

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

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<b>PHYSICIANS COMMITTEE FOR</b>		)	
<b>RESPONSIBLE MEDICINE and</b>		)	
<b>CATHERINE HOLMES,</b>		)	
		)	
Plaintiffs,		)	At Law No. _____
		)	
v.		)	
		)	
<b>INTERNATIONAL DAIRY FOODS</b>		)	
<b>ASSOCIATION, DAIRY MANAGEMENT,</b>		)	
<b>INC., NATIONAL DAIRY COUNCIL, INC.,</b>		)	
<b>and LIFEWAY FOODS, INC.,</b>		)	
		)	
Defendants.		)	
		)	
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**Motion for Judgment**

Plaintiffs, Physicians Committee for Responsible Medicine (PCRM) and Catherine Holmes, by and through their attorneys, file this Motion for Judgment for actual damages, declaratory judgment, attorneys’ fees and costs, and allege as follows:

**Preliminary Statement**

1. Plaintiffs bring this action against the defendants, who have embarked on a massive, deceptive advertising campaign to convince Virginia consumers specifically, and Americans generally, that increased consumption of dairy products will lead to weight loss. Defendants developed and promoted these claims despite the fact that the overwhelming weight of scientific evidence proves that that increased consumption of dairy products is likely to cause consumers to

**gain** weight, or, at best, have no effect at all. Plaintiffs seek to end this deceptive advertising campaign and to require defendants to deal honestly with Virginia consumers.

### Parties

2. PCRМ is a 501(c)(3) charitable organization with more than 100,000 physician and layperson members, headquartered at 5100 Wisconsin Avenue, N.W., Washington, D.C., 20016. PCRМ has approximately 4,700 members residing in the State of Virginia and advocates for preventive medicine through good nutrition, among other mission activities.

3. Catherine Holmes is a member of PCRМ and a resident of Virginia. Ms. Holmes saw the Weight Loss Promotion, relied upon it by going on the diet and increasing her consumption of dairy products, and gained, rather than lost, weight.

4. International Dairy Foods Association (IDFA), a District of Columbia corporation, is the dairy industry's lobbying arm, headquartered at 1250 H Street, N.W., Suite 900, Washington, D.C. 20005. IDFA describes itself as follows:

IDFA is the dairy foods industry's collective voice in Washington, D.C., throughout the country and in the international arena. IDFA has become a leading player in the formation of positive domestic and international dairy policies. Today, IDFA represents more than 500 dairy food manufacturers, marketers, distributors and industry suppliers across the United States and Canada, and in 20 other countries.

IDFA's mission includes: Leading and coordinating industry-wide consumer communications and marketing programs. In this role, IDFA was fully involved in the development of the Weight Loss Promotion described below, and knew and intended that this promotion would be seen by millions of Virginia residents. Upon information and belief, IDFA regularly transacts business in Virginia.

5. Dairy Management, Inc. (DMI), a District of Columbia corporation, is the dairy industry trade association, headquartered at 10255 West Higgins Road, Suite 900, Rosemont, IL 60018,

that promotes demand for dairy products on behalf of America's dairy farmers. DMI describes itself as follows:

Dairy Management Inc.<sup>TM</sup> (DMI) is the domestic and international planning and management organization that builds demand for dairy products on behalf of America's 80,000-plus dairy producers.

In this role, DMI was fully involved in the development of the Weight Loss Promotion, and knew and intended that this promotion would be seen by millions of Virginia residents. Upon information and belief, DMI regularly transacts business in Virginia.

6. The National Dairy Council, Inc. (NDC) is an Illinois corporation that shares offices with DMI at 10255 West Higgins Road, Suite 900, Rosemont, IL, 60018. NDC describes itself as follows:

The National Dairy Council® (NDC), the nutrition marketing arm of Dairy Management Inc.<sup>TM</sup> has been the leader in dairy nutrition research, education and communication since 1915.

In this role, NDC was fully involved in the development of the Weight Loss Promotion, and knew and intended that this promotion would be seen by millions of Virginia residents. Upon information and belief, NDC regularly transacts business in Virginia.

7. Lifeway Foods, Inc., is the manufacturer of Kefir, a dairy beverage similar in taste and texture to a drink-style yogurt. It is an Illinois corporation headquartered at 6431 West Oakton Ave., Morton Grove, IL 60053. Lifeway sells its products nationally, and throughout Virginia.

