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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

MELISSA STEWART, on behalf of herself and all others similarly situated	X	Civil Action No. _____
	:	
	:	
Plaintiff,	:	<b><u>CLASS ACTION</u></b>
	:	<b><u>COMPLAINT</u></b>
v.	:	
	:	
SMART BALANCE, INC.,	:	<b><u>JURY TRIAL DEMANDED</u></b>
	:	
Defendant.	:	
	X	

Plaintiff, Melissa Stewart, by her attorneys, Meiselman, Denlea, Packman, Carton & Eberz P.C., as and for her class action complaint, alleges, with personal knowledge as to her own actions, and upon information and belief as to those of others, as follows:

**IDENTIFICATION OF PARTIES PURSUANT TO  
NEW JERSEY LOCAL RULE 10.1**

1. The names and addresses of the named parties to this action are as follows: (1) Plaintiff, Melissa Stewart, 14 Country Acres Drive, Walkkill, New York, 12589; and (2) Defendant Smart Balance, Inc. 115 West Century Road, Suite 260, Paramus, New Jersey, 07652.

## NATURE OF THE CASE

2. With obesity the number one cause of preventable death in the United States, Americans are desperate for healthy options in the supermarket aisles. Against this backdrop, with consumers demanding dairy products that fit their diet and nutritional wants and needs, in 2008, Defendant Smart Balance, Inc. (“Smart Balance” or “Defendant”) began marketing “Fat Free” milks containing Omega-3s (“Fat Free Enhanced Milks”)<sup>1</sup> which purportedly taste as rich and creamy as 2% milk or whole milk. The Fat Free Enhanced Milks seemingly gave consumers the best of both worlds, a milk free of fat, but that still tasted as rich and creamy as its less healthy higher fat siblings – 2% milk and whole milk.

3. Unfortunately, however, despite aggressively marketing, promoting and labeling its Fat Free Enhanced Milks as “Fat Free,” Smart Balance’s line of Fat Free Enhanced Milks actually contain 1 gram of fat per serving. In reality, more than 9% of the calories per serving of what is labeled as “Fat Free” milk are actually “Calories from Fat.”

4. This action seeks to redress this unfair, deceptive, and otherwise improper business practice that Defendant is employing against unsuspecting consumers. Specifically, in an effort to bolster its sales of its Fat Free Enhanced Milks in the rapidly expanding “enhanced milk” market, Smart Balance misleadingly and confusingly misrepresents on its milk cartons, on its website, and in its promotions that these

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<sup>1</sup> Defendant’s Fat Free Enhanced Milks include (1) Fat Free Milk and Omega-3s; (2) Smart Balance® Lactose-Free Fat Free Milk and Omega-3s; and (3) Smart Balance® HeartRight® Fat Free Milk and Omega-3s, Vitamin E and Natural Plant Sterols.

enhanced milks are “Fat Free” when in fact they contain 1 gram of fat per serving. This 1 gram of fat per serving is double the legal limit of 0.5 grams of fat per serving that a food is legally permitted to contain to label itself “Fat Free.” See 21 C.F.R. § 101.62(b).

5. Through its various misstatements, Smart Balance deceptively markets its Fat Free Enhanced Milks as “Fat Free” in violation of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* (“FDCA”); and 21 CFR - Code of Federal Regulations - Title 21: Food and Drugs.

6. This suit is brought pursuant to the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 *et seq.*, and the common law, on behalf of a nationwide class of all persons who purchased Smart Balance Fat Free Enhanced Milks. It seeks, *inter alia*, compensatory damages, including, but not limited to, a refund of the monies paid for Defendant’s Fat Free Enhanced Milks, injunctive relief, punitive damages, attorneys’ fees and the costs of this suit.

