

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

GREGORY RITTENHOUSE,  
individually and on behalf of all others  
similarly situated,

Plaintiff,

- against -

TOPCO ASSOCIATES LLC,

Defendant.

Class Action Complaint

Jury Trial Demanded

Gregory Rittenhouse (“Plaintiff”), through Counsel, alleges upon information and belief, except for allegations about Plaintiff, which are based on personal knowledge:

1. A growing percentage of shoppers are seeking foods with only “Natural flavors, sourced from real ingredients,” and avoiding artificial flavors.<sup>1</sup>
2. This is because more than eighty percent of the public believe foods with artificial flavors are less healthy than those with only natural flavors.
3. Nielsen reports that the absence of artificial flavors is very important for over forty percent of respondents to their Global Health & Wellness Survey.
4. The result is that companies are seeking to remove artificial flavors and

<sup>1</sup> [Natural Flavors – Mosaic Flavors’ Legacy in Natural Flavor Innovation](#), Mosaic Flavors.

replace them with natural flavors.<sup>2</sup>

5. Among these, “Flavors that are generally recognized as occurring in nature [like fruit flavors] tend to be the most highly demanded natural flavors.”<sup>3</sup>

6. The trade journal, *Perfumer & Flavorist*, described “The Future of Artificial Flavors [& Ingredients]” as bleak, given consumer opposition to these synthetic ingredients.<sup>4</sup>

7. Mintel concluded that avoidance of artificial flavors is just as strong as consumers’ desire for natural flavors, in “Artificial: Public Enemy No. 1.”<sup>5</sup>

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

9. In response to that unregulated environment, where synthetic molecules made in laboratories substituted for the fruits and natural fruit flavors promoted to

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<sup>2</sup> Lauren Manning, *How Big Food is Using Natural Flavors to Win Consumer Favor*, Wall Street Journal.

<sup>3</sup> Stephen Daniells, [Natural flavors: Consumer purchasing habits don’t always reflect their preferences, but natural flavors are still growing](#), Food Navigator, June 19, 2013.

<sup>4</sup> Jim Kavanaugh, *The Future of Artificial Flavors & Ingredients*, *Perfumer & Flavorist*, June 12, 2017.

<sup>5</sup> Alex Smolokoff, *Natural Color and Flavor Trends in Food and Beverage*, *Natural Products Insider*, Oct. 11, 2019; Thea Bourianne, *Exploring Today’s Top Ingredient Trends and How They Fit Into Our Health-Conscious World*, Mar. 26-28, 2018; Nancy Gagliardi, *Consumers Want Healthy Foods – And Will Pay More For Them*, *Forbes*, Feb 18, 2015.

the public, the Federal Food, Drug and Cosmetic Act (“FFDCA”), and this State’s Agriculture and Markets Law (“AGM”), sought to prohibit “misbranding” and adulteration, not just with respect to natural fruit flavors, but across the sources of nourishment sought by American families. 21 U.S.C. § 301 *et seq.*;<sup>6</sup> AGM § 3.<sup>7</sup>

10. The newly established Food and Drug Administration (“FDA”) recognized “consumers initially [] rely on extrinsic cues such as visual information on labels and packaging,” requiring the source of a food’s taste, whether the pictured fruits, natural flavors from those or other fruits, or chemical sources, be conspicuously disclosed. 21 C.F.R. § 101.22(i).<sup>8</sup>

11. This was “premised on the simple notion that consumers value ‘the real

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<sup>6</sup> “Misbranded” is the statutory term for labeling that is false and/or misleading, while “adulterated” means to “render (something) poorer in quality by adding another substance, typically an inferior one.”

<sup>7</sup> Article 17, Adulteration, Packing, and Branding of Food and Food Products, AGM § 198 *et seq.*; Official Compilation of Codes, Rules and Regulations of the State of New York (“N.Y.C.R.R.”), Title 1, Department of Agriculture and Markets, Chapter VI, Food Control, Subchapter C, Food and Food Products (Article 17, AGM), including 1 N.Y.C.R.R. § 250.1 (adopting federal standards of identify for foods), 1 N.Y.C.R.R. § 259.1(a) (adopting Parts 100, 101 and 102 of Title 21).

<sup>8</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.

thing’ versus a close substitute and should be able to rely on the label to readily distinguish between the two.”<sup>9</sup>

12. “Natural flavor” was made from the “essential oil, oleoresin, essence or extractive” from fruits and natural sources. 21 C.F.R § 101.22(a)(3).

