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

HEATHER DOLIN, an individual;)
MICHAEL KELLY, an individual; and all)
others similarly situated;)

Plaintiffs,)

v.)

SAFEWAY INCORPORATED, a)
Delaware Corporation, d/b/a Safeway,)
Carrs, Genuardi's, Pavilions, Tom Thumb,)
Dominick's, Pak 'n Save Foods, Randall's,)
Vons; and DOES 1-30.)

Defendants.)

)

CASE NO.

CLASS ACTION COMPLAINT

1) UNJUST ENRICHMENT

2) UNLAWFUL, DECEPTIVE AND
UNFAIR BUSINESS PRACTICES;

3) BREACH OF CONTRACT;

4) BREACH OF WARRANTY;

5) NEGLIGENT MISREPRESENTATION;

6) DECLARATORY AND INJUNCTIVE
RELIEF.

JURY TRIAL DEMANDED

INTRODUCTION

Plaintiffs, by and through their attorneys of record, hereby file this Complaint on behalf of themselves and all persons similarly situated within the United States. Plaintiffs allege upon

1 personal knowledge as to themselves and their own acts, and upon information and belief based on
2 investigation 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 markets farm-raised
5 salmon that has been artificially colored to imitate wild salmon and to appeal to consumer
6 preference for deeply colored salmon. Without artificial coloring, this farm-raised salmon would
7 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.
16

17 **PARTIES**

18 1. Plaintiff Heather Dolin is a resident of King County and Washington State and has
19 purchased artificially colored salmon from the Defendant. Plaintiff Michael Kelly is a resident of
20 King County and Washington State and has purchased artificially colored salmon from the
21 Defendant.

22 2. Plaintiffs have been injured as a result of Defendant's misbranding, concealment
23 and nondisclosure of the artificial color in its farm-raised salmon.

24 3. Defendant Safeway Inc. is a Delaware corporation with its headquarters in
25 Pleasanton, CA. Defendant is now and has been at all times relevant to this action a for-profit
26 entity and has individually controlled, directed, participated in and formulated the policies relating
27 to the acts, practices, and activities which are the subject of this Complaint. Defendant is a food
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1 and drug retailer with an extensive network of distribution, manufacturing, and food processing
2 facilities in support of its stores. As of December 28, 2002, Defendant operated 1,695 stores in
3 Western, Southwestern, Rocky Mountain, and Mid-Atlantic regions of the United States and also,
4 in Western Canada. The Company had annual sales of approximately \$32.4 billion from
5 continuing operations in 2002.

6 4. In addition to owning and operating approximately two hundred and seven Safeway
7 and Carrs stores in Washington State, Defendant also owns and operates Safeway grocery stores in
8 Colorado, Arizona, Oregon, California, and Eastern States; Genuardi's grocery stores in
9 Pennsylvania, New Jersey, and Delaware; Tom Thumb grocery stores and Randall's grocery stores
10 in Texas; and Vons grocery stores in California.

11 5. Defendant operates an internet website through which it solicits Washington
12 residents and advertises its groceries for sale, including its farm raised salmon. Washington
13 residents can also purchase groceries and other items from Defendant via the internet. This action
14 is also brought against DOES 1-30, which are Defendant's predecessors, affiliates and subsidiaries,
15 which hereafter are also included in the term "Defendant."
16

17 **FACTUAL ALLEGATIONS**

18 6. Defendant enforces a nationwide policy to violate federal and state regulations and
19 conceal the fact that the farm-raised salmon it sells contains artificial coloring. Defendant's policy
20 is intended to increase sales volume and price of its farm-raised salmon.
21

22 7. Fish farmers artificially color their salmon by feeding them the chemicals
23 canthaxanthin and astaxanthin. They use a "Salmofan"—much like an artist's color wheel but in
24 various shades of red, orange and pink—to determine the volume of chemical to achieve a desired
25 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.

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

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

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

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

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

22 63 FR 14814 (1998)(emphasis added). Regulations requiring similar labeling of salmonid fish
23 colored with astaxanthin are also to prevent "economic fraud." 60 FR 18736 (1995).

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

28 14. By concealing the presence of artificial color in its farm-raised salmon, and thereby
imitating wild salmon, Defendant unfairly and deceptively disassociates its product from the real
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.

