UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

YAACOV SILBERSTEIN, individually and on behalf of all others similarly situated, Plaintiff, v. WHOLE FOODS MARKET GROUP, INC., and JOHN DOES 1-50, Defendants.	CASE NO. **NOTICE OF REMOVAL**

Defendant Whole Foods Market Group, Inc. ("WFM Group"), by and through its undersigned counsel, hereby removes the above-captioned action, entitled *Yaacov Silberstein v. Whole Foods Market Group, Inc.*, *et al.,* Index No. 608482/2024, from the Supreme Court of the State of New York, County of Nassau to the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. §§ 1332, 1446 and 1453. Removal is warranted under 28 U.S.C. § 1453 because this is a putative class action with minimal diversity and an amount in controversy that exceeds the sum or value of $5,000,000, exclusive of interests and costs. The following is a short, plain statement of the grounds for removal provided pursuant to 28 U.S.C. § 1446(a).

I. DESCRIPTION OF THE ACTION

1. On May 14, 2024, Yaacov Silberstein ("Plaintiff") filed a Class Action Complaint, on behalf of himself and a putative class of all persons in the State of New York, in the Supreme Court of New York, County of Nassau, Index No. 608482/2024 (the "State Court Action"). A copy of the Complaint is attached as part of **Exhibit 1**. The Complaint alleges that WFM Group engaged in consumer deception in violation of New York's General Business Law ("GBL") sections 349 and 350 by failing to clearly and conspicuously disclose the bottle deposit fee that applies to in-store purchases of certain Ronnybrook Farm Dairy products (the "Products").

2. Plaintiff alleges that WFM Group uses shelf tags that prominently display in large font the retail price of the Products while concealing the existence and amount of an applicable bottle deposit in much smaller font directly under the retail price. *See* Complaint, ¶¶1, 18. In particular, Plaintiff alleges the placement, description, language, font size and font style of the bottle deposit information on the shelf tag is "designed to, and has the effect of, concealing [the deposit fee] from consumers." *Id.*, ¶25. Plaintiff further alleges that the deceptive nature of WFM Group's in-store pricing practice is confirmed by the fact that WFM Group does not charge a bottle deposit on all Ronnybrook Farm Dairy products sold in-store and does not add a bottle deposit to online sales of the Products. *Id.*, ¶¶27-28, 31-32.

3. Based on these and similar allegations, Plaintiff asserts claims for false and misleading business practices in violation of GBL sections 349 and 350. Plaintiff seeks injunctive relief, monetary damages, including actual, statutory and/or punitive damages, interest, costs, expenses and reasonable attorneys, and any further relief the Court deems just and proper. *See* Complaint at p. 18. Plaintiff seeks this relief on behalf of himself and his putative class of all persons in the State of New York who purchased a Ronnybrook product from Whole Foods Market and were charged a bottle deposit fee from May 4, 2021 to the present. *Id.*, ¶36.

4. As set forth more fully below, this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d), and the action may be removed to this Court pursuant to 28 U.S.C. §§ 1453 and 1446.

II. NOTICE OF REMOVAL IS TIMELY

5. Pursuant to 28 U.S.C. § 1446(b)(1), "[t]he notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based…"

6. WFM Group is the only named defendant in Plaintiff's Complaint. *See* Complaint, ¶¶6-7. On May 17, 2024, Plaintiff served his Complaint on WFM Group through its agent for service of process in New York, New York. *See* Service of Process Transmittal Summary attached as part of **Exhibit 1**. As of the filing of WFM Group's Notice of Removal, Plaintiff has not filed an Affidavit of Service or Return of Summons in the State Court Action. *See* Case Docket attached as part of **Exhibit 2**.

7. Thus, WFM Group's Notice of Removal is timely under 28 U.S.C. § 1446(b)(1) because this Notice of Removal is filed within thirty (30) days after WFM Group was served with Plaintiff's Complaint.

8. The Supreme Court of New York, County of Nassau is located within the Eastern District of New York. Venue, therefore, is proper within the Eastern District of New York pursuant to 28 U.S.C. § 93 and 28 U.S.C. § 1441 because that is the district and division embracing the place where such action is pending.

9. No previous application has been made for the relief requested herein.

III. REMOVAL IS PROPER BECAUSE THIS COURT HAS ORIGINAL SUBJECT MATTER JURISDICTION

10. This Court has original jurisdiction over this case pursuant to 28 U.S.C. § 1332(d) (as amended by the Class Action Fairness Act ("CAFA")) and, therefore, it may be removed to this Court under the provisions of 28 U.S.C. §§ 1453 and 1446.

11. Pursuant to 28 U.S.C. § 1332(d)(2), "[t]he district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interests and costs, and is a class action in which—(A) any member of a class of plaintiffs is a citizen of a State different from any defendant …" 28 U.S.C. § 1332(d)(2). All requirements are satisfied here because Plaintiff has alleged a putative class action in which the aggregate amount in controversy exceeds the sum of $5,000,000, exclusive of interest and costs, and there is diversity of citizenship between Plaintiff Silberstein and WFM Group.[1]

A. The Action Qualifies as a "Class Action" under CAFA

12. CAFA defines the term "class action" to mean "any action filed under Rule 23 of the Federal Rules of Civil Procedure or similar state statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B).

