

FILED by VT D.C.  
ELECTRONIC  
  
March 17, 2009  
  
STEVEN M. LARIMORE  
CLERK U.S. DIST. CT.  
S.D. OF FLA. - MIAMI

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 09-CV-60412-Huck-O'Sullivan

JULIE FITZPATRICK, on Behalf of Herself )  
and All Others Similarly Situated, )

Plaintiff, )

vs. )

GENERAL MILLS, INC., and YOPLAIT )  
USA, INC., )

Defendants. )

**COMPLAINT – CLASS ACTION**

**DEMAND FOR JURY TRIAL**

Plaintiff Julie Fitzpatrick (“Plaintiff”), brings this action on behalf of herself and all others similarly situated against defendants General Mills, Inc. and Yoplait USA, Inc. (collectively, “General Mills” or “Defendant”), and states:

### **JURISDICTION AND VENUE**

1. This Court has original jurisdiction pursuant to 28 U.S.C. §1332(d)(2). The matter in controversy, exclusive of interest and costs, exceeds the sum or value of \$5,000,000 and is a class action in which members of the Class of plaintiffs are citizens of states different from General Mills. Further, greater than two-thirds of the Class members reside in states other than the state in which General Mills is a citizen.

2. Venue is proper in this Court pursuant to 28 U.S.C. §1391 in that many of the acts and transactions giving rise to this action occurred in this District and because Defendant:

(a) is authorized to conduct business in this District and has intentionally availed itself of the laws and markets within this District through the promotion, marketing, distribution and sale of its products in this District;

(b) does substantial business in this District; and

(c) is subject to personal jurisdiction in this District.

### **NATURE OF THE ACTION**

3. General Mills manufactures, markets and sells a yogurt product known as Yo-Plus®. Through an extensive and comprehensive nationwide marketing campaign, General Mills claims that Yo-Plus® with its “exclusive” Optibalance™ bacterial cultures naturally regulates the digestive health, providing consumers with additional digestive health benefits that other yogurt products do not. General Mills has no support for these claims, even though it states that it does, going so far as

to claim it has clinical proof. General Mills' representations are false, misleading and reasonably likely to deceive the public.

4. General Mills' own studies fail to support this advertising message, and a number of them flatly contradict General Mills' claims. In fact, General Mills has never tested Yo-Plus® for its ability to deliver the unique health benefits claimed in its advertising campaign. Nonetheless, as a result of General Mills' deceptive advertising campaign, General Mills charges a premium for Yo-Plus®.

5. General Mills' misleading marketing campaign begins with a deceptive name – Optibalance™ – for its “unique blend” of probiotic bacteria and fiber. Optibalance™ implies that Yo-Plus® delivers the specific claimed health benefits. General Mills' exhaustive advertising campaign builds on this deception.

6. In August 2007, General Mills began marketing Yo-Plus®. On its label and in its other advertisements, General Mills stated and continues to state that Yo-Plus® helps regulate digestive health naturally, even stating that this is clinically proven.

7. For the types of marketing claims at issue, the Federal Trade Commission (“FTC”) rules require that General Mills have competent and reliable scientific evidence for its digestive health claims at the time the claims were made. However, General Mills did not, and has never possessed the requisite clinical substantiation.

8. General Mills' nationwide advertising campaign has been extensive and comprehensive, spending millions of dollars to convey these deceptive messages to consumers throughout the United States. General Mills conveyed and continues to convey its deceptive claims about Yo-Plus® through a variety of media, including television, newspapers, magazines, direct

mail, the Internet, point-of-sale displays, and on the product's labels and labeling. On the Internet, General Mills' Yo-Plus® website is a prominently displayed paid listing in the results for "yogurt" on Google.

9. Through this extensive and comprehensive campaign, General Mills has conveyed one message: Yo-Plus®, containing Optibalance's™ unique blend of proprietary bacteria strains, (including the bacteria *Bifidobacterium lactis* strain Bb-12), which provides health benefits that other yogurt products do not. Each person who has purchased Yo-Plus® has been exposed to General Mills' misleading advertising message multiple times.

