

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

NATIONAL CONSUMERS LEAGUE
1701 K Street, N.W., #1200,
Washington, DC 20006

Plaintiff

v.

DEL MONTE FOODS, INC.
One Maritime Plaza
San Francisco, California 94111

Defendant.

No. 17CA8259

COMPLAINT

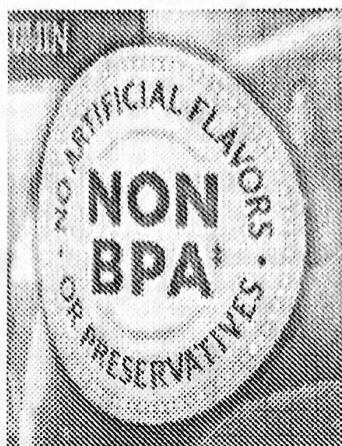
Plaintiff, National Consumers League ("NCL"), by its undersigned attorneys, brings this lawsuit on behalf of the General Public of the District of Columbia ("General Public") against Del Monte Foods, Inc. ("Del Monte" or "Defendant"), and alleges the following:

INTRODUCTION

1. Every day, millions of Americans purchase and consume packaged foods such as Del Monte's canned tomato products ("Products"). Unlike fresh tomatoes, consumers cannot judge the quality of Del Monte's Products by look, touch, or smell. Instead, the consumer must rely on the label to assess whether the product meets the consumer's preferences.

2. Del Monte robs consumers of that choice by making unlawful statements on its Products.

3. Specifically, Del Monte's seal makes the label statements, "No Artificial Flavors Or Preservatives" or "No Preservatives."



4. However, the Products contain artificial flavors and/or preservatives in the form of calcium chloride and/or citric acid.

5. These practices mislead consumers and deprive them of the information they require to make informed purchasing decisions. For example, a parent who reads labels because she does not wish to feed her child artificial flavors or preservatives would be misled by Del Monte's labeling.

6. Del Monte knows that consumers often rely on the "front of the pack" labeling and do not look at the fine print on the back or the nutrition facts panel on the back.

7. To exploit this tendency, Del Monte states on the front of the Products, "No preservatives" or "No artificial flavors or preservatives" hoping that consumers will not see calcium chloride and/or citric acid listed as ingredients on the back.

8. And if consumers do see these chemical ingredients, Del Monte hopes consumers won't know that the chemicals are acting as preservatives.

JURISDICTION AND VENUE

9. D.C. Code § 11-921 establishes this Court's jurisdiction. This Complaint arises under the District of Columbia Consumer Protection Procedures Act, D.C. Code § 28-3901 *et seq.*, and the Court, therefore, has subject matter jurisdiction thereunder.

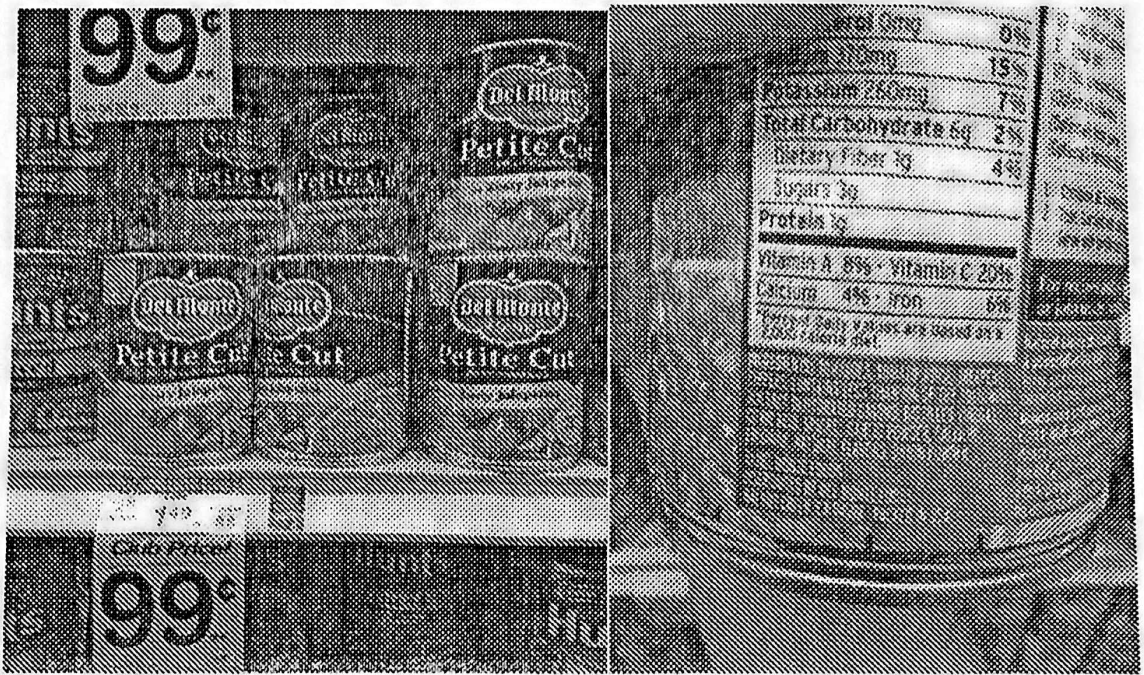
10. Venue is proper in the District of Columbia. The claims asserted in this Complaint arise, in part, within the District of Columbia. Plaintiff resides in Washington, D.C. and seeks to represent the interests of the General Public of the District of Columbia. These transactions occurred in retail stores located in Washington, D.C. Defendant transacts business and has caused injury in Washington, D.C.