13. Plaintiff brings this action under Article 9 of the New York Civil Practice Law and Rules ("CPLR"), which allows "one or more members of a class [to] sue or be sued as representative parties on behalf of all" when the alleged "class is so numerous that joinder of all members [] is impracticable;" "there are questions of law or fact common to the class which predominate over any questions affecting only individual members;" "the claims or defenses of

[1] WFM Group relies upon the Plaintiff's allegations solely for purposes of assessing eligibility for removal based on CAFA jurisdiction, 28 U.S.C. § 1332(d). WFM Group reserves all rights to challenge these allegations for all other purposes, including, but not limited to, denying that the putative classes are properly defined, that the Plaintiff has standing to assert claims on behalf of the alleged putative classes, and that the claims in this case are proper for class treatment.

the representative parties are typical of the claims or defenses of the class;" "the representative parties will fairly and adequately protect the interest of the class"; and "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." NY CPLR § 901(2022); Complaint, ¶¶38-43. The requirements for class certification under Article 9 parallel those of Federal Rule of Civil Procedure 23. *Compare*, NY CPLR § 901, *et seq*., with Fed. R. Civ. P. 23.

14. CAFA jurisdiction is limited to class actions where the primary defendants are not States, State officials or other governmental entity, and the number of members of all proposed plaintiff classes in the aggregate is 100 or more. *See* 28 U.S.C. § 1332(d)(5)(A)-(B).

15. WFM Group is not a State, State official or other governmental entity. Plaintiff purports to represent a class of "[a]ll persons in the State of New York who purchased a Ronnybrook product from Whole Foods and was charged a bottle deposit fee, between May 4, 2021, through the present. *See* Complaint, ¶36. More than 100 persons have purchased the Products from Whole Foods Market stores located in New York during the three years preceding the filing of this lawsuit. Thus, there are more than 100 putative class members.

B. Diversity of Citizenship

16. "Diversity jurisdiction in a class action depends solely on the citizenship of the named parties." *Reece v. Bank of New York Mellon*, 760 F.3d 771, 777 (8th Cir. 2014), citing *Snyder v. Harris*, 394 U.S. 332, 340, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969) ("[I]f one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant."). Citizenship of the parties is determined by their citizenship at the time the removal notice is filed. *Vera v. Saks & Co.*, 335 F.3d 109, 116 fn.2 (2d Cir. 2003).

17. Plaintiff Silberstein alleges that he is an individual residing in Nassau County, New York and purchased the Products frequently at Whole Foods Market stores, including those

in Nassau County. *See* Complaint, ¶¶5, 10-11. On information and belief, Plaintiff is a citizen of the State of New York.

18. "[A] corporation shall be deemed to be a citizen of every State and foreign state by which is has been incorporated and of the State or foreign state where it has its principal place of business …" 28 U.S.C. § 1332(c)(1); *see also Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010) (holding that a corporation is a citizen of its place of incorporation and its "principal place of business," which is "the actual center of direction, control, and coordination" of the corporation's activities). Plaintiff correctly alleges in his Complaint that WFM Group "is a corporation organized under the laws of the State of Delaware, with its principal place of business in Austin, Texas." *See* Complaint, ¶6. Thus, WFM Group is a citizen of Delaware and Texas. WFM Group is not now, and was not at the time Plaintiff filed his Complaint, a citizen of the State of New York.

19. The presence of unnamed defendants has no bearing on the diversity of citizenship of the parties with respect to removal to federal court. *See* 28 U.S.C. § 1332(c)(1). Thus, this action is between citizens of different states under the definition set forth in 28 US.C. § 1332.

C. Amount in Controversy

20. The general federal rule is that the complaint itself determines the amount in controversy. *See Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 353 (1961). If plaintiff has not alleged a specific damages amount, however, a removing defendant may establish the jurisdictional amount by establishing a "reasonable probability" that the amount in controversy threshold is satisfied. The defendant need only establish the requisite amount in controversy "with 'competent proof' and 'justify [its] allegations by a preponderance of the evidence.'" *United Foods & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Properties Merdien Square, Inc.*, 30 F.3d 298, 305 (2d Cir. 1994) (quoting *McNutt v. General Motors Acceptance Corp. of Indiana*, 299 U.S. 178, 189 (1936)). Defendant may establish these facts

through either the allegations in the complaint or affidavits or other evidence. *See, Mehlenbacher v. Akzo Nobel Salt, Inc.*, 216 F.3d 291, 296 (2d Cir. 2000) (citing *Davenport v. Procter & Gamble Mfg. Co.*, 241 F.2d 511, 514 (2d Cir. 1957)).

21. Under CAFA, the claims of individual class members in a class action are aggregated to determine if the amount in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs. *See* 28 U.S.C. § 1332(d)(6). Moreover, CAFA's legislative history makes clear that Section 1332(d)(6) is to be interpreted expansively. The Senate Committee states:

> . . . if a federal court is uncertain about whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value of $5,000,000,' the court should err in favor of exercising jurisdiction over the case. By the same token, the Committee intends that a matter be subject to federal court jurisdiction under this provision if the value of the matter in litigation exceeds $5,000,000 either from the viewpoint of the plaintiff or the viewpoint of the defendant, and regardless of the type of relief sought (e.g., damages, injunctive relief, or declaratory relief).

