

Burger King, which persists in using trans fats, in the par-fried products it ships to restaurants, as a frying oil, and as an ingredient in baked foods — all the while concealing from consumers the health risks of eating such foods. These practices render Burger King’s products unsafe and unmerchantable under the laws of the District of Columbia (D.C.).

4. The Center for Science in the Public Interest (CSPI) accordingly asks the Court to issue an injunction ordering Burger King to stop adulterating its food with trans fats and/or to display appropriate consumer warnings regarding the presence of trans fats in its food.

PRELIMINARY STATEMENT

5. CSPI brings this action on its own behalf, on behalf of its members residing in D.C., and on behalf of the interests of the general public (D.C. Consumers), to protect the health and welfare of D.C. Consumers by compelling Burger King to stop using trans fatty acids – commonly known as “trans fats” – in its French fries, baked goods, and other foods or at least to inform consumers of the presence of the harmful fat that is undetectable by any of the senses.

6. CSPI brings this action under D.C. law for equitable relief necessary as a result of Burger King’s use of dangerous trans fats to prepare its food items for sale to D.C. Consumers.

7. CSPI also seeks attorneys’ fees and costs.

8. All conditions precedent to the filing of this case have been performed, have occurred, or have been satisfied.

JURISDICTION AND VENUE

9. The Court has jurisdiction over this action pursuant to D.C. Code §§ 11-921 and 28-3905(k)(1).

10. The Court has jurisdiction over Burger King because it is a corporation that is authorized to conduct, and in fact does conduct, substantial business in D.C. Burger King has sufficient minimum contacts with D.C. or otherwise intentionally avails itself of the consumer

markets within D.C. through the promotion, sale, marketing, and/or distribution of its foods in D.C. to render the exercise of jurisdiction by the D.C. courts permissible under traditional notions of fair play and substantial justice.

11. CSPI does not seek judgment for any form of monetary damages for itself, its D.C. Members, or for any D.C. Consumer. The total benefit or value to CSPI, its D.C. Members, or any D.C. Consumer of all relief sought is less than \$74,000 per person. The cost to Burger King of all relief sought is less than \$74,000.

12. Venue is proper in D.C. because CSPI's headquarters are in D.C., the acts on which this action is based occurred in D.C., and D.C. Consumers purchased food items at Burger King locations in D.C. that contained trans fats, and were thereby injured and subjected to irreparable harm in this venue. Burger King received substantial compensation and profits from sales of such food items in D.C. Thus, Burger King's liability arose and continues in D.C.

PARTIES

13. CSPI is a non-profit organization based in D.C. Since 1971, CSPI has been a strong advocate for nutrition and health, food safety, alcohol policy, and sound science. Its award-winning newsletter, *Nutrition Action Healthletter*, with some 900,000 subscribers in the United States and Canada, is the largest-circulation health newsletter in North America. CSPI has approximately 3,200 members in D.C.

14. Founded in 1971 by executive director Michael Jacobson, Ph.D., and two other scientists, CSPI has carved out a niche as the organized voice of the American public on nutrition, food safety, health, and other issues. CSPI has long sought to educate the public, advocate government policies that are consistent with scientific evidence on health and environmental issues, and counter industry's powerful influence on public opinion and public policies. Over the years, CSPI has grown along with its reputation as an influential and

independent science-based organization. Though CSPI frequently criticizes the performance of the U.S. Food and Drug Administration (FDA), one indication of the respect CSPI has garnered is that the FDA honored it with the Commissioner's Special Citation, the highest award given to outside organizations or individuals (a decade ago Dr. Jacobson was honored with the same award).

15. CSPI's accomplishments include leading efforts to win passage of laws that protect the public's health and welfare by requiring Nutrition Facts on packaged foods (and, later, to include trans fat on those labels), defining the term "organic" for foods, and putting warning notices on alcoholic beverages. CSPI has also conducted the best studies on the nutritional quality of restaurant meals and movie theater popcorn, helped to increase funding for the government's food safety inspections and nutrition and physical activity programs, and spurred new policies to remove soda and junk foods from schools. CSPI also helped New York City adopt the nation's first law to ban trans fat from restaurants and the first regulation to list calorie information on menus and menu boards at certain large restaurant chains. CSPI is working with other cities and states on similar measures.

