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

CHRISTOPHER KRUPP, an individual;)
MICHAEL KELLY, an individual; and all)
others similarly situated;)

Plaintiffs,)

v.)

KROGER COMPANY, a Delaware)
Corporation, d/b/a Kroger, City Market,)
Dillons, Gerbes, Hilander, Jay C, King)
Sooper's, Owen's, Pay Less, Kessel Food)
Markets, Bell Markets, Cala Foods, Food 4)
Less, FoodsCo, Fred Meyer, Fry's,)
Ralph's, QFC, Smith's, Foods Co; FRED)
MEYER STORES, INC., a Delaware)
Corporation, d/b/a Fred Meyer; QFC SUB,)
INC., a Washington Corporation, d/b/a)
QFC Inc., and QFC; 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;
-) 7) PIERCING THE CORPORATE VEIL.

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 Kroger, Co., Defendant
5 Fred Meyer Stores, Inc., and Defendant QFC Sub Inc. market farm-raised salmon that has been
6 artificially colored to imitate wild salmon and to appeal to consumer preference for deeply colored
7 salmon. Without artificial coloring, this farm-raised salmon would have gray flesh, would be
8 difficult to market, and would command lower prices.

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

15 As a result of Defendants' misbranding, concealment and nondisclosure, customers are
16 misled to purchase the artificially colored salmon and/or to pay a greater price than they would
17 otherwise pay. Defendants have been unjustly enriched at the expense of these consumers.

18 **PARTIES**

19
20 1. Plaintiff Christopher Krupp is a resident of King County and Washington State and
21 has purchased artificially colored salmon from Defendants. Plaintiff Michael Kelly is a resident of
22 King County and Washington State and has purchased artificially colored salmon from the
23 Defendants.

24 2. Plaintiffs have been injured as a result of Defendants' misbranding, concealment
25 and nondisclosure of the artificial color in its farm-raised salmon.

26
27 3. Defendant Kroger is a Delaware corporation with its headquarters in Cincinnati,
28 Ohio. Defendant is now and has been at all times relevant to this action a for-profit entity and has
individually controlled, directed, participated in and formulated the policies relating to the acts,

1 practices, and activities which are the subject of this Complaint. As of February, 2003, the
2 Company operated approximately 2,418 supermarkets, price impact, or multi-department stores in
3 32 states under nearly two-dozen banners including Kroger, Fred Meyer, QFC, City Market,
4 Dillons, Gerbes, Hilander, Jay C, King Sooper's, Owen's, Pay Less, Kessel Food Markets, Bell
5 Markets, Cala Foods, Food 4 Less, FoodsCo, Fry's, Ralph's, Smith's, Foods Co. Defendant
6 Kroger is one of the nation's largest retail grocery chains.

7
8 4. In Washington State, Kroger owns and operates approximately 134 QFC and Fred
9 Meyer stores. Division headquarters of QFC and Fred Meyer are located in Seattle, WA and
10 Portland, OR respectively. Defendant Kroger has marketed and sold groceries in this state for
11 many years. The City of Seattle is amongst Kroger's top five major markets; annual sales volume
12 per store can exceed \$28 million.

13 5. Additionally, Defendant Kroger owns and operates Kroger grocery stores in
14 Alabama, Arkansas, Georgia, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North
15 Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and West Virginia; Fred Meyer
16 grocery stores in Alaska, Idaho, Oregon, and Utah; Frye's grocery stores in Arizona; Smith's
17 grocery stores in Arizona, Idaho, Montana, Nevada, New Mexico, Texas, Utah, and Wyoming;
18 Ralph's grocery stores in California; Food4Less stores in California, Illinois, Indiana, and Nevada;
19 King Soopers grocery stores in Colorado; Dillons grocery stores in Kansas, Missouri, and
20 Oklahoma; City Market grocery stores in Colorado; QFC grocery stores in Oregon; Foods Co
21 grocery stores in California; Hilander grocery stores in Illinois; Jay C grocery stores in Indiana;
22 Owen's grocery stores in Indiana; Kessel grocery stores in Michigan; Gerbes grocery stores in
23 Missouri, Cala Foods grocery stores in California; Bell Market grocery stores in California; and
24 Pay Less grocery stores in Indiana.