10. General Mills' advertising and marketing campaign is designed to cause consumers to buy Yo-Plus® as a result of this deceptive message, and General Mills has succeeded. As a result of this campaign, the Yo-Plus® launch has elevated the product to one of the top sellers in the product category.

11. And as a result of the misleading messages conveyed through its campaign, General Mills has been able to charge a significant price premium for Yo-Plus® over other yogurt products, including other Yoplait yogurt products.

12. In November 2008, the National Advertising Division of The Council of Better Business Bureaus, Inc. (hereinafter, the "NAD") examined the Yo-Plus® marketing claims at issue, analyzed General Mills' purported scientific substantiation, and concluded that "the body of evidence on Bb12, taken as a whole, is not sufficient to support the digestive health products performance claims for Yo-Plus." Based on its extensive review, the NAD recommended that General Mills avoid communicating that Yo-Plus® has been proven to help regulate digestive

health. However, rather than cease its false advertising, General Mills has strengthened its false message.

13. Plaintiff brings this action on behalf of herself and other similarly situated consumers who purchase Yo-Plus® in the State of Florida in order to halt the dissemination of this false and misleading advertising message, correct the false and misleading perception Defendant has created in the minds of consumers, and to obtain redress for those who have purchased Yo-Plus®. Plaintiff alleges violations of Florida's Deceptive and Unfair Trade Practices Act and breach of express warranty created by Defendant's advertising, including its labeling.

#### **PARTIES**

14. At all times relevant to this matter, Plaintiff Julie Fitzpatrick resided and continues to reside in this District. During the class period, Plaintiff was exposed to and saw General Mills' advertising claims, purchased Yo-Plus® in reliance on these claims, and suffered injury in fact and lost money as a result of the unfair competition described herein.

15. Defendant General Mills, Inc. is incorporated in the State of Delaware and is headquartered in Minneapolis, Minnesota. General Mills is registered to do business in the State of Florida, and does business in the State of Florida. General Mills promotes, markets, distributes and sells Yo-Plus® throughout the United States, including to tens of thousands of consumers in the State of Florida. General Mills distributes Yo-Plus® through its wholly-owned subsidiary Yoplait USA, Inc.

16. Defendant Yoplait USA, Inc. is incorporated in the State of Delaware and is headquartered in Minneapolis, Minnesota. Yoplait USA, Inc. is a wholly-owned subsidiary of General Mills.

17. Defendants General Mills, Inc. and Yoplait USA, Inc. are collectively referred to herein as “General Mills” or “Defendant.”

### **FACTUAL ALLEGATIONS**

18. In August 2007 General Mills announced the release of Yo-Plus®, “the newest way to help naturally regulate your digestive health.” General Mills was “excited to introduce to the market a delicious way to help health-conscious consumers obtain digestive benefits.” According to General Mills, “Yo-Plus is the only yogurt on the market with Optibalance, which helps put digestion back on track.” Since that time, General Mills has consistently conveyed the message to consumers throughout the United States that Yo-Plus®, which contains Optibalance’s™ unique blend of proprietary bacteria strains, is proven to deliver specific health benefits. General Mills has no valid substantiation for these claims.

19. While scientists have not agreed on a common definition, the Food and Agricultural Division of the United Nations and the World Health Organization define probiotics as “live microorganisms which when administered in adequate amounts, confer a health benefit on the host.” There is no scientific consensus about whether healthy people benefit from any type of probiotic bacterial supplements. There is no credible evidence at all that Yo-Plus® with Bb-12 has any probiotic effects at all.

20. Using the term as a marketing tool, and without regard to whether it actually delivers any probiotic benefits, General Mills defines probiotics as “live, good-for-you bacteria that provide a health benefit.” However, there is no credible scientific evidence that Yo-Plus® has any probiotic benefit at all, or delivers any health benefit beyond ordinary yogurt.

## GENERAL MILLS' CLAIMS ABOUT YO-PLUS®

21. General Mills' marketing claims "Yo-Plus™ contains Optibalance™, a unique blend of live probiotic cultures and natural fiber." And "Yo-Plus™ special formulation helps keep your digestive system on the right track."