13. Establishing an authentic natural flavor required balancing the sweet and sour elements of the individual fruits, which is based on the interaction between their volatile and non-volatile compounds.<sup>10</sup>

14. The former include esters, alcohols, aldehydes, lactones, terpenoids, aromatic hydrocarbons, and ketones.

15. The latter include sugars and organic acids, with the types and amounts of each critical to the specific fruit taste appreciated by consumers.<sup>11</sup>

16. These acids include citric acid, fumaric acid, malic acid, quinic acid, succinic acid, and tartaric acid.

17. Depending on the fruit, a natural flavor will require replicating the balance of its original acid composition.

18. In contrast, “artificial flavors” are molecular compounds, designed to

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<sup>9</sup> Steven Steinborn, Hogan & Hartson LLP, Regulations: Making Taste Claims, PreparedFoods.com, August 11, 2006.

<sup>10</sup> Gary Reineccius, Flavor Chemistry and Technology § 1.2 (2d ed. 2005).

<sup>11</sup> [Fruit Quality – How Do Fruits Get Their Flavor?](#), Penn State Extension, May 7, 2020.

provide taste, but from synthetic, chemical sources. 21 C.F.R § 101.22(a)(1).

19. To appeal to the “emerging trend” of “[C]onsumer desire for naturally flavored products,” and their similar avoidance of artificial flavoring, Topco Associates LLC (“Defendant”) manufactures, labels, markets, packages, distributes, and/or sells, (1) rice cakes, (2) with their taste described as “Apple Cinnamon,” (3) next to the statement, “Naturally Flavored,” in all capital letters, (4) across a green ribbon, the color associated with apples, (4) such that purchasers read and/or understand the food’s name as “Apple Cinnamon Naturally Flavored Rice Cakes,” and/or “Naturally Flavored Apple Cinnamon Rice Cakes,” (5) with pictures of three dark brown rice cakes, (6) presumably based on having “10g Whole Grain per serving,” whole grains known for their darker color, (7) covered with peanut butter, cut up apples, and a dash of cinnamon, (8) resting on what appears to be a green table cloth, (9) beneath a picture of a Granny Smith apple, and three cloves of cinnamon, (10) promising “No artificial colors, flavors or preservatives,” (11) and that it is “gluten free,” (12) under the Food Club brand, and its slogan, “add flavor to life” (“Product”).<sup>12</sup>

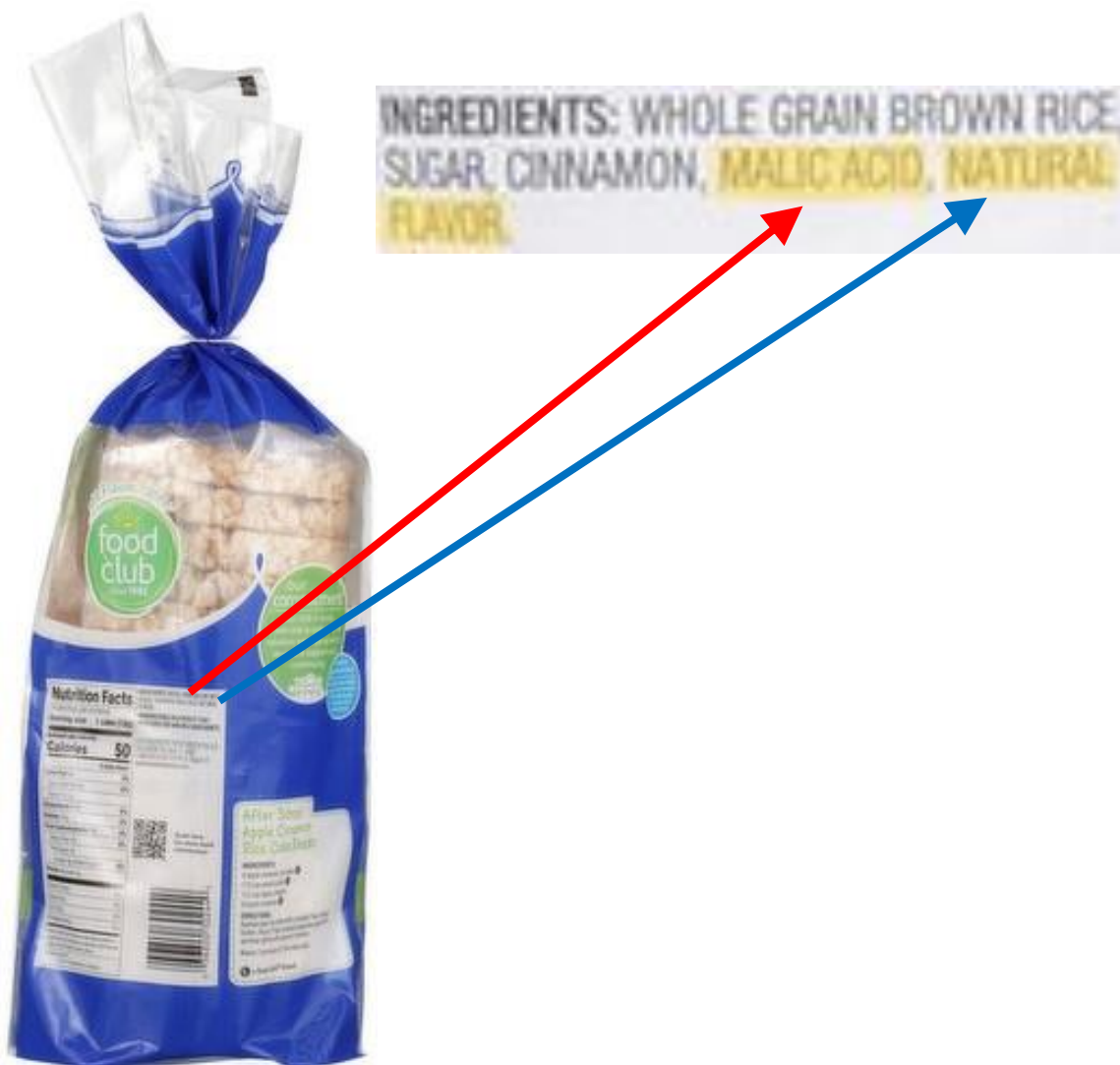
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<sup>12</sup> Keith Nunes, Using Natural Ingredients to Create Authentic, Fresh Flavors, Food Business News, Sept. 20, 2018.



