

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Paul Cohen, individually and on behalf of all
others similarly situated,

Plaintiff,

v.

XOCHITL (SO SHEE) INC., a Texas
corporation, and XOCHITL GOURMET
FOODS LLC, a Texas limited liability
company,

Defendants.

Case No. _____

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT AND DEMAND FOR TRIAL BY JURY

Plaintiff Paul Cohen by and through his counsel, brings this Class Action Complaint against defendants Xochitl (So Shee) Inc. and Xochitl Gourmet Foods LLC (collectively, “Xochitl” or “Defendants”), on behalf of himself and all others similarly situated, and allege, upon personal knowledge as to his own actions and his counsel’s investigations, and upon information and belief as to all other matters, as follows:

NATURE OF THE ACTION

1. This is a consumer protection and false advertising class action. Defendants market, advertise and distribute various corn chips, which they prominently advertise as “All Natural” and as containing “No GMO.” The term “GMO” refers to genetically modified organisms. The corn chips at issue are Xochitl Totopos de Maiz Salted Tortilla Chips, Unsalted Tortilla Chips, Garlic Tortilla Chips, Cajun Style Tortilla Chips, Picositos Con Limon Tortilla Chips and Holiday Inspired Tortilla Chips (collectively, the “Products”). These Products are *not*

all natural or free of GMOs.

2. The Products contain GMOs and are made from GM crops. A genetically modified (“GM”) crop, such as the corn from which the Products are derived, is a crop whose genetic material has been altered by humans using genetic engineering techniques. The World Health Organization defines GM organisms (which include crops) as “organisms in which the genetic material (DNA) has been altered in a way that does not occur naturally.” GM crops are not natural, but man-made. There are wide-ranging controversies related to GM crops, including health risks from ingesting foods derived from GM crops and negative environmental effects associated with growing GM crops. The use and labeling of GM foods is the subject of a variety of laws, regulations, and protocols worldwide.

3. On October 6, 2014, Consumer Reports, a widely respected research and publication organization, published the results of tests it conducted on Xochitl Totopos de Maiz original Salted Tortilla Chips.¹ Consumer Reports tested six samples of Defendants’ corn chips for genetically-modified DNA using the industry standard polymerase chain reaction (PCR) test.² All six samples of the Xochitl chips tested by Consumer Reports had considerable amounts of GM corn, indicating that GM corn was used to manufacture the corn chips. Indeed, Consumer Reports found an average of more than 75% GM corn content from the six different packages tested.³ The six packages of Xochitl chips tested by Consumer Reports had purchase dates that ranged from April 20, 2014 to July 8, 2014, which indicates that Defendants were

¹ See <http://www.consumerreports.org/cro/2014/10/where-gmos-hide-in-your-food/index.htm> (last visited Oct. 9, 2014).

² See http://www.greenerchoices.org/pdf/CR_FSASC_FTC_Letter_10062014.pdf (last visited Oct. 9, 2014).

³ *Id.*

manufacturing Products containing GE corn and carrying the “All Natural” and “No GMO” claims over an extended period of time.⁴

4. Consumer Reports also notified Defendants that its testing indicated that Xochitl’s corn chips had on average more than 75% GE corn content.⁵ In response, Defendants claimed they sourced their corn from suppliers of non-GMO corn.⁶ This response is not plausible, however. The list of ingredients for the Products identifies the first ingredient as “stone-ground corn,” and *not* “organic corn.” The U.S.D.A. estimates that the percentage of GM corn grown in the U.S. in 2013 was 90%. Given the amount of comingling of corn in grain silos, the corn from which Defendants’ Products is derived clearly contains GM corn, as was confirmed by Consumer Reports’ tests.

5. Although the Products are made from GM corn, Defendants knowingly, recklessly, and/or negligently market the Products as being “All Natural” and as containing “No GMO.” Defendants label the Products as “All Natural” and as containing “No GMO” because consumers perceive all natural, GMO-free foods as healthier, better, and more wholesome. The market for all natural foods has grown rapidly in the past few years, a trend Defendants seeks to take advantage of through false and misleading advertising.

