

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

THE NATIONAL CONSUMERS LEAGUE,)	
)	
Plaintiff,)	Case No. 2013-CA-006548 B
)	Judge John M. Mott
v.)	Next Event: Status Conference
)	January 8, 2016
BIMBO BAKERIES USA, INC.,)	
)	
Defendant.)	
_____)	

**ANSWER OF DEFENDANT BIMBO BAKERIES USA, INC.
TO FIRST AMENDED COMPLAINT**

Defendant Bimbo Bakeries USA, Inc. (“BBUSA”), for its Answer and Affirmative Defenses in response to the First Amended Complaint (“Complaint”) filed by Plaintiff The National Consumers League (“Plaintiff”), hereby states and alleges the following:

NATURE OF THE CASE

1. Plaintiff brings this action on behalf of the general public of the District of Columbia to redress the pervasive pattern of fraudulent, deceptive, and otherwise improper marketing practices regarding the sale of Thomas’ Light Multi-Grain Hearty Muffins and Sara Lee Classic Honey Wheat bread.

ANSWER. The allegations asserted in numbered paragraph 1 of the Complaint consist of Plaintiff’s characterizations as to the nature of this action, to which no response is required. To the extent that a response may be deemed to be required, BBUSA denies each and every allegation in paragraph 1, including without limitation that Plaintiff’s action is brought “on behalf of the general public” and that BBUSA has engaged in a “pervasive pattern of fraudulent, deceptive, and otherwise marketing practices.”

2. Defendant deceives consumers into believing that Thomas’ Light Multi-Grain Hearty Muffins and Sara Lee Classic Honey Wheat bread contain significant amounts of whole grain, when, in fact, they are predominantly composed of ordinary refined flour (also known as “wheat flour” or “enriched wheat flour”) and have minimal, if any, whole grain.

ANSWER. BBUSA denies that it deceives consumers in any way and therefore denies the allegations in paragraph 2 as stated.

3. Defendant deceives D.C. consumers into believing the muffins and bread referenced herein contain significant amounts of a variety of whole grains or whole wheat. But unlike the bread sold in D.C. by many of Defendant's competitors, which do in fact contain significant amounts of whole grain, Defendant's bread does not.

ANSWER. BBUSA denies that it deceives consumers in any way, including but not limited to by suggesting that Thomas' Light Multi-Grain Hearty English Muffins and/or Sara Lee Classic Honey Wheat Bread contain a significant amount of whole grain. BBUSA lacks knowledge or information sufficient to form a belief as to the meaning of "significant amounts" of whole grains or whole wheat as stated in the allegation. BBUSA lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding bread sold in Washington, D.C. by unnamed "competitors." BBUSA therefore denies the allegations in paragraph 3 as stated.

4. Plaintiff brings claims for violations of the D.C. Consumer Protection Procedures Act, D.C. Official Code §§ 28-3901 *et seq.* Plaintiff seeks restitution, damages, injunctive relief in the form of an order requiring the cessation of the unlawful marketing alleged herein and corrective advertising, and attorneys' fees and costs of this suit.

ANSWER. The allegations asserted in numbered paragraph 4 of the Complaint consist of Plaintiff's characterizations as to the nature of this action and the relief sought, to which no response is required. To the extent that a response may be deemed to be required, BBUSA admits that Plaintiff has purported to assert claims under the D.C. Consumer Protection Procedures Act and has sought the relief described in paragraph 4. BBUSA denies that Plaintiff has properly brought such claims or that it is entitled to the requested relief.

JURISDICTION

5. This Court has subject matter jurisdiction over this action, and venue is appropriate in this Court, pursuant to D.C. Code § 11-921 and §28-3905(k)(1).

ANSWER. The allegations asserted in numbered paragraph 5 of the Complaint consist of Plaintiff's characterizations as to the basis for invoking the subject matter jurisdiction and venue of this Court, to which no response is required. To the extent that a response may be deemed to be required, based on Plaintiff's representations to the United States District Court for the District of Columbia on removal that it is not bringing this suit as a class action, BBUSA admits that this Court has subject matter jurisdiction over this action and that venue is appropriate.

6. This Court has personal jurisdiction over Defendant pursuant to D.C. Code § 13-423. This Court has personal jurisdiction over the parties because, *inter alia*, Defendant markets its products in Washington, D.C., is engaged in deceptive schemes and acts directed at – and having the intended effect of – causing injury to persons residing in, located in, or doing business in Washington, D.C.

