

**THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

FILED

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CHRISTOPHER HOLLY, on behalf
of himself and all others similarly situated,

Case No.

CLERK, US DISTRICT COURT
MIDDLE DISTRICT OF FL
OCALA FLORIDA

Plaintiff,

CLASS ACTION

5:18-cv-453-OC-30PAL

-v-

HARDEE'S FOOD SYSTEMS, Inc
Located Tennessee,

**COMPLAINT FOR:
VIOLATIONS OF FEDERAL TRUTH IN
ADVERTISING ACT; THE LANHAM ACT;
FLORIDA'S UNFAIR COMPETITION
LAW; FALSE ADVERTISING LAW AND
CONSUMERS LEGAL REMEDIES ACT;
AND UNJUST ENRICHMENT**

Defendant.

Demand for Jury Trial

COMPLAINT

Plaintiff Chris Holly ("Plaintiff") alleges the following against Hardee's Food Systems Corporation ("Hardee's" or "Defendant") upon personal knowledge as to his own transactions and upon information and belief as to all other matters.

PRELIMINARY STATEMENT

1. That at all times relevant herein, and on or about 1992 the Defendant began selling a product it styled as "Frisco Breakfast Sandwich", currently available nationwide.
2. The Defendant advertised the Frisco Breakfast Sandwich as full of "ham".
3. Plaintiff asserts what the Defendant "actually serves" the general public, and what he personally received, was not even "close" to what the Defendant advertises the "Frisco Breakfast Sandwich" to look like.
4. Advertising pictures matter. Relying on Hardees representations how the "Frisco Breakfast Sandwich" will look like, consumers have been misled *en masse* into purchasing the sandwich.
5. In other words, by failing to offer a breakfast sandwich that "reasonably resembles" an advertisement picture, Hardees fraudulently, misleadingly, and deceptively

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adulterated the supposed “Frisco Breakfast Sandwich”. Its reasons for doing so are self-evident: by seriously decreasing the amount of sliced ham placed on the sandwich, thereby allowing Hardees to save money and increase its profit illegally..

6. Defendant’s advertising is misleading, deceptive, unfair, and fraudulent. It also violates, among other laws, Florida’s False Advertising Law (“FAL”), Florida Deceptive Trade Practices Laws (“FDTPL”).

PARTIES

7. Plaintiff Chris Holly resides in Marion County, Florida. On July 16, 2018 he purchased and consumed a “Frisco Breakfast Sandwich” from a Hardees located at 908 NW Pine Ave, Ocala, Florida. He would not have purchased the sandwich in question, had he known aforesaid sandwich in question was not prepared even close how it is advertised.

8. Defendant Hardees Corporation is a citizen of Tennessee with its corporate offices and principal place of business located at 6700 Tower Circle, Suite 1000 Franklin, TN 37067

9. Defendant sells its “Frisco Breakfast Sandwich’s” through its retail locations and franchise locations throughout the United States, including in Florida

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action under 28 U.S.C. § 1332(d), because this is a class action in which: (1) the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs; (2) members of the proposed class are citizens of a State different from Hardees principal place of business and place of incorporation; an) the number of members of the class is greater than 100.

11. Because a substantial portion of the wrongdoing alleged herein occurred in Florida, this Court has personal jurisdiction over Defendant. Defendant also has sufficient minimum contacts with Florida and has otherwise intentionally availed itself of the markets in Florida through the promotion, marketing, and sale of products sufficient to render the exercise

12. Venue is proper in this District under 28 U.S.C. § 1391(b)(2) and (3), because: (1) a substantial part of the events or omissions giving rise to these claims occurred in this District; (2) a substantial part of the property that is the subject of this action is situated in this District; and (3) Defendant is subject to the Court's personal jurisdiction with respect to this action.

TRUTH IN ADVERTISING

13. The Federal Trade Commission enacting the Truth In Advertising act, has clearly defined, when consumers see or hear an advertisement, whether it's on the Internet, radio or television, or anywhere else, that ad must be truthful, not misleading, and, when appropriate, backed by scientific evidence.