6. Defendants are well aware that their “All Natural” and “No GMO” claims appeal to consumers. The landing page of Defendants’ Internet website boldly claims that its products have been “All Natural Since 1921.”⁷ Defendants’ website also provides that it sells “All Natural Chips, Salsa and Dips.” Additionally, Defendants include the following statement on the

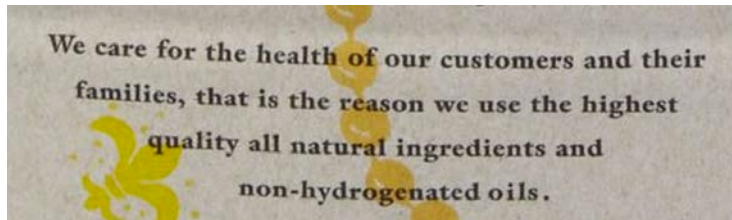
⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *See* <http://www.salsaxochitl.com/> (last visited Oct. 9, 2014).

back of Products' packaging:



These representations are false and misleading because the Products contain GM corn and are, thus, are not “All Natural.”

7. Any consumer who purchased the Products – irrespective of their motivation for purchasing the Products – suffered harm in the form of a higher price that Defendants were able to command for the Products based on the false representations that they are “All Natural” and contain “No GMO.”

8. Plaintiff Paul Cohen brings claims against Defendants individually and on behalf of a class of all other similarly situated purchasers of the Products throughout the United States and in Florida for: (1) breach of express warranty under the common law of each state; (2) unjust enrichment under the common law of each state; (3) declaratory and injunctive relief under the common law of each state; (4) violation of Florida’s Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, et seq.; and (5) breach of express warranty under Florida Law.

9. Plaintiff seeks an order requiring Defendants to, among other things: (1) cease the unlawful marketing; (2) conduct a corrective advertising campaign; and (3) pay damages and restitution to Plaintiff and Class members.

PARTIES

10. Plaintiff Paul Cohen is a consumer residing in Boynton Beach, Florida.

11. Defendant Xochitl (So Shee) Inc. is a Texas corporation with its principal place of business located in Irving, Texas. Defendant manufactures, markets, and distributes the Product

to consumers in Florida and throughout the United States.

12. Defendant Xochitl Gourmet Foods LLC is a Texas limited liability corporation with its principal place of business located in Dallas, Texas. Defendant manufactures, markets, and distributes the Product to consumers in Florida and throughout the United States.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action under the Class Action Fairness Act, 28 U.S.C. § 1332(d). The aggregated claims of the individual class members exceed \$5,000,000, exclusive of interest and costs, and this is a class action in which more than two-thirds of the proposed plaintiff class, on the one hand, and Defendants, on the other, are citizens of different states.

14. This Court has jurisdiction over Defendants because they have sufficient minimum contacts in Florida or otherwise intentionally avail itself of the markets within Florida, through the promotion, sale, marketing, and distribution of the Product sold in Florida, to render the exercise of jurisdiction by this Court proper and necessary.

15. Venue is proper in this District pursuant to 28 U.S.C. § 1391(a)(1) because, Defendants regularly conduct business throughout this District, and a substantial part of the events and/or omissions giving rise to this action occurred in this District.

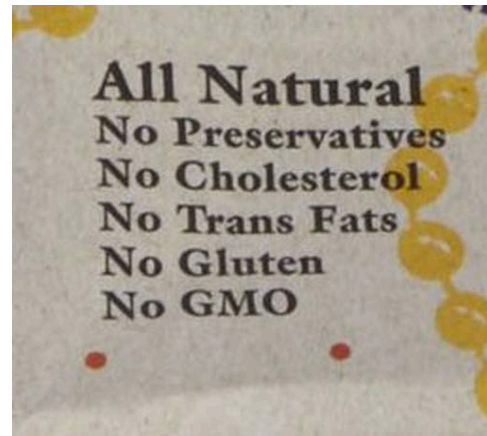
FACTUAL ALLEGATIONS

A. Defendants Deceptively Label The Products As “All Natural” And As Containing “No GMO”

16. Throughout the Class Period, Defendants have prominently and conspicuously labeled and advertised the Products as “All Natural” and as containing “No GMO.” The labeling and marketing on the Products communicates a straight-forward, material message, which is that

the “All Natural” Products are 100% natural *and* that they contain no GMOs. However, unbeknownst to Plaintiff, the Products actually contain GMOs and are derived from GM corn.

