

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION**

BENJAMIN PHELPS,
individually and on behalf of all
others similarly situated,

Case No.:

Plaintiff,

v.

HORMEL FOODS CORPORATION,

Defendant.

CLASS ACTION COMPLAINT

Plaintiff, Benjamin Phelps (“hereinafter Plaintiff”), individually, and on behalf of all other similarly situated persons, by and through the undersigned counsel, bring this class action complaint against Hormel Foods Corporation.

SUMMARY OF THE CASE

1. Hormel Foods Corporation (hereinafter “Hormel” or “Defendant”) is a company that manufactures, markets, and labels several food products which contain ingredients that are synthetic ingredients and/or preservatives, including, but not limited to, cultured celery powder and baking powder, and genetically modified ingredients, including, but not limited to, maltodextrin.

2. Hormel manufactures, markets, and labels its products sold with labels that, in describing the contents, display the words “100% Natural” and “No Preservatives.” In truth, Defendant’s products contain synthetic ingredients and/or preservatives, including, but not

limited to, cultured celery powder and baking powder, and genetically modified ingredients, including, but not limited to, maltodextrin.

3. Hormel products, as alleged herein, are not “100% Natural,” nor do they contain “No Preservatives,” because they contain ingredients that are synthetic and/or preservatives, including, but not limited to, cultured celery powder and baking powder, and genetically modified ingredients, including, but not limited to, maltodextrin.

4. The “100% Natural” claims are false because the Hormel products contain ingredients that are synthetic and so heavily processed that they are no longer chemically the same as the raw ingredients.

5. The U.S. Department of Agriculture (“USDA”) takes into account the level of processing in its policy on natural claims on food labeling. The USDA allows such products to be labeled “natural” when “(1) The product does not contain any artificial flavor or flavoring, coloring ingredient, or chemical preservative (as defined in 21 C.F.R. 101.22), or any other artificial or synthetic ingredient; and (2) the product and its ingredients are not more than minimally processed. Minimal processing may include those traditional processes used to make food edible or to preserve it or to make it safe for human consumption, e.g., smoking, roasting, freezing, drying, and fermenting. Relatively severe processes, e.g., solvent extraction, acid hydrolysis, and chemical bleaching would clearly be considered more than minimal processing.”

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6. Upon information and belief, Defendant knew and intended that consumers would pay a premium price for the Hormel products if they were labeled “100% Natural.”

¹ USDA, FOOD STANDARDS AND LABELING POLICY BOOK, available at http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf

7. Additionally, in a November 16, 2011 FDA Warning Letter to Alexia Foods, Inc., the FDA specified that, “because your products contain synthetic ingredients, the use of the claim ‘All Natural’ on this product label is false and misleading, and therefore your product is misbranded under section 403(a)(1) of the [Federal Food, Drug, and Cosmetic] Act.”² Similarly, because Defendant’s products contain synthetic ingredients, preservatives, and genetically modified ingredients, the “100% Natural” claim on the Hormel products is false and misleading, and therefore the products are misbranded.

8. Defendant knowingly and purposefully failed to disclose to its consumers that its Hormel products contain synthetic ingredients, preservatives, and genetically modified ingredients. These products are therefore falsely labeled as being “100% Natural.” The following Hormel products at issue are:

1. Natural Choice® Deli Roast Beef
2. Natural Choice® Oven Roasted Deli Turkey
3. Natural Choice® Honey Deli Ham
4. Natural Choice® Uncured Hard Salami
5. Natural Choice® Original Uncured Bacon
6. Natural Choice® Smoked Deli Turkey
7. Natural Choice® Cooked Deli Ham
8. Natural Choice® Honey Deli Turkey
9. Natural Choice® Cooked Deli Ham
10. Natural Choice® Cracked Black Pepper Deli Turkey
11. Natural Choice® Rotisserie Style Deli Chicken Breast
12. Natural Choice® Sun-Dried Tomato Deli Turkey
13. Natural Choice® Cherrywood Smoked Deli Ham
14. Natural Choice® Sriracha Flavored Deli Chicken Breast
15. Natural Choice® Uncured Canadian Bacon
16. Natural Choice® Fully Cooked Uncured Bacon
17. Natural Choice® Cherrywood Smoked Uncured Bacon

9. As a consequence of Defendant’s unfair and deceptive practices, Plaintiff and members of the Class purchased the Hormel products under the false impression that, by

² <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm281118.htm>

purchasing Defendant's products, they would be receiving products that were in fact "100% Natural" with "No Preservatives," or products completely void of synthetic ingredients, preservatives, and genetically modified ingredients.

10. Significantly, **each** consumer has been exposed to the **same** material misrepresentations and/or omissions, which are prominently displayed on the product's packaging prior to purchasing the products.

11. Under Federal and Florida State law, Defendant's products are "misbranded" if their "labeling is false or misleading in any particular," or if they do not contain certain information on their labeling. *See* 21 U.S.C. § 343(a); Florida Food Safety Act § 500 *et seq.*; Fla. Stat. §§ 500.01-500.80 (2014).

12. Further, any violation of 21 U.S.C. § 343(a) also constitutes violations of the Florida Consumer Protection Statutes §§ 501.201-501.213, Florida Deceptive and Unfair Trade Practices Act, Negligent Misrepresentation, the Florida Misleading Advertising Statute § 817.41, Breach of Express Warranties pursuant to Florida Statute § 672.313 and UCC § 2-313 and Unjust Enrichment. In this action, Plaintiff asserts claims under these state statutes, as well as under common law.

