

1 Penny L. Koepke
2 pkoepke@hoalaw.biz
3 Maxwell & Morgan, P.C.
4 4854 E. Baseline Road, Suite 104
5 Mesa, Arizona 85206
6 Telephone (480) 833-1001

7 [Additional counsel appearing on signature page]

8 *Attorneys for Plaintiff* SIDNEY NAIMAN
9 and the Class

10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE DISTRICT OF ARIZONA**

12 **Sidney Naiman**, individually and on
13 behalf of all others similarly situated,

14 Plaintiff,

Case No.

v.

JURY TRIAL DEMANDED

15 **Alle Processing Corp.**, a New York
16 Corporation,

Defendants.

17 **CLASS ACTION COMPLAINT**
18 **CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL**

19 Plaintiff Sidney Naiman (“Plaintiff” or “Naiman”) brings this Class Action
20 Complaint and Demand for Jury Trial (“Complaint”) against Defendant Alle
21 Processing Corp. (“Defendant” or “Alle”) to stop Defendant’s practice of selling
22 food products with inaccurate Nutrition Facts labels and to obtain redress for all
23 persons injured by its conduct. Plaintiff, for his Complaint, alleges as follows upon
24 personal knowledge as to himself and his own acts and experiences, and, as to all
25
26
27
28

1 other matters, upon information and belief, including investigation conducted by his
2 attorneys.

3 **NATURE OF THE ACTION**
4

5 1. Defendant Alle Processing Corp. is a food manufacturer based in
6 Queens, New York.

7 2. One of Defendant's food products is its Mon Cuisine brand frozen
8 meals.
9

10 3. Defendant formulated, manufactured, warranted, advertised, and sold
11 its Mon Cuisine frozen meals through the United States.
12

13 4. Unfortunately for consumers, who rely upon Defendant's advertising
14 and product label claims in deciding to purchase Defendant's food products, the
15 packaging of Defendant's Mon Cuisine frozen meals do not contain accurate
16 Nutrition Facts label statements.
17

18 5. Specifically, Defendant's Nutrition Facts label statements on the
19 packaging of its Mon Cuisine frozen meals significantly understate the calories, fat
20 content, cholesterol, sodium, and carbohydrates in a serving as well the Daily
21 Reference Value ("DRV").
22

23 6. This is because Defendant's Nutrition Facts statements inaccurately
24 state that there is only one 10 oz. serving in each container, when in reality the
25 containers contain 40 oz. of food.
26
27
28

1 59th Street, Maspeth, New York 11378. Defendant conducts business throughout
2 the State of New York and this District.

3
4 **JURISDICTION AND VENUE**

5 13. This Court has subject matter jurisdiction under the Class Action
6 Fairness Act, 28 U.S.C. § 1332 (“CAFA”), because the alleged Class consists of
7 over 100 persons, there is minimal diversity, and the claims of the class members
8 when aggregated together exceeds \$5 million. Further, none of the exceptions to
9 CAFA applies.
10

11 14. This Court has personal jurisdiction over Alle because it conducts
12 significant amounts of business transactions within this District, and the wrongful
13 conduct giving rise to this case occurred in, was directed to, and/or emanated from
14 this District.
15

16 15. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)
17 because both Plaintiff resides in this District and the causes of action arose, in
18 substantial part, in this District.
19
20

21 **COMMON FACTUAL ALLEGATIONS**

22 16. The FDA is responsible for assuring that foods sold in the United
23 States are properly labeled.
24

25 17. The Food, Drug, and Cosmetic Act (“FDCA”), 21 U.S.C. § 301, *et*
26 *seq.*, and the Fair Packaging and Labeling Act (“FPLA”) are the federal statutes
27
28

1 governing food products under the FDA's purview.

2 18. The National Labeling and Education Act ("NLEA"), which amended
3 the FDCA, requires most food to bear food labels and requires that the labels
4 contain nutrient content claims that comply with federally-mandated requirements.
5

6 19. Defendant's Mon Cuisine meals constitutes a food as that term is
7 defined under federal law and thus must comply with the FDCA's requirements, as
8 well as complying with the related FDA regulations codified at 21 C.F.R. § 101.9.
9

10 20. Defendant's misleading statements on its labels render its Mon Cuisine
11 meals misbranded as that term is defined in 21 U.S.C. § 343, *et. seq.*
12

13 **FACTS SPECIFIC TO PLAINTIFF NAIMAN**

14 21. Plaintiff Naiman fell victim to Defendant's mislabeled Mon Cuisine
15 meals.
16