11. As a result of the facts alleged in this Complaint, this Court has personal jurisdiction over Defendant. Defendant markets, distributes, and sells products to consumers in the District of Columbia. Defendant has transacted business in the District of Columbia; caused tortious injury in the District of Columbia via acts or omissions occurring therein; and derived substantial revenue from products sold in the District of Columbia.

PARTIES

12. Plaintiff NCL is a non-profit 501(c)(3) public interest, membership organization located in the District of Columbia at 1701 K Street, #1200, NW, Washington, District of Columbia 20006. In June 2016, and July 2017, NCL (through its agents) purchased cans of Del Monte's Products from Walmart, Giant Food and Safeway locations in the District of Columbia.

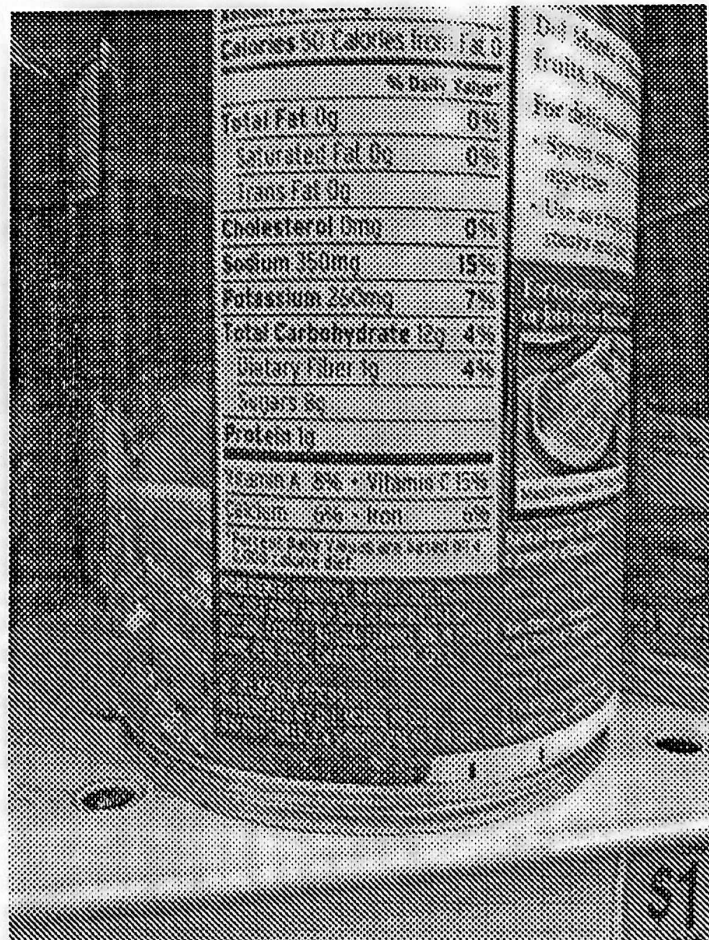
- a) NCL purchased a can of Zesty Jalapeno Petit Cut Tomatoes at the Safeway in Georgetown.



b) A can of Stewed Italian Recipe tomatoes from Safeway in Georgetown.