### **PARTIES**

7. Plaintiff Melissa Stewart is a citizen of the State of New York. Ms. Stewart regularly purchased Defendant’s Fat Free Enhanced Milks during the Class Period. She purchased Defendant’s Fat Free Enhanced Milks after viewing misleading statements and representations on Defendant’s Fat Free Enhanced Milk cartons, which led her to believe that the milk she was purchasing was “Fat Free” when it was not. Ms. Stewart paid more for Defendant’s Fat Free Enhanced Milks than she would have otherwise paid for alternative milk options because she believed that the Fat Free Enhanced Milks were in fact “Fat Free.”

8. Defendant Smart Balance is a consumer food products company that markets and sells, among other products, Fat Free Enhanced Milks under the Smart Balance® trademark. Smart Balance marketed and sold its Fat Free Enhanced Milks throughout the United States during the class period. Smart Balance's corporate headquarters and principal place of business are located at 115 West Century Road, Suite 260, Paramus, New Jersey, 07652.

### **JURISDICTION AND VENUE**

9. This Court has jurisdiction over this class action pursuant to 28 U.S.C. § 1332(d)(2). Plaintiff's citizenship is diverse from the Defendant and the claims of the Class members in this class action are in excess of \$5,000,000 in the aggregate, exclusive of interest and costs, and the total number of members of the proposed Class is greater than 100.

10. This Court has personal jurisdiction over the Defendant because its main corporate headquarters and principal place of business is located within this District.

11. Venue is proper pursuant to 28 U.S.C. § 1391(a) because a substantial part of the events giving rise to the claims occurred in this District and the Defendant's principal place of business is within this District. Upon information and belief, Defendant's creation and dissemination of the misleading statements described herein, including the misleading statements on Defendant's milk cartons and website, all originated in New Jersey.

### **FACTUAL ALLEGATIONS**

12. Smart Balance markets, advertises, promotes, distributes, and sells Fat Free Enhanced Milks under the Smart Balance® trademark.

13. The United States milk market has swelled in recent years to become a \$15 billion-a-year business. In 2010 and for the first half of 2011, Smart Balance milks represented 0.3% of the national milk market totaling annual sales of approximately \$45,000,000.

14. In or about January 2010, following a successful test market launch, Smart Balance began nationally marketing, advertising, promoting, distributing, and selling its Fat Free Enhanced Milks, labeling them as “Fat Free” despite the milk containing 1 gram of fat per serving.

15. Since its nationwide launch, Smart Balance’s Fat Free Enhanced Milks have enjoyed enormous success, leading to a 32.5% quarter-over-quarter sales increase of Smart Balance milks in the second quarter of 2011.

16. Smart Balance markets its Fat Free Enhanced Milks as rich and creamy, characteristics not common in fat free milk.

17. In fact, Smart Balance markets its Fat Free Enhanced Milks as tasting as rich and creamy as 2% milk and according to Robert Gluck, Smart Balance’s former vice chairman and chief operating officer, Smart Balance’s fat free milks taste “just like your old-fashioned whole milk.”

18. The marketing of its enhanced milks as Fat Free is intended to mislead consumers into believing that the enhanced milks are in fact “Fat Free.”

19. Smart Balance misleadingly markets its Fat Free Enhanced Milks on its website as “Fat Free” claiming the milks are “the fat free milk[s] that taste[] as rich and creamy as 2%.”

20. The below images are prominently displayed on Smart Balance’s website, which together show Defendant’s Fat Free Enhanced Milks clearly promoted as “Fat Free.”



[NUTRITION LABEL](#)

[View](#)

## Smart Balance® Fat Free Milk and Omega-3s

The fat free milk that tastes as rich and creamy as 2% and contains EPA/DHA Omega-3s and 25% more calcium and protein than whole milk.



NUTRITION LABEL

[View](#)

## Smart Balance® HeartRight® Fat Free Milk

Try 2 servings a day of our fat free milk with the rich, creamy taste of 2% and naturally sourced ingredients proven to help lower cholesterol as part of a diet low in saturated fat and cholesterol.



NUTRITION LABEL

[View](#)

## Smart Balance® Lactose-Free Fat Free Milk and Omega-3s

Lactose-free, fat free milk that tastes as rich and creamy as 2%, with 20% more calcium and protein than whole milk and the benefits of Omega-3s.