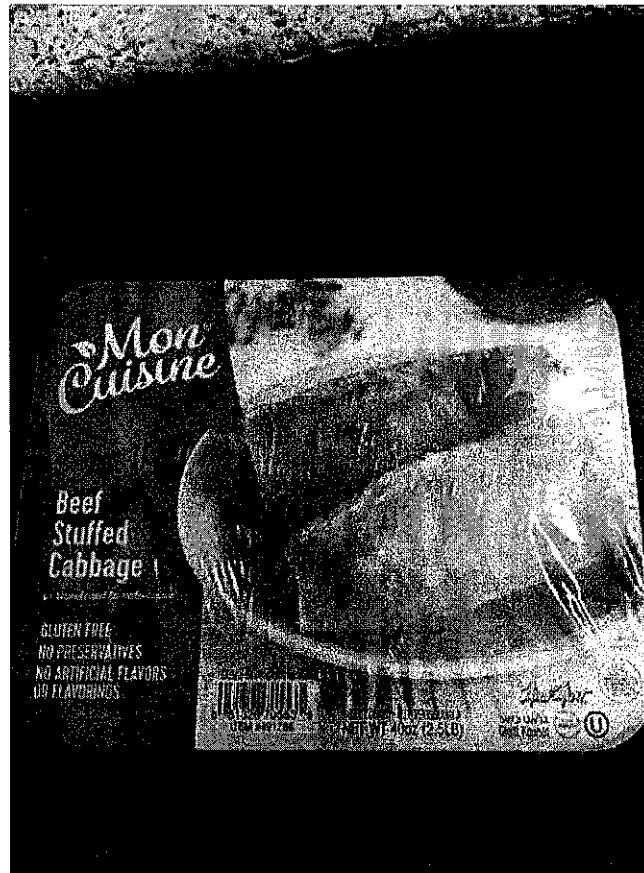
17 22. Naiman purchased one of Defendant's Mon Cuisine meals (the "Beef
18 Stuffed Cabbage" variety) on April 14, 2020 at a Costco store located at 4570 East
19 Cactus Road, Phoenix, AZ 85032.
20

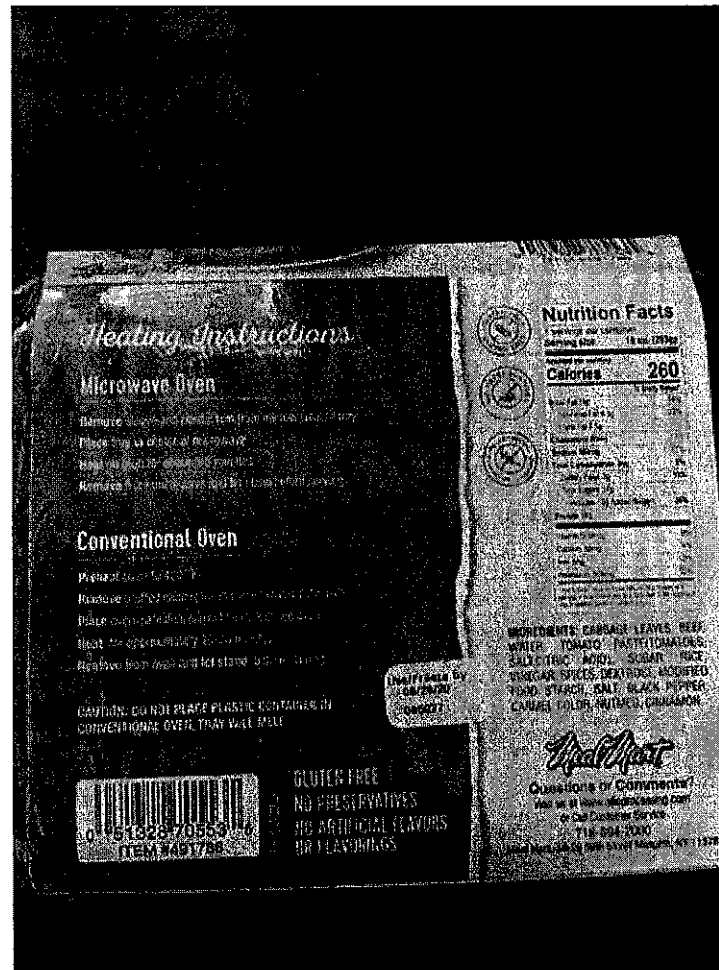
21 23. Naiman purchased Defendant's Mon Cuisine meal for his own
22 consumption.
23

24 24. Naiman purchased Defendant's product in part based on the
25 aforementioned misrepresentations concerning the product's nutrient content.
26
27
28

1 25. Plaintiff would not have purchased and consumed the product had she
2 known the truth about the product's nutrient content.