20. Despite the representations of its taste described as “Apple Cinnamon,” in all capital letters, larger than any other text, except the brand name, above the statement, “Naturally Flavored,” such that purchasers read and/or understand its name as “Apple Cinnamon Naturally Flavored Rice Cakes,” and/or “Naturally Flavored Apple Cinnamon Rice Cakes,” above to two fresh apple slices, resting on two cinnamon cloves, the Product’s apple cinnamon taste is provided, in significant part, by artificial flavoring ingredients.

21. Though this is not disclosed on the front label, it is not even revealed in the fine print, of the ingredient list, on the back of the package, which lists “Spice,” denoting cinnamon, and “Natural Flavor,” but also a substance identified as “Malic Acid,” listed before “Natural Flavor,” and present in a greater amount, based on weight.<sup>13</sup> 21 C.F.R. § 101.4(a).



<sup>13</sup> **INGREDIENTS: WHOLE GRAIN BROWN RICE, SUGAR, CINNAMON, MALIC ACID, NATURAL FLAVOR.**

22. To replicate the prototypical tart, sour, fruity, and sweet taste of apples requires balancing their free sugars, glucose and fructose, with their main organic acids.

23. These consist of malic acid, the first predominant acid, comprising ninety-five percent of total organic acids, along with its second most predominant acids, tartaric acid, and fumaric acid.<sup>14</sup>

<b>Fruit</b>	<b>First Predominant Acids</b>	<b>Second Predominant Acids</b>
<b>Apple</b>	<b>Malic Acid (95%)</b>	Tartaric Acid, Fumaric Acid
Apricot	Malic Acid (70%)	Citric Acid, Tartaric Acid
Blackberry	Malic Acid	Citric Acid
Blueberry	Malic Acid	Citric Acid, Quinic Acid
(Highbush, Jersey)		
Cherry	Malic Acid (94%)	Tartaric Acid
Cherry (Tropical)	Malic Acid (32%)	Citric Acid
Chili Pepper (habanero)	Citric Acid	Malic Acid, Succinic Acid
Coconut	Malic Acid	Citric Acid
Cranberries (American varieties)	Malic Acid (64%)	Citric Acid
Dragon fruit	Malic Acid	Citric Acid
Grape	Malic Acid (60%)	Tartaric Acid
Grapefruit	Citric Acid	Malic Acid
Guava	Citric Acid	Malic Acid
Kiwi	Quinic Acid, Citric Acid	Malic Acid
Lemon	Citric Acid	Malic Acid
Lime	Citric Acid	Malic Acid
Mango	Citric Acid	Malic Acid, Tartaric Acid
Orange	Citric Acid	Malic Acid
Peach	Malic Acid (73%)	Citric Acid

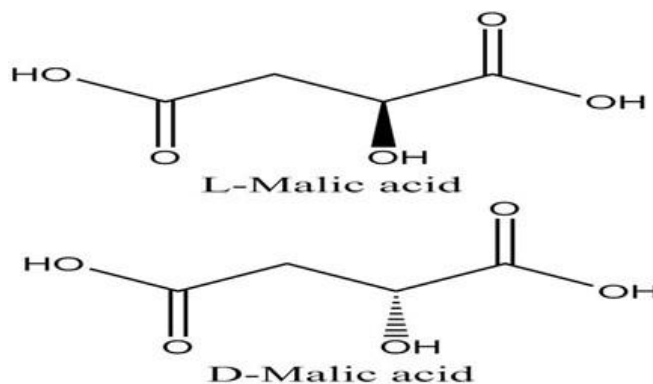
<sup>14</sup> Y.H. Hui, et al., Handbook of Fruit and Vegetable Flavors, p. 693 (2010).