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26 6. In Washington State, Defendant Kroger markets the farm-raised salmon at issue in
27 this complaint through Fred Meyer and QFC grocery stores.
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12. 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.

13. 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.

14. 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.

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

1 16. 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 17. Defendants' concealment of the artificial colors in their salmon misleads
23 consumers into believing that the unlabeled farm-raised salmon is a wild salmon. This is because
24 the 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 18. By concealing the presence of artificial color in its farm-raised salmon, and thereby
27 imitating wild salmon, Defendants unfairly and deceptively disassociate their products from the
28 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.
- 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.
- 10

11 19. By concealing the presence of artificial coloring their farm-raised salmon,
12 Defendants also disassociate their products 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.

18
19 20. 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.

26
27 21. 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 22. 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 23. By concealing the artificial coloration of farm-raised salmon, Defendants have
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 24. Jurisdiction is conferred over all claims and causes of action by RCW 2.08.010.

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

19 26. Venue is proper in this Court because a substantial portion of the transactions
20 complained of herein occurred within King County. Defendants sold artificially colored salmon in
21 King County, and Defendants have 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 27. Defendant Kroger controlled the marketing and labeling of the artificially colored
26 salmon at issue in this complaint through wholly owned and wholly controlled subsidiaries, and at
27 all times controlled the business practices at issue in this complaint. Each and every Kroger Co.
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1 grocery store is a wholly owned and wholly controlled by Kroger Co., and serves as agents of
2 Kroger Co.

3 28. Defendant Kroger maintains and manages company-wide systems that govern the
4 purchasing of products and the distribution of such products to stores, including Fred Meyer and
5 QFC stores. QFC and Fred Meyer stores are required to comply with standardized Kroger
6 business requirements. Through its company-wide systems, Defendant Kroger controls labeling
7 and marketing of products at its stores, including Fred Meyer and QFC stores.

8 29. Defendant Kroger maintains a website at Kroger.com, which includes direct links
9 to what Defendant terms "affiliate web sites" on its home page. These affiliate links include links
10 to the web pages of: QFC, Fred Meyer, and all other individually listed Kroger banner stores. The
11 Kroger Co., QFC, Fred Meyer, and all other Kroger banner store web pages refer to the same
12 information about Kroger Co. under an "About Our Company" web link. The QFC and Fred
13 Meyer interactive web pages allow users to locate Kroger Co. stores in Washington by entering
14 geographic information on a "Store Locator" screen. Defendants have purposefully availed
15 themselves of the privilege of doing business in Washington State by soliciting business in
16 Washington through their national websites and other advertising, though the operation of wholly
17 owned and wholly controlled subsidiaries doing business in Washington, and through other
18 business contacts in Washington.

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21 **CLASS ACTION ALLEGATIONS**

22 30. Plaintiffs bring this action both individually and on behalf of all persons in the
23 United States who, on or after April 23, 1999, purchased from Defendants any salmon containing
24 color additives, when such artificially colored salmon was not labeled or advertised as containing
25 such color additives. As an alternative, Plaintiffs bring this action on behalf of themselves and
26 such Sub-classes that this Court deems appropriate, including a Sub-class of such customers
27 residing in Washington State (collectively "Sub-classes")
28

1 31. The Class and Sub-Class of persons described above is so numerous that the
2 joinder of all members in one action is impracticable.

3 32. Questions of law and fact common to the entire Class and Sub-classes predominate
4 over individual questions because the actions of Defendants complained of herein were generally
5 applicable to the entire Class and Sub-classes.

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

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

22 35. Plaintiffs will fully and adequately represent and protect the interests of the entire
23 Class and Sub-Class because of the common injuries and interests of the Class and Sub-class
24 members and the singular conduct of Defendants applicable to all Class and Sub-class members.
25 Plaintiff has retained counsel competent and experienced in the prosecution of class action
26 litigation and has no interests that are contrary to or in conflict with those of the Class or Sub-class
27 she seeks to represent.
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1 Consumer Protection Act, RCW 19.86 *et seq.*, and similar statutory enactments of other states
2 (including consumer protection and consumer sales practices acts).¹

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

8 45. Defendants knowingly concealed and failed to disclose material facts with the
9 intent that consumers would rely upon such concealment, misbranding, and non-disclosure.
10

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

19 47. Additionally, Defendants' 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 48. As a result of Defendants' concealment, misbranding and non-disclosure, Plaintiffs
23 and Class and Sub-Class members have been harmed and continue to be harmed.