ANSWER. The allegations asserted in numbered paragraph 6 of the Complaint consist of Plaintiff's characterizations as to the basis for claiming personal jurisdiction over BBUSA, to which no response is required. To the extent that a response may be deemed to be required, BBUSA admits that this Court has personal jurisdiction over it. BBUSA specifically denies each and every remaining allegation in paragraph 6 to the extent they are not specifically admitted. BBUSA specifically denies that it has engaged in deceptive schemes or caused injury to persons located in Washington, D.C.

7. Plaintiff is headquartered in Washington, D.C.

ANSWER. The allegations in numbered paragraph 7 of the Complaint do not relate to BBUSA, and therefore no response is required. To the extent that a response may be deemed to be required, BBUSA lacks knowledge or information sufficient to form a belief as to the truth of the allegation regarding the location of Plaintiff's headquarters and therefore denies that allegation.

8. A substantial part of the actions which gave rise to Plaintiff's causes of action occurred in this jurisdiction.

ANSWER. The allegations asserted in numbered paragraph 8 of the Complaint consist of Plaintiff's characterizations as to the basis for invoking jurisdiction over BBUSA, to which no response is required. To the extent that a response may be deemed to be required, BBUSA admits that this Court has personal jurisdiction over it but specifically denies that any action or actions on its part gave rise to any causes of action asserted by Plaintiff.

PARTIES

9. Plaintiff, the National Consumers League, is a 501(c)(3) non-profit organization located at 1701 K Street N.W., Suite 1200, Washington, D.C. 20006.

ANSWER. The allegations in numbered paragraph 9 of the Complaint do not relate to BBUSA, and therefore no response is required. To the extent that a response may be deemed to be required, BBUSA lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 and therefore denies those allegations.

10. Plaintiff focuses its advocacy on consumer protection, including efforts to promote accurate labeling on food products. Plaintiff has purchased Thomas' Light Multi-Grain Hearty Muffins and Sara Lee Classic Honey Wheat bread.

ANSWER. The allegations in numbered paragraph 10 of the Complaint do not relate to BBUSA, and therefore no response is required. To the extent that a response may be deemed to be required, BBUSA lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 and therefore denies those allegations.

11. Defendant is Bimbo Bakeries USA ("Bimbo") with corporate headquarters at 255 Business Center Drive, Horsham, PA 19044.

ANSWER. BBUSA admits the allegation in numbered paragraph 11 of the Complaint.

THE INTERESTS OF NCL & THE GENERAL PUBLIC

12. Defendant deceptively marketed Thomas' Light Multi-Grain Hearty Muffins and Sara Lee Classic Honey Wheat Bread to District of Columbia residents by fostering the false impression that they contained substantial amounts of a variety of whole grains or whole wheat.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 12 of the Complaint.

13. Upon information and belief, Defendant has caused damage and adverse effects to residents of this District.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 13 of the Complaint.

14. Plaintiff acts for the benefit of the General Public as a Private Attorney General pursuant to District of Columbia Code §28-3905(k)(1).

ANSWER. BBUSA denies the allegations in numbered paragraph 14 of the Complaint. Among other things, Plaintiff purportedly seeks monetary damages on behalf of the general public but has not brought suit as a class action as required by applicable law. *See Rotunda v. Marriott Intern., Inc.*, 123 A.3d 980 (D.C. 2015).

15. The NCL has worked diligently to promote accurate labeling of consumer goods. It has investigated, publicized, and/or litigated on mislabeling for lemon juice, vine-ripened tomatoes, extra-virgin olive oil, sunflower seeds, false health claims on cereal, and adulterated honey.

ANSWER. The allegations in numbered paragraph 15 of the Complaint do not relate to BBUSA, and therefore no response is required. To the extent that a response may be deemed to be required, BBUSA lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15 of the Complaint and therefore denies those allegations.

SUBSTANTIVE ALLEGATIONS

A. Thomas' Light Multi-Grain Hearty Muffins

16. Consumers in the general public of the District of Columbia, relying on Defendant's representations, purchased Thomas' Light Multi-Grain Hearty Muffins with the reasonable expectation that the muffins contained substantial amounts of whole grains, i.e., at least 51% of the product is whole grain or contains at least 8 grams of whole grains per ounce as specified in the U.S. Dietary Guidelines.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 16 of the Complaint.

17. Via use of the product name Thomas' Light Multi-Grain Hearty Muffins, Defendant conveys to reasonable consumers that the muffins contains a significant amount of a variety of whole grains. But there is only a minimal amount of whole grain in this product.

