

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

IN RE: MCCORMICK & COMPANY, INC.,
PEPPER PRODUCTS MARKETING AND
SALES PRACTICES LITIGATION

MDL No. 2665
Master Docket No. 1:15-mc-1825-ESH

This Document Relates to All Class Actions

JURY TRIAL DEMANDED

SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

**[FILED UNDER SEAL – CONTAINS INFORMATION DESIGNATED AS
CONFIDENTIAL UNDER THE PROTECTIVE ORDER]**

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. THE PARTIES.....	4
III. JURISDICTION AND VENUE	8
IV. FACTUAL BACKGROUND.....	9
A. The Rising Price of Black Pepper Put Pressure on McCormick’s Promise to Its Shareholders to Cut Costs.....	9
B. McCormick Responds to the Rising Price of Black Pepper by Reducing the Amount of Pepper in the Tins and Grinders Sold to Consumers While Maintaining Prices.	10
1. McCormick’s Non-Transparent Tins Hide the Nonfunctional Slack-Fill.....	10
2. McCormick’s Black Peppercorn Grinders Hide the Nonfunctional Slack-Fill.....	13
C. McCormick and Nineteen Private Label Competitors Agreed to Sell Pepper Containers with Nonfunctional Slack-Fill to Maintain and Fix Wholesale, and Thus Retail, Prices and Eliminate Retail Price Competition.	15
V. RELEVANT MARKET.....	25
VI. CLASS ACTION ALLEGATIONS	29
VII. CAUSES OF ACTION	32
COUNT I CLAIM FOR VIOLATIONS OF 15 U.S.C. § 1 ON BEHALF OF NATIONWIDE CLASS	32
COUNT II VIOLATIONS OF STATE CONSUMER PROTECTION ACTS ON BEHALF OF CONSUMER PROTECTION SUBCLASS	34
COUNT III UNJUST ENRICHMENT ON BEHALF OF NATIONWIDE CLASS	38
VIII. PRAYER FOR RELIEF	38
DEMAND FOR JURY TRIAL	40

Plaintiffs Julia Vladimirskiy, Alexander Liberov, Hubert L. Gerstnecker, Cynthia Fernandez, Scott Allan Bittle, Debbie Esparza, Carmen Pellitteri, Brenda Theis, Holly Marsh, Sandra Robinson, Paula Cole Jones, and Catherine Grindel, on behalf of themselves and all others similarly situated, allege those facts as to their own purchases based upon personal knowledge and all other facts based upon the investigation of counsel:

I. INTRODUCTION

1. The clear market leader in the sale of spices (including black pepper) in the United States, McCormick and Company, Incorporated's ("McCormick") logo is immediately recognizable and relied upon by American consumers:



2. Until 2015, McCormick seemingly took its promise to be an American company with "integrity and ethical values" to heart. For decades, McCormick leveraged its iconic brand to market and sell its McCormick® Pure Ground Black Pepper in non-transparent, red and white tins and its McCormick® Black Peppercorn Grinders covered by non-transparent labels.

3. McCormick also took steps to ensure that its dominant market share of the spice market was not undercut by retailers' private label brands by establishing itself as the leading provider of private label spices and herbs. In fact, Wal-Mart Stores, Inc. ("Walmart") is one of McCormick's largest customers, including for Walmart's store brand, Great Value, spices.

4. In January 2014, McCormick faced a plethora of business difficulties: rising raw material costs, promises to shareholders about cost-savings that would improve its bottom line, an increasing price gap between McCormick Brand pepper and private label brands against which it competed, and declining market share. Further, because McCormick had increased wholesale prices five times in preceding years, additional wholesale increases were not an acceptable solution for fear that sales of private label brands would outpace McCormick-branded pepper.

5. For this reason, in early 2014, McCormick began to investigate a scheme to under fill, or “slack fill,” its black pepper products. The scheme was approved in July 2014, and upon its implementation by March 2015, McCormick reduced the amount of black pepper in its iconic red and white spice tins (among other containers) by 25 percent – while leaving the size of and price for the tins exactly the same. McCormick likewise reduced the fill in its black peppercorn grinders by 19 percent, while maintaining the size and price of the peppercorn grinders. Reducing the pepper in non-transparent containers while leaving the size of the containers the same constitutes “nonfunctional slack-fill” pursuant to 21 C.F.R. § 100.100 and is thus “misbranded” and “misleading.”

6. McCormick did not slack fill its products unilaterally. To protect its profit margins, as well as its interests in reducing competition between its branded black pepper products and private-label black pepper products at retail, McCormick invited 19 private label competitors to agree to slack fill their products in lieu of a wholesale price increase, in order to fix or maintain the retail price of the products. Among those 19 retailers were household names like Walmart and Publix Super Markets, Inc. (“Publix”). Like McCormick, these 19 retail competitors agreed to reduce fill in lieu of a wholesale price increase. They did so pursuant to

their agreement to maintain a retail price point and to avoid competition at retail comparing the price per ounce between a full product and a reduced fill product that would create downward pressure on retail prices and profits.

7. In reducing the amount of pepper in McCormick and private-label tins by 25 percent and in the grinders by 19 percent, Defendants did not plainly or adequately disclose the material fact that they reduced the amount of pepper contained therein. Rather, McCormick and the nineteen retail competitors continued to market the tins and grinders as if full, and consumers reasonably expected that the tins and grinders were full. Indeed, in many instances, retailers failed to update the net weights on the shelf tags and still displayed the incorrect, traditional net weights providing incorrect unit prices. By implementing a scheme to short-change customers, McCormick and the retailers were able to effectuate a de facto price increase while maintaining wholesale and thus retail prices, and preserving or increasing revenues without disclosing to consumers the corresponding deceptive fill tactics.

8. Moreover, through McCormick's and the nineteen Retailers' express agreements to slack fill the competing private label tins while McCormick and the Retailers maintained the prices at which the tins were sold, McCormick and the retailers entered into an agreement, understanding, and conspiracy in restraint of trade to artificially fix, raise, maintain, and stabilize wholesale, and thus retail, prices for black pepper in the United States and in the various States.

9. As a result of Defendants' actions, Plaintiffs and the Class were deceived when they paid for full tins of ground black pepper that in fact contained just 75% pepper and 25% air, or paid for full bottles of black peppercorns that in fact contained just 81% peppercorns and 19% air, and thus were overcharged, did not receive the benefit of the bargain and/or suffered out-of-pocket loss. Moreover, Defendants were unjustly enriched at the expense of Plaintiffs and the

Class. Plaintiffs thus bring claims for violation of Section 1 of the Sherman Act, state consumer protection statutes, and unjust enrichment.

II. THE PARTIES

10. Plaintiff Julia Vladimirskiy is, and at all relevant times was, a citizen of the State of Illinois and resident of Chicago, Illinois. Plaintiff purchased, for personal use, a small-sized tin of McCormick black pepper from the Jewel store in Evanston, Illinois during 2015. Plaintiff reasonably expected that the tin was full of black pepper, did not know that in fact the tin contained just 75% of the pepper that the tin was designed to hold, and was actually deceived. As a result of Defendants' actions, Plaintiff was overcharged, did not receive the benefit of the bargain and/or suffered out-of-pocket loss.