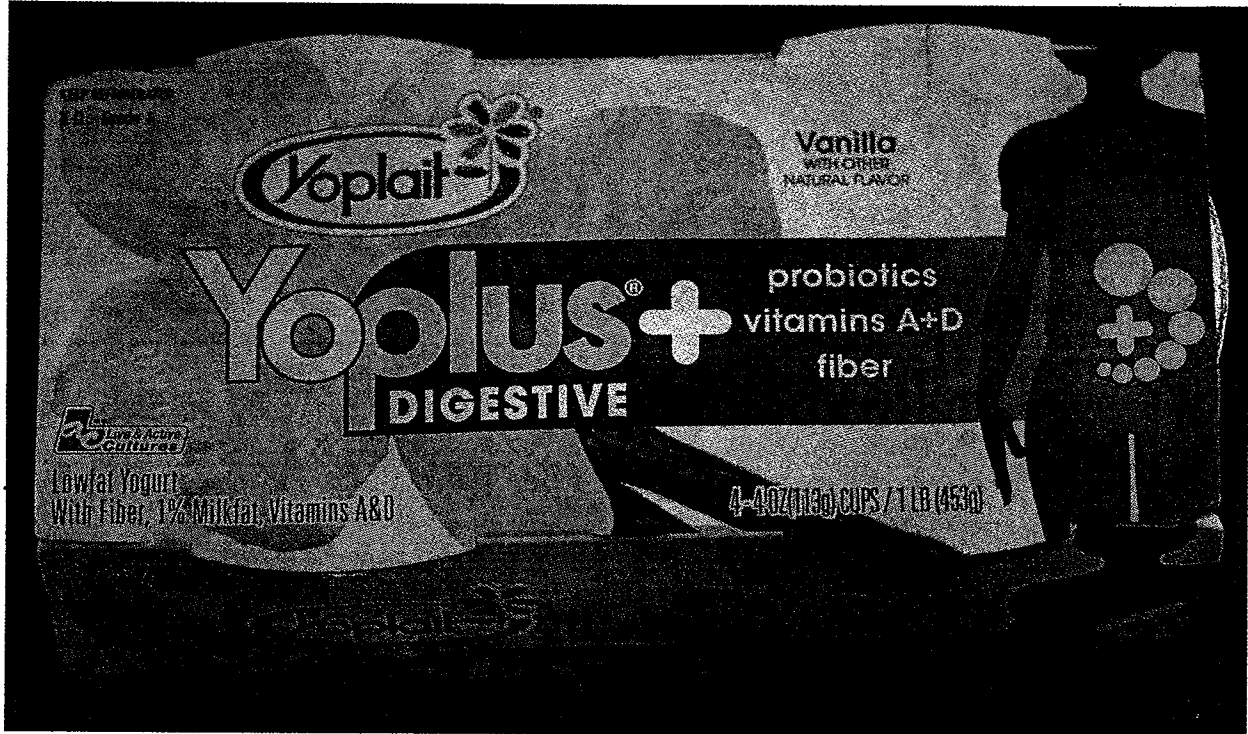
22. Optibalance™ is General Mills' trademarked blend of ingredients including the bacteria *Bifidobacterium lactis* strain Bb-12. General Mills' marketing department chose the "Optibalance" name to deceptively imply scientific significance and credibility to General Mills' inadequately tested blend of ingredients.

23. The consumer, unaware that Optibalance™ is nothing more than General Mills' cleverly developed marketing name, is led to believe that General Mills' blend of "probiotic" bacterial strains and small amounts of fiber will, in fact, improve the digestive system of healthy people. In fact, healthy people's bodies already maintain the proper balance of intestinal bacteria. Even if *Bifidobacterium lactis* strain Bb-12 could improve the balance of an already optimally-balanced digestive system, General Mills has no sufficient evidence that the small amount of bacteria in Yo-Plus® has any effect on one's gut flora.

24. Despite the absence of a single clinical test on the actual product, General Mills states that Yo-Plus® is different from eating other yogurts ("Just like other Yoplait yogurts, Yo-Plus has active cultures. But Yo-Plus gives you much more . . .").

25. Moreover, General Mills states that everyone can benefit from eating Yo-Plus® ("Yo-Plus™ is beneficial for people of all ages.").

