

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

CARLOS ORTIZ II, individually and
on behalf of all others similarly situated,

Plaintiff,

- against -

EAGLE FAMILY FOODS GROUP
LLC,

Defendant.

Class Action Complaint

Jury Trial Demanded

Carlos Ortiz ("Plaintiff"), through Counsel, alleges upon information and belief, except for allegations about Plaintiff, which are based on personal knowledge:

1. In 1885, Charles Cretors introduced the first mobile popcorn machine, which ushered in the now well-known combination of popcorn, butter, and salt.



2. These machines were used in the movie theaters of that era, introducing this food to the public for the first time.

3. Part of the reason consumers value popcorn with butter was because both are minimally processed foods, with nutritive value.

4. Popcorn, a whole grain, is relatively high in fiber, but low in calories.

5. Butter, defined by federal and state law as “made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter, and containing not less than 80 per centum by weight of milk fat,” high in protein, good fats, and calcium, fits this criteria. 21 U.S.C. § 321a.

6. The use of real butter in packaged popcorn is increasingly common, because, according to one food industry executive, “Consumers are reading product labels more closely,” with an increased focus on ingredients, especially in snack foods.

7. Consumer research company Mintel attributed this demand for “real ingredients” in part due to media attention focused on lack of transparency in the food industry.¹

8. This is because the public wants to consume foods with the types of ingredients they have in their refrigerators, instead of highly processed and synthetic

¹ Lynn Dornblaser, Director, Innovation & Insight, Mintel, “Clean Label: Why this Trend is Important Now,” 2017.

substitutes, made in laboratories.

9. To prevent unscrupulous merchants from exploiting “extrinsic cues such as visual information,”² in marketing foods based on valued ingredients like “real butter,” when they lack such ingredients, the Federal Food, Drug and Cosmetic Act (“FFDCA”) of 1938, and this State’s identical Agriculture and Markets Law (“AGM”), prohibited “misbranding” and adulteration, not just for “real butter,” but across the sources of nourishment sought by American families. 21 U.S.C. § 301 *et seq.*³ AGM § 3.⁴

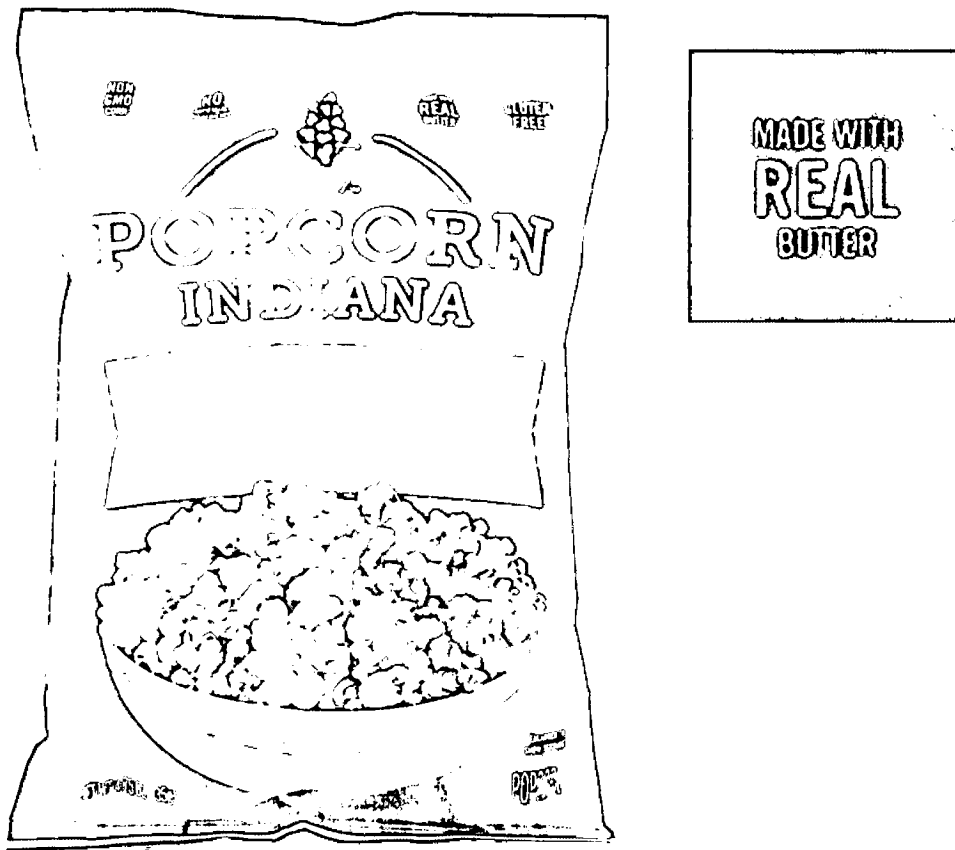
10. To appeal to consumers seeking “real butter” as part of packaged foods,

² 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 Ippeita, “Extrinsic Information Influences Taste and Flavor Perception: A Review from Psychological and Neuroimaging Perspectives,” *Seminars in Cell & Developmental Biology*, 24.3, Academic Press, 2013; Clement, J., Visual Influence on In-Store Buying Decisions: An Eye-Track Experiment on the Visual Influence of Packaging Design, *Journal of Marketing Management*, 23, 917-928 (2007); Gupta K, O. et al., Package Downsizing: Is it Ethical? 21 *AI & Society* 239-250 (2007).

