

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

NATIONAL CONSUMERS LEAGUE)	
1701 K Street, N.W., #1200,)	
Washington, DC 20006)	COMPLAINT
)	
Plaintiff,)	
v.)	Civil Action No. _____
)	
McCORMICK & COMPANY, INC.,)	
18 Loveton Circle)	
P.O. Box 6000)	
Sparks, MD 21152)	
)	
and)	
)	
GIANT OF MARYLAND LLC)	
6300 Sheriff Road)	
Landover, MD 20785)	
)	
Defendants.)	

Plaintiff, National Consumers League (“NCL”), by its undersigned attorneys, brings this action on behalf of the general public of the District of Columbia (“General Public”) against McCormick & Company, Inc. (“McCormick”) and Giant of Maryland LLC (“Giant”) (collectively “Defendants”), and alleges the following:

INTRODUCTION

1. This action is brought by Plaintiff on behalf of the General Public pursuant to District of Columbia Code §28-3905(k)(1). Plaintiff NCL is a non-profit 501(c)(3) public interest, membership organization with members located in the District of Columbia.

2. McCormick has misled, and continues to mislead, consumers and the General Public with regard to the true amount of pure ground black pepper (“Ground Pepper”) and

black peppercorn (“Peppercorn”) that it markets, distributes and sells to Plaintiff and the General Public.

3. McCormick has long marketed, distributed and sold Ground Pepper in the same size tins, to which consumers have become familiar and accustomed. Similarly, McCormick has marketed, distributed and sold Peppercorn in grinders of a certain size and shape.

4. However, recent increases in black pepper prices have forced McCormick to experience increased purchase costs.

5. McCormick needed a way to recoup those increased costs without *blatant* price increases that would risk a reduction in McCormick’s market share, especially in an increasingly competitive environment.

6. McCormick thus disguised its price increases by: (1) using the same opaque tins and functionally opaque grinders as it had traditionally used for Ground Pepper and Peppercorn, respectively; (2) “slack-filling” the tins and grinders to reduce the amount of Ground Pepper by 25% and the amount of Peppercorn by 20%; and (3) recommending the same unit pricing for the slack-filled tins and grinders as had been traditionally used for the tins and grinders that were previously not slack-filled.

7. In short, McCormick sold less product in the same containers and for the same unit price in a manner intended to, and with the tendency to, deceive consumers and the General Public.

8. By maintaining rather than decreasing the tin and grinder sizes, McCormick perpetrates the illusion that it is providing the same amount of Ground Pepper and Peppercorn for the same price that it has traditionally charged consumers.

9. Not surprisingly, McCormick's retailers continue to shelve the slack-filled tins and grinders from McCormick side-by-side with competitor tins and grinders of the same size that are *not* slack-filled, and therefore contain more Ground Pepper and Peppercorn.

10. Giant is one of the retailers engaging in these side-by-side shelving practices. Giant, like McCormick, also uses traditional-sized tins with slack-filled Ground Pepper content.

11. The confusion cultivated by McCormick's conduct is further demonstrated by Giant's own shelving inaccuracies: As detailed below, Giant displays the *price* for the amount of product (e.g. 2 ounce) traditionally sold in tins of McCormick Ground Pepper even though Giant is actually selling consumers a smaller amount of product (e.g. 1.5 ounce) in traditionally-sized slack-filled tins. As a result, consumers pay the 2-ounce price and receive the 1.5-ounce product.

12. The General Public has been, and continues to be, harmed by Defendants' conduct.

JURISDICTION AND VENUE

13. Jurisdiction of this Court is founded on D.C. Code § 11-921. This Complaint arises under the District of Columbia Consumer Protection Procedures Act, D.C. Code § 28-3901 *et seq.* and the Court, therefore, has subject matter jurisdiction thereunder.

14. Venue is proper in the District of Columbia. The claims asserted in this complaint arise, in part, within the District of Columbia. Plaintiff resides in Washington, D.C. and seeks to represent residents of the District of Columbia who have purchased Ground Pepper or Peppercorn from Defendants. These transactions occurred in retail stores located in Washington, D.C. Defendants transact business and have caused injury in Washington, D.C.

