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10 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
11 IN AND FOR KING COUNTY

12 LORI THOMAS, and all others similarly)
13 situated;)
14 Plaintiff,)

15 v.)

16 ALBERTSON'S, INCORPORATED, a)
17 Delaware Corporation, d/b/a Albertson's,)
18 Acme, Albertson's-Osco, Albertson's-)
19 Savon, Jewel, Jewel-Osco, Max Foods,)
20 Super Saver; and DOES 1-30.)

21 Defendants.)
22 _____)

- 23) CASE NO.
- 24) **CLASS ACTION COMPLAINT**
- 25) 1) UNJUST ENRICHMENT
- 26) 2) UNLAWFUL, DECEPTIVE AND
- 27) UNFAIR BUSINESS PRACTICES;
- 28) 3) BREACH OF CONTRACT;
- 29) 4) BREACH OF WARRANTY;
- 30) 5) NEGLIGENT MISREPRESENTATION;
- 31) 6) DECLARATORY AND INJUNCTIVE
- 32) RELIEF.

33) **JURY TRIAL DEMANDED**

34 **INTRODUCTION**

35 Plaintiff, by and through her attorneys of record, hereby files this Complaint on behalf of
36 herself and all persons similarly situated within the United States. Plaintiff alleges upon personal

1 knowledge as to herself and her own acts, and upon information and belief based on investigation
2 of counsel as to all other matters, as set forth herein.

3 This matter involves the unfair and illegal practices of one of the nation's largest and most
4 sophisticated grocery store chains. Throughout the country, Defendant Albertson's Inc. markets
5 farm-raised salmon that has been artificially colored to imitate wild salmon and to appeal to
6 consumer preference for deeply colored salmon. Without artificial coloring, this farm-raised
7 salmon would have gray flesh, would be difficult to market, and would command lower prices.

8 Defendant violates its duty to inform customers that these salmon are artificially colored.
9 Defendant's nondisclosure of this material fact constitutes misrepresentation, unfair and deceptive
10 business practices, breach of warranty, and breach of contract. The materiality of this information
11 is proven directly by federal and state regulations, which require Defendant to inform consumers
12 that its farm-raised salmon are artificially colored. Defendant flagrantly violates these regulations.

13 As a result of Defendant's misbranding, concealment and nondisclosure, customers are
14 misled to purchase the artificially colored salmon and/or to pay a greater price than they would
15 otherwise pay. Defendant has been unjustly enriched at the expense of these consumers.
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17 **PARTIES**

18 1. Plaintiff Lori Thomas is a resident of King County and Washington State and has
19 purchased artificially colored salmon from the Defendant.
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21 2. Plaintiff has been injured as a result of Defendant's misbranding, concealment and
22 nondisclosure of the artificial color in its farm-raised salmon.

23 3. Defendant Albertson's is a Delaware corporation with its headquarters in Boise,
24 Idaho. Defendant is now and has been at all times relevant to this action a for-profit entity and has
25 individually controlled, directed, participated in and formulated the policies relating to the acts,
26 practices, and activities which are the subject of this Complaint. As of January 31, 2002, the
27 Company operated 2,421 stores in 33 Northeastern, Western, Midwestern and Southern states.
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1 The Company's operations are within a single operating segment: the retail sale of food and drug
2 merchandise. The Company is one of the largest retail food and drug chains in the world.

3 4. In addition to owning and operating approximately eighty two stores in Washington
4 State, Albertson's owns and operates Albertson's grocery stores in Arkansas, Arizona, California,
5 Colorado, Florida, Idaho, Louisiana, Montana, North Dakota, Nebraska, New Mexico, Nevada,
6 Oklahoma, Oregon, South Dakota, Texas, Utah, and Wyoming; Acme grocery stores in Delaware,
7 Maryland, Pennsylvania, and New Jersey; Albertson's-Osco stores in Arizona and Nebraska;
8 Albertson's-Savon stores in California, New Mexico, and Nevada; Jewel grocery stores in Illinois;
9 Jewel-Osco stores in Iowa, Illinois, Indiana and Wisconsin; and Max Food and Super Saver stores
10 in California.

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12 5. This action is also brought against DOES 1-30, which are Defendant's
13 predecessors, affiliates and subsidiaries, which hereafter are also referred to in use of the term
14 "Defendant."