21. These statements are intentionally confusing and misleading. If the consumer clicks on the link to view the nutritional label or turns the milk carton over while shopping at the supermarket, the nutritional facts show that each of Smart



Balance's Fat Free Enhanced Milks contains 1 gram of fat, completely belying Smart Balances "Fat Free" claim.

<b>Nutrition Facts</b>		
Serving Size 1 cup (240 mL)		
Servings Per Container 8		
Amount Per Serving		
<b>Calories</b> 110	Calories from Fat 10	
	% Daily Value*	
<b>Total Fat</b> 1g	<b>2%</b>	
Saturated Fat 0g	<b>0%</b>	
Trans Fat 0g		
Polyunsaturated Fat 0g		
Monounsaturated Fat 0g		
<b>Cholesterol</b> 5mg	<b>2%</b>	
<b>Sodium</b> 150mg	<b>6%</b>	
<b>Potassium</b> 480mg	<b>14%</b>	
<b>Total Carbohydrate</b> 14g	<b>5%</b>	
Sugars 14g		
<b>Protein</b> 10g	<b>20%</b>	
Vitamin A 10%	• Calcium 35%	
Vitamin D 25%		
Not a significant source of dietary fiber, vitamin C, and iron.		
* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.		
	Calories	2,000 2,500
Total Fat	Less than	65g 80g
Sat Fat	Less than	20g 25g
Cholesterol	Less than	300mg 300mg
Sodium	Less than	2,400mg 2,400mg
Potassium		3,500mg 3,500mg
Total Carbohydrate		300g 375g
Dietary Fiber		25g 30g
Protein		50g 65g

**INGREDIENTS:** GRADE A FAT FREE MILK, NONFAT MILK SOLIDS, OMEGA-3 OIL BLEND (PURIFIED FISH OIL AND SUNFLOWER OIL - TO HELP MAINTAIN FRESHNESS)<sup>3</sup>, VITAMIN A PALMITATE, VITAMIN D<sub>3</sub>.

<b>Nutrition Facts</b>		
Serving Size 1 cup (240 mL)		
Servings Per Container 8		
Amount Per Serving		
<b>Calories</b> 110	Calories from Fat 10	
	% Daily Value*	
<b>Total Fat</b> 1g	<b>2%</b>	
Saturated Fat 0g	<b>0%</b>	
Trans Fat 0g		
Polyunsaturated Fat 0g		
Monounsaturated Fat 0g		
<b>Cholesterol</b> 5mg	<b>2%</b>	
<b>Sodium</b> 140mg	<b>6%</b>	
<b>Potassium</b> 450mg	<b>13%</b>	
<b>Total Carbohydrate</b> 14g	<b>5%</b>	
Sugars 14g		
<b>Protein</b> 10g	<b>20%</b>	
Vitamin A 10%	• Calcium 35%	
Vitamin D 25%		
Not a significant source of dietary fiber, vitamin C, and iron.		
* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.		
	Calories	2,000 2,500
Total Fat	Less than	65g 80g
Sat Fat	Less than	20g 25g
Cholesterol	Less than	300mg 300mg
Sodium	Less than	2,400mg 2,400mg
Potassium		3,500mg 3,500mg
Total Carbohydrate		300g 375g
Dietary Fiber		25g 30g
Protein		50g 65g

**INGREDIENTS:** GRADE A FAT FREE MILK, NONFAT MILK SOLIDS, OMEGA-3 OIL BLEND (SUNFLOWER OIL TO HELP MAINTAIN FRESHNESS AND PURIFIED FISH OIL)<sup>3†</sup>, LACTASE ENZYME<sup>†</sup>, VITAMIN A PALMITATE, VITAMIN D<sub>3</sub>.  
<sup>†</sup>INGREDIENT NOT IN REGULAR MILK.