S. Rep. No. 109-114, at 42 (2005), as reprinted in 2005 U.S.C.C.A.N. 40.

22. Plaintiff alleges a putative class action by which he seeks to represent "[a]ll persons in the State of New York who purchased a Ronnybrook product from Whole Foods and was charged a bottle deposit fee, between May 4, 2021, and the present." Complaint, ¶36. Plaintiff alleges further that the putative class is so numerous that "their individual joinder is impracticable" and estimates the class to be "at least tens of thousands, if not substantially more." Complaint, ¶38.

23. Plaintiff alleges he, and his putative class, were wrongly charged a two-dollar ($2.00) bottle deposit fee on certain Ronnybrook Farm Dairy products, including Ronnybrook Whole Milk, Chocolate Milk and Half & Half. Complaint, ¶¶13-16. WFM Group has sold more than 172,450 units of these three products at its stores in New York between May 4, 2021 and the present.

24. The Complaint alleges two claims for false and misleading business practices under New York GBL sections 349 and 350. Under GBL section 349(h), a plaintiff may bring an action to recover either his actual damages or fifty dollars, whichever is greater, and the court may award three times Plaintiff's actual damages up to one thousand dollars if it finds the defendant willfully or knowingly violated Section 349. While WFM Group denies violating Section 349 in any way, let alone willfully or knowingly, given the size of the potential class and number of units sold, the claims asserted by Plaintiff could potentially add up to $8.6M or more.

25. Pursuant to GBL section 350-e, a plaintiff may bring an action to recover either his actual damages or five hundred dollars, whichever is greater, and the court may award three times Plaintiff's actual damages up to ten thousand dollars if it finds the defendant willfully or knowingly violated Section 350 or 350-a. While WFM Group denies violating either Section 350 or 350-a in any way, let alone willfully or knowingly, given the size of the potential class and number of units sold, the claims asserted by Plaintiff could potentially add up to $86.2M or more.

26. Although WFM Group concedes no liability on Plaintiff's claims, assuming the allegations to be true for purposes of this notice, Plaintiff's claims place in controversy a sum greater than $5,000,000.00. As such, all requirements for removal under CAFA, 28 U.S.C. § 1332(d), are satisfied and this action is properly removed to this Court.

V. NOTICE OF REMOVAL TO PLAINTIFF AND STATE COURT, AND COPY OF THE COMPLETE FILE FROM THE STATE COURT ACTION.

35. Pursuant to 28 U.S.C. §1446(a), WFM Group has attached a copy of the complete file from the state court. WFM Group has attached the following to this Notice of Removal: Summons, Complaint and Stipulation. *See* Exhibit 1.

38. Pursuant to 28 U.S.C. § 1446(d), written notice of this removal will be provided promptly to Plaintiff and filed with the Supreme Court of New York, County of Nassau. *See* 28 U.S.C. § 1446(d) ("Promptly after the filing of such notice of removal of a civil action the

defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.").

VI. RESERVATION OF RIGHTS

39. This Notice of Removal is filed subject to and with full reservation of all rights and defenses under federal or state law. No admissions are intended hereby as to the propriety of liability or damages with respect to any aspect of this case. Nothing in this Notice of Removal should be taken as an admission that the Plaintiff's allegations are sufficient to state a claim for relief or have any merit, or that the plaintiff or putative class members are entitled to or otherwise may recover any of the amounts described above. WFM Group reserves the right to amend and/or supplement this Notice of Removal.

Dated: June 14, 2024

Respectfully submitted:

Dean Boyer

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Attorneys for Whole Foods Market Group, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2024, I caused a copy of the foregoing Notice of Removal and supporting documentation to be electronically filed with the Clerk of Court, United States District Court for the Eastern District of New York, within the time and manner prescribed by the rules of Court by using the ECF system. Notice of this filing will be sent to all parties via FedEx overnight delivery and e-mail to the following recipients:

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EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

YAACOV SILBERSTEIN, individually and on behalf of all others similarly situated, Plaintiff, - against - WHOLE FOODS MARKET GROUP, INC, and JOHN DOES 1-50, Defendants,	Index No.: **SUMMONS** Plaintiff designates Nassau County as the place of trial. Venue is based on Plaintiff's county of residence.

TO THE PERSONS NAMED AS DEFENDANTS ABOVE:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty (20) days after service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York).

YOU ARE HEREBY NOTIFIED THAT should you fail to answer or appear, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: May 14, 2024
Westlake Village, CA