15 **FACTUAL ALLEGATIONS**

16 6. Defendant enforces a nationwide policy to violate federal and state regulations and
17 conceal the fact that the farm-raised salmon it sells contains artificial coloring. Defendant's policy
18 is intended to increase sales volume and price of its farm-raised salmon.

19
20 7. Fish farmers artificially color their salmon by feeding them the chemicals
21 canthaxanthin and astaxanthin. They use a "Salmofan" -- much like an artist's color wheel but in
22 various shades of red, orange and pink -- to determine the volume of chemical to achieve a desired
23 flesh color.



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8. Unlike wild salmon, farm-raised salmon would have gray flesh if not for the artificial coloring added to their feed. This is because farm-raised salmon do not have access to natural food sources such as crustaceans, which provide wild salmon with pigmentation as well as many beneficial nutritional qualities.

9. The addition of artificial color to farm-raised salmon increases the marketability and inflates the price of the product. Consumer research has firmly established that color plays a decisive role for consumers when evaluating the quality of salmon at point-of-sale. In fact, color is considered the consumers' primary consideration in purchasing salmon. According to this research, consumers believe that color indicates a salmon's species, age, origin, price, expected flavor/texture, freshness and quality. Consumers equate redder flesh as a sign of higher quality salmon and are therefore willing to pay more for deeply colored salmon.

10. Under section 403 of the Federal Food, Drug, and Cosmetics Act, 21 U.S.C. § 343, and its implementing regulations, grocery stores are required to label their farm-raised salmon to inform consumers of the presence of artificial coloring. 21 C.F.R. §§ 73.35(d)(3), 73.75(d)(4), 101.22(a), (b), (k)(2), 101.100(a)(2). Laws enacted by most states, including RCW § 69.04.330 also require this disclosure.

11. Under Federal and State law, the failure of Defendant to label its farm-raised salmon as artificially colored constitutes misbranding. 21 U.S.C. § 343; RCW § 69.04.330.

1 12. In enacting the labeling requirement for artificially colored fish, the Food and Drug
2 Administration stated:

3 [T]he presence of the color additive must be declared on the label of any food, including
4 salmonid fish, containing added canthaxanthin and food containing such salmonid fish as
5 an ingredient. ... Section 101.22(c) requires that label statements of artificial coloring be
6 "likely to be read by the ordinary person under customary conditions of purchase and use
7 of such food."

8 ...

9 **The ingredient label would prevent economic fraud in salmonid fish containing added
10 canthaxanthin** because the ingredient label would notify the consumer that the fish is
11 artificially colored. Without such ingredient labeling, food comprising salmonid fish with
12 canthaxanthin would be deemed to be misbranded under Section 403(k) of the [Food Drug
13 and Cosmetic Act]...

14 **Therefore, in accordance with §§ 101.22(b), (c), (k)(2), and 101.100(a)(2), labeling on
15 any salmonid fish containing canthaxanthin is required to declare the presence of the
16 color additive mixture.** New § 73.75(d)(4) references §§ 101.22(b)(c), and (k)(2) and
17 101.100(a)(2) to ensure that, at a retail level, the presence of canthaxanthin will be
18 declared and that the labeling of the bulk fish container, including a list of all ingredients,
19 will be displayed on the container or on a counter card with similar information.

20 63 FR 14814 (1998)(emphasis added). Regulations requiring similar labeling of salmonid fish
21 colored with astaxanthin are also to prevent "economic fraud." 60 FR 18736 (1995).

22 13. Defendant's concealment of the artificial colors in its salmon misleads consumers
23 into believing that the unlabeled farm-raised salmon is a wild salmon. This is because the
24 presence of natural pigmentation indicates a wild salmon. Generally, consumers prefer and are
25 willing to pay a higher price for wild salmon as compared to farm-raised salmon.

26 14. By concealing the presence of artificial color in its farm-raised salmon, and thereby
27 imitating wild salmon, Defendant unfairly and deceptively disassociates its product from the real
28 and/or perceived defects of farmed salmon. Criticism leveled against farm-raised salmon and
salmon farming includes the following:

- Serious questions have been raised as to the potential health risks of eating farmed salmon.
- Farmed salmon are fed antibiotics, and are exposed to pesticides and other chemicals.