ANSWER. BBUSA admits that it previously had a product called "Thomas' Light Multi-Grain Hearty Muffins." BBUSA denies that the product name conveyed to reasonable consumers that the product contained a significant amount of a variety of whole grains. BBUSA lacks knowledge or information sufficient to form a belief as to the meaning of "significant amount" or "minimal amount" of whole grains as stated in the allegation, and therefore denies each and every remaining allegation in paragraph 17 to the extent they are not specifically admitted.

18. Indeed, based on the ingredients for the Light Multi-Grain Hearty Muffins (which are listed on the product package and website in descending order of predominance by weight), there is actually more cellulose fiber and yeast than any of the ingredients that are *potentially* whole grain, let alone actually whole grain. *Potential* whole grain ingredients appear in boldface type.

Unbleached enriched wheat flour [flour, malted barley flour, reduced iron, niacin, thiamin mononitrate (vitamin B1), riboflavin (vitamin B2), folic acid], water, modified food starch, polydextrose, wheat gluten, cellulose fiber, farina, yeast, **cornmeal**, preservatives (calcium propionate, potassium sorbate, sorbic acid,), whey (milk), salt, **rye**, malt extract, grain vinegar, monocalcium phosphate, **ground corn**, datem, sodium stearyl lactylate, ethoxylated mono-and diglycerides, **brown rice**, **oats**, xanthum gum, **triticale**, soy flour, mono-and diglycerides, sucralose, **barley**, flaxseed, **millet**, nonfat milk.

ANSWER. BBUSA admits that the ingredients listed in numbered paragraph 18 of the Complaint were the ingredients listed on the packaging and website for Thomas' Light Multi-Grain Hearty English Muffins at the time the Complaint was filed. BBUSA further admits that ingredients are listed in descending order of predominance by weight. BBUSA admits that the ingredients in bold may sometimes appear in "whole grain" form and that they appear later in the list of ingredients than cellulose fiber and yeast.

19. Guidance from the Food and Drug Administration explains that the term “whole grains” includes seven of the grains listed on Defendant’s label—assuming they are in whole and not processed form: barley, corn, rye, rice, oats, triticale and millet. However, according to the FDA, the corn meal and barley are unlikely to be whole grain. FDA, *Draft Guidance: Whole Grain Statements Q & A* 4 and 5.

ANSWER. BBUSA states that the document entitled “Guidance for Industry and FDA Staff, Whole Grain Label Statements, Draft Guidance” speaks for itself and denies any characterization in numbered paragraph 19 of the Complaint that is inconsistent with the document. To the extent that a response may be deemed to be required, BBUSA admits that a document entitled “Guidance for Industry and FDA Staff, Whole Grain Label Statements, Draft Guidance” appears to indicate that barley, corn, rye, rice, oats, triticale, and millet may be whole grains depending on processing conditions. BBUSA admits that the document further suggests that corn meal and barley in certain processed forms should not be considered whole grains.

20. Even if the remaining five grain ingredients in the Light Multi-Grain muffins are actually whole grain and are added together, they would still not constitute a significant amount of whole grain given their lack of predominance in the ingredient list.

ANSWER. BBUSA lacks knowledge or information regarding the “remaining five grain ingredients” referenced in the allegation in numbered paragraph 20 of the Complaint sufficient to form a belief as to the truth of the allegation and further lacks knowledge or information sufficient to form a belief as to the meaning of “significant amount” of whole grains as stated in the allegation. BBUSA therefore denies the allegations in numbered paragraph 20.

21. A comparison of the ingredients statement of Thomas’ regular Multi-Grain Muffins (as reproduced from its website) and the Light variety indicates that the regular version contains 8 grams of whole grain, the majority of which is attributable to the whole wheat in that product:

UNBLEACHED ENRICHED WHEAT FLOUR [FLOUR, MALTED BARLEY FLOUR, REDUCED IRON, NIACIN, THIAMIN MONONITRATE (VITAMIN B1), RIBOFLAVIN (VITAMIN B2), FOLIC ACID], WATER, **WHOLE WHEAT FLOUR**, SUGAR, FARINA, SOYBEAN OIL, YEAST, FLAXSEED, WHEAT GLUTEN, PRESERVATIVES (CALCIUM PROPIONATE, SORBIC

ACID), SALT, **RYE, CORN CEREAL**, DEXTROSE, **GROUND CORN**, MALT, MONOGLYCERIDES, **BROWN RICE, OATS**, SOYBEANS, **TRITICALE, BARLEY, MILLET**, CARAMEL COLOR, NONFAT MILK, SOY FLOUR, WHEY.

