UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHILIP KOENIG and ENRICO LUONGO, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BOULDER BRANDS, INC. and GFA BRANDS, INC.,

Defendants.

C.A. No. _____

ECF CASE

13 CV 1186

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs Philip Koenig and Enrico Luongo, by their attorneys, Meiselman, Packman, Nealon, Scialabba & Baker P.C., and Reese Richman LLP as and for their class action complaint, allege, with personal knowledge as to their own actions, and upon information and belief as to those of others, as follows:

NATURE OF THE CASE

1. Obesity is the number one cause of preventable death in the United States, and Americans are desperate for healthy options in the supermarket aisles. Against this backdrop, with consumers demanding dairy products that fit their diet and nutritional wants and needs, in 2008, Defendant Boulder Brands, Inc. (f/k/a Smart Balance Inc.) through its wholly-owned subsidiary and operating entity GFA Brands, Inc. ("GFA") (collectively "Defendants") began marketing "Fat Free" milks containing Omega-3s ("Fat Free" Enhanced Milks) in 2008.[1]

2. However, despite aggressively marketing, promoting and labeling its "Fat Free"

[1] Defendants' "Fat Free" Enhanced Milks include (1) "Fat Free" Milk and Omega-3s; (2) Lactose-Free "Fat Free" Milk and Omega-3s; and (3) HeartRight® "Fat Free" Milk and Omega-3s & Natural Plant Sterols.

Enhanced Milks as fat free, Boulder Brand's line of "Fat Free" Enhanced Milks actually contained 1 gram of fat per serving until September 2012. In reality, more than 9% of the calories per serving of what was labeled as "Fat Free" milk were actually "Calories from Fat."

3. This action seeks to redress this deceptive and otherwise improper business practice that Defendants employed against unsuspecting consumers. Specifically, in an effort to bolster their sales of their "Fat Free" Enhanced Milks in the rapidly expanding enhanced milk market, Defendants misleadingly, and purposefully, misrepresented on their milk cartons, on their website, and in their promotions that these enhanced milks were "fat free" when in fact they contained 1 gram of fat per serving and 8 grams of fat per container. This 1 gram of fat per serving was double the legal limit of 0.5 grams of fat per serving that a food is permitted to contain to carry a label of "fat free." *See* 21 C.F.R. § 101.62(b).

4. Through their various misstatements, Defendants deceptively marketed their "Fat Free" Enhanced Milks as fat free in violation of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* ("FDCA"), and 21 CFR Title 21: Food and Drugs with Defendants' "Fat Free" Enhanced Milks sold for a price premium based on Defendants' misrepresentations.

5. The International Dairy Foods Association ("IDFA"), of which Defendant GFA is a member, agrees with this straightforward interpretation of 21 C.F.R. § 101.62(b), stating in its Milk and Milk Products Labeling Manual that it "believes that the addition of fats, oils, or fat or oil containing ingredients to a product making a 'fat free' claim is acceptable as long as the product does not exceed 0.5 grams per reference amount."

6. Plaintiffs seek relief for violations of New York General Business Law § 349, breach of warranty, and unjust enrichment, individually and on behalf of a class of all New York

citizens who purchased Defendants' "Fat Free" Enhanced Milks during the class period. Plaintiffs do not allege a cause of action pursuant to the FDCA or allege anything that could be construed as seeking to impose different or greater obligations upon Defendants than the FDCA. Rather, Plaintiffs' claims mirror the federal requirements, alleging that Defendants failed to abide by the FDCA, and in doing so, misled Plaintiffs in violation of New York General Business Law § 349 and in breach of their warranties, resulting in Defendants' unjust enrichment.

7. Were it not for Defendants' unfair and deceptive practices, Plaintiffs and the Class would not have purchased Defendants' "Fat Free" Enhanced Milks or paid a price premium to purchase them.

8. Defendants have been on notice of these violations and in response to litigation filed against Defendants in 2011, on or about September 2012, Defendants changed the formulation of their "Fat Free" Enhanced Milks to eliminate the 1 gram of fat per serving.

PARTIES

9. Plaintiff Philip Koenig is a citizen of the State of New York. Beginning in 2009, Mr. Koenig regularly purchased Defendants' "Fat Free" Milk and Omega-3 during the Class Period in the state of New York, paying a price premium.

10. Plaintiff Enrico Luongo is a citizen of the State of New York. Beginning in 2009, Mr. Luongo regularly purchased Defendants' Lactose-Free "Fat Free" Milk and Omega-3s during the Class Period in the state of New York, paying a price premium.

11. Defendant Boulder Brands is a consumer food products company that markets and sells, among other products, "Fat Free" Enhanced Milks under the Smart Balance®

trademark. Boulder Brands marketed and sold its "Fat Free" Enhanced Milks throughout New York during the class period. Boulder Brands is a Delaware corporation with its corporate headquarters and principal place of business located at 115 West Century Road, Suite 260, Paramus, New Jersey, 07652.

12. Defendant GFA is the wholly-owned operating subsidiary of Boulder Brands. GFA marketed and sold Smart Balance® "Fat Free" Enhanced Milks throughout New York during the class period. GFA is a Delaware corporation with its corporate headquarters and principal place of business located at 115 West Century Road, Suite 260, Paramus, New Jersey, 07652.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this class action pursuant to 28 U.S.C. § 1332(d)(2). Plaintiffs' citizenships are diverse from the Defendants and the claims of the Class members in this class action are in excess of $5,000,000 in the aggregate, exclusive of interest and costs, and the total number of members of the proposed Class is greater than 100.

14. Venue is proper pursuant to 28 U.S.C. § 1391(a) because a substantial part of the events giving rise to the claims occurred in this District, including purchases of Defendants' "Fat Free" Milk and Omega-3s, and Defendants' Lactose-Free "Fat Free" Milk and Omega-3s.

FACTUAL ALLEGATIONS

BACKGROUND

15. In 2008, more than 68% of Americans were considered obese or overweight and currently an estimated 300,000 deaths each year in the United States are associated with obesity. Obesity and being overweight are associated with heart disease, certain types of cancer, type 2

diabetes, stroke, arthritis, respiratory problems, and psychological disorders, such as depression. Being overweight is a preventable condition for the most part, though, and reduction of fat intake is one important piece in the prevention puzzle. The caloric density of fat makes it a prime target for reduction by those attempting weight management.

16. Given the strong medical evidence linking fat intake and heart disease, including information about fat on food labels is prudent, assuming, of course, that the information provided to consumers is accurate, that average consumers understand the information provided, and that consumers are able to use the information to change their behavior in a way that allows them to reduce disease risk.

17. Reasonable consumers are concerned about their food's nutritional content, and product packaging is a significant source of their nutrition advice.

18. Studies show that consumers use product claims as a signal for quality; in a competitive environment, when one product says "low fat and low sodium" and a competing product does not, consumers use that information to infer that the latter product is nutritionally inferior.

19. Furthermore, "labels can strongly impact consumer behavior."[2]

20. Reasonable consumers such as Plaintiffs benefit from accurate nutritional information by using it to inform their food choices in the pursuit of better health.

21. Unfortunately, as stated by Louis Sullivan, Secretary of Health and Human Services, at a food policy conference in March 1990: "The grocery store has become a Tower of

[2] *Packaging's Role in Deterring Junk Food Consumption*, by Linda Casy, Packaging Digest. April 11, 2011.

Babel, and consumers need to be linguists, scientists and mind readers to understand the many labels they encounter."

REGULATORY FRAMEWORK

22. In 1990, Congress passed the Nutrition Labeling and Education Act, 21 U.S.C. 343 *et seq.* ("NLEA"), which amended the Federal Food Drug, and Cosmetic Act ("FDCA").