### **Nature of the Action**

8. The dairy industry, by and through the named defendants, has commenced a multi-million dollar advertising campaign designed to deceive Virginia consumers (along with all American consumers) with the patently false claim that consuming milk and other dairy products is an effective means of losing weight. The campaign also makes the false claim that consuming

dairy products assists individuals in “burning fat.” This campaign will hereafter be referred to as the Weight Loss Promotion.

9. In truth and in fact, adding milk and other dairy products to one’s diet, be they reduced-fat or not, does not cause weight loss; rather, it frequently encourages weight **gain**.

10. The dairy industry seeks to convince consumers that consuming 24 ounces of dairy products a day will help them lose weight. Dairy products do not have such benefits. The dairy industry’s claims ignore the body of scientific evidence disputing this claim and are based almost entirely upon the unreliable and/or unpublished studies of one scientist, Michael Zemel, Ph.D. Dr. Zemel’s objectivity is compromised, as his dairy studies are funded by the dairy industry. Dr. Zemel’s conclusions must be further questioned because he holds a patent on the alleged method of using calcium and/or dairy products for the treatment and prevention of obesity. Accordingly, he likely hopes to benefit financially every time the dairy industry makes a weight loss claim. Further, Dr. Zemel’s findings have been contradicted by virtually every other clinical trial that has examined the question whether dairy products cause weight loss.

11. The Zemel studies are flawed in many ways, most significantly because the participants in these studies were instructed to restrict the number of calories in their diet, not just to change the type of food and drink they were consuming. He never discloses whether the individuals consuming dairy products reduce their calorie intake to a greater or lesser extent than the study groups used for comparison. Thus, a reduction in calories is the likely cause of any weight loss in the Zemel studies, not the dairy products that were consumed.

12. PCRM brings this suit seeking a declaratory judgment that the Weight Loss Promotion constitutes false and misleading advertising in violation of Virginia law. Ms. Holmes seeks that same declaratory relief, plus damages consisting of money wasted on dairy products in a failed

effort to lose weight. The acts perpetrated on plaintiffs are the same and there being a community of interest between PCRM and Ms. Holmes, the parties should be joined as co-plaintiffs.

### **Jurisdiction and Venue**

13. This Court has jurisdiction pursuant to Va. Code Ann. §59.1-204 (Virginia Consumer Protection Act) and §59.1-68.3 (Virginia's false advertising statute).

14. This Court has personal jurisdiction over each of the defendants pursuant to Va. Code Ann. §8.01-328.1(1), as the defendants advertised and transacted business in the Commonwealth of Virginia.

15. Venue is permissible pursuant to Va. Code Ann. §8.01-262(3) and 262(4), as the defendants regularly advertised and conducted business in the City of Alexandria, Virginia.

### **GENERAL ALLEGATIONS**

16. Every year, consumers waste billions of dollars on false weight loss schemes. The Weight Loss Promotion is one more of these fraudulent weight loss schemes, promoted through a campaign of false and deceptive advertising. The Weight Loss Promotion promises that dairy products have weight loss benefits that do not exist. In fact, consumption of dairy products will either lead to weight gain, if overall dietary calories are increased or have no effect on weight, if dietary calories consumption is kept stable. Because of dairy's high calorie content, it is unlikely that an increase in dairy consumption would lower one's overall calorie consumption.

17. The Weight Loss Promotion, a national advertising campaign with almost total industry participation, has been active since October 2003. Since that time, print advertisements have run in scores of national magazines, including *People*, *TV Guide*, *Fitness*, and *Health*, trade journals including *Washington Family Physician* and *School Foodservice & Nutrition*, and on broadcast

and cable television, including “Dr. Phil,” “Will & Grace,” “Good Morning America,” “Alias,” and various Style Channel programs. The campaign also includes Internet advertising (e.g. [www.healthyweightwithdairy.com](http://www.healthyweightwithdairy.com); [www.2424milk.com](http://www.2424milk.com); [www.yoplait.com](http://www.yoplait.com); [www.lightnfit.com](http://www.lightnfit.com); [www.kraftfoods.com/dairy](http://www.kraftfoods.com/dairy); [www.lactaid.com](http://www.lactaid.com); [www.kefir.com](http://www.kefir.com)). This promotion constitutes a pattern of deception aimed at all consumers in Virginia and elsewhere who are concerned about their health, preventing obesity, maintaining a healthy weight, or losing weight.