16. Defendant Burger King is a corporation organized and existing under the laws of the State of Florida, with its principal place of business located at 5505 Blue Lagoon Drive, Miami, FL 33126. Burger King Corporation dictates the ingredients and manner of preparation for the foods sold in all Burger King restaurants.

17. Various individuals, partnerships, corporations, and associations (including franchisees) not named as defendants in this Complaint have participated in the violations alleged herein and have performed acts and made statements in furtherance thereof. In so acting or omitting to act, each such individual and entity was acting as an agent or representative of Burger King.

REPRESENTATIVE ACTION

18. CSPI brings this action on behalf of itself, its D.C. Members, and as a representative Plaintiff acting for the interests of D.C. Consumers, seeking relief pursuant to and from Burger King's use of trade practices that violate D.C. law, pursuant to D.C. Code § 28-3905(k)(l).

FACTS ABOUT TRANS FAT

19. Trans fat has severe adverse physiologic effects. It is produced artificially when natural vegetable oil is heated in the presence of metal catalysts and hydrogen. This process changes the molecular structure of the oil. Like saturated fat, it increases the bad (LDL) cholesterol in blood. But unlike saturated fat, trans fat also decreases the good (HDL) cholesterol in blood. It affects the walls of blood vessels in ways that increase the risk of heart disease. It also increases the risk of diabetes. About 80% of the trans fats Americans consume is from partially hydrogenated vegetable oil, the rest naturally occurring at low levels in beef and milk and in purified non-hydrogenated vegetable oils.

20. The hydrogenation process causes molecular changes that increase the melting point of liquid oils (making them more solid) and confer properties useful to fast-food companies. Hydrogenation turns liquid vegetable oils into fats that are solid or semi-solid at room temperature, but liquid when heated. The resulting inexpensive trans-fat-containing frying oils are reputed to have a longer shelf life and fry life than other oils (though that presumption is frequently not the case). That makes them useful for fried foods like French fries and chicken sticks. Partially hydrogenated oils may also confer a crisper texture to cookies and better baking quality to pie crusts, making such oils attractive to bakeries. Some of the large fast-food restaurants, including Burger King, began using partially hydrogenated vegetable oil since about 1990, in response to public health concerns about saturated fats like beef fat, which they had

been using. The general presumption at that time was that partially hydrogenated oils and trans fats were not as harmful as beef fat.

21. But beginning in about 1990 a rapidly growing body of scientific research has demonstrated that trans fat is a killer — on a gram-for-gram basis, ***more harmful than any other type of fat***. It causes heart disease and heart attacks. A 2% increase in trans fat consumption corresponds to as much as a 23% increase in the risk of developing coronary heart disease. A Harvard School of Public Health report estimates that ***eliminating trans fats from diets could prevent 30,000 to 100,000 deaths in the U.S. annually***. More recently, Harvard researchers determined that the ***near-elimination of industrially produced trans fats might avert between 72,000 and 228,000 heart attacks in the U.S. each year***.

22. In 2003, the National Academy of Science's Institute of Medicine recommended that individuals consume as little trans fats as possible. In 2004, a U.S. Food and Drug Administration advisory panel concluded that trans fat (on a gram-for-gram basis) is even more harmful to humans than saturated fat.

23. Recently, the American Heart Association revised its diet and lifestyle guidelines to recommend limiting trans fats to less than 1% of total calories — just two grams or about ***20 calories per day***.

24. Burger King requires all locations in D.C. to use partially hydrogenated oil, which is very high in trans fats. Some foods (such as French fries) may be par-fried in partially hydrogenated oil before being shipped to restaurants, where they are fried a second time in another trans fatty oil.

25. The amount of trans fats in Burger King food is significant, especially compared to the Heart Association's daily maximum. For example:

- French Toast Kid's Meal (with syrup): 4.5 g trans fat — **more than twice the maximum** (in a meal aimed at children)
- King Size Onion Rings: 6 g trans fat — **three times the maximum**
- Sausage, Egg, & Cheese Biscuit: 6 g trans fat — **three times the maximum**
- King Size French Fries: 7 g trans fat — **more than three times the maximum**
- Large Hash Browns: 13 g trans fat — **more than six times the maximum**

26. Partially hydrogenated oil is absolutely unnecessary to the preparation of Burger King's (or any other) foods. Various other oils are available that are free of trans fats and suitable for use in commercial food preparation.