23. The FDA published the proposed set of rules implementing the NLEA approximately one year after its enactment, in late November 1991. The main section related to fat content disclosure that was added to the Code of Federal Regulations was §101.62, titled "Nutrient Content Claims for Fat, Fatty Acid, and Cholesterol Content of Foods."

24. "Fat free" is a nutrient content claim regulated by the FDCA and NLEA. *See* 21 U.S.C. § 343(r)(1); 21 C.F.R. § 101.62(b).

25. By labeling their enhanced milks as "fat free," Defendants violated 21 C.F.R. § 101.62(b) which states:

> The terms "fat free," "free of fat," "no fat," "zero fat," "without fat," "negligible source of fat," or "dietarily insignificant source of fat" or, in the case of milk products, "skim" may be used on the label or in labeling of foods, provided that:
>
> (i) The food contains less than 0.5 gram (g) of fat per reference amount customarily consumed and per labeled serving or, in the case of a meal product or main dish product, less than 0.5 g of fat per labeled serving; and
>
> (ii) The food contains no added ingredient that is a fat or is generally understood by consumers to contain fat unless the listing of the ingredient in the ingredient statement is followed by an asterisk that refers to the statement below the list of ingredients, which states "adds a trivial amount of fat," "adds a negligible amount of fat," or "adds a dietarily insignificant amount of fat;" and
>
> (iii) As required in § 101.13(e)(2), if the food meets these conditions

> without the benefit of special processing, alteration, formulation, or reformulation to lower fat content, it is labeled to disclose that fat is not usually present in the food (e.g., "broccoli, a fat free food").

26. The 1 gram of fat per serving contained in Defendants' "Fat Free" Enhanced Milks ran afoul of 21 C.F.R. § 101.62(b)(i) and made compliance with § 101.62(b)(ii) impossible, and as such Defendants' statements that their "Fat Free" Enhanced Milks were fat free violated 21 C.F.R. § 101.62(b).

27. 21 C.F.R. § 101.62(b) is clear: to be labeled "fat free" the food must contain less than 0.5 gram (g) of fat per reference amount customarily consumed and per labeled serving; **and** contain no added ingredient that is a fat or is generally understood by consumers to contain fat unless the listing of the ingredient in the ingredient statement is followed by an asterisk that refers to the statement below the list of ingredients, which states "adds a trivial amount of fat," "adds a negligible amount of fat," or "adds a dietarily insignificant amount of fat."

28. On at least two occasions, the FDA has sent warning letters to companies informing them that their products are "misbranded" within the meaning of Section 403 of the FDCA because the product failed to accurately convey the fat content in the food.

29. On March 25, 2010, the FDA sent a warning letter to Today's Temptations, Inc. concerning the company's "fat free" claim relating to its whole wheat bread, which contained canola oil. The warning letter stated:

> Under 21 CFR 101.62(b), to use the term "fat free," a food must contain less than 0.5 grams of fat per reference amount customarily consumed (RACC) and per labeled serving. It must not contain an added ingredient that is a fat or that is generally understood to contain fat unless the ingredient statement lists the ingredient followed by an asterisk that refers to a statement indicating that the

> amount of fat added is insignificant. And, must either be specially processed to remove fat from the food or is labeled to disclose that fat is not usually present in the food. Your Whole Wheat bread product, however, contains canola oil which is an added ingredient generally understood to contain fat. Therefore, to use the term "fat free" in association with this product, you must indicate that the amount of fat added by canola oil is insignificant by placing an appropriate statement on the product label, in accordance with 21 CFR 101.62(b)(ii).

30. On June 10, 2010, the FDA sent a similar warning letter to Nicola Pizza Incorporated concerning its claims relating to its "fat free dough and sauce" which contained cheese. The warning letter stated:

> Your Nic-o-boli® products claim "fat free dough and sauce." Under 21 CFR 101.62(b), to use the term "fat free," a food must contain less than 0.5 grams of fat per reference amount customarily consumed (RACC) and per labeled serving; must not contain an added ingredient that is a fat or that is generally understood to contain fat unless the ingredient statement lists the ingredient followed by an asterisk that refers to a statement indicating that the amount of fat added is insignificant; and must either be specially processed to remove fat from the food or is labeled to disclose that fat is not usually present in the food.

31. In both of these instances, the companies violated 21 C.F.R. 101.62(b) in a similar manner to Defendants' violations complained of herein.

32. The FDA has therefore expressly regulated what standard a product must meet in order to be called "fat free"; Defendants' "Fat Free" Enhanced Milks do not meet these standards; and Plaintiffs' claims for violations of New York General Business Law § 349 for breach of warranty, and for unjust enrichment are consistent with the requirements of the FDCA.

DEFENDANTS' VIOLATIONS OF LAW RELATING TO THEIR "FAT FREE" ENHANCED MILKS

33. Defendants marketed, advertised, promoted, distributed, and sold "Fat Free" Enhanced Milks under the Smart Balance® trademark.

34. In or about January 2010, following a successful test market launch, Boulder

Brands began nationally marketing, advertising, promoting, distributing, and selling its "Fat Free" Enhanced Milks, labeling them as fat free despite the milk containing 1 gram of fat per serving. Significantly, this deception was not the result of an oversight or a singular claim. Defendants posted this erroneous claim in no less than nine places on its "Fat Free" Enhanced Milks' cartons, making the words "Fat Free Milk" the claim made most notoriously and often on its packaging.

35. Since their launch in New York, Defendants' "Fat Free" Enhanced Milks have enjoyed enormous success.

36. Defendants' marketing of their enhanced milks as fat free was intended to mislead consumers into believing that the enhanced milks were in fact "fat free."

37. Defendants' "Fat Free" Enhanced Milks violated multiple sections of 21 C.F.R. § 101.62(b) until their formulation and labels were changed in or around September 2012.

38. First, the "fat free" enhanced milks contained 1 gram of fat per labeled serving, twice the legal limit permitted by 21 C.F.R. § 101.62(b)(i).

39. Second, Defendants' "Fat Free" Enhanced Milks contained an added ingredient that is a fat, in this case Omega-3 Oil Blend, but failed to follow that ingredient with an asterisk that refers to a statement below the list of ingredients which states "adds a trivial amount of fat," "adds a negligible amount of fat," or "adds a dietarily insignificant amount of fat" in violation of 21 C.F.R. § 101.62(b)(ii).

40. Moreover, it is commercially feasible to provide Omega-3s in a milk product without adding fat, as Defendants have proven with their formulation and labeling change in or around September 2012. The presence of Omega-3s in a product is not synonymous with the

presence of fat.

41. Defendant was unable to comply with 21 C.F.R. § 101.62(b)(ii) as during the class period, the Omega-3 Oil Blend added more than a trivial, negligible or dietarily insignificant amount of fat, instead adding twice the legal limit of fat a food can contain to still call itself "fat free."

42. The IDFA, of which GFA is a member, agrees with this straightforward interpretation of 21 C.F.R. § 101.62(b).

43. A review of the IDFA's 13 page membership list reveals a who's who of the dairy industry, with such companies as ConAgra Foods Inc., The Dannon Company, Inc., Dean Foods Company, Farmland Dairies, LLC, Friendly Ice Cream Corporation, HP Hood LLC, Hershey Creamery Company, International Dairy Queen, Inc., The J.M. Smucker Company, Kraft Foods N.A., Inc., The Kroger Co., Mars Chocolate North America, Nestle USA, Inc., Stonyfield Farm, and Yoplait-USA, listed as members.

44. The IDFA published its 454-page Milk and Milk Products Labeling Manual "to facilitate the truthful and accurate labeling of milk and milk products." The relevant excerpt from the manual relating to total fat content claims appears below.