13. For the reasons stated herein, Defendant's products sold in the United States are misbranded and illegal.

14. Plaintiff now seeks to stop Defendant's unlawful conduct.

PARTIES

15. Plaintiff, Benjamin Phelps, is a citizen of the United States and is domiciled in Boca Raton, Florida.

16. Plaintiff purchased Defendant's Hormel products in this State and this District within the four years preceding the filing of this action (the "Class Period").

17. Plaintiff is, and throughout the entire class period asserted herein, has been very concerned about, and tries to avoid, consuming foods that are not natural—such as foods that contain synthetic ingredients, preservatives, and genetically modified ingredients. For this reason, Plaintiff was willing to pay a premium price for foods that are in fact "100% Natural." Based on the "100% Natural" representations on Defendant's Hormel product labels, Plaintiff and members of the Class reasonably believed the products they purchased were in fact "100% Natural," and relied on this representation in making the purchases thereof.

18. Not only did Plaintiff purchase the products because the labels said they were "100% Natural," Plaintiff also paid more money for the products than he would have paid for other similar products that contained synthetic ingredients, preservatives, and genetically modified ingredients.

19. Had Plaintiff known the truth – that the products were not "100% Natural"– he would not have purchased these products, nor would he have paid the premium price for these products.

20. Defendant, Hormel Natural, LLC, is a Minnesota Corporation with its principal place of business located at 1010 Dale Street North, St. Paul, Minnesota 55117.

21. Defendant is a corporation that produces, advertises, markets, sells, and distributes products throughout the United States, including in this State, district, and division.

JURISDICTION AND VENUE

22. This Court has original jurisdiction over this action under 28 U.S.C. § 1332(d) because this is a class action in which: (1) the matter in controversy exceeds the sum or value of

\$5,000,000, exclusive of interest and costs; (2) a member of the class of Plaintiffs is a citizen of a State different from a defendant; and (3) the number of members of all proposed Plaintiff classes in the aggregate is greater than 100.

23. During the class period, Plaintiff purchased Deli Roast Beef, Oven Roasted Deli Turkey, Honey Deli Ham, and Uncured Hard Salami at Publix Super Market.

24. This Court has personal jurisdiction over Defendant because a substantial portion of the wrongdoings alleged herein occurred in Florida. Defendant also has sufficient minimum contacts with Florida, and has otherwise intentionally availed itself of the markets in Florida through the promotion, marketing, and sale of products sufficient to render the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

25. Venue is proper in this District pursuant to 28 U.S.C. § 139(b)(2) and (3) because a substantial part of the events or omissions giving rise to these claims occurred in this District, a substantial part of the property that is the subject of this action is situated in this District, and Defendant is subject to the Court's personal jurisdiction with respect to this action.

FACTS RELEVANT TO ALL CLAIMS

Definition of "100% Natural"

26. Representing that food products or ingredients are "100% Natural" is a statement of fact, and the term, *natural*, has been defined by the federal governmental agencies that regulate food companies such as Defendant.

27. Although the Food and Drug Administration (FDA) does not directly regulate the term "natural," the FDA has established a policy defining the outer boundaries of the use of that term by clarifying that a product is not natural if it contains artificial color, artificial flavors, or

synthetic substances.³ Specifically, the FDA states: “the agency will maintain its policy regarding the use of ‘natural,’ as meaning nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food.” 58 Fed. Reg. 2302, 2407 (Jan. 6, 2003).

28. Pursuant to 7 C.F.R. § 205.2, an ingredient is synthetic or artificial as follows:

Synthetic. A substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources, except that such term shall not apply to substances created by naturally occurring biological processes.

Nonsynthetic (natural). A substance that is derived from mineral, plant, or animal matter and does not undergo a synthetic process as defined in section 6502(21) of the Act (7 U.S.C. 6502(21)). For the purposes of this part, nonsynthetic is used as a synonym for natural as the term is used in the Act.

29. Similarly, the USDA’s Food Safety and Inspection Service (“FSIS”) defined a natural product as, “a product that does not contain any artificial or synthetic ingredients and does not contain any ingredient that is more than “minimally processed”:

Minimal processing may include: (a) those traditional processes used to make food edible or to preserve it or to make it safe for human [or animal] consumption, e.g., smoking, roasting, freezing, drying, and fermenting, or (b) those physical processes which do not fundamentally alter the raw product and/or which only separate a whole, intact food into component parts, e.g., grinding meat, separating eggs into albumen and yolk, and pressing fruits to produce juices.

Relatively severe processes, e.g., solvent extraction, acid hydrolysis, and chemical bleaching would clearly be considered more than minimal processing...⁴

30. In addition, in an FDA letter to Judges Yvonne Gonzalez Rogers, Jeffrey S. White, and Kevin McNulty, regarding a request for the agency to make a determination about whether

³ See www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM199361.pdf

⁴ www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf

and under what circumstances food products containing ingredients produced using certain synthetic and/or artificial ingredients may be labeled “natural,” the FDA wrote:

[The] FDA has not promulgated a formal definition of the term “natural” with respect to foods. The agency has, however, stated that its policy regarding the use of the term “natural” on food labeling means that “nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food.”

See 58 Fed. Reg. 2302, 2407 (1993).

31. A reasonable consumer’s understanding of the term “100% Natural” comports with these federal definitions. A reasonable consumer’s understanding of the term “100% Natural” means that nothing artificial, synthetic, chemically processed, or genetically modified has been included in, or has been added to, a food labeled as “100% Natural.” A reasonable consumer would also expect that Defendant’s products are truthfully labeled (i.e. that they are “100% Natural”). In fact, Plaintiff’s understanding of the term “natural” does in fact mean that nothing artificial, synthetic, chemically processed, or genetically modified has been included in, or has been added to, a food labeled as “100% Natural.” Plaintiff’s reliance was reasonable and justified in that Defendant appeared to be, and represented itself to be, a reputable business, and it distributed the products through reputable companies.

