

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO:**

MEREDITH FRYDMAN, on Behalf of
Herself and All Others Similarly Situated,

Plaintiff,

v.

WHOLE FOODS MARKET GROUP, INC.,
and WFM PRIVATE LABEL, L.P.,

Defendants.

NOTICE OF REMOVAL

Defendants Whole Foods Market Group, Inc. and WFM Private Label, L.P. (“Defendants”), by and through their attorneys, Seyfarth Shaw LLP, and pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, hereby file this Notice of Removal¹ with respect to the above-captioned case, which was filed and currently is pending in the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida. In support of this Notice of Removal, Defendants state as follows:

Background

This action is one of eleven actions seeking relief based on allegations of the same general conduct by Whole Foods Market entities—the alleged misrepresentation of sugar content on the nutritional labels of Whole Foods Market 365 Everyday Value Plain Greek Yogurt (the

¹ The arguments raised in this Notice of Removal are for the purposes of removal only. By the assertion or omission of any argument or reliance upon any law, Defendants do not intend to waive and specifically reserve their right to assert any defenses and/or objections to which they may be entitled to assert through dispositive motion or otherwise.

“Related Cases”).² The ten other Related Cases were pending in federal district courts around the country, but are all now pending in the U.S. District Court for the Western District of Texas, before the Hon. Sam Sparks. The U.S. Panel on Multidistrict Litigation (“Panel”) transferred the Related Cases, including a Related Case brought by another Florida resident and previously pending in the Middle District of Florida, for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407. See **Exhibit A** (Transfer Order in *In Re: Whole Foods Market Greek Yogurt Marketing And Sales Practices Litigation*, MDL No. 2588 (Dec. 10, 2014) (transferring four Related Cases pending outside the W.D. Texas)); **Exhibit B** (*Finalized Conditional Transfer Order in In Re: Whole Foods Market Greek Yogurt Marketing And Sales Practices Litigation*, MDL No. 2588 (Dec. 22, 2014) (transferring four remaining Related Cases pending outside the W.D. Texas)). While several Related Cases were removed from state court, only Plaintiff in *Rodhouse v. Whole Foods Market Group, Inc.*, Case No. 4:14-cv-01764 (E.D. Mo.) sought a remand. The Motion to Remand in *Rodhouse* has been briefed and is currently pending before the Hon. Sam Sparks in the Western District of Texas.

² The ten other Related Cases include: (1) *Knox v. Whole Foods Market Group, Inc.*, Case No. 1:14-cv-13185 (D. Mass) (filed Aug. 1, 2014); (2) *Markley v. Whole Foods Market Group, Inc.*, Case No. 8:14-cv-01892-CEH-MAP (M.D. Fla.) (filed on Aug. 6, 2014); (3) *Bilder v. Whole Foods Market Group, Inc.*, Case No. 1:14-cv-06146-RBK-JS (D. N.J.) (initially filed on Aug. 8, 2014 as Case No. BUR-L-1904-14 (Superior Court of New Jersey) and removed to federal court on October 2, 2014); (4) *Clemente v. Whole Foods Market Group, Inc.*, Case No. 2:14-cv-05652-MMB (E.D. Pa.) (initially filed on August 11, 2014 as Case No. 140801271 (Court of Common Pleas, Philadelphia County) and removed to federal court on October 3, 2014); (5) *Jackson v. Whole Foods Market Group, Inc.*, Case No. 2:14-cv-06705-R-VBK (C.D. Cal.) (filed on Aug. 26, 2014); (6) *Grodnick v. Whole Foods Market Group, Inc.*, Case No. 1:14-cv-07035-ALC (S.D.N.Y.) (filed on Aug. 29, 2014); (7) *Rodhouse v. Whole Foods Market Group, Inc.*, Case No. 4:14-cv-01764 (E.D. Mo.) (initially filed on September 13, 2014 as Case No. 1422-CC09626 (Circuit Court of the City of St. Louis, State of Missouri) and removed to federal court on October 17, 2014); (8) *Richards v. Whole Foods Market Group, Inc.*, Case No. 2:14-cv-02221-JAT (D. Az.) (filed on Oct. 6, 2014); (9) *Steeley v. Whole Foods Market Rocky Mountain/Southwest, L.P.*, Case No. 1:14-cv-00932-SS (W.D. Tex.) (filed on Oct. 10, 2014); (10) *Kubick v. Whole Foods Market, Inc.*, Case No. 1:14-cv-01013-SS (filed Nov. 10, 2014).

Timeliness of Removal

1. On December 12, 2014, Plaintiff Meredith Frydman (“Plaintiff”) filed a Petition and Jury Demand (“Complaint”) against Defendants in the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida. The lawsuit is recorded on that court’s docket as 2014CA014864 (AB). There are no other parties named in the Complaint at the time of filing this removal.

2. On December 16, 2014, a copy of the Complaint was served through a registered agent upon Defendant Whole Foods Market Group, Inc. A true and correct copy of the Notice of Service of Process is attached hereto as **Exhibit C**. Defendant Whole Foods Market Private Label, L.P. has not been served with the Complaint but joins in this Notice of Removal.

3. Pursuant to 28 U.S.C. § 1446(a), a true and correct copy of Plaintiff’s Summons, Complaint, and Jury Demand, which constitutes “all summons, pleadings, and orders” served upon Defendant Whole Foods Market Group, Inc. in the 15th Judicial Circuit Court of the City of Palm Beach, State of Florida action, are attached hereto as **Exhibit D**.

4. Because Defendants have filed this Notice of Removal within thirty (30) days of service of Whole Foods Market Group, Inc., this Notice of Removal is timely pursuant to 28 U.S.C. § 1446(b).

Basis for Removal

5. The basis for removal is diversity jurisdiction under the Class Action Fairness Act (“CAFA”), codified at 28 U.S.C. § 1332(d).

6. This putative class action satisfies all the jurisdictional requirements under CAFA based on the allegations in the Complaint. Specifically: (1) the proposed class consists of 100 or more members; (2) the parties are minimally diverse; and (3) and the amount in controversy exceeds \$5,000,000, exclusive of interest and costs. *See* 28 U.S.C. § 1332(d)(2), (5)(B).

