SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MATTHEW PRINCE individually and on behalf of D'LITES L.A.M.D. B.H., INC.,

Plaintiff,

-against-

FOX TELEVISION STATIONS, INC. and ARNOLD DIAZ,

Defendants.

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Index No. 107129/2011

DECISION/ORDER
Motion Seq. 006

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this libel action arising from the television show "Shame Shame Shame," defendants Fox Television Stations, Inc. ("Fox") and Arnold Diaz ("Diaz") (collectively, "defendants") move for summary judgment dismissing the complaint of the plaintiff, Matthew Prince ("Prince") individually and on behalf of D'Lites L.A.M.D. B.H. Inc. ("LAMB") (collectively, "plaintiff").

Factual Background

Plaintiff established LAMB and entered into a sub-licensing agreement with the tri-state license holder for D'Lites Emporium, Inc. ("D'Lites") in order to sell "D'Lites" ice cream, a diet-friendly alternative to traditional ice cream.

On May 12, 2011 and May 14, 2011, defendants aired an investigative news report (the "Report") on Fox 5 about the nutritional content of D'Lites ice cream sold in two stores in Woodbury, New York and West Caldwell, New Jersey respectively, neither of which are owned

by plaintiff and locations about to open.[1] According to defendants, when Diaz reports that four more locations in New York are about to open, "a screengrab from the DEI website appears on the screen that lists 'Babylon L.I. N.Y., Bayside N.Y., Commack L.I. N.Y. and Greenvale, L.I., N.Y." During the Report, Diaz states, essentially, that although advertisements for D'Lites heralds the "low calorie, low carb, low sugar, low fat, no cholesterol" nature of D'Lites ice cream, laboratory tests revealed that the servings as advertised contained at least three times the amount of calories as noted on the small, medium, and large serving cups. The other categories were also significantly greater than the amounts advertised on the DEI website. The footage also showed that a 39 gram serving, which the owner, inventor, and licensor of the D'Lites mix claimed was accurately advertised, occupied less than ½ of a small cup serving, when customers are actually served much more in a small cup. The Report concludes by placing D'Lites into the Hall of Shame.

According to plaintiff, defendants knowingly published false information about plaintiff, even after the plaintiff gave documents to the defendants establishing that the information published was false.

In support of their motion, defendants argue that dismissal is warranted because plaintiff's defamation claim fails as a matter of law. The Report is not about plaintiff's stores, which had not, by the time of the airing, sold D'Lites ice cream or had been open. The Report did not mention Prince or LAMB. The Report did not intend to convey any defamatory implication about plaintiff's unopened stores. There is no evidence that the Report was false,

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[1] According to defendants, the Woodbury and West Caldwell stores brought a defamation suit against defendants in New Jersey, which was dismissed. These two stores have since closed.

and there is no showing of falsity as to plaintiff's stores. Further, the Report was substantially true. Defendants did not depart from accepted standards of reporting, and thus, were not grossly responsible in creating the Report. Further, defendants did not act with constitutional malice in publishing the Report so as to support a product disparagement claim. Nor does plaintiff have standing to assert a product disparagement claim under caselaw, as it does not "own" the product, *i.e.*, the formula for the ice cream.

In opposition, plaintiff argues that the Report is of or concerning the plaintiff, was false and misleading, was intended to encompass the plaintiff, and defendants were grossly irresponsible in airing the broadcast. Plaintiff also argues that defendants unfairly compared its test results to D'Lites nutritional label, failed to advise viewers that the test results in the "Per 100g column" are similar to D'Lites' test results DEI provided to them before the show aired, created a false impression that each spoonful of the ice cream was not as healthy as claimed and that diabetics should not eat any of the ice cream, and that there was an inconsistent use of multiples for carbohydrates for sugars. Further, defendants acted with malice, and caused plaintiff damages.

Additionally, issues of fact exist as to plaintiff's product disparagement claim, and plaintiff in fact owns the ice cream, after having purchased the mix as well as the machines. And, the caselaw cited by defendants does not support their argument that plaintiff lacks standing to assert this claim

In reply, defendants argue that there is no evidence that the Report is materially false about plaintiff's shops, that the alleged statements were false, and plaintiff's new theory that the Report conveys an implication that D'Lites is "Unhealthy" is prohibited by CPLR 3016, consists

of protected opinion, and the implication is substantially true. There is no evidence that defendants intended to convey any implication about plaintiff, who failed to raise a fact issue as to whether defendants were grossly irresponsible in publishing the statements in the Report. Also, the Report was not "of and concerning" plaintiff's stores. And, plaintiff failed to demonstrate that it is entitled to punitive damages given that there is no showing of constitutional or common law malice.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.,* 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.,* 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 A.D.3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions

are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 N.Y.2d 276, 281-82, 413 N.Y.S.2d 309 [1978]; *Carroll v Radoniqi,* 105 A.D.3d 493, 963 N.Y.S.2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 A.D.2d 342, 476 N.Y.S.2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 A.D.3d 492, 954 N.Y.S.2d 53 [1st Dept 2012]).

