1).

40. Publix's actions and conduct as alleged in this Complaint constitute an "unfair or deceptive act" within the definition, meaning, and construction of the FDUTPA because Defendant violated FDCA sections 301, 402, and 403 (21 U.S.C. §§ 331, 342, 343), the FFSA (Fla. Stat. §§ 500.04, 500.10, 500.11, 500.115), and Florida's misleading advertising statute (Fla. Stat. § 817.41).

41. Defendant's actions and conduct as alleged herein constitute an "unfair" act or practice within the definition, meaning, and construction of the FDUTPA because they offend established public policy and/or are immoral, unethical, oppressive, unscrupulous, and/or substantially injurious to its customers. Publix's unfair and deceptive practices regarding the marketing, advertising, packaging, labeling, and sale of its private label branded 100% Grated Parmesan Cheese Products are likely to mislead – and have misled – consumers acting reasonably under the circumstances. The harm caused by Defendant's wrongful conduct outweighs any utility of such conduct and has caused – and will continue to cause – substantial injury to Plaintiff and the Nationwide Class. Defendant could and should have chosen one of many reasonably available alternatives, including: (i) altering its packaging and labeling to prominently disclose that its 100% Grated Parmesan Cheese Products included significant and material quantities of adulterants and fillers; (ii) eliminating the use of adulterants and fillers, such as powdered cellulose, in its 100% Grated Parmesan Cheese Products; or (iii) not selling its 100% Grated Parmesan Cheese Products altogether.

42. Defendant's actions and conduct as alleged herein constitute a "deceptive" act or practice within the definition, meaning, and construction of the FDUTPA because

Defendant: (i) knowingly and willfully failed to disclose all material information to purchasers of its supposed 100% Grated Parmesan Cheese Products; (ii) knowingly made false representations of fact in connection with its 100% Grated Parmesan Cheese Products; (iii) affirmatively concealed and omitted that its 100% Grated Parmesan Cheese Products included significant and material quantities of adulterants and fillers to induce reliance by Plaintiff and the Nationwide Class; and (iv) charged premium prices for such products. Defendant's conduct was likely to deceive consumers. Plaintiff and the Nationwide Class relied on Defendant's representations and omissions. Defendant's failure to disclose this pertinent information regarding the true nature, specifications, and characteristics of Publix's 100% Grated Parmesan Cheese Products constitutes a material omission, in violation of the FDUTPA.

43. As a result of Defendant's "unfair" or "deceptive" conduct, Plaintiff and members of the Nationwide Class were induced to pay premium prices for Publix's 100% Grated Parmesan Cheese Products, which were worth substantially less than the products promised by Defendant, and Plaintiff and members of the Nationwide Class did not obtain the grated Parmesan cheese products promised by Defendant. Defendant's conduct directly and proximately caused Plaintiff and the Nationwide Class actual monetary damages in the form of the price paid for the Publix 100% Grated Parmesan Cheese Products. The injuries, damages, and harm caused to Plaintiff and the Nationwide Class by Defendant's unfair conduct are not outweighed by any countervailing benefits to consumers. Had Defendant disclosed that its 100% Grated Parmesan Cheese Products included significant and material quantities of adulterants and fillers, Plaintiff and the

members of the Nationwide Class would not have purchased the products at issue or would have paid substantially less for the products.

44. Defendant's "unfair" or "deceptive" business practices alleged herein constitute an ongoing course of wrongful conduct prohibited by the FDUTPA because Defendant markets and sell its 100% Grated Parmesan Cheese Products in a manner that offends public policy and/or in a fashion that is immoral, unethical, oppressive, unscrupulous, and/or substantially injurious to its customers. Plaintiff and the Nationwide Class therefore seek equitable and declaratory relief to remedy Defendant's deceptive advertising, packaging, and labeling of its grated Parmesan cheese products under the FDUTPA, Fla. Stat. § 501.211(1).

45. Plaintiff would purchase the 100% Grated Parmesan Cheese Products again if they were not misbranded and the products' prices reflected their true contents, characteristics, and qualities. However, if Plaintiff and members of the Nationwide Class purchase the 100% Grated Parmesan Cheese Products again in their presently-labeled condition, they will reencounter and repurchase a product, offered at premium prices, that is not what it is represented to be. Thus, Publix's deceptive and unfair conduct has deterred Plaintiff from purchasing the mislabeled 100% Grated Parmesan Cheese Products.