18. While these Weight Loss Promotion advertisements (WLP advertisements) are craftily worded, the message taken home by a reasonable consumer is clear: Consuming at least 24 ounces of dairy products every day will cause you to lose weight and body fat based on the special combination of nutrients, including calcium, in dairy products.

19. The WLP advertisements sometimes promote all dairy products, and sometimes limit the recommendation to low-fat or fat-free dairy products.

20. Examples of the false and misleading claims contained in these advertisements include:

- “One approach [to losing weight] is getting at least three servings a day of milk, cheese or yogurt instead of some of your current choices.”
- “Getting calcium and protein from low-fat or fat-free milk could help you lose more weight than by just reducing calories.”
- “The Secret’s in the Science.”
- “Calcium in milk is approximately twice as effective as calcium supplements in stopping fat storage and triggering fat breakdown.”
- Increasing consumption of dairy products will reduce the nation’s obesity epidemic.

- “Increasing dairy consumption to just 3-4 servings a day would result in billions of dollars in healthcare cost savings.”
- An advertisement targeting physicians implores: “One approach [to losing weight] is to encourage your patients to include at least 3 servings of milk, cheese, or yogurt as part of a reduced-calorie diet. Simply put, if they change how they look at dairy, they may change how their bodies look.”
- “And milk is the only beverage that naturally provides the unique combination of calcium and protein for healthy, effective weight loss support... So it’s time to add healthy weight loss to the already extensive list of good things that milk can do for your body.”
- “Drink Milk. Lose weight?... [D]rinking 3 glasses of milk daily when dieting may promote the loss of body fat while maintaining more muscle. The calcium and protein in milk may help explain these weight loss benefits.”
- An ad with actress Kelly Preston states, “Studies show that people who get enough calcium in their diet weigh less than those who don’t. Milk is an excellent source of calcium. So drink 24 oz. of milk every 24 hours for the calcium you need.”
- Kraft announces the “good news” that you can burn more fat by consuming any of its cheese products.

21. Defendants IDFA, DMI and NDC participated in the development of the Weight Loss Promotion, which they helped launch in October 2003 and which continues through the date of this complaint.

22. Upon information and belief, IDFA, DMI and NDC review and approve all advertising used in the Weight Loss Promotion.

23. Upon information and belief, IDFA, DMI and NDC financially support the Weight Loss Promotion using funds provided by the dairy industry.

24. Kraft Foods, Inc., General Mills, Inc., Dannon Company, Inc., McNeil-PPC, Inc. and Lifeway Foods, Inc., all marketed products using the Weight Loss Promotion.

25. Ms. Holmes saw various ads in magazines and on television that were part of the Weight Loss Promotion. Ms. Holmes specifically recalls seeing milk ads, ads by General Foods, Inc. and by Lifeway Foods, Inc. that were part of the Weight Loss Promotion. Ms. Holmes also saw other variations of these claims. Ms. Holmes believed these ads and commencing on or about mid-December 2004, she decided to alter her diet by significantly adding dairy products to her diet, cutting out meat and limiting her intake of beans, peas, brown rice, lentils and other carbohydrates, such as pasta. In reliance on these ads, Ms. Holmes and bought Kefir and other dairy products, in part, to assist her in losing weight.

26. Ms. Holmes did not lose weight when she added additional dairy to her diet. Instead she lost money and gained a small amount of weight.

27. Ms. Holmes has suffered damages by spending approximately \$236 on dairy products that she otherwise would not have bought, in reliance upon the defendants' false representations that consuming these additional dairy products would help her lose weight.

**The Body of Scientific Evidence Does Not Support the Dairy Industry's Claim that Dairy Products Cause Greater Weight Loss Than Just Cutting Calories.**

28. The dairy industry seeks to persuade consumers that dairy products facilitate weight control, citing what they characterize as “a growing body of research” that allegedly supports this claim. The body of scientific evidence, however, supports precisely the opposite conclusion. Studies show that adding dairy products to the diet does nothing whatsoever for weight **control**, and in some cases, it encourages weight **gain**.