15. As a result of the facts alleged in this Complaint, this Court has personal jurisdiction over Defendants. Defendants market, distribute, and sell the Ground Pepper and Peppercorn to consumers in the District of Columbia. Defendants have transacted business in the District of Columbia; caused tortious injury in the District of Columbia via acts or omissions occurring therein; and derived substantial revenue from products sold in the District of Columbia.

PARTIES

16. Plaintiff NCL is a non-profit 501(c)(3) public interest, membership organization located in the District of Columbia at 1701 K Street, #1200, NW, Washington, District of Columbia 20006.

17. Defendant McCormick is a corporation organized and existing under the laws of the State of Maryland. McCormick manufactures, markets, and distributes spices, seasoning mixes, condiments, and other flavorful products to the entire food industry – retail outlets, food manufacturers, and food service businesses. At all times material to this complaint, McCormick has labeled, advertised, distributed and/or sold Ground Pepper and Peppercorn to consumers in the District of Columbia.

18. Defendant Giant is a corporation organized and existing under the laws of the State of Maryland. It is part of the Dutch supermarket operator, Koninklijke Ahold NV, through that company's domestic subsidiary, Ahold USA. Giant operates grocery stores in the District of Columbia and sells Ground Pepper and Peppercorn from McCormick and under Giant's own brand label.

THE INTERESTS OF NCL & THE GENERAL PUBLIC

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

20. NCL is a non-profit 501(c)(3) public interest, membership organization, with consumer members residing in the District of Columbia, and has worked diligently to promote the public interest. NCL encourages and promotes accurate labeling and marketing of consumer goods through advocacy to state and federal agencies, through educational outreach to the general public, and through litigation.

21. In 2013, NCL exposed the adulteration and doctoring of foods, including spices, on the Diane Sawyer show on ABC Evening News.

22. NCL focuses its advocacy, in part, on consumer protection, including efforts to promote accurate labeling and advertising of food products.

23. Upon information and belief, Defendants have caused harm and adverse effects to the General Public of the District of Columbia.

FACTUAL BACKGROUND

24. For more than 125 years, McCormick has sold its branded McCormick spices and seasonings to consumers. McCormick is the dominant player in the global spices and seasonings category, with a 22% market share.

25. McCormick operates in two business segments, consumer and industrial. McCormick's consumer business segment has the higher profit margin, contributing about 60% of sales and 80% of operating income.

26. McCormick's consumer business sells product brands to consumers in 135 countries and territories.

27. McCormick's customers include various retail outlets that include grocery, mass merchandise, warehouse clubs, discount, and drug stores.

28. In addition to marketing its own branded products, McCormick is a leading supplier of private label (i.e. store brand) items.

29. Approximately half of McCormick's consumer business is spices, herbs and seasonings. For such products, McCormick is the category leader in its primary markets. Indeed, many of McCormick's competitors in these markets have less than 3% share of sales.

30. One of McCormick's most identifiable and important products is Ground Pepper contained in McCormick's traditional tins, which are instantly recognizable to millions of consumers in the United States.

31. McCormick has been the market leader in sales of Ground Pepper packaged in tins in the United States for many years.

32. McCormick sells its Ground Pepper tins through a variety of distribution channels and sales outlets in the District of Columbia, including through supermarkets (e.g., Safeway and Giant), mass merchandisers (e.g., Walmart and Target), grocery stores, convenience stores, club stores, supercenters, and drug stores.

33. McCormick's sales of Ground Pepper tins (both the McCormick brand as well as McCormick sales using retailer private labels) are estimated to be approximately 70% or more of total domestic black pepper tin sales.

34. McCormick has traditionally marketed and sold Ground Pepper to consumers in small, medium and large tins. The small tins contained 2 ounces of Ground Pepper; the medium tins contained 4 ounces of Ground Pepper; and the large tins contained 8 ounces of

Ground Pepper. These tins have stayed the same respective size for decades, and each tin is opaque, making the contents not visible to consumers.

35. McCormick's small, medium, and large tins became the industry standard, especially because competing makers of Ground Pepper eventually marketed their product in tins of the same basic size, with the same corresponding amount of Ground Pepper.