46. Plaintiff and members of the Nationwide Class face a real and immediate threat of future harm in the form of deceptively labeled, packaged, and marketed 100% Grated Parmesan Cheese Products sold at inflated prices based upon the deception that the products consist of "100% Real" Parmesan cheese, when they do not. Absent an

injunction, Plaintiff and members of the Nationwide Class cannot rely on Publix's representations regarding its 100% Grated Parmesan Cheese Products to be truthful and not misleading. Unless restrained and enjoined, Defendant will continue to engage in the conduct described above, subjecting Plaintiff and members of the Nationwide Class to substantial continuing harm. Accordingly, injunctive relief is appropriate.

47. Plaintiff and the Nationwide Class also seek an order requiring Defendant to make full restitution of all monies it has wrongfully obtained from Plaintiff and the Nationwide Class and to pay damages, along with all other relief permitted under the FDUTPA, Fla. Stat. §§ 501.211(2), 501.2105.

SECOND CAUSE OF ACTION
Violations of Fla. Stat. § 817.41 (Florida Misleading Advertising Statute)
On Behalf of Plaintiff and the Florida Sub-Class Against Defendant

48. Plaintiff, individually and on behalf of the Florida Sub-Class, incorporates by reference all of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

49. Florida's misleading advertising statute, Fla. Stat. § 817.41(1), prohibits "any person to make or disseminate or cause to be made or disseminated before the general public of the state, or any portion thereof, any misleading advertisement. Such making or dissemination of misleading advertising shall constitute and is hereby declared to be fraudulent and unlawful, designed and intended for obtaining money or property under false pretenses."

50. Fla. Stat. § 817.40(5) broadly defines "misleading advertising" to include "any statements made, or disseminated, in oral, written, electronic, or printed form or

otherwise, to or before the public, or any portion thereof, which are known, or through the exercise of reasonable care or investigation could or might have been ascertained, to be untrue or misleading, and which are or were so made or disseminated with the intent or purpose, either directly or indirectly, of selling or disposing of real or personal property, services of any nature whatever, professional or otherwise, or to induce the public to enter into any obligation relating to such property or services.”

51. Publix represented (and continues to represent) that its 100% Grated Parmesan Cheese Products consist of “100% Real” grated Parmesan cheese when, in fact, these products contain significant and material quantities of adulterants and fillers, including powdered cellulose.

52. At the time Publix made these representations regarding the composition, contents, characteristics, and quality of its 100% Grated Parmesan Cheese Products, Publix knew that these representations were false.

53. Publix’s representations that its 100% Grated Parmesan Cheese Products consist of “100% Real” grated Parmesan cheese, and its omission that these products contain significant and material quantities of adulterants and fillers, are material facts to Plaintiff and members of the Florida Sub-Class. Defendant knows that such representations and omissions are material to reasonable consumers and intends that consumers rely upon these representations and omissions when choosing to purchase the 100% Grated Parmesan Cheese Products.

54. Defendant knew that its misrepresentations and omissions regarding the 100% Grated Parmesan Cheese Products would materially affect Plaintiff and the Class members' decisions to purchase such products.

55. Acting as reasonable consumers, Plaintiff and members of the Florida Sub-Class were unaware of Publix's affirmative misrepresentations and active concealment of material facts regarding the 100% Grated Parmesan Cheese Products. Rather, they believed that Publix's 100% Grated Parmesan Cheese Products contained, in fact, "100% Real" grated Parmesan cheese and were free from substitutes, additives, adulterants, and fillers. Plaintiff and members of the Florida Sub-Class reasonably relied on Publix's misrepresentations and omissions regarding its 100% Grated Parmesan Cheese Products in connection with their decisions to purchase such products.

56. As a direct and proximate result of Publix's fraudulent misrepresentations regarding its 100% Grated Parmesan Cheese Products, Plaintiff and members of Florida Sub-Class were deceived and actually induced to purchase Defendant's 100% Grated Parmesan Cheese Products.

57. If the true facts had been known, Plaintiff and members of the Florida Sub-Class would not have purchased Publix's 100% Grated Parmesan Cheese Products, or would not have paid as much for the products at issue.

58. Publix has thus engaged in the dissemination of misleading advertising, in violation of Fla. Stat. § 817.41(1). The actions of Publix caused damage to Plaintiff and members of the Florida Sub-Class, who are therefore entitled to damages in an amount to be proven at trial and equitable relief as a result.

59. Defendant's conduct further constitutes fraud, actual malice, or deliberate oppression. Publix acted with actual knowledge of the wrongfulness of its actions and the high probability that damage to Plaintiff and the Florida Sub-Class would result and, despite that knowledge, intentionally pursued the course of conduct described herein, resulting in damage. At a minimum, Publix's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the rights and interests of Plaintiff and the Florida Sub-Class, who were exposed thereto.