<b>Nutrition Facts</b>		
Serving Size 1 cup (240 mL)		
Servings Per Container 8		
Amount Per Serving		
<b>Calories</b> 110	Calories from Fat 10	
	% Daily Value*	
<b>Total Fat</b> 1g	<b>2%</b>	
Saturated Fat 0g	<b>0%</b>	
Trans Fat 0g		
Polyunsaturated Fat 0g		
Monounsaturated Fat 0g		
<b>Cholesterol</b> 5mg	<b>2%</b>	
<b>Sodium</b> 150mg	<b>6%</b>	
<b>Potassium</b> 480mg	<b>14%</b>	
<b>Total Carbohydrate</b> 14g	<b>5%</b>	
Sugars 14g		
<b>Protein</b> 10g	<b>20%</b>	
Vitamin A 10%	• Calcium 35%	
Vitamin D 25%		
Not a significant source of dietary fiber, vitamin C, and iron.		
* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.		
	Calories	2,000 2,500
Total Fat	Less than	65g 80g
Sat Fat	Less than	20g 25g
Cholesterol	Less than	300mg 300mg
Sodium	Less than	2,400mg 2,400mg
Potassium		3,500mg 3,500mg
Total Carbohydrate		300g 375g
Dietary Fiber		25g 30g
Protein		50g 65g

**INGREDIENTS:** GRADE A FAT FREE MILK, NONFAT MILK SOLIDS, OMEGA-3 OIL BLEND (PURIFIED FISH OIL AND SUNFLOWER OIL - TO HELP MAINTAIN FRESHNESS)<sup>4</sup>, NATURAL PLANT STEROLS, VITAMIN A PALMITATE, VITAMIN D<sub>3</sub>.

22. Smart Balance also intentionally obscures the fact that its Fat Free Enhanced Milks contain Omega-3 fish oils, stating in small print on the milk labels and on its website that the 1g of fat comes from an Omega-3 oil blend.


23. The rationale for burying the fact that the Omega-3s come from fish oil is clear, as nobody wants to drink milk that smells or tastes like fish oil as one internet reviewer succinctly stated “Bleh. I’m not sure if I got a bad batch or what, but Smart Balance milk strongly tastes and smells like the fish oil (omega-3 rolls eyes) they put in it. ./ I was afraid to try it again.” <http://steepster.com/discuss/465-smart-balance-milk>

24. Compounding the confusing and misleading labeling of Defendant’s Fat Free Enhanced Milks as “Fat Free” (when they in fact contain 1 gram of fat per serving), is the fact that at least one of Smart Balance’s competitors markets and sells fat free milk with Omega-3 that is indeed fat free.

25. Horizon markets and sells “Fat-Free Milk plus DHA Omega-3” with the below image prominently displayed on Horizon’s website.



26. However, unlike Smart Balance’s Fat Free Enhanced Milks, the nutritional facts for Horizon’s Fat Free Milk with DHA Omega-3 reflect that the milk is indeed “Fat Free” as depicted below.

 <b>Nutritional Information</b>			
Serving Size 1 cup (240mL)			
Servings Per Container 8			
<b>Amount Per Serving</b>			
Calories 100		Calories from Fat 0	
% Daily Value *			
<b>Total Fat</b> 0g	0%	<b>Vitamin A</b> 10%	<b>Vitamin C</b> 10%
Saturated Fat 0g	0%	Calcium 30%	Iron 0%
Trans Fat 0g		Vitamin D 25%	Phosphorus 25%
Polyunsaturated Fat 0g		Magnesium 6%	
Monounsaturated Fat 0g		Calories 2,000 2,500	
<b>Cholesterol</b> 5mg	2%	Total Fat	Less than 65g 80g
<b>Sodium</b> 150mg	6%	Sat Fat	Less than 20g 25g
<b>Potassium</b> 460mg	15%	Cholesterol	Less than 2,400mg 300mg
<b>Total Carbohydrate</b> 14g	5%	Sodium	Less than 300mg 2,400mg
Dietary Fiber 0g	0%	Total Carbohydrates	Less than 300g 375g
Sugars 12g		Dietary Fiber	25g 25g
<b>Protein</b> 9g		Calories per gram:	
		Fat 9	
		Carbohydrates 4	
		Protein 4	
* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.			