Pear	Malic Acid (77%)	Citric Acid
Pineapple	Citric Acid	Malic Acid
Pomegranate	Malic Acid (>50%)	Citric Acid (>22%)
Raspberry	Citric Acid	Malic Acid, Tartaric Acid
Raspberry (black)	Citric Acid	Malic Acid, Tartaric Acid
Strawberry (wild pentaploid, Turkish cultivars)	Malic Acid, Tartaric Acid	Citric Acid
Tamarind	Tartaric Acid	Citric Acid, Malic Acid
Watermelon	Malic Acid (99%)	Fumaric Acid

24. Malic acid is even known as “apple acid,” from the Latin *mālum*, as *Malus* is the genus that contains all apple species.

25. Malic acid has two isomers, or arrangements of atoms, which are right and left-hand versions of the same molecular formula. 21 C.F.R. § 184.1069.<sup>15</sup>



26. While L-Malic Acid is found naturally in apples, D-Malic Acid does not occur naturally anywhere.

27. Instead, D-Malic Acid is a racemic mixture of the D and L isomers, or

<sup>15</sup> Dan Chong and Jonathan Mooney, *Chirality and Stereoisomers* (2019).

DL-Malic Acid.

28. Manufacturing DL-Malic Acid begins with petroleum.
29. Then, it undergoes catalytic processes, and numerous chemical reactions, including heating maleic anhydride with water, under extreme pressure, at 180°C.
30. The result is an equilibrium mixture of malic and fumaric acids.
31. After the soluble fumaric acid is filtered off and recycled, the synthetic, or DL-Malic Acid is concentrated and crystallized.
32. DL-Malic Acid is not a “natural fruit flavor,” because it is not from apples, nor any other fruit, vegetable, or other natural source, but from petroleum, made through chemical reactions.
33. DL-Malic Acid is an artificial flavoring ingredient.
34. Since the two types of malic acid are closely related, unscrupulous companies often replace naturally occurring L-Malic Acid, from apples, with the lower cost and synthetic DL-Malic Acid.
35. Moreover, malic acid is even present in cinnamon preparations.<sup>16</sup>
36. The Product is “adulterated” and misleads consumers, because despite the labeling and packaging, causing purchasers to expect its apple cinnamon taste is

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<sup>16</sup> S. Pagliari et al., Antioxidant and Anti-Inflammatory Effect of Cinnamon (*Cinnamomum verum J. Presl*) Bark Extract after In Vitro Digestion Simulation, *Foods*. 2023 Jan 18; 12(3):452.

only from apples, cinnamon, natural apple flavor, and other naturally sourced flavors, “[the] valuable constituent[s] [of natural flavors, including natural apple flavor] has been in whole or in part omitted or abstracted.” AGM § 200(7); 21 U.S.C. § 342(b)(1).

37. The Product is “adulterated” and misleads consumers, because despite the labeling and packaging, causing purchasers to expect its apple cinnamon taste is only from apples, cinnamon, natural apple flavor, and other naturally sourced flavors, “[malic acid] has been substituted wholly or in part [] for [natural flavors, including natural apple flavor].” AGM § 200(8); 21 U.S.C. § 342(b)(2).

38. Upon information and belief, and the investigation of Counsel, and such allegations are likely to have evidentiary support following the opportunity for discovery, that the “Malic Acid” used was the synthetic version was confirmed based on the principles of Wilhelmsen, who demonstrated how adulteration involving direct addition of foreign substances can be determined, with (1) well-defined detection limits, (2) sufficiently validated detection methods, and (3) knowledge the adulterant and/or its markers are not found in the food.<sup>17</sup>

39. This is because any detection is indicative of adulteration, without complicated statistical or other analysis.

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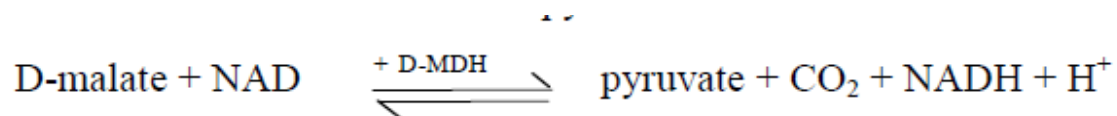
<sup>17</sup> Eric C. Wilhelmsen, “Food Adulteration,” in Food Science and Technology, Marcel Dekker (2004).

