

3. For decades and decades, tins of McCormick ground black pepper have been marketed and sold to consumers in the United States in three different package sizes: (1) a small metal tin measuring approximately $3 \frac{1}{16}$ inches tall, $1 \frac{5}{16}$ inches deep, and $2 \frac{5}{16}$ wide, which was filled substantially to capacity with two (2) ounces of ground black pepper (the “small tin”); (2) a medium metal tin measuring approximately $3 \frac{10}{16}$ inches tall, $1 \frac{9}{16}$ inches deep, and $2 \frac{13}{16}$ inches wide which was substantially filled with four (4) ounces of ground black pepper (the “medium tin”); and (3) a large metal tin measuring approximately $4 \frac{10}{16}$ inches tall, $2 \frac{4}{16}$ inches deep, and $3 \frac{5}{16}$ inches wide, which was substantially filled with eight (8) ounces of ground black pepper (the “large tin”). These tins were not transparent, so consumers were unable to determine visually how filled the tins were.

4. These tins became ubiquitous in the marketplace over the decades as competitors marketed their own ground black pepper products in substantially the same tin sizes filled with the same volume of ground black pepper. Consequently, consumers came to rely upon the “standard size and standard volume” packaging when making purchasing decisions, particularly because the contents were and are not visible in the non-transparent tin packaging.

5. Recently, however, the commodity price of black pepper skyrocketed in the global market. Normally, a company facing dramatically increased ingredient costs will either pass those increased costs on to consumers by raising prices or will absorb the higher commodity costs and suffer eroding profit margins (or some combination thereof). McCormick, however, decided to “have its cake and eat it too.” Sometime in or around January or February 2015, McCormick began shipping tens of millions of tins

of its ground black pepper products that contained approximately 25% *less* ground black pepper than these traditional-sized tins had historically contained. McCormick deceptively continued selling its ground black pepper product in its traditional-sized tins – which are now substantially *underfilled* – rather than shrinking the size of the tins to a new size that reflects the reduced fill.

6. By using its traditional-sized tins that have been recognized in the consumer marketplace for scores of years and then by *underfilling* those tins, McCormick deceptively misleads consumers into thinking that they are purchasing the same quantities of McCormick ground black pepper as they had historically. While the tins do identify the new reduced net weight of the product in small print on the bottom of the tins, consumers are not otherwise informed of this material change in the quantity of ground black pepper contained therein, nor that these tins are substantially underfilled with product. McCormick relies upon consumers' familiarity with the tin sizes and appearance, engrained through decades of marketing, to mislead consumers into thinking that they are receiving the historic quantities of ground black pepper at the same price point when, in reality, McCormick is filling those tins with approximately 25% less ground black pepper. By misleading consumers in this manner, McCormick is able to offset the high cost of the commodity, while preserving its margins.

THE PARTIES

7. Plaintiff Dupler is a natural person of full age of majority who is domiciled and resides in Nassau County, New York. Plaintiff has purchased McCormick's ground black pepper, packaged in its iconic non-transparent, metal tins, numerous times over many years. Earlier this year, Plaintiff purchased a small

tin of McCormick's ground black pepper, expecting it to contain approximately 2 ounces net weight of ground black pepper. Plaintiff subsequently learned that this small tin actually contained only approximately 1.5 ounces net weight of ground black pepper.

8. Defendant McCormick is a corporation organized and existing under the laws of the State of Maryland, with its principal place of business located at 18 Loveton Circle, Sparks, Maryland. McCormick describes itself as a global leader in flavor. McCormick manufactures, markets, and distributes spices, seasoning mixes, condiments, and other flavorful products to the entire food industry – retail outlets, food manufacturers, and food services businesses.

9. McCormick operates in two business segments, consumer and industrial. Historically, the consumer business has a higher overall profit margin than the industrial business, and contributes approximately 60% of sales and 80% of operating income.

10. The consumer business has product brands that reach consumers in 135 countries. McCormick's consumer business sells its products to a variety of retail outlets that include grocery, mass merchandise, warehouse clubs, discount, and drug stores. Approximately one half of McCormick's consumer business consists of sales of spices, herbs, and seasonings. For these products, McCormick's is the category leader in its primary markets.

11. More than 250 brands of spices, herbs, and seasonings are sold in the United States. Some are owned by large food manufacturers, while others are supplied by small, privately owned companies. In this competitive environment, McCormick's

stands out as the predominant competitor.