29. There are several scientific studies that have tested the effect of dairy product or calcium supplement consumption on body weight, both in the presence and absence of calorie restrictions. Out of all these studies, not one shows that dairy product or calcium consumption improves weight control or results in weight or fat loss. In fact, some of these studies show that dairy consumption leads to weight gain. *See* Lau EMC, Woo J, Lam V, Hong A. *Milk supplementation of the diet by postmenopausal Chinese women on a low calcium intake retards bone loss*. J Bone Miner Res. 2001;16:1704-1709; Barr SI, McCarron DA, Heaney RP, et al. *Effects of increased consumption of fluid milk on energy, nutrient intake, body weight, and cardiovascular disease risk factors in healthy older adults*. J Am Diet Assoc. 2000;100:810-817; Wosje KS, Kalkwarf HJ. *Lactation, weaning, and calcium supplementation: effects on body composition in postpartum women*. Am J Clin Nutr. 2004;80:423-429; Lappe JM, Rafferty KA, Davies M, Lypaczewski G. *Girls on a high-calcium diet gain weight at the same rate as girls on a normal diet: a pilot study*. J Am Diet Assoc. 2004;104:1361-1367; Gunther CW, Legowski PA, Lyle RM, et al. *Dairy products do not lead to alterations in body weight or fat mass in young women in a 1-y intervention*. Am J Clin Nutr 2005;81:751-6; Huang TTK, McCrory MA. *Dairy intake, obesity, and metabolic health in children and adolescents: knowledge and gaps*. Nutrition Reviews 2005;63:71-80; Harvey-Berino J, Gold BC, Lauber R. *The impact of dairy product consumption on weight loss*. Abstract presented at NAASO conference, November 2004; Bowen

J, Noakes M, Clifton PM. *A high dairy protein, high-calcium diet minimizes bone turnover in overweight adults during weight loss*. J Nutr. 2004;134:568-573; Jensen LB, Kollerup G, Quaade F, Sorensen OH. *Bone mineral changes in obese women during a moderate weight loss with and without calcium supplementation*. J Bone Miner Res. 2001;16:141-147; Shapses SA, Heshka S, Heymsfield SB. *Effect of calcium supplementation on weight and fat loss in women*. J Clin Endocrinol Metab. 2004;89:632-637.

30. The dairy industry rests its claim almost entirely on the findings of a single industry-funded experimenter, whose studies are small, poorly controlled, reported with only minimal detail and which have yielded inconsistent results. This researcher, Michael Zemel, Ph.D., of the University of Tennessee, Knoxville, consistently fails to report the changes in calorie intake of research participants, making it impossible to assess whether differences in calorie intake alone is responsible for any changes in weight. Some of his reports are abstracts only, rather than full reports, making it impossible to fully assess his methods or data.

31. None of Zemel's studies should be cited as scientific support for the proposition that dairy helps weight or fat loss. One of Zemel's studies involving consumption of dairy products did not reduce the participants' calorie intake. As one would expect, this study showed that dairy consumption had no impact on body weight. Three of Zemel's studies altered the participants' diets with both dairy product supplementation and calorie restriction. One of these studies failed to show any significant weight loss. The two other studies did show weight loss, although it is impossible to determine whether the weight loss was a result of dairy supplementation and/or calorie restriction because Zemel did not report the degree to which participants actually reduced their calorie intakes. All of Zemel's studies suffer from technical problems such as (1) failing to control for calorie intake (the main variable that may confound their results); (2) failing to

describe the methodology, and (3) failing to provide a full descriptive report, as opposed to an abstract reported without methodology descriptions (as was done with two of these four studies).

*See Zemel MB, et al. Increasing dairy calcium intake reduces adiposity in obese African-American adults. Circulation. 2002; 106 (suppl. 2) II-610. Abstract; Zemel MB, Teegarden D, Van Loan M, et al. Role of dairy products in modulation of weight and fat loss: A multi-center trial. FASEB J. 2004;18:A845; Zemel MB, Thompson W, Milstead A, Morris K, Campbell P. Calcium and dairy acceleration of weight and fat loss during energy restriction in obese adults. Obes Res. 2004;12:582-590; Zemel MB, Richards J, Mathis S, Milstead A, Gebhardt L, Silva E. Dairy augmentation of total and central fat loss in obese subjects. Int J Obes. 2005; 29:391–397.*

32. In addition to the imprecise and suspect study designs and methodologies utilized by Zemel, the value of his studies as scientific support for the Weight Loss Promotion is entirely undermined in light of his financial stake in the outcome of these studies. Not only did Zemel receive grants from the National Dairy Council and the breakfast cereal and yogurt industries to conduct his studies, but he also holds a patent with the U.S. Patent and Trademark Office on the method of using calcium and/or dairy products for the treatment and prevention of obesity. *See, <http://www.cspinet.org/cgi-bin/integrity.cgi> and <http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO2&Sect2=HITOFF&p=1&u=/netahtml/search-bool.html&r=26&f=G&l=50&col=AND&d=ptxt&s1=zemel.INZZ.&OS=IN/zemel&RS=IN/zemel>*. Upon information and belief, this patent provides Zemel with income every time the dairy weight loss claim is made.