27. Burger King is currently the third-largest restaurant chain, in terms of sales. The other members of the Top 10 restaurants are McDonald's, Kentucky Fried Chicken, Pizza Hut, Wendy's, Subway, Taco Bell, Domino's Pizza, Starbucks, and Applebee's Neighborhood Grill and Bar.

28. Each of the other Top 10 restaurants either has already switched to trans-free oils or is currently switching over, or already sells foods that contain little or no frying oil.

29. Burger King recognizes the harm that trans fat causes when it is consumed. Burger King has said that it has future plans to change to trans-free oil, but refuses to change in a reasonably timely manner or inform its customers before they select their foods that certain foods contain substantial amounts of trans fats. Although it knows that its continued protracted use of trans fat oils contributes to the deaths of thousands of Americans a year, Burger King is unwilling to commit to ***start removing*** trans fats from all its restaurants ***until the end of 2008***. This nearly two-year delay is inexcusable given every other large restaurant chain's commitment — and ability — to switch to trans-free oils either already or in the immediate future.

30. CSPI met privately with Burger King representatives several times, in person and by telephone, beginning in late January 2007. Burger King refused to make any commitments

regarding the elimination of trans fats other than vaguely representing that it would start doing so at the end of 2008. It also refused to agree to post warnings about trans fats until such time as it in fact eliminates trans fats completely.

31. The minor cost to Burger King in converting its equipment to use trans-free cooking oil is no excuse for using partially hydrogenated oil and exposing millions of its consumers to the long-term, and potentially deadly, harm inherent in the use of trans fats.

32. Furthermore, there is no evidence that a switch to trans-free oil would have any adverse impact on Burger King's sales. Wendy's made the switch nearly two years ago, and Wendy's has said that its customers have not noticed and there has been no drop in sales.

33. Burger King's practice is made far worse by the fact that it does not make any real effort to inform its customers that they are eating food items prepared with the most harmful oil possible.

34. Consumers have a growing general awareness of trans fat and the need to avoid it, but Burger King does not disclose to its customers that it uses products par-fried with trans fats and oils with trans fats in its cooking. No consumer can tell through taste, smell, or visual inspection that Burger King still uses partially hydrogenated oil, because it appears only as a hot liquid in the frying equipment seen by consumers.

35. Burger King's failure to: (1) discontinue its use of products containing trans fats and (2) warn its customers that it is subjecting them to serious and unnecessary health risks is outrageous, and harms the health of its customers. It is also a violation of D.C. consumer protection and warranty laws, thereby entitling CSPI, individually and as a representative of its D.C. Members and D.C. Consumers, to the relief requested.

COUNT I

VIOLATION OF D.C. CONSUMER PROTECTION PROCEDURES ACT

DECEPTION AND MISREPRESENTATION

36. The D.C. Consumer Protection Procedures Act (Act) provides that it is a violation, whether or not any consumer is in fact misled, deceived or damaged thereby, for any person to fail to state a material fact if such failure tends to mislead. D.C. Code § 28-3904(f).

37. Burger King violates D.C. Code § 28-3904(f) by, among other things:

- Failing to state in a manner readily seen by its customers the material fact of the type of oils it is using for preparing foods, with the intent or effect of deceiving or misleading D.C. Consumers.
- Failing to disclose that the consumption of Burger King's foods prepared with trans fats increases the risk of heart disease and is generally harmful to health.

D.C. Consumers, including individuals who are members of CSPI, have purchased Burger King foods without knowing about the presence of trans fats. This conduct violates the rights of CSPI, its members, and D.C. Consumers protected by the Act.

COUNT II

VIOLATION OF D.C. CONSUMER PROTECTION PROCEDURES ACT

BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

38. The Act also provides that it is a violation to sell consumer goods in a condition or manner not consistent with sections 28:2-312 through 318 of the D.C. Code (part of the D.C. version of the Uniform Commercial Code). D.C. Code § 28-3904.

39. D.C. Code § 28:2-314 provides:

1. Unless excluded or modified (section 28:2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
2. Goods to be merchantable must be at least such as

- a. pass without objection in the trade under the contract description; and
- b. in the case of fungible goods, are of fair average quality within the description; and
- c. are fit for the ordinary purposes for which such goods are used; and
- d. run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- e. are adequately contained, packaged, and labeled as the agreement may require; and
- f. conform to the promises or affirmations of fact made on the container or label if any.