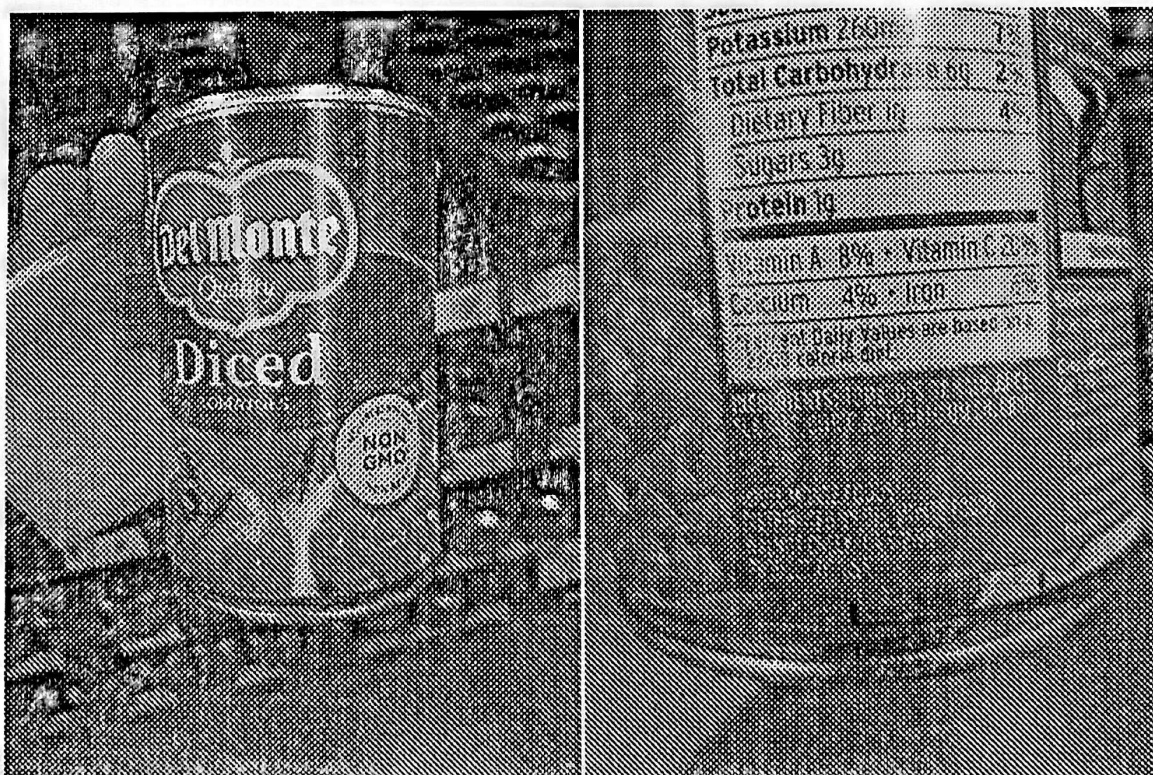
c) A can of Basic, Garlic & Oregano Diced Tomatoes at the Giant Food in Tenleytown:.