- 1 • According to the US Department of Agriculture, farmed Atlantic salmon is over 200
- 2 percent higher in saturated fat than wild pink or chum salmon.
- 3 • Farmed salmon are lower in beneficial Omega-3 fatty acids than are wild salmon.
- 4 • Preliminary research demonstrates that farmed salmon have higher concentrations of
- 5 dangerous contaminants such as polychlorinated biphenyls (PCB's) than wild salmon.
- 6 • Salmon farms are a significant source of pollution released into the marine
- 7 environment.
- 8 • Farm-raised salmon pose a threat to wild salmon runs. They can spread diseases and
- 9 parasites to wild salmon and routinely escape to pose threats to wild salmon.
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11 15. By concealing the presence of artificial coloring in its farm-raised salmon,
12 Defendant also disassociates its product from the controversy around the health risks associated
13 with the artificial coloring agents. For example, research has suggested that the buildup of the
14 coloring agent canthaxanthin can cause retinal damage. While the Food and Drug Administration
15 permits this chemical to be added to fish feed at a rate of 80 mg per kilogram of fish feed, and
16 many fish farms use this maximum dosage, there are questions about the safety of this level of
17 artificial coloring.

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19 16. On April 17, 2002, the European Community's Scientific Committee on Animal
20 Nutrition concluded that adding canthaxanthin to salmon feed at a rate of 80 mg/kg (the FDA
21 standard) caused consumers to exceed Acceptable Daily Intake (ADI) levels. In 1995, the Food
22 and Agricultural Organization of the United Nations and the World Health Organizations set the
23 ADI level at 0.03 mg of canthaxanthin per kg human body weight. In 1997, the EU Scientific
24 Committee on Food recognized the link between canthaxanthin and retinal damage and came to
25 the same conclusion regarding the ADI.

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27 17. On January 27, 2003, the European Community lowered the rate at which
28 canthaxanthin could be added to salmon feed from 80 mg/kg to 25 mg/kg. In publicizing this
action, the European Union's food safety commissioner David Byrne said:

1 Scientific assessments have shown that high intake of canthaxanthins produces an
2 accumulation of pigments in the retina, affecting the sight. The use of this feed additive is
3 purely cosmetic, to colour food, and reduced levels of the additive will not adversely affect
4 the taste or quality of our food which is why I wholeheartedly welcome today's decision to
5 reduce the authorised levels of canthaxanthins.

6 18. Given consumers' reliance upon salmon color in their purchasing decisions, their
7 preference for wild salmon, and their concerns about farmed-fish and artificial coloring agents,
8 proper labeling of artificially colored salmon would cause consumers to avoid purchasing and/or
9 pay less for farm-raised salmon.

10 19. By concealing the artificial coloration of farm-raised salmon, Defendant has
11 become unjustly enriched as consumers have been and continue to be misled into purchasing farm-
12 raised salmon and/or to purchasing such salmon at inflated prices.

13 **JURISDICTION AND VENUE**

14 20. Jurisdiction is conferred over all claims and causes of action by RCW 2.08.010.

15 21. This Court has jurisdiction over Defendant because Defendant has sufficient
16 minimum contacts with Washington and intentionally avails itself of the consumers and markets
17 within Washington. Some of the acts complained of herein, including the sale of artificially
18 colored salmon without adequate disclosure, occurred in Washington State.

19 22. Venue is proper in this Court because a substantial portion of the transactions
20 complained of herein occurred within King County. Defendant sold artificially colored salmon in
21 King County, and Defendant has received substantial compensation from the sale of their
22 artificially colored salmon in King County by doing business here and making numerous
23 misrepresentations and committing unfair and improper business practices which had a profound
24 effect in King County.

25 **CLASS ACTION ALLEGATIONS**

26 23. Plaintiff brings this action both individually and on behalf of all persons in the
27 United States who, on or after April 23, 1999, purchased from Defendant any salmon containing
28 color additives, when such artificially colored salmon was not labeled or advertised as containing

1 such color additives. As an alternative, Plaintiff brings this action on behalf of herself and such
2 Sub-classes that this Court deems appropriate, including a Sub-class of such customers residing in
3 Washington State (collectively "Sub-classes")

4 24. The Class and Sub-Class of persons described above is so numerous that the
5 joinder of all members in one action is impracticable.