Counsel for Plaintiff Yaacov Silberstein and the Proposed Class

THE JACOBS LAW FIRM, PC

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

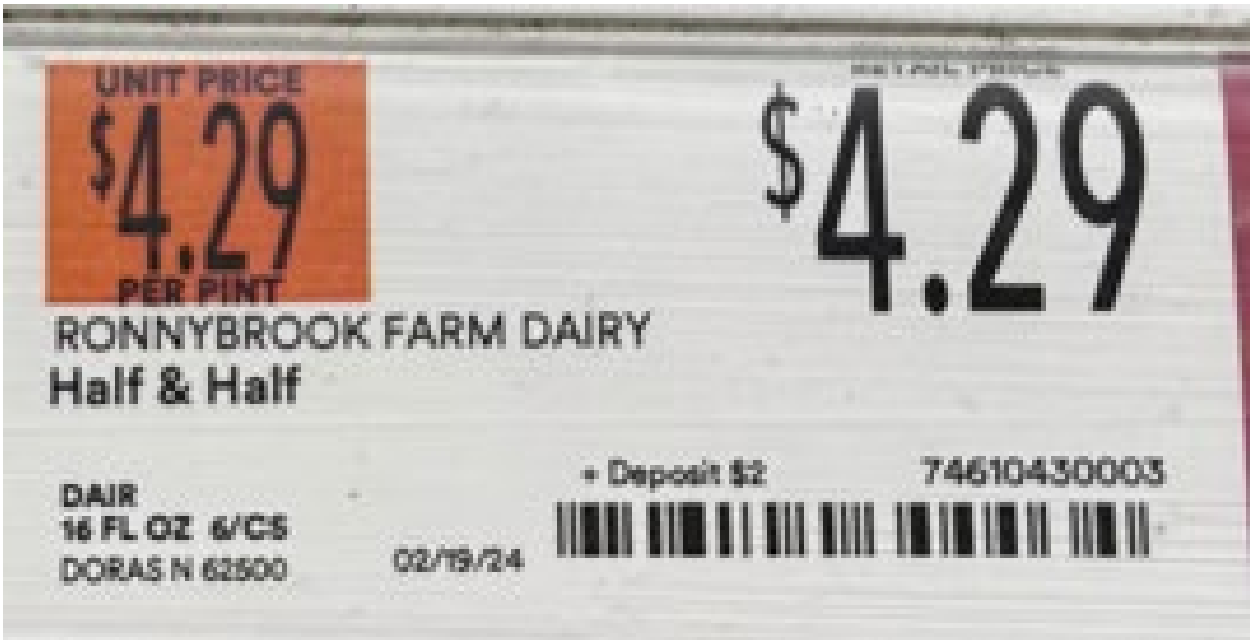
YAACOV SILBERSTEIN, individually and on behalf of all others similarly situated, Plaintiff, - against - WHOLE FOODS MARKET GROUP, INC, and JOHN DOES 1-50, Defendants,	Index No.: _____ **CLASS ACTION COMPLAINT** **JURY TRIAL DEMANDED** 1. Violation of NY GBL § 349 2. Violation of NY GBL § 350

Plaintiff Yaacov Silberstein ("Mr. Silberstein" or "Plaintiff"), individually and on behalf of all others similarly situated, by his undersigned counsel, for their class action complaint against defendant Whole Foods Market Group, Inc. ("Whole Foods" or "Defendant"), alleges, upon information and belief, expect as to the allegations that pertain to Mr. Silberstein, which are alleged upon personal knowledge, as follows:

PRELIMINARY STATEMENT

1. This case is about Whole Foods's efforts to deceive and mislead consumers by hiding the true price of products it sells. Whole Foods accomplished this deception in various ways, including by prominently displaying product "retail prices" in large font on its price labels, while effectively concealing additional "deposit" fees. Indeed, as the Whole Foods's price label in **Figure 1** below shows, the "$2" deposit fee is so small that it could practically fit inside the decimal point between the dollar and cent figures of the product's "retail price."

FIGURE 1



2. Mr. Silberstein has shopped at Whole Foods—a large, national grocery store chain—on numerous occasions in recent years. On many of these occasions, Mr. Silberstein has purchased Ronnybrook Farm Dairy ("Ronnybrook") products.

3. After a recent visit to a Whole Foods in Nassau County, New York, Mr. Silberstein reviewed his purchase receipt and was shocked to discover that Whole Foods charged him an additional $6.00 in "container deposit" fees on three Ronnybrook products, which increased the total cost of these products by nearly 50%.

4. Mr. Silberstein brings this class action complaint to hold Whole Foods accountable for its deceptive and misleading conduct.

PARTIES

5. Mr. Silberstein is an individual residing in Nassau County, New York.

6. Whole Foods is a corporation organized under the laws of Delaware, with its principal place of business in Austin, Texas.

7. Mr. Silberstein does not know the true names and/or capacities of the defendants sued herein as DOES 1 through 50, and for that reason sues those defendants under fictitious names. Mr. Silberstein will seek leave to amend this complaint when the true names and capacities of these defendants have been ascertained. Mr. Silberstein alleges that these defendants are responsible in whole or in part for causing the harms alleged in this complaint.

JURISDICTION AND VENUE

8. This Court has jurisdiction over Whole Foods pursuant to CPLR § 302(a)(1) because Whole Foods transacts business within New York and contracts to supply goods within New York. The Court also has jurisdiction pursuant to CPLR § 302(a)(2) because Whole Foods has committed tortious acts within New York.

9. Venue is proper in this the Court pursuant to CPLR §§ 503(a) because Mr. Silberstein resides in Nassau County.

FACTS

10. As noted above, Mr. Silberstein has shopped at Whole Foods grocery stores—including in Nassau County, New York—on many occasions in recent years.

11. During these visits, Mr. Silberstein frequently purchased Ronnybrook products—including, Ronnybrook Creamline™ Milk, Ronnybrook Homogenized Milk, and Ronnybrook Half & Half

12. Until around March 2024, Mr. Silberstein was entirely unaware that the prices Whole Foods displayed for certain Ronnybrook products were significantly lower than the actual price Whole Foods charged.

13. Specifically, on March 1, 2024, Mr. Silberstein purchased three Ronnybrook products from a Whole Foods store in Manhasset, New York: (1) one pint of Ronnybrook Whole Milk; (2) one pint of Ronnybrook Chocolate Milk; and (3) one pint of Ronnybrook Half & Half.