Total Fat Content Claims

Fat claims may be made on products to indicate that the product is "fat free," "lowfat," "reduced fat" or "100 percent fat free" (21 CFR §101.62 *Nutrient content claims for fat, fatty acids and cholesterol content of foods*). Other levels of "percent fat free" may be specified.

"FAT FREE"

The term "fat free" (or "free of fat," "no fat," "zero fat," "without fat," "nonfat," "trivial source of fat," "negligible source of fat" or "dietarily insignificant source of fat") may be used if the food contains less than 0.5 grams of fat per reference amount.

The agency believes that the addition of fats, oils, or fat or oil containing ingredients to a product making a "fat free" claim is acceptable as long as the product does not exceed 0.5 grams per reference amount. If fats, oils or fat- or oil-containing ingredients are added to products making a "fat free" claim, a disclaimer is required to appear below the list of ingredients indicating that the ingredient(s) contributes a negligible amount of fat to the product. An asterisk indicating the fat, oil or fat- or oil-containing ingredients in the ingredient statement must refer the consumer to one of the following statements: "adds a trivial amount of fat," "adds a negligible amount of saturated fat" or "adds a dietarily insignificant amount of fat." For example, milk added to "fat free sour cream" must indicate that milk contributes a trivial amount of fat to the product.

Products that meet the criteria of "fat free" without the benefit of special processing (i.e., are inherently free of fat), must designate this on the label by an appropriate qualifying statement (e.g., "____, a Fat Free Food," "_____, Naturally Fat Free"). For example, milk will not qualify for a "fat free" claim without further processing, therefore, a fat free milk could be labeled "Fat Free Milk," without referring to all milk products.

45. As shown, the IDFA "believes that the addition of fats, oils, or fat or oil containing ingredients to a product making a 'fat free' claim is acceptable as long as the product does not exceed 0.5 grams per reference amount" confirming Smart Balance's violation of 21 C.F.R. § 101.62(b). Here, however, the addition of oils exceeds the 0.5 grams per reference amount, making Defendants' use of the term "fat free" misleading and "unacceptable." Defendants' violations of the law were not mere technicalities.

46. The FDCA deems the labeling of a food "mislabeling if it fails to reveal facts that are: (1) Material in light of other representations made or suggested by statement, word, design, device or any combination thereof; or (2) Material with respect to consequences which may result from use of the article under . . . conditions of use as are customary and usual." 21 C.F.R. § 1.21.

47. Furthermore, the FDCA prohibits the distribution and sale of misbranded foods and provides that a "food shall be deemed to be misbranded . . . [if] its labeling is false or misleading in any particular . . . ." 21 U.S.C. §§ 331, 343(a).

48. Defendant misleadingly marketed its "Fat Free" Enhanced Milks on its website as fat free.

49. The below images were prominently displayed on Smart Balance's website, which together show Defendants' "Fat Free" Enhanced Milks clearly promoted as fat free.

View

Smart Balance® Fat Free Milk and Omega-3s

The fat free milk that tastes as rich and creamy as 2% and contains EPA/DHA Omega-3s and 25% more calcium and protein than whole milk.

View

Smart Balance® HeartRight® Fat Free Milk

Try 2 servings a day of our fat free milk with the rich, creamy taste of 2% and naturally sourced ingredients proven to help lower cholesterol as part of a diet low in saturated fat and cholesterol.

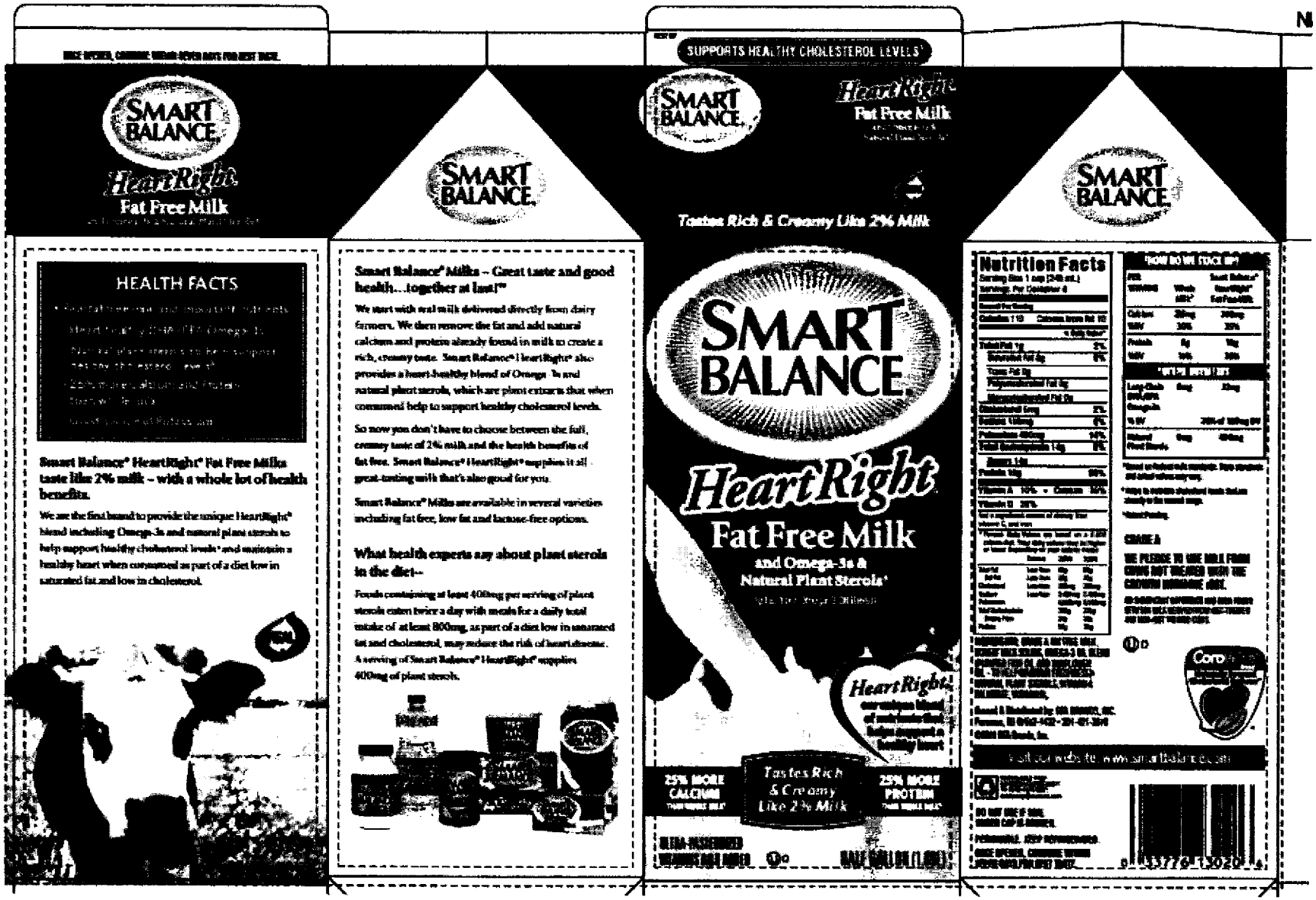
View

Smart Balance® Lactose-Free Fat Free Milk and Omega-3s

Lactose-free, fat free milk that tastes as rich and creamy as 2%, with 20% more calcium and protein than whole milk and the benefits of Omega-3s.

50. Below are copies of the full product packaging for each of Defendants' "Fat Free" Enhanced Milks up to in or around September 2012.