60. Accordingly, Plaintiff and the Florida Sub-Class seek all relief permitted under Fla. Stat. § 817.41(6), including an award of punitive damages.

THIRD CAUSE OF ACTION
Fraudulent Misrepresentation
On Behalf of Plaintiff and the Nationwide Class Against Defendant

61. Plaintiff, individually and on behalf of the Nationwide Class, incorporates by reference all of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

62. Publix represented (and continues to represent) that its 100% Grated Parmesan Cheese Products consist of "100% Real" grated Parmesan cheese when, in fact, these products contain significant and material quantities of adulterants and fillers, including powdered cellulose.

63. At the time Publix made these representations regarding the composition, contents, characteristics, and quality of its 100% Grated Parmesan Cheese Products, Publix knew that these representations were false.

64. Publix's representations that its 100% Grated Parmesan Cheese Products consist of "100% Real" grated Parmesan cheese, and its omission that these products contain significant and material quantities of adulterants and fillers, are material facts to Plaintiff and members of the Nationwide Class. Defendant knows that such representations and omissions are material to reasonable consumers and intends that consumers rely upon these representations and omissions when choosing to purchase the 100% Grated Parmesan Cheese Products.

65. Defendant knew that its misrepresentations and omissions regarding the 100% Grated Parmesan Cheese Products would materially affect Plaintiff and Class members' decisions to purchase such products.

66. Acting as reasonable consumers, Plaintiff and members of the Nationwide Class were unaware of Publix's affirmative misrepresentations and active concealment of material facts regarding the 100% Grated Parmesan Cheese Products. Rather, they believed that Publix's 100% Grated Parmesan Cheese Products contained, in fact, "100% Real" grated Parmesan cheese and were free from substitutes, additives, adulterants, and fillers. Plaintiff and members of the Nationwide Class reasonably relied on Publix's misrepresentations and omissions regarding its 100% Grated Parmesan Cheese Products in connection with their decisions to purchase such products.

67. As a direct and proximate result of Publix's fraudulent misrepresentations regarding its 100% Grated Parmesan Cheese Products, Plaintiff and members of Nationwide Class were deceived and actually induced to purchase Defendant's 100% Grated Parmesan Cheese Products.

68. If the true facts had been known, Plaintiff and members of the Nationwide Class would not have purchased Publix's 100% Grated Parmesan Cheese Products, or would not have paid as much for the products at issue.

69. The fraudulent actions and willful misconduct of Publix caused damage to Plaintiff and members of the Nationwide Class, who are therefore entitled to damages in an amount to be proven at trial and equitable relief as a result.

70. Defendant's conduct further constitutes actual malice or deliberate oppression. Publix acted with actual knowledge of the wrongfulness of its actions and the high probability that damage to Plaintiff and the Nationwide Class would result and, despite that knowledge, intentionally pursued the course of conduct described herein, resulting in damage. At a minimum, Publix's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the rights and interests of Plaintiff and the Nationwide Class who were exposed thereto. Accordingly, Plaintiff and the Nationwide Class also seek punitive damages, to the extent allowable under law.

FOURTH CAUSE OF ACTION
Negligent Misrepresentation
On Behalf of Plaintiff and the Nationwide Class Against Defendant

71. Plaintiff, individually and on behalf of the Nationwide Class, incorporates by reference all of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

72. Publix represented (and continues to represent) that its 100% Grated Parmesan Cheese Products consist of "100% Real" grated Parmesan cheese when, in fact,

these products contain significant and material quantities of adulterants and fillers, including powdered cellulose.

73. At the time Publix made these representations regarding its 100% Grated Parmesan Cheese Products, Publix knew, or should have known, that these representations were false, or made them without knowledge of their truth or veracity.

74. Publix's representations that its 100% Grated Parmesan Cheese Products consist of "100% Real" grated Parmesan cheese, and its omission that these products contain significant and material quantities of adulterants and fillers, are material facts to Plaintiff and members of the Nationwide Class. Defendant knows that such representations and omissions are material to reasonable consumers and intends that consumers rely upon these representations and omissions when choosing to purchase the 100% Grated Parmesan Cheese Products.

75. Defendant knew or should have known that its misrepresentations and omissions regarding the 100% Grated Parmesan Cheese Products would materially affect Plaintiff and the Class members' decisions to purchase such products.

76. Acting as reasonable consumers, Plaintiff and members of the Nationwide Class were unaware of Publix's misrepresentations and omissions of material facts regarding the 100% Grated Parmesan Cheese Products. Rather, they believed that Publix's 100% Grated Parmesan Cheese Products contained, in fact, "100% Real" grated Parmesan cheese and were free from substitutes, additives, adulterants, and fillers. Plaintiff and members of the Nationwide Class reasonably relied on Publix's

misrepresentations and omissions regarding its 100% Grated Parmesan Cheese Products in connection with their decisions to purchase such products.