33. Zemel's findings, allegedly supporting the dairy industry's claims, have not been replicated by other researchers testing similar hypotheses and are not representative of the complete body of research on the dairy/weight loss issue. Even some of Zemel's own studies

have shown that dairy product consumption does not facilitate weight loss. Thus, even some of Zemel's results are contrary to the industry's Weight Loss Promotion claims. See, Harvey-Berino J, Gold BC, Lauber R. *The impact of dairy product consumption on weight loss*. Abstract presented at NAASO conference, November 2004; Bowen J, Noakes M, Clifton PM. *A high dairy protein, high-calcium diet minimizes bone turnover in overweight adults during weight loss*. J Nutr. 2004;134:568-573; Jensen LB, Kollerup G, Quaade F, Sorensen OH. *Bone mineral changes in obese women during a moderate weight loss with and without calcium supplementation*. J Bone Miner Res. 2001;16:141-147.

34. The dairy industry incorrectly cites the Barr study in its materials, as supporting their dairy weight loss claim. However, the Barr review study concluded that dairy consumption does not affect weight or body fat. Thus, defendants are misleading the public by citing this study. See Barr SI. *Increased dairy product or calcium intake: Is body weight or composition affected in humans?* J Nutr. 2003;133:245S-248S; <http://www.nationaldairycouncil.org/nationaldairycouncil/healthyweight/science>.

35. In addition to the above-referenced clinical studies or reviews, several observational studies have been conducted on the relationship between calcium or dairy products and body weight and/or adiposity. None of these observational studies has shown any association between dairy or calcium intake and weight loss or fat loss. Indeed, none has observed weight or fat loss at all, and in at least one study milk consumption was associated with higher weight gain in adolescents. Some of the observational studies have observed associations between dairy or calcium intake and a reduced rate of weight gain or a lower weight or adiposity **at a single point in time** for some participant subgroups. However, an association between dairy and **slower**

weight gain is a far cry from the dairy industry's claim that dairy products will in any way facilitate weight or body fat loss.

36. Observational studies that appear to show an association between the use of dairy products or calcium supplements and a healthier body weight also do not support the dairy industry's weight loss claims. Because dairy products have been heavily promoted for their supposed health benefits, any results from observational studies may be biased by the fact that individuals using these products are more likely to be health-conscious than non-milk drinkers. These uncontrolled factors in observational studies do not render them completely without merit, but they are clearly limited with respect to the conclusions that can be drawn from them.

37. To date, ten observational studies investigating the relationship between calcium or dairy intake and body weight have been published in report form (as opposed to abstract form). None of these studies showed weight loss over time in any population group. See Lovejoy JC, Champagne CM, Smith SR, de Jonge L, Xie H. *Ethnic differences in dietary intakes, physical activity, and energy expenditure in middle-aged, premenopausal women: the Healthy Transitions Study*. Am J Clin Nutr. 2001;74:90-95; Loos R, Rankinen T, Leon A, et al. *Calcium intake and body composition in the HERITAGE Family Study*. Obes Res. 2003;11(S):597-P; Jacqmain M, Doucet E, Despres JP, Bouchard C, Tremblay A. *Calcium intake, body composition, and lipoprotein-lipid concentrations in adults*. Am J Clin Nutr. 2003;77:1448-1452; Mirmiran P, Esmailzadeh A, Aziz F. *Dairy consumption and body mass index: an inverse relationship*. Int J Obesity. 2005;29:115-21; Lin YC, Lyle RM, McCabe LD, McCabe GP, Weaver CM, Teegarden D. *Dairy calcium is related to changes in body composition during a two-year exercise intervention in young women*. J Am Coll Nutr. 2000;19:754-760; Phillips SM, Bandini LG, Cry H, Colclough-Douglas S, Naumova E, Must A. *Dairy food consumption and body weight and*