SMART BALANCE
Lactose-Free
Fat Free Milk
and
Omega-3s
Nutrition Facts
best life



51. The term fat free appeared twice on the front of each of Defendants' "Fat Free" Enhanced Milks.

52. On the back of the "Fat Free" Milk and Omega-3s cartons, the term fat free was used an additional four times.

53. The back of each carton of Defendants' "Fat Free" Enhanced Milks stated under a section entitled "**HEALTH FACTS**" that the consumer was purchasing either "Real fat free milk" or "Real lactose-free fat free milk."

54. The back of the carton for the Fat Free Milk and Omega-3s stated:

> **Smart Balance Fat Free Milks taste like 2% milk – with a whole lot of health benefits.** We start with real milk delivered directly from the dairy farmers. We then remove the fat and add natural calcium and protein already found in milk to create a rich, creamy taste. The result? A super nutritious fat free milk that has the delicious flavor of 2% milk – high levels of calcium and protein – and heart healthy Omega-3s. So now you don't have to choose between the full, creamy taste of 2% milk and the health benefits of fat free. With Smart Balance Fat Free Milk and Omega-3s you get it all – great taste and it's good for you.

55. The back of the carton for the Lactose-Free Fat Free Milk and Omega-3s stated:

> **Smart Balance® Lactose-Free Fat Free Milks taste rich and creamy – without the lactose and the saturated fat.** Now you don't have to choose between the full, creamy taste of 2% milk and the health benefits of fat free. With Smart Balance® Lactose-Free Fat Free Milk and Omega-3s you get it all – a great taste and it's good for you.

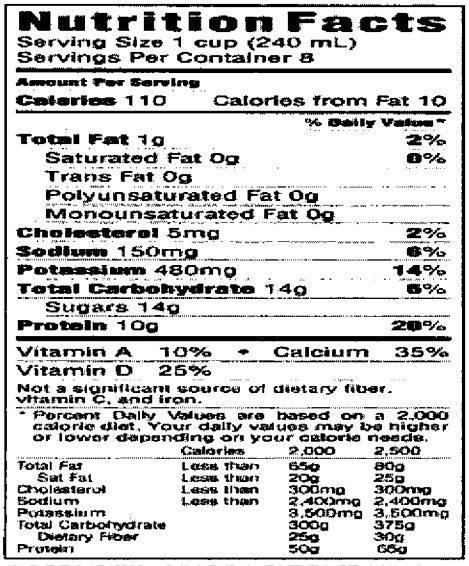
56. The back of the carton for the HeartRight Fat Free Milk and Omega-3s, Vitamin E and Natural Plant Sterols stated "**Smart Balance® HeartRight® Fat Free Milks taste like 2% milk – with a whole lot of health benefits,**" while the side of the carton stated "So now you don't have to choose between the full, creamy taste of 2% milk and the health benefits of fat free."

57. In total, the term "fat free" was used 9 times on each of Smart Balance's "Fat

Free" Enhanced Milks cartons.

58. These statements were false, and intentionally confusing and misleading.

59. The nutritional facts showed that each of Defendants' "Fat Free" Enhanced Milks contained 1 gram of fat, completely belying Defendants' "Fat Free" claim.



Nutrition Facts
Serving Size 1 cup (240 mL)
Servings Per Container 8

Amount Per Serving
Calories 110 Calories from Fat 10

	% Daily Value*
Total Fat 1g	2%
Saturated Fat 0g	0%
Trans Fat 0g	
Polyunsaturated Fat 0g	
Monounsaturated Fat 0g	
Cholesterol 5mg	2%
Sodium 150mg	6%
Potassium 480mg	14%
Total Carbohydrate 14g	5%
Sugars 14g	
Protein 10g	20%

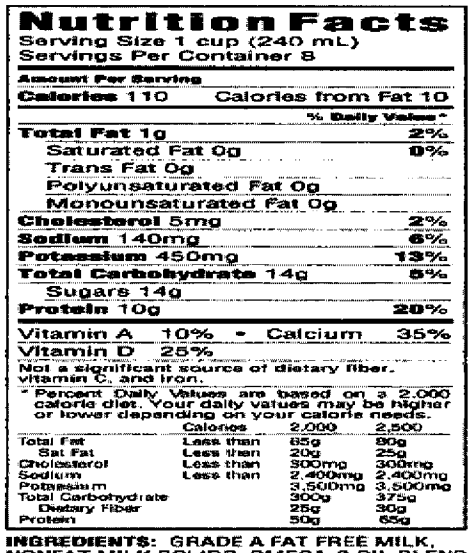
Vitamin A 10% • Calcium 35%
Vitamin D 25%

Not a significant source of dietary fiber, vitamin C, and iron.

* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.

	Calories	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Potassium		3,500mg	3,500mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g
Protein		50g	65g

INGREDIENTS: GRADE A FAT FREE MILK, NONFAT MILK SOLIDS, OMEGA-3 OIL BLEND (PURIFIED FISH OIL AND SUNFLOWER OIL – TO HELP MAINTAIN FRESHNESS)[3], VITAMIN A PALMITATE, VITAMIN D_3.



Nutrition Facts
Serving Size 1 cup (240 mL)
Servings Per Container 8

Amount Per Serving
Calories 110 Calories from Fat 10

	% Daily Value*
Total Fat 1g	2%
Saturated Fat 0g	0%
Trans Fat 0g	
Polyunsaturated Fat 0g	
Monounsaturated Fat 0g	
Cholesterol 5mg	2%
Sodium 140mg	6%
Potassium 450mg	13%
Total Carbohydrate 14g	5%
Sugars 14g	
Protein 10g	20%

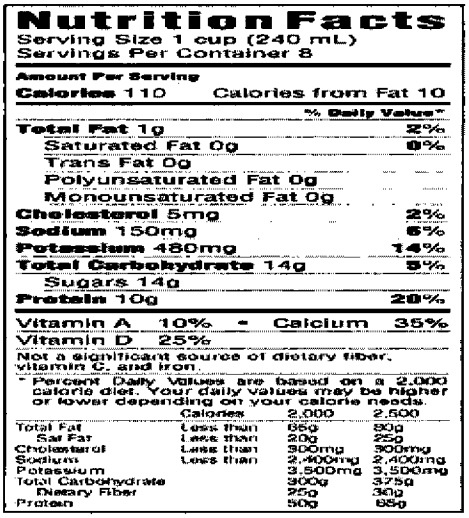
Vitamin A 10% • Calcium 35%
Vitamin D 25%

Not a significant source of dietary fiber, vitamin C, and iron.

* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.

	Calories	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Potassium		3,500mg	3,500mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g
Protein		50g	65g

INGREDIENTS: GRADE A FAT FREE MILK, NONFAT MILK SOLIDS, OMEGA-3 OIL BLEND (SUNFLOWER OIL TO HELP MAINTAIN FRESHNESS AND PURIFIED FISH OIL)[3†], LACTASE ENZYME†, VITAMIN A PALMITATE, VITAMIN D_3.
†INGREDIENT NOT IN REGULAR MILK.



Nutrition Facts
Serving Size 1 cup (240 mL)
Servings Per Container 8

Amount Per Serving
Calories 110 Calories from Fat 10

	% Daily Value*
Total Fat 1g	2%
Saturated Fat 0g	0%
Trans Fat 0g	
Polyunsaturated Fat 0g	
Monounsaturated Fat 0g	
Cholesterol 5mg	2%
Sodium 150mg	6%
Potassium 480mg	14%
Total Carbohydrate 14g	5%
Sugars 14g	
Protein 10g	20%

Vitamin A 10% • Calcium 35%
Vitamin D 25%

Not a significant source of dietary fiber, vitamin C, and iron.