14. In addition to the FTC under the FTC Act, private parties, such as consumers, can bring legal action regarding false advertising under the Lanham Act.

15. To establish a violation under the Lanham Act, consumers must prove that the advertiser made false statements, that the false advertisements actually deceived or had the capacity to deceive, that the deception was material, that the falsely advertised product was sold in interstate commerce, and that the party bringing the lawsuit (the plaintiff) was injured as a result of the deception.

16. The penalties for a Lanham Act violation include the additional profits to the advertiser resulting from the deceptive advertisement, treble damages, and attorneys' fees.

FACTUAL ALLEGATIONS

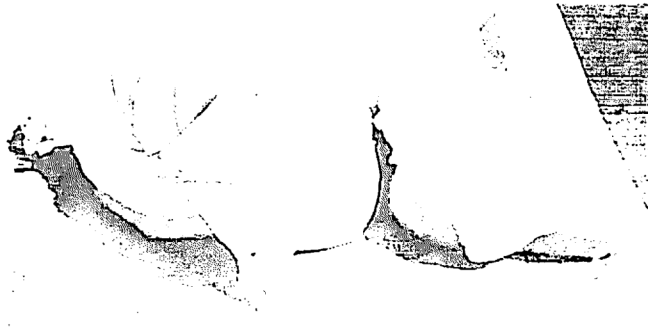
A. The "Frisco Breakfast Sandwich"

17. The "Frisco Breakfast Sandwich" has a folded egg and thinly sliced ham, topped with American & Swiss Cheeses stacked on fresh sourdough toast.

18. In 1992, Hardees began selling the "Frisco Breakfast Sandwich" in Hardees restaurants located nationwide.

19. Across the country, Hardees has begun advertising the Sandwich as filled with sliced ham. Below is an example of advertising picture:

20. The “actual” sandwich the Defendant is selling to the general public, including the Plaintiff looks like this:



21. This renders the actual sandwich sold to the general public, including the Plaintiff extremely misleading and adulterated, in contravention of federal regulations and Florida law. The ham contents of the sandwich cannot, under applicable law, be considered even close to the amount of ham as advertised by the Defendant..

22. Relying on representations about the amount of ham on the Sandwich, consumers have been misled *en masse* into purchasing an inferior, misleading, adulterated, and under-filled product, containing much less “sliced ham” as so displayed in the Defendant advertisement.

23. Such acts of product quantity misrepresentation result in consumers suffering a pecuniary loss by paying more for a product than they otherwise would have, or by purchasing a

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product they would not have absent the false, misleading, and deceptive advertising pictures. At minimum, consumers purchased the Sandwich believing their amount of sliced ham would reasonably resemble the amount of sliced ham displayed in the Defendants advertisement. To the extent that Hardees has used much less sliced ham then displayed in the Defendants advertisement.

24. These acts also harm competitors, by marketing an inferior, misleading, adulterated product.

CLASS ACTION ALLEGATIONS

25. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) on behalf of the following class: All persons in Florida who purchased Hardees “Frisco Breakfast Sandwich” (the “Florida Class”).

26. Additionally, Plaintiff seeks to certify a class pursuant to Federal Rule of Civil Procedure 23(b)(2) & 23(b)(3) on behalf of the following class: All consumers residing in the United States (the “Nationwide Class”).

27. Additionally, Plaintiff seeks to certify a class pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) on behalf of the following class:

All consumers who purchased Haedees “Frisco Breakfast Sandwich” in Alabama, Arkansas. Colorado, District of Columbia, Delaware, Florida, Georgia, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, North Dakota, Nebraska. New Hampshire, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, Wisconsin, West Virginia or Wyoming during the applicable liability period (the “Multi-State Class”).

28. The following persons are expressly excluded from the Classes: (i) Defendant and its subsidiaries and affiliates, (ii) all persons who make a timely election to be excluded from the

29. **Numerosity.** The Class comprises thousands of consumers throughout Florida and the nation. The Classes is so numerous that joinder of all members is impracticable.