6 25. Questions of law and fact common to the entire Class and Sub-classes predominate
7 over individual questions because the actions of Defendant complained of herein were generally
8 applicable to the entire Class and Sub-classes.

9 26. All questions as to the representations, concealment, misbranding and non-
10 disclosure attributable to Defendant and the impacts thereof are similarly common. Common
11 questions include: the determination of Defendant's failure to disclose the artificial coloring of its
12 farm-raised salmon; Defendant's violation of standards of duty established in part by federal and
13 state regulation; the materiality of Defendant's non-disclosure; the capacity of Defendant's action
14 to deceive the public; whether such conduct breached contract and warranties; and whether the
15 actions impacted the public interest. Furthermore, whether Defendant acted intentionally or
16 recklessly, and the extent of the appropriate measure of damages, penalties and other relief, are
17 questions common to all Class and Sub-Class members.

18 27. The claims of Plaintiff are typical of the claims of the Class and Sub-classes in that
19 Plaintiff and each class member purchased artificially colored salmon from Defendant based on
20 the color of such salmon, and without being informed of the material fact that such coloring was
21 artificial. Plaintiff and all Class and Sub-class members suffered similar damages resulting from
22 Defendant's actions.

23 28. Plaintiff will fully and adequately represent and protect the interests of the entire
24 Class and Sub-Class because of the common injuries and interests of the Class and Sub-class
25 members and the singular conduct of Defendant applicable to all Class and Sub-class members.
26 Plaintiff has retained counsel competent and experienced in the prosecution of class action
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1 litigation and has no interests that are contrary to or in conflict with those of the Class or Sub-class
2 she seeks to represent.

3 29. Defendant has acted and refused to act on grounds generally applicable to the entire
4 Class and Sub-classes thereby making it appropriate for this Court to grant final injunctive and
5 declaratory relief with respect to the Class and Sub-class as a whole.

6 30. A class action is superior to all other available methods for fair and efficient
7 adjudication of this controversy. Plaintiff knows of no difficulty to be encountered in the
8 management of this action that would preclude its maintenance as a class action.

9 31. The prosecution of separate actions by individual Class or Sub-class members
10 would create a risk of inconsistent and varying adjudications concerning the subject of this action,
11 which adjudications could establish incompatible standards of conduct for Defendant under the
12 laws alleged herein.

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14 **FIRST CAUSE OF ACTION**

15 **(Unjust Enrichment)**

16 32. Plaintiff incorporates by reference paragraphs “1” through “31”, as if fully alleged
17 herein.

18 33. As a result of the conduct described above, Defendant has been and will be unjustly
19 enriched at the expense of Plaintiff and members of the Class and Sub-classes. Specifically,
20 Defendant's unfair and illegal actions as described above have enabled Defendant to sell
21 artificially colored salmon to Plaintiff and members of the Class and Sub-classes and/or to inflate
22 the price of such product, unjustly enriching Defendant at an amount to be proven at trial.

23 34. Defendant should be required to disgorge this unjust enrichment.

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25 **SECOND CAUSE OF ACTION**

26 **(Unlawful, Deceptive and Unfair Business Practices)**

27 35. Plaintiff incorporates by reference paragraphs “1” through “34”, as if fully alleged
28 herein.

1 36. The concealment, misbranding and non-disclosure of Defendant as alleged herein
2 constitutes unlawful, deceptive and unfair business acts within the meaning of the Washington
3 Consumer Protection Act, RCW 19.86 *et seq.*, and similar statutory enactments of other states
4 (including consumer protection and consumer sales practices acts).¹

5 37. In particular, Defendant's concealment and non-disclosure of the presence of
6 artificial color in its farm-raised salmon is unfair and deceptive and has the capacity to mislead or
7 deceive consumers and members of the public. Such practice occurred in the conduct of trade or
8 commerce; it affected the public interest; and such practice proximately caused injury to Plaintiff
9 and members of the Class and Sub-class in their business and/or property.

10 38. Defendant knowingly concealed and failed to disclose material facts with the intent
11 that consumers would rely upon such concealment, misbranding, and non-disclosure.

12 39. Defendant's concealment, misbranding and non-disclosure and other acts described
13 above continue to this day and present a threat to Plaintiff and members of the Class and Sub-
14 classes. Furthermore, Defendant has failed to publicly acknowledge the wrongdoing or take
15 corrective actions. Defendant's conduct also affects and threatens the public interest in other ways
16 now unknown but to be proven at trial, including that undisclosed color additives in salmon
17 generate allergic reactions in chemical-sensitive individuals and such color additives may cause
18 other adverse health affects.