ANSWER. BBUSA admits that it has a product called “Thomas’ Multi-Grain English Muffins,” which indicates on the packaging that it is “Made With WHOLE GRAIN” and contains “8 grams of whole grain,” which BBUSA avers is unlike the packaging of the accused product, Thomas’ Light Multi-Grain Hearty English Muffins. BBUSA avers that the ingredients listed in paragraph 21 of the Complaint do not correspond completely to the ingredients listed on the packaging for Thomas’ Multi-Grain English Muffins either at the time the Complaint was filed or currently. BBUSA further admits that the inclusion of the ingredient “whole wheat” accounts for the majority of the 8 grams of whole grain contained in the Thomas’ Multi-Grain English Muffin product. BBUSA specifically denies each and every remaining allegation in paragraph 21 to the extent they are not specifically admitted, including without limitation any purported comparison to the Thomas’ Light Multi-Grain Hearty English Muffins.

22. Given that there is no whole wheat whatsoever in the Light variety, and all of the other potential whole grain ingredients are present in minute amounts comparable to the amounts listed for the regular “Made With Whole grains” variety, the muffins contain substantially less than 8 grams of whole grain per 57 gram (2 oz.) serving, let alone the 51% of product weight or 8 grams per ounce which is considered to be a significant amount under the U.S. Dietary Guidelines.

ANSWER. BBUSA denies any suggestion implicit in this allegation that it has made any representations or otherwise misled consumers into believing that Thomas’ Light Multi-Grain Hearty English Muffins contain a significant amount of whole grain. BBUSA admits that the ingredient “whole wheat” is not present in Thomas’ Light Multi-Grain Hearty English Muffins. BBUSA lacks knowledge or information sufficient to form a belief as to the meaning of “substantially less” or “minute amounts” of whole grains as stated in the allegation, and

therefore denies each and every remaining allegation in paragraph 22 to the extent they are not specifically admitted, including without limitation any purported comparison between the Thomas' Multi-Grain English Muffins and the Thomas' Light Multi-Grain English Muffins.

23. The packaging for the Light Multi-Grain Hearty Muffins is confusingly similar to the regular version and prominently displays the same multi-grain claim, on the same section of the package.

ANSWER. BBUSA denies that the packaging for the Light Multi-Grain Hearty Muffins is confusing. BBUSA admits that the labels for both the Light Multi-Grain Hearty Muffins and the Whole Grain Multi-Grain Hearty Muffins contain the statement "MULTI-GRAIN" on the packaging. BBUSA specifically denies each and every remaining allegation in paragraph 23 to the extent they are not specifically admitted.

24. However, the (false) implication and impression by the packaging is clear: the Light and regular muffins are the same except for calorie content—not whole grain content.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 24 of the Complaint.

25. Defendant knowingly exploits the product name "Multi-Grain" to deceive consumers into believing its Light Multi-Grain Hearty Muffins contain significant amounts of whole grain—like the higher calorie version.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 25 of the Complaint.

26. Defendant deliberately places the Light Multi-Grain Muffins in its "Hearty" line which is described on its website as "better for you muffins."

ANSWER. BBUSA admits that at the time the Complaint was filed, Thomas' Light Multi-Grain English Muffins were offered through Thomas' "Hearty" line. BBUSA further admits that at the time the Complaint was filed, Thomas described its "Hearty" line as "better for you

muffins.” BBUSA specifically denies each and every remaining allegation in paragraph 26 of the Complaint to the extent they are not specifically admitted.

27. By comparison, other products in its Hearty Muffin Line contain much higher amounts of whole grains, e.g, Thomas 100% Whole Wheat Made with Whole Grains English Muffins are 51% whole Grains.

ANSWER. BBUSA admits that its product, Thomas’ 100% Whole Wheat Made with Whole Grains English Muffins contains a higher amount of whole grains than Thomas’ Light Multi-Grain Hearty English Muffins. BBUSA further admits that some, but not all, of its other products that previously were offered through its “Hearty” line of muffins contained a higher amount of whole grains than Thomas’ Light Multi-Grain Hearty English Muffins. BBUSA specifically denies each and every remaining allegation in paragraph 27 of the Complaint to the extent they are not specifically admitted.

28. Even the Original Thomas’ English Muffins Made with Whole Grain are not part of the Hearty Muffin line, although *they* contain whole wheat as the third ingredient in the ingredient statement (and thereby have more whole grains than the Light Multi-Grain).