**Ingredients**

Organic Grade A Nonfat Milk, Organic Grade A Buttermilk\*, DHA Algal Oil+, Ascorbic Acid (Vitamin C)\*, Tocopherols (Vitamin E)\*, Vitamin A Palmitate, Vitamin D3.

\*Ingredient not in regular fat free milk

+Adds a trivial amount of fat

27. A reasonable consumer would therefore be misled by Smart Balance's labeling of its Fat Free Enhanced Milks.

28. As depicted above, Smart Balance's Fat Free Enhanced Milks include claims that the products are "Fat Free," despite the fact that the milks contain 1 gram of fat per serving, intentionally misleading and confusing consumers.

29. "Fat Free" is a nutrient content claim regulated by the FDCA. See 21 U.S.C. § 343(r)(1); 21 C.F.R. § 101.62(b).

30. By labeling its enhanced milks as "Fat Free," Defendant is violating 21 C.F.R. § 101.62 which states:

The terms "fat free," "free of fat," "no fat," "zero fat," "without fat," "negligible source of fat," or "dietarily insignificant source of fat" or, in the case of milk products, "skim" may be used on the label or in labeling of foods, provided that:

- (i) The food contains less than 0.5 gram (g) of fat per reference amount customarily consumed and per labeled serving or, in the case of a meal product or main dish product, less than 0.5 g of fat per labeled serving; and
- (ii) The food contains no added ingredient that is a fat or is generally understood by consumers to contain fat unless the listing of the ingredient in the ingredient statement is followed by an asterisk that refers to the statement below the list of ingredients, which states "adds a trivial amount of fat," "adds a negligible amount of fat," or "adds a dietarily insignificant amount of fat;" and
- (iii) As required in § 101.13(e)(2), if the food meets these conditions without the benefit of special processing, alteration, formulation, or reformulation to lower fat content, it is labeled to disclose that fat is not usually present in the food (e.g., "broccoli, a fat free food").

31. Because Smart Balance's Fat Free Enhanced Milks contain 1 gram of fat, any statements that the milks are "Fat Free" violates 21 C.F.R. § 101.62(b).

32. Smart Balance's violations of the law were not mere technicalities.

33. The FDCA deems the labeling of a food "mislabeling if it fails to reveal facts that are: (1) Material in light of other representations made or suggested by statement, word, design, device or any combination thereof; or (2) Material with respect to consequences which may result from use of the article under . . . conditions of use as are customary and usual." 21 C.F.R. § 1.21.

34. Furthermore, the FDCA prohibits the distribution and sale of misbranded foods and provides that a "food shall be deemed to be misbranded . . . [if] its labeling is false or misleading in any particular . . ." 21 U.S.C. §§ 331, 343(a).

35. In light of the foregoing, reasonable consumers, including Ms. Stewart and other members of the Class, were and are, likely to be deceived by Smart Balance's advertising and marketing practices as detailed herein.

36. A comparable product fully compliant with the law would have appeared substantially different in that it would not have been able to advertise itself as "Fat Free" when in fact it was not.

37. When purchasing Defendant's Fat Free Enhanced Milks, Ms. Stewart was seeking fat free milk that maintained the rich and creamy characteristics of 2% milk or whole milk for herself and her household.

38. Like other members of the Class, Ms. Stewart purchased Smart Balance's Fat Free Enhanced Milks believing them to have the qualities she sought (free of fat),

based on the unlawful and deceptive misrepresentations of Smart Balance.

39. Instead of receiving products that have the advantages inherent in being “Fat Free,” Plaintiff and members of the Class received a product containing 1 gram of fat per serving.