14. Whole Foods prominently displayed the following prices for these items on the labels appearing on the shelves near them: (1) $3.69 for the pint of Ronnybrook Whole Milk; (2) $4.29 for the pint of Ronnybrook Chocolate Milk; and (3) $4.29 for the pint of Ronnybrook Half & Half.

15. Mr. Silberstein relied on these prices displayed on these consumer-facing labels when he chose to buy the Ronnybrook products from Whole Foods. He did not expect—nor would any reasonable consumer in Mr. Silberstein's position have suspected—that Whole Foods would charge an additional $2.00 for each product.

16. After paying for the Ronnybrook products, Mr. Silberstein reviewed his receipt and was shocked to see that Whole Foods charged him a "CONTAINER DEPOSIT" of $2.00 for each of the Ronnybrook products. **Figure 2** below contains the receipt from Mr. Silberstein's purchase of Ronnybrook products from the Manhasset Whole Foods on March 1, 2024.

FIGURE 2

WHOLE FOODS
MARKET

Manhasset MHS 516-869-8900
2101 Northern Blvd
Manhasset, NY 11030 3528

RBF CREAMLINE 1 MLK	$3.69 F
CONTAINER DEPOSIT	$2.00
RBF CREAMLINE C MLK	$4.29 F
CONTAINER DEPOSIT	$2.00
RBF HALF AND HALF	$4.29 F
CONTAINER DEPOSIT	$2.00
Subtotal:	$18.27
Net Sales:	$18.27
Total:	**$18.27**
Sold Items:	3
Paid:	
American Exp *0113	$18.27
Chip Card:AMERICAN EXPRESS	
Chip Card AID:A00000002501	

RETURNS: All returns require a receipt.
No returns on items purchased after
90 days. For additional information
please visit wfm.com/returns.
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Earn 5% back at Whole Foods Market
with Prime Visa
and an eligible Prime membership
Learn more at amazon.com/wfmvisa
****

HOW WAS YOUR SHOPPING EXPERIENCE?
Go to: http://www.wfm.com/feedback
ENTER FOR A CHANCE TO WIN A $250 GIFT CARD
207 44376 03/01/2024 02:24 PM

630110063207443760301202 40
K6BA8A3E4X

Thanks for shopping at Whole Foods Market
WholeFoodsMarket.com

17. In relative terms, this hidden $6.00 fee was no small upcharge. The retail price of the Ronnybrook products Mr. Silberstein purchased ranged totaled $12.27. Thus, the hidden $6.00 fee raised the total cost of the products from $12.27 to $18.27—an increase of nearly 50%. Moreover, the $2.00 upcharge on the $3.69 bottle of Ronnybrook Creamline™ Milk constituted a price increase of ***more than 50%*** for that particular product.

18. After seeing the deposit fees on the purchase receipt, Mr. Silberstein went back to the Whole Foods store to review the price labels for the Ronnybrook products. Mr. Silberstein saw that, for each of the Ronnybrook products he purchased, Whole Foods prominently displayed a price of each in large clear font on the price label. But upon further investigation, he also noticed, for the first time, the notation "+ Deposit $2" appearing in tiny font just above the barcode at the bottom of the label.

19. **Figure 3** below contains a photograph of Ronnybrook Half & Half—and the price label appearing below it—from the Manhasset Whole Foods store, which Mr. Silberstein took after discovering the deposit fees on his purchase receipt.

FIGURE 3


HORIZON
ORGANIC
HALF
AND
HALF
$7.99
PER PINT
RETAIL PRICE
$7.99
RONNYBROOK FARM DAIRY
Heavy Cream
DAIR
16 FL OZ 6/CS
DORAS N 62501
02/19/24
+ Deposit $2
74610430001
UNIT PRICE
$4.29
PER PINT
$4.29
RONNYBROOK FARM DAIRY
Half & Half
DAIR
16 FL OZ 6/CS
DORAS N 62500
02/19/24
+ Deposit $2
74610430003
Horizon O
Organic

20. While this image alone is sufficient to demonstrate the deceptive and misleading nature of Whole Foods's label, an examination of the label's constituent parts reveals just how deceptive and misleading it actually is.

21. The top half of the label for the Ronnybrook Half & Half displays the single most important and relevant piece of information about the product: its price. In fact, the "$4.29" price is displayed not once, but twice, on the label. A "retail price" of "$4.29" is prominently displayed in large font in the top right corner of the label. Notably, the font size for the "$4.29" retail price is larger than the font size for any other text on the label. In addition, a "unit price" of "$4.29" appears in large black font displayed against an orange background on the top left of the label. The "$4.29" unit price, while slightly smaller than the "$4.29" retail price, is still significantly larger than any other text on the label.

22. The middle portion of the label includes two other pieces of information of relevance to a consumer: the brand name and product type. Specifically, the brand name "RONNNYBROOK FARM DAIRY" appears just below the unit price in medium-sized, capitalized text, and the product type "Half & Half" appears in medium-sized, emboldened text just below the brand name. While reasonable consumers might be able to discern the brand name and product type by simply looking at the product itself, the inclusion of the brand name and product type on the lable links that specific product to the price appearing immediately above it.