These warranties are implied in every sale of Burger King food in D.C. and have not been excluded or modified.

40. D.C. Consumers, including individuals who are members of CSPI, have purchased Burger King foods covered by this implied warranty.

41. Burger King's food cooked with partially hydrogenated oil is adulterated under D.C. Code § 48-103, as it bears or contains an artificial, poisonous, or deleterious substance that is injurious to health, and that the ordinary consumer, unschooled in nutrition and perhaps preoccupied with other matters, would not reasonably expect to encounter. Burger King prepares its foods in an unreasonably unsafe way using partially hydrogenated oil containing trans fats, rendering its foods unsafe from the point of view of the ordinary consumer. Burger King's foods are neither of fair average quality nor fit for human consumption. Therefore, Burger King's food is adulterated. D.C. Code § 48-103.

42. Burger King foods purchased by D.C. Consumers are not adequately described on menu boards (in stores and at drive-thrus) and other places to advise D.C. Consumers that they

are consuming dangerous trans-fat-containing products and exposing their health to serious injury.

43. Burger King's practices are therefore in breach of the implied warranty of merchantability, because Burger King food containing trans fats is: (1) not of fair or average quality; (2) not fit for the ordinary purpose of human consumption; and/or (3) not adequately described on menu boards and in promotional materials so as to advise D.C. Consumers that many of Burger King's foods contain dangerous amounts of trans fats. D.C. Code §28:2-314.

44. Burger King's breaches of implied warranty violate the rights of CSPI, its members, and D.C. Consumers protected by the Act.

RELIEF SOUGHT

45. The Act provides that any "person, whether acting for the interests of itself, its members, or the general public, may bring an action under this chapter in the Superior Court of the District of Columbia seeking relief from the use by any person of a trade practice in violation of a law of the District of Columbia." D.C. Code § 28-3905(k)(1).

46. Remedies under the Act include an injunction against the use of the unlawful trade practice, reasonable attorneys' fees, and any other relief that the Court deems proper. D.C. Code § 28-3905(k)(1).

Injunctive relief

47. Burger King's past and continued use of trans fats, as well as its past and continued failure to disclose that its food items are prepared with trans fats, has caused and continues to cause irreparable harm to the consuming public, thereby entitling CSPI, its D.C. Members, and D.C. Consumers to an injunction ordering Burger King: (1) to cease selling foods prepared with trans fat oils and foods that contain significant levels of trans fats in its restaurants or, in the alternative, (2) to take all necessary actions to insure that the consuming public knows,

immediately prior to purchasing any such food, that a food is prepared with trans fats. D.C. Code § 28-3904(x) and § 28-3905(k)(l)(D).

Declaratory relief

48. An actual controversy has arisen between CSPI, its D.C. Members, and D.C. Consumers on the one hand, and Burger King on the other hand, as to Burger King's obligations to D.C. Consumers who: (1) unknowingly purchased foods cooked with partially hydrogenated vegetable oil in the past; and (2) purchase food prepared with trans fats at Burger King restaurants in the future. Specifically, CSPI contends that the acts and practices as alleged in this Complaint are unfair and unlawful under the Act.

Attorneys' fees and costs

49. Burger King's acts and practices entitle CSPI to an award of attorneys' fees and costs. D.C. Code § 28-3904(x) and D.C. Code § 28-3905(k)(l)(B).

PRAYER FOR RELIEF

CSPI, on behalf of itself, its D.C. Members, and as a representative Plaintiff acting for the interests of D.C. Consumers, prays for relief against Burger King, as follows:

1. An order finding and declaring that Burger King's acts and practices as challenged herein are unlawful and deceptive;
2. An order enjoining Burger King's continued use of trans fats or, in the alternative, ordering Burger King to take all necessary actions to insure that D.C. Consumers are informed, immediately prior to buying any Burger King food prepared using trans fats, that the food contains trans fats;
3. Reasonable attorneys' fees;
4. Costs; and
5. Other relief as the Court deems just and proper under the circumstances.

JURY DEMAND

CSPI demands trial by jury on all claims for which there is a right to a jury trial.

Dated: May 16, 2007

Respectfully submitted,

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