

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No.: 0:12-cv-61803

Kelli Altman, individually, and on behalf
of all others similarly situated,

Plaintiff,

vs.

Frito-Lay North America, Inc., a Texas
Corporation,

Defendant.

CLASS ACTION COMPLAINT FOR EQUITABLE RELIEF AND DAMAGES

Plaintiff, KELLI ALTMAN (“Plaintiff”) by and through her undersigned counsel, hereby files this Complaint on behalf of herself and all others similarly situated throughout the United States, and alleges against Defendant, FRITO-LAY NORTH AMERICA, INC. (“Defendant” or “FRITO-LAY”) as follows:

I. INTRODUCTION

1. Defendant has represented without qualification that the Product is “ALL NATURAL,” but has not disclosed and concealed the fact that the product contains Genetically Modified Organisms (“GMOs”). Defendant manufactures, markets, advertises, distributes and sells various snack foods, including Bean Dip products that claim to be all natural but fail to disclose and thereby conceal the material fact that they contain GMOs (the “Product”).

2. Defendant markets the Product as “ALL NATURAL” on the Product’s packaging, label, but does not disclose the material fact that the Product contains GMOs.

3. The Product contains Soy, among other ingredients, which are known to be derived from GMOs.

4. GMOs are plants that grow from seeds in which DNA splicing has been used to place genes from another source into a plant.

5. The Product poses a potential threat to consumers because medical research and scientific studies have yet to determine the long-term health effects of genetically engineered foods. Recent studies suggest that GMOs may in fact be harmful to a consumer's health.

6. The Product also has the potential of harboring allergens not typically associated with the listed ingredients. The consumer would be unaware of the potential allergic reaction because the product containing the GMO would in no way warn of or even indicate its genetically modified condition, since it is labeled all natural.

7. Plaintiff contends that products containing GMOs should not be labeled "all natural" without also disclosing the fact the products contain GMOs, and that Defendant's advertising and labeling is deceptive and likely to mislead the public as a result. Plaintiff would not have purchased the Product if she had known that the Defendant could not support its claim that the Product is all natural because it contains GMOs.¹

II. PARTIES

8. Plaintiff is an individual consumer over the age of eighteen. She resides in Parkland, Broward County, FL, and is a citizen of Florida. Plaintiff has purchased a Product that is the subject of this action, Frito Lay Bean Dip products, numerous times

1. Plaintiff does not contend that Defendant was required to state whether its Products were made from genetically modified plants. Rather Plaintiff contends that Defendant's affirmative decision to label its Product "ALL NATURAL" without also disclosing the fact the Product contains GMO is misleading, given that the Products were made using GMO.

throughout the past 4 years, from a local Publix Supermarket located at 8095 North University Drive Parkland, FL 33067. Plaintiff routinely purchases the Product for her family, including minor children. Plaintiff is only making claims for economic damage on behalf of herself and the Class, and respectfully requests a jury trial on damage claims.

9. Defendant is a Texas corporation. FRITO-LAY is a corporation organized and existing under the laws of the state of Delaware. FRITO-LAY maintains a principal place of business at 7701 Legacy Drive, Plano, Texas 75024, and a registered agent for service of process as: CT Corporation System, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801. Directly and through its retailers, distributors, and agents, FRITO-LAY has substantial contacts with, and receives benefits and income from and through, the State of Florida.

III. VENUE AND JURISDICTION

10. This Court has jurisdiction over the subject matter presented by this Complaint because it is a class action arising under 28 U.S.C. § 1332(d), which, under the Class Action Fairness Act of 2005 (“CAFA”), Pub. L. No. 109-2, 119 Stat. 4 (2005), explicitly provides for the original jurisdiction of the Federal Courts of any class action in which any member of the Plaintiff class is a citizen of a state different from any Defendant, and in which the matter in controversy exceeds in the aggregate the sum of \$5,000,000, exclusive of interest and costs. Plaintiff alleges that the total claims of individual class members in this action are in excess of \$5,000,000 in the aggregate, exclusive of interest and costs, as required by 28 U.S.C. § 1332(d)(2), (5). Plaintiff is a citizen of the State of Florida, as set forth above, and Defendant can be considered a citizen of Texas. Therefore, diversity of citizenship exists under CAFA as required by 28 U.S.C. §

1332(d)(2)(A). Furthermore, Plaintiff alleges that the total number of members of the proposed Plaintiff Class is greater than 100, pursuant to 28 U.S.C. § 1332(d)(5)(B).

11. Venue in this district is proper pursuant to 28 U.S.C. §1391(b) because Defendant conducts business within, may be found in, and is subject to personal jurisdiction in this judicial district, and Plaintiff resides in and purchased the Product that is the subject of this action in this judicial district.