The Products’ Synthetic Ingredients and Preservatives

32. **Cultured Celery Powder:** *Cultured celery powder* is a preservative high in nitrates. The nitrates present in cultured celery powder make this ingredient valuable as a preservative. Pursuant to significant and steadfast data sources, “cultured” denotes reference to a bacterial culture used to transform and chemically manipulate the sodium nitrate found in celery powder to sodium nitrite, also a preservative. Additionally, several of the Hormel products

containing cultured celery powder also contain *lactic acid starter culture*.⁵ This lactic acid starter culture induces the further breaking down of nitrates within the celery powder, producing more nitrites. Though Hormel claims its products are “100% Natural” and have “No Preservatives,” with the exception of the Natural Choice® Deli Roast Beef, each and every Natural Choice® product contains *cultured celery powder or cultured celery juice powder* as a labeled ingredient, further evidencing Natural Choice’s wanton and deliberate false “100% Natural” and “No Preservatives” claims.

33. **Baking Powder:** All baking powders contain sodium bicarbonate. However, baking powder also contains two acids. One of these acids is monocalcium phosphate. Upon the addition of moisture to the sodium bicarbonate, the two ingredients begin to react, releasing carbon dioxide and causing chemical leavening. To extend the chemical leavening process, baking powder also contains a second acid, either sodium acid pyrophosphate (“SAPP”) or sodium aluminum sulfate.⁶ According to the International Food Additives Council, SAPP is typically prepared by the partial neutralization of phosphoric acid, which is derived from crushed and purified phosphate rock, with sodium hydroxide or sodium carbonate under controlled conditions. Sodium acid pyrophosphate is a synthetic ingredient per 7 CFR § 205.605(b). According to the FDA, SAPP does not belong in products making “100% Natural” claims, because SAPP is a synthetic substance. *See FDA warning letter to Middle East Bakery, LLC.*

34. The labeling of products as “100% Natural” carries implicit health benefits that are highly important to consumers—benefits that compel consumers to pay a premium price over comparable products that are not “100% Natural.” Over time, Hormel has cultivated and reinforced

⁵ http://www.fsis.usda.gov/wps/wcm/connect/16cf683e-7b58-4872-88c0-d800d58c6aef/Petition_Applegate_110311.pdf?MOD=AJPERES, pp. 2-3.

⁶ <http://phys.org/news/2014-05-difference-soda-powder.amp>

a corporate image that has catered to this “100% Natural” theme and has boldly placed this claim on its products, despite the fact Hormel uses synthetic ingredients and preservatives in the products as identified above.

35. Hormel advertises its products through an advertising campaign, “Make the Natural Choice.” Hormel maintains a website for its brand, www.makethenaturalchoice.com, and has advertisements on numerous social media websites, including, but not limited to, Facebook, Twitter, and Tumblr:



36. Hormel has used the “100% Natural” and “No Preservatives” labels to shape its brand and sell its foods. Yet, the existence of synthetic ingredients and preservatives in its food renders the use of the labels “100% Natural” and “No Preservatives” false and misleading. In manufacturing its products, Hormel had a choice between using natural, or synthetic ingredients and preservatives. It purposefully chose to use synthetic ingredients and preservatives, but nonetheless labeled its food products as “100% Natural.”

The Products’ Genetically Modified Ingredients

37. **Maltodextrin:** Maltodextrin is an artificial sugar produced from plants. However, in the United States, the main source for production is genetically modified corn. The production process of maltodextrin begins with corn starch “slurry” from the wet milling operation. The “slurry” is hydrolyzed with food grade acids and/or enzymes. The resulting syrup is refined by filtering and carbon treatment prior to spray drying. The chemical treatment of maltodextrin places it outside of the scope of a reasonable consumer’s definition of “100% Natural.”

Hormel Products Are Misbranded and Illegal

38. All containers of the Hormel products identified herein and sold in the United States are misbranded, falsely labeled, and as such are illegal.

39. Their sale constitutes violations of the FDCA, Florida Consumer Protection Statutes §§ 501.201-501.213, Florida Deceptive and Unfair Trade Practices Act, Negligent Misrepresentation, the Florida Misleading Advertising Statute § 817.41, Breach of Express Warranties pursuant to Florida Statute § 672.313 and UCC § 2-313, and Unjust Enrichment.

40. With the nutritional and health benefits of natural foods becoming widely known, consumer demand for these products has increased rapidly. It was this enormous new market that Defendant hoped to tap into with the sale of its Hormel products.

41. Defendant knowingly and intentionally sold these misbranded and falsely labeled products to consumers (including Plaintiff) with the intent to deceive them.

42. Plaintiff purchased the Hormel products within the Class Period while reasonably relying on the truth and accuracy of Defendant's product labels.

43. Despite the prevalence of synthetic ingredients, preservatives, and genetically modified ingredients in the products, the front labels of the Hormel products display the words "100% Natural" and "No Preservatives."

44. Hormel misleads consumers into believing the specified products consist of only "100% Natural" ingredients when they, in fact, contain synthetic ingredients and preservatives, including, but not limited to, celery juice powder and baking powder, and genetically modified ingredients, including, but not limited to, maltodextrin

45. Plaintiff was willing to pay a premium price for the Hormel products because of the representation that they were "100% Natural," and would not have paid as much for the products, or would have purchased alternative products in absence of the representations, or with the knowledge that the products contained synthetic ingredients, preservatives, and genetically modified ingredients.