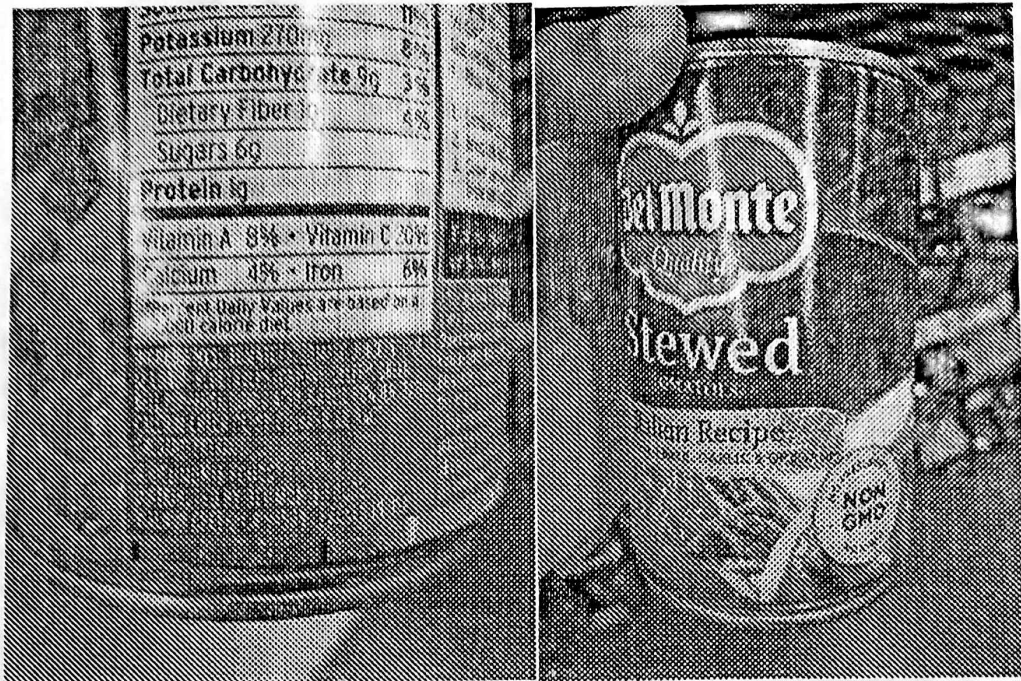


d) A can of Diced tomatoes at the Giant in Tenleytown:



- e) A can of Diced, a can of Stewed Italian Recipe and a can of Diced Basil, Garlic & Oregano tomatoes at Walmart:





13. Defendant Del Monte Foods, Inc. is a California corporation with its principal place of business at One Maritime Plaza, San Francisco, California 94111.

THE INTERESTS OF NCL & THE GENERAL PUBLIC

14. Plaintiff acts for the benefit of the General Public as a Private Attorney General pursuant to District of Columbia Code §28-3905(k)(1).

15. NCL is a non-profit 501(c)(3) public interest, membership organization, and has worked diligently to promote the public interest.

16. NCL encourages and promotes accurate labeling and marketing of consumer goods through advocacy to state and federal agencies, through educational outreach to the general public, and through litigation.

17. The NCL has worked diligently to promote accurate labeling of consumer goods. It has investigated, publicized, and/or litigated on mislabeling for whole grain bread, lemon juice, tomatoes, extra-virgin olive oil, sunflower seeds, formula, cereal, and adulterated honey.

18. Defendant sells its Products to District of Columbia residents online and through retail outlets with false representations about the ingredients in the Products.

19. Defendant's unlawful labeling practices have caused harm and adverse effects to the General Public.

FACTUAL ALLEGATIONS

20. In recent years, the Food and Drug Administration ("FDA") has become increasingly concerned that food manufacturers are disregarding food labeling regulations. To address this concern, the FDA elected to take steps to inform the food industry of its concerns and to place the industry on notice that food labeling compliance is an area of enforcement priority.

21. In October 2009, the FDA issued Guidance For Industry: Letter regarding Point Of Purchase Food Labeling ("2009 FOP Guidance"), to address its concerns about front of package labels like those at issue in the present case. The 2009 FOP Guidance advised the food industry, "FDA's research has found that with FOP labeling, people are less likely to check the Nutrition Facts label on the information panel of foods (usually, the back or side of the package).

It is thus essential that both the criteria and symbols used in front-of-package and shelf-labeling systems be nutritionally sound, well-designed to help consumers make informed and healthy food choices, and not be false or misleading.”¹

22. The 2009 FOP Guidance recommended that “manufacturers and distributors of food products that include FOP labeling ensure that the label statements are consistent with FDA law and regulations” and specifically advised the food industry that it would “proceed with enforcement action where such FOP labeling or labeling systems are used in a manner that is false or misleading.” *Id.*

23. Despite the issuance of the 2009 FOP Guidance, Defendant did not remove the unlawful and misleading food labeling claims from its Products and continued to make unlawful claims on the front of the cans.

24. On March 3, 2010, the FDA issued “Open Letter to Industry from [FDA Commissioner] Dr. Hamburg” (“Open Letter”). The Open Letter reiterated the FDA’s concern regarding false and misleading labeling by food manufacturers. In pertinent part, the letter stated:

The latest focus in this area, of course, is on information provided on the principal display panel of food packages and commonly referred to as “front-of-pack” labeling. The use of front-of-pack nutrition symbols and other claims has grown tremendously in recent years, and it is clear to me as a working mother that such information can be helpful to busy shoppers who are often pressed for time in making their food selections²

25. Notwithstanding the Open Letter, Defendant continues to utilize unlawful food

¹<https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm187208.htm> (last accessed on October 26, 2017).

