

Case Type Code: TI

**IN THE CIRCUIT COURT OF JACKSON COUNTY
STATE OF MISSOURI**

Abby Fisher, individually and on
behalf of all others similarly situated in
Missouri,

Plaintiffs,

V.

Hy-Vee, Inc

Defendant.

Serve: C T CORPORATION SYSTEM
120 South Central Ave
Clayton, MO 63105

Case No.: _____

Division: _____

JURY TRIAL DEMANDED

PETITION AND JURY DEMAND

1. Plaintiff, Abby Fisher, individually and on behalf of all others similarly situated in Missouri, alleges the following facts and claims upon personal knowledge, investigation of counsel, and information and belief.

NATURE OF THE CASE

2. This case arises out of Defendant Hy-Vee, Inc.’s (“Hy-Vee” or “Defendant”) deceptive, unfair, and false merchandising practices regarding its Strawberries & Cream Instant Oatmeal and its Peaches & Cream Instant Oatmeal (individually, the “Oatmeal” or the “Product,” and together the “Oatmeals” or the “Products”).

3. The labels of the Oatmeals feature prominent imagery which leads a reasonable consumer to conclude the Oatmeals contain strawberries and peaches. What appear to be dried strawberries and dried peaches are in fact cheap pieces of colored apple, literally disguised by dying to look like more expensive fruit.

4. Competing similar products either contain the actual, undisguised fruit, or emphasize on the label that flavored apple pieces are included rather than actual strawberries or peaches.

5. Plaintiff brings this case to recover damages for Defendant's false, deceptive, and misleading marketing and advertising in violation of the Missouri Merchandising Practices Act ("MMPA") and Missouri common law.

PARTIES

6. Plaintiff Abby Fisher is a resident of Lees Summit, Missouri. On at least one occasion during the Class Period (defined below), including on August 17, 2020, Plaintiff purchased the Oatmeals at a Hy-Vee grocery store located in Lees Summit, Missouri, for personal, family, or household purposes and for evaluative purposes of this lawsuit. The purchase price was \$1.50 for each Product. Plaintiff's claim is typical of class members in this regard.

7. On information and belief, Hy-Vee, Inc. is a citizen of Iowa (its state of incorporation and principal place of business). Hy-Vee maintains a registered agent in Missouri, at C T Corporation System, 120 South Central Ave. Clayton, Mo 63105.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action because the amount in controversy exceeds the minimum jurisdictional limits of the Court. The amount in controversy, however, is less than \$75,000 per Plaintiff and Class Member individually and less than \$5,000,000 in the aggregate.

9. Plaintiff believes and alleges that the total value of her individual claims is, at most, equal to the refund of the purchase price she paid for the Oatmeals. Moreover, because the value of Plaintiff's claims is typical of all class members with respect to the value of the claim, the total damages of Plaintiff and Class Members, inclusive of costs and attorneys' fees, will not exceed

\$4,999,999 and is far less than the five million dollar (\$5,000,000) minimum threshold to create federal court jurisdiction. There is therefore no diversity or CAFA jurisdiction for this case.

10. Defendant cannot plausibly allege that it had sufficient sales of the Oatmeals in Missouri during the Class Period to establish an amount in controversy that exceeds CAFA's jurisdictional threshold.

11. This Court has personal jurisdiction over Defendant pursuant to Missouri Code § 506.500, as Defendant has had more than minimum contact with the State of Missouri and has availed itself of the privilege of conducting business in this state. In addition, as explained below, Defendant has committed affirmative tortious acts within the State of Missouri that gives rise to civil liability, including distributing the fraudulent Oatmeals for sale throughout the State of Missouri.

12. Venue is proper in this forum pursuant to Missouri Code § 508.010 because Plaintiff's injury occurred in Jackson County and because Defendant is not a resident of this State.

13. Plaintiff and Class Members do not seek to recover punitive damages or statutory penalties in this case.

14. This pleading demands unliquidated damages. Accordingly, it is intended to limit recovery to an amount less than that required for diversity or CAFA jurisdiction in federal court.