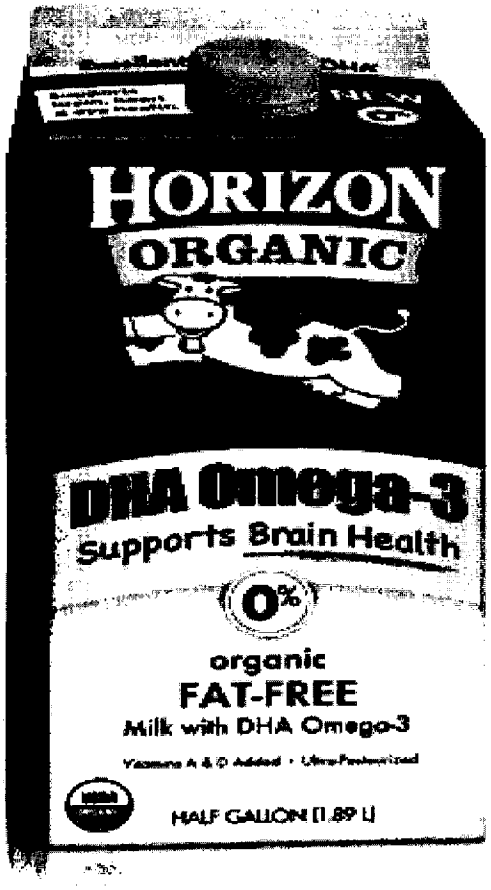
* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.

	Calories	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Potassium		3,500mg	3,500mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g
Protein		50g	65g

INGREDIENTS: GRADE A FAT FREE MILK, NONFAT MILK SOLIDS, OMEGA-3 OIL BLEND (PURIFIED FISH OIL AND SUNFLOWER OIL - TO HELP MAINTAIN FRESHNESS)[4] NATURAL PLANT STEROLS, VITAMIN A PALMITATE, VITAMIN D_3.

60. Compounding the confusing and misleading labeling of Defendants' "Fat Free" Enhanced Milks as fat free (when they in fact contained 1 gram of fat per serving) was the fact that at least one of Defendants' competitors marketed and sold fat free milk with Omega-3 that was indeed fat free and appropriately labeled its addition of oil with the appropriate asterisk and warning "adds a trivial amount of fat," in compliance with 21 C.F.R. § 101.62(b).

61. Horizon markets and sells "Fat-Free Milk plus DHA Omega-3" with the below image prominently displayed on Horizon's website.



62. However, unlike Smart Balance's Fat Free Enhanced Milks, the nutritional facts

for Horizon's Fat Free Milk with DHA Omega-3 reflect that the milk is indeed "fat free" as depicted below.

Nutritional Information

Serving Size 1 cup (240mL)
Servings Per Container 8

Amount Per Serving

Calories 100 Calories from Fat 0

	% Daily Value *
Total Fat 0g	0%
Saturated Fat 0g	0%
Trans Fat 0g	
Polyunsaturated Fat 0g	
Monounsaturated Fat 0g	
Cholesterol 5mg	2%
Sodium 150mg	6%
Potassium 460mg	15%
Total Carbohydrate 14g	5%
Dietary Fiber 0g	0%
Sugars 12g	
Protein 9g	

Vitamin A	10%	Vitamin C 10%
Calcium	30%	Iron 0%
Vitamin D	25%	Phosphorus 25%
Magnesium	6%	

Calories		2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	2,400mg	300mg
Sodium	Less than	300mg	2,400mg
Total Carbohydrates	Less than	300g	375g
Dietary Fiber		25g	25g

Calories per gram:
Fat 9
Carbohydrates 4
Protein 4

*** Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.**

Ingredients

Organic Grade A Nonfat Milk, Organic Grade A Buttermilk*, DHA Algal Oil+, Ascorbic Acid (Vitamin C)*, Tocopherols (Vitamin E)*, Vitamin A Palmitate, Vitamin D3.
**Ingredient not in regular fat free milk*
+Adds a trivial amount of fat

63. The Horizon Fat Free Milk with DHA Omega-3 complies with 21 C.F.R. §

101.62(b)(i) because it contains less than 0.5 grams of fat per serving.

64. The Horizon Fat Free Milk with DHA Omega-3 also complies with 21 C.F.R. § 101.62(b)(ii) by appropriately placing an asterisk after the ingredient "DHA Algal Oil" as the oil is an added ingredient that is a fat or is generally understood by consumers to contain fat, and then after the list of ingredients stating that this ingredient "Adds a trivial amount of fat."

65. Defendants' "Fat Free" Enhanced Milks, by comparison, failed to comply with 21 C.F.R. § 101.62(b)(i) as they contained more than 0.5 grams of fat per serving, and were unable to comply with 21 C.F.R. § 101.62(b)(ii), because they contained more than a "trivial amount of fat" and therefore were misbranded by using the term "fat free."

66. The market is saturated with products which use the term "fat free" that add an ingredient that is a fat or is generally understood by consumers to contain fat, yet actually comply with the labeling requirements of 21 C.F.R. § 101.62, and unlike Defendants' "Fat Free" Enhanced Milks comply with state law. Below are just a few examples of such products.

Fat Free Half & Half

◂ BACK TO CREAM AND HALF & HALF

Nutrition Facts

Serving Size 2 tbsp. (30mL)

Amount per Serving

Calories 20	Calories from Fat 0
	% Daily Values
Total Fat 0g	0%
Saturated Fat 0g	0%
Trans Fat 0g	
Cholesterol 0mg	0%
Sodium 30mg	1%
Total Carbohydrate 3g	1%
Fiber 0g	0%
Sugar 2g	
Protein <1g	2%

Vitamin A 2% Vitamin C 0%
Calcium 4% Iron 0%

AVAILABLE SIZES:

CONTAINS: MILK

INGREDIENTS:
FAT FREE MILK, CORN SYRUP, CREAM*, ARTIFICAL COLOR**, DISODIUM PHOSPHATE, CARRAGEENAN, GUAR GUM* AND VITAMIN A PALMITATE. *ADDS A TRIVIAL AMOUNT OF FAT **NOT IN REGULAR HALF & HALF

Just one taste of Hood® Fat Free Half & Half and you'll know that you've found a delicious fat free half & half without the guilt. With fewer calories and none of the fat of regular half & half, a creamy cup of coffee no longer needs to be a guilty pleasure! Hood Cream: Bringing Taste to Life.

The Original Irish Cream Fat Free

Every comforting drop of Irish Cream. Every familiar flavor note that lingers in your mouth and stays on your mind. Every bit of the aroma that carries you away from the day and into the moment. Everything you love about The Original Irish Cream Coffee Creamer, now without the fat. We'd say enjoy, but we know you already have.