11. Alexander Liberov is, and at all relevant times was, a citizen of Illinois and resident of Chicago, Illinois. He purchased, for personal use, a medium-sized tin of black pepper sold under the private-label brand Great Value from a Wal-Mart store in Wheeling, Illinois in early 2016. He reasonably expected that the tin was full of black pepper, did not know that in fact the tin contained just 75% of the pepper that the tin was designed to hold, and was actually deceived. As a result of Defendants' actions, he was overcharged, did not receive the benefit of the bargain and/or suffered out-of-pocket loss.

12. Plaintiff, Hubert L. Gerstnecker, is, and at all times relevant was, a citizen of Pennsylvania and a resident of Freedom, Pennsylvania. In the Spring of 2015, Plaintiff purchased, for personal use, a medium-sized tin of McCormick ground black pepper, believing it still contained the full 4 ounces it contained in the past. Plaintiff reasonably expected that the tin was full of black pepper, did not know that in fact the tin contained just 75% of the pepper that the tin was designed to hold, and was actually deceived. As a result of Defendants' actions,

Plaintiff was overcharged, did not receive the benefit of the bargain and/or suffered out-of-pocket loss.

13. Plaintiff Cynthia Fernandez is, and at all relevant times was, a citizen of Connecticut, and resident of Hamden, Connecticut. In 2015, Plaintiff purchased, for personal use, a small-sized tin of McCormick pure ground black pepper from a Stop & Shop Supermarket Company store in Hamden, Connecticut. Plaintiff reasonably expected that the tin was full of black pepper, did not know that in fact the tin contained just 75% of the pepper that it was designed to hold, and was actually deceived. As a result of Defendants' actions and conduct, Plaintiff was overcharged, did not receive the benefit of the bargain, and suffered out-of-pocket loss.

14. Plaintiff Scott Allan Bittle is, and at all relevant times was, a citizen of Illinois, and a resident of Freeburg, Illinois. In the Summer of 2015, Plaintiff purchased, for personal use, a small-sized tin of McCormick ground black pepper, believing it still contained the full 2 ounces it contained in the past. Plaintiff reasonably expected that the tin was full of black pepper, did not know that in fact the tin contained just 75% of the pepper that the tin was designed to hold, and was actually deceived. As a result of Defendants' actions, Plaintiff was overcharged, did not receive the benefit of the bargain and/or suffered out-of-pocket loss.

15. Plaintiff Debbie Esparza is, and at all relevant times was, a citizen of California, and a resident of the County of Los Angeles. Between January and July 2015, Plaintiff Esparza purchased, for personal use, small, medium, and large-sized tins of McCormick® Pure Ground Black Pepper, believing they were substantially filled to capacity. Plaintiff reasonably expected that the tins were full of black pepper, did not know that in fact the tins contained just 75% of the pepper that the tin was designed to hold, and was actually deceived. As a result of Defendants'

actions, Plaintiff was overcharged, did not receive the benefit of the bargain and/or suffered out-of-pocket loss.

16. Plaintiff Carmen Pellitteri is, and at all relevant times was, a citizen of Florida and resides in Lantana, Florida. In or around February 2015, Plaintiff Carmen Pellitteri purchased, for personal use, a small-sized tin of McCormick® Pure Ground Black Pepper believing it was substantially filled to capacity. Plaintiff reasonably expected that the tin was full of black pepper, did not know that in fact the tin contained just 75% of the pepper that the tin was designed to hold, and was actually deceived. As a result of Defendants' actions, Plaintiff was overcharged, did not receive the benefit of the bargain and/or suffered out-of-pocket loss.

17. Plaintiff Brenda Theis is, and at all times relevant was, a citizen of Illinois, and a resident of St. Clair County, Illinois. In 2015, Plaintiff purchased, for personal use, medium-sized tins of McCormick ground black pepper, believing they still contained the full 4 ounces they contained in the past. Plaintiff reasonably expected that the tins were full of black pepper, did not know that in fact the tins contained just 75% of the pepper that the tins were designed to hold, and was actually deceived. As a result of Defendants' actions, Plaintiff was overcharged, did not receive the benefit of the bargain and/or suffered out-of-pocket loss.

18. Plaintiff Holly Marsh is, and at all times relevant was, a citizen of the State of California, and a resident of Folsom, California. In 2015 Plaintiff purchased, for personal use, a medium-sized tin of McCormick ground black pepper, believing it still contained the full 4 ounces it contained in the past. Plaintiff reasonably expected that the tin was full of black pepper, did not know that in fact the tin contained just 75% of the pepper that the tin was designed to hold, and was actually deceived. As a result of Defendants' actions, Plaintiff was overcharged, did not receive the benefit of the bargain and/or suffered out-of-pocket loss.

19. Plaintiff Catherine Grindel is, and at all times relevant was, a citizen of Missouri, and a resident of St. Louis, Missouri. In 2015 Plaintiff purchased, for personal use, a medium-sized tin of McCormick ground black pepper. Plaintiff reasonably expected that the tin was full of black pepper, did not know that in fact the tin contained just 75% of the pepper that the tin was designed to hold, and was actually deceived. As a result of Defendants' actions, Plaintiff was overcharged, did not receive the benefit of the bargain and/or suffered out-of-pocket loss.

20. Plaintiff Sandra Robinson is, and at all times relevant was, a citizen of Maryland, and a resident of Silver Spring, Maryland. In 2015 Plaintiff purchased several medium-sized tins of McCormick ground black pepper. Plaintiff reasonably expected that the tin was full of black pepper, did not know that in fact the tin contained just 75% of the pepper that the tin was designed to hold, and was actually deceived. As a result of Defendants' actions, Plaintiff was overcharged, did not receive the benefit of the bargain and/or suffered out-of-pocket loss.

21. Plaintiff Paula Cole Jones is, and at all times relevant was, a citizen and resident of the District of Columbia. In 2015 Plaintiff purchased a small tin of McCormick ground black pepper. Plaintiff reasonably expected that the tin was full of black pepper, did not know that in fact the tin contained just 75% of the pepper that the tin was designed to hold, and was actually deceived. As a result of Defendants' actions, Plaintiff was overcharged, did not receive the benefit of the bargain and/or suffered out-of-pocket loss.

22. Defendant McCormick is a Maryland corporation with its principal place of business in Sparks, Maryland.

23. Defendant Walmart is a Delaware corporation with its principal place of business in Bentonville, Arkansas.

24. Defendants John Does 1-100 include various persons that are not expressly named as defendants but that have participated in the violations alleged herein and have performed acts and made statements in furtherance thereof. Plaintiffs reserve the right to name some or all of these persons as defendants at a later date. There are a finite number of co-conspirators and Plaintiffs believe that their identities can be ascertained through Defendants' own records.

III. JURISDICTION AND VENUE

25. Plaintiffs bring this action to obtain injunctive relief and to recover damages, including treble damages, costs of suit, and reasonable attorneys' fees arising from Defendants' violations of Section 1 of the Sherman Act (15 U.S.C. § 1). This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337(a) and 1367.

26. Alternatively, this Court has jurisdiction over the subject matter presented by this Class Action Complaint because it is a class action arising under 28 U.S.C. § 1332(d), which, under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005), explicitly provides for the original jurisdiction of the Federal Courts of any class action in which any member of the plaintiff class is a citizen of a state different from any defendant, and where the amount in controversy exceeds the aggregate sum of \$5,000,000, exclusive of interest and costs. Plaintiffs allege that the total claims of the individual members of the Plaintiff Class in this action are in excess of \$5,000,000 in the aggregate, exclusive of interest and costs, as required by 28 U.S.C. § 1332(d)(2).