30. **Commonality and Predominance.** Common questions of law and fact exist as to Plaintiff and the Classes and predominate over any questions that affect only individual Classes members. These common questions of law and fact include, without limitation:

- (a) Whether the “Frisco Breakfast Sandwich” contains reasonable equivalent “slices of ham,” as displayed in Defendants advertisement in a manner that does not violate federal law;
- (b) Whether advertising the “Frisco Breakfast Sandwich” as full of “sliced ham” violated Florida law;
- (c) Whether consumers of the “Frisco Breakfast Sandwich” suffered a pecuniary harm; and,
- (d) Whether Defendant was unjustly enriched by its deceptive practices.

31. **Typicality.** Plaintiff’s claims are typical of the claims of Classes members. Plaintiff and the Classes sustained damages arising out of Defendant’s common course of conduct in violation of law, as described herein. The damages of each Class member were caused directly by Defendant’s unlawful and deceptive conduct.

32. **Adequacy.** Plaintiff will fairly and adequately protect the interests of the Classes because they share common injuries as a result of Defendant’s conduct that is common to all Class members. Plaintiff has no interests adverse to the interests of absent Class members. Plaintiff is currently acting *pro se*, however will retain expert counsel when this case reaches the point beyond Plaintiffs legal knowledge, ability and/or financial ability to prosecute. Plaintiff is committed to prosecuting this action vigorously on behalf of the Classes.

33. **Superiority.** A class action is superior to other methods of fairly and efficiently adjudicating this litigation. While not inconsequential, the damages as to any individual litigant are such that individual litigation is not feasible. Furthermore, many Class members may not even be aware that they have a claim. Accordingly, for Class members, a class action is the only mechanism by which they could reasonably expect to vindicate their rights.

34. The prosecution of separate actions by individual Class members would create a risk of inconsistent and varying adjudications concerning the subject of this action.

35. Class treatment of predominating common questions of law and fact is superior to multiple individual actions because it would conserve the resources of the courts and the litigants, and further the efficient adjudication of Class member claims.

36. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

37. Defendant has acted, or refused to act, in a manner that applies generally to the Classes, such that final injunctive relief is appropriate as to the Classes as a whole.

CAUSES OF ACTION

COUNT I

Florida's Unfair Competition Law: Violation of the "Unlawful" Prong Florida's. Bus. & Prof. Code Title XXXIII (on behalf of the Florida Class)

38. Plaintiff repeats and re-alleges each of the above allegations.

39. Florida's Unfair Competition Law § 626.951 or § 626.9561 prohibits any "unlawful, unfair, or fraudulent" business practice. Florida's Deceptive and Unfair Trade Practices Act, known as (here after referred as "FDUTP") and Florida's. Bus. & Prof. Code Title XXXIII. Defendant's misrepresentations listed herein are "unlawful" under Florida's law.

40. A business practice is "unlawful" under the UCL if it violates any other law or regulation.

41. As explained herein, because the Sandwiches contain less than advertised amounts of sliced ham, the Sandwiches are misleading in violation of the law. Federal Trade Commission's Truth In Advertising act.

42. Defendant's conduct also violates various provisions of Florida's Intentional False Advertising Prohibited Act § 817.44.

43. As a result of the conduct described above, Defendant has been, and will continue to be, unjustly enriched at the expense of Plaintiff and the other Florida Class members. Specifically, Defendant has been unjustly enriched by obtaining revenues and profits it would not otherwise have obtained absent its false, misleading, and deceptive practices.

44. Plaintiff seeks to enjoin further unlawful, unfair, and/or fraudulent acts or practices by Defendant, to obtain restitutionary disgorgement of all monies and revenues generated as a result of such practices, and to obtain all other relief allowed under the FDUTP and Florida's. Bus. & Prof. Code Title XXXIII.

COUNT II
Violation of Florida's Unfair Competition Law: Violation of the "Unfair" Prong
Florida's. Bus. & Prof. Code Title XXXIII
(on behalf of the Florida Class)

45. Plaintiff repeats and re-alleges each of the above allegations.

46. Florida's UCL prohibits any "unlawful, unfair, or fraudulent" business practice. FDUTP and Florida's. Bus. & Prof. Code Title XXXIII. Defendants misrepresentations in advertising of the Sandwiches are "unfair" under Florida law.