ANSWER. BBUSA admits that its product Thomas’ Original Made With Whole Grains English Muffins was not offered as part of the “Hearty” line, contains “whole white wheat” as the third listed ingredient, and contains more whole grains than Thomas’ Light Multi-Grain Hearty English Muffin. BBUSA specifically denies each and every remaining allegation in paragraph 28 of the Complaint to the extent they are not specifically admitted.

29. Defendant deceives consumers by passing off multi-grain muffins that contain minimal (if any) amounts of whole grain, a feat that is made easier because many of the other multi-grain muffins and breads sold in Washington, D.C. with which defendant’s products compete actually do provide significant amounts of whole grain. These products include: Giant Multigrain English Muffins, Fiber One 100 Calories Multigrain Bread, Nature’s Own Healthy Multi-Grain Sandwich Rounds, and Arnold Nature’s Harvest Light Multigrain Bread.

ANSWER. BBUSA denies that it deceives consumers by passing off multi-grain muffins that contain minimal (if any) amounts of whole grain. BBUSA lacks knowledge or information

sufficient to form a belief as to the meaning of “significant amounts” or “minimal amounts” of whole grains as stated in the allegation. BBUSA admits that Nature’s Harvest Light Multigrain Bread (formerly Arnold Nature’s Harvest Light Multigrain Bread) contains at least 8 grams of whole grain per serving. BBUSA lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding other muffins and breads sold in Washington, D.C. with which BBUSA’s products allegedly compete, including Giant Multigrain English Muffins, Fiber One 100 Calories Multigrain Bread, and Nature’s Own Healthy Multi-Grain Sandwich Rounds, and it therefore denies those allegations. BBUSA specifically denies each and every remaining allegation in paragraph 29 of the Complaint to the extent they are not specifically admitted.

30. Research indicates that consumers tend to assume that multi-grain products contain large proportions of whole grain.

ANSWER. BBUSA lacks knowledge or information sufficient to form a belief as to the truth of the allegations asserted in numbered paragraph 30 of the Complaint, and therefore denies those allegations.

31. The same research indicates that non-wheat grains are as likely to be refined as is wheat; thus multi-grain products are not necessarily whole grain products.

ANSWER. BBUSA lacks knowledge or information sufficient to form a belief as to the truth of the allegations asserted in numbered paragraph 31 of the Complaint and therefore denies those allegations.

B. Sara Lee Classic Honey Wheat Bread

32. Reasonable D.C. consumers purchased Sara Lee Classic Honey Wheat bread, based on label representations, with the belief that the bread contains substantial amounts of whole wheat.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 32 of the Complaint.

33. The ingredient list for the Sara Lee Honey Wheat bread indicates that the most prevalent ingredient in Sara Lee’s Classic Honey Wheat bread is refined wheat flour and that the bread has more yeast and honey than whole wheat:

Enriched wheat flour, [flour, malted barley flour, reduced iron, niacin, thiamin mononitrate (Vitamin B1), riboflavin (Vitamin B2), Folic Acid], water, yeast, honey, **whole wheat flour**, wheat gluten, sugar, wheat bran, soybean oil, salt, calcium propionate (preservative), datem, monoglycerides, cellulose gum, calcium sulfate, monocalcium phosphate, cornstarch, soy lecithin, citric acid grain vinegar, potassium iodate, soy flour.

ANSWER. BBUSA admits that the ingredients listed in paragraph 33 of the Complaint were the ingredients listed on the packaging for Sara Lee Classic Honey Wheat Bread at the time the Complaint was filed. BBUSA further admits that the most prevalent ingredient in Sara Lee’s Classic Honey Wheat bread was enriched wheat flour at the time the Complaint was filed. BBUSA admits that ingredients are listed in descending order of predominance by weight and that “yeast” and “honey” appear earlier in the list of ingredients than “whole wheat flour.”

34. Indeed, Defendant deliberately takes advantage of the well-known consumer confusion about—and demand for—whole wheat products in choosing the term “wheat” as part of its product name.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 34 of the Complaint.

35. Indeed, Defendant used the very same name, “Honey Wheat” to describe a different bread in its product line which is, in fact, whole wheat.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 35 of the Complaint.

36. Defendant’s website described the Honey Wheat bread shown below as “our famously textured whole wheat bread.”

ANSWER. BBUSA admits that its website for a brief time mistakenly contained the statement referenced in paragraph 36 of the Complaint.