12. McCormick's iconic tins containing pure ground black pepper are among its best-selling products. These tins are sold through a variety of distribution channels and sales outlets throughout the United States as well as in the State of New York, including through supermarkets, mass merchandisers such as Walmart, grocery stores, convenience stores, club stores, supercenters, and drug stores.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). Jurisdiction is proper because (1) the matter in controversy exceeds the sum or value of \$5,000,000.00, exclusive of interests and costs and (2) the named Plaintiff and the Defendant are citizens of different states. 28 U.S.C. §1332(d)(2)(A).

14. Venue is proper in this Court pursuant to 28 U.S.C. §1391(a) because a substantial part of the events giving rise to the claim occurred within this judicial district and because Defendant has marketed and sold the products at issue in this action within this judicial district and has done business within this judicial district.

CHOICE OF LAW

15. New York law governs the state law claims asserted herein by Plaintiff and a class of New York residents who purchased the McCormick ground black pepper tins at issue because Defendant's acts and omissions described herein were implemented in the State of New York through Defendant's marketing and sales of its products within the State of New York.

16. New York has a substantial interest in protecting the rights and interests of

New York residents against wrongdoing by companies which market and distribute their products within the State of New York.

GENERAL ALLEGATIONS

17. As alleged above, in response to rising commodity prices for black pepper, sometime in the beginning of 2015, McCormick embarked on a course of filling its small, medium, and large tins of McCormick ground black pepper with substantially less ground black pepper – approximately 25% less ground black pepper – than it had historically done for many years.

18. As a consequence, consumers are being misled into believing that they are buying a larger volume of ground black pepper than is actually contained in the McCormick tins.

19. On information and belief, McCormick has maintained the price of its standard-sized tins, notwithstanding the significant reduction in the amount of ground black pepper contained in the traditional tin size that it continues to sell.

20. Unless consumers carefully study the net weight number set forth in small print on the front of the tin – and somehow realize that they are no longer receiving the same quantity of ground black pepper as before – consumers are being misled by McCormick's deceptive practice of underfilling its tins into paying approximately the same amount for a same-sized tin, but unknowingly receiving substantially less ground black pepper.

21. McCormick's dishonest practices are known in the industry as "slack-fill." Indeed, regulations under the federal Food, Drug, and Cosmetic Act prohibit nonfunctional slack-fill. The prohibition against slack-fill is set forth in 21 C.F.R. §

100.100 which provides, in relevant part:

In accordance with section 403(d) of the act, a food shall be deemed to be misbranded if its container is so made, formed, or filled as to be misleading. (a) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill. Slack-fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack-fill is the empty space in a package that is filled to less than its capacity for reasons other than:

- (1) Protection of the contents of the package;
- (2) The requirements of the machines used for enclosing the contents in such package;
- (3) Unavoidable product settling during shipping and handling;
- (4) The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of a food), where such function is inherent to the nature of the food and is clearly communicated to consumers;
- (5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value which is both significant in proportion to the value of the product and independent of its function to hold the food, e.g., a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed; or durable commemorative or promotional packages; or
- (6) Inability to increase level of fill or to further reduce the size of the package (e.g., where some minimum package size is necessary to accommodate required food labeling (excluding any vignettes or other nonmandatory designs or label information), discourage pilfering; facilitate handling, or accommodate tamper-resistant devices).

22. As a result of McCormick's misleading and deceptive use of traditional-sized, non-transparent metal tins, with unlawful slack-fill, Plaintiff and consumers have purchased tins of McCormick ground black pepper which contain substantially less (approximately 25% less) ground black pepper than Plaintiff and consumers had

previously received in the identical sized tins. Plaintiff and the class have been damaged thereby.

CLASS ACTION ALLEGATIONS

23. Applying New York substantive law, Plaintiff seeks to be appointed as class representative of a New York class composed of and defined as follows:

All persons who bought any McCormick ground black pepper tins in New York State, beginning on or about January 1, 2015, with a substantially reduced quantity of ground black pepper due to McCormick's new practice of slack-filling, and did not resell them. Excluded from the Class are the Defendant and any Judge presiding over this matter and the members of his or her immediate family. Also excluded from this class are the legal representatives, heirs, successors, and attorneys of any excluded person or entity, and any person acting on behalf of any excluded person or entity.

24. As to the above class, this action is appropriately suited for a class action. Plaintiff is informed, believes, and thereon alleges, that the Class is sufficiently numerous such that a class action is superior to other available methods for the fair and efficient adjudication of this controversy because joinder of all purchasers of such tins of McCormick ground black pepper is impractical.