24 49. Plaintiffs and the Class and Sub-Class are entitled to an injunction against
25 Defendants' misleading and deceptive practices and a declaration that Defendants' actions
26 constitute a violation of the consumer protection laws. In addition, Defendants should be required
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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 to pay civil penalties, including those provided for under RCW 19.86.140 and comparable statutes
2 from other states, for every violation. Plaintiffs and the Class and Sub-Class are also entitled to
3 damages sustained as a result of Defendants' unfair and deceptive acts and practices, treble
4 damages or other punitive damages to the extent allowed by law, and reimbursements of costs and
5 attorneys fees.

6 **THIRD CAUSE OF ACTION**

7 **(Breach of Contract)**

8 50. Plaintiffs incorporate by reference paragraphs "1" through "49", as if fully alleged
9 herein.

10 51. Plaintiffs and each member of the Class and Sub-class purchased artificially
11 colored salmon from Defendants. A contract was created between Defendants and Plaintiffs and
12 each and every member of the Class and Sub-class.

13 52. By reason of the conduct described above, Defendants and their predecessors have
14 uniformly breached their contracts with Plaintiffs and members of the Class and Sub-class by: (a)
15 failing to provide orange, pink, or red colored salmon that did not contain color additives, artificial
16 colors, and/or artificial coloring; (b) failing to disclose that the goods purchased were not what
17 Defendant represented them to be; (c) failing to act in good faith; (d) breaching warranties existing
18 because of the contracts; and (e) such other actions now unknown but to be proven at trial.

19 53. As a proximate result of the aforementioned wrongful conduct and breach
20 committed by Defendants, Plaintiffs and members of the Class and Sub-class have suffered and
21 will continue to suffer damages and economic loss in an amount to be proven at trial.

22 **FOURTH CAUSE OF ACTION**

23 **(Breach of Warranties)**

24 54. Plaintiffs incorporates by reference paragraphs "1" through "53", as if fully alleged
25 herein.
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SEVENTH CAUSE OF ACTION

(Piercing the Corporate Veil)

67. Plaintiffs incorporate by reference paragraphs “1” through “66”, as if fully alleged herein.

68. Defendant Kroger owns and/or operates Kroger, Fred Meyer, QFC, and other grocery stores and controls the labeling and marketing of farm-raised salmon sold in those stores. Defendant Kroger is responsible for the labeling and marketing of artificially colored salmon at all stores that it owns, operates, or controls. To the extent Defendant does not so control the actions at its grocery stores that are complained of herein, Defendant Kroger intentionally misleads customers about the nature of the Kroger Co. structure, which results in serious confusion about the manner and capacity in which the parents and subsidiaries are acting. This is accomplished through misleading statements disseminated through the website and through other corporate advertising and materials regarding the Kroger Co., its store formats, and its relationship to Fred Meyer, QFC, and other grocery stores. To the extent that a corporate shell separates Kroger Co. from QFC, Fred Meyer, and any other grocery store under which it operates, such corporate formalities should be disregarded.

69. Defendant Kroger has created this corporate structure to avoid its duties to consumers and to shelter its wrongdoings from judicial or administrative oversight.

PRAYER FOR RELIEF

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

1. For economic, compensatory, and general damages on behalf of all members of the Class and Sub-class;
2. For restitution;
3. For disgorgement of ill-gotten gains as set forth herein;

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

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

6. For a judicial piercing of the corporate veil as necessary to hold Defendant Kroger
Co. responsible for the labeling and marketing of the salmon at issue in this Complaint;

7. For punitive damages, as applicable;

8. For declaratory and injunctive relief as set forth herein;

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

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

JURY DEMAND

Plaintiffs hereby demand a trial by jury.

RESPECTFULLY SUBMITTED this _____ day of April, 2003

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

By: _____
Knoll Lowney, WSBA#23457
Richard A. Smith, WSBA#21788
Paul Kampmeier, WSBA#31560
Davida Finger, WSBA#32818
Attorneys for Plaintiff and Plaintiff Classes