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United States District Court  
Southern District of New York

1:20-cv-05339

Kimberly Fisher, individually and on behalf of  
all others similarly situated,

Plaintiff,

- against -

Whole Foods Market Group, Inc.,

Defendant

Class Action Complaint

Plaintiff by attorneys allege upon information and belief, except for allegations pertaining to plaintiff, which are based on personal knowledge:

1. Whole Foods Market Group, Inc. (“defendant”) manufactures, distributes, markets, labels and sells coconutmilk beverages purporting to be flavored only with vanilla under the 365 Everyday Value brand (“Product”).
2. The Product is available to consumers from defendant’s retail stores, its website and Amazon.com and is sold in cartons of 32 OZ (946 ML).
3. The relevant front label representations include “365 Everyday Value,” “Unsweetened,” “Coconut,” “Organic,” “Coconutmilk Beverage” and “Vanilla.”



4. The unqualified, prominent and conspicuous representation of the Product's flavor as "Vanilla" is false, deceptive and misleading because the Product contains non-vanilla, artificial flavors which imitate, resemble and extend vanilla's taste but are not derived from vanilla beans, yet these flavors are not disclosed to consumers on the front label as required and expected.

5. According to Nielsen, 62% of consumers say they try to avoid artificial flavors.<sup>1</sup>

6. Another study by New Hope Network concludes that "71% of consumers today are

<sup>1</sup> Nielsen, [Reaching For Real Ingredients: Avoiding The Artificial](#), Sept. 6, 2016.

avoiding artificial flavors.”<sup>2</sup>

7. Label Insight determined that 76% of consumers avoid products with artificial flavors.<sup>3</sup>

8. Vanilla is “one of the most widely used flavors within the food industry” because it is “unique, versatile and highly evocative.”<sup>4</sup>

9. Real vanilla flavor – from vanilla beans – is “strongly linked to comfort and authenticity, which is aligned with” consumers’ preferences for foods and flavors they recognize and are not created in a laboratory.<sup>5</sup>

10. The tropical orchid of the genus *Vanilla* (*V. planifolia*) is the source of the flavor commonly known as vanilla.

11. Vanilla’s “desirable flavor attributes...make it one of the most common ingredients used in the global marketplace, whether as a primary flavor, as a component of another flavor, or for its desirable aroma qualities.”<sup>6</sup>

12. Vanilla’s unique flavor and aroma is due to at least 200 compounds scientists have identified.<sup>7</sup>

13. Re-creating the complexity and richness of “vanilla flavor” provided by vanilla beans is a task science has been unable to duplicate, which is why consumers are willing to pay more for products labeled solely with the term “Vanilla.”

14. These include volatile constituents such as “acids, ethers, alcohols, acetals,

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<sup>2</sup> Alex Smolokoff, [Natural color and flavor trends in food and beverage](#), Natural Products Insider, Oct. 11, 2019.

<sup>3</sup> Thea Bourianne, [Exploring today’s top ingredient trends and how they fit into our health-conscious world](#), March 26-28, 2018.

<sup>4</sup> Kristiana Lalou [Queen of flavors: Vanilla rises above transparency concerns to lead category](#), Food Ingredients First, Sept. 3, 2019.

<sup>5</sup> *Id.*

<sup>6</sup> Daphna Havkin-Frenkel, F.C. Bellanger, Eds., *Handbook of Vanilla Science and Technology*, Wiley, 2018.

<sup>7</sup> Arun K. Sinha et al., “[A comprehensive review on vanilla flavor: extraction, isolation and quantification of vanillin and other constituents](#),” *International Journal of Food Sciences and Nutrition* 59.4 (2008): 299-326.

heterocyclics, phenolics, hydrocarbons, esters and carbonyls.”

15. The non-volatile constituents include “tannins, polyphenols, free amino acids and resins.”

16. During the first half of the 20<sup>th</sup> century, “the widespread and exceedingly serious adulteration of vanilla extracts that are now labeled ‘pure’” was rampant, which resulted in consumers expecting vanilla but receiving its synthetic replacement, vanillin:<sup>8</sup>

Misbranding was alleged for the further reason that the product was labeled and branded so as to deceive and mislead the purchaser thereof, in that said label was calculated and intended to create the impression and belief in the mind of the purchaser that the product was a genuine vanilla extract, whereas, in fact, it was a mixture of vanilla extract, vanillin, and coumarin, artificially colored with caramel.

