

**BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF FINANCIAL INSTITUTIONS
DIVISION OF SECURITIES**

In the Matter of

SUMMARY ORDER TO CEASE AND
DESIST

LUCKY TACO, INC. and
TIMOTHY P. MCQUISTON,

File No. S-233500 (EX)

Respondents.

I.

The Administrator of the State of Wisconsin, Department of Financial Institutions, Division of Securities (“Division”), having legal authority and jurisdiction to administer and enforce ch. 551, Stats., the Wisconsin Uniform Securities Law, and ch. DFI-Sec, Wis. Admin. Code, deems it necessary and appropriate in the public interest and for the protection of investors, to issue the following:

II.

After an investigation, the Division has presented evidence sufficient for the Administrator to make the following findings of fact and conclusions of law:

A. Findings of fact.

Respondents

1. Lucky Taco, Inc., (“Lucky Taco”) is a Nevada corporation organized on December 6, 2007 and whose certificate of authority in Wisconsin was revoked as of October 24, 2012. Its registered agent in Wisconsin is Timothy McQuiston, and its last known principal office is 5743 Pleasant Hill Road, Hartford, Wisconsin 53027.
2. Timothy P. McQuiston (“McQuiston”) is an adult born in October 1951, who at all times material hereto has been the President, Treasurer, and sole director of Lucky Taco, Inc., with a last known business address at 5743 Pleasant Hill Road, Hartford, Wisconsin 53027, and a residential address of 450 South Lake Street, Apt 5, Hustisford, Wisconsin 53034.

Conduct

3. From 2009 through at least January, 2014, McQuiston sold promissory notes for investment in the business of Lucky Taco to several Wisconsin residents. McQuiston represented that Lucky Taco was in the business of making cookies.

4. McQuiston offered and sold to Investor A two promissory notes for the business of Lucky Taco:
 - a. A promissory note for the principal amount of \$90,000 on or about February 12, 2009, with interest payments of \$6,000 due each month until April 13, 2009, when the principal was due.
 - b. A promissory note for the principal amount of \$30,000 on or about March 3, 2009, with 12 percent interest per annum to be paid quarterly, plus bonuses if certain sales targets are met.
5. McQuiston told Investor A that he needed the investment money to buy equipment and to increase production of his cookie-making business.
6. McQuiston offered and sold to Investor B three promissory notes for the business of Lucky Taco:
 - a. A promissory note for the principal amount of \$50,000 on February 6, 2009, with 12 percent interest per year to be paid quarterly, plus bonuses if certain gross sales targets are met.
 - b. A promissory note for the principal amount of \$25,000 on March 3, 2009, with 12 percent interest per year to be paid quarterly, plus bonuses if certain gross sales targets are met.
 - c. A promissory note for the principal amount of \$20,000 on December 22, 2009, with 12 percent interest per year to be paid with the principal due on May 8, 2010.
7. In soliciting the investments, McQuiston told Investor B that he needed the money for his cookie-making business, and gave him some documents about Lucky Taco, including projected gross profits, costs, and returns, as well as the capacity for cookie production and the markets in which Lucky Taco intended to sell cookies. Copies of the documents given to Investor B describing Lucky Taco's business are attached hereto and incorporated by reference herein as Exhibit 1.
8. McQuiston offered and sold to Investor C and his wife three promissory notes for the business of Lucky Taco:
 - a. A promissory note for the principal amount of \$30,000 on October 8, 2009, with interest of 12 percent per year to be paid in quarterly payments of not less than \$900, plus bonuses if certain sales targets were met. The principal and interest were due for repayment on October 8, 2011.
 - b. A promissory note for the principal amount of \$100,000 on December 4, 2009, with interest of 12 percent per year, plus bonuses if certain gross sales targets were met. The duration of the note was for one year, with an option to renew the arrangement.
 - c. A promissory note for the principal amount of \$35,000 on January 21, 2010, with interest of 28.6 percent per year for a total of \$37,500 which was to be repaid on April 21, 2010.
9. Each time he asked them to invest, McQuiston told Investor C and his wife that he was raising the investment money for his business of making Lucky Taco cookies, including the purchase of higher capacity equipment to keep up with the cookie orders. He gave

them some documents projecting the costs and returns of the business which are attached hereto and incorporated by reference herein as Exhibit 2.