27. Venue is proper in this judicial district pursuant to 15 U.S.C. §§ 15 and 22, and 28 U.S.C. § 1391, because Defendants do business throughout this District, a Plaintiff and class members purchased McCormick and Walmart black pepper products in this District, and a Plaintiff resides in this District. Additionally, venue is proper here because the parties are subject to the Judicial Panel on Multidistrict Litigation order transferring this litigation here.

IV. FACTUAL BACKGROUND

A. The Rising Price of Black Pepper Put Pressure on McCormick's Promise to Its Shareholders to Cut Costs.

28. McCormick does not grow its own pepper. Instead, the company purchases black pepper imported from India, Brazil, Indonesia, Malaysia, Sri Lanka, Vietnam and certain other locations in the world. The United States is the largest importer of pepper spice.

29. Since 2010 the cost of raw black pepper has increased by approximately 500% as a result of various factors, including increased consumption in Southeast and East Asia, as well as production problems in traditional export regions like Vietnam. Although the cost of raw black pepper had been increasing for years, beginning in the summer of 2014 the worldwide price of black pepper began to experience a particularly steep increase.

30. The increase in prices clashed with McCormick's promise to its shareholders that it would continuously work on cost savings through its long-running Comprehensive Continuous Improvement program. In fact, McCormick had promised \$85 million or more in cost savings for its 2015 fiscal year.

31. McCormick had limited options to offset this continued and increasing rise in the cost of black pepper. In a January 2015 earnings call, Alan Wilson—McCormick's Chairman, President, and CEO—stated that with respect to pepper, the company was “getting to a price point where it's pretty stretched” and, unable to increase prices due to the competitive landscape, the company would need to find ways to cut costs.

32. In 2015, unable to meet its cost savings targets without a substantial reduction in other costs or increase in prices, McCormick began shipping millions of pepper tins and grinders to retail stores containing 25% and 19% less black pepper, respectively, than the containers were designed to hold.

B. McCormick Responds to the Rising Price of Black Pepper by Reducing the Amount of Pepper in the Tins and Grinders Sold to Consumers While Maintaining Prices.

1. McCormick’s Non-Transparent Tins Hide the Nonfunctional Slack-Fill

33. For decades, McCormick has sold ground black pepper in non-transparent metal tins that have become widely recognized by consumers. Indeed, the tin sizes have become the industry norm. These non-transparent metal tins came in different sizes: (i) a small metal tin measuring approximately 3 1/16” tall, 1 5/16” deep, and 2 5/16” wide, which (until 2015) was substantially filled to capacity consistent with industry norms with 2 ounces of ground black pepper (the “Small Tin”); (ii) a medium metal tin measuring approximately 3 10/16” tall, 1 9/16” deep, and 2 13/16” wide, which (until 2015) was substantially filled to capacity consistent with industry norms with 4 ounces of ground black pepper (the “Medium Tin”); and (iii) a large metal tin measuring approximately 4 10/16” tall, 2 4/16” deep, and 3 5/16” wide, which (until 2015) was substantially filled to capacity consistent with industry norms with 8 ounces of ground black pepper (the “Large Tin”).

34. However, in March 2015, McCormick intentionally began shipping millions of these same-sized tins of ground black pepper with 25 percent less fill. Rather than change the size of the tin from the traditional size to a new size that reflected the reduced fill, McCormick deceptively and misleadingly continued to use the same traditional-sized tins that had been used for decades, giving the false impression that nothing had changed.

35. During the class period, McCormick’s non-transparent tins of ground black pepper were approximately 25% empty, which constitutes nonfunctional “slack-fill:”

Tin Size	McCormick Traditional Fill	McCormick Slack-Fill
Small	2 ounces	1.5 ounces
Medium	4 ounces	3 ounces
Large	8 ounces	6 ounces

36. For example, Photo A below shows the traditional McCormick Small Tins with the 1.5-ounce slack-fill (on the left) and the traditional 2-ounce fill (on the right). Although the tins note the weight in small print, the tins are the exact same size. McCormick fails to disclose that, in fact, the slack-filled tins contain a significant void. Rather, the McCormick Small Tin with the 1.5-ounce slack-fill (on the left) falsely appears to contain the same amount of ground black pepper as the other tins with 2-ounce fills.

Photo A



37. Photo B below depicts the traditional McCormick Medium Tins with the 3-ounce slack-fill (on the right) and the traditional 4-ounce fill (on the left). Although the tins note the weight in small print, the tins are the exact same size. McCormick fails to disclose that, in fact, the slack-filled tins contain a significant void. Rather, the McCormick Medium Tin with the 3-ounce slack-fill falsely appears to contain the same amount of ground black pepper as the other tins with 4-ounce fills.

Photo B



38. Photo C below shows the traditional McCormick Large Tins with the 8-ounce traditional fill (on the left) and the 6-ounce slack-fill (on the right). The McCormick Large Tins with an 8-ounce fill (on the left) was marketed for decades. McCormick's use of the same McCormick Large Tin with a 6-ounce fill with nonfunctional slack-fill (on the left) gives the deceptive and misleading impression that it is full.

Photo C



39. In a statement to the Associated Press, McCormick has admitted that it reduced the fill of pepper in its traditional tins, claiming it followed "industry standard procedures."

However, neither the law nor industry standard permits companies to sell products in opaque packaging containing nonfunctional slack-fill, as Defendants have done here.

2. McCormick’s Black Peppercorn Grinders Hide the Nonfunctional Slack-Fill

40. McCormick also sells its branded McCormick® Black Peppercorn Grinder in bottles with a built-in grinder and substantially covered by a non-transparent label.

41. Bottles of McCormick® Black Peppercorn Grinder have been marketed and sold to consumers in the United States in two different package sizes: a small bottle with a built-in grinder (the “Small Grinder”) and a large bottle with a built-in grinder (the “Large Grinder”). Prior to early 2015, these bottles were substantially filled to capacity.

42. The Small Grinder currently holds 1 ounce of black peppercorn. Prior to early 2015, however, McCormick substantially filled the Small Grinder to capacity with 1.24 ounces of black peppercorn. Although the amount of black peppercorn in the Small Grinder has been reduced by 19% since early 2015, the actual size of the Small Grinder has, at all relevant times, remained the same.

43. Photo D below shows the current bottle now holding 1 ounce, but with the non-transparent label that conceals from consumers that the bottle is not filled to capacity.

Photo D



44. Photo E below shows the original bottle holding 1.24 ounces (on the right) and the current bottle now holding 1 ounce (on the left). Only the nontransparent label has been removed to show the contents of the bottles.

Photo E



45. The Large Grinder holds 2.5 ounces of black peppercorn (Photo F below). Prior to early 2015, McCormick substantially filled the Large Grinder to capacity with 3.1 ounces of black peppercorn. Although the amount of black peppercorn in the Larger Grinder has been reduced by 19% since early 2015, the actual size of the Large Grinder has, at all relevant times, remained the same.

Photo F



C. McCormick and Nineteen Private Label Competitors Agreed to Sell Pepper Containers with Nonfunctional Slack-Fill to Maintain and Fix Wholesale, and Thus Retail, Prices and Eliminate Retail Price Competition.