7. *First*, CAFA requires that the putative class consist of at least 100 persons. 28 U.S.C. § 1332(d)(5). In the Complaint, Plaintiff purports to bring this action on behalf of “all persons in the State of Florida, within the relevant statute of limitations period, [who] purchased” Whole Foods 365 Everyday Value brand Plain Greek Yogurt. Compl. ¶ 26. Plaintiff claims the “members of the Class number in the tens of thousands.” Compl. ¶ 28. Therefore, by Plaintiff’s own allegations, the putative class exceeds at least 100 persons.

8. *Second*, CAFA requires that the parties be minimally diverse; that is, at least one putative class member must be a citizen of a different state than at least one Defendant. 28 U.S.C. § 1332(d)(2). The term “class members” means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action. 28 U.S.C. § 1332(d)(1)(D). In the Complaint, Plaintiff alleges that she is a citizen of Palm Beach County, Florida. Compl. ¶ 6. Therefore, Plaintiff is a citizen of Florida. Defendant Whole Foods Market Group, Inc. is a Delaware Corporation with its principle place of business in Texas. Therefore, Whole Foods Market Group, Inc. is deemed a citizen of Delaware and Texas. 28 U.S.C. § 1332(c)(1). Defendant WFM Private Label, L.P. has two partners, both of which are Delaware corporations with principal places of business in Texas. Therefore, WFM Private Label, L.P. is deemed a citizen of Delaware and Texas. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990) (a limited partnership is a citizen of each state in which any of its partners, limited or general, are citizens.). Plaintiff alleges in the Complaint that Defendant WFM Private Label, L.P. is a Delaware Limited Partnership with its principle place of business in Texas. Even if that were true and the basis for determining its citizenship, WFM Private Label, L.P. would be a citizen of Delaware and Texas. Either way, Plaintiff and Defendants are citizens of different states and the parties satisfy the minimal diversity requirement.

9. *Third*, to confer diversity jurisdiction under CAFA, the amount in controversy must exceed the sum or value of \$5,000,000, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2). “[T]he District Court [must] determine whether it has jurisdiction by adding up the value of the claim of each person who falls within the definition of [the] proposed class and determine whether the resulting sum exceeds \$5 million. If so, there is jurisdiction and the court may proceed with the case.” *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348 (2013).

10. It is fundamental that Plaintiff is the master of her complaint. *See, e.g., Escala v. Victoria’s Secret Stores, LLC*, 727 F. Supp. 2d 1350, 1352-53 (S.D. Fla. 2009) (citing *Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1314 (11th Cir. 2004)). And the amount in controversy requirement can be satisfied by the allegations in the Complaint alone. *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 754 (11th Cir. 2010) (quoting *Williams v. Best Buy Co., Inc.*, 269 F.3d 1316, 1319 (11th Cir. 2001)); *see also Nowlin v. Nat’l Linen Serv.*, Civ. A. No. 5:97CV226-RH, 1997 WL 715035, at *1 (N.D. Fla. Oct. 7, 1997) (“What a plaintiff may *not* do is have it both ways; a plaintiff may not pursue a complaint seeking damages in excess of ...[the jurisdictional amount] while obtaining remand on the grounds that the amount in controversy is not that much.”). The removing defendant need only prove the amount in controversy requirement is met by a preponderance of the evidence where plaintiff does not claim a specific amount in the Complaint. *Id.* Even where the removing defendant is required to prove the amount in controversy requirement is met by a preponderance of the evidence, *i.e.*, where the plaintiff has not claimed a specific amount in the Complaint, the district court may consider facts alleged in the notice of removal or other summary judgment type evidence *if* the amount in controversy is not “facially apparent” from the complaint. *Id.*; *see also Roe v. Michelin N. Am., Inc.*, 613 F.3d 1058, 1061-62 (11th Cir. 2010). The Eleventh Circuit gives district courts leeway

“to make ‘reasonable deductions, reasonable inferences, or other reasonable extrapolations’ from the pleadings to determine whether it is facially apparent that a case is removable.” *Roe*, 613 F.3d at 1061-1062.

11. Plaintiff alleges on the face of the Complaint that “[n]o individual Class Member’s claim is equal to or greater than seventy-five thousand (\$75,000), inclusive of costs and attorneys’ fees.” Compl. ¶ 8. Attorneys’ fees are included in the determination of the amount in controversy. *See Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805, 808 n.4 (11th Cir. 2003) (attorneys’ fees count towards the amount in controversy where allowed by contract or statute); *Suzuki Motor Corp. v. Jiujiang Hison Motor Boat Mfg. Co., Ltd.*, Civ. A. No. 1:12-cv-20626, 2012 WL 2873733, at *15 (S.D. Fla. June 29, 2012) (attorneys’ fees potentially recoverable from non-prevailing party under Florida’s Deceptive and Unfair Trade Practices Act). Costs are not included in the amount in controversy. 28 U.S.C. § 1332(d)(2). But any amounts of each plaintiff’s claim attributable to taxable costs would be *de minimis*. *See, e.g., Kearney v. Auto-Owners Ins. Co.*, Civ. A. No. 8:06-cv-00595-T-24-TGW, 2010 WL 3062420, at *2 (M.D. Fla. 2010) (emphasizing that Congress has imposed uniform and rigid controls on cost-shifting in federal courts by enacting 28 U.S.C. § 1920); *Gray v. FedEx Ground Package Sys., Inc.*, Civ. A. No. 4:06-CV-00422 JAR, 2014 WL 4386739, at *2 (E.D. Mo. Sept. 5, 2014) (same; awarding, after 8 years of litigation involving eleven prevailing plaintiffs, less than three-thousand dollars in taxable costs per plaintiff); *Villaneuva-Gonzalez v. Grainger Farms, Inc.*, Civ. A. No. 2:09-CV-00716-36DNF, 2011 WL 5834629, at *2 (M.D. Fla. 2011) (awarding costs in multi-year litigation to ninety-four prevailing plaintiffs of less than \$120 per plaintiff).