47. A business practice is "unfair" under the UCL if the gravity of the harm to the victim outweighs the utility of the defendant's conduct.

48. Defendant has violated, and continues to violate, the "unfair" prong of the UCL by misrepresenting the amount of sliced ham on the Sandwich as displayed in the Defendants advertisement.

49. The gravity of the harm to Plaintiff and the other Florida Class members resulting from these unfair acts and practices outweighs any conceivable utility of Defendant's conduct.

50. As a result of the conduct described above, Defendant has been, and will continue to be, unjustly enriched at the expense of Plaintiff and the other Florida's Class members. Specifically, Defendant has been unjustly enriched by obtaining revenues and profits it would not otherwise have obtained absent its false, misleading, and deceptive practices.

51. Plaintiff seeks to enjoin further unlawful, unfair, and/or fraudulent acts or practices by Defendant, to obtain restitutionary disgorgement of all monies and revenues generated as a result of such practices, and to obtain all other relief allowed under the FDUTP and Florida's Bus. & Prof. Code Title XXXIII.

COUNT III
Violation of Florida's Unfair Competition Law: Violation of the
"Fraudulent" Prong
Florida's Bus. & Prof. Code Title XXXIII
(on behalf of the Florida Class)

52. Plaintiff repeats and re-alleges each of the above allegations.

53. Florida's UCL prohibits any "unlawful, unfair, or fraudulent" business practice. FDUTP and Florida's Bus. & Prof. Code Title XXXIII. Defendant's misrepresentations and omissions in advertising of the Sandwiches are "unfair" under Florida law.

54. A fraudulent business practice is one in which members of the public are likely to be deceived.

55. Defendant has violated, and continues to violate, the "fraudulent" prong of the UCL by misrepresenting the actual amount of sliced ham on the Sandwich. In so doing, Defendant deceives its customers into buying products they believe contain a "reasonable amount" of slice ham as advertised, which they do not.

56. As a result of the conduct described above, Defendant has been, and will continue to be, unjustly enriched at the expense of Plaintiff and the other Florida Class members. Specifically, Defendant has been unjustly enriched by obtaining revenues and profits it would not otherwise have obtained absent its false, misleading, and deceptive practices.

57. Plaintiff seeks to enjoin further unlawful, unfair, and/or fraudulent acts or practices by Defendant, to obtain restitutionary disgorgement of all monies and revenues generated as a result of such practices, and to obtain all other relief allowed under the FDUTP and Florida's. Bus. & Prof. Code Title XXXIII.

COUNT IV
Violation of Florida's False Advertising Law
(on behalf of the Florida Class)

58. Plaintiff repeats and re-alleges each of the above allegations.

59. This cause of action is brought under Florida's False Advertising Law, § 817.44 Intentional False Advertising Prohibited, Federal Truth In Advertising Act And The Federal Lanham Act.

60. The FAL, Federal Truth In Advertising Act, and Federal Lanham Act prohibits the dissemination of any advertising which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. Florida's False Advertising Law, § 817.44.

61. Defendant engaged in a scheme of offering the Sandwiches for sale to Plaintiff and the members of the Florida Class by way of advertising. These materials misrepresented the true amount of sliced ham of Defendant's Sandwiches.

62. As is explained herein, Defendant advertised, and continues to advertise, its products in a manner that was, and is, untrue and misleading.

63. Defendant knew or should have known that its advertisements were and are misleading or likely to mislead for the reasons set forth above.

64. Defendant's advertisements and inducements were made within Florida and come within the definition of advertising as contained in FDUTP and Florida's. Bus. & Prof. Code Title XXXIII in that such product displayed in the advertisement were intended as inducements to purchase Defendant's Sandwiches and are disseminated by Defendant to Plaintiff and the members of the Florida Class that were intended to reach the members of the Florida Class.

65. Plaintiff suffered injuries in fact and losses of money or property as a result of Defendant's acts and practices, which violate § 817.44 of the Florida's False Advertising Law.