40. Since fruits and vegetables do not synthesize D-Malic Acid, its presence in certain foods, above established thresholds, indicates this artificial version has been added.

41. The most accepted method to identify DL-Malic Acid is based, in part, on the European Standard (“EN”) 12138:1997, developed by the European Committee for Standardization (“CEN”), for the enzymatic determination of the total content of D-Malic Acid in fruit juices and related products.<sup>18</sup>

42. This enzymatic approach is based on D-malate dehydrogenase (“D-MDH”), an enzyme that oxidizes D-Malic Acid (“D-malate”) to pyruvate and carbon dioxide, in the presence of an appropriate cofactor.

43. D-malate is oxidized by nicotinamide adenine dinucleotide (“NAD”) to oxaloacetate.



44. The oxaloacetate formed by this reaction is split into pyruvate and carbonic acid.

45. The quantity of NADH formed is proportional to the concentration of D-Malic Acid and measured at a wavelength of 334, 340 or 365 nm.

<sup>18</sup> [SIST EN 12138:1998](#), Fruit and Vegetable Juices – Enzymatic Determination of D-Malic Acid Content – NAD Spectrometric Method.

46. Laboratory analysis of the Product was or would be performed, based on this enzymatic method, in accordance with accepted industry standards, procedures, and protocols.

47. Applying D-MDH, D-Malic Acid was or would be preferentially oxidized over L-Malic Acid.

48. Upon information and belief, and the investigation of Counsel, the result was or would be that the synthetic D-isomer of malic acid was or would be identified above the appropriate threshold for this method, and such allegations are likely to have evidentiary support, following the opportunity for discovery, indicating the Product used artificial, DL-Malic Acid, not L-Malic Acid, naturally occurring in apples and/or cinnamon.

49. The combination of DL-Malic Acid with the free sugars from apples is not equivalent to the taste of apples, natural apple flavor, and natural flavors from other natural sources.

50. DL-Malic Acid does not supplement, enhance, or modify the original taste of apples, because it is a core component of their taste. 21 C.F.R. § 170.3(o)(11).

51. The Product is “adulterated” and misleads consumers, because despite the labeling and packaging, causing purchasers to expect its apple cinnamon taste is only from apples, cinnamon, natural apple flavor, and other naturally sourced

flavors, the “substance [of synthetic DL-Malic Acid] has been added thereto or mixed or packed therewith so as to...make it appear better or of greater value than it is,” by providing, enhancing, simulating, and/or reinforcing its apple taste, without having to add greater amounts of natural flavors, including natural apple flavor. AGM § 200(10); 21 U.S.C. § 342(b)(4).

52. The Product is “misbranded” and misleads consumers, because despite the labeling and packaging, causing purchasers to expect its apple cinnamon taste is only from natural flavorings, it uses the synthetic compound of malic acid, to provide, enhance, and/or simulate, its apple and/or cinnamon taste. AGM § 201(1); 21 U.S.C. § 343(a)(1).

53. The expectation that the Product will not get its apple taste from artificial flavoring is further supported by its promotion of healthful attributes, such as pictures of two dark brown rice cakes, based on having “10g of Whole Grain,” known for its darker color, next to two fresh apple slices, resting on two cinnamon cloves, promising “Quality Assured,” having “No High Fructose Corn Syrup.”

54. Given that the public is increasingly aware of the potential health harms of artificial flavors, it would be incongruent to expect a product with such positive health features to also contain an ingredient associated with “possible health issues,”

and “linked to” numerous negative side effects.<sup>19</sup>

55. The Product is “misbranded” and misleads consumers, because the labeling and packaging, promoting its apple cinnamon taste as only from natural flavorings, including natural apple flavor, “fails to reveal facts material in light of such representations,” because in place of natural flavors, like natural apple flavor, it has added and/or substituted DL-Malic Acid, a synthetic flavoring molecule, in a greater amount than natural flavors, like natural apple flavor, which enhances, simulates, provides, and/or reinforces its apple taste. AGM § 201(1); 21 U.S.C. § 343(a)(1); 15 U.S.C. § 55(a)(1).

56. Substituting synthetic DL-Malic Acid for natural flavors, including natural apple flavor, is of material interest to consumers, because (1) natural flavors, including natural apple flavor, cost more than synthetic DL-Malic Acid, and/or (2) consumers seek to avoid artificial flavors and artificial flavorings, for reasons related to health, nutrition, and/or a desire for more natural and less processed food ingredients and/or flavorings.