40. Smart Balance’s Fat Free Enhanced Milks were worth less than what Plaintiff and members of the Class paid for them and Plaintiff and members of the Class lost monies as a result of Smart Balance’s deception in that they did not receive what they paid for.

41. Were it not for Defendants’ unfair and deceptive practices, Plaintiff and the Class would not have purchased Smart Balance’s Fat Free Enhanced Milks, or they would have purchased alternative milk that was actually fat free at a lower price.

42. Accordingly, Plaintiff and members of the Class suffered an ascertainable loss as a result of Smart Balance’s deceptive conduct.

### **CLASS ALLEGATIONS**

43. Plaintiff brings this action on her own behalf and additionally, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of a nationwide class of all persons who purchased Smart Balance’s Fat Free Enhanced Milks (the “Class”). Excluded from the Class is Defendant; any parent, subsidiary, or affiliate of Defendant; any entity in which Defendant has or had a controlling interest, or which Defendants otherwise control or controlled; and any officer, director, employee, legal representative, predecessor, successor, or assignee of Defendant.

44. This action is brought as a class action for the following reasons:

a. The Class consists of hundreds of thousands of persons and is therefore so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

b. There are questions of law or fact common to the Class that predominate over any questions affecting only individual members, including:

i. whether Defendant's labeling, advertising, marketing, promotion, and sale of its Fat Free Enhanced Milks is false, fraudulent, deceptive, or misleading;

ii. whether Defendant's actions constitute violations of the New Jersey Consumer Fraud Act;

iii. whether Defendant's actions constitute violations of the FDCA and 21 C.F.R. §§ 101 et seq.;

iv. whether Defendant is being unjustly enriched at the expense of consumers in connection with the marketing, advertising, promotion, distribution, and sale of its Fat Free Enhanced Milks;

v. whether Defendant has breached warranties made to the consuming public about its Fat Free Enhanced Milks;

vi. whether members of the Class have sustained damages and, if so, the proper measure thereof;

vii. whether Defendant should be enjoined from the continued mis-labeling, marketing, advertising, promotion, distribution, and sale of its Fat Free Enhanced Milks as "Fat Free" when they are not.

c. The claims asserted by Plaintiff are typical of the claims of the members of the Class as she purchased Defendant's Fat Free Enhanced Milks based on Smart Balance's material misstatements described herein and sustained damages as a result of Smart Balance's conduct;

d. Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff has no interests antagonistic to those of other class members. Plaintiff is committed to the vigorous prosecution of this action and has retained attorneys experienced in class and complex litigation. Plaintiff's counsel understand the duties imposed upon lead counsel in consumer fraud class actions in federal court, and have proven adept at all phases of such litigation, from discovery and motion practice to trial and appeal or settlement;

e. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, for at least the following reasons:

i. Absent a class action, Class members as a practical matter will be unable to obtain redress, Defendant's violations of its legal obligations will continue without remedy, additional consumers and purchasers will be harmed, and Defendant will continue to retain its ill-gotten gains;

ii. It would be a substantial hardship for most individual members of the Class if they were forced to prosecute individual actions;

iii. When the liability of Defendant has been adjudicated, the Court will be able to determine the claims of all members of the Class;



iv. A class action will permit an orderly and expeditious administration of Class claims, foster economies of time, effort, and expense and ensure uniformity of decisions; and

v. The lawsuit presents no difficulties that would impede its management by the Court as a class action;

f. Defendant has acted on grounds generally applicable to Class members, making class-wide monetary and injunctive relief appropriate;

g. The prosecution of separate actions by individual members of the Class would create a risk of incompatible standards of conduct for Defendant and of inconsistent or varying adjudications for all parties; and

h. Defendant's violations of the New Jersey Consumer Fraud Act, are applicable to all members of the Class as Defendant created and effectuated in New Jersey, the misleading statements described herein and maintains its principal place of business in New Jersey.

