

IN THE CIRCUIT COURT THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

RONALD WILLIAMS and JENNIFER
CLAYTON, *individually and on behalf of all
others similarly situated,*

Plaintiffs,

v.

KAHALA CORP.,

Serve the Registered Agent for defendant at:

*CT Corporation System
2394 E. Camelback Rd.
Phoenix, AZ 85016*

Defendants.

Case No. 10-L- 1160

FILED

FEB 12 2010

CLERK OF CIRCUIT COURT # 82
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

CLASS ACTION COMPLAINT

Plaintiffs, Ronald Williams and Jennifer Clayton ("Plaintiffs"), individually and on behalf of all others similarly situated, for their Class Action Complaint against Defendant, Kahala Corp. ("Defendant"), allege the following:

Summary, Jurisdiction and Venue

1. This Class Action Complaint challenges unscrupulous advertising and business practices engaged in by the national sandwich and restaurant chain commonly known as Blimpie. In particular, Blimpie advertises its "Super StackedTM" sub sandwiches as containing "double portions of meat," and it charges customers a premium for these sandwiches, even though they do not in fact have double portions of meat as compared to the standard, non-Super Stacked equivalents on the Blimpie menu.
2. Plaintiff Ronald Williams is a citizen of Illinois, residing in Madison County.
3. Plaintiff Jennifer Clayton is a citizen of Illinois, residing in Madison County.

4. Defendant Kahala Corp. is a Florida corporation with its principal place of business in Arizona.

5. Jurisdiction over Defendant is proper because Defendant transacts business within this State, is a corporation doing business within this State, and for any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States. 735 ILCS 5/2-209(a)(1), (a)(7), (b)(4) and (c). There is no federal jurisdiction over this case because Plaintiffs seek no individual relief, cause of action, remedy or damages in excess of \$75,000 and because no claims arise under the laws of the United States.

6. Venue is proper because Defendant is a nonresident of this State. 735 ILCS 5/2-101.

General Allegations

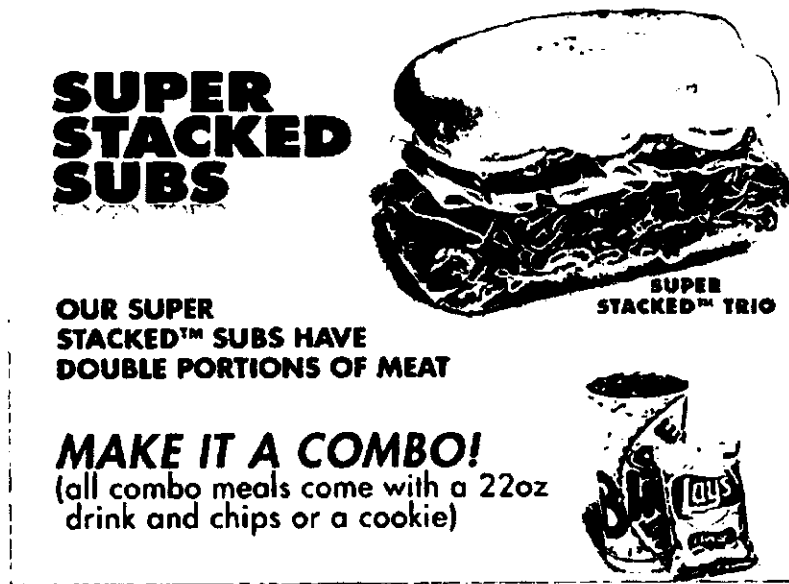
7. Defendant is the franchisor of Blimpie restaurants in Illinois and throughout the United States. Upon information and belief, Defendant may also be the operator of its own company-owned Blimpie sandwich shops in certain locations.

8. Upon information and belief, Defendant exercises sufficient control over the day-to-day operations of Blimpie sandwich shops, and especially in connection with the recipes and advertising at issue in this action, as to render Defendant legally responsible for the conduct at issue, under the direct participant doctrine, the alter ego doctrine, and the doctrine of respondeat superior.

9. Upon information and belief, Defendant provides to Blimpie restaurants the recipes for Blimpie sandwiches, and the restaurants are required to follow these recipes, including those for the Super Stacked sandwiches at issue.

10. Defendant advertises—and upon information and belief encourages or requires its franchisees to advertise—sandwiches that Defendant refers to as “Super Stacked” sandwiches. These Super Stacked sandwiches are advertised as containing double portions of meat, as compared to their non-Super Stacked or “regular” counterparts.