12. Therefore, based on the allegations of the Complaint, Plaintiff specifically pleads a sum certain that the amount in controversy for each individual Class Member is \$74,999 less *de minimis* costs. *Raye v. Employer's Ins. of Wausau*, 345 F. Supp. 2d 1313, 1316-17 (S.D. Ala. 2004) (“[t]he complaint expressly articulates the plaintiff’s desire to recover \$75,000.00 in compensatory and punitive damages” where plaintiff alleged that he “be awarded damages . . . not to exceed Seventy-Five Thousand and No/100 (\$75,000.00) Dollars.”); *Dibble v. Avrich*, Civ. A. No. 14-CIV-61264, 2014 WL 6632629, at *4 (S.D. Fla. Nov. 21, 2014) (noting the plaintiff in *Raye* “expressly demanded recovery in excess of \$75,000” in the complaint); *see also Grawitch v. Charter Commc’ns, Inc.*, 750 F.3d 956, 960 (8th Cir. 2014) (holding that the defendant met its burden as to the CAFA amount in controversy jurisdictional threshold through the plaintiffs’ allegations of “a nationwide class consisting of at least \$50,000 in damages per class member,” based on which “a jury might conclude that the class suffered damages of more than \$5 million dollars, even if the individual class members’ monthly overpayment was minimal”).

13. Plaintiff also alleges that the “members of the Class number in the tens of thousands.” Compl. ¶ 28.

14. Therefore, multiplying by just 1% of Plaintiff’s alleged sum certain, \$749.99, by half of Plaintiff’s minimum alleged class size, 10,000 putative Class Members, the amount placed in controversy for CAFA is \$7,499,900.00, well in excess of the jurisdictional amount. Indeed, given the number of Class Members specifically alleged by Plaintiff, the jurisdictional minimum under CAFA would be satisfied by approximately 0.33% of the Plaintiff’s alleged sum certain per 20,000 Class Members—just \$250 per Class Member.

15. Plaintiff cannot escape CAFA removal by simply alleging that “[n]o individual Plaintiff’s or Class Member’s claim is equal to or greater than seventy-five thousand (\$75,000),

inclusive of costs and attorneys' fees, and in the aggregate will not exceed \$4,999,999 and is less than the sum or value of the five million (\$5,000,000) minimum threshold to create federal court jurisdiction." Compl. ¶ 8. Such stipulations may *not* prevent removal under CAFA. *See, e.g., Standard Fire Ins. Co.*, 133 S. Ct. at 1348 (precertification stipulation limiting class damages sought to less than \$5 million in order to avoid removal does not defeat federal jurisdiction under CAFA); *Stafford v. Whole Foods Markt Cal., Inc.*, Civ. A. No. 4:14CV00420 JLH, 2014 WL 4755988, at *3 (E.D. Ark. Sept. 24, 2014) (“[a]lthough the complaint alleges damages do not exceed the \$5,000,000 amount in controversy threshold, by alleging damages up to \$74,999.00 per class member, Stafford has placed that amount in controversy for each class member.”).

16. Because the CAFA jurisdictional requirements are all met, this case is properly removable to this Court under 28 U.S.C. § 1332(d).

Additional Information

17. True and correct copies of “all process, pleadings, and orders” from the state court are attached in conformity with 28 U.S.C. § 1446(a). There has been no other process, pleadings, or orders served upon either of the Defendants to date in this case.

18. Pursuant to Local Rule 5H, this Notice of Removal is being filed in the United States District Court for the Southern District of Florida, West Palm Beach Division, as this is the district court within which the Fifteenth Judicial Circuit Court action is pending. 28 U.S.C. § 1441(a).

19. Contemporaneously with the filing of this Notice of Removal, Defendants are filing a copy of the same with the clerk of the 15th Judicial Circuit Court in and for Palm Beach County, Florida, and a Notice of Filing Notice of Removal.

20. Written notice of this filing of this Notice of Removal has also been served upon Plaintiff.

21. Defendants reserve the right to supplement this Notice of Removal by adding any jurisdictional defenses which may independently support a basis for removal. By filing this Notice of Removal, Defendants do not waive any claims or defenses available at law, in equity or otherwise.

WHEREFORE, Defendants respectfully request that the above-referenced civil action proceed in the United States District Court for the Southern District of Florida, West Palm Beach Division, as an action properly removed thereto.

DATED: January 2, 2015

Respectfully submitted,

SEYFARTH SHAW LLP

By: s/Alex S. Drummond

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 2nd day of January 2, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record:

Barry L. Davis, Esq.
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Atlanta GA 30338

s/Alex S. Drummond
Counsel for Defendant

CIVIL COVER SHEET

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

DEFENDANTS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

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

(c) Attorneys (Firm Name, Address, and Telephone Number)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. 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
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF 1 1 Incorporated or Principal Place of Business In This State
2 2 Incorporated and Principal Place of Business In Another State
3 3 Foreign Nation
4 4
5 5
6 6

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

Table with 5 columns: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

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)

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):

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 \$

CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

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

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT IFP JUDGE MAG JUDGE

ATTACHMENT A

I. (c)

Plaintiff's Attorneys:

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Joseph J. Orzano (*pro hac vice* to be filed)
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EXHIBIT A

**UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION**

**IN RE: WHOLE FOODS MARKET, INC., GREEK YOGURT
MARKETING AND SALES PRACTICES LITIGATION**

MDL No. 2588

TRANSFER ORDER

Before the Panel:* Plaintiffs in an action (*Knox*) pending in the District of Massachusetts move under 28 U.S.C. § 1407 to centralize this litigation in that district. The litigation consists of the four actions listed on Schedule A: the *Knox* action and actions pending in the Central District of California, the Middle District of Florida, and the Southern District of New York, respectively.¹

All parties support centralization, but there is disagreement regarding the choice of an appropriate transferee district. The Whole Foods defendants² support selection of the Western District of Texas, or, in the alternative, the Southern District of Texas. Plaintiffs in the three other constituent actions and four potential tag-along actions support centralization in the Western District of Texas, or, in the alternative, the Southern District of New York.³

On the basis of the papers filed and the hearing session held, we are persuaded that centralization under Section 1407 in the Western District of Texas will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. These actions, all of which are putative class actions, share factual issues arising from highly similar allegations that Whole Foods 365 Greek Yogurt contains much more sugar than stated on its label, that defendants' marketing of the Yogurt was false and deceptive, and that defendants were negligent in testing the Yogurt, and in ensuring that the label was accurate. Centralization will eliminate duplicative discovery, prevent inconsistent pretrial rulings on class certification and other issues, and conserve the resources of the parties, their counsel, and the judiciary.

* Judge Charles R. Breyer took no part in the decision of this matter.

¹ The Panel has been informed of six additional related federal actions. These actions and any other related federal actions are potential tag-along actions. *See* Panel Rules 1.1(h), 7.1, and 7.2.