37. Defendant caused confusion when it did not provide information on its website for the similarly labeled “Sara Lee *Classic* Honey Wheat Bread” that is the subject of this suit.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 37 of the Complaint.

38. Defendant knew, or should have known that the name of its *Classic Sara Lee Honey Wheat Bread* is deceptive and likely to mislead reasonable consumers into believing it has the same properties and ingredients as its whole wheat Honey Wheat bread.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 38 of the Complaint.

39. Defendant deceives consumers by passing off its predominantly white bread as whole grain, a feat that is made easier because many of the other “wheat” breads sold in Washington, D.C., with which Defendant’s products compete, actually do provide significant amounts of whole grain. These products include: Ovenjoy Wheat Bread (Safeway brand); Giant Wheat, Stroehmann’s Wheat Made with Whole Grain; and Pepperidge Farm Light Style Soft Wheat.

ANSWER. BBUSA denies that it deceives consumers by passing off its predominantly white bread as whole grain. BBUSA lacks knowledge or information sufficient to form a belief as to the meaning of “significant amounts” of whole grains as stated in the allegation. BBUSA admits that Stroehmann’s Wheat Made with Whole Grain contains 8 grams of whole grain per serving. BBUSA lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding other breads sold in Washington, D.C. with which BBUSA’s products allegedly compete, including Ovenjoy Wheat Bread (Safeway brand); Giant Wheat; and Pepperidge Farm Light Style Soft Wheat, and it therefore denies those allegations. BBUSA specifically denies each and every remaining allegation in paragraph 39 of the Complaint to the extent they are not specifically admitted.

40. As another example, the primary ingredient in Pepperidge Farm’s Whole Grain Honey Wheat bread is whole wheat flour.

ANSWER. The allegations in numbered paragraph 40 of the Complaint do not relate to BBUSA, and therefore no response is required. To the extent that a response may be deemed to

be required, BBUSA lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40 of the Complaint and therefore denies those allegations.

C. Whole Grain Market

41. Research indicates that consumers tend to assume that wheat products contain large proportions of whole grain.

ANSWER. BBUSA lacks knowledge or information sufficient to form a belief as to the truth of the allegations in numbered paragraph 41 of the Complaint and therefore denies those allegations.

42. For example, in one study, consumers overestimated the amount of whole wheat in a product when shown packages that emphasized the word “wheat.”

ANSWER. BBUSA admits that the article cited by Plaintiff appearing in Milling & Baking News, Nutrition and Health, p. 48 (Feb. 21, 2012) cites to a survey commissioned by the advocacy group Center for Science and the Public Interest. The article speaks for itself. BBUSA denies each and every remaining allegation in paragraph 42 of the Complaint.

43. A consumer survey specifically regarding a “Wheat Bread” found that 61% of consumers “mistakenly believed that at least half the grain in that product would be whole grain.”

ANSWER. BBUSA admits that the article cited by Plaintiff and published by the advocacy group The Whole Grains Council cites to a survey commissioned by the advocacy group Center for Science and the Public Interest. The article speaks for itself. BBUSA denies each and every remaining allegation in paragraph 43 of the Complaint.

44. The last several years have seen a sustained upward trend in demand for whole grains.

ANSWER. BBUSA admits that the website cited by Plaintiff appears to contain trend reports published by the advocacy group The Whole Grains Council and reports a general upward trend in demand for whole grains. The website speaks for itself. BBUSA lacks knowledge or

information sufficient to form a belief as to the truth of the remaining allegations in paragraph 44 of the Complaint and therefore denies those allegations.

45. A survey of grocery shoppers found that whole grains and multigrain were the two product types experiencing the greatest growth in consumer demand.

ANSWER. BBUSA admits that the website cited by Plaintiff and published by the advocacy group The Whole Grains Council reports results of a 2009 survey. The website speaks for itself. BBUSA denies each and every remaining allegation in paragraph 45 of the Complaint.

46. Nutritionists advise adults to eat several servings of whole grain each day.

ANSWER. BBUSA admits that the Dietary Guidelines for Americans 2010 by the United States Department of Agriculture (“USDA”) recommend that adults eat several servings of whole grain each day. BBUSA lacks knowledge or information regarding the remaining allegations in paragraph 46 and therefore denies them as stated.

47. Since 2005, the Dietary Guidelines for Americans have advised consumers to “make at least half your grains whole.”

ANSWER. BBUSA admits that the USDA’s Dietary Guidelines for Americans in 2005 and 2010 advised consumers to consume at least half of all grains as whole grains.