17. The core deceptive, false, and misleading representations that the Products are “All Natural” and contain “No GMO[s]” are conspicuously and prominently placed on the Product’s packaging for every person to see as soon as they pick up the Products to read it. By way of illustration, the “All Natural” and “No GMO” representations on the Products’ packaging appears like this:



18. By conspicuously and prominently placing the “All Natural” and “No GMO” representations on the Product’s packaging, Defendants have ensured that all consumers purchasing the Products would be exposed to its “All Natural” and “No GMO” claims.

B. Food Derived From Genetically Modified Organisms Is Not All Natural

19. Genetically modified crops do not occur in nature, and as such are not “all natural.” On the contrary, genetically modified crops are crops that are genetically manipulated from their natural state. For example, Monsanto, one of the largest producers of genetically modified crop seed, defines “Genetic modification (genetic engineering) – The technique of removing, modifying or adding genes to a living organism via genetic engineering or other more

traditional methods. Also referred to as gene splicing, recombinant DNA (rDNA) technology or genetic engineering.”⁸ Monsanto also defines Genetically Modified Organisms (“GMO”). GMO is “[p]lants or animals that have had their genetic makeup altered to exhibit traits that are not naturally theirs. In general, genes are taken (copied) from one organism that shows a desired trait and transferred into the genetic code of another organism.”⁹

20. The World Health Organization’s (“WHO”) definition of GMO is consistent with how Monsanto defines them: “Genetically modified (GM) foods are foods derived from organisms whose genetic material (DNA) has been modified in a way that does not occur naturally, e.g. through the introduction of a gene from a different organism.”¹⁰ WHO also cautions that “All GM foods should be assessed before being allowed on the market.”¹¹

21. The United States Environmental Protection Agency (“EPA”) for Prevention, Pesticides, And Toxic Substances, has distinguished between conventional breeding of plants “through natural methods, such as cross-pollination” and genetic engineering. “Conventional breeding is a method in which genes for pesticidal traits are introduced into a plant through natural methods, such as cross-pollination.” “Genetically engineered plant-incorporated protectants are created through a process that utilizes several different modern scientific techniques to introduce a specific pesticide-producing gene into a plant's DNA genetic material.”¹²

⁸ See <http://www.monsanto.com/newsviews/Pages/glossary.aspx> (last visited Oct. 9, 2014).

⁹ See *id.*

¹⁰ See http://www.who.int/topics/food_genetically_modified/en/ (last visited Oct. 9, 2014).

¹¹ *Id.*

¹² See EPA Questions & Answers, Biotechnology: Final Plant-Pesticide/Plant Incorporated Protectants (PIPs) Rules, dated July 19, 2001 at <http://www.epa.gov/scipoly/biotech/pubs/qanda.pdf> (last visited Oct. 9, 2014).

22. Romer Labs, a company that provides diagnostic services to the agricultural industry, including tests to detect and determine the existence of GM crops, defines GM crops as “[a]griculturally important plants [that] are often genetically modified by the insertion of DNA material from outside the organism into the plant’s DNA sequence, allowing the plant to express novel traits that normally would not appear in nature, such as herbicide or insect resistance. Seed harvested from GMO plants will also contain these modifications.”¹³

23. As indicated by the various industry, government and health protection agency organizations cited above, GM crops and GMOs are not “all natural.” In addition, products made from GM crops and GMOs are not “all natural.”

24. The U.S.D.A. estimates that the percentage of GM corn grown in the U.S. was 25% in 2000, 73% in 2007, and 90% in 2013.¹⁴

25. The market for natural products is large and ever growing and consumers are willing to pay a premium for products they believe to be natural, healthy and/or organic. Natural Foods Merchandiser magazine’s 2010 Market Overview reported significant growth for the natural and organic products industry. Gleaning more than \$81 billion dollars in revenue in 2010 alone, the industry grew seven percent (7%) from 2009, revealing that consumers’ desire for natural products is huge and continues to grow.