3 26. Below are photographs of the Mon Cuisine meal purchased by
4 Plaintiff:
5





1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18 27. Naiman is a member of the alleged Class pleaded herein, who all
19 purchased Defendant's Mon Cuisine products during the relevant time period.

20
21 28. Naiman and the other members of the Class were misled by
22 Defendant's misrepresentations and would not have purchased the products if they
23 had not been deceived by the inaccurate nutrient label.
24
25
26
27
28

CLASS ALLEGATIONS

1
2 29. Plaintiff Naiman brings this action pursuant to Federal Rule of Civil
3 Procedure 23(a), (b)(2), and (b)(3) on behalf of herself and two classes defined as
4 follows:
5

6 **Mon Cuisine Purchaser Class:** All persons in the United States who
7 from the beginning of any applicable statutory limitations period
8 through the present purchased Defendant’s Mon Cuisine product where
9 the nutrient label on the packaging of the product misrepresented the
10 nutritional content contained in the container.

11 30. The following people are excluded from the Class: any Judge or
12 Magistrate presiding over this action and members of their families; (2) Defendant,
13 Defendant’s subsidiaries, parents, successors, predecessors, and any entity in which
14 the Defendant or its parents have a controlling interest and its current or former
15 employees, officers and directors; (3) persons who properly execute and file a
16 timely request for exclusion from the Classes; (4) persons whose claims in this
17 matter have been finally adjudicated on the merits or otherwise released; (5)
18 Plaintiff’s counsel and Defendant’s counsel; and (6) the legal representatives,
19 successors, and assigns of any such excluded persons. Plaintiff anticipates the
20 potential need to amend the Class Definition following the completion of class
21 discovery regarding the size and scope of the Class.
22
23
24

25 31. **Numerosity:** The exact size of the Class is unknown and not available
26 to Plaintiff at this time, but individual joinder is impracticable. On information and
27
28

1 belief, there are hundreds or thousands of consumers who purchased Defendant's
2 Sous-Vide Oatmeal Bites and who fall into the definition of the Class. Members of
3 the Classes can be easily identified through Defendant's records and by reference to
4 objective criteria.

5
6 **32. Commonality:** There are several questions of law and fact common to
7 the claims of Plaintiff and the Class on which every class member's claim will
8 either succeed or fail, and which will be proven using common evidence. Such
9 common questions for the Class include, without limitation:
10

- 11 (a) Whether the product was mislabeled;
12
13 (b) Whether the Nutritional Facts label on the product is accurate;
14
15 (c) Whether Defendant violated federal labeling requirements;
16
17 (d) Whether Defendant breached express warranties to Plaintiff and
18 Members of the Class;
19
20 (e) Whether Defendant was unjustly enriched at the expense of
21 Plaintiff and the Class; and
22
23 (f) Whether Plaintiff and the Class are entitled to injunctive relief.

24 **33. Typicality:** Plaintiff's claims are typical of the claims of the other
25 members of the Class. Plaintiff is a member of the Class, and if Defendant's
26 labeling violated the law as it relates to Plaintiff then it violated the law as it relates
27 to other Class members. Plaintiff and the Classes sustained damages as a result of
28

1 Defendant's uniform wrongful conduct during transactions with Plaintiff and the
2 Class.

3 **34. Adequate Representation:** Plaintiff will fairly and adequately
4 represent and protect the interests of the Class, and has retained counsel competent
5 and experienced in complex class actions. Plaintiff has no interest antagonistic to
6 those of the Class, and Defendant has no defenses unique to Plaintiff.
7

8 **35. Policies Generally Applicable to the Class:** This class action is
9 appropriate for certification because Defendant has acted or refused to act on
10 grounds generally applicable to the Class as respective wholes, thereby requiring
11 the Court's imposition of uniform relief to ensure compatible standards of conduct
12 toward the Class members, and making final injunctive relief appropriate with
13 respect to the Classes as respective wholes. Defendant's practices challenged herein
14 apply to and affect the Class members uniformly, and Plaintiff's challenge of those
15 practices hinges on Defendant's conduct with respect to the Classes as respective
16 wholes, not on facts or law applicable only to Plaintiff.
17

18 **36. Predominance:** The common questions of law and fact set forth above
19 predominate over any individual issues.
20

21 **37. Superiority and Manageability:** This case is also appropriate for
22 class certification because class proceedings are superior to all other available
23 methods for the fair and efficient adjudication of this controversy given that joinder
24
25
26
27
28

1 of all parties is impracticable. The damages suffered by the individual members of
2 the Class will likely be relatively small, especially given the burden and expense of
3 individual prosecution of the complex litigation necessitated by Defendant's
4 actions. Thus, it would be virtually impossible for the individual members of the
5 Class to obtain effective relief from Defendant's misconduct. Even if members of
6 the Class could sustain such individual litigation, it would still not be preferable to a
7 class action, because individual litigation would increase the delay and expense to
8 all parties due to the complex legal and factual controversies presented in this
9 Complaint. By contrast, a class action presents far fewer management difficulties
10 and provides the benefits of single adjudication, economy of scale, and
11 comprehensive supervision by a single court. Economies of time, effort and expense
12 will be fostered and uniformity of decisions ensured.