19 40. Additionally, Defendant's concealment and non-disclosure of the artificial color in
20 its farm-raised salmon constitutes a per se violation of the Washington Consumer Protection Act
21 and all other similar enactments in other states.

22 41. As a result of Defendant's concealment, misbranding and non-disclosure, Plaintiff
23 and Class and Sub-Class members have been harmed and continue to be harmed.

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¹ Plaintiffs do not allege a violation of Mont. Code Ann. §§ 30-14-101 *et seq.* or Wyo. Stat. §§ 40-12-101
et seq. or other consumer protection statutes that prohibit class actions or are otherwise inapplicable.

1 47. Plaintiff incorporates by reference paragraphs “1” through “46”, as if fully alleged
2 herein.

3 48. Artificially colored salmon are “goods” within the meaning of Uniform
4 Commercial Code Article 2 and RCW 62A.2 *et seq.*

5 49. Defendant’s conduct as described herein constitutes breach of an implied or express
6 warranty of affirmation and a violation of RCW 62A.2-313. In particular, each and every failure
7 of Defendant to properly disclose the artificially coloring in its farm-raised salmon constitutes an
8 assertion that such salmon are free of artificial coloring.

9 50. Defendant’s conduct as described herein constitutes breach of an implied warranty
10 of merchantability and a violation of RCW 62A.2-314. In particular, the salmon sold by
11 Defendant was not merchantable at the time of sale due to Defendant's misbranding, concealment
12 and non-disclosure.

13 51. Defendant’s conduct as described herein constitutes breach of an implied warranty
14 of fitness for a particular purpose and a violation of RCW 62A.2-315. In particular, many
15 consumers purchase salmon because there is a common understanding that natural, unadulterated
16 fish is a healthy food and promotes the overall health of the consumer. Defendant specifically
17 promotes this common understanding. The artificially colored salmon sold by Defendant was not
18 fit for that particular purpose because it is not unadulterated; unbeknownst to consumers, it
19 actually contains artificial coloring.

20 52. As a proximate result of the aforementioned wrongful conduct and breach, Plaintiff
21 and Class and Sub-class members have suffered and will continue to suffer damages and economic
22 loss in an amount to be proven at trial. Defendant had actual or constructive notice of such
23 damages.
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1 **FIFTH CAUSE OF ACTION**

2 **(Negligent Misrepresentation)**

3 53. Plaintiff incorporates by reference paragraphs “1” through “52”, as if fully alleged
4 herein.

5 54. Defendant negligently and/or recklessly misrepresented and concealed from
6 consumers the true nature of their artificially colored salmon, which made false, deceptive and
7 illusory the sale of such goods.

8 55. These representations were negligently or recklessly made to potential customers
9 and the general public through uniform misbranding, concealment and non-disclosure, through
10 mass media and point-of-sale advertising, and through other information prepared or disseminated
11 by Defendant. As a direct and proximate result of these misrepresentations, omissions and
12 concealments, Plaintiff and Class and Sub-class members have been damaged in an amount to be
13 proven at trial.

14 56. Defendant at all times knew that Plaintiff and Class and Sub-class members relied
15 upon the labeling and lack of labeling provided by Defendant, and the materiality of such labeling
16 is established as a matter of State and Federal law. Defendant's concealment, misbranding and
17 non-disclosure were intended to influence consumers' purchasing decisions and were done with
18 reckless disregard for the rights of consumers.

19 **SIXTH CAUSE OF ACTION**

20 **(Declaratory and Injunctive Relief)**

21 57. Plaintiff incorporates by reference paragraphs “1” through “56”, as if fully alleged
22 herein.

23 58. Plaintiff and Class and Sub-class members are entitled to declaratory relief
24 establishing that Defendant is engaging in unfair and deceptive practices, and that their conduct
25 constitutes negligent misrepresentation and concealment, breach of contract and warranty, and that
26 Defendant was thereby unjustly enriched.
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1 RESPECTFULLY SUBMITTED this _____ day of April, 2003

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3 SMITH & LOWNEY, P.L.L.C.

4
5 By: _____
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