

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

KYLE DUNCAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	
COSTCO WHOLESALE	)	_____
CORPORATION; RIZO-LOPEZ	)	
FOODS, INC.; RESER'S	)	
FINE FOODS, INC.	)	
	)	
Defendants.	)	

**CLASS ACTION COMPLAINT**

COMES NOW, Plaintiff, Kyle Duncan, on behalf of himself and others similarly situated and brings this civil action to recover damages against the above-named Defendants, and for their causes of action would show unto the Court, the following:

**NATURE OF THE ACTION**

1. Plaintiff, Kyle Duncan, files this Class Action lawsuit on behalf of himself and all others similarly situated due to Defendants' manufacturing, distribution and sale of unsafe and contaminated food.

2. Between October 27, 2023 and February 6, 2024 Defendant Costco Wholesale Corporation (hereinafter "Costco") sold Item # 29443 Southwest Chicken Wraps in all of its locations throughout the United States that were contaminated with *Listeria monocytogenes*.

3. Between October 27, 2023 and February 6, 2024, Item # 29443 Southwest Chicken Wraps sold at Costco stores nationwide, contained ingredients provided by Defendant Rizo-Lopez

Foods, Inc. (hereinafter “Rizo-Lopez”) and Defendant Reser’s Fine Foods, Inc. d/b/a Fresh Creative Foods (hereinafter “RFF”) that were contaminated with *Listeria monocytogenes*.

4. By selling contaminated food to the Plaintiff and other customers nationwide, Costco was negligent.

5. By selling contaminated and unsafe food to customers in the state of Florida, Costco violated the Florida Deceptive Trade Practices Act.

6. By manufacturing, distributing, and causing contaminated food to be sold to customers nationwide, Rizo-Lopez and RFF were negligent.

7. By manufacturing, distributing, and causing contaminated and unsafe food to be sold in the state of Florida, Rizo-Lopez and RFF violated the Florida Deceptive Trade Practices Act.

8. Plaintiff Duncan files this lawsuit on behalf of three classes of people: 1) all consumers nationwide who purchased Item # 29443 Southwest Chicken Wraps and became sick, 2) all individuals nationwide who became sick after eating the Item # 29443 Southwest Chicken Wraps, and 2) all consumers in the State of Florida that purchased the Item # 29443 Southwest Chicken Wraps.

#### **PARTIES, JURISDICTION, AND VENUE**

9. Plaintiff Kyle Duncan is over the age of eighteen (18) years, and is domiciled in Broward County, Florida.

10. Defendant Costco Wholesale Corporation is a Washington Corporation with its principal place of business in Issaquah, Washington and is domiciled in the State of Washington. Costco did and does business in the State of Florida at all times material herein.

11. Defendant Rizo-Lopez Foods, Inc. is a California Corporation with its principal place of business in Modesto, California and is domiciled in the State of California. Rizo-Lopez did and does business in the State of Florida at all times material herein.

12. Defendant Reser's Fine Foods d/b/a Fresh Creative Foods is an Oregon Corporation with its principal place of business in Beaverton, Oregon and is domiciled in the State of Oregon. RFF did and does business in the State of Florida at all times material herein.

13. This Court has jurisdiction over the class claims in this case pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. 1332(d), which explicitly provides for the original jurisdiction of the Federal Courts over any class action in which any member of the Plaintiff Class is a citizen of a state different from any Defendant, and in which the matter in controversy exceeds in the aggregate the sum of \$5,000,000.00, exclusive of interest and costs.

14. This Court also has subject matter jurisdiction over this action pursuant to 18 U.S.C. § 1964.

15. Plaintiff and all members of the Class allege that the total claims of the individual members of the proposed Plaintiff Class are in excess of \$5,000,000.00 in the aggregate, exclusive of interest and costs, as required by 28 U.S.C. § 1332(d)(2) and (5). As set forth below, Plaintiff is domiciled in Florida and a citizen of Florida, and Defendants are domiciled and considered citizens of Washington, California, and Oregon. Therefore, minimal diversity of citizenship exists under CAFA as required by 28 U.S.C. § 1332(d)(2)(A).