46. Plaintiff paid for "100% Natural" products, but received products that were not in fact "100% Natural." The products that Plaintiff received were worth less than the products for which he paid. By purchasing products in reliance on advertising that is false, Plaintiff has suffered injury in fact and lost money as a result of the unfair business practices as alleged herein.

47. To some consumers, including Plaintiff, processes and places of origin matter. Purchasing decisions are heavily influenced by information about production processes and places of origin, such as whether food is kosher or halal, whether wine is from a particular locale, whether

a diamond is conflict-free, and whether food was produced by union workers, although these considerations have nothing to do with the product's function or performance.

48. For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to pay if the product had been labeled accurately. The economic harm—the loss of real dollars from a consumer's pocket—is the same whether or not a court might objectively view the products as functionally equivalent.

49. When representations about processes and origins are not true, the consumer who cares about them has “not received the benefit of his or her bargain.”

50. There are “innumerable ways” for a plaintiff to show economic injury, including by showing that the consumer paid more than he or she would have paid otherwise, or entered a transaction that would otherwise have been unnecessary. Defendant's misrepresentations that its products are “100% Natural” were an immediate cause of the injury-producing conduct, as Plaintiff acted upon reliance on the deceptive or misleading statements.

51. With respect to Hormel's products, Defendant has violated the FDCA and regulations promulgated thereunder. As a result, Defendant has violated various provisions of the Florida Food Safety Act, Fla. Stat. §§ 500.01-500.80 (2014).

52. Defendant has violated Fla. Stat. § 500.11(1)(f) (2014), because words, statements, or other information required, pursuant to the Florida Food Safety Act, to appear on the label or labeling were unlawfully placed upon the label or labeling, as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

53. Defendant has violated Florida Food Safety Act § 500.04(1) (2014), which makes it unlawful to manufacture, sell, deliver, possess, hold, or offer to sell any misbranded food.

54. Defendant has violated Fla. Stat. § 500.115 (2014), which provides that, “an advertisement of a food is deemed to be false if it is false or misleading in any particular.” Defendant’s product labels constitute false advertisement pursuant to Fla. Stat. § 500.115 (2014).

55. The FDCA generally prohibits misleading labeling. *See* 21 U.S.C. § 343(a) (“A food shall be deemed to be “misbranded” if “its labeling is false or misleading in any particular.”). Defendant’s labeling is false and misleads consumers because contrary to the “100% Natural” claims, Hormel products contain synthetic ingredients and/or preservatives, including, but not limited to, celery juice powder and baking powder, and genetically modified ingredients, including, but not limited to maltodextrin. Thus, Defendant’s labeling violates the FDCA. Plaintiff has not, however, sued because the conduct violates the FDCA. Rather, his claims are based on Florida statutes as well as the common law, law that could exist, even if the FDCA were never passed.

56. Plaintiff’s state law claims are aimed at Defendant’s intentional conduct of naming and labeling which are voluntary, and not specifically required conduct by the FDA regulations. Defendant selected the name and label described herein in order to maximize the label’s deceptive impact upon Plaintiff and other consumers. Indeed, FDA regulations did not require Defendant to label its products using the terms “100% Natural.” Defendant made these labeling decisions because of its marketing strategy. Defendant’s labeling and marketing misleads consumers into believing that its Hormel products are “100% Natural.” Defendant’s label is designed to cause consumers to purchase Hormel products as a result of this deceptive message, and Defendant has succeeded.

Potential Preemption

57. Preemption is foremost a question of congressional intent: did Congress, expressly or implicitly, seek to displace state law? *Wyeth*, 555 U.S. at 565; *Jankey v. Lee* 55 Cal.4th 1038, 1048 (Cal., 2012). When courts have considered the reach of a similar USDA regulation the Organic Foods Act, they have found no express preemption of state consumer protection lawsuits. In *In re Aurora Dairy Corporation Organic Milk Marketing* 621 F.3d 781 (8th Cir., 2010), the Eighth Circuit considered and rejected the argument that the act expressly preempted state mislabeling claims. The court recognized the limited nature of express preemption under the act, which extends to state standards and certification programs not approved by the USDA, and no further. In contrast, the court further held, Congress did not expressly preempt state tort claims, consumer protection statutes, or common law claims. *Id.* at p. 792. Federal trial courts have arrived at the same conclusion. *See Jones v. ConAgra Foods, Inc.* 912 F.Supp.2d 889, 894–895 (N.D.Cal., 2012) (claim under California unfair competition and false advertising laws that organic food is mislabeled because it contains disqualifying ingredients is not expressly preempted); *Brown v. Hain Celestial Group, Inc.* 2012 U.S. Dist. Lexis 108561, p. *26 (N.D.Cal., 2012) (same).

58. The regulation of food labeling to protect the public is quintessentially a matter of longstanding local concern. The first state legislation designed to address fraud and adulteration in food sales was enacted in 1785. In response to widespread mislabeling, misbranding, and adulteration by food suppliers, by the late 18th century many if not most states exercised their traditional police powers to regulate generally the marketing of impure or deceptively labeled foods and beverages. *Bronco Wine Co.*, 33 Cal.4th at 960; *see id.* at pp. 959–961. Outside of food regulation as well, states have long concerned themselves with the protection of consumers against

deceptive and unfair business practices. *California v. ARC America Corp.* 490 U.S. 93, 101 (1989); *Farm Raised Salmon Cases*, supra, 42 Cal.4th at 1091.