57. The Product is “misbranded” and misleads consumers, because its name, read and/or understood as “Apple Cinnamon Naturally Flavored Rice Cakes,” and/or “Naturally Flavored Apple Cinnamon Rice Cakes,” “includes or suggests the

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<sup>19</sup> Joshua Eichel, [The Dangers of Artificial Flavors – What You Need To Know](#), Wicked Protein, Mar. 13, 2024.

name[s] of [apples, cinnamon, and/or natural flavors]...but not all such ingredients [malic acid], even though the names of all such ingredients are stated elsewhere in the labeling,” on the fine print, reverse side, of the ingredient list, notwithstanding it is not identified as an artificial flavoring ingredient. AGM § 201(1); 21 U.S.C. § 343(a)(1); 21 C.F.R. § 101.18(b); 1 N.Y.C.R.R. § 259.1(a)

58. The Product is “misbranded” and misleads consumers, because “Apple Cinnamon Naturally Flavored Rice Cakes,” and/or “Naturally Flavored Apple Cinnamon Rice Cakes,” is not a truthful or non-misleading “common or usual name[s].” AGM § 201(9); 21 U.S.C. § 343(i).

59. Neither “Apple Cinnamon Naturally Flavored Rice Cakes,” nor “Naturally Flavored Apple Cinnamon Rice Cakes,” “accurately identif[ies] 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); 21 C.F.R. § 101.3(b)(2); 1 N.Y.C.R.R. § 259.1(a).

60. This “common or usual name” fails to disclose the source of its apple and/or cinnamon taste, based on the presence of DL-Malic Acid, an artificial flavoring ingredient, which imparts the taste of apples. 21 C.F.R. § 101.22(i)(2).

61. Federal and state regulations require that because the Product’s taste is represented as “Apple Cinnamon,” yet contains and/or uses DL-Malic Acid, that imparts the flavor of apples, “Apple Cinnamon” is required to “be accompanied by



the word(s) ‘artificial’ or ‘artificially flavored,’” such as “Artificial Apple Cinnamon Flavored” or “Artificially Flavored Apple Cinnamon.” 21 C.F.R. § 101.22(i)(2).

62. Instead, “Apple Cinnamon” is in all capital letters, larger than any other text, except the brand name, above the statement, “Naturally Flavored,” accompanied by two fresh apple slices, resting on two cinnamon cloves, when this is false and misleading, based on the use of DL-Malic Acid, an artificial flavoring ingredient, to provide its apple and/or cinnamon taste.

63. The Product is “misbranded” and misleading because even though it is required to conspicuously display that its apple cinnamon taste is provided, in significant part, by artificial flavoring, it fails to disclose this anywhere. AGM § 201(6); 21 U.S.C. § 343(f).

64. The Product is “misbranded” and misleading because it includes the artificial flavoring ingredient of DL-Malic Acid, essential to the taste of apples, but “it [does not] bear[s] labeling stating that fact.” AGM § 201(11); 21 U.S.C. § 343(k).

65. As a result of the false and misleading representations, the Product is sold at a premium price, approximately \$2.89 for a bag of fourteen rice cakes, 6.52 oz (185 g), excluding tax, 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

66. Plaintiff Rittenhouse is a citizen and resident of New York.

67. The Court has jurisdiction over Defendant because it transacts business within New York and sells the Product to consumers within New York, through its sale and/or distribution from at least thirty-six stores, including twenty-six King Kullen stores, and nine Weis Markets, and/or other supermarkets and retailers, and/or online, to citizens of this State.

68. Defendant transacts business in New York, through the sale of the Product to citizens of New York, from at least thirty-six stores, including twenty-six King Kullen stores, and nine Weis Markets, and/or other supermarkets and retailers, and/or online, to citizens of this State.

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

70. Defendant has committed tortious acts outside this State by labeling, packaging, representing, and/or selling the Product, in a manner which causes injury to consumers within this State, by misleading them as to its contents, production practices, type, origins, quantity, 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.

71. 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, ingredients, production practices, type, origins, 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**

72. Plaintiff Rittenhouse resides in Suffolk County, New York.

73. Venue is in this Court because Plaintiff Rittenhouse's residence is in Suffolk County.

74. Venue is in this Court because a substantial and/or entire part of the events or omissions giving rise to Plaintiff Rittenhouse's claims occurred in Suffolk County.

75. This is because Plaintiff Rittenhouse purchased, applied, used, and/or consumed the Product in Suffolk County, in reliance on the packaging and labeling identified here, and/or learned the representations and omissions identified here were false and/or misleading in Suffolk County.