23. Unlike the upper portions of the label, the bottom third of the label contains numerous items which—while of potential significance to Whole Foods—has no significance whatsoever to any reasonable consumer, specifically: (1) a bar code; (2) an 11-digit number above the barcode; (3) the capitalized letters "DAIR," presumably a reference to an internal

product category; (4) the date "02/19/24," which is unaccompanied by any descriptor (for example, the "shelf placement date" or "product expiration date") that would convey any significance to a consumer; (5) the product volume "16 FL OZ," which, a consumer could discern from labeling on the product itself; (6) the notation "6/CS," which has no discernable significance to a consumer; and (7) the notation "DORAS N 62500," which, again, has no discernable significance to a consumer.

24. Mixed in with these seven meaningless features in the bottom third of the label is another notation—*i.e.*, "+ Deposit $2" (the "Deposit Fee")—which is highly and indisputable relevant to the consumer because the Deposit Fee increases the total price of the Ronnybrook Half & Half by nearly 50%.

25. Despite the significance of the Deposit Fee to consumers, everything about its presentation is designed to, and has the effect of, concealing it from consumers. For example:

a. **Font Size:** The Deposit Fee font is tiny—much smaller than the large-sized font used to display both the "retail price" and the "unit price" and the medium-sized font used to display the brand name and product type. Indeed, as noted above, the Deposit Fee font is so small that the "$2" figure could practically fit within the decimal place between the dollar and cent figures in the "retail price."

b. **Placement:** The Deposit Fee is buried on the bottom third of the label, mixed in with seven other features (described above) that have no consumer significance.

c. **Font Style:** In addition to the tiny font size, the Deposit Fee is the only text on the label that contains letters which are both unemboldened and uncapitalized.

d. **Description:** The manner in which the Deposit Fee is described further ensures that no reasonable consumer—however unrushed and eagle-eyed—would understand its

significance. Instead of using plain English to disclose this fee (for example, "$2.00 Deposit Fee to be Added"), Whole Foods opted for a confusing mixture of mixture of symbols and words—specifically, a "+" sign followed by the word "Deposit" (unaccompanied by the word "fee" or "payment") and a partial price figure (*i.e.*, a dollar amount that does not include cent digits).

26. While the label alone would be sufficient to deceive and mislead any reasonable consumer about the true price of these Ronnybrook products, Whole Foods priced other Ronnybrook products in a manner that increased consumer confusion.

27. For example, Mr. Silberstein discovered that Whole Foods does not charge a Deposit Fee on all Ronnybrook products it sells. **Figure 4** below contains an image from a Whole Foods grocery store of a price label for Ronnybrook 2% Milk.

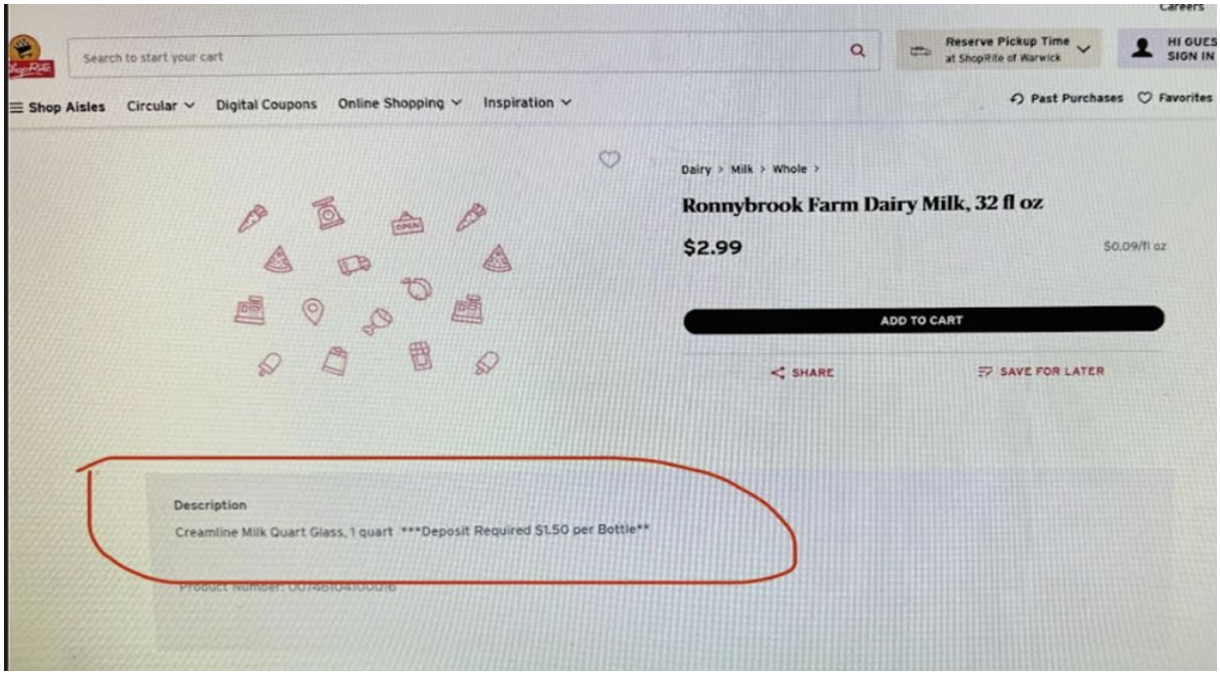
28. Despite the fact that the Ronnybrook 2% Milk comes in a bottle similar in all material respects to Ronnybrook Half & Half, the Ronnybrook 2% Milk label does not display the notation "+ Deposit $2." Thus, a reasonable consumer with a history of purchasing Ronnybrook products (like Ronnybrook 2% Milk) for which Whole Foods does not charge consumers a deposit fee would have even less reason to expect or suspect that other Ronnybrook products would carry this hidden upcharge.