59. The presumption against preemption applies with particular force where state consumer protection laws regulating deceptive food labeling are at issue. *Farm Raised Salmon Cases*, supra, 42 Cal.4th at 1088; see *Bronco Wine Co.*, 33 Cal.4th at 974 (given the states' extensive and dominant exercise of police power to regulate food labeling, a strong presumption against preemption applies); *General Motors Corp. v. Abrams* 897 F.2d 34, 41–42 (2d Cir., 1990) (compelling evidence of an intention to preempt is required where consumer protection is concerned). The expectation Congress would have said something expressly if it had intended to override the states' longstanding regulatory primacy is at its apex here. See *Farm Raised Salmon Cases*, supra, 42 Cal.4th 1091.

60. Hormel has engaged in fraud by intentionally labeling its products as “100% Natural,” when in fact Hormel is fully aware of the synthetic ingredients, preservatives, and genetically modified ingredients, thereby pocketing the additional premiums organic produce commands. The purposes and objectives underlying the USDA regulations (FMIA and PPIA) do not suggest such suits are an obstacle; to the contrary, a core reason for the act was to create a clear standard for what production methods qualify as organic so that fraud could be more effectively stamped out and consumer confidence and fair market conditions promoted. Nor does anything in the text or background of the act and its regulations indicate Congress intended remedial exclusivity for the enforcement mechanisms it provided. Finding no obstacle to congressional purposes and objectives, we are confident that a court in this jurisdiction would conclude that the claims referenced herein are not preempted.

61. The FDCA provides that only the federal government – and in limited cases, states – may bring suit to enforce its provisions. *See* 21 U.S.C. § 337. But it does not preempt all state law. *See Nutrition Labeling and Education Act of 1990*, Pub. L. No. 101-535, § 6(c)(1) (“The Nutrition Labeling and Education act of 1990 shall not be construed to preempt any provision of State Law, unless such provision is expressly preempted under... the Federal Food, Drug, and Cosmetic Act.”). Indeed, the Act expressly contemplates that states will enforce their own food labeling requirements. *See* 21 U.S.C. § 343-1(a). Such requirements, though, must be “identical” to those provided by the FDCA. *Id.* To survive a preemption challenge, therefore, a state-law food labeling claim must thread a “narrow gap.” The plaintiff must be suing for conduct that violated the FDCA, but the plaintiff must not be suing *because* the conduct violates the FDCA. *Perez v. Nidek Co.*, 711 F. 3d 1109, 1120 (9th Cir. 2013). Plaintiff here has threaded this gap.

62. It is plausible that a reasonable consumer, such as Plaintiff and members of the Class, could interpret the words “100% Natural” to mean that the products do not include synthetic ingredients, preservatives, or genetically modified ingredients. It is plausible that a reasonable consumer would rely on Defendant’s “100% Natural” claims and such reliance would be reasonable and justified in that Defendant appears to be, and represented itself to be, a reputable business, and it distributed the products through reputable companies.

Defendant’s Strategy to Appeal to Health-Conscious Consumers

63. Defendant engaged in this fraudulent advertising and marketing scheme because it knew that its target market pays more for “100% Natural” food products than for conventional food products. This is due to the association consumers make between natural food products and a wholesome way of life, the perceived higher quality, health and safety benefits of the products, and/or low impact on the environment.

64. Research studies illustrate that a company's marketing of products as "natural" increases the consumers' willingness to pay (WTP) by up to twenty-five percent (25%) at the 95th percentile of consumers, and seventeen percent (17%) on average for all consumers. According to a June 2014 consumer report survey, many consumers feel that "natural" currently means no pesticides were used (66%), no artificial ingredients were used (66%), no artificial materials were used during processing (65%), and no GMOs were used (64%).

65. As such, Defendant's "100% Natural" labeling is central to its marketing of the products and part of its overall strategy to capture the rapidly expanding natural foods market. As a result, Defendant commands a premium price for the products; using "100% Natural" claims to distinguish them from its competitors' food products.

66. As Defendant is reasonably aware, many American consumers are health-conscious and seek out wholesome natural foods to keep a healthy diet. Because of this, consumers routinely take nutrition information into consideration in selecting and purchasing food items.

67. Consumers also value "100% Natural" ingredients for countless other reasons, including perceived benefits of avoiding disease, helping the environment, assisting local farmers, assisting factory workers who would otherwise be exposed to synthetic and hazardous substances, and financially supporting the companies that share these values.

68. Consumers attribute a wide range of benefits to foods made entirely of natural ingredients. In fact, the market for "100% Natural" foods has grown rapidly in recent years, a trend that Defendant exploits through its false advertising. Catering to consumers' taste for natural foods is tremendously advantageous for business. In 2008, foods labeled with the word "natural" produced \$22.3 billion in sales, a 10% increase from 2007, and a 37% increase from 2004. In 2009, sales jumped again by an additional 4%.

69. It was in an effort to capture the growing demand and to entice consumers to purchase its products that Hormel committed the unlawful acts detailed in this Complaint.

70. Consumers lack the ability to test or independently ascertain the accuracy of a food product label, especially at the point of sale. Reasonable consumers must and do rely on the company to truthfully and accurately label its products in conformance with Federal regulations, policies, and guidelines.

71. As a result of its false and misleading labeling, Defendant was able to sell its products to consumers, throughout the United States and Florida. Hormel has unjustly received significant profits from these false and deceptive label misrepresentations.

72. Consequently, consumers who purchased the Hormel products suffered harm. Specifically, Plaintiff was harmed by paying a higher price for the Hormel products due to the false representations that the Hormel products are “100% Natural.”

73. By clearly and prominently placing the “100% Natural” claims on the Hormel products packaging, Defendant ensured that all consumers purchasing the Hormel products are exposed to these claims.

Defendant’s Knowledge of the Falsity of its Advertising

74. Defendant had knowledge of the false representations that were made regarding the Hormel products, insofar as all of those representations appeared on the Hormel products’ packages.