THE ORIGINAL IRISH CREAM FAT FREE COFFEE CREAMER
Ultra-Pasteurized, Natural & Artificial Flavors

Nutrition Facts

Serving Size 1 Tbsp (15mL)

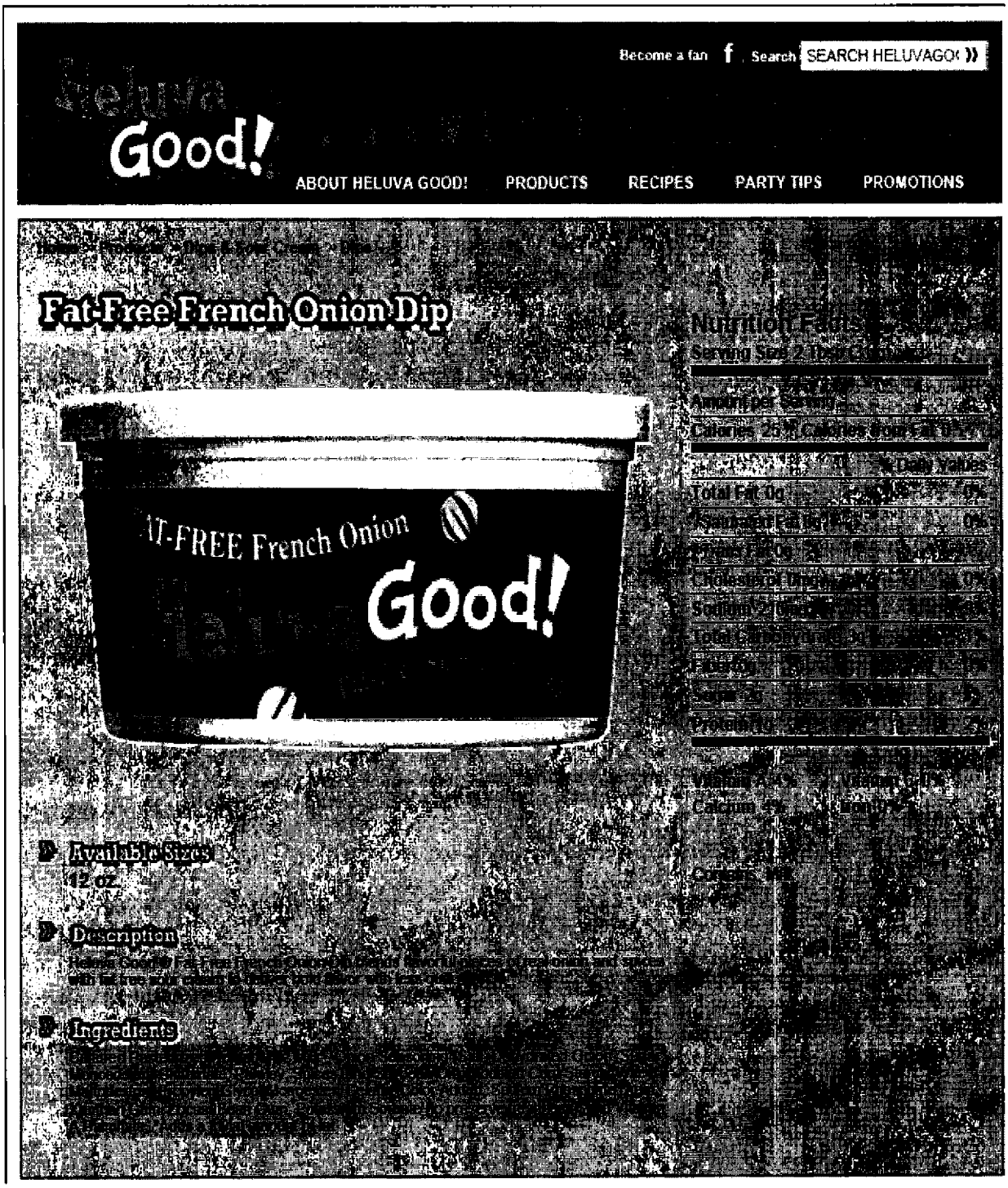
Amount per Serving	
Calories 25	Calories from Fat 0
	% Daily Values*
Total Fat 0g	1%
Saturated Fat 0g	1%
Trans Fat 0g	
Cholesterol 0mg	0%
Sodium 20mg	1%
Total Carbohydrate 5g	2%
Dietary Fiber 0g	0%
Sugars 5g	
Protein 0g	1%

Vitamin A 0% Vitamin C 0%
Calcium 0% Iron 0%

* Percent Daily Values are based on a 2,000 calorie diet. Your Daily values may be higher or lower depending on your calorie needs.

INGREDIENTS: [redacted] trivial amount of fat.

CONTAINS: Milk
SERVINGS PER CONTAINER: Pint 32, Quart 6
AVAILABLE SIZES: Pint (16 FL OZ), Quart (32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PRODUCTS
RECIPES
PARTY TIPS
PROMOTIONS
Fat-Free French Onion Dip
Good!
Available Sizes
12 oz
Description
Ingredients

Main Products

32 oz Fat Free Half & Half

Nutrition Facts

Serving Size 2 Tbsp

Amount per Serving	
Calories 20	Calories from Fat 0
	% Daily Value
Total Fat 0g	1%
Saturated Fat 0g	0%
Trans Fat 0g	
Cholesterol 0mg	0%
Sodium 30mg	1 %
Total Carbohydrate 3g	1 %
Fiber 0g	0%
Sugar 2g	
Protein <1g	2%

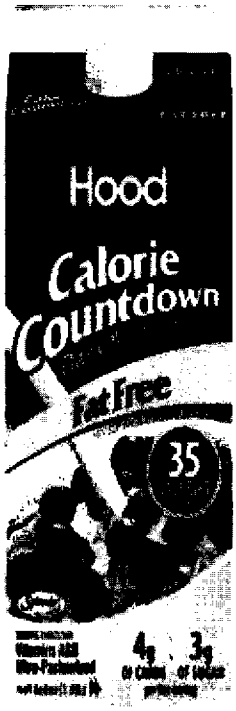
Vitamin A 2% Vitamin C 0%
Calcium 4% Iron 0%
Vitamin D 0%

Contains: Milk

Ingredients: Fat Free Milk, Corn Syrup, Cream**, Artificial Color*, Disodium Phosphate, Carrageenan, Guar Gum*, and Vitamin A Palmitate. *Not in regular Half & Half ** Adds a trivial amount of fat

Calorie Countdown Fat Free Dairy Beverage

BACK TO PRODUCTS



Hood® Calorie Countdown® Fat Free Dairy Beverage provides the wholesome, creamy nutrition of milk without all the sugar, calories and carbohydrates. In fact, each 8-ounce serving contains 70% fewer calories, 75% less sugar and 75% fewer carbohydrates than whole milk. Enjoy it with a meal, snack or in your favorite recipes! The Calorie Countdown line also includes 2% Reduced Fat white and 2% Reduced Fat Chocolate varieties. Always Good. Always Hood.

Nutrition Facts

Serving Size 1 cup (240mL)

Amount per Serving

Calories 35	Calories from Fat 0
	% Daily Values
Total Fat 0g	1%
Saturated Fat 0g	1%
Trans Fat 0g	
Cholesterol 5mg	2%
Sodium 180mg	8%
Total Carbohydrate 4g	1%
Fiber <1g	4%
Sugar 3g	
Protein 6g	11%

Vitamin A 10% Vitamin C 0%
Calcium 30% Iron 0%
Vitamin D 30%

CONTAINS: MILK

INGREDIENTS:
WATER, ULTRAFILTERED FAT FREE MILK, CREAM**, CELLULOSE GEL, CELLULOSE GUM, CALCIUM CARBONATE, SALT, DISODIUM PHOSPHATE, ARTIFICIAL COLOR, NATURAL FLAVOR, SUCRALOSE, ACESULFAME POTASSIUM, VITAMIN A PALMITATE, AND VITAMIN D3. **ADDS A TRIVIAL AMOUNT OF FAT

Darigold Fat Free Sour Cream

- 58% Fewer Calories than Regular
- Smooth, Creamy Texture
- Live and Active Probiotic Cultures
- 9 Essential Nutrients
- Excellent Source of Calcium and Vitamin D