11. For example, the “menu” page of Blimpie’s website currently contains the following advertisement, available at http://www.blimpie.com/assets/pdf/blimpie_menu_generic_01_09_09.pdf and attached in its entirety as Exhibit 1 hereto:



This advertisement highlights that “OUR SUPER STACKED™ SUBS HAVE DOUBLE PORTIONS OF MEAT.”

12. Defendant does not actually put double the meat on all of its Super Stacked sandwiches as compared to their “regular” counterparts, however. It nevertheless charges its customers a premium price for Super Stacked sandwiches.

13. For example, the website advertisement referenced above goes on to advertise both the "BLIMPIE Best®" and the "Super Stacked BLIMPIE Best®" sandwiches. They are advertised as containing exactly the same ingredients: slow-cured ham, salami, cappacola, prosciuttini, provolone with tomatoes, lettuce, onion, vinegar, oil and oregano. See Ex. 1.

14. As would be expected, Blimpie's advertised Nutritional Statement (currently available at http://www.blimpie.com/assets/pdf/BLMP_Nutritional_Info_020410.pdf and attached in its entirety as Exhibit 2), indicates that the 12" Regular version of the BLIMPIE Best sandwich contains twice as much protein as the 6" version (*i.e.*, 50 grams and 25 grams, respectively). Protein is contained in the meat and cheese on these sandwiches, and the fact that the 12" version contains double the protein as compared to the 6" version is consistent with the 12" version having double the volume of meat and cheese, as expected.

15. The Super Stacked versions of the BLIMPIE Best sandwich do not have double the protein, however, at least in part because they do not have double the meat. The 12" Super Stacked BLIMPIE Best contains only 73 grams of protein. Ex. 2. While this is approximately double the protein of the 6" version of the Super Stacked BLIMPIE Best (*i.e.*, 37 grams), as expected, it is far less than double the protein of that contained in the 12" regular version of the BLIMPIE Best (*i.e.*, 50grams). The 6" Super Stacked BLIMPIE Best likewise contains less than double the protein as compared to its 6" regular counterpart (*i.e.*, 37 grams vs. 25 grams).

16. In some instances, Defendant advertises Super Stacked sandwiches with no "regular" counterpart at all, meaning that there is no regular sandwich to compare for purposes of supporting Defendant's claim of "double portions of meat."

Allegations as to Plaintiffs

17. Both Plaintiffs Williams and Clayton have regularly patronized one or more Blimpie restaurants, and both Plaintiffs have on multiple occasions ordered the Super Stacked Turkey and Bacon sandwich, expecting it to contain a “double portion of meat” as advertised. Plaintiffs recently learned, however, that this sandwich does not contain double meat, for at least two reasons.

18. First, Blimpie does not offer a “regular” Turkey and Bacon sandwich. Thus, there is no comparable “regular” sandwich with which to compare the Super Stacked version to support the claim that it has a “double portion” of meat. Second, Blimpie does offer “Turkey and Avocado,” “Turkey and Cranberry,” and “Turkey and Provolone” sandwiches, but the Super Stacked Turkey and Bacon sandwich does not contain double the number of slices of turkey as compared to these other sandwiches (which are the only other turkey sandwiches Blimpie offers). Plaintiffs’ prior purchases of the Super Stacked Turkey and Bacon sandwich were without the knowledge that it did not, in fact, contain “double meat” as advertised.

Class Allegations

19. This action is brought as a class action pursuant to 735 ILCS 5/2-801, *et seq.*, for damages caused by Defendant’s practice of charging customers for double portions of meat on its Super Stacked sandwiches, but without actually adding double portions of meat on all of those sandwiches.

20. The class of persons on whose behalf this action is brought is defined as follows (the “Class”):

All persons who have purchased a Super Stacked sandwich from a Blimpie restaurant in the State of Illinois.

Excluded from the Class are: (1) members of the Illinois state judiciary, and (2) Defendant, its employees, and any entity in which it has a controlling interest, including officers and directors and the members of their immediate families.

21. At this time, Plaintiffs' claim is geographically limited pursuant to the preceding paragraph, pending discovery of policies and conduct in other states.

22. The members of the Class, being geographically dispersed and numbering at least 50, are so numerous that joinder of them in a single action is impracticable.