75. Hormel had knowledge of the federal regulations that apply to the labeling of its food products and, thus, was aware that some of the ingredients have been federally declared as synthetic substances and/or require extensive processing to be safely used as a food ingredient. Defendant has retained expert nutritionists, food chemists, and other scientists, and has spent much

time and money in developing its own food technologies, such that it was aware that the synthetic ingredient, preservatives, and genetically modified ingredients used in its products are not natural.

76. As such, Defendant had knowledge of all facts demonstrating that its “100% Natural” Hormel products contain synthetic ingredients, preservatives, and genetically modified ingredients, and that the products were falsely labeled. The misrepresentation and omissions were uniform and were communicated to Plaintiff, and to each member of each class, at the point of purchase and consumption.

77. Plaintiff read and reasonably relied on the labels as described herein when deciding to purchase Hormel products.

78. At point of sale, Plaintiff did not know, and had no reason to know, that Hormel products contained synthetic ingredients, preservatives, and genetically modified ingredients, and therefore were not “100% Natural” as labeled.

79. Plaintiff relied on the deceptive or misleading statements and believed Defendant's products were in fact “100% Natural.” As already stated, processes of production and places of origin matter significantly to Plaintiff, and such information heavily influences his purchasing decisions. When representations about processes and origins are not true, Plaintiff has not received the benefit of his bargain.

80. But for Defendant's misrepresentations that its products are "100% Natural," Plaintiff would not have purchased the products mentioned herein. Plaintiff valued the products as labeled more than the money he parted with. However, Plaintiff valued the money he parted with more than the products as they actually are, which are not “100% Natural.”

81. Because of the misrepresentation, Plaintiff was made to part with more money than he otherwise would have been willing to spend (i.e. that Plaintiff paid more than he actually valued

the product). That increment, the extra money paid, is economic injury and affords Plaintiff standing to sue.

82. A reasonable person would attach importance to Defendant's misrepresentations in determining whether to purchase Hormel products.

CLASS ACTION ALLEGATIONS

83. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) on behalf of the following class:

All persons in Florida who, within the Class Period, purchased Hormel products, labeled "Hormel Natural Choice," (the "Class").

84. In the alternative, Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(c) on behalf of the following class:

All persons in the United States who, within the Class Period, purchased Hormel products, labeled "Hormel Natural Choice," (the "Class").

85. The following persons are expressly excluded from the Class: (1) Defendant and its subsidiaries and affiliates; (2) all persons who make a timely election to be excluded from the proposed Class; (3) governmental entities; and (4) the Court to which this case is assigned and its staff.

86. This action can be maintained as a class action because there is a well-defined community of interest in the litigation and the proposed Class is easily ascertainable.

87. **Numerosity:** Based upon Defendant's publicly available sales data with respect to Hormel products, the class is so numerous that joinder of all members is impracticable.

88. **Common Questions Predominate:** This action involves common questions of law and fact applicable to each Class member that predominate over questions that affect only individual Class members. Thus, proof of a common set of facts will establish the right of each

Class member to recover. Questions of law and fact common to each Class member include, for example:

- a. Whether Defendant engaged in unfair, unlawful or deceptive business practices by failing to properly package and label Hormel products sold to consumers;
- b. Whether the food products at issue were misbranded or unlawfully packaged and labeled as a matter of law;
- c. Whether Defendant made unlawful and misleading claims regarding the “100% Natural” characteristics of the Hormel products;
- d. Whether Defendant uniformly conveyed to the Class that the products were “100% Natural;”
- e. Whether Defendant’s claims that the products are “100% Natural” are true or false, or likely to deceive a reasonable consumer;
- f. Whether Defendant violated Florida Consumer Protection Statutes §§ 501.201-501.213, Florida Deceptive and Unfair Trade Practices Act, Negligent Misrepresentation, the Florida Misleading Advertising Statute § 817.41, Breach of Express Warranties pursuant to Florida Statute § 672.313 and UCC § 2-313, and Unjust Enrichment;
- g. Whether Plaintiff and the Class are entitled to equitable relief;
- h. Whether Defendant’s unlawful, unfair and/or deceptive practices harmed Plaintiff and the Class;
- i. Whether Defendant acted negligently by its deceptive practices;
- j. Whether Defendant was unjustly enriched by its deceptive practices.

89. **Typicality:** Plaintiff's claims are typical of the claims of the Class because Plaintiff purchased Defendant's products during the Class Period. Defendant's unlawful, unfair, and fraudulent actions concern the same business practices described herein, irrespective of where they occurred or were experienced. The injuries of each member of the Class were caused directly by Defendant's wrongful conduct. In addition, the factual underpinning of Defendant's misconduct is common to all Class members and represents a common thread of misconduct resulting in injury to all members of the Class. Plaintiff's claims arise from the same practices and course of conduct that give rise to the claims of the Class members and are based on the same legal theories.

90. **Adequacy:** Plaintiff will fairly and adequately protect the interests of the Class. Neither Plaintiff nor his counsel have any interests that conflict with or are antagonistic to the interests of the Class members. Plaintiff has retained competent and experienced class action attorneys to represent his interests and those of the members of the Class. Plaintiff and his counsel have the necessary resources to adequately and vigorously litigate this class action, and Plaintiff and his counsel are aware of their fiduciary responsibilities to the Class members and will diligently discharge those duties by vigorously seeking the maximum possible recovery for the Class.

91. **Superiority:** There is no plain, speedy, or adequate remedy other than by maintenance of this class action. The prosecution of individual remedies by members of the Class will tend to establish inconsistent standards of conduct for Defendant and result in the impairment of Class members' rights and the disposition of their interests through actions to which they are not parties. Class Action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of effort and expense that numerous individual actions would create.

