

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI**

BRIDGET COBURN, individually and  
on behalf of all others similarly situated,

Plaintiff,

- against -

THE KROGER CO.,

Defendant

4:23-cv-01399-HEA

First Amended  
Class Action Complaint

Jury Trial Demanded

Plaintiff Bridget Coburn (“Plaintiff”) alleges upon information and belief, except for allegations about Plaintiff, which are based on personal knowledge:

**I. CONSUMER AVOIDANCE OF ADDITIVES**

1. According to a recent survey of American consumers by the International Food Information Council (“IFIC”), almost thirty percent of the public consider additives in food one of their top three concerns.<sup>1</sup>

2. Additives refer to non-food ingredients created in laboratories to fulfill various functions.

3. These includes facilitating processing (“processing aids”), improving appearance (“colorants”), creating or enhancing taste (“flavorings”) and extending shelf-life and slowing deterioration (“preservatives”).

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<sup>1</sup> Tom Neltner, Environmental Defense Fund, Chemicals Policy Director, Chemicals in food continue to be a top food safety concern among consumers, Food Navigator, Sept. 20, 2021.

4. Consumer aversion to additives is based on the belief that chemicals of any kind are not necessarily safe and may pose health risks.<sup>2</sup>

5. This behavior makes sense, because although they may be approved for consumption, “some have been known to induce allergic reactions, and others have been linked to asthma, attention deficit hyperactivity disorder and cancer – although research remains inconclusive.”<sup>3</sup>

6. According to one observer, “Our foods are laden with additives that are meant to enhance flavor, color and shelf life that research has shown are either bad for people to consume or inconclusively so.”<sup>4</sup>

7. A well-known commentator echoed consumer concern that “Packaged and processed foods are scary [because] It’s nearly impossible to keep up with which ingredients are safe to eat and which ones cause some kind of harm.”

## **II. LEGAL BACKGROUND**

8. Over 100 years ago, consumers were similarly concerned, based on the reports of muckraking journalists, about the harmful and untested chemicals added

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<sup>2</sup> Cary Funk et al., Public Perspectives on Food Risks, Pew Research Center, Nov. 19, 2018.

<sup>3</sup> Bhavana Kunkalika, Processed danger: Industrial food additives and the health risks to children, News-Medical.net, May 23, 2023 (citing recent study in the Journal of the Academy of Nutrition and Dietetics, researchers explore the potential adverse health effects on children due to the use of industrial additives in processed food).

<sup>4</sup> Frank Giustra, You Might Be Surprised by What’s in Your Food, Modern Farmer, Feb. 8, 2021.

to their food.

9. In response to an unregulated environment where consumers were sold foods with dangerous, undisclosed chemicals that attempted to replace the wholesome ingredients and natural production processes advertised to them, the Pure Food and Drug Act of 1906 set standards for what companies were required to tell the public.

10. These requirements for honest labeling were strengthened by the Federal Food, Drug and Cosmetic Act (“FFDCA”) in 1938, which set standards for what labeling of packaged foods had to disclose. 21 U.S.C. § 301 et seq.

11. Beyond the potential to cause physical harm, these synthetic substances were significantly cheaper, and their undisclosed usage resulted in consumers getting less than what they bargained for.

12. To facilitate an honest marketplace and protect consumers, the Food and Drug Administration (“FDA”) required that all foods have a “common or usual name” that “accurately identif[y] or describe[s], in as simple and direct terms as possible, the basic nature of the food or its characterizing properties or ingredients.” 21 C.F.R. § 102.5(a).

13. Since “consumers initially [] rely on extrinsic cues such as visual information on labels and packaging,” like whether it communicates its taste is only from being smoked over hardwoods or added smoke flavor, the source of a food’s

smoked taste becomes part of its “common or usual name.”<sup>5</sup> 21 C.F.R. § 102.5(a); 21 C.F.R. § 101.22(i).

14. According to one scholar, this rule “is premised on the simple notion that consumers value ‘the real thing’ versus a close substitute and should be able to rely on the label to readily distinguish between the two.”<sup>6</sup>

15. Missouri adopted these laws in their entirety through Ch. 196, Food, Drugs and Tobacco, of the Missouri Revised Statutes (“Mo. Rev. Stat.”) and accompanying regulations. MO Rev Stat § 196.010 *et seq.*; Missouri Code of State Regulations (“CSR”), 19 CSR § 20-1.045 (“Food Labeling”).