ALLEGATIONS OF FACT

15. Defendant produces, markets, and sells foodstuffs—including the Oatmeals—throughout the United States, including Missouri.

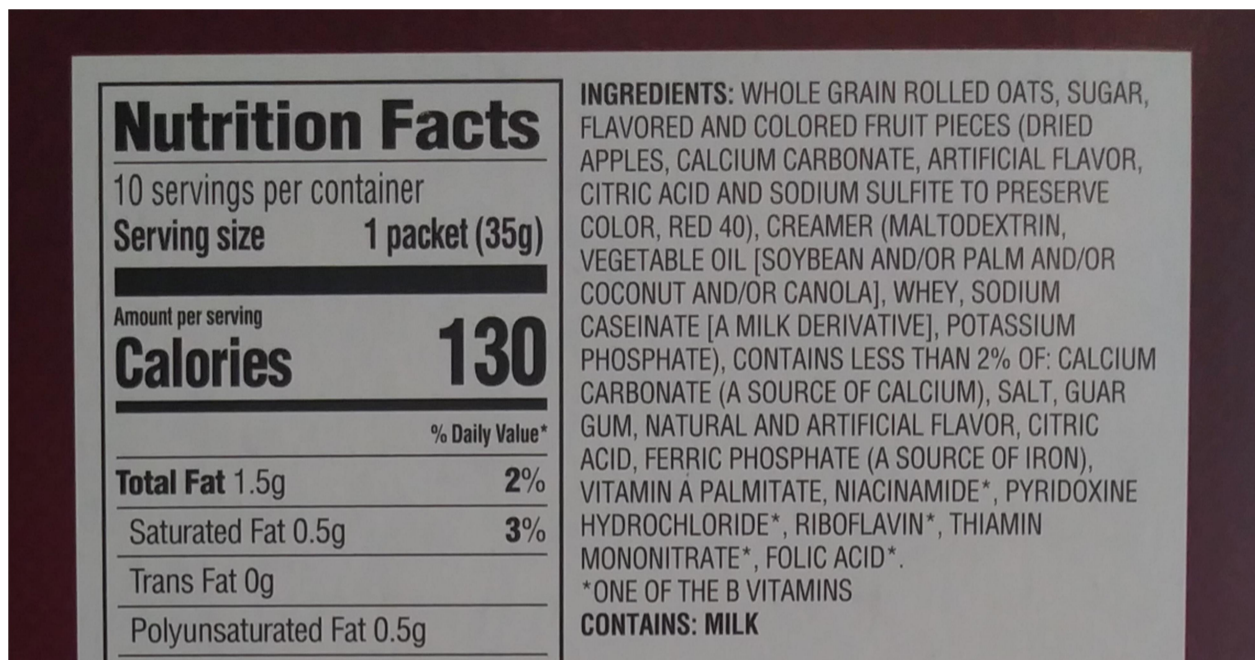
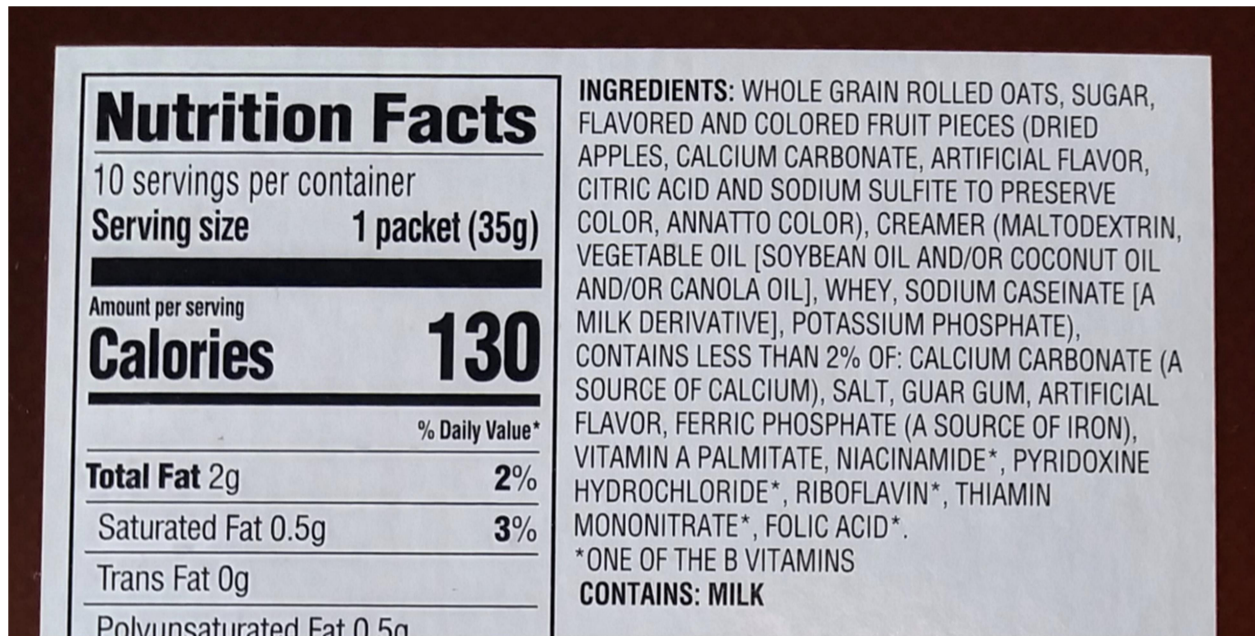
16. As part of its packaging, labeling, and sales, Defendant affixed labels to the Oatmeals that contain photographs of fruit that appear to be dried strawberries and dried peaches, along with images of fresh strawberries and peaches, and text that prominently states "Strawberries"