FIGURE 4


RONNYBROOK FARM • DAIRY
THE RONNYBROOK STORY
www.ronnybrook.com
Return Bottle For Deposit
LOCAL
$1.45
$5.79
RONNYBROOK FARM DAIRY
2% Reduced Fat Milk
new
07/01/24
PPORTS GUT HEALTH
• LACTOSE FREE

29. Fee disclosures made by Whole Foods's competition underscores the deceptive and misleading nature of Whole Foods's labeling practices. **Figure 5** below contains a screenshot from the online store of ShopRite, a large grocery store chain and one of Whole Foods's competitors.

FIGURE 5



30. As this image demonstrates, unlike Whole Foods, ShopRite conspicuously and unambiguously disclosed that the price of Ronnybrook Creamline Milk includes a $1.50 deposit, by including following statement, in normal-sized font, under the product description: "***Deposit Required $1.50 per Bottle**". ShopRite even includes asterisks on both ends of this disclosure statement, which appear intended to draw the consumers eye to the disclosure.

31. Whole Foods's online sales of Ronnybrook products also underscore the deceptive and misleading nature of its in-store pricing practices. For example, Whole Foods

does not add a Deposit Fee to certain Ronnybrook products sold online, despite the fact that it adds the Deposit Fee to these same products sold in-store.

32. Whole Foods engages in these disparate pricing practices because it is substantially more difficult to impose hidden fees on online purchases than in-store purchases. Online consumers are presented with an itemized price list on their computer screen or mobile device immediately ***before*** placing an order, which is often located adjacent to the "order" button. Instore customers, on the other hand, do not receive an itemized receipt of their purchase, if at all, until ***after*** completing the purchase.

33. Instead of relying on the post-purchase receipt, reasonable consumers, like Mr. Silberstein, rely on the prices displayed on labels appearing next to products within the store. And for all the reasons set forth above, the prices displayed on consumer-facing Ronnybook labels were materially deceptive and misleading.

34. Mr. Silberstein and other Whole Foods consumers have unknowingly purchased Ronnybrook products at inflated prices based on Whole Foods's deceptive and misleading labeling practices.

35. Mr. Silberstein and other Whole Foods consumers would not have purchased these products if Whole Foods had not deceived and misled them regarding the price.

CLASS ALLEGATIONS

36. Plaintiff brings this class action pursuant to Article 9 of the New York Civil Practice Law and Rules ("CPLR") on behalf of the following Class:

The Class: All persons in the State of New York who purchased a Ronnybrook product from Whole Foods and was charged a bottle deposit fee, between May 4, 2021, through the present (the "Class Period").

37. Plaintiff and Class members reserve the right to amend the Class definitions as discovery proceeds and to conform to the evidence. Excluded from the Class are: (a) any Judge presiding over this action and members of their families; (b) Whole Foods and its subsidiaries and affiliates; and (c) all persons who properly execute and file a timely request for exclusion from the Class.

38. **Numerosity.** Members of the Class are so numerous that their individual joinder is impracticable. Moreover, the Class is composed of an easily ascertainable, self-identifying set of individuals and entities who purchased Ronnybrook products from Whole Foods's brick-and-mortar stores. The precise number of Class members can be ascertained through discovery, which includes Defendant's records. Plaintiff estimates the number of Class members to be in at least the tens of thousands, if not substantially more. The disposition of their claims through a class action will benefit both the parties and the Court.

39. **Typicality.** Plaintiff's claims are typical of those of other members of the Class, all of whom have suffered similar harm due to Defendant's conduct as described in this Complaint. All Class members have been deceived and misled (or were likely to have been deceived and misled) by Whole Foods's false and deceptive pricing scheme, as described in this Complaint. Plaintiff advances the same claims and legal theories on behalf of himself and all Class members.

40. **Existence and Predominance of Common Questions of Law or Fact.** Common questions of law and fact exist as to all members of the Class that predominate over any questions affecting only individual members of the Class. These common legal and factual questions, which do not vary among members of the Class, and which may be determined without reference to the individual circumstances of any member of the Class, include, but are not limited to, the following:

a. whether, during the Class Period, Whole Foods advertised the price of the Ronnybrook products in the manner alleged herein;

b. whether Whole Foods's conduct was consumer-oriented;

c. whether Whole Foods's conduct was materially deceptive and misleading;

d. whether the Class suffered injury as a result of Whole Foods's deceptive and misleading acts or practices;

e. whether Whole Foods's conduct was likely to deceive or mislead a reasonable consumer acting reasonably under the circumstances;

f. whether Whole Foods violated NY GBL § 349.

g. whether Whole Foods violated NY GBL § 350.

h. whether and to what extent Whole Foods's conduct caused, and continues to cause, harm to the Class;

i. whether the members of the Class are entitled to damages and/or restitution;

j. what injunctive relief is appropriate and necessary to enjoin Whole Foods from continuing to engage in deceptive and misleading practices, and, if so, what type of injunctive relief is appropriate and necessary; and

k. whether Whole Foods' conduct was willful or knowing.