16. Missouri law recognizes that whether labeling of a food is misleading is based on “not only representations made or suggested by statement, word, design, device, sound, or in any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations.” Mo. Rev. Stat. § 196.010(2)

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<sup>5</sup> Lancelot Miltgen et al., “Communicating Sensory Attributes and Innovation through Food Product Labeling,” *Journal of Food Products Marketing*, 22.2 (2016): 219-239; Helena Blackmore et al., “A Taste of Things to Come: The Effect of Extrinsic and Intrinsic Cues on Perceived Properties of Beer Mediated by Expectations,” *Food Quality and Preference*, 94 (2021): 104326; Okamoto and Ippaita, “Extrinsic Information Influences Taste and Flavor Perception: A Review from Psychological and Neuroimaging Perspectives,” *Seminars in Cell & Developmental Biology*, 24.3, Academic Press, 2013.

<sup>6</sup> Steven Steinborn, Hogan & Hartson LLP, *Regulations: Making Taste Claims*, PreparedFoods.com, August 11, 2006.

### III. SMOKE FOODS AND SMOKED FLAVORING

17. Smoking is a processing method to preserve or improve the flavor of food by exposing it to smoke from burning hardwoods.

18. The drying action of the smoke and the different phenol compounds helps to preserve protein-rich foods such as meat and cheese.

19. During the second half of the twentieth century, the popularity of smoking foods over hardwoods decreased due to the prevalence of “smoke flavor,” which is smoke condensed into a liquid form, known as liquid smoke or pyroligneous acid.<sup>7</sup>

20. For numerous reasons, the past two decades have seen a resurgence in demand for smoked foods without added smoke flavoring.

21. First, consumers value production methods used to make foods.<sup>8</sup>

22. These credence attributes are quality characteristics which cannot accurately be assessed at the point of sale without additional information.

23. According to researchers, “Cues signaling traditional production seem to affect liking in a positive direction, whereas signals of ‘modernity’ or ‘industrialized

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<sup>7</sup> Matthew Sedacca, Liquid Smoke: The History Behind a Divisive Culinary Shortcut – Barbecue's love/hate relationship with the manufactured flavor, Eater.com, Jun 15, 2016.

<sup>8</sup> Del Giudice, Teresa, Carla Cavallo, and Riccardo Vecchio. "Credence attributes, consumers trust and sensory expectations in modern food market: is there a need to redefine their role?." *International Journal on Food System Dynamics* 9.1012-2018-4128 (2018).

food’ seem to have a negative impact on liking.”<sup>9</sup>

24. In this context, consumers prefer foods made only from being smoked over hardwoods than those to which liquid smoke flavor is added.

25. Second, there is an increasing avoidance by consumers of foods with even “natural flavor,” a mysterious additive that is the “fourth most common ingredient listed on labels [after] salt, water and sugar.”<sup>10</sup>

26. Many commentators have recognized that “because of the wide variety of ingredients that typically go into ‘natural’ flavorings, ‘there does not seem to be much of a difference between natural and artificial flavors.’”<sup>11</sup>

27. Third, reports from the European Food Safety Authority (“EFSA”) that many liquid smoke flavorings contain compounds at levels which may pose a toxic risk when consumed.<sup>12</sup>

28. Fourth, liquid smoke flavor lacks the 400 flavor compounds which provide a true smoked taste, such as pyrazines, aromatic hydrocarbons, alcohols, organic acids, esters, furans, phenols, and carbonyl and noncarbonyl compounds.

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<sup>9</sup> Fernqvist, F. and Ekelund, L. (2014) Credence and the effect on consumer liking of food – A review. *Food Quality and Preference*. Volume: 32, Part C, pp 340-353.

<sup>10</sup> Amanda Woerner, What are natural flavors, really?, *Life by Daily Burn*, CNN, Jan. 14, 2015.

<sup>11</sup> Roni Caryn Rabin, Are ‘Natural Flavors’ Really Natural?, *New York Times*, Feb. 1, 2019.

<sup>12</sup> Faizah Ahmed, Smoke-Flavored Foods May Be Toxic, *Food Safety News*, Feb. 16, 2010.