46. McCormick supplies about half of the store-brand spices sold annually in the United States, and store brands account for a significant share of the market for spices like pepper, generally 36 percent. McCormick agreed to supply store-branded tins of pure ground black pepper to 19 co-conspiring competitors (the “Retailers”), including the Great Value brand sold in Walmart, the Publix brand sold in Publix stores. The Retailers agree on all aspects of the store-branded product to be supplied by McCormick, including container, type and amount of product in the container, and the labels or representations on the containers. In this case, the store-branded tins of pure ground black pepper are non-transparent and are of a similar size and shape as McCormick® Pure Ground Black Pepper.

47. As with its branded McCormick® Pure Ground Black Pepper, prior to early 2015 and pursuant to its agreements with the private-label Retailers, McCormick substantially filled to capacity the store-branded tins of pure ground black pepper that it supplied.

48. However, effective March 2015, McCormick and the Retailers agreed that, in lieu of a wholesale price increase, McCormick would reduce the amount of ground black pepper contained in the McCormick-supplied, but competing store-branded tins, even though the actual size of the store-branded tins has, at all relevant times, remained the same. Moreover, the Retailers maintained the retail prices of the store-branded tins.

49. For example, both Walmart's Great Value-branded pepper tins and Publix-branded pepper tins were under-filled in the identical manner as the McCormick-branded pepper tins: *e.g.*, traditional 4 ounce tins during the class period were filled with only 3 ounces of pepper; traditional 8 ounce tins were filled with only 6 ounces. Just as with the McCormick prices, the prices for the store brands remained constant.

50. Photo G shows Great Value Pure Ground Pepper, filled by McCormick, and sold on the shelves of Walmart. The net weights displayed on the new, slack-filled tins plainly conflict with the net weights displayed on the shelf label, which still reflect the traditional 4 oz. and 8 oz. sizes. Contributing to the deception, the shelf label provides customers with an incorrect and patently misleading unit price.

Photo G



51. Photo H depicts the full line of Publix-branded pepper tins. During the class period, each tin was sold in the same reduced quantities as McCormick's slack-filled counterparts.

Photo H



52. As a result of Defendants' blatantly misleading and deceptive use of traditional-sized, non-transparent metal tins and grinders with unlawful slack-fill, Plaintiffs and the Class have been deceived into believing that the containers contain the amount of ground black pepper that the containers are designed to hold.

53. In fact, in many instances, McCormick acts as a "Category Captain" for Retailers throughout the country. As a Category Captain, McCormick is responsible for designing and managing the spice module layouts at a particular retailer, including the manner in which the different brands are stocked and marketed within the module by sizes and brands.

54. Both the tins and grinders are a form of advertisement that, together with strategic placement on the shelf, is one of the most effective methods to induce sales. When McCormick's slack-filled tins and grinders (as well as the concomitant store-branded containers) are positioned on a grocery store shelf next to competitors, Defendants induce consumers to buy their pepper because it appears – falsely – that their containers are equivalent to, or larger than, the non-conspiring competitors.

55. There is substantial evidence showing that the Retailers agreed with McCormick to the “Slack-Fill Scheme,” in which these competitors maintained retail prices and eliminated competition about fill level to avoid creating downward pressure on prices. That evidence includes the following.

56. In January 2014, McCormick began to investigate an “opportunity to reduce net weight on existing metal cans to accommodate commodity cost increases expected in the next 12 months.”¹ Officially, this Slack-Fill Scheme commenced on May 30, 2014. The proposed reduction in fill, then limited to McCormick brand products alone, was planned at 10% and was expected to yield savings of nearly \$800,000 each year.²

57. Reducing fill would allow McCormick “to avoid taking a price increase. Since 2010, everyday price on [McCormick] Black Pepper ha[d] increased 37%. In contrast, [private label] Black pepper ha[d] increased only 21%, resulting in an increased price gap of 46% vs. 30%”³ McCormick found this untenable, as the price gap was “driving continued share losses on [McCormick] Black Pepper.”⁴

58. Because increasing wholesale prices (and, as a result, retail prices) was “not an acceptable solution[,]”⁵ McCormick concluded that it was necessary to “reduce[] our fill on commodity inflated items such as Black Pepper to maintain a retail price point.”⁶

59. McCormick’s Executive Leadership Team approved the Slack-Fill Scheme on July 1, 2014. Over the following months, the Scheme evolved in several ways. First, McCormick

¹ MCC00001428, MCC00015678.

² MCC00004734.

³ MCC00026609.

⁴ *Id.*

⁵ MCC00014951.

⁶ MCC00003215.

increased the planned fill reduction from 10% to 25% to “save quite a bit more.”⁷ Second, McCormick expanded the Scheme to nineteen private label competitors, the Retailers.

60. By July 2014, McCormick became concerned about the risk of a McCormick-only fill reduction. On one hand, McCormick could not “afford to continue to increase price” because it would “lead[] to crossing key absolute price thresholds and widening the gap to [private label products].”⁸ On the other, it feared that a unilateral reduction might be “deceptive and could very well back fire on us[,]” since the private label competitors would likely “advertise ‘10% more vs [McCormick]’” and thus “point[] this deception out to our loyal branded customer.”⁹

61. Stated differently, McCormick’s supplier interest, *i.e.* cost mitigation, threatened its competitor interests, *i.e.* to prevent further share losses and protect its iconic brand. The solution, McCormick determined, was concerted action to eliminate the risk that McCormick would suffer from competition related to its decision to slack fill.

62. Accordingly, McCormick approached nineteen Retailers with invitations to slack fill their competing products, thereby eliminating competition about fill level and maintaining retail prices. Those Retailers are Ahold, AWG, CVS, Dollar General, Family Dollar, Food Lion, Hannaford, Harris Teeter, Meijer, Publix, Safeway, Shop Rite, Southern Home, Spice Classics, Spice Trend, Springfield, Supervalu, Walmart, and Winn Dixie.¹⁰ McCormick selected these Retailers for participation in the Slack Fill Scheme “based on volume and contractual agreements.”¹¹

⁷ MCC00014974.

⁸ MCC00005671.

⁹ MCC00025401.

¹⁰ MCC00026496.

¹¹ MCC00003046.

63. Among other documents, McCormick maintained a spreadsheet entitled “Econ Black Pepper Customer Action Plan,” which tracked stages of conversion to slack-filled products. An iteration of the spreadsheet contained columns for each Retailer, the “Action Proposed” by McCormick,” and also the competitor’s decision about that proposal (“Action to be Taken”) given the Retailers’ response to McCormick’s invitation to the Slack-Fill Scheme. The table below summarizes those columns.¹²

Private Label Competitor	“Action Proposed”	“Action To Be Taken” (Retailer Decision)
Ahold	Reduce Fill	Agree
AWG	Reduce Fill	Agree
CVS	Reduce Fill	Agree
Dollar General	Reduce Fill	Agree
Family Dollar	Reduce Fill	Agree
Food Lion	Reduce Fill	Agree
Hannaford	Reduce Fill	Agree
Harris Teeter	Reduce Fill	Agree
Meijer	Reduce Fill	Agree
Publix	Reduce Fill	Agree
Safeway	Reduce Fill	Agree
Shop Rite	Reduce Fill	Agree
Southern Home	Reduce Fill	Agree
Spice Classics	Reduce Fill	Agree
Spice Trend	Reduce Fill	Agree
Springfield	Reduce Fill	Agree
Supervalu	Reduce Fill	Agree
Walmart	Reduce Fill	Agree
Winn Dixie	Reduce Fill	Agree
Big Y	Price Increase	Agree
Giant Eagle	Price Increase	Agree
Golub	Price Increase	Agree
Kroger	Price Increase	Agree
Roundys	Price Increase	Agree
Spartan	Price Increase	Agree
Special Valu	Price Increase	Agree
Walgreens	Price Increase	Agree
Raleys	No change until 2016	Agree
Sunny Select	No change until 2016	Agree

¹² MCC00026496.