³ “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.”

⁴ 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).

Eagle Family Foods Group LLC (“Defendant”) manufactures, labels, markets, packages, distributes, and/or sells (1) popcorn, (2) described as “Movie Theater Butter,” (3) across a bright yellow band on the front label, (4) with “Naturally Flavored” in small print, (5) promoted as “Made With Real Butter,” (6) under the Popcorn Indiana brand (“Product”).



11. Despite the emphasis on “real butter,” the fine print ingredients, listed in on the reverse side of the packaging, indicate the Product contains “Clarified Butter,” and “Natural Butter Flavor.” 21 C.F.R. § 101.4(a).

INGREDIENTS: POPCORN, VEGETABLE OIL (SUNFLOWER, SAFFLOWER, CORN AND/OR CANOLA), CLARIFIED BUTTER, SEA SALT, NATURAL BUTTER FLAVOR.



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12. The Product is “misbranded” and mislead consumers, because the labeling and packaging, namely, “Made With Real Butter,” cause purchasers to expect it would contain “real butter” as the exclusive, or predominant source for its taste, or at least that it would be present in a significant, relative and absolute amount, compared to ingredients used. AGM § 201(1); 21 U.S.C. § 343(a)(1).

13. Consumers expect that where a food, or a food’s component, is represented as being “Made With,” and/or “With,” a valuable ingredient, that ingredient will be the predominant component of whatever it is a part of, or at least

present in a significant, and non-de minimis amount.

14. Instead of “real butter,” the Product uses “Clarified Butter,” and “Natural Butter Flavor.”

15. Upon information and belief, and the investigation of Counsel, “clarified butter” refers to a form of anhydrous milkfat (“AMF”), and such allegations are likely to have evidentiary support following a reasonable opportunity for discovery.

16. AMF is an industrial ingredient from which practically all moisture and solids-not-fat from pasteurized cream or butter have been removed.⁵

17. While no FDA “standard of identity” for AMF, often referred to as “butter oil,” exists, it is defined as containing not less than 99.8 percent fat and not more than 0.1 percent moisture and, when produced from butter, not more than 0.1 percent other butter constituents, of which the salt shall be not more than 0.05 percent.⁶

18. Whereas “real butter” contains “milk or cream, or both, with or without common salt, and with or without additional coloring matter,” butteroil can, and typically is, made with a type of preservative additive called an “antioxidant.”
Compare 21 U.S.C. § 321a and 7 C.F.R. § 58.305(b), 7 C.F.R. § 58.337 (listing

⁵ The various forms of AMF and nomenclature may include anhydrous butteroil and butteroil.

⁶ A Codex Standard exists which is applied by the United States Department of Agriculture and other agencies.

antioxidants, such as propyl gallate, butylated hydroxytoluene (BHT), butylated hydroxyanisole (BHA), tocopherols, ascorbyl palmitate, dilauryl thiodipropionate, and antioxidant synergists, including citric acid, sodium citrate, isopropyl citrate, phosphoric acid, and monoglyceride citrate).

19. Since unlike butter, butteroil is stored for significant periods of time, these preservatives help minimize or retard oxidative processes, caused by elevated levels of polyunsaturated fatty acids and exposure to oxygen.

20. Though milk fat contains naturally-occurring antioxidants, these are present at low levels.

21. In producing AMF, the unique butter flavor, from diacetyl, butyric acid, and δ -lactones, is negatively affected.

22. In fact, the USDA definition of butteroil requires that its flavor “be bland,” in contrast to the flavor of butter. 7 C.F.R. § 58.347.

23. Though the small print on the front label, next to “Movie Theater Butter,” states, “Naturally Flavored,” this is in small font and inconspicuous, with condensed, thin white letters, difficult to see on the yellow background.

24. Even if eagle eyed consumers, who spend more than the typical thirteen seconds in making their purchases, notice the small print of “Naturally Flavored,” next to “Movie Theater Butter,” this does not disclose to them that the Product does not contain “real butter.”

25. While “Natural [Butter] Flavor” is defined as the “essential oil, [or] distillate,” from dairy ingredients, which can include “real butter,” it has little in common with “real butter,” as understood and expected by consumers. 21 C.F.R. § 101.22(a)(3).