and “Peaches.” Much smaller and less prominent text states that the product is “artificially flavored.”

17. In fact, the Oatmeals do not contain strawberries or peaches. The small fruit pieces photographed inside the oatmeal that appear to be pieces of strawberry and peach are instead pieces of apple that have been colored with annatto¹ and Red 40 to look like peaches and strawberries—much more expensive fruits. Whole strawberries and a whole peach included in the imagery strengthen the consumers’ association that the Oatmeals contain the depicted fruits.



¹ A dye derived from achiote seeds, used in foods as well as textiles, cosmetics, and hygiene products.



18. Defendant's Products thus imitate competitors that sell instant oatmeal which actually contains the advertised fruit, such as Kodiak's Strawberries and Cream (containing strawberries)² or Better Oats Classic Strawberries & Cream (containing strawberries, while noting the product

² https://shop.kodiakcakes.com/products/strawberries-and-cream-oatmeal-packets?variant=31290516471875&utm_medium=cpc

also contains “artificial strawberries ... flavor”).³ Better Oats is a telling comparison, as the vignette shows the incredible similarity between actual dried strawberries (Better Oats) and dyed apple pieces (Hy-Vee), and Better Oats similarly notes artificial flavoring while still containing the depicted fruit.



19. As shown in the Better Oats example, instant oatmeal thus can be artificially flavored in multiple ways (in the oatmeal, and in the dried fruit). Competing products including artificial flavoring in the fruit pieces take care to inform consumers this is the case. For example, Quaker sells a similar product (with flavored apple pieces) which actually informs consumers in the principal display panel that they are buying “**ARTIFICIALLY FLAVORED FRUIT PIECES**” (bold