10. McQuiston offered and sold an investment contract on behalf of Lucky Taco for the principal amount of \$20,000 to Investor D on October 5, 2011. Investor D was to receive interest of 10 percent per annum. This was subsequently documented with a promissory note on December 4, 2012 for \$22,000 to reflect the interest earned on the initial value provided by Investor D. The terms of the promissory note required that the remaining balance of principal and interest were to be paid in full to Investor D on May 4, 2013.
11. McQuiston offered and sold to Investor D two promissory notes for the business of Lucky Taco:
 - a. A promissory note for the principal amount of \$5,000 on December 13, 2013, with interest of 10 percent per annum. Investor D was to receive payments of \$1,500 per month, and balance paid by March 1.
 - b. A promissory note for the principal amount of \$47,000 on January 14, 2014 which consolidated the prior investment contracts and promissory notes into one promissory note for \$47,000 as the result of renegotiations between Investor D and McQuiston. The interest rate on the new note was 20 percent per annum, with payments of \$1,500 due monthly until January 14, 2016, when the balance of the note was due.
12. Prior to selling promissory notes for the business of Lucky Taco, around 2005 McQuiston sold promissory notes to at least three investors residing in Wisconsin, as detailed in subparagraphs (a) and (b). McQuiston represented to these investors that their funds would be used for a car-related business he was starting. McQuiston failed to repay the car-business investors according to the terms of the promissory notes.
 - a. McQuiston issued a promissory note for the principal amount of \$100,000 in October 2005 to one of the investors in his car business. The note called for monthly interest payments, but McQuiston made only two payments: \$3,000 in 2007 and \$1,000 in 2008.
 - b. McQuiston issued a promissory note and option agreement for the principal amount of \$90,000 in July 2005 to a married couple who invested in his car business. The note called for monthly interest payments to be made, but McQuiston stopped making any payments in 2007.
13. On June 12, 2006 the IRS filed the Notice of Federal Tax Liens against McQuiston with the Washington County Register of Deeds' Office for delinquencies on his federal income taxes for 1991 of \$10,967.25, and 1992 of \$12,418.59. As of the date of this order, the liens have never been satisfied.
14. McQuiston continued to accrue unsatisfied tax warrants with the Wisconsin Department of Revenue filed in Washington County Circuit Court, including \$98,394.20 on June 30, 2006, \$18,016.39 on September 15, 2008, and \$130,088.57 on January 17, 2013.
15. As of the date of this order, McQuiston has several unsatisfied civil judgments docketed against him, including the following:
 - a. Dodge County Case No. 2009-SC-000231, Moderski v. McQuiston, on February 27, 2009 for \$3,847.46.