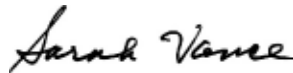
² Whole Foods Market Group, Inc., Whole Foods Market Private Label, L.P., Whole Foods Market California, Inc., WFM-WO, Inc., and Mrs. Gooch's Natural Food Markets, Inc.

³ The actions of these tag-along plaintiffs are pending in the District of Arizona, the District of New Jersey, the Eastern District of Pennsylvania and the Western District of Texas. The brief of the Arizona plaintiff does not propose an alternative to the Western District of Texas.

After weighing the relevant factors, we select the Western District of Texas as transferee district for this litigation. The record shows that all defendants are headquartered in this district, and thus many witnesses and relevant documents are likely to be found there. Further, the Honorable Sam Sparks, to whom we assign the litigation, is an experienced jurist, and we have no doubt that he will steer this MDL on a prudent course.

IT IS THEREFORE ORDERED that the actions listed on Schedule A and pending outside the Western District of Texas are transferred to the Western District of Texas, and, with the consent of that court, assigned to the Honorable Sam Sparks for coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION



Sarah S. Vance
Chair

Marjorie O. Rendell
Ellen Segal Huvelle
Catherine D. Perry

Lewis A. Kaplan
R. David Proctor

**IN RE: WHOLE FOODS MARKET, INC., GREEK YOGURT
MARKETING AND SALES PRACTICES LITIGATION**

MDL No. 2588

SCHEDULE A

Central District of California

JACKSON, ET AL. v. WHOLE FOODS MARKET, INC., C.A. No. 2:14-06705

Middle District of Florida

MARKLEY v. WHOLE FOODS MARKET, INC., C.A. No. 8:14-01892

District of Massachusetts

KNOX, ET AL. v. WHOLE FOODS MARKET, INC., C.A. No. 1:14-13185

Southern District of New York

GRODNICK, ET AL. v. WHOLE FOODS MARKET INC., C.A. No. 1:14-07035

EXHIBIT B

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: WHOLE FOODS MARKET, INC., GREEK
YOGURT MARKETING AND SALES
PRACTICES LITIGATION

MDL No. 2588

(SEE ATTACHED SCHEDULE)

CONDITIONAL TRANSFER ORDER (CTO -1)

On December 10, 2014, the Panel transferred 4 civil action(s) to the United States District Court for the Western District of Texas for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. *See* F.Supp.2d (J.P.M.L. 2014). Since that time, no additional action(s) have been transferred to the Western District of Texas. With the consent of that court, all such actions have been assigned to the Honorable Sam Sparks.

It appears that the action(s) on this conditional transfer order involve questions of fact that are common to the actions previously transferred to the Western District of Texas and assigned to Judge Sparks.

Pursuant to Rule 7.1 of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation, the action(s) on the attached schedule are transferred under 28 U.S.C. § 1407 to the Western District of Texas for the reasons stated in the order of December 10, 2014, and, with the consent of that court, assigned to the Honorable Sam Sparks.

This order does not become effective until it is filed in the Office of the Clerk of the United States District Court for the Western District of Texas. The transmittal of this order to said Clerk shall be stayed 7 days from the entry thereof. If any party files a notice of opposition with the Clerk of the Panel within this 7-day period, the stay will be continued until further order of the Panel.

FOR THE PANEL:



Jeffery N. Lüthi
Clerk of the Panel

Inasmuch as no objection is pending at this time, the stay is lifted.

Dec 22, 2014

CLERK'S OFFICE
UNITED STATES
JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

**IN RE: WHOLE FOODS MARKET, INC., GREEK
YOGURT MARKETING AND SALES
PRACTICES LITIGATION**

MDL No. 2588

SCHEDULE CTO-1 – TAG-ALONG ACTIONS

<u>DIST</u>	<u>DIV.</u>	<u>C.A.NO.</u>	<u>CASE CAPTION</u>
ARIZONA			
AZ	2	14-02221	Richards v. Whole Foods Market Group Incorporated et al
MISSOURI EASTERN			
MOE	4	14-01764	Rodhouse v. Whole Foods Market Group, Inc.
NEW JERSEY			
NJ	1	14-06146	BILDER v. WHOLE FOODS MARKET GROUP, INC. et al
PENNSYLVANIA EASTERN			
PAE	2	14-05652	CLEMENTE et al v. WHOLE FOODS MARKET GROUP, INC. et al

EXHIBIT C



**Service of Process
Transmittal**

12/16/2014

CT Log Number 526255033

TO: Roberta Lang
Whole Foods Market, Inc.
550 Bowie St
Austin, TX 78703-4644

RE: Process Served in Florida

FOR: Whole Foods Market Group, Inc. (Domestic State: DE)

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION: Meredith Frydman, on behalf of herself and all others similarly situated,
Pltf. vs. Whole Foods Market Group, Inc. and WFM Private Label, L.P., Dfts.

DOCUMENT(S) SERVED: Summons, Complaint and Jury Demand

COURT/AGENCY: Palm Beach County Circuit Court, FL
Case # 2014CA014864AB

NATURE OF ACTION: Plaintiff and the class have been aggrieved by defendants' unfair and deceptive practices in that they paid Whole Foods for the Mislabeled Yogurts, a product they would not have purchased on the same terms if the true facts concerning the sugar content and mislabeling of Mislabeled Yogurt had been known

ON WHOM PROCESS WAS SERVED: C T Corporation System, Plantation, FL

DATE AND HOUR OF SERVICE: By Process Server on 12/16/2014 at 15:00

JURISDICTION SERVED : Florida

APPEARANCE OR ANSWER DUE: Within 20 days after service, exclusive of the day of service

ATTORNEY(S) / SENDER(S): Barry L. Davis
Thornton, Davis and Fein, P.A.
80 SW Eighth Street
29th Floor
Miami, FL 33130
305-446-2646

ACTION ITEMS: CT has retained the current log, Retain Date: 12/17/2014, Expected Purge Date:
12/22/2014
Image SOP
Email Notification, Email Process SOP@WHOLEFOODS.COM
Email Notification, Roberta Lang barbara.jenkins@wholefoods.com

SIGNED: C T Corporation System
ADDRESS: 1200 South Pine Island Road
Plantation, FL 33324
TELEPHONE: 954-473-5503

Page 1 of 1 / AM

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EXHIBIT D

IN THE CIRCUIT COURT OF THE 15TH
JUDICIAL CIRCUIT IN AND FOR PALM
BEACH COUNTY, FLORIDA

CASE NO. 2014 CA 014864 (AB)

MEREDITH FRYDMAN, on behalf of Herself
and All Others Similarly Situated,

Plaintiff,

vs.