The elements of a defamation claim are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation *per se (Frechtman v Gutterman,* 115 A.D.3d 102, 979 N.Y.S.2d 58 [1st Dept 2014]; *Dillon v City of New York*, 261 A.D.2d 34, 704 N.Y.S.2d 1 [1st Dept 1999] *citing* Restatement of Torts, Second § 558). CPLR 3016(a) requires that in a defamation action, "the particular words complained of ... be set forth in the complaint." The complaint also must allege the time, place and manner of the false statement and to specify to whom it was made (*Dillon citing Arsenault v Forquer*, 197 A.D.2d 554, 602 N.Y.S.2d 653 [2d Dept 1993]; *Vardi v Mutual Life Insurance Co. of New York*, 136 A.D.2d 453, 523 N.Y.S.2d 95). The "lower standard of gross irresponsibility applicable to private-person plaintiffs" may also be alleged to support a defamation claim (*Rivera v Time Warner Inc.*, 56 A.D.3d 298, 867 N.Y.S.2d 405 [1st Dept 2008] *citing Chapadeau v Utica Observer–Dispatch*, 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569 [1975]).

As to defendants' argument that the defamation claim fails because the Report was not "of and concerning" the plaintiff, it has been held that where the alleged statements do not

reference the plaintiff, they are not "'of and concerning" plaintiff, and thus, the complaint is subject to dismissal (*Alf v Buffalo News, Inc.*, 100 A.D.3d 1487, 953 N.Y.S.2d 797 [4th Dept 2012] (dismissing the complaint to the extent that the allegedly defamatory statements did not name plaintiff)). In "order for plaintiffs to be entitled to maintain an action for a defamatory statement, it must appear that they are the persons concerning whom it was made. It must be shown that the publication was "of and concerning" them (*Giaimo v Literary Guild*, 79 A.D.2d 917, 434 N.Y.S.2d 419 [1st Dept 1981]). However, it "is not necessary that [plaintiff] be named in the publication, if the allusion is apparent. 'Where the person defamed is not named in a defamatory publication, it is necessary, if it is to be held actionable as to him, that the language used be such that persons reading it will, in the light of the surrounding circumstances, be able to understand that it refers to the person complaining" (*Giamo, supra citing* 34 N.Y.Jr., Libel and Slander Sec. 55). Defendants failed to establish that the Report was not "of and concerning" the plaintiff. The Report mentioned three upcoming locations and the towns, Babylon, Bayside, and Commack. That these three stores did not, at the time of the airing of the Report, sell D'Lites ice cream is inconsequential, since the Report expressly stated that these three store locations "were about to open" as part of "a growing national chain" and the Report identified the very three towns where plaintiffs obtained sub-licenses to open. Notably, the Report makes reference to the stores by the towns in which they are located, and plaintiff's stores share the name D'Lites with the two other stores which were more prominently mentioned. While Corsover attests that she did not intend to convey any implications about the serving practices at the stores about to open because they were not open at the time of the investigation, denies having heard of Prince or LAMB, and confirms that the broadcast was about the nutritional content of a small serving of

ice cream as sold in the Woodbury and West Caldwell stores, the express mention of the three stores about to open implies that the new stores will sell the same product that originates from DEI, and that the nutritional content of the product will likewise be underreported.

Thus, it cannot be said, based on such facts, that defendants did not intend or endorse the alleged defamatory implication.

And, that plaintiff later opened the stores as "Yogurt Couture" selling "YoCream" is also inconsequential, as these renamed stores were opened *after* the Report aired, and, as a result of the effects of the Report. This is not an instance where the publication made no reference to plaintiff at all (*cf.*, *Giamo, supra*). In light of the surrounding circumstances of the Report, defendants' failed to establish, as a matter of law, that the Report was not "of or concerning" the plaintiff (*see Angio-Medical Corp. v Eli Lilly & Co.*, 720 F.Supp. 269 [SDNY 1989] ("the question of whether the statements are in fact imputable to the plaintiff is, like the question of whether the statements are defamatory, better left to a jury")).

