

II. JURISDICTION AND VENUE

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 (a) (1) in that the amount in controversy exceeds \$75,000 and plaintiff is not a citizen of the same state as the defendant.
4. This Court further has jurisdiction pursuant to 28 U.S.C. § 1332 (d) (2) in that this case has been filed as a putative class action, the proposed class consist of more than 100 persons, the amount of controversy exceeds \$5,000,000 and a member of the putative class of plaintiffs is a citizen of a State different from the defendant.
5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 in that the defendant is registered to conduct business in Missouri, operates multiple retail stores within this district and is otherwise subject to the Court's personal jurisdiction with respect to this action.

III. THE BIG BUSINESS OF HERBAL DIETARY SUPPLEMENTS

6. Herbal supplements are a type of dietary supplement that purport to contain plant materials having potential therapeutic properties.
7. For instance, manufacturers and distributors of Echinacea claim it helps to prevent colds, while manufacturers and distributors of Gingko Biloba praise its perceived ability to improve memory.
8. Herbal dietary supplements can be purchased at a variety of retail stores including supermarkets, health food stores and retail pharmacies.

9. The popularity of herbal supplements has been increasing since the 1960s. As of 2013, data showed that tens of millions of U.S. adults claimed to use herbal supplements. This represented a 33% increase since 2011.¹
10. Sales of herbal dietary supplements in the United States have steadily increased, reaching \$6 billion in total estimated sales.²
11. The global market for global herbal dietary supplements is estimated to be \$100 billion.³
12. Herbal supplements are regulated by the Food and Drug Administration, but not to the same extent as prescription pharmaceuticals. They have not been subjected to the same scientific scrutiny as prescription drugs.
13. According to the World Health Organization, the adulteration of herbal products is a threat to consumer safety.⁴

IV. DEFENDANT WALMART'S SALE OF HERBAL DIETARY SUPPLEMENTS

14. Defendant Wal-Mart sells its own store-brand herbal dietary supplements under the brand name Spring Valley at its retail stores in Missouri and all across the United States, including but not limited to supplements labeled Ginkgo Biloba, St. John's Wort, Ginseng, Garlic, Echinacea, and Saw Palmetto.
15. Plaintiff purchased Wal-Mart's Spring Valley brand herbal dietary supplements from Defendant Wal-Mart at its retail stores in Columbia and Boonville, Missouri.

¹ See <http://www.nutraingredients-usa.com/Markets/Future-looks-increasingly-bright-for-herbal-supplements-market-researcher-says>.

² See http://cms.herbalgram.org/press/2014/2013_Herb_Market_Report.html?ts=1423516029&signature=e0c37f11ff0664e577f6b48ccfc479b2.

³ See <http://www.nutraingredients-usa.com/Markets/Herbal-supplement-sales-to-hit-93.15-billion-by-2015-Report>.

⁴ See <http://www.biomedcentral.com/1741-7015/11/222>.

16. In particular, Plaintiff purchased Ginkgo Biloba on a regular basis from Defendant, and St. John's Wort intermittently.

17. In purchasing these herbal dietary supplements from Defendant, Plaintiff reasonably expected the product to contain the substances advertised on the product label.

18. Wal-Mart's herbal dietary supplements do not contain the substances claimed by Wal-Mart and in many cases contain other substances not listed on the product labels. For instance:

- a. Wal-Mart's Ginkgo Biloba product does not, in fact, contain ginkgo biloba. Instead, it contains oryza (commonly known as rice), dracaena (a tropical houseplant), mustard, wheat, radish, and non-plant materials.
- b. Wal-Mart's St. John's Wort product does not, in fact, contain St. John's Wort. Instead, it contains allium, oryza, and cassava.
- c. Wal-Mart's Ginseng product does not, in fact, contain ginseng. Instead, it contains oryza, dracaena, pinus strobes, wheat/grass, citrus, and non-plant materials.
- d. Wal-Mart's Garlic product does not, in fact, primarily contain garlic. Instead, it primarily contains, oryza, pinus strobes, palm, dracaena, wheat, oryza, and non-plant materials.
- e. Wal-Mart's Echinacea product does not, in fact, contain Echinacea. Instead, it contains non-plant materials.
- f. Wal-Mart's Saw Palmetto product predominately contains materials other than saw palmetto. Instead, it primarily contains alium, oryza, and non-plant materials.