Further, as the damages suffered by individual members of the Class may be relatively small, the expense and burden of individual litigation would make it difficult or impossible for individual members of the Class to redress the wrongs done to them, while an important public interest will be served by addressing the matter as a class action. Class treatment of common questions of law and fact would also be superior to multiple individual actions or piecemeal litigation in that class treatment will conserve the resources of the Court and the litigants, and will promote consistency and efficiency of adjudication.

92. The prerequisites to maintaining a class action equitable relief pursuant to Fed. R. Civ. P. 23(b)(2) are met as Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate equitable relief with respect to the Class as a whole.

93. The prerequisites to maintaining a class action pursuant to Fed R. Civ. P. 23(b)(3) are met as questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

94. Plaintiff and his counsel are unaware of any difficulties that are likely to be encountered in the management of this action that would preclude its maintenance as a class action.

95. Plaintiff is a member of the Class she seeks to represent. Plaintiff's claims are typical of the Class members' claims. Plaintiff will fairly and adequately protect the interests of the Class in that Plaintiff's claims are typical and representative of the Class.

96. There are no unique defenses that may be asserted against Plaintiff individually, as distinguished from the Class. The claims of Plaintiff are the same as those of the Class.

97. This class action is superior to any other method for the fair and efficient adjudication of this dispute.

CAUSES OF ACTION

COUNT I

VIOLATION OF FLORIDA CONSUMER PROTECTION STATUTES §§ 501.201-501.213, FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

98. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 97 above as if fully set forth herein.

99. Defendant's conduct constitutes unlawful, unfair and deceptive business acts and trade practices.

100. Defendant sold its products in Florida during the Class Period.

101. Florida Consumer Protection Statute § 501.204 (2014) prohibits any "unlawful," "fraudulent" or "unfair" business act or practice and any false or misleading advertising. For the reasons discussed above, Defendant has engaged in unfair, false, deceptive, business acts and false and misleading advertising in violation of Fla. Stat. §§ 501.201-501.213 (2014).

102. The Florida Deceptive and Unfair Trade Practices Act also prohibits any, "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in conduct of any trade or commerce." Defendant has violated Fla. Stat. § 501.204's prohibition against engaging in unlawful acts and practices by, *inter alia*, making the false and deceptive representations, as set forth more fully herein, and violating, 21 U.S.C. § 331, 21 U.S.C. § 362, 21 C.F.R. § 1.21, and the common law.

103. Plaintiff and the Class reserve the right to allege other violations of law which constitute other unlawful business acts or practices. Such conduct is ongoing to this date.

104. As stated in this Complaint, Plaintiff alleges violations of consumer protection, unfair competition, and truth-in-advertising laws in Florida resulting in harm to consumers.

Defendant's conduct constitutes violations of the public policies against engaging in false and misleading advertising, unfair competition and deceptive conduct towards consumers as proscribed by Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201-501.213 (2014).

105. There were reasonably available alternatives to further Defendant's legitimate business interests, other than the conduct described herein.

106. Defendant's false claims, nondisclosures and misleading statements, as more fully set forth above and collectively as a scheme, were intentionally misleading and likely to deceive the consuming public within the meaning of the Florida Deceptive and Unfair Trade Practices Act.

107. Defendant's deceptive conduct constitutes a prohibited practice, which directly and proximately caused and continues to cause substantial injury to Plaintiff and the other Class members. Plaintiff and Class members have suffered injury in fact, actual damages, and have lost money because they purchased the products at the price they paid believing the labeling claims described above to be true.

108. Plaintiff, on behalf of himself, and all others similarly situated, seeks restitution and disgorgement of all money obtained from Plaintiff and the members of the Class collected as a result of unfair competitions, and all other relief this Court deems appropriate, consistent with Florida Deceptive and Unfair Trade Practices Act.

COUNT II

NEGLIGENT MISREPRESENTATION

109. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 97 above as if fully set forth herein.

110. During the relevant statutory time period, Defendant made false representations to Plaintiff and Class Members as they pertain to the sale of its Hormel products.

111. The representation of material fact that Defendant's Hormel products were "100% Natural" was false. The true facts are: 1.) Defendant's Hormel products are not "100% Natural" and contain synthetic ingredients, preservatives, and genetically modified ingredients; 2.) despite having knowledge that its Hormel products were not "100% Natural," Defendant labeled its Hormel products as "100% Natural;" 3.) Defendant charged a premium for its "100% Natural" Hormel products, despite their not being "100% Natural."

112. When Defendant made the representations set forth above, it had no reasonable grounds for believing them to be true.

113. Defendant made the representations with the intention of inducing Plaintiff and Class Members to act in reliance upon these representations in the manner alleged herein, or with the expectation that they would so act.

114. Plaintiff and Class Members, at the time the representations were made by Defendant, were ignorant of the falsity of the representations and believed them to be true. In reliance on these representations, Plaintiff and Class Members were induced to and did pay monies to purchase Defendant's Hormel products.

115. Had Plaintiff and Class Members known the actual facts, they would not have taken such action. Furthermore, Defendant had no reason to believe that Plaintiff and other consumers would act otherwise than to rely on the "100% Natural" representations.

116. As a direct and proximate result of the Defendant's conduct as herein alleged, Plaintiff and Class members paid monies to Defendant, through Defendant's regular retail sales

channels, to which Defendant is not entitled, and have been damaged in an amount to be proven at trial.

117. As a direct and proximate result of Defendant's misrepresentations, Plaintiff and Class members have sustained injuries by purchasing Defendant's Hormel products, which were not as represented, thus entitling Plaintiff to judgment and equitable relief against Defendant, as well as restitution, attorneys' fees and costs, as set forth in the Prayer for Relief.