### **PARTIES**

76. Plaintiff Rittenhouse is a citizen of Suffolk County, New York.

77. Defendant Topco Associates LLC is a Delaware limited liability

company with a principal place of business in Illinois.

78. Defendant is the largest American retail food GPO group purchasing organization (“GPO”).

79. Defendant supplies grocery stores with the equivalent of private label products, under a variety of brands, including Food Club.

80. While grocery stores sell leading national brands of products, they also sells many products under one of Topco’s private label brands, Food Club.

81. Private label products are made by third-party manufacturers, and sold under the name of the retailer, or its sub-brands.

82. Previously referred to as “generic” or “store brand,” private label products have increased in quality, and often are superior to their national brand counterparts.

83. Products under the Food Club brand have an industry-wide reputation for quality.

84. In releasing products under the Food Club brand, Defendant’s foremost criteria was to have high-quality products that were equal to or better than the national brands.

85. Topco gets national brands to produce its private label items, due its loyal customer base, high standards, and experience.

86. Private label products under the Food Club brand benefit by their

association with consumers' appreciation for the supermarket's brand overall.

87. That Food Club-branded products satisfy or would satisfy this high bar was or would be proven by focus groups, which rated or would rate them equal to or above their name brand equivalent.

88. A survey by The Nielsen Co. "found nearly three out of four American consumers believe store brands [or their equivalents] [like Food Club] are good alternatives to national brands, and more than sixty percent consider them to be just as good."

89. Upon information and belief, private label products generate higher profits for retailers and/or GPOs, like Topco, because national brands spend significantly more on marketing, contributing to their higher prices.

90. The result is that private label products can be sold at relatively lower costs compared to national brands.

91. The development of private label items is a growth area for Topco, as it selects only top suppliers to develop and produce Food Club products.

92. Plaintiff is like most consumers, who prefers foods with natural flavors, and tries to avoid foods with artificial flavors, based on the belief they are potentially harmful, not natural, and/or unhealthy.

93. Plaintiff is like most consumers and looks to the front label of foods to see what he is buying and to learn basic information about it.

94. Plaintiff is like most consumers, and is accustomed to the front label of packaging telling them if what they are buying gets its taste from artificial flavoring, because this is something required by law, and what most products have been doing for almost one hundred years.

95. Plaintiff is like most consumers and when they see that a front label does not disclose artificial flavoring, they expect its taste is from the identified ingredients and/or natural flavoring.

96. Plaintiff read, saw, and relied on the packaging and labeling, to mean its apple cinnamon taste was only from natural flavors, including natural apple flavor, when this was false and misleading, because it used synthetic DL-Malic Acid to provide its apple taste.

97. Plaintiff bought the Product with the labeling and packaging identified here, at or around the above-referenced price.

98. Plaintiff purchased the Product between August 2021 and August 2024, at stores, in this State.

99. Plaintiff expected that the Product's apple cinnamon taste (1) was only from natural flavors, including natural apple flavor, and/or (2) did not expect its apple cinnamon taste to be provided by artificial flavorings and/or artificial flavoring ingredients.

100. Plaintiff paid more for the Product than he would have, had he known its

apple cinnamon taste (1) was not only from natural flavors, including natural apple flavor, and/or (2) was provided by artificial flavorings and/or artificial flavoring ingredients, as he would have paid less.

101. The Product was worth less than what Plaintiff paid, and he would not have paid as much absent Defendant's false and misleading statements and/or omissions.

102. The Product's features and/or attributes, when taken together, and/or utilized for the purpose of conjoint analysis, choice analysis, choice-based ranking, hedonic pricing, or other similar methods, impacted Plaintiff's purchasing choice, compared to similar products lacking its features and/or attributes.

### CLASS ALLEGATIONS

103. Plaintiff seeks to represent the following class:

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

104. Excluded from the Class are (a) Defendant, Defendant's board members, executive-level officers, members, and attorneys, and immediate family members of any of the foregoing persons, (b) governmental entities, (c) the Court, the Court's immediate family, and Court staff and (d) any person that timely and properly excludes himself or herself from the Class.

105. 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.

106. 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.

107. Plaintiff is an adequate representative because his interests do not conflict with other members.

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

109. 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.

110. The class is sufficiently numerous, with over one hundred members, because the Product has or had been sold throughout the State for several years, with the representations, omissions, packaging, and/or labeling identified here, from at least thirty-six stores, including twenty-six King Kullen stores, and nine Weis Markets, and/or other supermarkets and retailers, and/or online, to citizens of this State.