29. Moreover, the smoke generation process influences the wood-smoke composition, generating compounds that are not capable of being included in liquid smoke flavor, like trans-isceugenol and 4-methylsyringol.

#### IV. LABELING IS MISLEADING

30. Cheese industry observers note that “smoked cheeses are on the rise,” as “[p]eople are seeking bigger flavors, bolder flavors, deeper flavors,” that only smoking over hardwoods can provide.

31. To appeal to these consumers, The Kroger Co. (“Defendant”) sells slices of “Smoked Gouda” identified as having a “distinctive, smoky flavor” under the Private Selection brand (“Product”).



32. However, “Smoked Gouda” and “distinctive, smoky flavor” are false, deceptive, and/or misleading, because the Product’s smoked taste is provided in part by liquid smoke, disclosed only in the fine print of the ingredient list on the back of the package where it states, “SMOKE FLAVOR.”



33. The Product is “misbranded” and misleads consumers because “Smoked Gouda” and “distinctive, smoky flavor” fails to inform purchasers that its smoked taste comes, in part, from added liquid smoke flavor. 21 U.S.C. § 343(a)(1); MO Rev Stat § 196.075(1).

34. The replacement of smoking over hardwoods with added smoke flavor is of material interest to consumers seeking a natural product like cheese without additives, which gets its smoked taste entirely through a natural smoking process.



35. The Product is “misbranded” and misleading because “Smoked Gouda” “purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations,” specifically, a “flavored standardized cheese[.]” MO Rev Stat § 196.075(7); 21 U.S.C. § 343(g); 21 C.F.R. § 133.193; 21 C.F.R. § 133.142 (“Gouda cheese.”).<sup>13</sup>

36. However, “its label [does not] bear[] the name of the food specified in the definition and standard,” because “Gouda” does not “include [] a declaration of any flavor [] that characterizes [it], in the manner prescribed in § 101.22 of this chapter.” MO Rev Stat § 196.075(7); 21 U.S.C. § 343(g); 21 C.F.R. § 133.193(b).

37. The FDA considered it misleading to describe a food as “smoked” when “true smoke is absorbed in a liquid or other medium, and that medium is added to a food to provide a smoke flavor.”

38. The FDA has warned companies that fail to inform consumers of foods advertised as smoked but have added smoke flavor:

If these smoke ingredients [natural smoke flavor] are added flavors, they should be declared in accordance with 21 C.F.R. § 101.22 [on the front of the label]; however, if these ingredients describe the smoking process, then they must not be listed as

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<sup>13</sup> The Product’s “common or usual name” is the definition set forth in the relevant food standard. 21 U.S.C. § 343(i); MO Rev Stat § 196.075(9).

ingredients in the ingredient statement.<sup>14</sup>

39. Even when a food has undergone some smoking, the addition of liquid smoke flavoring is required to be prominently disclosed on the front label, such as “with added smoke flavor,” “[with] natural smoke flavor” or “flavor added.”

40. Where cheese may have undergone some smoking but adds smoke flavor, it must disclose this to consumers, shown by the sliced cheeses of other companies who state, “with Natural Smoke Flavor.”



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<sup>14</sup> FDA Warning Letter, Smoked Seafood, Inc. d/b/a Little Mermaid Smokehouse, MARCS-CMS 515739 – June 27, 2017.

41. In contrast, the Private Selection Smoked Gouda informs purchasers only that it has a “distinctive, smoky flavor,” instead of telling them the source of this “smoky flavor.”

42. The result is that consumers are misled by products that appear identical, even though Private Selection Smoked Gouda is not equal in quality to smoked cheeses without added smoke flavor.

43. Consumers are misled because the absence of required, qualifying terms, i.e., “natural smoke flavored Gouda,” “smoke flavored Gouda,” or “Gouda with natural [added] smoke flavor,” gives them the false impression that the Product’s smoked attributes, including taste and color, are imparted only by smoking, when this is false. 21 C.F.R. § 101.22(i)(1)(i).

44. Beyond adding smoke flavor, the Product’s use of “Color Added” further misleads consumers.

45. The added color darkens the Product, giving the impression it was smoked for a longer period than it was, giving the appearance of higher quality.

## **V. CONCLUSION**

46. Consumers buying cheese represented as smoked, without any indication that the smoked taste comes from added flavoring, are seeking to avoid additives like liquid smoke flavor.