However, defendants sufficiently established that the Report was substantially true, thus defeating plaintiff's claim that the Report was falsity. Truth provides a complete (affirmative) defense to defamation and disparagement claims (*Silverman v Clark*, 35 A.D.3d 1, 822 N.Y.S.2d 9 [1st Dept 2006]; *Garcia v Puccio*, 17 A.D.3d 199, 793 N.Y.S.2d 382 [1st Dept 2005]).

The affidavits of Diaz, Angela Cascarano (Producer for Fox who worked on the Report) ("Cascarano"), Ray Parisi ("Parisi") (the Executive Producer of the show), deposition transcripts, and exhibits demonstrate that based on a tip received *via* email (redacted) from a "Tipster," laboratory tests from Certified Laboratories showed a substantial discrepancy between the calories, total fat, carbohydrates and sugar content for a 4 ounce serving, *to wit*: 148 calories

versus 50 calories as claimed; 5.38g total fat versus 1.5g as claimed; 21.92g carbohydrates versus 6g as claimed; 13.8g sugar versus 3g as claimed. The Certified Laboratories was later mailed to Cascarano (see email and laboratory report, Cascarano Affidavit, Exh. A and B).

Cascarano did her own independent research *via* the Internet, and saw that the Woodbury store's website featured "an abundantly" filled cup of ice cream with a label in the photograph stating "Only 50 calories per serving" and indicated that four more stores (including one in Babylon, Commack, and Bayside) were due to open (see website pages, Cascarano Affidavit, Exhibit C). Cascarano, Diaz, and Ray decided to further investigate the "Tipster's" claim, and engaged Sani-Pure Laboratory in New Jersey to perform an analysis, who advised them on how to transport a sample for testing. Cascarano, Diaz, and Parisi decided to obtain samples from the Woodbury store, as named by the Tipster, and the West Caldwell store, which is the only other store in the show's viewing area.

Cascarano, along with a cameraman (with a hidden camera) visited the two stores, obtained two small cups of vanilla and chocolate ice cream from each store, and submitted them for testing (their collection of the samples is depicted on video recordings submitted on the motion). The laboratory results from Sani-Pure showed that the ½ cup serving contained significantly higher amounts of calories, fat, carbohydrates, and sugar than what was advertised on website.

In order to understand the basis for the discrepancy, Cascarano, Diaz, and Parisi contacted DEI's owner, Jerry Corsover ("Corsover"), who directed them to Magda Abt ("Abt") and Todd Coven, as they were the owners of the Woodbury store as well as the license for the tri-state area. According to Cascarano's subsequent hidden-videotaped meeting with Abt at the Woodbury

store, the cups have "overflow," known as "overrun;" "you have to put air into it" and "it does come out to four ounces." According to Abt's interview, "It's all caloried and portioned out" and the small "full" cup, which contains overflow (*i.e.*, air put into it) called overrun, "in which if you defrost it, it comes down out to 4 ounces." After leaving the store, Cascarano, Diaz, and Parisi decided for Diaz to interview Abt on camera as she exited the store, which was thwarted by Abt's brother.

Thereafter, when Cascarano contacted Todd Coven ("Coven"), Abt's husband and co-owner of the Woodbury store, he claimed that defendants failed to take into account that 70% of the served ice cream was air, and thus, the Sani-Pure results should have discounted the test results by 70%. Coven also directed them to speak to Corsover for additional testing information. In a subsequent conversation with Corsover, Corsover promised to send defendants the test results he claimed supported his nutritional claims.

Thereafter, Cascarano, Diaz, and Parisi spoke to Sani-Pure about the effect of overrun in the small cup ice cream on its results. Sani-Pure advised that overrun can change the volume but not the calories, carbohydrates, fat or sugars contained in a "small" cup of the ice cream served to customers. Sani-Pure clarified that because it measured the nutritional values in the "small" container that was submitted, and that such container came from the store, those values could not be effected because such ice cream already had overrun in it. Sani-Pure also explained that he listed the results of his test under the "Results Per ½ Cup (160g)" column because the ice cream served in the small cup weighed 160 grams despite that the cup was only ½ cup in size. It is noted that Sani-Pure's witness testified at his deposition that his calculations were based on actual weight, and not based on erroneous assumptions, and that the calculations of calories was

based on the serving that was actually presented to him (Ronald Schnitzer EBT, pp. 200-201).