- b. Waukesha County Case No. 2009-CV-002770, Nancy Stumpf, et al. v. USPL Auto Accessories, Inc., et al. on February 17, 2010 for \$826,254.96.
 - c. Washington County Case No. 2009-CV-000952, Associated Bank, N.A. v USPL Auto Accessories, Inc., et al., on June 11, 2010 for \$277,150.58.
 - d. Waukesha County Case No. 2010-SC-000020, CL&D Digital Inc. v. McQuiston, on February 1, 2010 for \$1,027.21.
 - e. Dodge County Case No. 10-CV-000487, Michel, et al v. Lucky Cookie Company, et al., on July 12, 2010 for \$219,218.26.
 - f. Dodge County Case No. 10-CV-000582, Pfaffle v. McQuiston, on July 27, 2010 for \$122,560.96.
 - g. Washington County Case No. 2010-SC-002251, Sysco Eastern Wisconsin LLC v. USPL Auto Accessories, et al., on December 6, 2010 for \$872.71.
 - h. Washington County Case No, 2011-SC-000187, Courtney v. McQuiston, on March 15, 2011 for \$570.50 and replevin of a 2008 Mini Cooper.
 - i. Washington County Case No. 2011-SC-001747, Shaefer's BP Inc. v McQuiston, on October 10, 2011 for \$2611.31.
 - j. Dodge County Case No. 2013-SC-001592, Justman Building Systems, Inc. v. McQuiston and Lucky Taco, Inc., on October 18, 2013 for \$131,094.79 and eviction.
16. On April 2, 2012, the Food & Drug Administration ("FDA") sent a warning letter to McQuiston about allergen disclosure concerns and labeling errors regarding the cookie samples previously collected from Lucky Taco. A copy of this letter is attached hereto and incorporated herein as Exhibit 3.
 17. In the course of each offer and sale of the promissory notes to Investor A, McQuiston failed to disclose his history of delinquent taxes; failure to repay obligations to past creditors and previous investors; and the unpaid tax liens and warrants filed against him by the IRS and Wisconsin Department of Revenue prior to 2009, as set forth in ¶¶ 10-13.
 18. In the course of each offer and sale of the promissory notes to Investor B, McQuiston failed to disclose his history of delinquent taxes; failure to repay obligations to past creditors and previous investors; the unpaid tax liens and warrants filed against him by the IRS and Wisconsin Department of Revenue; and any of the unsatisfied judgments docketed against McQuiston or Lucky Taco prior to 2009, as set forth in ¶¶ 10-13.
 19. In the course of each offer and sale of the promissory notes to Investor C, McQuiston failed to disclose his history of delinquent taxes; failure to repay obligations to past creditors and previous investors; the unpaid tax liens and warrants filed against him by the IRS and Wisconsin Department of Revenue; and any of the unsatisfied judgments docketed against McQuiston or Lucky Taco prior to 2009, as set forth in ¶¶ 10-13.
 20. In the course of each offer and sale of the promissory notes to Investor D, McQuiston failed to disclose the warning letter from the FDA, in addition to his failure to disclose McQuiston's history of delinquent taxes; failure to repay obligations to past creditors and previous investors; the tax liens and warrants filed against him by the IRS and Wisconsin

Department of Revenue; and any of the unsatisfied judgments docketed against McQuiston or Lucky Taco prior to 2013 as set forth in ¶¶ 10-14, and that he was currently in default on his notes to Investors A, B, and C.

B. Conclusions of law.

Legal Authority and Jurisdiction

21. The Administrator has legal authority and jurisdiction over the conduct described above, pursuant to ch. 551, Stats., and ch. DFI-Sec., Wis. Admin. Code.
22. Wis. Stat. § 551.102(28) defines a security to include “notes.”
23. Pursuant to Wis. Stat. § 551.102(28)(d), an “investment contract” is included in the definition of a security.
24. The promissory notes offered by Respondents are securities as defined by Wis. Stat. § 551.102(28).
25. The investment contracts offered by Respondents are securities as defined by Wis. Stat. § 551.102(28)(d).

Violations

26. As the result of the conduct described above, Respondents violated Wis. Stat. § 551.501(2), which makes it unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly, to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, when in the course of each offer and sale of securities to Investors A, B, C, and D, Respondents omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

III.

A. Summary orders.

In view of the above findings of fact and conclusions of law, the Administrator deems it necessary and appropriate in the public interest and for the protection of investors, and pursuant to its legal authority and jurisdiction under Wis. Stats. Ch. 551, to wit Wis. Stat. § 551.604, to issue the following orders and notices:

IT IS ORDERED summarily that RESPONDENTS, their agents, servants, officers, employees, successors, affiliates, and every entity and person directly or indirectly controlled or organized by or on behalf of any RESPONDENT, shall cease and desist from making or causing to be made to any person or entity in Wisconsin any further offers or sales of securities unless and until such securities qualify as covered securities or are registered under Wis. Stats. Ch. 551 or successor statute, pursuant to Wis. Stat. § 551.604(1)(a).