47. As a result of the false and misleading representations and omissions, the

Product is sold at a premium price, approximately \$3.39 per 10 slices (8 oz), excluding tax and sales, higher than similar products, represented in a non-misleading way, and higher than it would be sold for absent the misleading representations and omissions.

### **JURISDICTION**

48. Plaintiff is a citizen of Missouri.

49. Defendant is a citizen of Ohio.

50. The Court has jurisdiction over Defendant because it transacts business within Missouri and sells the Product to consumers within Missouri from its grocery stores under the names of Kroger, Rulers, Gerbes Supermarket and/or Dillon's.

51. Defendant transacts business in Missouri, through the sale of the Product to consumers within Missouri from its grocery stores under the names of Kroger, Rulers, Gerbes Supermarket and/or Dillon's.

52. Defendant has committed tortious acts within this State through the distribution and sale of the Product, which is misleading to consumers in this State.

53. Defendant has committed tortious acts outside this State by labeling, representing and selling the Product in a manner which causes injury to consumers within this State by misleading them as to its contents, amount and/or quality, by regularly doing or soliciting business, or engaging in other persistent courses of conduct to sell the Product to consumers in this State, and/or derives substantial

revenue from the sale of the Product in this State.

54. Defendant has committed tortious acts outside this State by labeling the Product in a manner which causes injury to consumers within this State by misleading them as to its contents, amount and/or quality, through causing the Product to be distributed throughout this State, such that it expects or should reasonably expect such acts to have consequences in this State and derives substantial revenue from interstate or international commerce.

### **VENUE**

55. Venue is in this Court because Plaintiff is a resident of St. Louis County.

56. Venue is in this Court because a substantial part of the events or omissions giving rise to these claims occurred in St. Louis County, which is where Plaintiff's causes of action accrued.

57. Plaintiff purchased, used and/or consumed the Product in reliance on the labeling identified here in Missouri.

58. Plaintiff became aware the labeling was false and misleading in St. Louis County.

### **PARTIES**

59. Plaintiff Bridget Coburn is a citizen of St. Louis County, Missouri.

60. Defendant The Kroger Co. is an Ohio corporation with a principal place of business in Ohio.

61. Defendant operates grocery stores under the names of Kroger, Ruler Foods, Gerbes Supermarket and Dillon's.

62. In addition to selling national brands of products, it sells at least 54 varieties of cheese in a range of formats under its private label brand of Private Selection.

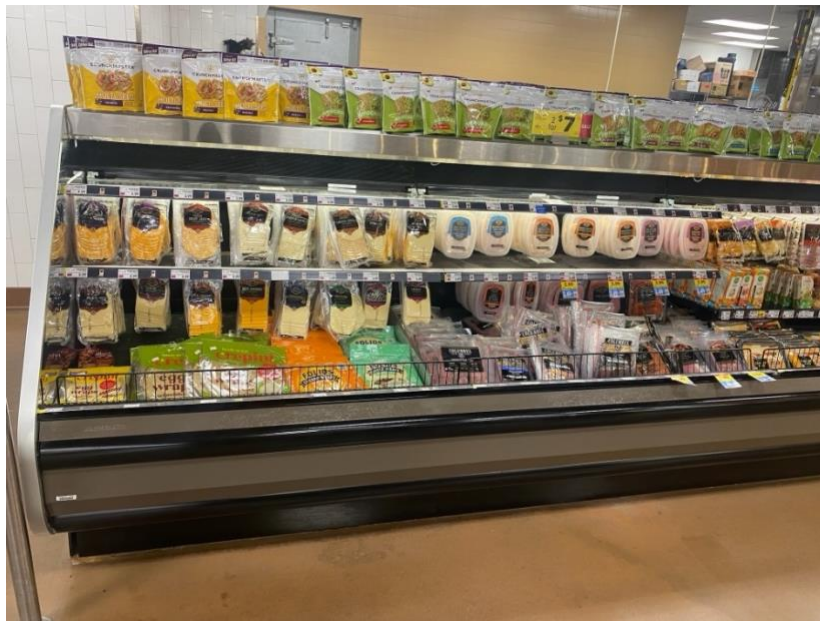
63. "Private label" refers to products manufactured or packaged for sale under the name of the retailer or its sub-brands rather than that of the manufacturer.