² <http://wayback.archive-it.org/7993/20170406011336/https://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm202733.htm> (last accessed on October 26, 2017).

labeling claims despite the express guidance of the FDA.

26. Despite the fact that its Products contain artificial flavors and/or chemical preservatives, Defendant falsely represents on certain labels of its Products that they are free of artificial flavors or preservatives.

27. In fact, the Products contain either calcium chloride or citric acid and in some cases, both.

28. Citric acid and calcium chloride are chemical preservatives in the Products.

29. Defendant's representations are demonstrably false and misleading.

30. According to the standardized requirements for canned tomatoes (21 C.F.R. § 155.190) citric acid may only be used for acidification purposes while calcium chloride may only be used as a firming agent.

31. Given that these uses are both artificial and a form of preservation, the label statements "no preservatives" and "no artificial flavors or preservatives" are both false and misleading and render the Products misbranded.

32. Moreover, even if Defendant had not included false representations that its Products were free of artificial flavors or preservatives, these Products would still be misbranded as a matter of law because of Defendant's failure to disclose the presence of such ingredients.

33. Pursuant to 21 C.F.R. § 101.22, "[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 defines a chemical preservative as "any chemical that, when added to food, tends to prevent or retard deterioration thereof"

34. Defendant's Products are misbranded because they contain chemical preservatives, but fail to disclose that fact.

35. For example, because certain Products contain citric acid, which is used in those products as an acidulant, a type of chemical preservative designed to retard spoilage in canned vegetables, the Products' labels should have included a parenthetical such as (preservative) or (to retard spoilage) after the term citric acid in the ingredient statement.

36. Because Defendant unlawfully fails to indicate these ingredients are being used as chemical preservatives or firming agents, a reasonable consumer would have no reason to doubt the preservative-free claim.

37. The same applies to Defendant's use of calcium chloride.

38. In fact, Del Monte made a conscious decision not to disclose such information because it knew consumers would react negatively to its Products.

CLAIM FOR RELIEF

(Violation of the District of Columbia Consumer Protection Procedures Act)

39. Plaintiff brings this claim pursuant to the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901 *et seq.*

40. Plaintiff brings this claim on behalf of itself and of the General Public of the District of Columbia pursuant to District of Columbia Code § 28-3905(k)(1)(A), (C) and (D).

41. D.C. Code § 28-3904 makes it an unlawful trade practice "whether or not any consumer is in fact misled, deceived or damaged thereby," to, among other things:

- (a) represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have;
- (d) represent that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another;

- (e) misrepresent as to a material fact which has a tendency to mislead;
and
- (f) fail to state a material fact if such failure tends to mislead.

42. In labeling its goods, Defendant violated the above provisions of the CPPA by,

inter alia:

- (i) as to § 28-3904(a), misrepresenting that the Products do not contain preservatives when, in fact, they do;
- (ii) as to § 28-3904(d), misrepresenting that the Products are free of preservatives when, in fact, they are not;
- (iii) as to § 28-3904(e), misrepresenting that the Products do not contain preservatives when, in fact, they do; and
- (iv) as to §28-3904(f), failing to disclose the true purpose of including citric acid and/or calcium chloride.

43. Plaintiff, on behalf of itself only, hereby seeks restitution and treble damages or statutory damages in the amount of \$1,500 per violation, whichever is greater, pursuant to D.C. Code § 28-3905(k)(2). Plaintiff further seeks equitable and injunctive relief.

44. Plaintiff, on behalf of the General Public, seeks only injunctive and/or equitable relief. It does not seek statutory or other damages based on the purchases of individual consumers.

45. Plaintiff, on behalf of itself and the General Public of the District of Columbia, further seeks reasonable attorneys' fees and costs plus interest.

JURY DEMAND

Plaintiff and the General Public hereby demand a trial by jury of their claim.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant, and in favor of Plaintiff

and the General Public, and a grant of the following relief:

- a) declaring that Defendant's conduct is in violation of the D.C. Consumer Protection Procedures Act;
- b) enjoining Defendant's conduct found to be in violation of the D.C. Consumer Protection Procedures Act;
- c) granting Plaintiff statutory damages in the amount of \$1,500 per violation, whichever is greater;
- d) granting Plaintiff its costs of prosecuting this action, including attorneys' fees, experts' fees and costs together with interest; and
- e) granting such other relief (including equitable relief) as this Court may deem just and proper.

DATED: December 8, 2017.

/s/ Tracy D. Rezvani

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