26. The label on each carton of Yo-Plus® substantially appears as follows:



27. On every Yo-Plus® label, General Mills also prominently claims: “Helps Naturally Regulate **DIGESTIVE HEALTH** with Optibalance™.” The labeling exclaims to consumers to “Try it for 10 Days and See How Different You Feel!” because “Yo-Plus™ special formulation helps keep your digestive system on the right track.” The labeling also contains claims such as:

**How Does Yo-Plus™ help to regulate digestive health?**

Yo-Plus™ contains a unique blend of a beneficial probiotic bacteria (Bifidobacterium lactis BB-12®) and a natural fiber (chicory root extract). The two work together to help crowd out the unfriendly bacteria in your system and promote digestive health.

**What are probiotics?**

**Probiotics** are beneficial cultures that can help maintain an optimal balance of good-for-you bacteria that naturally reside in your digestive system. Maintaining this balance in your body helps keep your digestive system on track.



### **What is Bifidobacterium?**

Bifidobacterium lactis BB-12® is the **probiotic culture** used in Yo-Plus™.

\* \* \*

### **Who can benefit from eating Yo-Plus™?**

Yo-Plus™ is beneficial for people of all ages.

### **Why is Yo-Plus different from other yogurt products?**

Yo-Plus™ provides additional digestive health benefits with probiotic cultures and fiber. Unlike some other yogurts, it is a good source of vitamins A and D. All this PLUS the great taste of Yoplait®!

### **How often should I consume Yo-Plus™?**

Eat Yo-Plus™ every day to help maintain a balance of good-for-you bacteria in your digestive system and regulate digestive health. Try it for ten days and see how different you feel!

**Learn more at [www.Yo-Plus.com](http://www.Yo-Plus.com)**

General Mills did not and does not have substantiation for these statements, which are false and misleading and reasonably likely to deceive the average consumer.

28. General Mills' Yo-Plus® television commercials convey the same message conveyed by General Mills in other media. A typical Yo-Plus® television commercial claims: "When you feel good inside, you feel good all over. Try Yo-Plus® yogurt for 10 days and you just might feel like . . . Yo-Plus® . . . helps regulate digestive health naturally."

29. Television commercials for Yo-Plus® have aired regularly across the country since the launch of Yo-Plus®. The first television advertisements began in August 2007 on network channels and stated: "Introducing Yo-Plus®, a delicious new yogurt with special added cultures and fiber that naturally help regulate your digestion – which makes every day more positive. New Yo-Plus – Try it for 10 days and feel the difference."

30. To reinforce the deceptive message, and in accordance with its pre-determined marketing plan, General Mills touts a money-back guarantee offer challenging consumers to “Try it for 10 Days and See How Different You Feel!” This part of General Mills’ marketing campaign was included in all of the forms of media General Mills has used.

31. General Mills’ statements about the ability of Yo-Plus® strains of bacteria to survive the gastrointestinal system in sufficient numbers to have probiotic effects are also unsubstantiated, false and misleading.

32. Nonetheless, General Mills claims that all of its purportedly probiotic bacteria survive: “Yo-Plus contains three different types of live and active cultures. *S. thermophilus* and *L. bulgaricus* are the same types of bacteria you usually find in yogurt. But Yo-Plus also provides the added benefit of the probiotic culture *Bifidobacterium lactis* Bb-12™. Together, these three strains provide billions of live cultures throughout the shelf life of Yo-Plus.” However, Yoplait recently conceded to the NAD that there are no clinical tests of Bb-12 in a similar matrix found in Yo-Plus®.

#### **GENERAL MILLS’ OWN SUBSTANTIATION DEMONSTRATES THE FALSITY OF ITS CLAIMS**

33. General Mills deceptively advertises that Yo-Plus® cultures have been clinically proven to help naturally regulate digestive health.