36. As a result of decades of marketing and sales of these standardized Ground Pepper tins, consumers associate each size of tin with a corresponding amount of Ground Pepper. Consumers would not expect any size tin, (all of which are opaque), to suddenly contain a decreased volume of Ground Pepper.

37. Recently, however, McCormick has seen a dual threat to its dominance in the spices and seasonings segment: a drastic increase in raw material prices for black pepper, and a growing threat from private label brands of large retailers such as Wal-Mart as well as smaller retailers with loyal customer bases, such as Trader Joe's.

38. In the face of these threats, McCormick chose to raise its Ground Pepper and Peppercorn prices to avoid decreased profits. However, McCormick knew that conspicuous increases in consumer pricing would risk the loss of market share, especially in the context of growing and aggressive competition.

39. For example, in 2013, McCormick faced increased competition from spices and seasonings competitors. In response to a drop in sales, McCormick instituted a price increase in late 2013.

40. In 2014, not wanting to do another overt price increase, McCormick approached retailers with undisclosed "pricing recommendations" for spices and seasonings.

41. In fact, when asked, McCormick CEO Alan Wilson said that he “couldn’t pinpoint any specifics on the process changes.”

42. By not disclosing the nature of the “pricing recommendations,” analysts recommended that consumers watch the *pricing* on the shelves.

43. Most recently, McCormick has decided to implement a misleading and improper business strategy: surreptitiously increasing Ground Pepper and Peppercorn prices by decreasing the amount of product supplied to consumers in each Ground Pepper tin and Peppercorn grinder.

44. Specifically, in January and February 2015, McCormick began shipping tens of millions of Ground Pepper tins containing approximately 25% *less* Ground Pepper than such traditional-sized tins had historically contained.

45. Similarly, in 2015, McCormick began shipping Peppercorn grinders containing approximately 20% *less* Peppercorn than McCormick’s traditional-sized grinders had historically contained.

46. McCormick deceptively continued selling its Ground Pepper and Peppercorn in their traditional-sized containers – which are now significantly slack-filled – rather than shrinking the size of the containers to a new size that reflects the reduced fill.

47. McCormick’s deceptive maintenance of the old packaging contrasts with other recent corporate decisions; for example, McCormick recently employed entirely new packaging in the relaunch of its gourmet product line.

48. The practice of underfilling is called slack-filling. Regulations under the Federal Food, Drug, and Cosmetic Act prohibit nonfunctional slack-filling practices like those practiced by McCormick. *See* 21 C.F.R. § 100.100.

49. A comparison of the traditional tins with the slack fill tins reveals McCormick's scheme to deliver 25% less Ground Pepper. The small tin traditionally contained 2 ounces of Ground Pepper, and now contains 1.5 ounces. The medium tin traditionally contained 4 ounces of Ground Pepper, and now contains 3 ounces. The large tin traditionally contained 8 ounces of Ground Pepper, and now contains 6 ounces.

50. One of McCormick's competitors, Watkins Inc., recently provided the below pictures in a federal lawsuit; these pictures demonstrate the sizing confusion:





51. By slack-filling traditional-sized tins that have been recognized in the consumer marketplace for decades, McCormick deceptively misleads consumers into thinking that they are purchasing the same quantities of Ground Pepper as they had historically purchased.

52. While the tins list the net weight of the product in tiny white print on the bottom of the tins, consumers are not otherwise informed of the material change in the quantity of Ground Pepper, or that the tins are substantially slack-filled in violation of FDA regulations.

53. Moreover, many consumers cannot see the net weight without removing the tin from the shelf because the tins are often shelved in such a manner as to block the lower portion of the product.

54. For example, the shelving design at a Safeway store in the Georgetown neighborhood of Washington, DC, blocks any disclosure of the net weight before a purchase decision is even made:



55. The above picture further demonstrates the consumer confusion resulting from McCormick's conduct: the McCormick tin containing 1.5 ounces of Ground Pepper is the same size as the Safeway brand "Signature Kitchens" tin, which contains 2 ounces of Ground Pepper.