Nevertheless, after *Coven* contacted Sani-Pure to "correct" the results, Coven adjusted the Report to add a column for "Result per Density Adjusted," based on the hypothetical overrun percentage that Coven had given him. Under this adjustment, the laboratory results showed that there were 53.39 calories versus 50 calories as claimed; 1.96g total fat versus 1.5g as claimed; 7.89g carbohydrates versus 6g as claimed; 5.2g sugar versus 3g as claimed.

Corsover later sent defendants a response containing a letter from DEI, a two-page letter from Roger Legg at RL Food Testing Laboratory, results from ABC Research Corp. for the vanilla and chocolate servings, and the nutritional panel for the ice cream. Defendants noted that these submissions were inconsequential, because they did not focus on the amount of ice cream actually served by the Woodbury and West Caldwell stores, but focused on hypothetical amounts of ice cream. And, the test results submitted were missing three of four pages. The test results given, however, showed results similar to Sani-Pure's results. Corsover's letter represented that D'Lites considered 30 grams to be the amount of ice cream that, when fully aerated, would fill ½ cup container and contain 50 calories.

Thereafter, defendants returned to the West Caldwell store to obtain "39" grams of ice cream, and discovered, when taken to Sani-Pure, that 39 grams did not even fill one half of the ½ cup container.[2]

Defendants later visited the West Caldwell store, and was given the same information

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[2] The Court notes that according to an affidavit from Michael Ball, to whom Corsover sold a franchise license to sell D'Lites ice cream in Citrus Hills, Florida, his machines, which were not defective, were unable to make 40g of aerated ice cream fill a small size D'Lites cup, and instead, it took between 84-100g of D'Lites ice cream produce to fill a ½ cup to the rim. Bell's laboratory testing of the ice cream he serves also showed that there were 143 calories per 100g of vanilla ice cream product mix or 57.2 calories per 40g, and 152 calories per 100g of chocolate product mix or 60.8 calories per 40g.

about calories, carbohydrates, fat and sugar as provided by the Woodbury store.

Finally, and based on the above research, defendants aired the story about D'Lites ice cream on May 12, 2011 and again, on May 14, 2011. The broadcast of the Report essentially shows Cascarano purchasing a small size cup of D'Lites ice cream, speaking to Sani-Pure about the ice cream purchased, the result of Sani-Pure's laboratory results, the confrontation between Diaz and Abt's brother in the parking lot of the Woodbury store, Corsover's statements, a footage of showing that 39 grams in small size cup only fills half of the container. Diaz warns that the D'Lites ice cream served in the Woodbury and West Caldwell stores is "not being caloried and portioned out correctly . . . and there is no way for customers to know that" and concludes the segment by inducting D'Lites into the "Hall of Shame."

This Court finds that the above evidence and submissions collectively demonstrate that truth of the statements depicted in the Report, which advises the public that the amount of D'Lites ice cream *served* to the public in a "small" sized serving cup of D'Lites ice cream contains much more calories, fat, carbohydrates, and sugars than advertised.[3] During the broadcast, Diaz makes mention to the small cup "served" and how much the stores are actually "serving." The above facts establish, as a matter of law that the Report was substantially true, and that defendants were not grossly negligent.

Plaintiff's arguments in opposition fail to raise an issue of fact as to the substantial truth of the Report and broadcast, as well as whether defendants were grossly negligent. The

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[3] It is noted that Cregg Askins, a former owner of a D'Lites store in Florida, testified that Corsover told him that ½ cup weighed 40g, but when Askins "put 40 grams in a [½ cup], it wouldn't even come up to the rim of the cup. It was about half of a half a cup. . . we surely can't sell that as a half-a-cup serving. I mean you couldn't market it that way."

nutritional claims per ½ cup serving does not take into account that the Report is aimed at the nutritional value of what is actually served to the public as a ½ cup serving, and the remaining arguments are aimed at statements which are protected opinion (*see e.g., McGill v Parker*, 179 A.D.2d 98, 582 N.Y.S.2d 91 [1st Dept 1992] (assertions that horses are housed under "unsafe, unhealthy" conditions, constitute protected opinion under New York State law)).

As to the product disparagement claim, "[P]roduct disparagement is an action to recover for words or conduct which tend to disparage or negatively reflect upon the condition, value, or quality of a product or property, and ... the elements which must be proven are: (1) falsity of the statement; (2) publication to a third person; (3) malice (express or implied); and (4) special damages" (*Thome v Alexander & Louisa Calder Foundation*, 70 A.D.3d 88, 890 N.Y.S.2d 16 [1st Dept 2009] *citing* 44 N.Y. Jur.2d Defamation and Privacy § 273 [footnotes omitted] (*Newport Service & Leasing, Inc. v Meadowbrook Distributing Corp.*, 18 A.D.3d 454, 794 N.Y.S.2d 426 [2d Dept 2005] (finding summary dismissal warranted on plaintiff's product disparagement claim where criticisms "were substantially true")).