COUNT III

VIOLATION OF FLORIDA MISLEADING ADVERTISING STATUTE § 817.41

118. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 97 above as if fully set forth herein.

119. In § 817.41, Fla. Stat., it prohibits "any person to make or disseminate or cause to be made or disseminated before the general public of the state, or any portion thereof, any misleading advertisement. Such making or dissemination of misleading advertising shall constitute and is hereby declared to be fraudulent and unlawful, designed and intended for obtaining money or property under false pretenses."

120. Defendant made false representations of material fact that it knew, or should have known, were false.

121. By creating and disseminating the false and deceptive product labels, Defendant has falsely represented to the public that its products are "100% Natural" when in fact they are not "100% Natural."

122. Defendant knew, or should have known, that the aforementioned false representations of material fact disseminated by the Defendant were false.

123. Defendant disseminated false representations of material fact with the intent to induce Plaintiff, and other members of the Class, to rely on said false representations.

124. The false representations of material fact made by the Defendant were likely to deceive reasonable consumers.

125. The Plaintiff, and other members of the Class, reasonably relied on the false representations of material fact made by the Defendant.

126. In relying on the false representations of material facts made by the Defendant, the Plaintiff, and other members of the Class, were deceived.

127. As a direct and proximate cause of Defendant's violation of Florida Statute § 817.41, Plaintiff and the members of the Class, were injured when they paid money for the Defendant's misbranded and falsely labeled products.

128. As a result of Defendant's unlawful false advertising practices, Plaintiff and the members of the Class who purchased Defendant's products in Florida and throughout the United States are entitled to orders and judgments which may be necessary to disgorge Defendant's ill-gotten gains and to restore to Plaintiff and the members of the Class money paid for the Defendant's products, both are amounts to be determined at trial.

129. Plaintiff and the members of the Class are also entitled to costs, including reasonable attorney's fees.

COUNT IV

BREACH OF EXPRESS WARRANTY PURSUANT TO § 672.313 FLORIDA STATUTES AND UNIFORM COMMERCIAL CODE § 2-313

130. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 97 above as if fully set forth herein.

131. Plaintiff, and each member of the Class, formed a contract with Defendant at the time Plaintiff and the other members of the Class purchased the Hormel products. The terms of that contract included the express promise and affirmation of fact that the products were “100% Natural.” The Hormel products’ packaging and advertising constitute express warranties, became part of the basis of the bargain, and are parts of a standardized contract between Plaintiff and the members of the Class on the one end, and Defendant on the other.

132. Hormel displayed the words “100% Natural” on the front of the products’ packaging, which created an express warranty. Hormel breached this express warranty by including synthetic ingredients, preservatives, and genetically modified ingredients that are not “100% Natural.”

133. At the time of making this express warranty with respect to the “100% Natural” nature of the Hormel products, Defendant knew or should have known that it had breached the terms of the warranty with Plaintiff and the Class, by providing the Hormel products that proved to not be “100% Natural.”

134. Members of the public, including Plaintiff, reasonably relied upon the skill and judgment of the Defendant, and upon said express warranty, when purchasing Hormel products.

135. Due to Defendant’s illegal conduct as alleged herein, Plaintiff and the Class could not have known about the synthetic ingredients, preservatives, and genetically modified ingredients present in the Hormel products.

136. As a direct and proximate result of Defendant’s breach of express warranty with respect to the Hormel products, Plaintiff suffered injuries as set forth above, entitling Plaintiff to judgment and equitable relief against Defendant, as well as restitution, including all monies paid

for the Hormel products and disgorgement of profits from Defendant received from sales of the Hormel products, attorneys' fees, and costs, as set forth in the Prayer for Relief.

137. All conditions precedent to Defendant's liability under this contract, including providing Defendant with pre-suit notice, have been performed by Plaintiff and the Class.

COUNT V

UNJUST ENRICHMENT

138. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 97 above as if fully set forth herein.

139. As a result of Defendant's fraudulent and misleading labeling, advertising, marketing, and sales of the Hormel products, Defendant was enriched at the expense of Plaintiff and the Class.

140. Defendant sold the Hormel products, which were products that were illegally sold, illegally branded and had no economic value, to Plaintiff and the Class.

141. It would be against equity and good conscience to permit Defendant to retain the ill-gotten benefits it received from Plaintiff and the Class in light of the fact that the products were not what Defendant purported them to be.

142. Thus, it would be unjust and inequitable for Defendant to retain the benefit without restitution to Plaintiff and the Class of monies paid to Defendant for the Hormel products at issue.

143. As a direct and proximate result of Defendant's actions, Plaintiff and the Class have suffered damages in an amount to be proven at trial.

JURY DEMAND

Plaintiff hereby demands a trial by jury of his claims.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually, and on behalf of all other similarly situated persons, pray for judgment against Defendant as follows:

- A. For an order certifying this case as a Class Action and appointing Plaintiff and his counsel to represent the Class;
- B. That the Court adjudges and decrees that Defendant has engaged in the conduct alleged herein;
- C. Awarding declaratory relief as permitted by law or equity, including: Directing Defendant to identify, with Court supervision, victims of its conduct and pay them restitution and disgorgement of all monies acquired by Defendant by means of any act or practice declared by this Court to be wrongful;
- D. Ordering Defendant to engage in a corrective advertising campaign;
- E. Awarding Plaintiff and the proposed Class members' damages;
- F. Awarding restitution and disgorgement to Plaintiff and the other Class members;
- G. Awarding attorneys' fees and costs; and
- H. Providing such further relief as may be just and proper.

Dated: October 11, 2016

Respectfully submitted,

/s/ Tim Howard

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