26. While “natural flavor” may have contained some oil or other compound from real butter, at some distant point in the past, it is mixed with potentially a hundred additives and solvents, comprising roughly eighty percent of its volume, bearing little resemblance to the real butter it seeks to imitate.⁷

27. To create what many have called this “mysterious additive,” specialized chemists, known as “flavorists,” engage in modern day alchemy, concentrating, and synthesizing proteins from the cells and tissue of foods, like butter.

28. They use “‘natural’ bioidentical chemicals,” which are molecularly identical to their synthetic counterparts used in “artificial flavors,” and differing in only their source material, to imitate the taste of real butter, from milk and cream, with added salt.⁸

29. One Harvard Professor went further, by “unequivocally stat[ing], ‘One

⁷ Roni Caryn Rabin, Are ‘Natural Flavors’ Really Natural?, New York Times, Feb. 1, 2019.

⁸ Natasha Longo, Food Labs Use an Average of 2000 Chemicals to Create 500 ‘Natural Flavors’ You Would Never Suspect are Artificial, Waking Times, Aug. 27, 2013.

thing you can be sure of when you see ‘natural flavor’ on a package is that it is not ‘natural.’”⁹

30. In fact, many have noted how “There is little substantive difference in the chemical compositions of natural and artificial flavors,” since both are “blends [of] appropriate chemicals together in the right proportions.”¹⁰

31. Unfortunately for consumers, chemical flavors manufactured to mimic the taste of butter provides none of its nutritive and/or health benefits, like protein, calcium, and/or vitamin D.

32. Moreover, according to flavor expert Bob Holmes, an ingredient designated as “natural flavor” is unable to provide “all the flavor depth of the [butter] itself.”

33. Instead, the added “Natural Butter Flavor” contributes, enhances, resembles, provides, and/or simulates, the taste of butter, causing consumers to believe what they are consuming is due to a greater amount of real butter, when this is false.

34. The Product is “misbranded” and misleads consumers, because its name,

⁹ Carol Kendig, Xylitol by Any Other Name Would be as Deadly, Northwest Naturals, Mar. 21, 2022.

¹⁰ Natasha Longo, Food Labs Use an Average of 2000 Chemicals to Create 500 ‘Natural Flavors’ You Would Never Suspect are Artificial, Waking Times, Aug. 27, 2013.

labeling, and/or packaging, including “Movie Theater Butter,” with “Naturally Flavored” in inconspicuous and small font next to it, described as “Made With Real Butter,” “includes or suggests the name[s] of [real butter]...but not all such ingredients [clarified butter or AMF], even though the names of all such ingredients are stated elsewhere in the labeling,” on the fine print, back of the package, in the ingredient list. 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)

35. The Product is “misbranded” and misleads consumers, because the labeling and packaging, including “Movie Theater Butter,” with “Naturally Flavored” in inconspicuous and small font next to it, described as “Made With Real Butter,” “fails to reveal facts material in light of such representations,” because in place of an absolute and relatively greater amount of real butter, it has substituted “Clarified Butter” and “Natural Butter Flavor.” AGM § 201(1); 21 U.S.C. § 343(a)(1); 15 U.S.C. § 55(a)(1).

36. Substituting clarified butter and natural butter flavor for real butter is of material interest to consumers, because (1) real butter costs more than clarified butter and natural butter flavor, (2) real butter contains more, and/or higher quality nutrients than clarified butter and/or natural butter flavor, (3) real butter is a more natural ingredient than clarified butter and natural butter flavor, and/or (4) real butter has a more authentic “buttery” taste, compared to clarified butter and natural butter

flavor.

37. The Product is “misbranded” and misleads consumers, because “Naturally Flavored,” as part of its “common or usual name,” “Movie Theater Butter [–] Naturally Flavored,” is insufficiently conspicuous for many consumers to notice. AGM § 201(9); 21 U.S.C. § 343(i); 21 C.F.R. § 101.3(a); 21 C.F.R. § 101.3(b); 1 N.Y.C.R.R. § 259.1(a).

38. First, “Naturally Flavored” is not “in letters not less than one-half the height of the letters in the name of the characterizing flavor,” “Movie Theater Butter,” but significantly smaller. 21 C.F.R. § 101.22(i)(1)(i)

39. Second, the condensed, pencil-thin white font of “Naturally Flavored,” on the bright yellow background, makes it difficult to read and/or notice, especially compared to the significantly larger “Movie Theater Butter” statement.

40. As a result of the false and misleading representations and omissions, the Product are sold at a premium price, approximately \$2.79 for three ounces (86 grams), with correspondingly higher and lower prices based on package size, higher than similar products, represented in a non-misleading way, and higher than they would be sold for absent the misleading representations and omissions, when these factors are taken together, and/or utilized for the purpose of conjoint analysis, choice analysis, choice-based ranking, hedonic pricing, and/or other similar methods, to evaluate a product’s attributes and/or features.