25. This action involves questions of law and fact common to the Class. In marketing the tins of McCormick ground black pepper, Defendant engaged in a systematic course of misrepresenting the products to consumers. Such common issues of law and fact include, but are not limited to:

- Whether the slack-filling of traditional sized tins of McCormick ground black pepper with substantially less (approximately 25% less) ground black pepper was and is likely to mislead consumers;
- Whether Defendant represented that the tins of McCormick ground black pepper were of a particular standard or quality or net weight when they were not;

- Whether, as a result of Defendants' misconduct, the Class is entitled to equitable and injunctive relief;
- Whether the Class members obtained the benefit of their bargain in purchasing tins of McCormick ground black pepper;
- Whether, as a result of Defendant's misconduct, the Class is entitled to damages.

26. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, including legal and factual issues relating to liability and available remedies.

27. Plaintiff's claims are typical of the claims of members of the Class, and Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff purchased the McCormick ground black pepper product and suffered an injury-in-fact as a result of Defendant's conduct, as did all Class members who purchased any McCormick ground black pepper products containing the reduced net weight of ground black pepper. Plaintiff's interests are coincident with and not antagonistic to those of the other members of the Class. Plaintiff is represented by counsel who is competent and experienced in the prosecution of consumer class action litigation.

28. A class action is superior to other methods for the fair and efficient adjudication of this controversy. Treatment as a class action will permit a large number of similarly situated purchasers of the McCormick ground black pepper products to adjudicate simultaneously their common claims in a single forum in an efficient manner, and without the duplication of effort and expense that numerous individual actions would engender. Class treatment also will permit the adjudication of relatively small claims by many members of the Class who could not afford individually to litigate the claims pleaded in this Complaint. There are no difficulties likely to be

encountered in the management of this class action that would preclude its maintenance as a class action.

FIRST CAUSE OF ACTION
(New York Class Only)
(Violation of New York General Business Law Section 349)

29. On behalf of herself and the members of the New York Class, as defined in Paragraph 23 above, Plaintiff hereby realleges, and incorporates by reference as though set forth fully herein, the allegations contained in Paragraphs 1 through 28.

30. By reducing the net weight of the ground black pepper contained in McCormick's traditional-size non-transparent tins, Defendant has engaged in an unfair and deceptive business practice that has the capacity, tendency and effect of deceiving reasonable consumers who purchase the products. Reasonable consumers would believe that the same traditional-size tins of McCormick ground black pepper that they have purchased for decades would contain the same quantity of ground black pepper as before.

31. Defendant knew, or should have known, that by slack-filling its tins of traditional-sized ground black pepper with substantially less quantity of ground black pepper, consumers would be misled into purchasing a substantially lesser quantity of ground black pepper at a similar price as before.

32. Defendant has deceptively advertised, marketed, promoted, distributed, and sold its McCormick ground black pepper tins ever since it began to slack fill those tins in early 2015.

33. Plaintiff and the Class have been aggrieved and have suffered losses as a

result of Defendant's violations of Section 349 of the New York General Business Law. By virtue of the foregoing unfair, unconscionable, and deceptive acts in the conduct of trade or commerce, Plaintiff and the members of the Class have been substantially injured in the amount of the purchase prices for the McCormick's ground black pepper tins that they paid, or, in the alternative, have been damaged by paying more for the McCormick's ground black pepper tins that they purchased.

34. Defendant continues to violate Section 349 of the New York General Business Law, and continues to aggrieve the members of the Class.

35. By reason of the foregoing, Defendant's conduct, as alleged herein, constitutes deceptive acts and practices in violation of Section 349 of the New York General Business Law, and Defendant is liable to Plaintiff and the Class for the actual damages that they have suffered as a result of Defendant's actions, the amount of such damages to be determined at trial, plus treble damages, and attorneys' fees and costs. Plaintiff further demands injunctive relief enjoining Defendant from continuing to engage in, use, or employ any act, including advertisements, packaging, or other representations, prohibited by Section 349 of the New York General Business Law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against Defendant as follows:

1. Certifying this action as a class action as soon as practicable, with the classes as defined above, designating Plaintiff as the named class representative, and designating the undersigned as Class Counsel.
2. On Plaintiff's First Cause of Action, awarding against Defendant the

damages that Plaintiff and the other members of the Class have suffered as a result of Defendant's actions, the amount of such damages to be determined at trial, plus treble damages.

3. Awarding Plaintiff and the Class interest, costs, and attorneys' fees.

4. Enjoining Defendant from continuing to engage in, use, or employ any act, including advertisements, packaging, or other representations, prohibited by Section 349 of the New York General Business Law.

5. Awarding Plaintiff and the Class such other and further relief as this Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Pursuant to Federal Rule of Civil Procedure Rule 38, Plaintiff hereby demands a trial by on all issues so triable.

Dated: White Plains, New York
June 15, 2015

Respectfully Submitted,

/s/ Jeffrey I. Carton
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