Private Label Competitor	“Action Proposed”	“Action To Be Taken” (Retailer Decision)
Wegmans	No change until 2016	Agree
Weis	No change until 2016	Agree
America’s Choice	Discontinue	Agree

64. McCormick anticipated that some Retailers might respond negatively to the invitation to participate in the Scheme. In preceding years, McCormick had raised wholesale prices five times.¹³ Moreover, it expected that the Retailers would view the invitation to slack fill, a “weight reduction for [the] same price[,]” no differently than it did: a price increase “in disguise.”¹⁴

65. Accordingly, McCormick carefully and methodically approached the Retailers to invite their participation to the Scheme. For some key accounts, like Walmart, McCormick held prefatory conversations to “float” the slack fill proposal. McCormick’s Rick Morse did so around July 23, 2014 in a conversation with Walmart’s Paul Ley. In preparation for the meeting, Morse emailed Udyan Khanna for information about rising pepper commodity costs, as Morse “want[ed] to share . . . commodity increases to justify our decisions.”¹⁵

66. In October 2014, McCormick began rolling out the Slack Fill Scheme. First, it officially teased the possibility in a “pre-sell” letter to customers to “prepare folks for an upcoming change.”¹⁶ Next, on October 6, 2014, McCormick delivered another letter to the Retailers and other private label customers announcing its “decision” to slack fill both McCormick Brand and Retailers’ private label products.¹⁷

¹³ MCC00011948.

¹⁴ MCC00010820, MCC00005671.

¹⁵ MCC00021563.

¹⁶ MCC00005767.

¹⁷ MCC00005777.

67. However, rather than a “decision” about the products it would provide to the Retailers, the Slack-Fill Scheme was, in fact, a conspiracy that the Retailers agreed to join at McCormick’s invitation. ““Depending on the [private label] volume and existing customer contracts, there are 4 scenarios for [the private label products]: 1. Net Weight Reduction 2. [Wholesale] Price Increase 3. Discontinuation 4. No Change.”¹⁸ McCormick’s preferred plan for each Retailer was “communicated and specific information was sent via e-mail to the responsible Customer Business Manager” on the private label team.¹⁹

68. In preparation for phone calls that the private label team placed to each of the Retailers after McCormick’s October 6, 2014 announcement, McCormick prepared a “Frequently Asked Questions” document that emphasized the Retailers retained a choice about participation in the Scheme.²⁰ McCormick would “pass[] through [the] commodity cost increase to ensure full cost mitigation coverage” to those Retailers who did not agree to slack fill.²¹

69. Among other topics, the FAQ provided as follows:

- **Q:** “What if the Private Label customer does not accept the size change and wants to stay in current package?” **A:** “Customers can choose to stay in the current size package but would be subject to the commodity cost increase which is \$0.06 \ ounce.”
- **Q:** “So for Private Label, our customers can either change size or accept the price increase?” **A:** “Yes, that is correct.”
- **Q:** “If the customer accepts the weight change, what are the next steps that we need to take?” **A:** “The most immediate need will be for the customers to provide new item and case UPC codes for the items that are changing. Once these codes are provided they should be immediately communicated to the private label team.”²²

¹⁸ MCC00010854.

¹⁹ MCC00011155.

²⁰ MCC00026737.

²¹ MCC00010731.

²² MCC00026737.

70. As of October 8, 2014, the private label team's calls to the Retailers were "going well" and had been placed to "most of [McCormick's] top 10 customers."²³ By October 30, 2014, McCormick had "engaged with strategic customers such as Ahold, Publix, and AWG to present our Private Label options related to the commodity increase of black pepper"²⁴

71. Following the earlier prefatory conversation with Rick Morse, Walmart's Paul Ley said to Morse in an October 7, 2014 meeting that "[Walmart's private label] Great Value should definitely follow McCormick [in transitioning to slack-filled tins and grinders]."²⁵

72. To that end, Walmart's Emily O'Leary, Tyler Windham, and Bronwen Hutchins worked with McCormick's Bo Jones (among others) to ensure the Great Value pepper on Walmart's shelves would have non-functional slack fill, just like the McCormick Brand products against which it competed. A key step in participation was providing new UPC codes to McCormick.²⁶

73. Specifically, on December 18, 2014, O'Leary asked that McCormick's Jones reach out to Walmart's Hutchins "to discuss next steps for the fill change on [Great Value] Pepper items[.] I want to make sure we get it set up correctly (and quickly)."²⁷

74. Jones reached out to Hutchins on December 22, 2014 and requested that Walmart provide McCormick with new UPC codes.²⁸

75. On January 8, 2015, Hutchins emailed Jones new UPC codes for 3 ounce and 6 ounce Great Value ground black pepper tins.²⁹

²³ MCC00005947.

²⁴ MCC00006174.

²⁵ MCC00003085.

²⁶ MCC00006010.

²⁷ WALBPL00000760.

²⁸ WALBPL00000772.

76. Each of the Retailers, like Walmart, took all steps necessary to deliver new UPC codes to McCormick in order to facilitate delivery of slack-filled products to grocery shelves in or around March 2015.

77. Even some Retailers who expressed concern with the Slack-Fill Scheme eventually joined this antitrust conspiracy. For example, despite some concern about the Scheme's legality, Publix agreed to slack fill its private label products. Publix's Jeff Gresham wrote to McCormick's Randy Sullins on December 19, 2014, asking Sullins to "[p]lease make 100% sure that this question is thoroughly researched. I am certainly not an expert on this, but since the Publix brand is involved, our neck is on the line too."³⁰ Sullins was concerned about "laws (probably from the USDA or FDA) that regulated down-sizing of products."³¹

78. Specifically, Gresham wanted McCormick to answer the following question: "[i]t is legal to down-size 25% of the product without making a change in the packaging?"³² Sullins assured Gresham on December 23, 2014 that McCormick had "double checked the laws and FDA regulations" and that "McCormick's Quality Assurance and Legal teams ha[d] been involved in the project and [would] be providing additional context regarding FDA regulations in the near future."³³

²⁹ WALBPL00000765.

³⁰ MCC00006646.

³¹ *Id.*

³² *Id.*

³³ MCC00008923.

79. Likewise, despite concern that the Slack Fill Scheme would be a “disaster” and a “consumer nightmare,” as McCormick and the Retailers would appear to be “pull[ing] a fast one” on consumers, Ahold agreed to participate in the Slack-Fill Scheme.³⁴

80. Ahold did so following several communications with McCormick’s Reid Bryant, the account manager for Ahold, which began in October 2014. As of October 23, 2014, Ahold was “still determining whether to take the [wholesale price] increase or the label weight reduction.” In response to an internal McCormick communication about Ahold’s indecision, McCormick’s Mike Rochford expressed dismay: “When I see the words ‘disaster’ and ‘nightmare’ being communicated related to our number one initiative, I’m not feeling too great.”³⁵

81. By March 2015, each of the “priority” Retailers had agreed to the Slack Fill Scheme,³⁶ and products with nonfunctional slack fill were on grocery shelves nationwide. Nineteen Retailers agreed to McCormick’s invitation to the Slack-Fill Scheme, in lieu of a wholesale price increase in order to fix and maintain retail prices. Eight smaller retailers by volume (Big Y, Giant Eagle, Golub, Kroger, Roundys, Spartan, Special Valu, and Walgreens), however, were not invited or elected a price increase instead,³⁷ thereby not becoming co-conspirators while maintaining their independence to set retail prices.