26. Defendants’ “All Natural” and “No GMO” representations are deceptive, false, misleading, and unfair to consumers who are injured in fact by purchasing Products that Defendants claim are “All Natural” and free of GMOs when the Products actually are made from

¹³ See <http://www.romerlabs.com/en/knowledge/gmo/> (last visited Oct. 9, 2014).

¹⁴ See Economic Research Service, USDA, Genetically engineered varieties of corn, upland cotton, and soybeans, by State and for the United States, 2000-14 (alltables.xls), available at <http://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us.aspx#.VBcWqC5dWyR> (last visited Oct. 9, 2014).

GM corn, and, thus, are not all natural or GMO-free.

C. Defendants' False and Misleading Advertising is Likely to Deceive Reasonable Consumers

27. Defendants' false and misleading representations and omissions are likely to deceive Plaintiff and other reasonable consumers.

28. Reasonable consumers must and do rely on food label representations and information in making purchase decisions.

29. Defendants' statement that the Products are "All Natural," is material to a reasonable consumer's purchase decision because reasonable consumers, such as Plaintiff and members of the National and Florida Classes, care whether food products contain unnatural, synthetic, artificial, and/or GM ingredients, especially when a product claims to be "All Natural" and claims to have "No GMO."

30. Reasonable consumers attach importance to an "All Natural" and "No GMO" claim when making a purchasing decision.

31. According to a June 2014 consumer survey conducted by Consumer Reports, more than 8 out of 10 consumers believe that packaged foods carrying the "natural" label should come from food that contains ingredients grown without pesticides (86%), do not include artificial ingredients (87%), and do not contain GM organisms (GMOs) (85%).¹⁵

32. Defendants market and advertise the Products as "All Natural" and as containing "No GMO" to increase sales derived from the Product. Defendants are well-aware that claims of food being "All Natural" and containing "No GMO" are material to reasonable consumers.

¹⁵ See <http://finance.yahoo.com/news/consumer-reports-survey-majority-americans-1000003330.html> (last visited Oct. 9, 2014).

33. Upon information and belief, in making the false, misleading, and deceptive representations and omissions, Defendants knew and intended that consumers would pay a price premium for the Products over comparable products that are not labeled “All Natural” and “No GMO,” furthering Defendants’ private interest of increasing sales for the Products, and decreasing the sales of products by Defendants’ competitors that do not claim to be “All Natural” or GMO-free.

D. Plaintiff’s Reliance and Damages

34. Plaintiff Cohen purchased the Class Product in Palm Beach County, Florida within the applicable statute of limitations.

35. The packaging of the Product that Mr. Cohen purchased contained the representations that the Products are “All Natural” and that it contains “No GMO.”

36. Mr. Cohen believed Defendants’ representation that the Products are “All Natural” and that it contains “No GMO.” He relied on the “All Natural” and “No GMO” representations in making his purchase decisions for himself and his family. Mr. Cohen would not have purchased the Products had he known it was not, in fact, “All Natural” and GMO-free because it was derived from GM crops.

37. Mr. Cohen paid for an “All Natural” Product that contained “No GMO,” but he received a Product that was not “All Natural” and that contains GMOs. Specifically, he received a Product made from corn that was genetically manipulated in a laboratory to exhibit traits corn does not possess in nature and highly processed.

38. The Product Mr. Cohen received was worth less than the product for which he paid. Mr. Cohen was injured in fact and lost money as a result of Defendants’ improper conduct.

CLASS ACTION ALLEGATIONS

39. Plaintiff seeks relief in his individual capacity and as a representative of all others who are similarly situated. Pursuant to Fed. R. Civ. P. 23(a) and (b)(2) and/or (b)(3), Plaintiff seeks certification of a Nationwide class and a Florida class. The Nationwide class is initially defined as follows:

All persons residing in the United States who, from October 9, 2010 until the date notice is disseminated to the Class (the "Class Period"), purchased any of the following Xochitl Totopos de Maiz chips in the United States: (1) Salted Tortilla Chips, (2) Unsalted Tortilla Chips, (3) Garlic Tortilla Chips, (4) Cajun Style Tortilla Chips, (5) Picositos Con Limon Tortilla Chips and (6) Holiday Inspired Tortilla Chips (collectively the "Class Product") (the "Nationwide Class").