48. By exploiting this confusion about, and demand for, whole grains, Defendant reaps increased profits by capitalizing on consumers’ desires to avoid white breads, while still essentially selling them (cheaper to produce) white breads.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 48 of the Complaint.

49. Bread industry experts note that the “key to reversing the tide of public opinion about bread is clear...The quicker we move to make the fresh bread category all about whole grains, the faster we will be able to address the negative press we are getting from the critics of bread...”¹³

ANSWER. BBUSA admits that the quoted language in paragraph 49 has been attributed to R. Michael Veal, vice-president of marketing, ConAgra Mills. BBUSA specifically denies each

and every remaining allegation in paragraph 49 of the Complaint to the extent they are not specifically admitted.

50. Following this advice, Bimbo deceptively touts its breads as whole wheat, when in fact that is an ingredient it does not provide at all or only in insignificant amounts. Thus, it is able to derive sales it otherwise would not obtain from D.C. consumers.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 50 of the Complaint.

51. Bimbo is motivated to pursue this deceptive scheme because whole grain breads require more ingredients that need to bind together than is the case with white bread—meaning a more complicated (and expensive) production process.

ANSWER. BBUSA admits that the news article cited by Plaintiff contains a statement by Brian J. Walker, technical service manager at Horizon, stating that in his view, whole grain breads require more ingredients that need to bind together. BBUSA specifically denies each and every remaining allegation in paragraph 51 of the Complaint to the extent they are not specifically admitted.

52. Following the release of the USDA's Dietary Guidelines for Americans, which recommended products that contain at least 51% of total weight as whole grains or those that provide at least 8 grams of whole grains per ounce-equivalent, supermarket aisles became flooded with products boasting the presence of whole grains, and restaurants and sandwich shops also began featuring whole grain products.

ANSWER. BBUSA admits that the USDA's Dietary Guidelines for Americans 2010 recommended products that contain at least 51% of total weight as whole grains or those that provide at least 8 grams of whole grains per ounce-equivalent. BBUSA lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 52 of the Complaint and therefore denies those allegations.

53. Defendant's website evidences its intention that consumers rely on these representations when making purchasing decisions.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 53 of the Complaint.

54. As a result of Defendant’s false, deceptive, and misleading advertising, consumers do not receive the benefit of their bargains when they purchase the breads referenced herein.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 54 of the Complaint.

ANSWERING CAUSE OF ACTION

D.C. Consumer Protection Act – D.C. Official Code §§ 28-3901, *et seq.*

55. Plaintiff incorporates by reference and realleges all previous paragraphs.

ANSWER. BBUSA realleges and incorporates by reference its answers to the allegations that are set forth above in numbered paragraphs 1 through 54 as if fully set forth herein.

56. This Count is brought pursuant to the District of Columbia Consumer Protection Procedures Act (“CPPA”), D.C. Code §28-3901 *et seq.* This Count is alleged against the Defendant on behalf of the General Public of the District of Columbia pursuant to District of Columbia Code § 28-3905(k)(1)(A)-(D).

ANSWER. The allegations asserted in numbered paragraph 56 of the Complaint consist of Plaintiff’s characterizations as to the nature of this action, to which no response is required. To the extent that a response may be deemed to be required, BBUSA denies that the count is alleged on behalf of the general public because Plaintiff has not brought suit as a class action as would be required to assert a representative action seeking monetary damages on behalf of the general public. *See Rotunda v. Marriott Intern., Inc.*, 123 A.3d 980 (D.C. 2015). BBUSA further denies that Plaintiff is entitled to the relief requested.

57. Defendant is a “person” within the meaning of D.C. Official Code § 28-3901(a)(1), and provide “goods” within the meaning of § 28-3901(a)(7).

ANSWER. The allegations in numbered paragraph 57 of the Complaint consist of legal arguments, to which no response is required. To the extent that a response may be deemed to be required, BBUSA admits the allegations in paragraph 57 of the Complaint.

58. Plaintiff is a “non-profit organization” within the meaning of § 28-3901(a)(14) and a “public interest organization” within the meaning of §28-3901(a)(15).

ANSWER. The allegations in numbered paragraph 58 of the Complaint consist of legal arguments, to which no response is required. To the extent that a response may be deemed to be required, BBUSA lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 58 and therefore denies those allegations.