23. Plaintiffs can and will fairly and adequately represent and protect the interests of the Class, as (a) the claims of Plaintiffs are substantially similar (if not identical to) those of absent Class members, (b) there are questions of law or fact that are common to the Class and that overwhelmingly predominate over any individual issues, such that by prevailing on their own claims, Plaintiffs necessarily will establish Defendant's liability as to all Class members, (c) without the Class representation provided by Plaintiffs, virtually no Class members will receive legal representation or redress for their injuries, (d) Plaintiffs and Class counsel have the necessary financial resources to adequately and vigorously litigate this class action, and (e) Plaintiffs and Class counsel are aware of their fiduciary responsibilities to the class members and are determined diligently to discharge those duties by vigorously seeking the maximum possible recovery for the Class.

24. There are questions of law and fact that are common to all class members, including, *inter alia*:

- (a) Whether Blimpie's Super Stacked sandwiches have contained double portions of meat as advertised;
- (b) Whether Defendant's conduct constitutes statutory fraud;
and

- (c) Whether the Class members have sustained damages and, if so, the proper measure of their damages.

25. These common questions of law or fact predominate over any questions or issues affecting individual class members.

26. A class action is an appropriate method for the fair and efficient adjudication of this controversy, given that: (a) common questions of law and fact overwhelmingly predominate over any individual questions that may arise, such that there would be enormous economies to the Court and the parties in litigating the common issues on a class-wide basis, rather than a repetitive individual basis; (b) the size of each Class member's relatively small claim is too insignificant to make individual litigation an economically viable alternative, such that as a practical matter there is no "alternative" means of adjudication to a class action; (c) few class members have any interest in individually controlling the prosecution of separate actions (any that do may opt out); (d) class treatment is required for optimal deterrence and compensation and for limiting the court-awarded reasonable legal expenses incurred by class members; (e) the economies of scale inherent in litigating similar claims on a common basis will enable this class action to be litigated on a cost-effective basis, especially when compared with repetitive individual litigations; and (f) no unusual difficulties are likely to be encountered in the management of this class action insofar as Defendant's liability turns on substantial questions of law or fact that are common to the Class and that predominate over any individual questions.

COUNT I

(Violation of Illinois Consumer Fraud and Deceptive Business Practices Act)

27. Plaintiffs incorporate the allegations set forth in all preceding paragraphs as if fully set forth herein.

28. At all times relevant hereto, the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.*, was in full force and effect.

29. Section 2 of Illinois' Consumer Fraud Act provides, in relevant part:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use of or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use of employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act," approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section, consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

815 ILCS 505/1 (footnotes omitted).

30. Defendant has committed unfair or deceptive acts by engaging in the acts and practices alleged herein, including without limitation misrepresenting that its Super Stacked sandwiches contain double portions of meat, failing to include double portions of meat on its Super Stacked sandwiches as advertised, and failing to disclose that its Super Stacked sandwiches do not in fact come with double meat.

31. Plaintiffs and members of the Class are consumers within the meaning of the Consumer Fraud Act, given that Defendant's practices were addressed to the market generally and/or otherwise implicate consumer protection concerns.

32. Defendant intended that Plaintiffs and members of the Class rely on the material misrepresentations, deceptions, unfair practices and omissions alleged herein.

33. As a proximate result of the foregoing, Plaintiffs and other members of the Class have suffered damages under the applicable consumer fraud statute in amounts to be determined at the trial of this matter, but in no event greater than \$75,000.00 per person.

WHEREFORE, Plaintiffs individually and on behalf the Class of persons described herein, respectfully request the following relief:

- A. Certification of the Class proposed herein;
- B. Designation of Plaintiffs as representatives of the Class and counsel as Class counsel;
- C. Final judgment in favor of Plaintiffs and the Class and against Defendant for their damages, and for such other relief available by law;
- D. A permanent injunction enjoining Defendant from advertising that its Super Stacked sandwiches contain double portions of meat without, in fact, including double portions of meat in such sandwiches;
- E. Final judgment in favor of Plaintiffs and the Class and against Defendant, reimbursing all allowable costs, including the reasonable fees and expenses of any necessary expert witnesses; and
- F. Reasonable attorneys' fees; and
- G. Such further relief as this Court deems just and appropriate.

Dated: February 12, 2010

Respectfully submitted,

Ronald Williams and Jennifer Clayton
Class Plaintiffs,

By:



One of His Attorneys

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**Attorneys for Plaintiffs
and the Proposed Class**