WHOLE FOODS MARKET GROUP, INC. and
WFM PRIVATE LABEL, L.P.,

Defendants.

MAK
#475
12-16-14
3:00 PM

CIVIL ACTION SUMMONS

THE STATE OF FLORIDA:
To Each Sheriff of the State:

YOU ARE COMMANDED to serve this summons and a copy of the Complaint in this action on
Defendant:

By Serving:

WHOLE FOODS MARKET GROUP, INC.
C.T. Corporation system, Registered Agent
1200 South Pine Island Road
Plantation, FL 33324

The Defendant is required to serve written defenses to the **Complaint** on counsel for Plaintiff:

Barry L. Davis, Esq., Thornton, Davis & Fein, P.A., 80 S.W. 8th Street, Suite 2900,
Miami, FL 33130; Tel. (305) 446-2646; Facsimile: (305) 441-2374;
Primary E-Mail: davis@tdflaw.com; Secondary E-Mail: Moreno@tdflaw.com
Counsel for Plaintiff

Antonio Vozzolo, Esq. (pro hac to be filed), Faruqi & Faruqi, LLP,
369 Lexington Avenue, 10th Floor, New York, NY 10017;
Tel. (212) 983-9330; Facsimile: (212) 983-9331
E-Mail: avozzolo@faruqilaw.com
Counsel for Plaintiff

-and-

Corey D. Holzer, Esq. (pro hac to be filed), Holzer & Holzer, LLC,
1200 Ashwood Parkway, Suite 410, Atlanta, GA 30338;
Tel. (770) 392-0090; Facsimile: (770) 392-0029
E-Mail: cholzer@holzerlaw.com
Counsel for Plaintiff

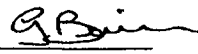
*** FILED: PALM BEACH COUNTY, FL SHARON R BOCK, CLERK. ***

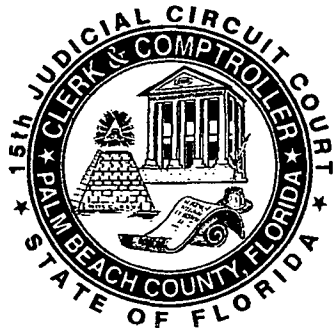
Within 20 days after service of this summons on that Defendant, exclusive of the day of service, and to file the original of the defenses with the clerk of this Court either before service on the above-named attorney or immediately thereafter. If the Defendant fails to do so, a default will be entered against the Defendant for the relief demanded in the Complaint.

DATED on _____ day of December, 2014.

DEC 16 2014

Clerk of he Court

By: 
As Deputy Clerk



Gina Brimmer

SHARON R. BOCK
Clerk & Comptroller
P.O. Box 4667
West Palm Beach, Florida
33402-4667

**IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
PALM BEACH COUNTY, FLORIDA**

MEREDITH FRYDMAN, on Behalf of Herself
and All Others Similarly Situated,

Plaintiff,

v.

WHOLE FOODS MARKET GROUP, INC. and
WFM PRIVATE LABEL, L.P.,

Defendants.

Case No. 2014CA014864 DIV. AB

CLASS REPRESENTATION

JURY TRIAL DEMANDED

Pursuant to Florida Rule of Civil Procedure 1.220, Plaintiff Meredith Frydman (“Plaintiff”) brings this action on behalf of herself and all others similarly situated. Plaintiff, by her attorney, makes the following allegations pursuant to the investigation of her counsel and based upon information and belief, except as to allegations specifically pertaining to herself and her counsel, which are based on personal knowledge.

NATURE OF THE ACTION

1. Plaintiff brings this consumer class action against Whole Foods Market Group, Inc. and WFM Private Label, L.P. (“Whole Foods” or “Defendants”) arising out of the sale of its Whole Foods’ 365 Everyday Value brand Plain Greek Yogurt, which comes in come in “2% milk fat” and “0% milk fat” varieties (the “Mislabelled Yogurt”). The Mislabelled Yogurt, which is sold in 6 ounce and 32 ounce sizes, is marketed by Defendants as containing a mere 2 grams of sugar per serving.

2. Whole Foods, which focuses its marketing on health conscious consumers, repeatedly emphasizes in its marketing the importance of lowering dietary sugar intake. For example, in the “Healthy Eating” section of Whole Foods’ marketing website, Whole Foods points out that “[s]tudies show that Americans eat far more sugar than they need.”

<http://www.wholefoodsmarket.com/healthy-eating/simple-changes-lifelong-health> (last visited September 26, 2014). Whole Foods also points out that “[f]rom diabetes management to weight loss to disease prevention, there are many reasons to take up a sugar-conscious diet.” <http://www.wholefoodsmarket.com/healthy-eating/special-diets/sugar-conscious> (last visited September 26, 2014). According to Whole Foods, “[o]unce for ounce, plain Greek yogurt is typically lower in sugar.” <http://www.wholefoodsmarket.com/blog/great-greek-yogurt> (last visited September 26, 2014).

3. Defendants’ representations concerning the sugar content of its Mislabeled Yogurt, however, are false and misleading. Contrary to the representations on the products’ packaging, labeling, and marketing materials, the Mislabeled Yogurt contains nearly six times the sugar content as stated on the packaging. Indeed, *Consumer Reports* recently tested the Mislabeled Yogurts and found the sugar content of the Mislabeled Yogurt was approximately 11.4 grams per serving. <http://www.consumerreports.org/cro/news/2014/07/a-whole-foods-365-greek-yogurt-has-five-times-more-sugar-than-its-nutrition-label-shows/index.htm> (last visited September 26, 2014).

4. Defendants have misled consumers like Plaintiff into believing there is only 2 grams of sugar per serving in or added to the Mislabeled Yogurt. This misrepresentation played a substantial part in influencing Plaintiff’s decision to purchase the Mislabeled Yogurt, who relied upon Defendants’ sugar content misrepresentations prominently displayed on the product’s carton. Indeed, the sugar content of similar products sold and marketed by competitors is often significantly higher, usually 5 to 10 grams per serving. If Plaintiff had known the true sugar content of the Mislabeled Yogurt, she would not have paid as much for them.