34. There is widespread consensus within the scientific community concerning the proper research and testing that must be conducted to substantiate a claim made for a given effect ascribed to a probiotic bacteria. As the American Society for Microbiology concluded in a symposium focusing on purported probiotic bacteria used in food:

There is a pronounced need for large, carefully designed (randomized, placebo controlled) clinical trials of probiotics that undertake broad sampling of host microbiota, have clear end points, and have well informed participants who consent

to treatment. Investigations like these are needed to overcome the placebo effect [of probiotic treatments] and other barriers to the thorough investigation of probiotic products.<sup>1</sup>

35. A properly conducted clinical or scientific trial – *e.g.*, one capable of providing substantiation for General Mills’ claims – is the well-designed, randomized controlled trial (“RCT”).<sup>2</sup> In RCTs, human study subjects similar to each other are randomly assigned to receive either the test substance or a placebo. Double-blind RCTs, where neither the patient nor the administering researcher knows which intervention is placebo, is preferred and considered more accurate than a single-blind RCT, particularly where, as here, the manufacturer pays for the studies. General Mills has not so much as attempted to undertake such a process.

36. Rather, as purported support for its claims, General Mills relies upon several non-clinical studies that merely indicate survival of a bacterial strain in feces of some people when administered in a medium different than Yo-Plus®. For example, General Mills relies upon M. Matsumoto, et al., Effect of Bifidobacterium lactis LKM 512 Yogurt on Fecal Microflora in Middle to Old Aged Persons, *Microbia Ecology In Health and Disease*, 12:77-88 (2000). That study sought to analyze the survival of Bb-12 in 11 Japanese long-term hospitalized inpatients with an average age of 76.9 years, and whose diet consisted of rice porridge. General Mills also relies upon Y. Bouhnik, et al., Fecal Recovery in Humans of Viable Bifidobacterium sp Ingested in

---

<sup>1</sup> R. Walker & M. Buckley, *Probiotic Microbes: The Scientific Basis*, at 19 (Colloquium convened before the American Society of Microbiology, Nov. 5-7, 2005).

<sup>2</sup> M. Araya, et al., *Guidelines for the Evaluation of Probiotics in Food* (Food and Agriculture Organization of the United Nations and World Health Organization, Report of a Joint Working Group, April 30 and May 1, 2002), available at [http://www.who.int/foodsafety/fs\\_management/en/probiotic\\_guidelines.pdf](http://www.who.int/foodsafety/fs_management/en/probiotic_guidelines.pdf) (last visited March 11, 2009).

Fermented Milk, *Gastroenterology* 102, 875-878 (1992), for its Bb-12 survival conclusion. The eight study volunteers – there was no control group – were told to ingest the fermented milk product three times daily for eight days. However, if this study could be characterized as clinical – which it cannot – simply because 30% of Bb-12 survives transit, it does not constitute clinical proof that Yo-Plus® helps to regulate digestive health.

37. On December 4, 2008, the NAD – an industry-created and operated entity that reviews advertising – recommended that General Mills modify or discontinue certain advertising claims for Yo-Plus®.

38. The NAD examined whether General Mills' uniform advertising claim that Yo-Plus® helps regulate digestive health naturally and provides consumers with an established and unqualified digestive health benefit was substantiated. The NAD found that the claim was not substantiated. In fact, it found that no testing of the product was conducted. The NAD also examined the advertising claim that Yo-Plus® asserted health benefits would be achieved in 10 days ("Try it for 10 Days and See How Different You Feel!"). The NAD also concluded that this claim was "unsupported": "NAD determined that consumers could reasonably interpret the 10 day claim to mean that the product will provide the promised digestive health benefit in 10 days," and recommended that Yo-Plus® "discontinue its unsupported 10-day claim."

39. In defense of its claims, General Mills submitted extensive briefing and citations to the studies which it believes substantiate the Yo-Plus® advertising claims. The NAD rejected General Mills' arguments that the body of evidence regarding the digestive health benefits of Bb-12 and inulin, supported the health-related product-performance claims at issue. After reviewing each of the studies provided by General Mills, the NAD concluded "that the advertiser has not

demonstrated that the results of any one of the[] various studies can be properly extrapolated to provide support for digestive health performance claims for the Yo-Plus product itself.”

40. Despite the NAD’s conclusions, General Mills continues to deceptively market and advertise that Yo-Plus® helps regulate digestive health and that these benefits can be achieved in 10 days.