³ https://www.amazon.com/Better-Oats-STRAWBERRIES-Instant-Oatmeal/dp/B00IIUGSBY/ref=asc_df_B00IIUGSBY/?tag=hyprod-20&linkCode=df0&hvadid=312152750572&hvpos=&hvnetw=g&hvrnd=3874244829162900374&hvpone=&hvptwo=&hvqmt=&hvdev=c&hvdvcmdl=&hvlocint=&hvlocphy=9029600&hvtargid=pla-570710678050&pssc=1&tag=&ref=&adgrpid=64869345351&hvpone=&hvptwo=&hvadid=312152750572&hvpos=&hvnetw=g&hvrnd=3874244829162900374&hvqmt=&hvdev=c&hvdvcmdl=&hvlocint=&hvlocphy=9029600&hvtargid=pla-570710678050.

emphasis added), and that the product itself is “**ARTIFICIAL STRAWBERRIES & CREAM FLAVOR**” (bold emphasis added).⁴



Similarly, H-E-B’s Strawberries & Cream Instant Oatmeal includes “**ARTIFICIALLY FLAVORED FRUIT PIECES**” (bold emphasis added) on the front labels to inform consumers they are not buying actual strawberries.⁵

20. Hy-Vee currently advertises variants of these labels that contains *additional* misleading elements: “artificially flavored” statements that are nearly the same color as the background of

⁴ <https://www.walmart.com/ip/Quaker-Instant-Oatmeal-Strawberries-Cream-10-Packets/10312453>. For peaches, the Quaker labeling contains a similar note to consumers. https://www.amazon.com/Quaker-Instant-Oatmeal-Peaches-Cream/dp/B015N1G5XQ/ref=sr_1_11?dchild=1&keywords=oatmeal+peaches&qid=1597898287&s=grocery&sr=1-11.

⁵ <https://www.heb.com/product-detail/h-e-b-instant-strawberries-cream-instant-oatmeal/445128>.

the principal display panel, in contrast to bright, vivid, and large lettering indicating Strawberries (in the color of strawberries) and Peaches (in the color of peaches).⁶



21. Further, some Hy-Vee Oatmeals actually *do* contain the fruits depicted on the label, further strengthening the association in the minds of reasonable consumers that what they see is what they get from Hy-Vee.⁷

22. Defendant then placed the Oatmeals with the misleading labels into the stream of commerce, where they were purchased by Plaintiff and Class Members.

23. Defendant's purpose in using the misleading labels was to increase its profits by promising consumers strawberries and peaches but delivering instead cheap apples.

⁶ <https://web.archive.org/web/20200820044133/https://www.hy-vee.com/grocery/PD9300756/Hy-Vee-Strawberries-Cream-Instant-Oatmeal-10-123-oz-Packets>; <https://web.archive.org/save/https://www.hy-vee.com/grocery/PD9304870/Hy-Vee-Peaches-Cream-Instant-Oatmeal-10-123-oz-Packets>.

⁷ Hy-Vee's Instant Oatmeal Cranberry with Flaxseed actually contains dried cranberries. <https://www.hy-vee.com/grocery/PD29621504/Hy-Vee-Instant-Oatmeal-Cranberry-with-Flaxseed-8-141-oz-Packets>.

24. Defendant's misrepresentations violate the MMPA's prohibition of 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. § 407.020, RSMo.

25. While FDA regulations govern some relevant label aspects, FDA labeling regulations do not address the totality of the misleading text and imagery, and thus do not preempt Missouri law prohibiting deceptive advertising.

CLASS ALLEGATIONS

26. Pursuant to Missouri Rule of Civil Procedure 52.08 and § 407.025.2 of the MMPA, Plaintiff brings this action on her own behalf and on behalf of a proposed class of all other similarly situated persons ("Class Members" of the "Class") consisting of:

All persons in Missouri who purchased Hy-Vee Strawberries & Cream Instant Oatmeal or Peaches & Cream Instant Oatmeal in the five years preceding the filing of this Petition (the "Class Period").

27. Excluded from the Class are: (a) federal, state, and/or local governments, including, but not limited to, their departments, agencies, divisions, bureaus, boards, sections, groups, counsels, and/or subdivisions; (b) any entity in which Defendant has a controlling interest, to include, but not limited to, its legal representative, heirs, and successors; (c) all persons who are presently in bankruptcy proceedings or who obtained a bankruptcy discharge in the last three years; and (d) any judicial officer in the lawsuit and/or persons within the third degree of consanguinity to such judge.