5. Defendants' misleading statements regarding the Mislabeled Yogurt violated state, as detailed herein. As such, Plaintiff asserts claims on her own behalf and on behalf of all purchasers of the Mislabeled Yogurt for unjust enrichment, breach of express warranty, negligent misrepresentation, and violations of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. §§ 501.201, *et seq.*

PARTIES

6. Plaintiff is a citizen of Palm Beach County, Florida. On or about April of 2014, Plaintiff purchased the Mislabeled Yogurt for her personal consumption from a Whole Foods store at 1400 Glades Road, Boca Raton, Florida. Plaintiff has ingested these products. The Mislabeled Yogurt purchased by Plaintiff contained an average of 11.4 grams of sugar per serving contrary to the representations made on the product labeling and in product advertising that the Mislabeled Yogurt only contained 2 grams of sugar per serving. Defendants' misrepresentation of the sugar content of the Mislabeled Yogurt on the packaging label misled Plaintiff to believe that the products contained 2 grams of sugar per serving. Plaintiff relied on Defendants' product packaging information, including the purported sugar content, when deciding to purchase the Mislabeled Yogurt.

7. Defendant Whole Foods Market Group, Inc. is a Delaware corporation with its principal place of business located at 550 Bowie Street, Austin, Texas. Defendant Whole Foods Market Group, Inc. is a subsidiary of the holding company Whole Foods Market, Inc. Since its founding in 1980, Whole Foods has developed a reputation for being a credible and trustworthy retailer, offering information and advice to consumers desiring natural foods or those seeking to avoid certain food ingredients. Whole Foods Market Group, Inc., directly and through its agents, has substantial contacts with and receives benefits and income from and through the State of

Florida. Defendant WFM Private Label, L.P. is a Delaware corporation with its principal place of business located at 550 Bowie Street, Austin, Texas. Defendant WFM Private Label, L.P. is a subsidiary of the holding company Whole Foods Market, Inc. Defendant WFM Private Label, L.P. is responsible products sold under Whole Foods' own brand, including the Mislabeled Yogurt. WFM Private Label, L.P., directly and through its agents, has substantial contacts with and receives benefits and income from and through the States of Florida.

JURISDICTION AND VENUE

8. This court has jurisdiction over this action as the amount in controversy exceeds exceed the minimum jurisdictional limits of the Court. The amount in controversy, however, is less than \$75,000 per plaintiff and Class Members individually and less than \$5,000,000 in the aggregate. No individual Plaintiff's or Class Member's claim is equal to or greater than seventy-five thousand (\$75,000), inclusive of costs and attorneys' fees, and in the aggregate will not exceed \$4,999,999 and is less than the sum or value of the five million (\$5,000,000) minimum threshold to create federal court jurisdiction. Therefore no diversity or jurisdiction pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d) for this case.

9. Venue is proper in this Circuit because, as alleged in this Complaint, Defendant conducted and transacted substantial business in this Circuit, a substantial portion of the events and conduct giving rise to the violations complained of in this action occurred in this Circuit, and Defendant conducts business with consumers in this Circuit.

FACTS COMMON TO ALL CAUSES OF ACTION

False and Misleading Marketing of Mislabeled Yogurt

10. The Mislabeled Yogurt is a yogurt product market and sold by Defendants under its "365 Everyday Value" brand in Whole Foods locations in the State of Florida. Individual

cartons of the Mislabeled Yogurt retails in stores for approximately \$1.29 for the 6 oz. size, and \$5.99 for the 32 oz. size.

11. As American consumers have become more health conscious they increasingly seek to avoid foods containing high sugar content. There is a growing demand for foods that contain low sugar content.

12. Whole Foods' entire business is geared towards the health conscious consumer. Whole Foods' markets itself as "America's Healthiest Grocery Store." <http://www.wholefoodsmarket.com/company-info> (last visited September 26, 2014).

13. A major aspect of Whole Food's marketing campaign is its purported efforts to educate its customers "about natural and organic foods, health, nutrition and the environment." <http://www.wholefoodsmarket.com/mission-values/core-values/we-satisfy-delight-and-nourish-our-customers> (last visited September 26, 2014). Whole Foods frequently emphasizes that Americans consumer far too much sugar and the importance of lowering sugar intake. For example, in the "Healthy Eating" section of its website, Whole Foods states to consumers that "[s]tudies show that Americans eat far more sugar than they need – over 22 teaspoons per day, or about 130 pounds a year!" <http://www.wholefoodsmarket.com/healthy-eating/simple-changes-lifelong-health>

14. In fact, one of Whole Food's main marketing messages is that consumers should be "Sugar Conscious," in choosing which foods to consume. Specifically, the website states:

SUGAR CONSCIOUS

From diabetes management to weight loss to disease prevention, there are many reasons to take up a sugar-conscious diet. Even if you aren't actively avoiding sugar, chances are, you're getting more in your diet than you think...

According to the American Heart Association (AHA), the average American consumes far more sugar than needed – over 22 teaspoons (or about 355 calories) per day. That’s a lot for a substance with no nutritional value. Studies show that excess sugar consumption leads to all kinds of health problems, from diabetes to obesity, and can even interfere with essential nutrient intake.

Whether you’re on a sugar-restricted diet or not, it’s a good idea to watch how much sugar you’re eating – or drinking – each day. The AHA recommends limiting sugars to 100 calories (about 6 teaspoons) per day for women and 150 calories (or about 9 teaspoons) for men. Check packages carefully, and aim for foods with no more than 5 grams of sugar per serving.

<http://www.wholefoodsmarket.com/healthy-eating/special-diets/sugar-conscious> (last visited September 26, 2014).

15. Similarly, one of Whole Foods’ “Healthy Tips” is to limit sugar intake. A screenshot captured from Defendants’ website featuring “Healthy Tips” is provided below:

Healthy Tip: Watch Your Sugar

To support good health, become aware of your daily intake of added sugar, cut back accordingly, and learn to recognize hidden sugars on labels.

Of course, the sugar picture gets a bit murkier because there are naturally occurring sugars in fruits and dairy products.

<http://www.wholefoodsmarket.com/blog/whole-story/healthy-tip-watch-your-sugar> (last visited September 26, 2014).