40. The Florida Class is initially defined as follows:

All persons residing in Florida who, from October 9, 2010 until the date notice is disseminated to the Class (the "Class Period"), purchased any of the following Xochitl Totopos de Maiz chips in the Florida: (1) Salted Tortilla Chips, (2) Unsalted Tortilla Chips, (3) Garlic Tortilla Chips, (4) Cajun Style Tortilla Chips, (5) Picositos Con Limon Tortilla Chips and (6) Holiday Inspired Tortilla Chips (collectively the "Class Product") (the "Florida Class").

41. Excluded from each of the above Classes are Defendants, including any entity in which Defendants have a controlling interest, is a parent or subsidiary, or which is controlled by Defendants, as well as the officers, directors, affiliates, legal representatives, predecessors, successors, and assigns of Defendants. Also excluded are the judges and court personnel in this case and any members of their immediate families, as well as any person who purchased the Product for the purpose of resale.

42. Plaintiff reserves the right to amend or modify the Class definitions with greater specificity or division into subclasses after having had an opportunity to conduct discovery.

43. Numerosity. Fed. R. Civ. P. 23(a)(1). Each Class is so numerous that joinder of all members is unfeasible. While the precise number of Class members has not been determined at this time, Plaintiff is informed and believe that millions of consumers have purchased Products during the class period.

44. Commonality. Fed. R. Civ. P. 23(a)(2) and (b)(3). There are questions of law and fact common to each Class, which predominate over any questions affecting only individual members of each respective Class. These common questions of law and fact include, without limitation:

- a. Whether Defendants falsely and/or misleadingly misrepresented the Product as being “All Natural”;
- b. Whether Defendants falsely and/or misleadingly misrepresented the Product as containing “No GMO”;
- c. Whether Defendants’ misrepresentations are likely to deceive reasonable consumers;
- d. Whether Defendants breached express warranties
- e. Whether Defendants’ were unjustly enriched;
- f. Whether Defendants violated Florida’s Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, *et seq.*; and
- g. The nature of the relief, including equitable relief, to which Plaintiff and the Class members are entitled.

45. Typicality. Fed. R. Civ. P. 23(a)(3). Plaintiff’s claims are typical of the claims of the Class he seeks to represent. Plaintiff and all Class members were exposed to uniform practices and sustained injuries arising out of and caused by Defendants’ unlawful conduct.

46. Adequacy of Representation. Fed. R. Civ. P. 23(a)(4). Plaintiff will fairly and adequately represent and protect the interests of the members of the Classes. Further, Plaintiff's counsel is competent and experienced in litigating class actions.

47. Superiority of Class Action. Fed. R. Civ. P. 23(b)(3). A class action is superior to other available methods for the fair and efficient adjudication of this action since joinder of all Class members is impracticable and will waste judicial resources. Moreover, the adjudication of this controversy through a class action will avoid the possibility of inconsistent and potentially conflicting outcomes. Finally, there will be no difficulty in managing this action as a class action.

48. Injunctive and Declaratory Relief. Fed. R. Civ. P. 23(b)(2). Defendants' misrepresentations are uniform as to all members of each Class. Defendants have acted or refused to act on grounds that apply generally to each Class, so that final injunctive relief or declaratory relief is appropriate with respect to each Class as a whole.

FIRST CAUSE OF ACTION
Breach of Express Warranty Under The Common Law Of Each State
(On Behalf of Plaintiff and the Nationwide Class)

49. Plaintiff incorporates the substantive allegations contained in Paragraphs 1 through 48 as if fully set forth herein.

50. Defendants sold the Products in its regular course of business. Plaintiff and Class members purchased the Products.

51. Defendants made promises and representations in an express warranty provided to all consumers, which became the basis of the bargain between Plaintiff, Class members, and Defendants. Defendants gave these express warranties to Plaintiff and Class members in written form on the packaging of the Products.