Available in 16oz

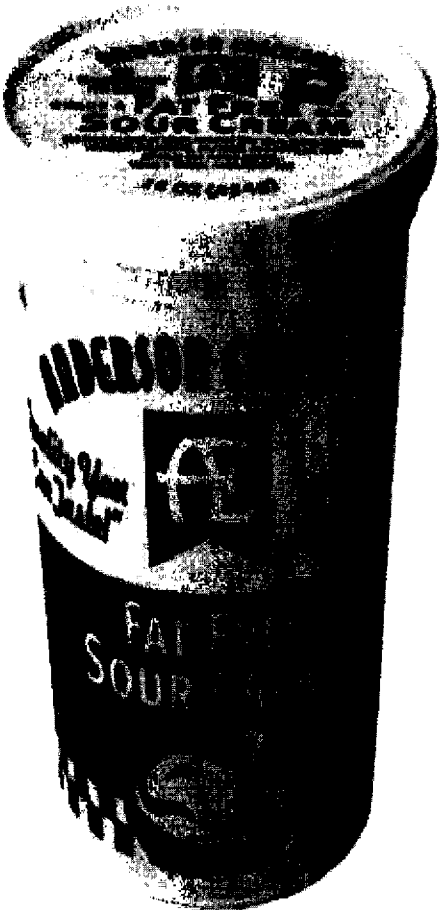
Ingredients Statement

Cultured Pasteurized Nonfat Milk, Nonfat Dry Milk, Cultured Milk*, Whey Protein Concentrate, Modified Food Starch, Maltodextin, Artificial Color*, Potassium Sorbate (as preservative), Sodium Phosphate, Carrageenan, Sodium Stearoyl Lactylate, Carob Bean Gum, Vitamin A Palmitate**, *adds a trivial amount of fat, **not found in regular sour cream.

Serving Size	2 tbsp (32g)		Sodium	50mg	2%
Servings Per Container	About 15		Potassium		
Amounts Per Serving			Total Carbohydrate	4g	1%
Calories	25		Dietary Fiber	0g	0%
Calories from Fat	0		Sugars	3g	
% Daily Values*			Protein	2g	
Total Fat	0g	0%	Vitamin A	4%	
Saturated Fat	0g	0%	Vitamin C	0%	
Trans Fat			Vitamin D	0%	
Cholesterol	5mg	1%	Calcium	6%	
			Iron	0%	

* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.

Calories:		2,000	2,500
Total Fat	Less Than	65g	80g
Sat Fat	Less Than	20g	25g
Cholesterol	Less Than	300mg	300mg
Sodium	Less Than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g



Nutrition Facts

Serving Size: 2 tbsp (30g)

Servings Per Container: About 80

Amount Per Serving	
Calories	20
Fat Calories	0
Total Fat	0g
Sat Fat	0g
Trans Fat	0g
Cholesterol	0mg
Sodium	55mg
Total Carb	3g
Fiber	0g
Sugars	2g
Protein	2g
Vitamin A	
Vitamin C	
Calcium	
Iron	

* Percent Daily Values are based on a 2,000 calories diet.

Ingredients:

Cultured Lowfat Milk (adds a trivial amount of fat), Nonfat Dry Milk, Corn Starch, Vitamin A Palmitate, Enzymes, Acidophilus and Bifidum Cultures added.

No Fat Cottage Cheese

Our old-fashioned, Vermont-style cottage cheese is high in protein and a good source of calcium. When it comes to "The Healthy Snack", enjoy the great taste of Cabot's cottage cheese.

Product Options

1 LB 1.5 LBS

Product FAQ

Store Finder

Product Type: No Fat Cottage Cheese

Options: Any

Zip Code:

City:

State:

Distance: Less than 10 Miles

If you can't find what you're looking for, ask your local store manager to begin carrying Cabot products.

Nutrition Facts

Serving Size 1/2 cup (114 grams)
Servings Per Container Varies

Amount Per Serving	
Calories 70	Calories from Fat 0
	% Daily Value
Total Fat 0g	0%
Saturated Fat 0g	0%
Polyunsaturated Fat g	
Trans Fat 0g	
Cholesterol 5mg	2%
Sodium 410mg	17%
Total Carbohydrate 5g	2%
Dietary Fiber 0g	
Sugars 4g	
Protein 13g	
Vitamin A 6%	Vitamin C 0%
Vitamin D 25%	Calcium 10%
Iron 0%	

Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.

Ingredients

Pasteurized skim milk**, nonfat dry milk**, salt, Grade A whey, grade A buttons, titanium dioxide (color), guar gum, carrageenan, citric acid, locust bean gum, lactic acid, phosphoric acid, natural flavoring, cultured grade A skim milk**, Vitamin D3, Vitamin A palmitate, enzymes. **adds a trivial amount of fat *adds a trivial amount of fat.

Naturally Yours Fat Free Sour Cream

1 lb

Email Tweet 0 Recommend

59 Medium match for you?
Create a profile to find out

Add to List

Ingredients:

Grade A Pasteurized Cultured Skim Milk, Milk (Adds a Negligible Amount of Fat), Modified Food Starch, Nonfat Milk Solids, Whey Protein Concentrate, Propylene Glycol Monoester, Artificial Color, Kosher Gelatin, Sodium Phosphate, Natural Flavor, Agar, Xanthan Gum, Sodium Citrate, Locust Bean Gum, Potassium Sorbate (To Help Protect Flavor), Vitamin A Palmitate.

Stuff you want

- Low Calorie
- Low Cholesterol
- Low Fat
- Low Saturated Fat
- Low Sodium

Stuff you don't want

- Color Additives
- Preservatives

Similar Products

Daisy Sour Cream
3 lbs

66 Add to list

Personalize this Nutrition Label

Nutrition Facts

Serving Size 2 tbsp
Servings Per Container 15

Amount Per Serving	
Calories 20	Calories from Fat 0
	% Daily Value*
Total Fat 0 g	0%
Saturated Fat 0 g	0%
Trans Fat —	
Cholesterol 0 mg	0%
Sodium 50 mg	2%
Potassium —	—
Total Carbohydrate 3 g	1%
Dietary Fiber 0 g	0%
Sugars 2 g	
Protein 1 g	
Vitamin A	4%
Vitamin C	0%
Calcium	4%
Iron	0%
Copper	—
Folic Acid	—
Iodine	—
Magnesium	—
Niacin	—
Phosphorus	—
Riboflavin	—
Thiamin	—
Vitamin B12	—
Vitamin B6	—
Vitamin D	—
Vitamin E	—
Zinc	—

* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.

67. Based on Plaintiffs' investigation, Smart Balance's "Fat Free" Enhanced Milks were the only product on the market that contained more than 0.5 of fat per serving and yet used the term "fat free."

68. A reasonable consumer, including Plaintiffs, would therefore have been misled by Defendants' labeling of its "Fat Free" Enhanced Milks as "fat free."

69. When purchasing Defendants' "Fat Free" Enhanced Milk, Plaintiffs were seeking fat free milk for themselves and their household.

70. Like other members of the Class, Plaintiffs purchased Defendants' "Fat Free" Enhanced Milks believing them to have the qualities they sought (free of fat), based on the unlawful and deceptive misrepresentations of Defendants.

71. Instead of receiving products that have the advantages inherent in being "fat free," Plaintiffs and members of the Class received a product containing 1 gram of fat per serving.

72. Were it not for Defendants' unfair and deceptive practices, Plaintiffs and the Class would not have purchased Defendants' "Fat Free" Enhanced Milks, resulting in Defendants' unjust enrichment. Plaintiff also paid a price premium for the "Fat Free" Enhanced Milks based on Defendants' misrepresentations.

73. Defendants' "Fat Free" Enhanced Milks were worth less than what Plaintiffs and members of the Class paid for them and Plaintiffs and members of the Class lost monies as a result of Defendants' deception in that they did not receive what they paid for.

74. Defendants' conduct alleged herein constitutes an unconscionable and deceptive practice in violation of New York General Business Law § 349 and a breach of warranty. Defendants were also unjustly enriched through their conduct.