**FIRST CAUSE OF ACTION**  
**(Violation of New Jersey Consumer Fraud Act, N.J.S.A. 56: 8-1 et seq.)**

45. Plaintiff repeats and re-alleges the allegations contained in Paragraphs 1-44 above as if fully set forth herein.

46. The Consumer Fraud Act prohibits, *inter alia*:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale or advertisement of any merchandise. . . .

N.J.S.A. § 56:8-2.

47. Defendant, in its capacity as marketer, advertiser, promoter, distributor, and seller of Fat Free Enhanced Milks, is a “person” as defined in the Consumer Fraud Act. N.J.S.A. § 56:8-1(d).

48. Smart Balance’s Fat Free Enhanced Milks constitute “merchandise” within the meaning of Consumer Fraud Act § 56:8-1(c).

49. Defendant’s misrepresentations and false, deceptive, and misleading statements with respect to its Fat Free Enhanced Milks, as described above, constitute affirmative misrepresentations in connection with the manufacture, marketing, advertising, promotion, distribution, and sale of Smart Balance’s Fat Free Enhanced Milks, in violation of the Consumer Fraud Act.

50. Defendant’s false, deceptive, and misleading statements would have been material to any potential consumer’s decision to purchase or consume Smart Balance’s Fat Free Enhanced Milks.

51. Moreover, Defendant made such false, deceptive, and misleading statements, about its Fat Free Enhanced Milks with the intent that others rely upon such statements.

52. Plaintiff and the other members of the Class purchased Smart Balance’s Fat Free Enhanced Milks for personal use and suffered ascertainable loss as a direct and proximate result of Defendant’s actions in violation of the Consumer Fraud Act.

53. As a consequence of Defendant’s wrongful actions, Plaintiff and the other

members of the Class suffered an ascertainable loss of monies, including but not necessarily limited to the purchase price of Smart Balance's Fat Free Enhanced Milks that they purchased, the amount of such loss to be determined at trial.

54. Smart Balance's conduct is further "unlawful" because it violated the FDCA and the Code of Federal Regulations on Food and Drugs.

55. By reason of the foregoing, Defendant is liable to Plaintiff and the other members of the Class for trebled compensatory damages -- including but not limited to payment of a sum equal to treble the amount of a refund of all monies acquired by reason of Defendant's marketing, advertising, promotion, distribution, or sale of Smart Balance's Fat Free Enhanced Milks -- plus reasonable attorneys' fees, filing fees, and costs of suit. N.J.S.A. §§ 56:8-2.11, 8-2.12, 8-19.

56. Defendant's conduct was intentional, wanton, willful, malicious, and in blatant disregard of, or grossly negligent and reckless with respect to, the life, health, safety, and well-being of Plaintiff and the other members of the Class. Defendant is therefore additionally liable for punitive damages, in an amount to be determined at trial.

**SECOND CAUSE OF ACTION**  
**(Unjust Enrichment)**

57. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 - 56 above as if fully set forth herein.

58. By engaging in the conduct described above, Defendant has unjustly enriched itself at the expense of Plaintiff and the other members of the Class and is required, in equity and good conscience, to fully compensate them for the damages that

they have suffered as a result of Defendant's actions.

59. By reason of the foregoing, Defendant is liable to Plaintiff and the other members of the Class for the damages that they have suffered as a result of Defendant's actions, the amount of such damages to be determined at trial.

**THIRD CAUSE OF ACTION**  
**(Breach of Warranty)**

60. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 - 59 above as if fully set forth herein.

61. Defendant breached the express warranty on the label of, and/or in the advertising for, its Fat Free Enhanced Milks by providing milks containing 1 gram of fat per serving.

62. Defendant made such express warranty knowing the purpose for which its Fat Free Enhanced Milks were to be used, and advocating its use for such purpose.

63. Defendant made such express warranty as part of its marketing campaign; in advertisements in print, on the Internet, and in other media; and on the label of the product.

64. Smart Balance's Fat Free Enhanced Milks do not conform to the express warranty made by Defendant and do not conform to Defendant's promises, descriptions, or affirmations of fact. Smart Balance's Fat Free Enhanced Milks therefore were not adequately packaged, labeled, sold, promoted, or fit for the ordinary purposes for which they were used.