Notice of Judgment No. 2241, Adulteration and Misbranding of...Vanilla Extract, United States Department of Agriculture, W. M. Hays, Acting Secretary, Washington, D.C., January 23, 1913.

17. Due to widespread fraud, vanilla became the only flavor to have a standard of identity, to “insure, for the protection of both the consumers and our industry, that all vanilla products are correctly labeled and meet at least minimum standards.”<sup>9</sup> *See* 21 C.F.R. § 169.175 – 21 C.F.R. § 169.182 (vanilla products); *see also* 1 NYCRR § 250.1(a)(17) (“the commissioner hereby adopts the following as the standards of identity...as published in...21 CFR part 169”).<sup>10</sup>

18. In the context of non-vanilla flavors, various terms are used to truthfully disclose the source and amount of a product’s primary characterizing flavor. *See* 21 C.F.R. § 101.22(i)(1)(i)

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<sup>8</sup> Letter from McCormick & Company Inc. to HEW Secretary, January 15, 1960; Memorandum of Telephone Conversation between Mr. Alfred Daibock, Commercial Policy Division, Department of State and Tom Bellis, Food Standards Branch, FDA (the FDA stated, “The prime purpose sought to be served by the standards adopted was to promote honest, fair dealing with housewives and other consumers of the flavorings covered by the standards”).

<sup>9</sup> Letter from McCormick & Company Inc. to HEW Secretary, January 15, 1960; Press Release U.S. Department of Health, Education, and Welfare, September 13, 1963.

<sup>10</sup> 1 NYCRR § 250.1(a)(17), Section 250.1, Foods, Part 250, Definitions and Standards, Subchapter C, Food and Food Products, Chapter VI, Food Control, Title 1; 1. New York State has adopted and incorporated in its entirety, all provisions of the Federal Food, Drug and Cosmetic Act (“FFDCA”) through its Agriculture and Markets Law (“AGM”) and the accompanying regulations. *See* Title 1, Department of Agriculture and Markets, Official Compilation of Codes, Rules and Regulations of the State of New York (“NYCRR”).

(requiring food to be labeled “strawberry flavored shortcake” where it contains an insufficient amount of strawberries to independently characterize the food and natural strawberry flavor); 21 C.F.R. § 101.22(i)(1)(ii) (where a food contains no flavor from the product whose flavor is simulated but flavor from other natural sources, the label must state “artificially flavored”).

19. The Product’s front label of “Vanilla” without qualification gives reasonable consumers the impression that only vanilla ingredients provide its taste. *See* 21 C.F.R. § 101.22(i)(1) (“If the food contains no artificial flavor which simulates, resembles or reinforces the characterizing flavor, the name of the food on the principal display panel or panels of the label shall be accompanied by the common or usual name of the characterizing flavor, e.g., ‘vanilla’”).

20. However, the Product contains non-vanilla flavors, evident from the ingredients “organic natural flavor” and “natural flavor.”

**INGREDIENTS:** ORGANIC COCONUTMILK (FILTERED WATER, ORGANIC COCONUT CREAM), CALCIUM CARBONATE, ORGANIC NATURAL FLAVOR, ORGANIC LOCUST BEAN GUM, GELLAN GUM, NATURAL FLAVOR, SEA SALT, VITAMIN A PALMITATE, ERGOCALCIFEROL (VITAMIN D2), CYANOCOBALAMIN (VITAMIN B12).

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21. “Organic natural flavor” and “natural flavor” are distinct from the exclusively vanilla ingredients. *See* 21 C.F.R. § 101.4(a)(1) (“designation of ingredients” by common or usual name)

22. Where a food is flavored only by vanilla, the ingredient list is required to “bear[s] the name of the food specified in the definition and standard.” *See* 21 U.S.C. §343(g); *see also* 21 C.F.R. § 169.175 (b)(1) (“The specified name of the food is ‘Vanilla extract’ or ‘Extract of

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