13
14
15
16
17 **FIRST CAUSE OF ACTION**
18 **Breach of Express Warranties**
19 **(On behalf of Plaintiff and the Class)**

20 37. Plaintiff incorporates the foregoing allegations as if fully set forth
21 herein.

22 38. Defendant made express warranties and representations in respect to
23 the Mon Cuisine nutrient content, namely the number of servings contained in the
24 package.

25 39. Defendant's labeling on its Mon Cuisine packaging were made directly
26
27
28

1 to consumers and end purchasers of the product, constitute express warranties, and
2 became part of the basis of the bargain between the Parties.

3 40. Thus, a collective “express warranty” was created that the Mon
4 Cuisine meals would conform to Defendant’s affirmations and promises.
5

6 41. Defendant breached express warranties about its Mon Cuisine meals
7 because Defendant’s statements about the product were false and the product
8 doesn’t conform to Defendant’s affirmations and promises, as described above.
9

10 42. Defendant’s conduct constitutes a breach of express warranties under
11 UCC 2-313, as adopted by the follow state statutes:
12

13 Ala. Code § 7-2-313, et seq.; Alaska Stat. § 45.02.313, et seq.; Ariz.
14 Rev. Stat. § 47-2313, et seq.; Ark. Code § 4-2-313, et seq.; Cal. Com.
15 Code § 2313, et seq.; Colo. Rev. Stat. § 4-2-313, et seq.; Conn. Gen.
16 Stat. § 42a-2-313, et seq.; 6 Del. C. § 2-313, et seq.; D.C. Code § 28:2-
17 313, et seq.; Fla. Stat. § 672.313, et seq.; O.C.G.A. § 11-2-313, et seq.;
18 Haw. Rev. Stat. § 490:2-313, et seq.; Idaho Code § 28-2-313, et seq.;
19 810 Ill. Comp. Stat. 5/2-313, et seq.; Ind. Code § 26-1-2-313, et seq.;
20 Iowa Code § 554.2313, et seq.; Kan. Stat. § 84-2-313, et seq.; Ky. Rev.
21 Stat. § 355.2-313, et seq.; La. Rev. Stat § 9:2800.53(6) , et seq.; 11
22 M.R.S.A. § 2-313, et seq.; Md. Code Ann., Com. Law § 2-313, et seq.;
23 Mass. Code 106, § 2-313, et seq.; Mich. Comp. Laws 440.2313, et
24 seq.; Minn. Stat. § 336.2-313, et seq.; Miss. Code § 75-2-313, et seq.;
25 Mo. Rev. Stat. § 400.2-313, et seq.; Mont. Code § 30-2-313, et seq.;
26 Neb. U.C.C. § 2-313, et seq.; Nev. Rev. Stat. § 104.2313, et seq.; N.H.
27 Rev. Stat. § 382-A:2-313, et seq.; N.J. Stat. § 12A:2-313, et seq.; N.M.
28 Stat. § 55-2-313, et seq.; N.Y. U.C.C. § 2-313, et seq.; N.C. Gen. Stat.
§ 25-2-313, et seq.; N.D. Cent. Code § 41-02-30, et seq.; Ohio Rev.
Code § 1302.26, et seq.; Okla. Stat. Tit. 12A, § 2-313, et seq.; Or. Rev.
Stat. § 72.3130, et seq.; 13 Pa. Cons. Stat. § 2313, et seq.; R.I. Gen.
Laws § 6A-2-313, et seq.; S.C. Code § 36-2-313, et seq.; S.D. Codified
Laws § 57A-2-313, et seq.; Tenn. Code § 47-2- 313, et seq.; Tex. Bus.
& Com. Code § 17.50; V.T.C.A., Bus. & C. § 2.313, et seq.; Utah

1 Code § 70A-2-313, et seq.; Vt. Stat. Tit. 9A, § 2-313, et seq.; Va. Code
2 § 8.2-313, et seq.; Wash. Rev. Code § 62A.2-313, et seq.; W. Va. Code
3 § 46-2-313, et seq.; Wis. Stat. § 402.313, et seq.; and Wyo. Stat. §
4 34.1-2-313, et seq.