77. As a direct and proximate result of Publix's negligent misrepresentations regarding its 100% Grated Parmesan Cheese Products, Plaintiff and members of Nationwide Class were deceived and actually induced to purchase Defendant's 100% Grated Parmesan Cheese Products.

78. If the true facts had been known, Plaintiff and members of the Nationwide Class would not have purchased Publix's 100% Grated Parmesan Cheese Products or would not have paid as much for the products at issue.

79. The negligent actions of Publix caused damage to Plaintiff and members of the Nationwide Class, who are therefore entitled to damages in an amount to be proven at trial and equitable relief as a result.

FIFTH CAUSE OF ACTION
Unjust Enrichment
On Behalf of Plaintiff and the Nationwide Class Against Defendant

80. Plaintiff, individually and on behalf of the Nationwide Class, incorporates by reference all of the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

81. Plaintiff and members of the Nationwide Class conferred upon Defendant non-gratuitous payments for Publix's 100% Grated Parmesan Cheese Products. Defendant appreciated, accepted, and retained such benefits conferred by Plaintiff and members of the Nationwide Class with knowledge and awareness that, as a result of Defendant's sale of Publix-branded 100% Grated Parmesan Cheese Products, Plaintiff

and members of the Nationwide Class were not receiving containers of grated Parmesan cheese filled with “100% Real” Parmesan cheese that had been represented by Defendant and reasonable consumers would have expected.

82. Defendant profited from its unlawful, unfair, misleading, and deceptive practices at the expense of Plaintiff and members of the Nationwide Class. Absent Defendant’s misleading and deceptive representations regarding the character and qualities of the grated Parmesan cheese in its products, Plaintiff and each member of the Nationwide Class would not have purchased the products at issue or would have paid substantially less for Defendant’s 100% Grated Parmesan Cheese Products. As such, Plaintiff and other members of the Nationwide Class conferred an improper windfall upon Defendant, which knew of the windfall and has unjustly retained such benefits.

83. As a direct and proximate result of Defendant’s unjust enrichment, under principles of equity and good conscience, Plaintiff and the Nationwide Class are entitled to full disgorgement and restitution of all amounts by which Defendant was enriched through its unlawful or wrongful conduct in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and the Nationwide Class and Florida Sub-Class, requests that the Court order the following relief and enter judgment against Defendant as follows:

A. An Order certifying the proposed Nationwide Class and Florida Sub-Class under Federal Rule of Civil Procedure 23 and appointing Plaintiff and his counsel to represent the Classes;

B. A declaration finding that Defendant engaged in the illegal conduct alleged herein in violation of the FDUPTA (Fla. Stat. §§ 501.201, *et seq.*), FDCA section 301 (21 U.S.C. § 331), the FFSA (Fla. Stat. §§ 500.01, *et seq.*), and Fla. Stat. § 817.41(1);

C. An Order that Defendant be permanently enjoined from its improper activities and conduct described herein;

D. A Judgment awarding Plaintiff and the Nationwide Class and Florida Sub-Class restitution, damages (including statutory and punitive damages where applicable), and disgorgement in amounts according to proof at trial, including an award of pre- and post-judgment interest, to the extent allowable;

E. An Order awarding Plaintiff and the Nationwide Class and Florida Sub-Class their reasonable litigation expenses, costs, and attorneys' fees;

F. An Order awarding such other injunctive and declaratory relief as is necessary to protect the interests of Plaintiff and the Nationwide Class and Florida Sub-Class; and

G. An Order awarding such other and further relief as the Court deems necessary, just, and proper.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury, pursuant to Fed. R. Civ. Proc. 38(b), for all claims and issues so triable.

Dated: September 19, 2016

Respectfully submitted,

/s/ Nathan C. Zipperian
Nathan C. Zipperian (F.B.N. 61525)
Shepherd, Finkelman, Miller & Shah LLP
1625 N. Commerce Pkwy., Suite 320

Fort Lauderdale, FL 33326-3206
Tel: (866) 849-7545
Fax: (866) 300-7367
nzipperian@sfmslaw.com

Robert C. Schubert
Willem F. Jonckheer
Dustin L. Schubert
Schubert Jonckheer & Kolbe LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
Tel: (415) 788-4220
Fax: (415) 788-0161
rschubert@schubertlawfirm.com
wjonckheer@schubertlawfirm.com
dschubert@schubertlawfirm.com

Attorneys for Plaintiff and the Putative Classes