**V. THE STATE OF NEW YORK'S INVESTIGATION OF
DEFENDANT WAL-MART'S HERBAL DIETARY SUPPLEMENT PRODUCTS**

19. The Attorney General for the State of New York has conducted an investigation of the defendant's herbal dietary supplement products.
20. That investigation resulted in the New York Attorney General issuing cease and desist letters to Wal-Mart on February 2, 2015.
21. The cease and desist letter issued to Wal-Mart established that six Wal-Mart "Spring Valley" brand dietary supplements purchased at three different locations were genetically tested five times per sample, yielding 90 results. The supplements tested included Ginkgo Biloba, St. John's Wort, Ginseng, Garlic, Echinacea, and Saw Palmetto.
22. Using established DNA barcoding technology, analytic testing disclosed that all of the tested dietary supplement products were either unrecognizable or a substance other than what they claimed to be.
23. According to the test results obtained by the New York Attorney General's office, only 4 percent of the tests yielded DNA matching the product label; 40 percent tested for botanical material other than what was on the label; and 56 percent yielded no plant DNA at all.

IX. CLASS ACTION ALLEGATIONS

24. Plaintiff brings this class action pursuant to Mo. Rev. Stat. § 407.010 et seq. (the Missouri Merchandising Practices Act) and Federal Rule of Civil Procedure 23 on behalf of herself and members of the following class:

All persons who purchased Wal-Mart Spring Valley herbal dietary supplements during the period February 2, 2010 through the present (the Class Period).

Excluded from the Class are Defendants, any entity in which the Defendants have a controlling interest or which has a controlling interest in Defendant, Defendant's

legal representatives, predecessors, successors, assigns, employees and the Court presiding over this action.

25. Plaintiff meets this class definition as a person who purchased herbal dietary supplements from the defendant within the Class period.
26. Members of the putative class can be identified using records and other information that Defendant keeps in the usual course of business. Members of the class can receive notification through direct mailings and publication, if necessary.
27. Given the size of the market for herbal dietary supplements and the size of the defendant's retail stores, the number of putative class members is so numerous that joinder is impracticable.
28. Plaintiffs' claims are typical of the class in that Plaintiff, like other putative class members, purchased defendant's store brand herbal supplements, which (1) purported to contain materials they did not actually contain (2) contained materials that were not identified on the product label, and sustained damages as a result.
29. There are numerous questions of law and fact common to the class, and such common questions predominate over any questions affecting only individual class members.
Common issues include, but are not limited to:
 - a. Whether the defendant's products did not contain the materials/ingredients as otherwise represented and/or advertised on the defendants' products' labels;
 - b. Whether the defendant's products contained materials/ingredients not disclosed on the product's packaging;
 - c. Whether the defendant's products constitute "merchandise" under Chapter 407 of the Missouri Revised Statutes;

- d. Whether plaintiff and the putative class members are “persons” under Chapter 407 of the Missouri Revised Statutes;
 - e. Whether the defendant, by manufacturing, marketing and selling its herbal dietary supplements, engaged in “trade” or “commerce” under Chapter 407 of the Missouri Revised Statutes;
 - f. Whether the defendant’s conduct as more fully described herein was deceptive or otherwise amounted to the concealment a material fact as described in Mo. Rev. Stat. § 407.020;
 - g. Whether defendant should be enjoined from continuing to sell herbal supplement products as currently constituted in the state of Missouri;
 - h. Whether the defendant has been unjustly enriched as result of its deceptive and unlawful conduct;
 - i. Whether the defendant intended for plaintiffs and the class to rely on the representations as to the materials/ingredients contained within its herbal dietary supplement products; and,
 - j. Whether the plaintiff and class relied on the defendant’s representations as to the materials/ingredients contained within their herbal dietary supplement products.
30. Defendant has engaged in a common course of conduct as to each member of the putative class. As such, all common questions are able to be resolved through the same factual occurrences as specifically or generally alleged herein.
31. Plaintiff will fairly and adequately represent and protect the interests of the members of the class. Plaintiff has no claims antagonistic to those of the class. Plaintiff has retained

competent and experienced counsel in complex class actions. Counsel is committed to the vigorous prosecution of this action.

32. The prosecution of separate actions by the Plaintiff and individual members of the class against Defendant would create a risk of inconsistent or varying adjudications on the common issues of law and fact related to this action.
33. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy given that the prosecution of thousands of individual actions would impose unnecessary burdens on the Courts and the expense and burden of litigation would substantially impair the ability of the class members to pursue individual cases to protect their rights. In the absence of a class action, Defendant will continue to violate Missouri and federal law in operating its business.
34. Class certification under Rule 52.08(b)(1) is appropriate because adjudications with respect to individual members of the class would, as a practical matter, be dispositive of the interest of other members not party to the adjudications.
35. Class certification under Rule 52.08(b)(2) is appropriate because Defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.
36. Class certification under Rule 52.08(b)(3) is appropriate because the common issues of fact and law alleged herein are common to the class and predominate over any question affecting only individual members, thereby rendering the class action superior to all other available methods for the fair and efficient adjudication of this controversy.