- 1 • Farmed salmon are fed antibiotics, and are exposed to pesticides and other chemicals.
- 2 • According to the US Department of Agriculture, farmed Atlantic salmon is over 200
- 3 percent higher in saturated fat than wild pink or chum salmon.
- 4 • Farmed salmon are lower in beneficial Omega-3 fatty acids than are wild salmon.
- 5 • Preliminary research demonstrates that farmed salmon have higher concentrations of
- 6 dangerous contaminants such as polychlorinated biphenyls (PCB's) than wild salmon.
- 7 • Salmon farms are a significant source of pollution released into the marine
- 8 environment.
- 9 • Farm-raised salmon pose a threat to wild salmon runs. They can spread diseases and
- 10 parasites to wild salmon and routinely escape to pose threats to wild salmon.
- 11

12 15. By concealing the presence of artificial coloring in its farm-raised salmon,
13 Defendant also disassociates its product from the controversy around the health risks associated
14 with the artificial coloring agents. For example, research has suggested that the buildup of the
15 coloring agent canthaxanthin can cause retinal damage. While the Food and Drug Administration
16 permits this chemical to be added to fish feed at a rate of 80 mg per kilogram of fish feed, and
17 many fish farms use this maximum dosage, there are questions about the safety of this level of
18 artificial coloring.

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

CLASS ACTION ALLEGATIONS

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2 23. Plaintiffs bring this action both individually and on behalf of all persons in the
3 United States who, on or after April 23, 1999, purchased from Defendant any salmon containing
4 color additives, when such artificially colored salmon was not labeled or advertised as containing
5 such color additives. As an alternative, Plaintiffs bring this action on behalf of themselves and
6 such Sub-classes that this Court deems appropriate, including a Sub-class of such customers
7 residing in Washington State (collectively "Sub-classes").

8
9 24. The Class and Sub-Class of persons described above is so numerous that the
10 joinder of all members in one action is impracticable.

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

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

23
24 27. The claims of Plaintiffs are typical of the claims of the Class and Sub-classes in
25 that Plaintiffs and each class member purchased artificially colored salmon from Defendant based
26 on the color of such salmon, and without being informed of the material fact that such coloring
27 was artificial. Plaintiffs and all Class and Sub-class members suffered similar damages resulting
28 from Defendant's actions.

SECOND CAUSE OF ACTION

(Unlawful, Deceptive and Unfair Business Practices)

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3 35. Plaintiffs incorporate by reference paragraphs “1” through “34”, as if fully alleged
4 herein.

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

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

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

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

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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 economic loss in an amount to be proven at trial. Defendant had actual or constructive notice of
2 such damages.

3 **FIFTH CAUSE OF ACTION**

4 **(Negligent Misrepresentation)**

5 53. Plaintiffs incorporate by reference paragraphs “1” through “52”, as if fully alleged
6 herein.

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

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

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

21 **SIXTH CAUSE OF ACTION**

22 **(Declaratory and Injunctive Relief)**

23 57. Plaintiffs incorporate by reference paragraphs “1” through “56”, as if fully alleged
24 herein.

25 58. Plaintiffs and Class and Sub-class members are entitled to declaratory relief
26 establishing that Defendant is engaging in unfair and deceptive practices, and that their conduct
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1 constitutes negligent misrepresentation and concealment, breach of contract and warranty, and that
2 Defendant was thereby unjustly enriched.

3 59. Plaintiffs and Class and Sub-class members are entitled to an injunction forcing
4 Defendant to permanently halt their misbranding, concealment and non-disclosure, and remedying
5 such past acts with new disclosures and other measures.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiffs pray that this case be certified and maintained as a class action
8 and for judgment against the Defendant as follows:

9 1. For economic, compensatory, and general damages on behalf of all members of the
10 Class and Sub-class;

11 2. For restitution;

12 3. For disgorgement of ill-gotten gains as set forth herein;

13 4. For treble damages under RCW §§ 19.86 and other similar statutes of other states,
14 as applicable;

15 5. For an assessment of civil penalties under RCW §§ 19.86 and similar statutes of
16 other states, as applicable;

17 6. For punitive damages, as applicable;

18 7. For declaratory and injunctive relief as set forth herein;

19 8. For reasonable attorneys' fees and reimbursement of all costs for the prosecution of
20 this action, based upon the creation of a common fund recovery and under the consumer protection
21 act, and based upon other theories and statutory bases.

22 9. For such other and further relief as this Court deems just and appropriate

23 **JURY DEMAND**

24 Plaintiffs hereby demand a trial by jury.

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RESPECTFULLY SUBMITTED this _____ day of April, 2003

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

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