56. Safeway shoppers are thus led to believe that they can buy the same amount of Ground Pepper in the McCormick brand than in the Safeway brand, when in fact they are getting *less* Ground Pepper.

57. The same holds true for Giant shoppers in the Tenleytown neighborhood in Washington, DC, where consumers are led to believe that for a mere 15 cents more, they could purchase the McCormick brand version of the medium tins when, unbeknownst to those consumers, they are getting less product in the established McCormick brand tin than in the traditionally less expensive store-brand tin:



58. At the Giant in the Friendship Heights neighborhood of Washington, DC, the medium size tins from McCormick and Giant are the same size, but provide different amounts of Ground Pepper:



59. McCormick relies upon consumers' familiarity with the tin sizes and appearance, engrained through decades of marketing, to mislead consumers into thinking that they are receiving the historic quantities of Ground Pepper at the same price point when, in reality,

60. McCormick is slack-filling those tins in violation of FDA regulations with approximately 25% less Ground Pepper.

61. By misleading consumers in this manner, McCormick is able to offset the high cost of the commodity and growing competitive pressure while preserving its margins and market share.

62. As a consequence of McCormick's conduct, consumers are being misled into believing that they are buying a larger volume of Ground Pepper than is actually contained in the McCormick tins.

63. Giant, in turn, is capitalizing and contributing to the confusion by pricing the slack-filled Ground Pepper as if the product was being offered for sale at the traditional weight.

64. For example, the Tenleytown location of Giant sells 1.5 ounces of Ground Pepper (whether under the McCormick label or Giant's own brand), but charges for 2 ounces of Ground Pepper.



65. NCL experienced this deceptive sales practice on June 22, 2015 when it purchased a tin of McCormick's 1.5 oz tin which was marked and priced at 2 oz.

66. Specifically, although the unit pricing label on the shelf of the Tenleytown Giant lists Ground Pepper as costing \$19.12 per pound, NCL was actually charged, and paid, \$25.49 per pound.

67. The same mispricing at the point of sale exists at the Friendship Heights location of Giant; namely, Giant is selling 1.5 ounces of Ground Pepper while marking the shelves for 2 ounce pricing:



68. As the pictures demonstrate, Giant is also using the traditional sized tins to provide less Ground Pepper in competing against other brands.

69. In addition to its deceptive conduct as to the sale of Ground Pepper, McCormick also surreptitiously increased the price of its Peppercorns sold in the peppermill container, often labeled a “grinder.”

70. At the Tenleytown location of Safeway, the McCormick grinder containing 1 ounce of Peppercorn is shelved alongside with the competitor’s grinders containing 1.24 ounces

of Peppercorn. McCormick's slack-filling is misleading to consumers, who would have the tendency to believe that the McCormick grinder is 30 cents less expensive than the Morton grinder containing the same amount of product:



71. As demonstrated by the pictures, even though the grinders appear to be made of clear glass or plastic, the packaging and wrapping at the throat and opening of the grinder is opaque, rendering it impossible to visually compare the contents of the grinders.

72. Like the Ground Pepper tins, the Peppercorn grinders cause consumers to be unaware of McCormick's surreptitious slack-fill.

73. On information and belief, McCormick has maintained the price of its standardized tins and grinders notwithstanding the significant reduction in the amount of Ground Pepper and Peppercorn contained in the traditional sized containers.

74. McCormick's and Giant's practice of slack-filling its Ground Pepper tins, and McCormick's practice of slack-filling its Peppercorn grinders in violation of District of

Columbia law and of FDA regulations, are capable of deceiving (and deceive) reasonable consumers into purchasing the same amount for a same-sized container, even though consumers unknowingly receive substantially less Ground Pepper and Peppercorn.

75. As a result of Defendants' misleading and deceptive use of traditional sized, non-transparent containers with unlawful slack-fill, Plaintiff and the General Public have been deceived into paying higher prices and purchasing smaller quantities of Ground Pepper and Peppercorn (approximately 25% less Ground Pepper and 20% less Peppercorn) than they had previously received in these identically sized containers.