28. Upon information and belief, the Class consists of thousands of purchasers. Accordingly, it would be impracticable to join all Class Members before the Court.

29. There are numerous and substantial questions of law or fact common to all of the members of the Class and which predominate over any individual issues. Included within the common question of law or fact are:

- a. Whether the Oatmeals' labels are false, misleading, and deceptive;
- b. Whether Defendant violated the MMPA by selling the Oatmeals with false, misleading, and deceptive representations;
- c. Whether Defendant's acts constitute deceptive and fraudulent business acts and practices or deceptive, untrue, and misleading advertising; and
- d. The proper measure of damages sustained by Plaintiff and Class Members.

30. The claims of the Plaintiff are typical of the claims of Class Members, in that they share the above-referenced facts and legal claims or questions with Class Members and there is a sufficient relationship between the damage to Plaintiff and Defendant's conduct affecting Class.

31. Members and Plaintiff have no interests adverse to the interests of other Class Members.

32. Plaintiff will fairly and adequately protect the interests of Class Members and has retained competent and experienced counsel.

33. A class action is superior to other methods for the fair and efficient adjudication of this controversy, since individual joinder of all Class Members is impracticable and no other group method of adjudication of all claims asserted herein is more efficient and manageable for at least the following reasons:

- a. The claim presented in this case predominates over any questions of law or fact, if any exists at all, affecting any individual member of the Class;

- b. Absent a Class, the Class Members will continue to suffer damage and Defendant's unlawful conduct will continue without remedy while Defendant profits from and enjoys its ill-gotten gains;
- c. Given the size of individual Class Members' claims, few, if any, Class Members could afford to or would seek legal redress individually for the wrongs Defendant committed against them, and absent Class Members have no substantial interest in individually controlling the prosecution of individual actions;
- d. When the liability of Defendant has been adjudicated, claims of all Class Members can be administered efficiently and/or determined uniformly by the Court; and
- e. This action presents no difficulty that would impede its management by the court as a class action, which is the best available means by which Plaintiff and members of the Class can seek redress for the harm caused to them by Defendant.

34. Because Plaintiff seeks relief for the entire Class, the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual member of the Class, which would establish incompatible standards of conduct for Defendant.

35. Further, bringing individual claims would overburden the Courts and be an inefficient method of resolving the dispute, which is the center of this litigation. Adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interest of other members of the Class who are not parties to the adjudication and may impair or impede their ability to protect their interests. As a consequence, class treatment is a superior method for adjudication of the issues in this case.

CLAIMS FOR RELIEF

First Claim for Relief

Violation of Missouri's Merchandising Practices Act

36. Plaintiff repeats and re-alleges the allegations of the preceding paragraphs as if fully set forth herein.

37. Missouri's Merchandising Practices Act (the "MMPA") prohibits 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." § 407.020, RSMo.

38. The MMPA further provides for a civil action to recover damages in § 407.025.1, RSMo, as follows:

Any person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020, may bring a private civil action in either the circuit court of the county in which the seller or lessor resides or in which the transaction complained of took place, to recover actual damages. The court may, in its discretion, award punitive damages and may award to the prevailing party attorney's fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary or proper.

39. Defendant's conduct constitutes the act, use, or employment of deception, fraud, false pretenses, false promises, misrepresentation, unfair practices, and/or the concealment, suppression, or omission of any material facts in connection with the sale or advertisement of any merchandise in trade or commerce in that the label of the Oatmeals leads consumers to believe that the Oatmeals contain costlier fruits which they do not. The Products were therefore worth less than the products as represented.

40. Plaintiff and Class Members purchased the Oatmeals for personal, family, or household purposes and thereby suffered an ascertainable loss as a result of Defendant's unlawful conduct as alleged herein, including the difference between the actual value of the product (containing dried apple pieces) and the value of the product if it had been as represented (containing strawberries or peaches).