111. 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

#### General Business Law (“GBL”) §§ 349 and 350

112. To the extent required, this section incorporates by reference other paragraphs as necessary.

113. The purpose of the GBL is to protect consumers against unfair and deceptive practices.

114. This includes making state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.

115. The GBL considers false advertising, unfair acts, and deceptive practices in the conduct of any trade or commerce to be unlawful.

116. Violations of the GBL can be based on (1) other laws and standards related to consumer deception, (2) public policy, established through statutes, laws, or regulations, (3) principles of the Federal Trade Commission Act (“FTC Act”), (4) FTC decisions with respect to those principles, (5) any rules promulgated pursuant to the FTC Act, and/or (6) standards of unfairness and deception set forth and interpreted by the FTC or the federal courts relating to the FTC Act. 15 U.S.C. §§ 41, 45, *et seq.*

117. Defendant’s false and deceptive representations and omissions with respect to the Product’s contents, origins, nutrient values, servings, ingredients, flavoring, type, functionality, and/or quality, are material in that they are likely to

influence consumer purchasing decisions.

118. The replacement of natural flavorings, like natural apple flavor, with DL-Malic Acid, from petroleum, is of material interest to consumers, because (1) natural apple flavor, and natural flavors from natural sources, cost more than synthetic DL-Malic Acid, and/or (2) consumers seek to avoid artificial flavors and artificial flavorings, for reasons related to health, nutrition, and/or a desire for more natural and less processed food ingredients and/or flavorings.

119. The labeling of the Product violated the FTC Act, thereby violating the GBL, because the representations, omissions, packaging, and/or labeling, caused consumers to expect (1) its apple cinnamon taste was only from natural flavors, including natural apple flavor, and/or (2) its apple cinnamon taste was not from artificial flavorings, and/or artificial flavoring ingredients, which was unfair and deceptive to consumers.

120. The labeling of the Product violates laws, statutes, rules, regulations, and/or norms, which prohibit unfair, deceptive, and/or unconscionable conduct, against the public.

121. The labeling of the Product violated the GBL, because the representations, omissions, packaging, and/or labeling, was contrary to statutes and/or regulations, which prohibit consumer deception by companies in the labeling of food products.

<u>Federal</u>	<u>State</u>
21 U.S.C. § 342(b)(1)	AGM § 200(7)
21 U.S.C. § 342(b)(2)	AGM § 200(8)
21 U.S.C. § 342(b)(4)	AGM § 200(10)
21 U.S.C. § 343(a)(1)	AGM § 201(1)
21 U.S.C. § 343(i)	AGM § 201(9)
21 C.F.R. § 101.18	
21 C.F.R. § 101.22	1 N.Y.C.R.R. § 259.1(a)
21 C.F.R. § 102.5	

122. Plaintiff believed the Product’s apple cinnamon taste (1) was only from natural flavors, including natural apple flavor, and/or (2) was not provided by artificial flavorings and/or artificial flavoring ingredients.

123. Plaintiff paid more for the Product, and would not have paid as much, if he knew that its apple cinnamon taste (1) was not only from natural flavors, including natural apple flavor, and/or (2) was provided by artificial flavorings and/or artificial flavoring ingredients.

124. Plaintiff seeks to recover for economic injury and/or loss he sustained based on the misleading labeling and packaging of the Product, a deceptive practice under the GBL.

125. Plaintiff may produce evidence showing how he and consumers paid more than they would have paid for the Product, relying on Defendant’s

representations, omissions, packaging, and/or labeling, using statistical and economic analyses, hedonic regression, hedonic pricing, conjoint analysis, and/or other advanced methodologies.

126. This means the individual damages will be based on the value attributed to the challenged claims and/or omissions, a percentage of the total price paid, not the total price of the Product.

127. As a result of Defendant's misrepresentations and omissions, Plaintiff was injured and suffered damages by payment of a price premium for the Product, which is the difference between what he paid based on its labeling, packaging, representations, statements, omissions, and/or marketing, and how much it would have been sold for without the misleading labeling, packaging, representations, statements, omissions, and/or marketing identified here.

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: September 17, 2024

Respectfully submitted,

/s/ Spencer Sheehan

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Notice of Lead Counsel Designation:

Lead Counsel for Plaintiff

Spencer Sheehan

Sheehan & Associates P.C.

Counsel for Plaintiff

**Certificate of Service**

I certify that on September 17, 2024, I served and/or transmitted the foregoing by the method below to the persons or entities indicated, at their last known address of record (blank where not applicable).

	Electronic Filing	First-Class Mail	Email	Fax
Defendant's Counsel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Plaintiff's Counsel	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Court	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

/s/ Spencer Sheehan