76. Plaintiff and the General Public have been harmed as a result of Defendants' conduct.

COUNT I
(Violation of the District of Columbia Consumer Protection Procedures Act)
Against All Defendants

77. This Count is brought pursuant to the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901 *et seq.*

78. This Count is alleged against Defendants on behalf of the General Public of the District of Columbia pursuant to District of Columbia Code § 28-3905(k)(1)(A), (C) and (D).

79. 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;
- (e) misrepresent as to a material fact which has a tendency to mislead;

- (f-1) use innuendo or ambiguity as to a material fact, which has a tendency to mislead;
- (h) advertise or offer goods or services without the intent to sell them as advertised or offered;
- (x) sell consumer goods in a condition or manner not consistent with ... operation or requirement of federal law;

80. In marketing Ground Pepper and Peppercorn, Defendants violated the above provisions of the CPPA by, *inter alia*:

- (i) as to § 28-3904(a), misrepresenting the quantities of the Ground Pepper and Peppercorn through misleading or inaccurate container sizes and shelf pricing;
- (ii) as to § 28-3904(e), misrepresenting a material fact: the net weight of the Ground Pepper and Peppercorn through the misleading use of traditional sized, slack-filled containers and misleading or inaccurate shelf pricing;
- (iii) as to § 28-3904(f-1), fostering the impression, through the misleading use of traditional sized, slack-filled containers and misleading or inaccurate shelf pricing, that consumers were comparing “apples to apples” when shopping amongst the various brands of Ground Pepper or Peppercorns;
- (iv) as to § 28-3904(h), advertising traditional sized containers with traditional amounts of Ground Pepper and Peppercorns with no intent to provide traditional quantities of each, and not supplying traditional quantities of each; and
- (v) as to § 28-3904(x), selling Ground Pepper and Peppercorn in a manner not consistent with federal law, as found in 21 C.F.R. § 100.100.

81. Plaintiff, on behalf of itself, its members, and the General Public of the District of Columbia, hereby seeks restitution, equitable and injunctive relief, and treble damages or statutory damages in the amount of \$1,500 per violation, whichever is greater, pursuant to D.C. Code § 28-3905(k)(2).

82. Plaintiff, on behalf of itself, its members, and the General Public, of the District of Columbia further seeks reasonable attorneys' fees and costs plus interest.

COUNT II
(Violation of the District of Columbia Consumer Protection Procedures Act)
Against Defendant Giant Only

83. This Count is brought pursuant to the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901 *et seq.*

84. This Count is alleged against Defendant on behalf of the General Public pursuant to District of Columbia Code § 28-3905(k)(1)(A), (C) and (D).

85. Giant violated the Unit Pricing Requirement Act of 2012, D.C. Code §28-5201, *et seq.* (the "Unit Pricing Act").

86. The CPPA recognizes as a predicate act, the violation of any other District of Columbia law.

87. Defendant Giant violated the Unit Pricing Act, when it provided the wrong unit price for the Ground Pepper sold to NCL, consumers and the General Public.

88. Plaintiff, on behalf of itself, its members, and the General Public of the District of Columbia, hereby seeks restitution, equitable and injunctive relief, and treble damages or statutory damages in the amount of \$1,500 per violation, whichever is greater, pursuant to D.C. Code § 28-3905(k)(2).

89. Plaintiff, on behalf of itself, its members, and the General Public, of the District of Columbia further seeks reasonable attorneys' fees and costs plus interest.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants, and in favor of Plaintiff and the General Public, and a grant of the following relief:

- a) declaring that Defendants' conduct is in violation of the D.C. Consumer Protection Procedures Act;
- b) declaring that Defendant Giant's conduct is in violation of the United Pricing Requirement Act of 2012;
- c) enjoining Defendants' conduct found to be in violation of the D.C. Consumer Protection Procedures Act and the United Pricing Requirement Act of 2012;
- d) granting Plaintiff and the General Public of the District of Columbia treble damages or statutory damages in the amount of \$1,500 per violation, whichever is greater;
- e) granting Plaintiff its costs of prosecuting this action, including attorneys' fees, experts' fees and costs together with interest; and
- f) granting such other relief as this Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury on all issues so triable.

DATED: July 21, 2015

/s/ Tracy D. Rezvani

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