59. D.C. Code § 28-3904 makes it an “unlawful trade practice ... whether or not any consumer is in fact misled, deceived or damaged thereby,” to, among other things:

- (a) Represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have;
- (b) Represent that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another;
- (e) Misrepresent as to a material fact which has a tendency to mislead;
- (f) Fail to state a material fact if such failure tends to mislead;
- (f-1) Use innuendo or ambiguity as to a material fact, which has a tendency to mislead; and
- (u) Represent that the subject of a transaction has been supplied in accordance with a previous representation when it has not.

ANSWER. The allegations asserted in numbered paragraph 59 of the Complaint consist of legal arguments to which no response is required. To the extent that a response may be deemed to be required, BBUSA states that the statute speaks for itself and denies any characterization that is inconsistent with the statute itself, including without limitation Plaintiff’s reliance on § 28-3904(b), while citing the language that corresponds with § 28-3904(d).

60. Defendant violated these provisions by, *inter alia*, intentionally representing that its Sara Lee Honey Wheat bread contains significant amounts of whole wheat when in fact there

is a minimal amount and by intentionally representing that its multigrain muffins contain significant amounts of whole grains when, in fact, they contain little if any whole grains.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 60 of the Complaint.

61. Defendant violated these provisions by the use of innuendo or ambiguity to create a false impression that its Thomas' Light Multi-Grain Hearty Muffins had an amount of whole grains similar to its "regular" Multi-Grain Hearty Muffins and that its Sara Lee Honey Wheat Classic and Honey Wheat breads were identical.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 61 of the Complaint.

62. Defendant knew or should have known that consumers would consider its largely refined Thomas' Light Multi-Grain Hearty Muffins and Sara Lee Classic Honey Wheat bread to contain substantial amounts of whole wheat and/or other whole grains.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 62 of the Complaint.

63. Defendant knew or should have known of the likelihood of confusion between its multigrain muffins that contains minimal whole grains and other muffins and breads on the market.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 63 of the Complaint.

64. Defendant knew or should have known of the likelihood of confusion between its Sara Lee Classic Honey Wheat, which has a minimal amount of whole wheat and its Honey Wheat bread, which is composed primarily of whole wheat.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 64 of the Complaint.

65. Although reliance is not required by the CPPA, District consumers have nevertheless reasonably relied on Defendant's misrepresentations when purchasing Defendant's breads.

ANSWER. BBUSA denies each and every allegation in numbered paragraph 65 of the Complaint.

RESPONSE TO RELIEF REQUESTED

BBUSA denies that Plaintiff is entitled to any relief whatsoever in this action, either as prayed for in its Complaint or otherwise.

RESPONSE TO JURY DEMAND

Plaintiff's demand for a jury requires no response.

GENERAL DENIAL

To the extent any further response is deemed necessary to the numbered paragraphs of the Complaint, Jury Demand, or Prayer for Relief, whether set forth on pages 15 through 16 of the Complaint or within the numbered paragraphs, BBUSA denies any allegations contained therein. BBUSA further denies any allegations contained in the Complaint not specifically admitted herein to be true.

BBUSA'S AFFIRMATIVE DEFENSES

BBUSA reserves the right to assert additional affirmative defenses based on information learned or obtained during discovery. For its affirmative defenses to Plaintiff's claims, BBUSA states and alleges the following:

FIRST DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Plaintiff's claim is preempted by federal law.

THIRD DEFENSE

Plaintiff's claim is barred by the doctrine of primary jurisdiction.

FOURTH DEFENSE

Plaintiff fails to satisfy any of the four statutory standing requirements under the D.C. Code § 28-3901(k)(1)(A)-(D).

FIFTH DEFENSE

Plaintiff is not entitled to monetary damages on behalf of the general public. *See* D.C. Code § 3905(k)(2)(A). Further, Plaintiff's demand for monetary damages on behalf of the general public does not comport with Rule 23 of the D.C. Superior Court Civil Rules. *See Rotunda v. Marriott Intern., Inc.*, 123 A.3d 980 (D.C. 2015).

REQUEST FOR RELIEF

WHEREFORE, having fully answered, BBUSA respectfully requests the following relief:

- A. The entry of judgment as to all claims raised in the Complaint in favor of BBUSA, and against Plaintiff, with prejudice.
- B. An award to BBUSA of its costs and litigation expenses, including attorneys' fees.
- C. Such other relief as this Court deems just and appropriate.

Dated: January 8, 2016

Respectfully submitted,

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Counsel for Defendant Bimbo Bakeries USA, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of January 2016, a copy of the foregoing Answer of Bimbo Bakeries USA, Inc. to First Amended Complaint was served by CaseFileExpress upon all counsel of record in this proceeding.

/s/ Steven P. Hollman
Steven P. Hollman