CLASS ALLEGATIONS

75. Plaintiffs bring this action on their own behalf and additionally, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of a class of all persons who purchased Smart Balance's Fat Free Enhanced Milks in New York between 2008 and September 2012 (the "Class"). Excluded from the Class are Defendants; any parent, subsidiary, or affiliate of Defendants; any entity in which Defendants have or had a controlling interest, or which Defendants otherwise control or controlled; and any officer, director, employee, legal representative, predecessor, successor, or assignee of Defendants.

76. This action is brought as a class action for the following reasons:

a. The Class consists of thousands of persons and is therefore so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

b. There are questions of law or fact common to the Class that predominate over any questions affecting only individual members, including:

i. whether Defendants' labeling, advertising, marketing, promotion, and sale of their "Fat Free" Enhanced Milks was false, fraudulent, deceptive, or misleading;

ii. whether Defendants' actions constituted violations of the New York General Business Law § 349;

iii. whether Defendants breached warranties made to the consuming public about their "Fat Free" Enhanced Milks;

iv. whether Defendants were unjustly enriched by their conduct;

v. whether members of the Class have sustained damages and, if so, the proper measure thereof;

c. The claims asserted by Plaintiffs are typical of the claims of the members of the Class as they purchased Defendants' "Fat Free" Enhanced Milk based on Defendants' material misstatements described herein and sustained damages as a result of Defendants' conduct;

d. Plaintiffs will fairly and adequately protect the interests of the Class. Plaintiffs have no interests antagonistic to those of other class members. Plaintiffs are committed to the vigorous prosecution of this action and have retained attorneys experienced in class and complex litigation. Plaintiffs' counsel understand the duties imposed upon lead counsel in consumer fraud class actions in federal court, and have proven adept at all phases of such litigation, from discovery and motion practice to trial and appeal or settlement;

e. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, for at least the following reasons:

i. Absent a class action, Class members as a practical matter will be unable to obtain redress;

ii. It would be a substantial hardship for individual members of the Class if they were forced to prosecute individual actions;

iii. When the liability of Defendants has been adjudicated, the Court will be able to determine the claims of all members of the Class;

iv. A class action will permit an orderly and expeditious administration of Class claims, foster economies of time, effort, and expense, and ensure uniformity of decisions; and

v. The lawsuit presents no difficulties that would impede its

management by the Court as a class action;

FIRST CAUSE OF ACTION
(Violation of New York General Business Law § 349)

77. Plaintiffs repeat and re-allege the allegations above as if fully set forth herein.

78. Defendants' misrepresentations and false, deceptive, and misleading statements made to consumers with respect to their "Fat Free" Enhanced Milks, as described above, constituted affirmative misrepresentations in connection with the manufacture, marketing, advertising, promotion, distribution, and sale of Smart Balance's "Fat Free" Enhanced Milks, in violation of New York General Business Law § 349.

79. Defendants' false, deceptive, and misleading statements would have been material to any reasonable consumer's decision to purchase Defendants' "Fat Free" Enhanced Milks.

80. Plaintiffs and the other members of the Class purchased Defendants' "Fat Free" Enhanced Milks for personal use and suffered injury as a direct and proximate result of Defendants' actions.

81. Plaintiffs and the Class have suffered a loss of money or property as a result of Defendants' actions. Plaintiff and the Class have been damaged in the amount of the purchase prices for Defendants' "Fat Free" Enhanced Milks, or, in the alternative, have been damaged as a result of the price premium they paid for Defendants' "Fat Free" Enhanced Milks. Were it not for Defendants' unfair and deceptive practices, Plaintiffs and the Class would not have purchased Defendants' "Fat Free" Enhanced Milks, resulting in Defendants' unjust enrichment. Plaintiff also paid a price premium for the "Fat Free" Enhanced Milks based on Defendants' misrepresentations.

82. By reason of the foregoing, Defendants have willfully and knowingly violated N.Y. Gen. Bus. Law § 349. Defendants are liable to Plaintiffs and the other members of the Class for the damages that they have suffered as a result of Defendants' actions, such damages to be determined at trial but not less than $50.00 for each purchase of Defendants' "Fat Free" Enhanced Milks, such damages to be trebled, plus attorneys' fees.

SECOND CAUSE OF ACTION
(Breach of Warranty)

83. Plaintiffs repeat and reallege the allegations contained above as if fully set forth herein.

84. Defendants expressly warranted that their "Fat Free" Enhanced Milks were in fact "fat free."

85. Defendants breached the express warranty on the label of, and/or in the advertising for, their "Fat Free" Enhanced Milks by providing milks containing 1 gram of fat per serving.

86. Defendants made such express warranty knowing the purpose for which its "Fat Free" Enhanced Milks were to be used, and advocating its use for such purpose.

87. Defendants made such express warranty as part of its marketing campaign; in advertisements in print, on the Internet, and in other media; and on the label of the product.

88. Defendants' "Fat Free" Enhanced Milks did not conform to the express warranty made by Defendants and did not conform to Defendants' promises, descriptions, or affirmations of fact. Defendants' "Fat Free" Enhanced Milks therefore were not adequately packaged, labeled, sold, promoted, or fit for the ordinary purposes for which they were used.

89. Plaintiffs and the other members of the Class purchased Defendants' "Fat Free" Enhanced Milks based upon and in reliance upon such false warranty.

90. Plaintiffs and other members of the Class were injured as a direct and proximate result of Defendants' misrepresentations because: (i) they would not have purchased Defendants' "Fat Free" Enhanced Milk on the same terms if the true facts concerning their fat content had been known; (ii) they paid a price premium due to the misrepresentations on the label that Defendants' "Fat Free" Enhanced Milks were fat free; and (iii) Defendants' "Fat Free" Enhanced Milks were not as warranted.

91. As a consequence of the foregoing, Defendants are liable to Plaintiffs and the other members of the Class for the damages incurred as a result of Defendants' actions, including but not necessarily limited to the purchase price of Defendants' "Fat Free" Enhanced Milks that they purchased, the amount of such damages to be determined at trial, or in the alternative the price premium paid by Plaintiffs and the members of the Class, the amount of such loss to be determined at trial.

THIRD CAUSE OF ACTION
(Unjust Enrichment)

92. Plaintiffs repeat and reallege the allegations contained above as if fully set forth herein.

93. As a result of Defendants' deceptive, fraudulent, and misleading labeling, advertising, marketing, and sales of Defendants' "Fat Free" Enhanced Milks, Defendants were enriched, at the expense of Plaintiffs, and all others similarly situated, through the payment of the purchase price for Defendants' "Fat Free" Enhanced Milks.

94. Under the circumstances, it would be against equity and good conscience to permit Defendants to retain the ill-gotten benefits that they received from Plaintiffs and the members of the Class in light of the fact that Defendants' "Fat Free" Enhanced Milks purchased by Plaintiffs and the members of the Class were not what Defendants purported them to be.

95. Thus, it would be unjust or inequitable for Defendants to retain the benefit without restitution to Plaintiffs and the members of the Class for the monies paid to Defendants for such Products.

PRAYER FOR RELIEF

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

A. Determining that this action is properly brought as a class action and certifying Plaintiffs as representatives of the Class and their counsel as Class counsel;

B. Awarding against Defendants the damages that Plaintiffs and the other members of the Class suffered as a result of Defendants' actions, the amount of such damages to be determined at trial, plus punitive and treble damages in an amount to be determined at trial;

C. Awarding prejudgment interest on all amounts awarded;

D. Awarding Plaintiffs and the Class their reasonable attorneys' fees and expenses and costs of suit;

E. Awarding Plaintiffs and the other members of the Class such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury on all claims in this action.

Dated: February 21, 2013
White Plains, New York

MEISELMAN, PACKMAN, NEALON SCIALABBA & BAKER P.C.

By: _____

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