V. RELEVANT MARKET

82. The product market is the wholesale market for black pepper. The geographic market is the United States.

³⁴ MCC00006102.

³⁵ *Id.*

³⁶ MCC00000581.

³⁷ *See* MCC00026496.

83. McCormick controls as much as 70% of the black pepper market, as well as 50% of the store-branded spice market. McCormick is both a supplier of private-label products to retail stores, and competes for sales and market share through its McCormick brand against the private-label products at retail stores. McCormick's agreements to supply private label brands that also compete with its nationally-branded products thus have both vertical and horizontal effects. The economic literature supports this position.

84. "The penetration of private labels by retail chains is an increasingly important feature of the food sector. This has to do with how retailers compete directly with one another and with how they compete with products originating from the manufacturing sector. Private labels have therefore both a vertical and horizontal effect."³⁸

85. "For the retailer, private labels are a means via which they can differentiate themselves from other retailers. Since the retailer effectively also becomes the supplier, it also competes directly with the producer of the nationally branded product. In sum, the penetration of private labels can have both horizontal and vertical impacts on competition in the food chain."³⁹

86. "When assessing whether a private label product and branded product are in the same market, authorities will look at the competitive constraints between the two. . . . However, this is ultimately a question of evidence and not a starting position."⁴⁰

³⁸ Organisation for Economic Co-operation and Development (OECD) Competition Committee, Policy Roundtables, "Competition Issues in the Food Chain Industry" ("OECD"), at 26 (May 15, 2014), available at <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-other-international-competition-fora/1310food-chain-us.pdf> (last accessed December 8, 2016).

³⁹ OECD at 27; *see also id.* at 28 ("Second, as noted above, the introduction of private labels has both a horizontal and vertical effect.").

⁴⁰ Institute of European and Comparative Law, University of Oxford, "Trends in Retail Competition: Private labels, brands and competition policy, Report on the eleventh annual symposium on competition amongst retailers and suppliers" ("Oxford"), at 28 (May 2015).

87. “The key question when assessing whether a private label constrains the branded equivalent,” and therefore is in the same market, “is whether a hypothetical monopolist supplier of branded goods could introduce a small but significant non-transitory price increase (e.g. 5-10%) without losing sales to private label suppliers.”⁴¹

88. Here, the answer is no. McCormick could not introduce a small but significant non-transitory price increase to its McCormick pepper products without losing sales to private-label pepper suppliers.

89. By McCormick’s own admissions, competition from the private label brands constrained it from raising prices on the McCormick-branded equivalent. The Slack-Fill Scheme was born when McCormick could not “afford to continue to increase price” because it would “lead[] to crossing key absolute price thresholds and widening the gap to [private label products].”⁴² Even McCormick’s CEO stated, in a January 2015 earnings call, that McCormick pepper was “getting to a price point where it’s pretty stretched” and thus the company was unable to increase prices due to the competitive landscape (*i.e.* the private label products).

90. One recent commentator explained the complicated nature of the analysis of both the vertical and horizontal nature of the relationship in situations like that of McCormick and its retailer clients:

The nature of the relationship between brands and private labels is complicated by the role of retailers in commissioning and controlling private labels while also being the route by which branded goods reach final consumers. Specifically, selling private label alongside branded goods means that the retailer serves as both the *customer* and *competitor* to a branded goods supplier, such that their relationship entails elements of both *vertical competition* (in the battle for profit share between successive

⁴¹ Oxford at 29.

⁴² MCC00005671.

stages of the supply chain) and *horizontal competition* (in the battle for market share at the product level).

This dual aspect to brand/private label competition needs careful consideration when undertaking competitive assessments about behaviour and outcomes in FMCG^[43] markets, and especially when seeking to identify and delineate relevant economic markets. In particular, there is a risk for competition authorities of not fully appreciating or understanding the intricate nature of FMCG competition, and especially the retailer's role in influencing market outcomes through the positioning and use of private labels, and in turn their effect on price and non-price competition in FMCG markets.

91. Thus, for a brand producer, like McCormick, which has to go through the retailer, like Walmart, to reach final consumers, McCormick influences its product's retail price – and thus competition with the private label product at retail - by how it sets its wholesale price to the retailer, or in this instance how it obtains agreement from its most important retail customers to reduce fill and *not* make a change to wholesale (and thus retail) prices.⁴⁴

92. In sum, the relevant market here – where the antitrust violation occurred – is the wholesale market where McCormick is a supplier of its private label brand and the producer of the private label brands – but controls the wholesale price of both.

93. The anticompetitive effect of this conspiracy harms competition in the relevant market and thus affects consumers because retailers set the retail prices for *both* the private label brand and the branded equivalent (and would thus pass through any increase in wholesale prices by McCormick).⁴⁵

⁴³ The “FMCG” sector is defined as the “fast-moving consumer goods (FMCG) sector with frequently purchased, low involvement, low cost food and non-food goods sold through supermarkets, mass merchandisers, discounters and drug stores.” Dobson & Chakrabourty, “Assessing Brand and Private Label Competition,” 36 *Eur. Competition L. Rev.* 76, 76 (2015), available at <https://www.researchgate.net/publication/284423393> (italics in original).

⁴⁴ Dobson & Chakrabourty at 78-79.

⁴⁵ Dobson & Chakrabourty at 78.

94. By agreeing at the wholesale level to reduce fill on both McCormick and private label products, McCormick ensured that private label products would not compete for retail customers based on price comparisons, i.e. more pepper for a lower price. Had McCormick acted unilaterally, it would have either (1) reduced fill on the McCormick products and retailers would have been free to compete based on price and volume comparisons to their “full” private label products; or (2) increased wholesale prices, which would have given retailers the unilateral choice to raise retail prices, reduce their own profit margins, or switch suppliers and forego McCormick as a producer of private label products (which some non-co-conspirators have since done).

95. Moreover, the geographic market is the United States, given that McCormick’s Slack-Fill Scheme was based on a conspiracy with 19 large retail chains and nationwide contracts with each for the supply of private label pepper products. “In the absence of price discrimination based on customer location, the [FTC and DOJ] normally define geographic markets based on the locations of suppliers. Geographic markets based on the locations of suppliers encompass the region from which sales are made.”⁴⁶

VI. CLASS ACTION ALLEGATIONS

96. Plaintiffs bring this action both on behalf of themselves, and as a class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3), on behalf of the following class.

The “Nationwide Class” shall be defined as:

All persons in the United States who purchased McCormick-brand black pepper, Walmart’s Great Value-brand black pepper, Publix-

⁴⁶ OECD, Section I: Competition Issues In the Retail Grocery Sector – Contribution from the United States (August 24, 2015), at fn. 12, citing 2010 Horizontal Merger Guidelines § 4.2 (2010), available at https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/structural_issues_in_the_groceries_sector-lacf_2015.pdf (last accessed December 8, 2016).

brand black pepper and/or McCormick-filled private-label black pepper between March 1, 2015, and the present, for their personal or household use.

The “Consumer Protection Subclass” shall be defined as:

All persons residing in Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, South Dakota, Washington, and/or Wisconsin who purchased McCormick-brand black pepper, Walmart’s Great Value-brand black pepper, Publix-brand black pepper and/or McCormick-filled private-label black pepper between March 1, 2015 and the present, for their personal or household uses.