41. **Superiority.** A class action is superior to other available methods for the fair and efficient adjudication of this controversy because individual litigation of the claims of all members of the Class is impracticable. Requiring each individual class member to file an individual lawsuit would unreasonably consume the amounts that may be recovered as damages. Even if every member of the Class could afford individual litigation, the adjudication of thousands of identical claims would be unduly burdensome to the court system. Individualized litigation would also present the potential for varying, inconsistent, or contradictory judgments and would magnify the delay and expense to all parties and to the court system resulting from multiple trials of the same factual issues.

42. By contrast, the conduct of this action as a class action, with respect to some or all of the issues presented, presents no management difficulties, conserves the resources of the parties and of the court system, and protects the rights of the members of the Class. Plaintiff anticipates no difficulty in the management of this action as a class action. The prosecution of separate actions by individual members of the Class may create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of the other members of the Class who are not parties to such adjudications, or that would substantially impair or impede the ability of such non-party Class members to protect their interests.

43. **Adequacy of Representation.** Plaintiff is an adequate representative of the Class and will fairly and adequately protect the interests of the Class. Plaintiff has retained attorneys who are experienced in the handling of complex litigation and class actions, and Plaintiff and his counsel intend to prosecute this action vigorously. Plaintiff has no antagonistic or adverse interests to those of the Class.

CAUSES OF ACTION

First Cause of Action

(Violation of New York General Business Law § 349 Against All Defendants)

44. Plaintiff repeats, realleges, and incorporates by reference the allegations set forth in all other paragraphs as though fully set forth herein.

45. By virtue of the acts complained of herein, Defendant has violated New York General Business Law ("GBL") § 349.

46. As detailed in the preceding allegations, Defendant's failure to clearly and conspicuously disclose the Deposit Fee that applies to in-store purchases of Ronnybrook products is consumer-oriented, materially misleading, and injurious not only to Plaintiff, but to other consumers at large.

47. As a direct and proximate result of Defendant's deceptive and misleading conduct, Plaintiff suffered damages in an amount to be proven at trial.

48. As a result of Defendant's willful, wanton, and malicious conduct, Plaintiff is entitled to recover punitive damages from Whole Foods in an amount to be determined at trial.

Second Cause of Action

(Violation of New York General Business Law § 350 Against All Defendants)

49. Plaintiff repeats, realleges, and incorporates by reference the allegations set forth in all other paragraphs as though fully set forth herein.

50. By virtue of the acts complained of herein, Defendant has violated GBL § 350.

51. As detailed in the preceding allegations, Defendant's failure to clearly and conspicuously disclose the Deposit Fee for in-store purchases of Ronnybrook products is

consumer-oriented, materially misleading, and injurious not only to Plaintiff, but to other consumers at large.

52. As a direct and proximate result of Defendant's deceptive and misleading pricing scheme, Mr. Silberstein suffered damages in an amount to be proven at trial.

53. As a result of Defendants' willful, wanton, and malicious conduct, Plaintiff is entitled to recover punitive damages from Whole Foods in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff is entitled to a judgment against Defendant awarding Plaintiff:

1. All damages available under GBL §§ 349 and 350, including actual damages and statutory damages;

2. For treble damages in accordance with GBL § 349(h);

3. For an order enjoining Defendant from continuing its deceptive practices;

4. Attorney's fees;

5. Pre-judgment interest;

6. Post-judgment interest at the legal rate;

7. Costs of suit; and

8. Such further and other relief as this Court deems just and proper.

Plaintiff respectfully demands a trial by jury of all issues so triable.

Dated: May 14, 2024
Westlake Village, CA

Counsel for Plaintiff Yaacov Silberstein and the Proposed Class

THE JACOBS LAW FIRM, PC

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

YAACOV SILBERSTEIN, individually and on behalf of all others similarly situated,	
Plaintiff,	
- against -	Index No.: _____
WHOLE FOODS MARKET GROUP, INC, and JOHN DOES 1-50,	
Defendants,	

SUMMONS AND COMPLAINT

I hereby certify pursuant to 22 NYCRR § 130-1.1 that, to the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the following papers and the contentions therein are not frivolous as defined in 22 NYCRR § 130-1.1(c) and that the matter was not obtained through illegal conduct: summons and complaint.

Dated: May 14, 2024
Westlake Village, CA

Counsel for Plaintiff Yaacov Silberstein and the Proposed Class

THE JACOBS LAW FIRM, PC

By: _____

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matt@jacobslawfirm.com

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------x

YAACOV SILBERSTEIN, individually and on behalf of all others similarly situated,

Plaintiff,

-against-

WHOLE FOOD MARKET GROUP, INC., and JOHN DOES 1-50,

Defendants.

----------x

Index No. 608482/2024

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the parties in the above-captioned proceedings, that Defendants' time to answer or appear in this action is hereby extended to and including July 8, 2024.

IT IS FURTHER STIPULATED AND AGREED, that facsimile or electronic copies of signatures of counsel on this Stipulation may be treated as originals for all purposes.

Dated: June 4, 2024

Dean Boyer

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EXHIBIT 2

NYSCEF

Nassau County Supreme Court

Document List

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Case Caption: **Yaacov Silberstein v. Whole Foods Market Group, Inc.**

Judge Name:

Doc#	Document Type/Information	Status	Date Received	Filed By
1	SUMMONS + COMPLAINT	Processed	05/14/2024	Jacobs, M.
2	STIPULATION - TIME TO ANSWER	Processed	06/05/2024	Boyer, N.

ClassAction.org