16. Venue is proper pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to this Class Action Complaint occurred in this district, or alternatively, Defendants are both subject to the Court's personal jurisdiction with respect to this action as they intentionally caused the subject food to be sold in Broward County, Florida.

## FACTS

17. Between December 20, 2024 and December 27, 2024, Plaintiff Duncan purchased and ate multiple Item # 29443 Southwest Chicken Wraps.

18. Plaintiff Duncan purchased all of his Item # 29443 Southwest Chicken Wraps from the Costco store located at 1800 W Sample Rd, Pompano Beach, Florida 33064.

19. All of the Item # 29443 Southwest Chicken Wraps contained ingredients provided and/or distributed by Rizo-Lopez and RFF.

20. On January 22, 2024, Plaintiff Duncan began experiencing pain in his body.

21. On January 24, 2024, Plaintiff Duncan noticed a discharge from his belly button.

22. On January 27, 2024, Plaintiff Duncan was admitted to Baptist Health Boca Raton Regional Hospital (“BHBRR”) located at 800 Meadows Rd., Boca Raton, Fl 33486.

23. On January 30, 2024, Plaintiff Duncan underwent surgery at BHBRR.

24. Plaintiff Duncan was diagnosed with a bacterial infection due to *Listeria* consumption.

25. Recently, the FDA and CDC, in collaboration with state and local partners, investigated a *Listeria monocytogenes* infection outbreak nationwide, linked to products manufactured by Rizo-Lopez. See <https://www.fda.gov/safety/major-product-recalls/2024-recalls-food-products-associated-dairy-products-rizo-lopez-foods-inc-due-potential-risk>

26. A sample of Rizo Bros Aged Cotija tested positive for *Listeria monocytogenes* during sampling conducted by the Hawaii State Department of Health’s Food and Drug Branch in January 2024.

27. In response to that finding, Rizo Lopez Foods, Inc. voluntarily recalled one batch of Rizo Bros Aged Cotija Mexican Grating Cheese (8oz) on January 11, 2024.

28. The CDC and FDA reopened the investigation in January 2024 after new illnesses were reported in December 2023 and whole genome sequencing (WGS) analysis of the cotija cheese sample showed that it was the same strain of *Listeria* that was causing illnesses in this outbreak.

29. In response to this investigation, Rizo Lopez Foods, Inc. voluntarily recalled all sell by dates of its dairy products. The recalled products include cheese, yogurt, and sour cream sold under the brand names Tio Francisco, Don Francisco, Rizo Bros, Rio Grande, Food City, El Huache, La Ordena, San Carlos, Campesino, Santa Maria, Dos Ranchitos, Casa Cardenas, and 365 Whole Foods Market.

30. As a result of the *Listeria* outbreak listed above, the FDA recommended the following:

- Do not eat, sell, or serve recalled brands of cheeses, sour creams (cremas), or yogurts manufactured by Rizo Lopez Foods, Inc. or products made with recalled dairy products.
- Check your refrigerators and freezers for any recalled products and throw them away. If you froze a product without the original packaging and can't tell if it is part of the recalls, throw it away.
- Consumers, restaurants, and retailers who purchased or received recalled products, including wholesale products, should carefully clean and sanitize any surfaces or containers that it touched. Follow [FDA's safe handling and cleaning advice](#) to reduce the risk of cross-contamination. *Listeria* can survive in refrigerated temperatures and can easily spread to other foods and surfaces.
- If you have symptoms of listeriosis you should contact your health care provider to report your symptoms and receive care.