52. Defendants' written affirmations of fact, promises, and/or descriptions as alleged are each a written warranty.

53. Defendants breached the warranty because the representation on the Products' packaging that the Products are "All Natural" and that they contain "No GMO" are false and the Products did not contain the properties represented by Defendant.

54. The Products are not "All Natural" because they contain GMOs and are derived from GM corn. Likewise, the "No GMO" claim is false because the Products contain GMOs and GM corn. The false information provided on the label was undiscoverable to Plaintiff and the Class members at the time of purchase of the Products.

55. All conditions precedent to seeking liability under this claim for breach of express warranty have been performed by or on behalf of Plaintiff and others in terms of paying for the goods at issue. Defendants had actual and/or constructive notice of the false labeling information and to date has taken no action to remedy their breaches of express warranty.

56. Defendants were on notice of their breaches of express warranty by virtue of the October 2014 Consumer Reports article referenced herein, as well as the notification Defendants received directly from Consumer Reports. Further, Defendants previously knew or should have known of the falsity of their "All Natural" and "No GMO" claims because 90% of all corn in the United States is genetically modified and Defendants did not use organic corn for the Products. Defendants have refused to remedy such breaches.

57. Defendant's breaches of warranty have caused Plaintiff and Class members to suffer injuries, paying for falsely labeled products, and entering into transactions they would not have entered into for the consideration paid. As a direct and proximate result of Defendants' breaches of warranty, Plaintiff and Class members have suffered damages and continue to suffer

damages, including economic damages in terms of the difference between the value of the Products as promised and the value of the Products as delivered.

58. As a result of the breach of these warranties, Plaintiff and Class members are entitled to legal and equitable relief including damages, costs, attorneys' fees, rescission, and/or other relief as deemed appropriate, for an amount to compensate them for not receiving the benefit of their bargain.

SECOND CAUSE OF ACTION
Unjust Enrichment
(On Behalf of Plaintiff and the Nationwide and Florida Classes)

59. Plaintiff incorporates the substantive allegations contained in Paragraphs 1 through 48 as if fully set forth herein.

60. Plaintiff and the Class have conferred substantial benefits on Defendants by purchasing the Products, and Defendants have knowingly and willingly accepted and enjoyed these benefits.

61. Defendants either knew or should have known that the payments rendered by Plaintiff and the Class were given and received with the expectation that the Products would be as represented and warranted. For Defendants to retain the benefit of the payments under these circumstances is inequitable.

62. Defendants, through deliberate misrepresentations or omissions in connection with the advertising, marketing, promotion, and sale of the Products reaped benefits, which resulted in Defendants' wrongful receipt of profits.

63. Equity demands disgorgement of Defendants' ill-gotten gains. Defendants will be unjustly enriched unless Defendants are ordered to disgorge those profits for the benefit of Plaintiff and the Class.

64. As a direct and proximate result of Defendants' wrongful conduct and unjust enrichment, Plaintiff and the Class are entitled to restitution from and institution of a constructive trust disgorging all profits, benefits, and other compensation obtained by Defendants.

THIRD CAUSE OF ACTION
Declaratory and Injunctive Relief
(On Behalf of Plaintiff and the Nationwide and Florida Classes)

65. Plaintiff incorporates the substantive allegations contained in Paragraphs 1 through 48 as if fully set forth herein.

66. Defendants acted or refused to act on grounds that apply generally to the Class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the Class as a whole within the meaning of Fed. R. Civ. P. 23.

67. Plaintiff, on behalf of himself and putative Class members, seek a Court declaration of the following:

- a. The Products developed, manufactured, marketed, tested and sold by Defendants on or after *October 9, 2010* contained false and misleading claims that it was "All Natural" and contained "No GMO";
- b. Defendants knew or should have known of the false information they provided to Plaintiff and Class members and thereby breached their warranties to Plaintiff and the Class; and
- c. Defendants shall recall all falsely labeled Products from distributors and retailers, or re-label those Products with accurate information.
- d. Defendants shall institute a corrective advertising campaign to educate consumers about the fact that the Products were falsely labeled and to inform

them about that the Products are not “All Natural” and that they contain GMOs.