41. General Mills submitted 17 studies to the NAD, which it claimed constituted the key clinical studies regarding Bb-12. Five studies were conducted in infants subsisting on an infant formula. And these five and three others tested Bb-12 on an irrelevant clinical endpoint – diarrhea. Four others tested the transit survival characteristics of Bb-12. In fact, the NAD “determined that most of the seventeen studies were not sufficiently relevant (for instance, they were not conducted on a fermented milk or yogurt medium, the population was not relevant to the Yo-Plus target audience, or they did not employ a digestive health end point) to provide support for the Yo-Plus digestive health *product performance* claim at issue.”

42. General Mills’ claims about the benefits of Yo-Plus® are not substantiated by its own studies. For example, despite General Mills’ statement “Yo-Plus is beneficial for people of all ages,” of the 17 studies General Mills claims constitute the key clinical tests, not a single study analyzes the product’s digestive health benefits in the population targeted by General Mills. Thus, the NAD correctly pointed out that the most relevant evidence would be well-controlled studies conducted on a healthy, adult, U.S. population.

43. On every Yo-Plus® label General Mills makes a claim regarding the product’s proven efficacy in just 10 days (“Try it for 10 Days and See How Different You Feel!”). General

Mills does not have substantiation for the product's digestive health efficacy over any time period, and has never tested Yo-Plus® effectiveness over 10 days.

44. Despite inadequate and inapposite testing, General Mills continues to unequivocally claim that because of its specially formulated and unique bacteria in Yo-Plus®, the product is clinically and scientifically proven to deliver health benefits other yogurt products cannot.

45. Despite merely providing the benefits of traditional yogurt products, General Mills' Yo-Plus® costs significantly more than traditional yogurt. Through the uniform deceptive and misleading marketing campaign, General Mills leads consumers to believe that Yo-Plus® with probiotic health benefits justifies the price differential.

46. General Mills' CEO acknowledged that the success of Yo-Plus® depended on how effective its advertising proved. Addressing analysts, he stated:

Let me turn now to yogurt where we got off to a slow start in 2008, but after we turned on our advertising for new Yo-Plus symbiotic yogurt and supported the core business with great marketing, our results have picked up.

47. To accomplish its goal – persuading consumers to switch from a less expensive yogurt product – General Mills had to paint a compelling story that all persons would enjoy the added and exclusive health benefits of Yo-Plus®. The story General Mills' marketing tells is more fiction than fact.

### **CLASS ACTION ALLEGATIONS**

48. Plaintiff brings this lawsuit on behalf of herself and the proposed Class members under Rule 23(b)(2) and (3) of the Federal Rules of Civil Procedure. The proposed Class consists of:

All persons who purchased Yo-Plus® in the State of Florida.

49. Subject to additional information obtained through further investigation and discovery, the foregoing definition of the Class may be expanded or narrowed by amendment or amended complaint. Specifically excluded from the proposed Class are the Defendant, its officers, directors, agents, trustees, parents, children, corporations, trusts, representatives, employees, principals, servants, partners, joint venturers, or entities controlled by the Defendant, and its heirs, successors, assigns, or other persons or entities related to or affiliated with the Defendant and/or its officers and/or directors, or any of them; the Judge assigned to this action, and any member of the Judge's immediate family.

50. *Numerosity.* The members of the Class are so numerous that their individual joinder is impracticable. Plaintiff is informed and believes, and on that basis alleges, that the proposed Class contains many thousands of members. The precise number of Class members is unknown to Plaintiff. The true number of Class members is known by the Defendant, however, and thus, may be notified of the pendency of this action by first class mail, electronic mail, and by published notice.

51. *Existence and Predominance of Common Questions of Law and Fact.* Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting only individual Class members. These common legal and factual questions include, but are not limited to, the following:

- (a) whether General Mills had adequate substantiation for its claims prior to making them;
- (b) whether the claims discussed above are true, or are misleading, or reasonably likely to deceive;
- (c) whether General Mills' alleged conduct violates public policy;

- (d) whether the alleged conduct constitutes violations of the laws asserted herein;
- (e) whether General Mills engaged in false or misleading advertising;
- (f) whether Plaintiff and Class members have sustained monetary loss and the proper measure of that loss;
- (g) whether Plaintiff and Class members are entitled to an award of punitive damages; and
- (h) whether Plaintiff and Class members are entitled to declaratory and injunctive relief.