Collectively, the Nationwide Class and Consumer Protection Subclass shall be referred to as the “Class.”

97. Plaintiffs do not know the exact number of Class members because such information is in the exclusive control of Defendants. Plaintiffs believe that, due to the nature of the trade and commerce involved, there are most likely hundreds of thousands of Class members, geographically dispersed throughout the United States such that joinder of all Class members is impracticable.

98. Plaintiffs’ claims are typical of the claims of the Class in that Plaintiffs all purchased black pepper packaged by McCormick. All Class members were damaged by the same wrongful conduct of Defendants and their co-conspirators as alleged herein, and the relief sought is common to the Class.

99. Numerous questions of law or fact arise from Defendants’ anticompetitive and misleading conduct that is common to the Class, including but not limited to:

- a. Whether and when McCormick began under-filling black pepper containers sold to consumers;

- b. The nature of the agreements between McCormick and its nineteen Retailer co-conspirators;
- c. Whether Defendants misrepresented or failed to disclose to Plaintiffs and the Class that the pepper containers were under-filled;
- d. Whether the misrepresented and undisclosed facts were material to Plaintiffs and the Class;
- e. Whether Defendants were unjustly enriched;
- f. Whether McCormick and its retail customers, including Walmart and Publix, engaged in a contract, combination, agreement, arrangement, and or conspiracy to fix, maintain, control, or stabilize the prices of pepper by selling under-filled containers;
- g. The operative time period of the alleged conspiracy;
- h. Whether Defendants' conduct caused an increase in the effective price of pepper sold in under-filled containers;
- i. Whether Defendants' conduct caused injury to the business or property of Plaintiffs and Class members;
- j. Whether Defendants' conduct violated federal antitrust law;
- k. The definition of the relevant market;
- l. Whether Defendants' conduct violated state consumer protection statutes, by virtue of having violated so-called "slack-fill" laws;
- m. Whether Defendants were unjustly enriched by their conduct, including but not limited to the misbranding resulting from its violations of so-called "slack-fill" law; and
- n. Whether Plaintiffs and the Class are entitled to recover damages, whether actual, statutory or punitive, restitution, and/or equitable relief from Defendants based on the conduct alleged herein.

These and other questions of law and fact are common to the Class and predominate over any questions affecting only individual Class members.

100. Plaintiffs' claims are typical of the claims of the Class because they arise out of the same conduct by Defendants that was directed to all Class members.

101. Plaintiffs will fairly and adequately represent the interests of the Class in that they have no conflict with any other members of the Class. Furthermore, Plaintiffs have retained competent counsel experienced in antitrust, class action, and other complex litigation.

102. Defendants have acted on grounds generally applicable to the Class, thereby making final injunctive relief appropriate with respect to the Class as a whole.

103. This class action is superior to the alternatives, if any, for the fair and efficient adjudication of this controversy. Prosecution as a class action will eliminate the possibility of repetitive litigation. There will be no material difficulty in the management of this action as a class action.

104. The prosecution of separate actions by individual Class members would create the risk of inconsistent or varying adjudications, establishing incompatible standards of conduct for Defendants.

VII. CAUSES OF ACTION

COUNT I

CLAIM FOR VIOLATIONS OF 15 U.S.C. § 1 ON BEHALF OF NATIONWIDE CLASS

105. Plaintiffs incorporate by reference all the above allegations as if fully set forth herein.

106. Beginning in October 2014, effective March 2015, and continuing through at least mid-2016, McCormick and 19 conspiring Retailers entered into a continuing agreement, understanding, and conspiracy in restraint of trade to artificially fix, raise, maintain, and stabilize prices for pepper in the United States, in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). They did so by simultaneously reducing fill in competing pepper products to avoid competing on fill levels, and thereby avoiding any downward pressure on prices.

107. In formulating and carrying out the alleged agreement, understanding, or conspiracy to under-fill pepper tins and grinders, McCormick and its co-conspirators effectively fixed, raised, maintained, and stabilized the price of pepper tins and grinders.

108. The combination and conspiracy alleged herein has had the following effects, among others:

- a. Price competition in the sale of pepper has been restrained or suppressed in the United States;
- b. Prices for pepper sold by McCormick and its co-conspirators have been fixed, raised, maintained, and stabilized at artificially high, non-competitive levels throughout the United States;
- c. Those who purchased pepper, directly or indirectly, from McCormick and its co-conspirators have been deprived of the benefits of free and open competition; and
- d. Plaintiffs and Class members paid supra-competitive, artificially inflated prices for pepper.

109. Plaintiffs and members of the Nationwide Class have been injured and will continue to be injured in their business or property by Defendants' antitrust violations. Their injury consists of receiving less pepper in a pepper tin or grinder and thus effectively paying higher prices for their pepper purchases than they would have paid in the absence of those violations.

110. Plaintiffs and the Class, pursuant to Rule 57 of the Federal Rules of Civil Procedure and 18 U.S.C. § 2201(a), hereby seek a declaratory judgment that Defendants' conduct as described herein violates Section 1 of the Sherman Act.

111. Plaintiffs and the Nationwide Class are entitled to an injunction against Defendants, preventing and restraining the violations alleged herein.

112. Plaintiffs seek injunctive relief, actual damages, compensatory relief, treble damages, and attorneys' fees and costs.

COUNT II

VIOLATIONS OF STATE CONSUMER PROTECTION ACTS ON BEHALF OF CONSUMER PROTECTION SUBCLASS

113. Plaintiffs incorporate by reference all the above allegations as if fully set forth herein.

114. Plaintiffs and the members of the Class are individuals that paid for purchases of black pepper for personal, family, or household purposes.

115. Defendants had a statutory duty to refrain from unfair or deceptive acts or practices in the promotion and sale of McCormick black pepper or store-branded black pepper.

116. Defendants violated this duty by selling black pepper in non-transparent containers containing nonfunctional slack-fill.

117. Defendants' actions constitute violations of the Federal Food, Drug and Cosmetic Act ("FDCA") Section 403 (21 U.S.C. § 343); Section 403(d) (21 U.S.C. § 343(d)); the Code of Federal Regulations Title 21 part 100, *et seq.*; the Lanham Act, 15 U.S.C § 1125; and those similar deceptive and unfair practices and/or consumer protection state laws in all fifty states.

118. Specifically, Defendants' actions violate 21 C.F.R. § 100.100, which prohibits nonfunctional slack-fill:

In accordance with section 403(d) of the act, a food shall be deemed to be misbranded if its container is so made, formed, or filled as to be misleading. (a) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill. Slack-fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack-fill is the empty space in a package that is filled to less than its capacity for reasons other than:

- (1) Protection of the contents of the package;
- (2) The requirements of the machines used for enclosing the contents in such package;
- (3) Unavoidable product settling during shipping and handling;

- (4) The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of a food), where such function is inherent to the nature of the food and is clearly communicated to consumers;
- (5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value which is both significant in proportion to the value of the product and independent of its function to hold the food, e.g., a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed; or durable commemorative or promotional packages; or
- (6) Inability to increase level of fill or to further reduce the size of the package (e.g., where some minimum package size is necessary to accommodate required food labeling (excluding any vignettes or other nonmandatory designs or label information), discourage pilfering, facilitate handling, or accommodate tamper-resistant devices).