COUNT I

VIOLATION OF MISSOURI MERCHANDISING PRACTICES ACT

(Mo. Rev. Stat. §§ 407.010 et seq.).

37. Plaintiff incorporates the foregoing paragraphs as though fully set forth herein.
38. The Missouri Merchandising Practices Act, as codified in Chapter 407, RSMo and promulgated through administrative rules found in 15 C.S.R. 60-8.010 to 60-9.110, was enacted to prohibit deceptive, fraudulent and unfair conduct and to protect persons from such conduct. The act provides as follows in pertinent part:
- 407.020. 1. The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice.
39. Plaintiff and the putative class members are all natural persons.
40. Similarly, the defendant is a for-profit corporation that also satisfies the term “person” as § 407.010 defines it.
41. The defendant’s herbal dietary supplements are otherwise objects, wares, goods and/or commodities such that they constitute “merchandise as § 407.010 defines it.
42. By selling its herbal dietary supplements to plaintiff and the putative class members in exchange for cash or credit at their retail stores, the defendant finalized a sale as §407.010 defines it.
43. By advertising, offering for sale and selling its herbal dietary supplements at their retail stores, the defendant engaged in trade and commerce as § 407.010 defines it.

44. By marketing and selling herbal dietary supplements to plaintiffs that lacked herbal ingredients/materials as set forth on their products labels, and that further contained other ingredients/materials that did not appear on its' products' labels, the defendant engaged in deception, fraud, false pretense, false promise, misrepresentation, unfair practice, and the concealment, suppression, or omission of material facts in connection with a sale and advertisement as defined in § 407.020.
45. Defendant's action in selling herbal supplement products that did not contain the herbal supplements advertised has caused Plaintiff and the class substantial and ascertainable loss of money and/or property and other damages in that plaintiff and the putative class received a product different from the product Defendant advertised and plaintiffs believed they were purchasing that had a lesser value.
46. Plaintiff has been forced to hire attorneys to enforce her rights under the MMPA.
47. Defendant's conduct in this case shows reckless and conscious disregard for the health, well-being and rights of plaintiff and the putative class members entitling plaintiff and the class to an award of punitive damages in a reasonable amount.

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, prays the Court for judgment on Count I of her Petition for such sums as are fair and reasonable, for costs incurred, for attorney's fees pursuant to § 407.025, for an award of punitive damages, for an order enjoining the defendant from manufacturing, marketing and selling herbal dietary supplements that either do not contain plant ingredients as advertised and/or contain ingredients that do not appear on the label of such products, and for any and all other relief permitted by law this Court deems just and proper.

COUNT II:

FRAUDULENT MISREPRESENTATION

48. Plaintiff incorporates the foregoing paragraphs as though fully set forth herein.
49. The defendant marketed its herbal dietary supplements as having certain therapeutic benefits. Specifically, the defendants marketed (1) Gingko Biloba as having the ability to improve memory; (2) St. John's Wort as having the ability to improve depression (3) Ginseng as having the ability to strengthen the immune system; (4) garlic as having the ability to strengthen the immune system; (5) Echinacea as having the ability to fight off the common cold; (6) Saw Palmetto as having the ability to treat symptoms of an enlarged prostate gland; and, (7) Valerian Root as having the ability to help with sleep.
50. The products sold by the defendant bearing these names, however, did not contain the substances as indicated on the label of these products as set forth above.
51. In representing to its customers that the herbal dietary supplements listed above contained substances they did not, the defendant made a false and material representation about the contents of these herbal dietary supplement products.
52. Similarly, in including substances/ingredients in their herbal dietary supplements that did not appear on the label, the defendant further made a false and material representation as to the contents of their herbal dietary supplement products.
53. The defendant knew that its representations as to the contents of its herbal dietary supplements were false, or alternatively were ignorant as to the truth of their representations.

54. The defendant intended for the plaintiff and putative class members to rely on its representations in purchasing these herbal dietary supplements at defendant's retail stores.
55. Plaintiff and the putative class members did not know, and could not have known, that the defendant's products did not contain the herbal substances they claimed to contain and otherwise contained other substances not appearing on the products' labels.
56. Plaintiff and the putative class members had a right to rely on, and reasonably relied on the defendant's representations as to the contents of their herbal dietary supplement products.
57. As a direct and proximate result of the defendant's conduct as set forth above, plaintiff and the putative class members sustained pecuniary damages in that the product they received was not as advertised and was, in fact, of lesser value.

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, prays the Court for judgment on Count II of his Petition for such sums as are fair and reasonable, for costs incurred, for punitive damages in a reasonable amount and for any and all other relief permitted by law this Court deems just and proper.