52. **Typicality.** Plaintiff's claims are typical of the claims of the members of the Class in that the Defendant was unjustly enriched as a result of Plaintiff's and the Class' respective purchases of Yo-Plus®.

53. **Adequacy of Representation.** Plaintiff will fairly and adequately protect the interests of the members of the Class. Plaintiff has retained counsel highly experienced in complex consumer class action litigation, and Plaintiff intends to prosecute this action vigorously. Plaintiff has no adverse or antagonistic interests to those of the Class.

54. **Superiority.** A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The damages or other financial detriment suffered by individual Class members is relatively small compared to the burden and expense that would be entailed by individual litigation of their claims against the Defendant. It would thus be virtually impossible for the Class, on an individual basis, to obtain effective redress for the wrongs done to them. Furthermore, even if Class members could afford such individualized litigation, the court system could not. Individualized litigation would create the danger of inconsistent or contradictory



judgments arising from the same set of facts. Individualized litigation would also increase the delay and expense to all parties and the court system from the issues raised by this action. By contrast, the class action device provides the benefits of adjudication of these issues in a single proceeding, economies of scale, and comprehensive supervision by a single court, and presents no unusual management difficulties under the circumstances here.

55. In the alternative, the Class may also be certified because:

(a) the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudication with respect to individual Class members that would establish incompatible standards of conduct for the Defendant;

(b) the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of other Class members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and/or

(c) Defendant has acted or refused to act on grounds generally applicable to the Class thereby making appropriate final declaratory and/or injunctive relief with respect to the members of the Class as a whole.

56. The claims asserted herein are applicable to all customers throughout the State of Florida who purchased Yo-Plus®.

57. Adequate notice can be given to Class members directly using information maintained in Defendant's records or through notice by publication.

58. Damages may be calculated, in part, from the sales information maintained in Defendant's records, so that the cost of administering a recovery for the Class can be minimized.

However, the precise amount of damages available to Plaintiff and the other members of the Class is not a barrier to class certification.

59. Unless a class is certified, Defendant will retain monies received as a result of its conduct that was taken from Plaintiff and proposed Class members. Unless a classwide injunction is issued, Defendant will continue to commit the violations alleged, and the members of the Class will continue to be misled.

### COUNT I

**For Violations of the Florida Deceptive and Unfair Trade Practices Act,  
Florida Statutes §501.201 *et seq.*,  
On Behalf of Plaintiff and the Class**

60. Plaintiff realleges and incorporates by reference the allegations contained in the paragraphs above as if fully set forth here.

61. This cause of action is brought pursuant to the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §501.201 *et seq.* (the “Act”). The stated purpose of the Act is to “protect the consuming public . . . from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.” Fla. Stat. §501.202(2).

62. Plaintiff is a consumer as defined by Fla. Stat. §501.203. Yo-Plus® is a good within the meaning of the Act. General Mills is engaged in trade or commerce within the meaning of the Act.

63. Fla. Stat. §501.204(1) declares unlawful “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.”

64. Fla. Stat. §501.204(2) states that “due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to [section] 5(a)(1) of the Federal Trade Commission Act.” General Mills’ unfair and deceptive practices are likely to mislead – and have misled – the consumer acting reasonably in the circumstances, and violate Fla. Stat. §500.04 and 21 U.S.C. §343. Further, FTC rules and regulations require that General Mills have the same level of substantiation for its advertisements at the time they are made as it claimed in the advertisement. General Mills claims clinical proof.

65. General Mills has violated the Act by engaging in the unfair and deceptive practices as described herein which offend public policies and are immoral, unethical, unscrupulous and substantially injurious to consumers.

66. Plaintiff and the Class have been aggrieved by General Mills’ unfair and deceptive practices in that they paid for Yo-Plus®.

67. The damages suffered by Plaintiff and the Class were directly and proximately caused by the deceptive, misleading and unfair practices of General Mills, as more fully described herein.

68. Pursuant to Fla. Stat. §501.211(1), Plaintiff and the Class seek a declaratory judgment and court order enjoining the above-described wrongful acts and practices of Defendant and for restitution and disgorgement.