31. On February 7, 2024, Fresh Creative Foods (RFF) recalled certain cremas, everything sauces, cilantro cotija dressing, poblano Caesar dressing, and cilantro dressing, sold in Costco, H-E-B, and Trader Joe's stores; and taco kits sold in Costco and Albertson's stores. Recalled products were sold in CA, CT, FL, ID, IL, MD, MT, NJ, NV, OR, PA, SD, TX, UT, VA, and WA. See <https://www.fda.gov/food/outbreaks-foodborne-illness/outbreak-investigation-listeria-monocytogenes-queso-fresco-and-cotija-cheese-february-2024>.

32. On February 7, 2024, Costco sent the following Recall Notice to the Plaintiff and other individuals nationwide:

February 7, 2024

Important Food Safety Recall Notice  
Southwest Chicken Wrap with Sauce  
Item #29433

Dear Costco Member,

Our records indicate that you, or one of your add on members, purchased Item # 29433 Southwest Chicken Wrap with Sauce from our Service Deli between October 27, 2023 and February 6, 2024.



Rizo-Lopez Foods Inc. and Fresh Creations Foods, along with the FDA, have issued a voluntary Class I Recall of the cotija cheese contained in the wraps out of an abundance of caution due to potential *Listeria monocytogenes* contamination.

If you have any of this product remaining, do not consume; please return it to Costco for a full refund.

*Listeria* is an organism which can cause serious and sometimes fatal infections in young children, frail elderly people and individuals with weakened immune systems. Healthy people may suffer only short-term symptoms such as high fever, severe headache, stiffness, nausea, abdominal pain and diarrhea. *Listeria* infection can cause miscarriages and stillbirths among pregnant women.

You can go to <https://customerservice.costco.com/> or contact Costco at 800-774-2678 with your questions.

All of us at Costco are sorry for any inconvenience this recall has caused.

33. In sum, all three Defendants sold, caused to be sold, distributed, and marketed Item # 29443 Southwest Chicken Wraps in all Costco locations throughout the United States and the State of Florida that were contaminated with *Listeria monocytogenes*.

34. The sale of the contaminated and unsafe Item # 29443 Southwest Chicken Wraps injured the Plaintiff, and the members of the putative class he seeks to represent.

35. This conduct is in violation of the FDUTPA because it is misleading, unfair, unconscionable, and deceptive to sell or cause to be sold unsafe products like Item # 29443 Southwest Chicken Wraps .

36. But for the misleading, deceptive, unsafe, and unconscionable actions and inactions of Defendants, individually, jointly, and in concert with one another, Plaintiff and the putative class would have been paid for the Item # 29443 Southwest Chicken Wraps.

37. Defendants' actions and inactions make them each individually liable and responsible for Plaintiff's injuries and damages as described herein as well as those of the members of the putative class.

### **CLASS ALLEGATIONS**

38. Plaintiff, individually and on behalf of the Class, bring this class action against Defendants pursuant to Fed. R. Civ. P. 23, on behalf of three classes of individuals:

**1) Nationwide Purchaser Class**

**All individuals nationwide who purchased and ate Item # 29443 Southwest Chicken Wraps from a Costco store and suffered an adverse medical condition as a result at any time from October 27, 2023 to the date of judgment or settlement.**

**2) Nationwide Illness Class**

**All individuals nationwide who ate Item # 29443 Southwest Chicken Wraps sold from a Costco store and suffered an**

**adverse medical condition as a result at any time from October 27, 2023 to the date of judgment or settlement.**

**3) Florida Class**

**All individuals who purchased Item # 29443 Southwest Chicken Wraps in a Costco store located in the State of Florida between October 27, 2023 and February 6, 2024.**

39. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown at the present time, it is estimated that there are thousands of members in the Class.

40. Despite the numerical size of the Class, the identities of the Class members can be ascertained by Defendant Costco's own business records.

41. Costco can identify the purchasers of Item # 29443 Southwest Chicken Wraps by their membership numbers, and in fact has already provided notice of the contamination via direct emails to each consumer.

42. Thus, Plaintiff and his counsel do not anticipate any difficulties in the management of this action as a class action.