FOURTH CAUSE OF ACTION

**Violations of Florida’s Deceptive & Unfair Trade Practices Act, Fla. Stat. § 501.201, *et seq.*
(On Behalf of Plaintiff and the Florida Class)**

68. Plaintiff incorporates the substantive allegations contained in Paragraphs 1 through 48 as if fully set forth herein.

69. This cause of action is brought pursuant to the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, *et seq.* (the “FDUTPA”).

70. The express purpose of FDUTPA is to “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).

71. Fla. Stat. § 501.204(1) declares as unlawful “unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.”

72. The sale of the Product at issue was a “consumer transaction” within the scope of FDUTPA.

73. Plaintiff is a “consumer” as defined by Fla. Stat. § 501.203.

74. Defendants’ Products are goods within the meaning of FDUTPA and Defendants are engaged in trade or commerce within the meaning of FDUTPA.

75. Defendants’ unfair and deceptive practices are likely to mislead – and have misled – reasonable consumers, such as Plaintiff and members of the Florida Class, and therefore, violate Fla. Stat. § 500.04.

76. Defendants have violated FDUTPA by engaging in the unfair and deceptive practices described above, which offend public policies and are immoral, unethical, unscrupulous

and substantially injurious to consumers.

77. Specifically, Defendants have represented that the Products are “All Natural” and contain “No GMO” when, in fact, the Products are made from GM Corn, contain GMOs and are not all natural.

78. Plaintiff and Florida Class members have been aggrieved by Defendants’ unfair and deceptive practices in violation of FDUTPA, in that they purchased and consumed Defendants’ mislabeled Product.

79. Reasonable consumers rely on Defendants to honestly represent the true nature of their ingredients.

80. Defendants have deceived reasonable consumers, like Plaintiff and other members of the Florida Class, into believing the Product was something it was not; specifically that it was “All Natural” and that it contained “No GMO.”

81. The knowledge required to discern the true nature of the Products is beyond that of the reasonable consumer – namely that the Products are or are not derived from unnatural, synthetic, artificial, and/or genetically modified ingredients.

82. Plaintiff and other members of the Florida Class suffered damages and are entitled to injunctive relief. Plaintiff seeks all available remedies, damages, and awards as a result of Defendants’ violations of FDUTPA.

83. Pursuant to Fla. Stat. §§ 501.211(2) and 501.2105, Plaintiff and the Florida Class make claims for damages, attorneys’ fees, and costs. The damages suffered by the Plaintiff and the Florida Class were directly and proximately caused by the deceptive, misleading, and unfair practices of Defendants. Plaintiff requests that the Court issue sufficient equitable relief to restore Florida Class members to the position they would have been in had Defendants not

engaged in unfair competition, including by ordering restitution and disgorgement of all funds that Defendants may have acquired as a result of its unfair competition, and by requiring Defendants to engage in a corrective advertising campaign.

FIFTH CAUSE OF ACTION
Breach of Express Warranty Under Florida Law
(On Behalf of Plaintiff and the Florida Class)

84. Plaintiff incorporates the substantive allegations contained in Paragraphs 1 through 48 as if fully set forth herein.

85. Plaintiff and other members of the Florida Class formed a contract with Defendants at the time they purchased the Product. The terms of that contract include the promises and affirmations of fact Defendants make on the Product's packaging and through marketing and advertising, including Defendant's promise that the Products are "All Natural" and that they contain "No GMO," as described above. This marketing and advertising constitute an express warranty and became part of the basis of the bargain, and are part of the standardized contract between Plaintiff and other members of the Florida Class, on the one hand, and Defendants, on the other.

86. All conditions precedent to Defendants' liability under this contract have been performed by Plaintiff and other members of the Florida Class when they purchased the Product for its ordinary purposes.

87. At all times relevant to this action, Defendants have breached their express warranty about the Products because the Products are not "all natural" and not free of GMO – because they are made from GM corn, contain GMO and are not "all natural."

88. As a result of Defendants' breach of their express warranty, Plaintiff and other members of the Florida Class were damaged in an amount to be proven at trial.