41. Defendant's unlawful practices have caused similar injury to Plaintiff and numerous other persons. § 407.025.2.

Second Claim for Relief
Negligent Misrepresentation

42. Plaintiff repeats and re-alleges the allegations of the preceding paragraphs as if fully set forth herein.

43. Defendant has negligently represented that the Products contain strawberries or peaches. In fact, the Products contain cheaper colored pieces of apple dyed to appear as the more expensive fruits. Multiple competing products more clearly inform consumers what they are purchasing or actually contain the depicted fruits.

44. Such representation was made by Defendant with the intent that Plaintiff and Class Members rely on such representation in purchasing the Products.

45. As a result, Defendant has failed to take ordinary care and misrepresented a material fact to the public, including Plaintiff and Class Members, about the Products.

46. Defendant knew or should have known that these omissions and affirmative statements would materially affect consumers' decisions to purchase the Products.

47. Reasonable consumers relied on Defendant's representations set forth herein, and, in reliance thereon, purchased the Products.

48. The reliance is reasonable and justified in that Defendant appeared to be, and represented itself to be, a reputable business, including selling other products that actually contain the depicted fruits, as do competing products.

49. Plaintiff and Class Members suffered an economic loss by paying a price premium for the Products that they would not have paid absent Defendant's misrepresentations.

50. As a direct and proximate result of these misrepresentations, Plaintiff and Class Members were induced to purchase and consume the Products, and have suffered damages to be determined at trial, in that, among other things, they have been deprived of the benefit of their bargain in that they bought Products that were not what they were represented to be, and they have spent money on Products that had less value than was reflected in the price they paid for the Products.

Third Claim for Relief
Unjust Enrichment

51. Plaintiff repeats and re-alleges the allegations of the preceding paragraphs as if fully set forth herein.

52. Plaintiff and the Class Members conferred a benefit on Defendant in that they purchased the Oatmeals that were manufactured, distributed, and sold by the Defendant.

53. Defendant appreciated the benefit because, were consumers not to purchase the Oatmeals, Defendant would have no sales and would make no money from the Oatmeals.

54. Defendant's acceptance and retention of the benefit is inequitable and unjust because the benefit was obtained by Defendant's fraudulent and misleading representations about the Oatmeals.

55. Equity cannot in good conscience permit Defendant to be economically enriched for such actions at Plaintiff and Class Members' expense and in violation of Missouri law, and therefore restitution and/or disgorgement of such economic enrichment is required.

PRAYER FOR RELIEF

56. WHEREFORE, Plaintiff, individually and on behalf of all similarly situated persons, prays the Court:

- a. Grant certification of this case as a class action;
- b. Appoint Plaintiff as Class Representative and Plaintiff's counsel as Class Counsel;
- c. Award compensatory damages to Plaintiff and the proposed Class in an amount which, when aggregated with all other elements of damages, costs, and fees, will not exceed \$75,000 per Class Member and/or \$4,999,999 for the entire Class, or, alternatively, require Defendant to disgorge or pay restitution in an amount which, when aggregated with all other elements of damages, costs, and fees, will not exceed \$75,000 per Class Member and/or \$4,999,999 for the entire Class;
- d. Award pre- and post-judgment interest in an amount which, collectively with all other elements of damages, costs, and fees will not exceed \$75,000 per Class Member and/or \$4,999,999 for the entire Class;
- e. Award reasonable and necessary attorneys' fees and costs to Class counsel, which, collectively with all other elements of damages, costs, and fees will not exceed \$75,000 per Class Member and/or \$4,999,999 for the entire Class; and
- f. For all such other and further relief as may be just and proper.

Dated this 21st day of August 2020.

Abby Fisher, Individually, and on Behalf of a Class
of Similarly Situated Individuals, Plaintiff

Submitted By:

/s/ R. John Azimi

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