43. Plaintiff will fairly and adequately represent the interests of the Class. Plaintiff is committed to vigorously prosecute this action and have retained competent counsel experienced in class action litigation.

44. Plaintiff and Class members and have no interests antagonistic to or in conflict with other Class members.

45. Plaintiff is represented by lawyers who have had extensive experience in prosecuting class actions and will adequately represent the purported Class in this action.



46. This action raises numerous questions of law and fact common to the Class members, which predominate over any questions that may affect particular Class Members. Such common questions of law and fact include but are not limited to the following:

- a. Whether Defendants sold or caused to be sold products containing unsafe Listeria in them;
- b. Whether Defendants distributed products containing unsafe Listeria;
- c. Whether Defendants sold or caused to be sold unsafe products;
- d. Whether Defendants conduct misled or was likely to mislead consumers in the State of Florida;
- e. Whether Defendants' actions were unfair, unconscionable, deceptive, misleading, or likely to mislead customers like the Plaintiff;
- f. Whether Defendants violated 18 U.S.C. § 1962; and
- g. Whether or not Plaintiff and putative class were harmed by Defendants' conduct.

47. The claims or defenses of the represented parties are typical of the claims or defenses of the Class.

48. Plaintiff has the same interests as the other Class members in prosecuting the claims against Defendants because they were all harmed by the same products sold and/or caused to be sold by the same Defendants.

49. Plaintiff and all the members of the Class sustained damages as a result of Defendants' wrongful conduct.

50. Additionally, Defendants have acted on grounds generally applicable to the Class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the Class as a whole.

51. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

52. Common issues predominate.

53. Furthermore, the expense and burden of individual litigation make it extraordinarily difficult for Class members to redress the wrongs done to them individually.

### **COUNT ONE**

#### **NEGLIGENCE**

##### **(On behalf of Nationwide Purchaser Class and Nationwide Illness Class)**

54. This Count applies to all members of the Nationwide Purchaser Class and Nationwide Illness Class.

55. Plaintiff, individually and on behalf of the two Classes listed above, incorporates by reference all of the factual allegations contained in paragraphs 1 through 53 of this Complaint.

56. Plaintiff and all members of the Classes listed above ate Item # 29443 Southwest Chicken Wraps from a Costco store.

57. The aforementioned Item # 29443 Southwest Chicken Wraps contained ingredients from Rizo-Lopez.

58. The Item # 29443 Southwest Chicken Wraps sold at Costco stores and containing Rizo-Lopez ingredients were contaminated with Listeria.

59. The Item # 29443 Southwest Chicken Wraps were unsafe.

60. Both Defendants owed a duty to not sell unsafe products to customers.

61. Both Defendants owed a duty to not sell contaminated products to customers.

62. Defendant Costco breached its duty to the Plaintiff and putative classes by selling unsafe and contaminated products.

63. Defendant Rizo-Lopez breached its duty to the Plaintiff and the putative classes by manufacturing, distributing, and causing to be sold unsafe and contaminated products.

64. As a direct and proximate cause of the conduct referenced above by both Defendants, Plaintiff and all members of the Classes identified above were damaged.

65. Stated differently, as a direct and proximate result of the sale of the unsafe Item # 29443 Southwest Chicken Wraps by Costco and Rizo-Lopez, the Plaintiff and all members of the Classes identified above have suffered harm and been damaged.

66. The Plaintiff and all members of the Classes identified above suffered injury, illness, loss of capacity for the enjoyment of life, inconvenience, and expenses.

**WHEREFORE**, Plaintiff, individually and on behalf of the Nationwide Purchaser Class and Nationwide Illness Class, demand judgment against Defendants for damages, including legal fees and costs, in an amount that would be just and proper under the circumstances and under the laws of the State of Florida and the United States of America.

## **COUNT TWO**

### **VIOLATION OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT (FDUTPA), SECTIONS 501.201, *et. seq.*, FLORIDA STATUTES (2005)**

**(On behalf of the Florida Class)**

67. This Count applies to all members of the Florida Class.

68. Plaintiff, individually and on behalf of the Class, incorporates by reference all of the factual allegations contained paragraphs 1 through 53 of this Complaint.