*fatness studied longitudinally over the adolescent period.* Int J Obes. 2003;27:1106-1113; Novotny R, Daida YG, Acharya S, Grove JS, Vogt TM. *Dairy intake is associated with lower body fat and soda intake with greater weight in adolescent girls.* J Nutr. 2004;134:1905-1909; Barba G, Troiano E, Russo P, Venezia A, Siani A. *Inverse association between body mass and frequency of milk consumption in children.* Brit J Nutr. 2005;93:15-19; Tanasescu M, Ferris AM, Himmelgreen DA, Rodriguez N, Perez-Escamilla R. *Biobehavioral factors are associated with obesity in Puerto Rican children.* J Nutr. 2000;130:1734-1742; Berkey CS, Rockett HRH, Willett WC, Colditz GA. *Milk, dairy fat, dietary calcium, and weight gain: a longitudinal study of adolescents.* Arch Pediatr Adolesc Med 2005;159:543-550.

38. The dairy industry sets forth 35 studies on its Web site that allegedly support the dairy weight loss claims. *See* <http://www.nationaldairycouncil.org/nationaldairycouncil/healthyweight/science>. An examination of these studies reveals that the industry has distorted the results and significance of the studies both in their characterization of the study results and presentation of the data. Moreover, they have omitted relevant studies that refute the dairy industry's Weight Loss Promotion claims. Such distortions and omissions have given a false and misleading impression to the reasonable consumer about the scientific validity (or lack of scientific validity) of the dairy industry's claim that the daily consumption of three servings of dairy products will result in weight and fat loss.

39. The industry is so desperate for some semblance of scientific support for its dairy weight loss claims that they even include studies irrelevant to the dairy/weight loss hypothesis. *See*, Layman D, *et al.* *A reduced ratio of dietary carbohydrate to protein improves body composition and blood lipid profiles during weight loss in adult women.* J Nutr. 2003; 133: 411-417; Pereira

MA, Jacobs DR, Van Horn L, Slattery ML, Kartashov AI, Ludwig DS. *Dairy consumption, obesity, and the insulin resistance syndrome in young adults*. JAMA. 2002;287:2081-2089; Albertson AM, et al. *Ready-to-eat cereal consumption: its relationship with BMI and nutrient intake of children aged 4 to 12 years*. J Am Diet Assoc. 2003;103:1613-9. None of these studies reported on whether dairy products have any relationship with weight or body fat. Therefore, it is indisputably deceptive to identify these studies as supporting the dairy industry's claims.

40. Thus, after evaluating all of the studies relevant to the dairy weight loss question, the only studies that actually support the claims of the Weight Loss Promotion are the two small trials by Zemel, both of which are of poor quality, insufficient relevance, refuted by the body of scientific evidence, and authored by an experimenter with serious conflicts of interest.

41. The dairy industry is immensely wealthy and powerful. It is also highly sophisticated in the science of nutrition **and** in selling its products to consumers. The dairy industry defendants in this case are well aware of the available scientific information about dairy intake and weight. As a result, they also know that the average consumer is likely to **gain**, not **lose**, weight, by adding dairy products, especially high-fat dairy products, to their diet.

42. The Weight Loss Promotion constitutes false and deceptive advertising.

**Count I**  
**(Violation of Virginia Consumer Protection Act)**

43. The prior allegations of the complaint are incorporated herein by reference.

44. The Virginia Consumer Protection Act of 1977, Va. Code Ann. § 59.1-196 *et seq.*, (the “CPA”) was designed by the General Assembly as:

[R]emedial legislation to promote fair and ethical standards of dealings between suppliers and the consuming public.

Va. Code Ann. § 59.1.197.

45. The CPA defines “consumer transaction” to include: “the advertisement, sale . . . of goods . . . to be used primarily for personal, family or household purposes.” The CPA defines “supplier” to mean “a seller, lessor or licensor . . . who advertises, solicits or engages in consumer transactions, or a manufacturer, distributor or licensor . . . who advertises and sells, leases or licenses goods or services to be resold . . . by other persons in consumer transactions.” Va. Code Ann. § 59.1-198.

46. Each of the named defendants is a supplier as that term is defined by CPA, either because they are sellers or licensors who are directly or indirectly responsible for advertising to consumers, or because they are a manufacturer who sells goods to be resold in a consumer transaction.