65. Plaintiff and the other members of the Class purchased Smart Balance's

Fat Free Enhanced Milks based upon and in reliance upon such false warranty.

66. As a consequence of the foregoing, Defendant is liable to Plaintiff and the other members of the Class for the damages incurred as a result of Defendant's actions, including but not necessarily limited to the purchase price of Smart Balance's Fat Free Enhanced Milks that they purchased, the amount of such damages to be determined at trial.

67. Defendant's conduct was intentional, wanton, willful, malicious, and in blatant disregard of, or grossly negligent and reckless with respect to, the life, health, safety, and well-being of plaintiff and the other members of the Class. Defendant is therefore additionally liable for punitive damages, in an amount to be determined at trial.

**FOURTH CAUSE OF ACTION**  
**(Injunctive Relief)**

68. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 – 67 above as if fully set forth herein.

69. Given Defendant's wrongful actions as set forth above, which are ongoing and continuing to deceive and harm purchasers and users of Smart Balance's Fat Free Enhanced Milks, the Court should (a) enjoin Defendant from continuing to market, advertise, promote, distribute, or sell its Fat Free Enhanced Milks through use of any misrepresentations concerning the fat content of the products and (b) order Defendant to take all steps necessary to remove the offending milk cartons from supermarket shelves.

70. Unless Defendant's conduct is enjoined, consumers will continue to be

deceived into believing that they are buying fat free milk, when in fact they are buying milk containing 1 gram of fat per serving.

71. Such harm will continue unless and until injunctive relief is granted.

**PRAYER FOR RELIEF**

WHEREFORE, plaintiff respectfully requests that the Court should enter judgment against Defendants, as follows:

A. Determining that this action is properly brought as a class action and certifying Plaintiff as representative of the Class and her counsel as Class counsel;

B. On Plaintiff's First Cause of Action, awarding against Defendant, damages in the amount of three times the loss of monies that Plaintiff and the other members of the Class suffered -- including but not limited to payment of a sum equal to treble the amount of a refund of all monies acquired by reason of Defendant's marketing, advertising, promotion, distribution, or sale of its Fat Free Enhanced Milks, the amount of such trebled loss to be determined at trial -- plus reasonable attorneys' fees, filing fees, and reasonable costs of suit, plus punitive damages in an amount to be determined at trial;

C. On Plaintiff's Second Cause of Action, awarding against Defendant, the damages that plaintiff and the other members of the Class suffered as a result of Defendant's actions, the amount of such damages to be determined at trial, plus punitive damages in an amount to be determined at trial;

D. On Plaintiff's Third Cause of Action, awarding against Defendant, the damages that Plaintiff and the other members of the Class suffered as a result of

Defendant's actions, the amount of such damages to be determined at trial, plus punitive damages in an amount to be determined at trial;

E. On Plaintiff's Fourth Cause of Action, (a) enjoining Defendant from continuing to market, advertise, promote, distribute, or sell its Smart Balance's Fat Free Enhanced Milks through use of any misrepresentations concerning the fat content of the products and (b) ordering Defendant to take all steps necessary to remove the offending milk cartons from supermarket shelves;

F. Ordering Defendant to disgorge all profits earned in connection with the sale of its Fat Free Enhanced Milks;

G. Awarding Plaintiff and the other members of the Class such other and further relief as this Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a trial by jury on all claims in this action.

**CERTIFICATION OF NOTICE PURSUANT TO N.J.S.A. 56:8-20**

Pursuant to N.J.S.A. 56:8-20, a copy of this original Complaint will be furnished to the Office of the Attorney General of the State of New Jersey, within ten days of the filing of this action.

Dated: October 19, 2011  
White Plains, New York

MEISELMAN, DENLEA, PACKMAN,  
CARTON & EBERZ P.C.

By: s/ Barry B. Cepelewicz  
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