COUNT V

**Violation of the Florida's Consumers Legal Remedies Act: Deceptive Advertising
(on behalf of the Florida's Class)**

66. Plaintiff repeats and re-alleges each of the above allegations.

67. This cause of action is brought under the FDUTP.

68. Plaintiff, as well as each member of the Class, constitutes a "consumer" within the meaning of the FDUTP.. Defendant's sale of the Sandwich's constitutes "transactions" within the meaning of Civil Code § 501.20.8(8) The merchandise purchased by Plaintiff and the Class members constitutes "goods" under Civil Code § 501.20.8(8).

69. Defendant's representations to Plaintiff and other members of the Class that they were receiving merchandise containing a "reasonable amount" or sliced ham as advertised were false, in violation of § 817.44 of Florida's False Advertising Law. Specifically, Defendants' conduct violated, among others, (1) Civil Code § 817.44 (1) which prohibits "[t]o offer for sale or to issue invitations for offers for the sale of any property, real or personal, tangible or intangible, or any services, professional or otherwise, by placing or causing to be placed before the general public, by any means whatever, an advertisement describing such property or services as part of a plan or scheme with the intent not to sell such property or services so advertised, or with the intent not to sell such property or services at the price at which it was represented in the advertisement to be available for purchase by any member of the general public and, (2) Civil Code § 817.44 (2) which prohibits "[t]o sell any article or a class of articles advertised, or the refusal to sell at the price at which it was advertised to be available for purchase, shall create a rebuttable presumption of an intent to violate this section.

70. Under Civil Code § 817.44 (1) and (2), Plaintiff, on behalf of himself and the Class, requests that this Court enjoin Defendant from continuing to engage in these unlawful and deceptive practices.

71. Plaintiff also reserves the right to amend this Complaint to include a request for damages under the FDUTP and Florida's. Bus. & Prof. Code Title XXXIII after complying with Civil Code § 817.44 (1) and (2) within thirty days after the commencement of this cause of action for injunctive relief.

COUNT VI
Unjust Enrichment
(on behalf of the Nationwide Classes)

72. As a result of Defendant's unlawful and deceptive actions described above, a benefit was conferred on Defendant at the expense of Plaintiff and the Classes.

73. Defendant appreciated and knew of this benefit.

74. Under the circumstances, it would be against equity and good conscience to permit Defendant to retain the ill-gotten benefits that it received from Plaintiff and the Classes.

75. Because Defendant's retention of the non-gratuitous benefit conferred on it by Plaintiff and all Class members is unjust and inequitable, Defendant must pay restitution to Plaintiff and the Class members for its unjust enrichment, as ordered by the Court.

PRAYER FOR RELIEF

Plaintiff, individually and on behalf of the Class, prays for judgment and relief against Defendant as follows:

- A. For an order certifying this case as a class action and appointing Plaintiff *Pro Se* to represent the Classes;
- B. For an order awarding, as appropriate, damages to Plaintiff and the Classes, including all monetary relief to which Plaintiff and the Classes are entitled under Florida law.
- C. For an order awarding restitutionary disgorgement to Plaintiff and the Classes;
- D. For an order awarding non-restitutionary disgorgement to Plaintiff and the Classes;
- E. For an order requiring Defendant to immediately cease and desist from selling its "Frisco Breakfast Sandwich" in violation of law; enjoining Defendant from continuing to deliver, offer to deliver, market, advertise, distribute, and sell its "Frisco Breakfast Sandwich" in the unlawful

manner described herein; and ordering Defendant to engage in corrective action

- F. For an order awarding attorneys' fees in the event Plaintiff retains counsel and costs pursuant to, inter alia, Florida Code of Civil Procedure § 501.2105
- G. For an order awarding pre-judgment and post-judgment interest as permitted by law; and
- H. For an order providing such further relief as this Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

Dated: August 28, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Christopher Holly", with a stylized flourish at the end.

Christopher Holly, CPL, AAS
Criminal Justice,
Pro Se Plaintiff
Po Box 1
Ocklawaha, FL 32183