IV. FACTUAL ALLEGATIONS

12. Defendant markets the Product as “ALL NATURAL” without disclosing the fact that the product contained GMO.

13. The Product’s packaging and marketing is misleading, however, because Defendant’s Product contains GMOs, ingredients that have been modified through biotechnology and are therefore not all natural and this fact is not disclosed in conjunction with the claim the product is “all natural.”

14. The Product uses plants grown from Genetically Modified Organisms (“GMOs”). Specifically, the Product contains Soy, among other ingredients, which are known to be derived from GMOs.

15. Plaintiff contends that Defendant’s failure to disclose the presence of GMOs in its Product amounts to a material misrepresentation because the Product is not all natural as a result thereof. Plaintiff would not have purchased the Product had she known it was not all natural.

16. At a minimum, Plaintiff contends that Defendant should not label the Product “All Natural” without at least also providing a simultaneous disclosure of the presence of GMOs). Defendant’s covert inclusion of GMOs in its Product amounts to an

affront to the health conscious consumers and the public at large.

17. Defendant's failure to disclose the presence of GMOs in its Product violates the consumer's right to know what is being introduced into his or her body/internal system, and right to choose whether he or she wishes to participate in the current experimental stage of genetically modified organisms and their comprehensive effect on human health.

V. CLASS ALEGATIONS

18. Plaintiff re-alleges and incorporates by reference the allegations set forth *supra* in paragraphs one (1) through twenty-nine (17) of this Complaint.

19. Plaintiff brings this class action pursuant Federal Rule of Civil Procedure 23 and seeks certification of the claims and certain issues in this action pursuant to the applicable provisions of Federal Rule of Civil Procedure 23, on behalf of all persons in Florida who, within the four years preceding the filing of this Complaint ("Class Period") purchased the Product for personal use ("Class").

20. Defendant's practices and omissions were applied uniformly to all members of the Class, so that the questions of law and fact are common to all members of the Class. All members of the putative Class were and are similarly affected by having purchased and used the Product for its intended and foreseeable purpose, and the relief sought herein is for the benefit of Plaintiff and members of the putative Class.

21. Plaintiff is informed and believes, and on that basis alleges, that the Plaintiff Class is so numerous that joinder of all members would be impractical. Based on the annual sales of the Product and the popularity of the Product, it is apparent that the number of consumers of the Product would at least be in the many thousands, thereby making joinder impossible.

22. Questions of law and fact common to the Plaintiff Class exist that predominate over questions affecting only individual members, including, *inter alia*:

- a. Whether Defendant's practices in connection with the design, testing, manufacture, assembly, development, promotion, marketing, advertising and sale of the Product were deceptive or unfair in any respect, thereby violating the Florida Deceptive and Unfair Trade Practices Act, *inter alia*, sections 501.201 to 201.213, *Florida Statutes*;
- b. Whether Defendant was unjustly enriched through its sale of the Product;
- c. Whether Defendant failed to adequately warn of, and/or concealed the dangers and health risks associated with the Product; and
- d. Whether Defendant's conduct as set forth above injured consumers and if so, the extent of the injury.

23. The claims asserted by Plaintiff in this action are typical of the claims of the members of the Plaintiff Class, as the claims arise from the same course of conduct by Defendant, and the relief sought is common.

24. Plaintiff will fairly and adequately represent and protect the interests of the members of the Plaintiff Class. Plaintiff has retained counsel competent and experienced in both consumer protection and class action litigation.

25. Certification of this class action is appropriate under Federal Rule of Civil Procedure 23 because the questions of law or fact common to the respective members of the Class predominate over questions of law or fact affecting only individual members. This predominance makes class litigation superior to any other method available for the fair and efficient adjudication of these claims.

26. Absent a class action, it would be highly unlikely that the representative Plaintiff or any other members of the Class would be able to protect their own interests because the cost of litigation through individual lawsuits might exceed expected recovery.

27. Certification is also appropriate because Defendant acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole. Further, given the large number of consumers of the Products, allowing individual actions to proceed in lieu of a class action would run the risk of yielding inconsistent and conflicting adjudications.

28. A class action is a fair and appropriate method for the adjudication of the controversy, in that it will permit a large number of claims to be resolved in a single forum simultaneously, efficiently, and without the unnecessary hardship that would result from the prosecution of numerous individual actions and the duplication of discovery, effort, expense and burden on the courts that such individual actions would engender.

29. The benefits of proceeding as a class action, including providing a method for obtaining redress for claims that would not be practical to pursue individually, outweigh any difficulties that might be argued with regard to the management of this class action.

**VI. FIRST CAUSE OF ACTION:
FOR VIOLATIONS OF FLORIDA'S DECEPTIVE AND UNFAIR
TRADE PRACTICES ACT, FLA. STAT. § 501.201, ET SEQ.**

30. Plaintiff re-alleges and incorporates by reference verbatim the allegations set forth in paragraphs one (1) through forty-one (29) of this Complaint.