69. This cause is brought pursuant to the Florida Deceptive and Unfair Trade Practices Act, Fla. Sta. § 501.201 et seq. (the “Act” or “FDUTPA”).

70. 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).

71. Plaintiff is a consumer as defended by Fla. Stat. § 501.203 and has standing to pursue this claim because he was exposed to Defendants’ representations regarding the sale of Item # 29443 Southwest Chicken Wraps and has suffered injury in fact in that he has lost money as a result of Defendants’ sale of unsafe products.

72. 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”.

73. Defendants’ conduct alleged herein violates the legislatively declared policies in the FDUTPA.

74. Defendants misled Florida consumers into believing that they were purchasing safe products, but Defendants sold Plaintiff and the putative class unsafe products contaminated with Listeria.

75. As a result of Defendants’ “unfair” and “deceptive” conduct, Plaintiff and the members of the Class purchased Item # 29443 Southwest Chicken Wraps.

76. Defendants have violated the Act by engaging in the unfair and deceptive practices as described herein that offend public policies and are immoral, unethical, unscrupulous and substantially injurious to consumers.

77. Plaintiff and the Class have been aggrieved by Defendants' unfair and deceptive practices because they would not have purchased Item # 29443 Southwest Chicken Wraps if Defendants had disclosed that they contained Listeria.

78. Plaintiff and the Class were damaged in that they spent money on unsafe products that they would never have purchased were it not for Defendants' deceptive, misleading and unfair practices.

79. The damages Plaintiff and the Class suffered were directly and proximately caused by the deceptive, misleading, and unfair practices of Defendants.

80. Plaintiff and the Class seek repayment of the purchase price of the Item # 29443 Southwest Chicken Wraps.

81. Pursuant to Fla. Sta. §§ 501.211(s) and 401.2105, Plaintiff and the Class seek damages, attorneys' fees, and costs of prosecuting this action.

82. Pursuant to Fla. Stat. § 501.211(1), Plaintiff and the Class seek a declaratory judgment and Court Order providing an accounting of the moneys earned by the Defendants due to the sale of the unsafe Item # 29443 Southwest Chicken Wraps, and enjoining the above-described wrongful acts and practices of Defendants, and for restitution and damages.

**WHEREFORE**, Plaintiff, individually and on behalf of the Florida Class demands judgment against Defendants for damages, attorneys' fees, and costs, in an amount that would be just and proper under the circumstances and under the laws of the State of Florida and the United States of America.

**PRAYER FOR RELIEF**

Plaintiff, on behalf of himself and the Nationwide Purchaser Class, the Nationwide Illness Class, and the Florida Class, requests that the Court Order the following relief and enter judgment against the Defendants as follows:

A. An Order certifying the proposed Class under Rule 23 of the Federal Rules of Civil Procedure and appointing Plaintiff and his counsel to represent the Class;

B. A declaration that Defendants have engaged in the illegal conduct described herein;

C. An Order awarding declaratory and injunctive relief as permitted by law or equity, including permanently enjoining Defendants from continuing their unlawful practices as set forth herein;

D. A judgment awarding Plaintiff and the Class actual damages, punitive damages, and restitution in an amount according to proof and all other entitled awards under the FDUTPA;

E. An accounting of the moneys earned by Defendants as a result of the sale of their Item # 29443 Southwest Chicken Wraps;

F. Awarding attorneys' fees and costs incurred in prosecuting this action;

G. Pre-judgment and post-judgment interest; and

H. All other relief that the Court deems necessary, just, and proper.

**JURY DEMAND**

Pursuant to Fed. R. Civ. P. 38(b), Plaintiff, individually and on behalf of each Class, hereby demands a trial by jury.

Respectfully submitted,

/s/ Joshua R. Gale  
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