64. Private Selection sells at least four varieties of crumbled cheese, including Traditional Feta, Blue Cheese, Smoked Blue Cheese, and Crumbled Goat Cheese.



65. Private selection sells at least eighteen varieties of sliced cheese, including Sharp Cheddar, Provolone, Colby, Pimento Colby, Fuego Colby Jack, Smoked Gouda, Aged Gouda, Sharpe Cheddar, Mild Cheddar, Aged Cheddar, White

Cheddar, Lacey Swiss, Swiss, Vermont Sharp White Cheddar Mozzarella, Muenster, Pepper Jack, Baby Swiss, Havarti, and Horseradish Havarti.



66. Private selection sells at least five varieties of bagged shredded cheese, including Aged Cheddar Blend, Chef's Blend, Italian Style Blend, Pizzeria Style Blend, and Alpine Blend.



67. Private selection sells at least seven varieties of shredded cheese in cups, including Grated Parmesan, Shredded Parmesan, Shaved Parmesan, Mexican Style Blend, Mozzarella, Smoked Gouda and Shredded Romano.



68. Private selection sells at least three varieties of block cheese, including Vermont Extra Sharp White Cheddar, Cheddar Gruyere with Gruyere Notes and Wisconsin Extra Sharp Cheddar.



69. Private selection sells at least three varieties of cracker cuts of cheese,



including Sharp Cheddar, Gouda, and a variety pack, in addition to selling the cracker cuts with crackers.

70. Private selection sells at least eight varieties of cheese dips, including Queso Blanco, Extra Sharp Cheddar & Poblano, Medium Chile Con Queso, Aged Cheddar & Jalapeno, Parmesan & Peppercorn, Creamy Jalapeno, Medium Queso Blanco and Pimento Cheese.

71. Private selection sells at least five varieties of cheese cubes, including Colby Jack, Pepper Jack, Gouda, Sharp Cheddar and Mild Cheddar.



72. Plaintiff is like most consumers who prefer products, especially natural foods like cheese, which do not contain additives, for the reasons indicated above.

73. Plaintiff read, saw and relied on the label's statements of "Smoked Gouda" and "distinctive smoky flavor" and expected the cheese's taste was not from smoke additives but only from being smoked over hardwoods.

74. Plaintiff relied on the omission of added smoke flavoring from the front label as it related to the Product's smoked attributes.

75. Plaintiff relied on the darker color of the cheese which made it appear darker than it otherwise would have been, indicative of being smoked for a longer period.

76. Based on her experience with how foods containing added flavoring would disclose such facts to consumers on the front label, Plaintiff expected that if the Product used liquid smoke flavoring, this would be prominently presented to her.

77. Plaintiff purchased the Private Selection Smoked Gouda described as having a "distinctive smoky flavor" with the labeling identified here between September 2019 and September 15, 2023, at grocery stores owned and operated by Kroger under the names of Kroger, Ruler Foods, Gerbes Supermarket and/or Dillon's, near where she resides in this State.

78. Plaintiff bought the Product at or exceeding the above-referenced price.

79. Plaintiff paid more for the Product than she would have had she known the representations and omissions were false and misleading or would not have purchased it.

80. The value of the Product that Plaintiff purchased was materially less than its value as represented by Defendant.

81. Plaintiff chose between Defendant's Product and products represented

similarly, but which did not misrepresent the source of their smoked taste.

82. Plaintiff intends to, seeks to, and will purchase the Product again when she can do so with the assurance its smoked taste is only from being smoked over hardwoods.

83. Plaintiff is unable to rely on the representations not only of this Product, but other similar foods that are represented as being smoked because she is unsure whether those representations are truthful.

84. If Defendant's labeling were to be truthful, Plaintiff could rely on the labeling of other such products.

### **CLASS ALLEGATIONS**

85. Plaintiff seeks to represent the following class:

All persons in the State of Missouri who purchased the Product in Missouri during the statutes of limitations for each cause of action alleged.

86. Common questions of issues, law, and fact predominate and include whether Defendant's representations were and are misleading and if Plaintiff and class members are entitled to damages.

87. Plaintiff's claims and basis for relief are typical to other members because all were subjected to the same unfair, misleading, and deceptive representations, omissions, and actions.