JURISDICTION

41. Plaintiff Ortiz is a citizen and resident of New York.

42. The Court has jurisdiction over Defendant because it transacts business within New York, and sells the Product to consumers within New York, through third parties, including grocery stores, big box stores, dollar stores, bodegas, gas stations, warehouse club stores, drug stores, convenience stores, specialty grocery stores, ethnic food stores, gas station convenience stores, other similar locations, and/or online, to citizens of this State.

43. Defendant transacts business in New York, through the sale of the Product to citizens of New York, through third parties, including grocery stores, big box stores, dollar stores, bodegas, gas stations, warehouse club stores, drug stores, convenience stores, specialty grocery stores, ethnic food stores, gas station convenience stores, other similar locations, and/or online, to citizens of this State.

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

45. 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.

46. 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

47. Plaintiff Ortiz resides in Bronx County, New York.

48. Venue is in this Court because Plaintiff Ortiz's residence is in Bronx County.

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

PARTIES

50. Plaintiff Ortiz is a citizen of Bronx County, New York.

51. Defendant Eagle Family Foods Group LLC is a Delaware limited liability company with a principal place of business in Ohio.

52. Plaintiff is like most consumers, and looks to, and/or cannot avoid

viewing, the front label of foods, such as juices, to see what he is buying, and/or to learn basic information about them.

53. Plaintiff is like most consumers, and is accustomed to the front label of packaging telling him about a food's predominant or significant ingredients, as they relate to the food itself, and/or its taste.

54. Plaintiff is like most Americans who do not know what "clarified butter," AMF, and/or "natural butter flavor" are, but knows what butter is.

55. Plaintiff read, saw, and/or relied on the packaging and labeling, (1) popcorn, (2) described as "Movie Theater Butter," (3) across a bright yellow band on the front label, (4) with "Naturally Flavored" in small print, (5) promoted as "Made With Real Butter," (6) under the Popcorn Indiana brand to mean it contained real butter, consistent with how consumers understand this term, as the source of its butter taste, or at least that real butter was present in a relatively significant amount, compared to other ingredients.

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

57. Plaintiff purchased the Product between August 2021 and August 2024, at grocery stores, big box stores, dollar stores, bodegas, gas stations, warehouse club stores, drug stores, convenience stores, specialty grocery stores, ethnic food stores, gas station convenience stores, and/or other similar locations, in counties which may

include Bronx County.

58. Plaintiff paid more for the Product than he would have, had he known real butter was not the exclusive or predominant source of its taste, nor was it present in a relatively significant amount, compared to other ingredients, as he would have paid less.

59. 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.

60. 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

61. Plaintiff is a consumer, not a re-seller or merchant, and seeks to represent other consumers in the class identified below, against a big business:

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

62. Plaintiff's claims are based upon New York General Business Law ("GBL") §§ 349 and 350, passed by the legislature to protect unsophisticated consumers against large and sophisticated commercial entities.

63. 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.

64. 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.

65. 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.

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

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

68. 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.

69. The class is sufficiently numerous, with over one hundred members, because the Product has been sold throughout the State for several years, with the representations, omissions, packaging, and/or labeling identified here, through third

parties, including grocery stores, big box stores, dollar stores, bodegas, gas stations, warehouse club stores, drug stores, convenience stores, specialty grocery stores, ethnic food stores, gas station convenience stores, other similar locations, and/or online, to citizens of this State.

70. 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

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

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

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

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

75. 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.*

76. 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.

77. The replacement of real butter with clarified butter and/or natural butter flavor is of material interest to consumers, because (1) real butter costs more than clarified butter and natural butter flavor, (2) real butter contains more, and/or higher quality nutrients than clarified butter and/or natural butter flavor, (3) real butter is a more natural ingredient than clarified butter and/or natural butter flavor, and/or (4) real butter has a more authentic "buttery" taste, compared to clarified butter and natural butter flavor.

78. 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 real butter was the exclusive or predominant source of its taste, which was unfair and deceptive to consumers.

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

against the public.

80. 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>State</u>	<u>Federal</u>
<u>AGM § 201(1)</u>	<u>21 U.S.C. § 343(a)(1)</u>
<u>AGM § 201(9)</u>	<u>21 U.S.C. § 343(i)</u>

81. Plaintiff believed real butter was the exclusive or predominant source of its taste, or at least was present in a relatively significant amount.

82. Plaintiff paid more for the Product, and would not have paid as much, if he knew that real butter was not the exclusive or predominant source of its taste, nor was present in a relatively significant amount.

83. 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.

84. 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.

85. This means individual damages will be based on the value attributed to the challenged claims and/or omissions, a percentage of the total price paid.

86. 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 28, 2024

Respectfully submitted,

/s/ Spencer Sheehan

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