COUNT III

NEGLIGENT MISREPRESENTATION

58. Pleading in the alternative to Count II, Plaintiff incorporates the foregoing paragraph as though fully set forth herein.
59. The defendant marketed its herbal dietary supplements as having certain therapeutic benefits. Specifically, the defendants marketed (1) Gingko Biloba as having the ability to improve memory; (2) St. John's Wort as having the ability to improve depression (3)

- Ginseng as having the ability to strengthen the immune system; (4) garlic as having the ability to strengthen the immune system; (5) Echinacea as having the ability to fight off the common cold; (6) Saw Palmetto as having the ability to treat symptoms of an enlarged prostate gland; and, (7) Valerian Root as having the ability to help with sleep.
60. The products sold by the defendant bearing these names, however, did not contain the substances as indicated on the label of these products as set forth above.
61. Defendant, in its regular course of business represented their herbal dietary supplements to have ingredients and properties they did not in order to induce customers such as plaintiff and the putative class to purchase such products and thereby confer a pecuniary benefit upon defendant.
62. In representing the contents of the aforementioned herbal dietary supplements, the defendant failed to exercise reasonable care and competence and, as a result, the representations they made to their customers were false.
63. The defendant intentionally made representations as to the contents of their herbal dietary supplements in order to guide persons such as plaintiff and the putative class members to enter a business transaction with defendant to purchase such products.
64. Plaintiff and the putative class members had a right to rely on, and reasonably relied on the defendant's representations as to the contents of their herbal dietary supplement products.
65. As a direct and proximate result of the defendant's conduct as set forth above, plaintiff and the putative class members sustained pecuniary damages in that the product they received was not as advertised and was, in fact, of lesser value.

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, prays the Court for judgment on Count III of his Petition for such sums as are fair and reasonable, for costs incurred, for punitive damages in a reasonable amount and for any and all other relief permitted by law this Court deems just and proper.

COUNT IV

UNJUST ENRICHMENT

66. Plaintiff incorporates the foregoing paragraphs as though fully set forth herein.
67. By purchasing the defendant's store brand herbal dietary supplements, plaintiff and the putative class members conferred a pecuniary benefit on the defendant.
68. In accepting money from the plaintiff and putative class members in exchange for the defendant's store brand herbal dietary supplements, the defendant realized the benefit that plaintiff and the putative class conferred upon them.
69. The defendant has retained the benefit conferred upon them under inequitable and unjust circumstances in that the products sold to plaintiff and the putative class were not as advertised and did not otherwise contain the herbal substances they purported to retain.
70. Because defendant has retained the benefit that plaintiff and the putative class conferred upon it under inequitable and unjust circumstances, the defendant should be required to disgorge all monies they have received from plaintiff and the putative class members as a result of the defendant's sale of the specific herbal dietary supplements referenced above.

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, prays the Court for judgment on Count IV of his Petition for such sums as are fair and reasonable, for costs incurred, for punitive damages in a reasonable amount and for any and all other relief permitted by law this Court deems just and proper.

Respectfully submitted,

**BARTIMUS, FRICKETON, ROBERTSON
& GOZA, P.C.**

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JS 44 (Rev 09/10)

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI****CIVIL COVER SHEET**

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is authorized for use only in the Western District of Missouri.

The completed cover sheet must be saved as a pdf document and filed as an attachment to the Complaint or Notice of Removal.

Plaintiff(s):

First Listed Plaintiff:
Sherri Lowe ;
1 Citizen of This State;
County of Residence: Cooper County

Defendant(s):

First Listed Defendant:
WalMart ;
NA;
County of Residence: Outside This District

County Where Claim For Relief Arose: Cooper County

Plaintiff's Attorney(s):

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Basis of Jurisdiction: 4. Diversity of Citizenship

Citizenship of Principal Parties (Diversity Cases Only)

Plaintiff: 1 Citizen of This State

Defendant: NA

Origin: 1. Original Proceeding

Nature of Suit: 890 Other Statutory Actions

Cause of Action: Missouri Merchandising Practices Act Fraudulent Misrepresentation Negligent Misrepresentation Unjust Enrichment

Requested in Complaint

Class Action: Class Action Under FRCP23

Monetary Demand (in Thousands): >5,000,000,000

Jury Demand: Yes

Related Cases: Is NOT a refiling of a previously dismissed action

Signature: /s/Edward D. Robertson, III

Date: 2/13/15

If any of this information is incorrect, please close this window and go back to the Civil Cover Sheet Input form to make the correction and generate the updated JS44. Once corrected, print this form, sign and date it, and submit it with your new civil action.