88. Plaintiff is an adequate representative because her interests do not

conflict with other members.

89. No individual inquiry is necessary since the focus is only on Defendant's practices and the class is definable and ascertainable.

90. Individual actions would risk inconsistent results, be repetitive and are impractical to justify, as the claims are modest relative to the scope of the harm.

91. Plaintiff's counsel is competent and experienced in complex class action litigation and intends to protect class members' interests adequately and fairly.

## **CAUSES OF ACTION**

### **COUNT I**

#### Missouri Merchandising Practices Act ("MPA") Mo. Rev. Stat. § 407.025, et seq.

92. Plaintiff incorporates by reference paragraphs 1-47.

93. The purpose of the MPA is to protect consumers against unfair and deceptive practices.

94. The labeling of the Product violated the MPA because the front label statements of "Smoked Gouda" and "Distinctive, Smoky Flavor" failed to disclose its smoked attributes were due in part to added liquid smoke flavoring, which was unfair and deceptive to consumers.

95. Defendant's false and deceptive representations and omissions are material in that they are likely to influence consumer purchasing decisions, because purchasers like Plaintiff prefer foods without additives and get their taste from

natural production processes.

96. Plaintiff believed the Product's smoked taste was entirely from being smoked and not from added liquid smoke flavoring.

97. Plaintiff paid more for the Product, would not have purchased it or paid as much if she knew that its smoked taste was not entirely from being smoked but from added liquid smoke flavoring.

98. Plaintiff will produce evidence showing how she and consumers paid more than they otherwise would have paid for the Product, relying on Defendant's representations and omissions, using statistical and economic analyses, hedonic regression, and other advanced methodologies.

99. Plaintiff seeks to recover for economic injury and/or loss she sustained based on the misleading labeling and packaging of the Product, by paying more for it than she otherwise would have.

100. As a result of Defendant's misrepresentations and omissions, Plaintiff and class members suffered damages in the price premium paid for the Product, which is the difference between what they paid for it and how much it would have been sold for without the false and misleading representations and omissions identified here.

**COUNT II**  
Breach of Express Warranty

101. Plaintiff incorporates by reference paragraphs 1-47.

102. The Product was marketed and sold by Defendant and expressly warranted to Plaintiff and class members that all its smoked attributes, including taste and color, were entirely from being smoked and not from added liquid smoke flavoring and added coloring.

103. Defendant directly marketed the Product to Plaintiff and consumers through its advertisements and marketing, through various forms of media, on the packaging, in print circulars, direct mail, and/or targeted digital advertising.

104. Defendant knew the product attributes that potential customers like Plaintiff were seeking, such as foods which got their smoked attributes entirely from being smoked, without added smoke flavoring and developed its marketing and labeling to directly meet those needs and desires.

105. Defendant's representations affirmed and promised that the Product got its smoked attributes entirely from being smoked and without added smoke flavoring.

106. Defendant described the Product so Plaintiff and consumers believed it got its smoked attributes entirely from being smoked and without added smoke flavoring, which became part of the basis of the bargain that it would conform to its affirmations and promises.

107. Plaintiff recently became aware of Defendant's breach of the Product's express warranty.

108. Plaintiff provided or will provide notice to Defendant, its agents, representatives, retailers, and/or their employees.

109. Plaintiff hereby provides notice to Defendant that it breached the Product's express warranty.

110. Defendant received notice and should have been aware of these issues due to complaints by third parties, including regulators, competitors, and consumers, to its main offices, and by consumers through online forums.

111. The Product did not conform to its affirmations of fact and promises due to Defendant's actions, because it did not get all its smoked attributes entirely from being smoked but also from added smoke flavoring.

112. Plaintiff and class members would not have purchased the Product or paid as much if the true facts had been known, suffering damages.

### **JURY DEMAND AND PRAYER FOR RELIEF**

Plaintiff demands a jury trial on all issues.

**WHEREFORE**, Plaintiff prays for judgment:

1. Declaring this a proper class action, certifying Plaintiff as representative and the undersigned as counsel for the class;
2. Awarding monetary damages and interest;
3. Awarding costs and expenses, including reasonable fees for Plaintiff's attorneys and experts; and

4. Other and further relief as the Court deems just and proper.

Dated: December 29, 2023

Respectfully submitted,

/s/ Daniel F. Harvath

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