5 43. As a result of Defendant's breach of warranty, Plaintiff and the Class
6 have suffered actual damages in an amount to be determined at trial.

7
8 **SECOND CAUSE OF ACTION**
9 **Unjust Enrichment**
10 **(On behalf of Plaintiff and the Class)**

11 44. Plaintiff incorporates the foregoing allegations as if fully set forth
12 herein.

13 45. Plaintiff and the other members of the Class conferred benefits on
14 Defendant by purchasing its Mon Cuisine meals.

15 46. Defendant has been unjustly enriched in retaining the revenues derived
16 from the purchases of the Mon Cuisine meals by Plaintiff and the Class.

17 47. Retention of those monies under these circumstances is unjust and
18 inequitable because Defendant's labeling of the product was misleading to
19 consumers, which caused damages to Plaintiff and the Class because they would not
20 have purchased the product (or would have paid less for the product) had they
21 known the true nutrient facts.

22 48. Because Defendant's retention of the non-gratuitous benefits conferred
23 on it by Plaintiff and the Class is unjust and inequitable, Defendant must pay
24
25
26
27
28

1 restitution to Plaintiff and the Class, as Ordered by the Court.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiff Sid Naiman, individually and on behalf of the Class,
4 prays for the following relief:
5

6 1. An order certifying the Class as defined above, appointing Plaintiff Sid
7 Naiman as the representative of the Class and appointing his counsel as Class
8 Counsel;
9

10 2. A declaratory judgment declaring that Defendant's conduct violates
11 federal labeling requirements,
12

13 3. An award of actual monetary loss from such violations to be paid into
14 a common fund for the benefit of the Plaintiff and the other Class Members;
15

16 4. An injunction requiring Defendant and its agents to cease selling
17 mislabeled products, and otherwise protecting the interests of the Classes;

18 5. An award of reasonable attorneys' fees and costs to be paid from the
19 common fund; and
20

21 6. Such other and further relief that the Court deems reasonable and just.

22 **JURY DEMAND**

23 Plaintiff requests a trial by jury of all claims that can be so tried.
24

25
26 Respectfully submitted,
27
28

1 Dated: May 18, 2020

SID NAIMAN, individually and on behalf of
all others similarly situated,

2
3
4 By: /s/ Penny L. Koepke
One of Plaintiff's Attorneys

5 Penny L. Koepke
6 pkoepke@hoalaw.biz
Maxwell & Morgan, P.C.
7 4854 E. Baseline Road, Suite 104
Mesa, Arizona 85206
8 Telephone (480) 833-1001

9 Patrick H. Peluso*
10 ppeluso@woodrowpeluso.com
Stephen A. Klein*
11 sklein@woodrowpeluso.com
Woodrow & Peluso, LLC
12 3900 East Mexico Ave., Suite 300
Denver, Colorado 80210
13 Telephone: (720) 213-0675
Facsimile: (303) 927-0809

14 Attorneys for Plaintiff and the Class

15 * *Pro Hac Vice* admission to be sought
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

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 District of Arizona.

The completed cover sheet must be printed directly to PDF and filed as an attachment to the Complaint or Notice of Removal.

Plaintiff(s): Sidney Naiman

Defendant(s): Alle Processing Corp.

County of Residence: Maricopa

County of Residence: Outside the State of
Arizona

County Where Claim For Relief Arose: Maricopa

Plaintiff's Atty(s):

Defendant's Atty(s):

**Penny Koepke (Sidney Naiman)
Maxwell & Morgan P.C.
4854 E. Baseline Road, Suite 104
Mesa, Arizona 85206
480-833-1001**

II. Basis of Jurisdiction: 4. Diversity (complete item III)

**III. Citizenship of Principal
Parties (Diversity Cases Only)**

Plaintiff:-1 Citizen of This State
Defendant:-2 Citizen of Another State

IV. Origin : 1. Original Proceeding

V. Nature of Suit: 190 Other Contract

**VI.Cause of Action: 28 U.S.C. 1332. Breach of express warranties and unjust
enrichment claims arising from misleading nutrition facts label.**

VII. Requested in Complaint

Class Action: Yes
Dollar Demand:
Jury Demand: Yes

VIII. This case is not related to another case.

Signature: /s/ Penny Koepke

Date: 05/18/2020

If any of this information is incorrect, please go back to the Civil Cover Sheet Input form using the *Back* button in your browser and change it. Once correct, save this form as a PDF and include it as an attachment to your case opening documents.

Revised: 01/2014