119. Defendants' deceptive representations and material omissions to Plaintiffs and the proposed Class members were, and are, unfair and deceptive acts and practices.

120. Defendants' actions, as complained of herein, constitute unfair compensation or unfair, unconscionable, deceptive, or fraudulent acts or practices in violation of various state consumer protection statutes listed below.

121. Individually, Plaintiffs seek to recover under the laws of their home states of Illinois, District of Columbia, Maryland, Pennsylvania, Connecticut, California, Florida, and Missouri. At class certification, Plaintiffs will seek redress for Class members under the following consumer protection statutes:

- a. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of ARK. CODE § 48 88 101, et seq., including § 48 88 113(f), and § 48 88 102(5);
- b. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of CAL. BUS. & PROF. CODE § 12606, CAL. BUS. & PROF. CODE § 12606.2, and CAL. BUS. & PROF. CODE § 17200, and CAL. CIV. CODE § 1770, et seq.;

- c. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of COLO. REV. STAT. § 6-1-105, et seq., including § 6-1-113(1)(c) and § 6-1-102(b);
- d. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of CONN. GEN. STAT. § 42-110b, et seq., including § 42-110(a)(3);
- e. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 6 DEL. CODE § 2511, et seq., including 6 DEL. CODE § 2512;
- f. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of D.C. CODE § 28-3901, et seq., including § 28-3904;
- g. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of FLA. STAT. § 501.201, et seq.;
- h. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of IDAHO CODE § 48-601, et seq., including § 48-602;
- i. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 815 ILCS § 501/1, et seq.;
- j. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of IOWA CODE § 714H.1, et seq.,
- k. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of MD. CONN. LAW CODE § 13-101, et seq., including § 13-101(h);
- l. Defendants have engaged in unfair competition or unfair and deceptive acts or practices in violation MASS. GEN. LAWS ANN. ch. 93A.
- m. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of MICH. STAT. § 445.901, et seq., including § 445-902(c);
- n. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of MINN. STAT. § 325F.67, et seq., including § 407.010(5);
- o. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of MO. REV. STAT. § 407.010, et seq.;

- p. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of NEB. REV. STAT. § 59 1601, et seq., including § 59 1601(1);
- q. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.H. REV. STAT. § 358 A:1, et seq., including § 358A:1(1);
- r. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.J. STAT. ANN. § 57:8 1, et seq., including § 56:8 1(d);
- s. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.M. STAT. ANN. § 57 12 1, et seq.;
- t. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.Y. GEN. BUS. LAW § 349, et seq.;
- u. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.D. CENT. CODE § 51 15 01, et seq., including § 51 15 01(4);
- v. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 73 PA. STAT. § 201 1, et seq., including § 201 2(2);
- w. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of S.D. CODE LAWS § 37 24 1, et seq., including § 37 24 1(8);
- x. Defendants have engaged in unfair competition or unfair, deceptive acts or fraudulent acts or practices in violation of WASH. REV. CODE § 19.86.010, et seq., including § 19.86.010(1); and
- y. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of WIS. STAT. § 100.18, et seq.

122. Plaintiffs and members of the Class were directly and proximately injured by Defendants' conduct and would not have paid for Defendants' black pepper had they known that the containers were under-filled.

123. As a proximate result of Defendants' misrepresentations and omissions, Plaintiffs and the proposed Class members have suffered an ascertainable loss and are entitled to relief, in an amount to be determined at trial.

124. Plaintiffs and Class members are entitled to damages, restitution, disgorgement, and/or such orders or judgments as may be necessary to restore to any person in interest, any money which may have been acquired by means of such unfair practices and to the relief set forth below.

125. Plaintiffs have provided notice to the Attorney General where required by state statute and have sent pre-suit demand letters where appropriate.

COUNT III

UNJUST ENRICHMENT ON BEHALF OF NATIONWIDE CLASS

126. Plaintiffs reallege and incorporate by reference the preceding allegations as if fully set forth above.

127. Defendants have unjustly retained a benefit to the detriment of Plaintiffs and members of the Class. Defendants sold black pepper to Plaintiffs and the Class, in containers that included nonfunctional slack-fill while maintaining price levels for full containers. Defendants did so for the purpose of enriching themselves. Thus, Defendants continue to possess money paid by Plaintiffs and the Class to which it is not entitled.

128. Defendants' retention of the benefit violates the fundamental principles of justice, equity and good conscience. Defendants did not disclose to Plaintiffs and the Class that the black pepper containers contained nonfunctional slack-fill.

129. As a direct and proximate result of the Defendants' misrepresentations and/or omissions with respect to the nonfunctional slack-fill in the pepper tins and grinders, Plaintiffs and the Class have suffered damages in an amount to be proven at trial.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and Class members request that the Court enter an order or judgment against the Defendants including the following:

A. Declaring that this action may be maintained as a class action pursuant to Federal Rules of Civil Procedure, Rule 23, and for an order certifying this case as a class action and appointing Plaintiffs as Class representatives;

B. Finding that Defendants have engaged in a contract, combination, and conspiracy in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), and that Plaintiffs and the members of the Class have been injured in their business and property as a result of Defendants' violations;

C. Finding that Plaintiffs and the members of the Class recover damages sustained by them, as provided by the federal antitrust laws, and that a judgment in favor of Plaintiffs and the Class be entered against the Defendants in an amount to be trebled to the extent such trebling is permitted pursuant to such laws;

D. Enjoining Defendants, its subsidiaries, affiliates, successors, transferees, assignees, and the respective officers, directors, partners, agents, and employees thereof and all other persons acting or claiming to act on its behalf from (1) continuing and maintaining the combination, conspiracy, or agreement alleged herein; and (2) continuing to sell black pepper containers containing nonfunctional slack-fill;

E. Declaring that the Defendants' practice of advertising and selling its black pepper tins and grinders as being full – when they are not – was wrongful and unfair;

F. Awarding restitution of all purchases of black pepper by Plaintiffs and the Class, in an amount to be determined at trial;

G. Granting disgorgement of the ill-gotten gains derived by the Defendants from their misconduct;

H. Awarding actual damages in an amount according to proof, punitive damages, compensatory damages, and statutory damages where applicable, caused by the Defendants' unfair or deceptive practices; along with exemplary damages to Plaintiffs and each Class member for each violation; and pre-judgment and post-judgment interest at the maximum rate permitted by applicable law;

I. Awarding Plaintiffs and the Class their attorneys' fees and costs and expenses incurred in connection with this action; and

J. Granting such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues so triable.

DATED: December 9, 2016

Respectfully submitted,

By: _____

Elizabeth A. Fegan
Daniel J. Kurowski
Mark Vazquez
Andrew Gordon
HAGENS BERMAN SOBOL SHAPIRO LLP
455 N. Cityfront Plaza Drive, Suite 2410
Chicago, IL 60611
Telephone: (708) 628-4949
Facsimile: (708) 628-4950
beth@hbsslaw.com
dank@hbsslaw.com
markv@hbsslaw.com
andrewg@hbsslaw.com

Steve W. Berman
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, Washington 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com

Co- Lead Counsel
Scott Kamber
KAMBERLAW LLC
100 Wall Street, 23rd floor
New York, NY 10005
(212) 920-3072
(212) 202-6364 (fax)
skamber@kamberlaw.com

Deborah Kravitz
KAMBERLAW LLP
401 Center Street, Suite 111
Healdsburg, CA 95448
(707) 820-4247
dkravitz@kamberlaw.com

Co-Lead Counsel