31. This cause of action is brought pursuant to the Florida Deceptive and Unfair Trade Practices Act, Sections 501.201 to 201.213, *Florida Statutes*. The express purpose of the Act is to “protect the consuming public...from those who engage in unfair

methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce” Section 501.202(2).

32. The sale of the Product at issue in this cause was a “consumer transaction” within the scope of the Florida Deceptive and Unfair Trade Practices Act, Sections 501.201 to 201.213, *Florida Statutes*.

33. Plaintiff is a “consumer” as defined by Section 501.203, *Florida Statutes*. Defendant’s Product is a “good”, within the meaning of the Act. Defendant is engaged in trade or commerce within the meaning of the Act.

34. Section 501.204(1), *Florida Statutes* declares as unlawful “unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce”.

35. Section 501.204(2), *Florida Statutes* states that “due consideration be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the Trade Commission Act.” Defendant’s unfair and deceptive practices are likely to mislead – and have misled – the consumer acting reasonably under the circumstances and, therefore, violate Section 500.04, Florida Statutes and 21 U.S.C. Section 343.

36. Defendant has violated the Act by engaging in the unfair and deceptive practices described above, which offend public policies and are immoral, unethical, unscrupulous and substantially injurious to consumers. Specifically, Defendant has represented that the Product is “ALL NATURAL,” and failed to disclose and concealed the fact that the Product contains GMOs.

37. Plaintiff and Class Members have been aggrieved by Defendant’s unfair and deceptive practices in that they purchased and consumed Defendant’s Product.

38. The damages suffered by the Plaintiff and the Class were directly and proximately caused by the deceptive, misleading and unfair practices of Defendant, as described above.

39. Pursuant to Section 501.211(1), *Florida Statutes*, Plaintiff and the Class seek a declaratory judgment and court order enjoining the above described wrongful acts and practices of the Defendant and for restitution and disgorgement.

40. Additionally, pursuant to sections 501.211(2) and 501.2105, *Florida Statutes*, Plaintiff and the Class make claims for damages, punitive damages, attorney's fees and costs.

**VII. SECOND CAUSE OF ACTION:
UNJUST ENRICHMENT**

41. Plaintiff re-alleges and incorporates by reference verbatim the allegations set forth in paragraphs one (1) through forty-one (41) of this Complaint.

42. Defendant has represented that the Product is "ALL NATURAL," and failed to disclose and concealed the material fact the Product contains GMOs.

43. Plaintiff and Class Members conferred a benefit on Defendant by purchasing its Product.

44. Defendant accepted and retained the benefit in the amount of the profits it earned from sales of its Product to Plaintiff and Class Members.

45. Defendant has profited from its unlawful, unfair, misleading, and deceptive practices and advertising at the expense of Plaintiff and Class Members, under circumstances in which it would be unjust for Defendant to be permitted to retain the benefit.

46. Plaintiff and Class Members do not have an adequate remedy at law against Defendant (in the alternative to other claims pleaded herein).

47. Plaintiff and Class Members are entitled to restitution of the excess amount

paid for the Product, over and above what they would have paid if the dangers and health risks associated with the Product had been adequately disclosed. Accordingly, the Product was valueless such that Plaintiff and Class Members are entitled to restitution in an amount not less than the purchase price of the Product.

48. Plaintiff and Class Members are also entitled to disgorgement of the profits Defendant derived from the sales of its Product.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, prays for relief, jointly and severally pursuant to each cause of action set forth in this Complaint as follows:

1. For an order certifying that the action may be maintained as a class action and Plaintiff' counsel be appointed as Class Counsel;
2. For an award of equitable relief as follows:
 - a. Enjoining Defendant from continuing to engage, use, or employ any unfair and/or deceptive business acts or practices related to the design, testing, manufacture, assembly, development, marketing and advertising of the Product for the purpose of selling the Product in such manner as set forth in detail above;
 - b. Restoring all monies that may have been acquired by Defendant as a result of such unfair and/or deceptive act or practices; and
3. For actual damages in an amount to be determined at trial;
4. For punitive damages in an amount to be determined at trial;
5. For an award of attorney's fees;

6. For an award of costs;
7. For pre- and post-judgment interest on any amounts awarded; and
8. For any other award the Court might deem just, appropriate, or proper.

XV. DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial on all issues so triable.

Respectfully Submitted,

Dated: September 13, 2012

/s/ Joshua H. Eggnatz
Joshua H. Eggnatz, Esq.
Fla. Bar. No.: 0067926
THE EGGNATZ LAW FIRM, P.A.
1920 N. Commerce Parkway, Suite 1
Weston, FL 33326
Tel: (954) 634-4355
Fax: (954) 634-4342
JEggnatz@EggnatzLaw.com
Attorney for Plaintiff