69. Additionally, pursuant to Fla. Stat. §§501.211(2) and 501.2105, Plaintiff and the Class make claims for damages, attorneys’ fees and costs.

## COUNT II

### **Breach of Express Warranty On Behalf of Plaintiff and the Class**

70. Plaintiff realleges and incorporate by reference the allegations contained in the paragraphs above as if fully set forth here.

71. Plaintiff, and each member of the Class, formed a contract with Defendant at the time Plaintiff and the other members of the Class purchased Yo-Plus®. The terms of that contract include the promises and affirmations of fact made by General Mills on its product labels and through its marketing campaign, as described above. This product labeling and advertising constitutes express warranties, became part of the basis of the bargain, and is part of a standardized contract between Plaintiff and the members of the Class on the one hand, and General Mills on the other.

72. All conditions precedent to General Mills' liability under this contract, including notice, have been performed by Plaintiff and the Class.

73. General Mills breached the terms of this contract, including the express warranties, with Plaintiff and the Class by not providing the product which could provide the benefits described above.

74. As a result of General Mills' breach of its contract and warranties, Plaintiff and the Class have been damaged in the amount of the purchase price of the Products they purchased.

### **PRAYER FOR RELIEF**

Wherefore, Plaintiff prays for a judgment:

- A. Certifying the Class as requested herein;
- B. Awarding Plaintiff and the proposed Class members damages;

C. Awarding restitution and disgorgement of General Mills' revenues to Plaintiff and the proposed Class members;

D. Awarding declaratory and injunctive relief as permitted by law or equity, including enjoining Defendant from continuing the unlawful practices as set forth herein, and directing Defendant to identify, with Court supervision, victims of its conduct and pay them restitution and disgorgement of all monies acquired by Defendant by means of any act or practice declared by this Court to be wrongful;

E. Awarding Plaintiff and the Class punitive damages;

F. Ordering General Mills to engage in a corrective advertising campaign;

G. Awarding attorneys' fees and costs; and

H. Providing such further relief as may be just and proper.

#### **JURY DEMAND**

Plaintiff demands a trial by jury on all issues so triable.

DATED: March 17, 2009

COUGHLIN STOIA GELLER  
RUDMAN & ROBBINS LLP  
JONATHAN M. STEIN  
Florida Bar No. 009784  
CULLIN A. O'BRIEN  
Florida Bar No. 597341



---

JONATHAN M. STEIN

120 East Palmetto Park Road, Suite 500  
Boca Raton, FL 33432  
Telephone: 561/750-3000  
561/750-3364 (fax)  
jstein@csgrr.com  
cobrien@csgrr.com

COUGHLIN STOIA GELLER  
RUDMAN & ROBBINS LLP  
JOHN J. STOIA, JR.  
TIMOTHY G. BLOOD  
LESLIE E. HURST  
THOMAS J. O'REARDON II  
655 West Broadway, Suite 1900  
San Diego, CA 92101  
Telephone: 619/231-1058  
619/231-7423 (fax)

BALKAN & PATTERSON, LLP  
JOHN B. PATTERSON  
Florida Bar No. 023930  
ADAM M. BALKAN  
Florida Bar No. 0044880  
601 South Federal Highway Suite 302  
Boca Raton, FL 33432  
Telephone: 561-750-9191  
561/750-1574 (fax)  
john@balkanpatterson.com  
adam@balkanpatterson.com

SHEPHERD FINKELMAN MILLER  
& SHAH, LLP  
JAYNE A. GOLDSTEIN  
Florida Bar No. 144088  
1640 Town Center Circle, Suite 216  
Weston, FL 33326  
Telephone: 954/515-0123  
954/515-0124 (fax)  
jgoldstein@sfmslaw.com

THE CLIMACO LAW FIRM  
JOHN R. CLIMACO  
55 Public Square, Suite 1950  
Cleveland, Ohio 44113  
Telephone: 216/621-8484  
216/771-1632 (fax)

FRANK PISCITELLI CO., LPA  
FRANK PISCITELLI  
55 Public Square, Suite 1950  
Cleveland, Ohio 44113  
Telephone: 216/931-7000  
216/931-9925 (fax)

Attorneys for Plaintiff and the Class