Although defendants' failed to establish that plaintiff lacks standing to assert a product disparagement claim,[4] based on the above, the substantial truth of the Report and broadcast defeats plaintiff's product disparagement claim. In any event, the record establishes that defendants adequately investigated the Report prior to its broadcast, and had no basis to doubt

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[4] Defendants cite *Isuzu Motors Ltd. v Consumers Union of U.S., Inc.* (12 F.Supp.2d 1035 [C.D. Cal. 1998]) for the proposition that plaintiff lacks standing to assert this claim because it does not own the product. However, the Court in *Isuzu* did not address ownership or manufacturer of the product at issue therein, i.e., the Trooper vehicle, in comparison with its co-defendant distributor of the vehicle. Instead, in dismissing the product disparagement claim, the Court reasoned that the alleged disparaging comments could not be "understood to suggest that the Distributor is responsible for the supposed roll-over risk presented by the Trooper as a result of design changes."

the truth of the laboratory results it obtained from Sani-Pure (*see De Marco-Stone Funeral Home v WRGB De Marco-Stone Funeral Home v WRGB Broadcasting*, 203 A.D.2d 780 [1st Dept 1994] (dismissing claim sounding in product disparagement where there was no evidence "that defendants proceeded with knowledge of falsity or in reckless disregard as to truth or falsity")). Similarly, it cannot be disputed that the Report concerns a matter of public concern. The show reported whether the D'Lites ice cream actually served to the general public in certain stores was actually as low in calories, fat, carbohydrates, and sugars as advertised and as believed by the general public. And here, the record establishes that defendants were not grossly irresponsible with respect to the investigation and broadcast of the Report. Defendants, upon receipt of a tip from a member of the public, accompanied by a laboratory report, performed their own independent research by contacting an independent laboratory, the owner of the license (DEI), and the store owners to verify the claimed nutritional values of the servings being sold to the general public. That defendants did not attempt to contact plaintiff as the owner of the stores that had yet to open does not raise an issue of fact as to defendants' confidence in their investigation of the D'Lites product as it was served.

Plaintiff failed to raise an issue of fact as to defendants' intent, investigation of the Report, or malice in broadcasting the Report. Although the results of Sani-Pure's testing were challenged, defendants confirmed the veracity of Sani-Pure's results a second time in order to address the purported "over run" claim and when the results were confirmed, proceeded with the broadcast. That plaintiff does not agree with the test results and insists that D'Lites ice cream was accurately advertised is insufficient. Further, that defendants did not test 40 grams of D'Lites ice cream does not raise an issue of fact as their intent or alleged gross irresponsibility,

since 40 grams of ice-cream was not the amount of ice cream actually served to them by either store. The Report and broadcast informed the public of the nutritional value of the amount of ice cream actually served in a "small" cup and compared that amount as proven by the laboratory tests with the nutritional values of a "small" as advertised.[5]

Finally, although defendants improperly raised, for the first time in reply, the argument that the absence of any showing of malice defeats the punitive damages claim (*JPMorgan Chase Bank, N.A. v Luxor Capital, LLC*, 101 A.D.3d 575, 957 N.Y.S.2d 45 [1st Dept 2012]), dismissal of the punitive damages claim is warranted given that the substantive claims are hereby dismissed and punitive damages is not a separate cause of action (*Rivera v City of New York*, 40 A.D.3d 334, 836 N.Y.S.2d 108 [1st Dept 2007]).

As such, dismissal of the complaint is warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants Fox Television Stations, Inc. and Arnold Diaz for summary judgment dismissing the complaint of the plaintiff, Matthew Prince individually and on behalf of D'Lites L.A.M.D. B.H. Inc. is granted, and the complaint is hereby dismissed; and it is further

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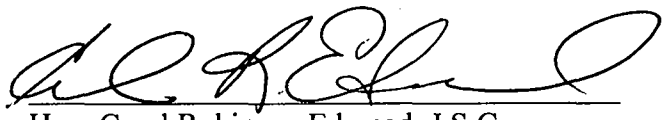
[5] As to plaintiff's claim that a diabetic could always ask for less in the cup or eat only a small amount of what was put in the cup underscores the veracity of the broadcast, as there would be no reason for any person, let alone a diabetic, to ask for less if one were aware that the serving size contained more calories, fat, carbohydrates and sugars as advertised.

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 6, 2014



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD