

IN THE CIRCUIT COURT OF TANEY COUNTY, MISSOURI

2014 FEB 28 AM 11:17

RICHARD MCMILLIN,)
On behalf of himself and a)
class of similarly situated individuals,)
)
Plaintiff,)

CLERK OF COURT
TANEY COUNTY, MISSOURI

Case No: 14AF-CC00154

v.)

Division:

FOGLE ENTERPRISES, INC.)
Serve Registered Agent:)
Nolan Fogle)
119 Stoneridge Drive)
Branson, MO 65616)

and)

JURY TRIAL DEMANDED
CLASS ACTION

NOLAN FOGLE)
Serve:)
119 Stoneridge Drive)
Branson, MO 65616,)
)
Defendants.)

PETITION FOR DAMAGES

Plaintiff states and alleges the following as a cause of action against Defendants.

JURISDICTION & VENUE

1. This action alleges that Defendants engaged in unlawful merchandising practices in violation of the Missouri Merchandising Practices Act, R.S.Mo. §§ 407.020, *et seq.*
2. The unlawful merchandising practices alleged herein occurred in Taney County, Missouri, where Plaintiff was first injured by Defendants' unlawful conduct; as such, venue is proper in this Court.

PARTIES

3. Plaintiff Richard McMillin is a resident of Clark County, Nevada.

4. Defendant Fogle Enterprises, Inc. is a Missouri corporation doing business in and around Branson, Missouri at the times of the unlawful practices alleged herein.

5. Defendant Nolan Fogle is a resident of Taney County, Missouri. He owns and operates Fogle Enterprises, Inc. and was personally responsible for the decision to carry out the unlawful scheme alleged herein.

6. Defendants are sued individually and as participants, aiders and abettors in the improper acts, plans, schemes, and transaction to charge the improper CDF fee.

ALLEGATIONS

7. Defendants operate restaurants at multiple locations within the State of Missouri, including the Great American Steak and Chicken House, the Fall Creek Steak and Catfish House, Whipper Snappers, Baldknobbers Country Restaurant, and The Burger Shack.

8. Defendants have unjustly, unfairly, and unlawfully implemented a scheme that resulted in its customers paying hundreds of thousands of dollars for something Defendants describe as “Com Dev Fund” at the bottom of its receipts.

9. This amount is automatically added onto each customer’s check in addition to the amounts advertised and charged for food, service and tax.

10. This practice is not mandated by any local or state law.

11. Instead, Defendants have implemented the CDF fee in order to generate additional revenue.

12. This practice violates the Missouri Merchandising Practices Act because, among other things, it is unlawful pursuant to RSMO 407.456-.462, it is unconscionable, unfair and deceptive, provides no benefit to the consumer, offends public policy, is unethical, oppressive and unscrupulous, presents a risk of, or causes, substantial injury to consumers, violates

Defendants' duty of good faith, and charges a consumer for something that the consumer has not ordered.

13. This scheme has unjustly enriched Defendants.

14. Plaintiff is one of the many victims of this unlawful scheme and brings this suit on behalf of himself and all others similarly situated for Defendants' wanton and willful violations of Missouri law.

15. On November 29, 2013, Richard McMillin entered the Great American Steak and Chicken House in Branson, Missouri, owned and operated by Fogle Enterprises and purchased lunch. Plaintiff McMillin was served by waitress Kristan. Plaintiff McMillin ordered a hamburger and an onion stack. In addition to the menu items, Plaintiff McMillin was charged an additional fee, labeled as "Com Dev Fund." The "Com Dev Fund" charge was an additional charge, approximating 1.5% of the total bill. Plaintiff McMillin did not ask for "Com Dev Fund" as part of his meal.

16. Plaintiff did not receive any benefit for the payment of his CDF fees.

CLASS ACTION ALLEGATIONS

17. Plaintiff brings this action on behalf of himself and all other members of a proposed plaintiff class initially defined as:

Defendants' customers within the last five years who were charged a CDF fee.

18. Excluded from the Class are Defendants, any affiliate, parent, employee or subsidiary of Defendants; any officer, director, or employee of Defendants, anyone employed by counsel for Plaintiffs in this action; and any Judge to whom this case is assigned as well as his or her immediate family.

19. This action has been brought and may be properly maintained as a class action under Mo. Rule of Civil Procedure 52.08 and / or Mo. Rev. Stat. § 407.025.

20. Numerosity of the Class. Class members are so numerous that their individual joinder is impracticable. Plaintiffs estimate that there are more than 1,000 members of the proposed Class. The precise number of Class members and their addresses can be obtained from information and records in Defendants' possession and control, including credit card records. Class members may be notified of the pendency of this action by mail or by published notice or other appropriate methods.

21. 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 questions affecting only individual Class members. These common legal and factual questions, each of which may also be certified under Rule 23(c)(4), include the following:

- a. Whether Defendants' fee scheme is unconscionable or otherwise violates the MMPA;
- b. Whether Defendants failed to disclose material information regarding the nature of the fee;
- c. Whether Defendants unjustly retained a monetary benefit from charging customers a fee;
- d. The amount retained from the fee;
- e. Whether Defendants violated Missouri law by engaging in deception, fraud, false pretenses, false promise, misrepresentation, bait and switch, unfair practices or the concealment, suppression, or omission of any material fact;
- f. Whether Defendants are liable for money had and received;

- g. Whether Plaintiff and the other Class members are entitled to equitable relief, including declaratory relief, restitution, rescission, corrective notice, a preliminary and/or a permanent injunction; and
- h. Whether Plaintiff and the other Class members are entitled to damages and/or other monetary relief.

22. Typicality. Plaintiff's claims are typical of the claims of the Class because, like all other Class members, Plaintiff was charged the CDF fee.

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

24. 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 are small compared with the burden and expense that would be entailed by individual litigation of their claims against Defendants. It would thus be virtually impossible for the Class, on an individual basis, to obtain effective redress for the wrongs done 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.

25. In the alternative, the Class may be certified under Rule 23 (b)(1) and/or (b)(2) 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 Defendants;
- b. The prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them which 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. Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final and injunctive relief with respect to the members of the Class as a whole.

FIRST CAUSE OF ACTION

**(For Violations of Missouri's Merchandising Practices Act,
Mo. Rev. Stat. § 407.010, *et seq.*)**

26. Plaintiff hereby incorporates by reference and re-alleges all paragraphs previously alleged herein. Plaintiff asserts this cause of action on behalf of the Class against Defendants.

27. Plaintiff and Defendants are "persons" within the meaning of Section 407.010(5).

28. Defendants' activities and services constitute the sale of "merchandise" within the meaning of Section 407.010(4).

29. As set forth herein, Defendants' acts, practices and conduct violate Section 407.020(1) in that, among other things, Defendants have used and/or continue to use unfair practices, concealment, suppression and/or omission of material facts in connection with the advertising, marketing, and offering of its services.

30. Defendants' unfair, unlawful and deceptive acts, practices, and conduct include charging a fee that they cannot legally charge, concealing the nature of the CDF fee and charging the fee without disclosing that the fee has no benefit to the customer.

31. Defendants' conduct violates the Merchandising practices Act pursuant to state regulations 15 C.S.R. §60-8 because their conduct: (1) offends public policy; (2) is unethical, oppressive, and unscrupulous; (3) causes substantial injury to consumers; (4) was not in good faith; (5) is unfair because Defendants charged consumers for services which the customer had not ordered or solicited; (6) is unconscionable; and (7) is unlawful.

32. Plaintiff and Class members seek actual damages; a declaration that Defendants' methods, acts and practices violate the Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010, *et seq.*; an injunction prohibiting Defendants from continuing to engage in such unlawful methods, acts, and practices; restitution; rescission; corrective notice to those who were charged the fee; disgorgement of all profits obtained from Defendants' unlawful conduct; pre and post-judgment interest; punitive damages; attorneys' fees and costs; and any other relief that the Court deems necessary or proper.

SECOND CAUSE OF ACTION
(Money Had and Received)

33. Plaintiff hereby incorporates by reference and re-alleges all paragraphs previously alleged herein. Plaintiff asserts this cause of action on behalf of the Class against Defendants.

34. Defendants have been enriched by the money it made in connection with the CDF fee.

35. Defendants obtained this money through wrongful, unfair and deceptive practices.

36. Defendants fail or failed to provide any consideration to Plaintiff and Class members in exchange for the CDF fee.

37. Equity and good conscience require restitution to Plaintiff and Class members. Plaintiff and the Class have been wrongfully deprived of their money and are entitled to its restoration, along with interest thereon from the date the money was taken by Defendants to the date of judgment, attorneys' fees and costs, and any other relief the Court deems necessary and proper.

THIRD CAUSE OF ACTION
(For Unjust Enrichment)

38. Plaintiff hereby incorporates by reference and re-alleges all paragraphs previously alleged herein. Plaintiff asserts this cause of action on behalf of the Class against Defendants.

39. Defendants have received and continued to receive benefits at the expense of Plaintiff and Class members and it is inequitable for Defendants to retain these benefits.

40. Through their payment of the CDF fee, Plaintiff and Class members have conferred monetary benefit on Defendants and Defendants have unjustly profited from the monetary benefit. Plaintiff and Class members have not received any corresponding benefit since they already separately paid for the price of the food and service they ordered.

41. Defendants have accepted and retained the benefits conferred upon it to the detriment of Plaintiff and the Class.

42. As a direct and proximate result of Defendants' unlawful acts and practices, Plaintiff and the Class have been wrongfully deprived of their money and are entitled to its restoration, along with interest thereon from the date the money was taken by Defendants to the date of judgment, as well as attorneys' fees and costs, corrective notice, and any other relief the Court deems necessary and proper.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and all similarly situated persons, requests judgment and relief on all causes of action as follows:

1. For an order certifying the proposed Class and appointing Plaintiff and his counsel of record to represent the proposed Class;
2. For an order enjoining Defendants' wrongful conduct and ordering corrective notice be made available to the class;
3. For an order declaring that Defendants have violated the Missouri Merchandising Practices Act, Mo. Rev. State. § 407.010, *et seq.*;
4. For an order directing Defendants to disgorge all profits obtained from their unfair and deceptive trade practices;


5. For an order awarding Plaintiff and the Class damages in an amount to be proven at trial, including punitive damages, together with pre-trial and post-trial interest thereon;
 6. For an order awarding Plaintiff and the Class attorneys' fees and costs of suit;
- and
7. For an order awarding such other and further relief as this Court deems just and proper.

JURY DEMAND

WHEREFORE, Plaintiff, on behalf of himself and all similarly situated persons, hereby demands a trial by jury on all issues that are triable to a jury.

Respectfully submitted,

WILLIAMS DIRKS, LLC



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