16. Moreover, Whole Foods emphasizes to consumers they should trust the accuracy of the nutritional information on the label. For example, on its website, Whole Foods states:

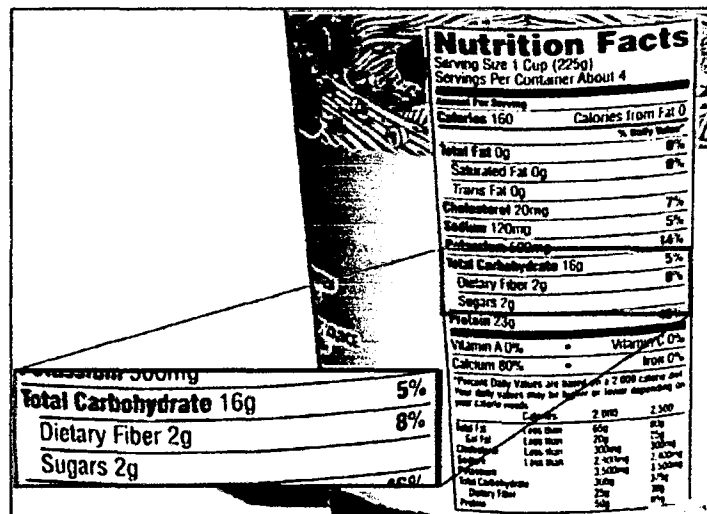
Our Private Label registered dietitian reviews each nutrition label for accuracy and completeness before the label is printed. All attempts are made to review nutrition labels on a regular basis to ensure accuracy and FDA compliance.

<http://www.wholefoodsmarket.com/about-our-products/product-faq/ingredients> (last accessed September 26, 2014).

17. In an effort to capitalize on consumer demand for foods with low sugar content, Defendants began to market its Mislabeled Yogurt as containing nominal amounts of sugar.

18. For example, on the “Blog” section of Defendants’ website, Whole Foods touts the lower sugar content of plain Greek Yogurt, stating “[o]nce for ounce, plain Greek yogurt is typically lower in sugar, lower in carbohydrates and higher in protein than regular plain yogurt.” <http://www.wholefoodsmarket.com/blog/great-greek-yogurt> (last visited September 26, 2014).

19. Defendants prominently and voluntarily represents on the product packaging for its Mislabeled Yogurt that the products have 2 grams of sugar per serving.



<http://www.consumerreports.org/cro/news/2014/07/a-whole-foods-365-greek-yogurt-has-five-times-more-sugar-than-its-nutrition-label-shows/index.htm> (last visited September 26, 2014).

20. These misrepresentations were uniform and were communicated to Plaintiffs and every other member of the Class at every point of purchase and consumption.

21. But, in fact, Defendants have deceived consumers by misstating the sugar content of its Mislabeled Yogurt, which are also labeled and sold in violation of federal and state laws. Indeed, contrary to Whole Foods' recommendation to consumers that they "aim for foods with no more than 5 grams of sugar per serving," the Mislabeled Yogurt actually contains 11.4 grams of sugar per serving.

22. Consumers could not know the truth about the sugar content of the Mislabeled Yogurt without significant investigations and testing which is beyond an average reasonable consumer's means. Had Defendants not made the misrepresentations regarding the Mislabeled Yogurt, Plaintiff and the class would not have been injured.

Testing Shows Whole Foods Mislabeled Yogurt

23. On July 17, 2014, Consumer Reports published the results of six tests conducted on the Mislabeled Yogurts. The Tests done by consumer reports determined the Mislabeled Yogurt actually contains at least 11.4 grams of sugar per serving, rather than the advertised 2 grams. <http://www.consumerreports.org/cro/news/2014/07/a-whole-foods-365-greek-yogurt-has-five-times-more-sugar-than-its-nutrition-label-shows/index.htm> (last visited September 26, 2014).

24. Consumer Reports also pointed out:

To put this in context, bear in mind that all yogurt naturally contains the sugar lactose. That means that even plain yogurts and those made with non-nutritive sweeteners such as stevia and sucralose (not just flavored yogurts that contain added sugar) have some sugar. What's more, the label on this 365 yogurt also listed 16 grams of total carbohydrate per serving. Since lactose provides the vast majority of carbs in yogurt, the numbers just didn't add up.

Id.

CLASS ACTION ALLEGATIONS

25. Plaintiff brings this action on behalf of herself and all other similarly situated persons pursuant to Florida Rules of Civil Procedure 1.220.

26. Plaintiff seeks to represent a Class defined as all persons in the State of Florida, within the relevant statute of limitations period, purchased Mislabeled Yogurt (the "Class"). Excluded from the Class are persons or entities that purchased Mislabeled Yogurt for resale and Defendants, its subsidiaries, affiliates, directors and officers or employees and legal representatives, heirs, successors or assignees.

27. Plaintiff reserves the right to amend or modify the Class definition with greater specificity or further division into subclasses or limitation to particular issues as discovery and the orders of this Court warrant.

28. Members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is presently unknown, and can only be ascertained through appropriate discovery, Plaintiff believes the members of the Class number in the tens of thousands.

29. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among questions of law and fact common to the Class are:

- a. Whether Defendants' marketing, advertising, packaging, labeling and other promotional materials concerning the Mislabeled Yogurt are deceptive;
- b. Whether Defendants knew or should have known its claims concerning the sugar content of the Mislabeled Yogurt are false and/or misleading;

- c. Whether Defendants breached express warranties by making the representations above;
- d. Whether Defendants have been unjustly enriched as a result of its unlawful business practices;
- e. Whether Defendants' actions as described above violate the FDUTPA, Fla. Stat. §§ 501.201, *et seq.*; and
- f. Whether Defendants should be required to make restitution, disgorge profits, reimburse losses, and pay damages as a result of the above described practices.

30. Plaintiff's claims are typical of the claims of Class members because Plaintiff and each member of the Class purchased Mislabeled Yogurt and suffered a loss of money as a result of that purchase.

31. Plaintiff is an adequate representative of the Class because her interests do not conflict with the interests of the Class members she seeks to represent, she has retained competent counsel experienced in prosecuting class actions, and she intends to prosecute this action vigorously. The interests of Class members will be fairly and adequately protected by Plaintiff and her counsel.

32. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by the individual members of the Class may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this class action.

COUNT I
UNJUST ENRICHMENT

33. Plaintiff and Class members reallege and incorporate by reference each allegation set forth above and further allege as follows.