JURY DEMAND

Plaintiff demands a trial by jury of all claims in this Complaint that are so triable.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the other members of the Classes proposed in this Complaint, respectfully requests that the Court enter judgment in their favor and against Defendants, as follows:

A. Declaring that this action is a proper class action, certifying the Class as requested herein, designating Plaintiff as Class Representative and appointing the undersigned counsel as Class Counsel;

B. Ordering Defendants to pay actual damages (and no less than the statutory minimum damages) and equitable monetary relief to Plaintiff and the other members of the Nationwide and Florida Classes;

C. Ordering Defendants to pay punitive damages, as allowable by law, to Plaintiff and the other members of these Classes;

D. Ordering Defendants to pay statutory damages, as allowable by the statutes asserted herein, to Plaintiff and the other members of these Classes;

E. Awarding injunctive relief as permitted by law or equity, including enjoining Defendants from continuing the unlawful practices as set forth herein, and ordering Defendants to engage in a corrective advertising campaign;

F. Ordering Defendants to pay attorneys' fees and litigation costs to Plaintiff and the other members of the Nationwide and Florida Classes;

G. Ordering Defendants to pay both pre- and post-judgment interest on any amounts awarded; and

H. Ordering such other and further relief as may be just and proper.

Dated: October 10, 2014

/s/ John A. Yanchunis
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CIVIL COVER SHEET

JS 44 (Rev. 12/12)

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.) **NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.**

I. (a) PLAINTIFFS Paul Cohen, individually and on behalf of all others similarly situated

DEFENDANTS XOCHITL (SO SHEE) INC., and XOCHITL GOURMET FOODS LLC,

(b) County of Residence of First Listed Plaintiff **Palm Beach County, FL**
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, and Telephone Number)
Morgan & Morgan Complex Litigation Group, 201 N. Franklin Street,
7th Floor, Tampa, FL 33602, 813-223-5505

Attorneys (If Known)

(d) Check County Where Action Arose: MIAMI-DADE MONROE BROWARD PALM BEACH MARTIN ST. LUCIE INDIAN RIVER OKEECHOBEE HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- 1 U.S. Government Plaintiff
 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
 4 Diversity (Indicate Citizenship of Parties in Item III)

- Citizen of This State 1 PTF 1 DEF
Citizen of Another State 2 PTF 2 DEF
Citizen or Subject of a Foreign Country 3 PTF 3 DEF
- Incorporated or Principal Place of Business In This State 4 PTF 4 DEF
Incorporated and Principal Place of Business In Another State 5 PTF 5 DEF
Foreign Nation 6 PTF 6 DEF

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Med. Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence Other: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment <input type="checkbox"/> 8 Remanded from Appellate Court	

V. ORIGIN

(Place an "X" in One Box Only)

- 1 Original Proceeding 2 Removed from State Court 3 Re-filed (See VI below) 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate Judgment 8 Remanded from Appellate Court

VI. RELATED/ RE-FILED CASE(S)

(See instructions):

a) Re-filed Case YES NO b) Related Cases YES NO

JUDGE

DOCKET NUMBER

VII. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. § 1332(d)
LENGTH OF TRIAL via days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$** 5,000,000.00 **CHECK YES only if demanded in complaint:** **JURY DEMAND:** Yes No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE

DATE: October 10, 2014 SIGNATURE OF ATTORNEY OF RECORD: 

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

IFP

JUDGE

MAG JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**Authority For Civil Cover Sheet**

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Refiled (3) Attach copy of Order for Dismissal of Previous case. Also complete VI.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

Remanded from Appellate Court. (8) Check this box if remanded from Appellate Court.

VI. Related/Refiled Cases. This section of the JS 44 is used to reference related pending cases or re-filed cases. Insert the docket numbers and the corresponding judges name for such cases.

VII. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.**

Example: U.S. Civil Statute: 47 USC 553

Brief Description: Unauthorized reception of cable service

VIII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

Date and Attorney Signature. Date and sign the civil cover sheet.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

_____ District of _____

Plaintiff(s)

v.

Defendant(s)

)
)
)
)
)
)
)
)
)
)
)
)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