47. Each of the named defendants engaged in consumer transactions as that term is defined by the CPA.

48. The CPA at § 59.1-200 states in pertinent part as follows:

The following fraudulent acts or practices committed by a supplier in connection with a consumer transaction are hereby declared unlawful:

\* \* \*

5. Misrepresenting that goods or services have certain quantities, characteristics, ingredients, uses, or benefits;

\* \* \*

14. Using any other deception, fraud, false pretenses, false promise or misrepresentation in connection with a consumer transaction.

49. Each of the defendants violated the CPA by falsely representing that dairy products would have characteristics, uses and benefits that they do not have; specifically, that dairy products assist consumers in losing weight.

50. Each of the defendants violated the CPA by using deception, fraud, false pretenses, false promises or misrepresentations in connection with consumer transactions, i.e., the Weight Loss Promotion.

51. The CPA at § 59.1-204 provides as follows:

**Individual action for damages or penalty**

A. Any person who suffers loss as a result of a violation of this chapter shall be entitled to initiate an action to recover actual damages, or \$500, whichever is greater. If the trier of fact finds that the violation was willful, it may increase damages to an amount not exceeding three times the actual damages sustained, or \$1,000, whichever is greater.

B. Notwithstanding any other provision of law to the contrary, in addition to damages awarded, such person may also be awarded reasonable attorney's fees and costs.

52. Ms. Holmes suffered actual damages as a result of the violation of the CPA in the approximate amount of \$236 by purchasing greater quantities of dairy products than she would have were it not for defendants' false and misleading Weight Loss Promotion.

53. Ms. Holmes suffered actual damages in that the dairy products she purchased did not, as advertised, assist her in losing weight.

54. PCRM's members, 4,658 of whom live in Virginia, continue to suffer actual damages in that they are subjected to false and misleading advertising.

55. Some PCRM members consume dairy products. Upon information and belief, given the pervasive advertising by the defendants, some of PCRM's members are likely to have been misled by the campaign and purchased dairy products in reliance on the advertisements. PCRM does not seek money damages on behalf of its members. Rather, it seeks declaratory relief, attorney's fees and costs of suit.

**Count II**  
**(Violation of Virginia's False Advertising Statute)**

56. The prior allegations of the complaint are incorporated herein by reference.

57. Virginia's False Advertising Statute, Va. Code Ann. §18.2-216, provides in pertinent part as follows:

Any person, firm, corporation or association who, with the intent to sell . . . merchandise . . . to the public for sale or distribution **or with intent to increase the consumption thereof** . . . makes, publishes, disseminates, circulates or places before the public . . . an advertisement of any sort regarding merchandise . . . which advertisement contains any promise, assertion, representation or statement of fact which is untrue, deceptive or misleading . . . shall be guilty of a Class 1 misdemeanor. [Emphasis supplied.]

58. Private actions may be brought under the False Advertising Statute. Va. Code Ann. § 59.1-68.5 provides in pertinent part that:

Any person who suffers loss as a result of a violation of Article 8 ( § 18.2-214 *et seq.*), Chapter 6 of Title 18.2 shall be entitled to bring an individual action to recover damages, or \$100, whichever is greater. . . . Notwithstanding any other provision of law to the contrary, in addition to the damages recovered by the aggrieved party, such person may be awarded reasonable attorney's fees.

59. The defendants, and each of them, violated the False Advertising Statute by producing and distributing advertising that contained promises, assertions, representations and statements of fact that were untrue, deceptive or misleading, in connection with the Weight Loss Promotion.

60. Ms. Holmes has suffered loss as a result of defendants' violations of the False Advertising Statute.

61. PCRМ members have suffered loss as a result of defendants' violations of the False Advertising Statute. PCRМ does not seek pecuniary relief for losses suffered by its members. Rather, it seeks declaratory relief, attorney's fees and costs of suit.

**Prayer for Relief**

PCRM and Ms. Holmes move for final judgment in their favor, and against each and every defendant, jointly and severally, for the following:

- A. Compensatory damages for Ms. Holmes; and
- B. Treble damages for Ms. Holmes; and
- C. Declaratory judgment that the Weight Loss Promotion constitutes false and misleading advertising; and
- D. Attorney's fees and costs of suit; and
- E. Such additional and further relief as the Court may deem just and proper.

**JURY DEMAND**

A trial by jury is hereby demanded of all issues so triable.

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