34. Plaintiff brings this Count I individually and on behalf of the members of the Class against Defendants.

35. Plaintiff and Class members conferred a benefit on Defendants by purchasing the Mislabeled Yogurt.

36. Defendants have been unjustly enriched in retaining the revenues derived from Class members' purchases of the Mislabeled Yogurts, which retention under these circumstances

is unjust and inequitable because Defendants misrepresented the facts concerning the sugar content of the products and caused Plaintiff and the Class to lose money as a result thereof.

37. Plaintiff and Class members suffered a loss of money as a result of Defendants' unjust enrichment because: (a) they would not have purchased the Mislabeled Yogurt on the same terms if the true facts concerning the sugar content and mislabeling of the Mislabeled Yogurt had been known; (b) they paid a price premium due to the false representations about the Mislabeled Yogurt; and (c) the Mislabeled Yogurt did not have the quality or value as promised.

38. Because Defendants' retention of the non-gratuitous benefit conferred on them by Plaintiff and Class members is unjust and inequitable, Defendants must pay restitution to Plaintiff and Class members for its unjust enrichment, as ordered by the Court.

COUNT II
BREACH OF EXPRESS WARRANTY

39. Plaintiff and Class members reallege and incorporate by reference each allegation set forth above and further allege as follows.

40. Plaintiff brings this Count II individually and on behalf of the members of the Class against Defendants.

41. Defendants expressly warranted in its labeling, marketing, advertising and promotion of the Mislabeled Yogurts that the Mislabeled Yogurts contained 2 grams of sugar per serving. These statements are untrue as detailed above. These promises regarding sugar content specifically relate to the goods being purchased and became the basis of the bargain.

42. Plaintiff and members of the Class purchased the Mislabeled Yogurt based upon the above said express warranties made in Defendants' advertising and labeling of the

Mislabeled Yogurt. Defendants breached their express warranties by selling the Mislabeled Yogurt that did not conform to the warranties they made.

43. Plaintiff and the Class were injured as a direct and proximate result of Defendants' breach and deserve to be compensated for the damages they suffered. Plaintiff and Class members suffered a loss of money as a result of Defendants' breach of warranty because: (a) they would not have purchased the Mislabeled Yogurt on the same terms if the true facts concerning the sugar content and mislabeling of the Mislabeled Yogurt had been known; and (b) they paid a price premium due to the false representations about the Mislabeled Yogurt.

COUNT III
VIOLATION OF FLORIDA'S FDUTPA
(Fla. Stat. §§ 501.201, *et seq.*)

44. Plaintiff and Class members reallege and incorporate by reference each allegation set forth above and further allege as follows.

45. This Count III is asserted by Plaintiff on behalf of the Class under Florida law.

46. This cause of action is brought pursuant to the FDUTPA, Fla. Stat. § 501.201 *et seq.* The express purpose of the 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).

47. Plaintiff and the Class are "consumers" within the meaning of the Fla. Stat. § 501.203(7).

48. Defendants were engaged in "trade of commerce" as defined by Fla. Stat. § 501.203(8).

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

50. Fla. Stat. § 501.204(2) states that “due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to [section] 5(a)(1) of the Federal Trade Commission Act.” Whole Foods’ unfair and deceptive trade practices are likely to mislead – and have misled – the consumer acting reasonably in the circumstances, and violate Fla. Stat. § 501.204.

51. Defendants have violated the FDUTPA by engaging in the unfair and deceptive practices as describe herein which offend public policies and are immoral, unethical, unscrupulous, and substantially injurious to consumers. Moreover, Defendants did not, in good faith, engage in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated the FDUTPA.

52. Plaintiff and the Class have been aggrieved by Defendants’ unfair and deceptive practices in that they paid Whole Foods for the Mislabeled Yogurts, a product they would not have purchased on the same terms if the true facts concerning the sugar content and mislabeling of the Mislabeled Yogurt had been known.

53. The damages suffered by Plaintiff and Class were directly and proximately caused by the deceptive, misleading and unfair practices of Defendants, as more fully described herein.

54. Pursuant to Fla. Stat. § 501.211(1), Plaintiff and the Class seek actual damages, restitution and disgorgement.

55. Additionally, pursuant to Fla. Stat. § 501.211(2 and 501.2105, Plaintiff and the Class make claims for damages and attorneys’ fees and costs.

COUNT IV
NEGLIGENT MISREPRESENTATION

56. Plaintiff and Class members reallege and incorporate by reference each allegation set forth above and further allege as follows.

57. Plaintiff brings this Count IV individually and on behalf of the members of the Class against Defendants.

58. Defendants misrepresented that the Mislabeled Yogurt contained 2 grams of sugar per serving.

59. These representations were material facts that influenced Plaintiffs' and Class members' purchase of the Mislabeled Yogurt.

60. Defendants made these representations with the intent to induce Plaintiff and Class members to act upon them by purchasing the Mislabeled Yogurt.

61. At the time Defendants made these representations, Defendants knew or should have known that these representations were false or made them without knowledge of their truth or veracity.

62. Plaintiff and Class members justifiably and detrimentally relied on these representations and, as a proximate result thereof, have suffered damages in the form of lost money from the purchase price of the Mislabeled Yogurts.

63. Plaintiff and Class members suffered a loss of money as a result of Defendants' wrongful conduct because if Plaintiff and the Class had known the true facts concerning the Mislabeled Yogurt, they would not have purchased the Mislabeled Yogurt on the same terms if the true facts concerning the sugar content and mislabeling of the Mislabeled Yogurt had been known; and (b) they paid a price premium due to the false representations about the Mislabeled Yogurt.

PRAYER FOR RELIEF

Plaintiff, on her own behalf and on behalf of the Class, prays for the following relief:

- A. For an order certifying a Class under Rule 1.220 of the Florida Rules of Civil Procedure and naming Plaintiff as Class Representatives and her attorneys as Class Counsel to represent the Class members;
- B. For an order declaring that Defendants' conduct violates the statutes referenced herein;
- C. For an order finding in favor of Plaintiff and the Class on all counts asserted herein;
- D. For an order awarding compensatory damages in amounts to be determined by the Court and/or jury;
- E. For prejudgment interest on all amounts awarded;
- F. For an order of restitution and all other forms of equitable monetary relief; and
- G. For an order awarding Plaintiff and the Class their reasonable attorneys' fees and expenses and costs of suit.

JURY DEMAND

Plaintiff demands trial by jury on all issues herein stated.

Dated: December 12th, 2014

Respectfully submitted,

By: s/Barry L. Davis

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