IT IS FURTHER ORDERED summarily that all exemptions from registration set forth at Wis. Stats. Ch. 551 or successor statute that might otherwise apply to any offer or sale of any security of or by any of the RESPONDENTS, their agents, servants, officers, employees, successors, affiliates, and every entity and person directly or indirectly controlled or organized

by or on behalf of any RESPONDENT, are hereby revoked, pursuant to Wis. Stat. § 551.604(1)(b).

IT IS FURTHER ORDERED summarily that RESPONDENTS, their successors, affiliates, controlling persons, officers, agents, servants, employees and every entity and person directly or indirectly controlled or hereafter organized by or on behalf of any RESPONDENT, are prohibited from violating Wis. Stat. § 551.501 or successor statute.

IT IS FURTHER ORDERED summarily that RESPONDENTS, their successors, affiliates, controlling persons, officers, agents, servants, employees, and every entity and person directly or indirectly controlled or hereafter organized by or on behalf of either RESPONDENT, are prohibited from violating Wis. Stats. Ch. 551 or successor statute that might otherwise apply to any offer or sale of a security of or by RESPONDENTS.

IT IS NOTICED that the above summary orders are effective on the date of issuance, pursuant to Wis. Stat. § 551.604(2).

B. Service of order and notice of hearing rights.

IT IS FURTHER ORDERED that this order shall be sent promptly by certified mail to each party named in the order at his or her last known address or to the party's attorney of record, or shall be personally served upon the party or the party's attorney of record, pursuant to s. DFI-Sec 8.06, Wis. Admin. Code.

IT IS FURTHER NOTICED that the date of the service of this order is the date it is placed in the mail (which is also the issue and effective date below).

IT IS FURTHER NOTICED that you have the right to request a hearing. Every request for a hearing shall be in the form of a petition filed with the Division, pursuant to § DFI-Sec 8.01, Wis. Admin. Code. A petition for a hearing to review an order shall:

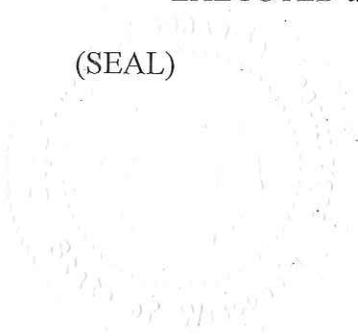
- (1) Plainly admit or deny each specific allegation, finding or conclusion in the order and incorporated papers. However, if the petitioner lacks sufficient knowledge or information to permit an admission or denial, the petition shall so state, and that statement shall have the effect of a denial; and
- (2) State all affirmative defenses. Affirmative defenses not raised in the request for hearing may be deemed waived.

IT IS FURTHER NOTICED that, within 15 days after receipt of a request in a record from you, the matter will be scheduled for a hearing, pursuant to Wis. Stats. §§ 551.604(2) and (3).

IT IS FURTHER NOTICED that if you do not request a hearing and none is ordered by the Administrator within 30 days after the date of service of this order, the findings of fact, conclusions of law, and summary and proposed orders, including the imposition of a civil penalty or requirement for payment of restitution, disgorgement, interest, or the costs of investigation sought in a statement in the order, becomes final as by operation of law, pursuant to Wis. Stat. § 551.604(2), Stats.

EXECUTED at Madison, Wisconsin, this 8th day of September, 2016.

(SEAL)



Leslie M. Van Buskirk

Leslie M. Van Buskirk
Administrator
State of Wisconsin
Department of Financial Institutions
Division of Securities
201 West Washington Avenue, Suite 300
Madison, Wisconsin 53703

LUCKY COOKIE COMPANY, INC.

Brief Overview

RECEIVED

DEC 14 2015

STATE OF WISCONSIN
DEPARTMENT OF FINANCIAL INSTITUTIONS
DIVISION OF SECURITIES



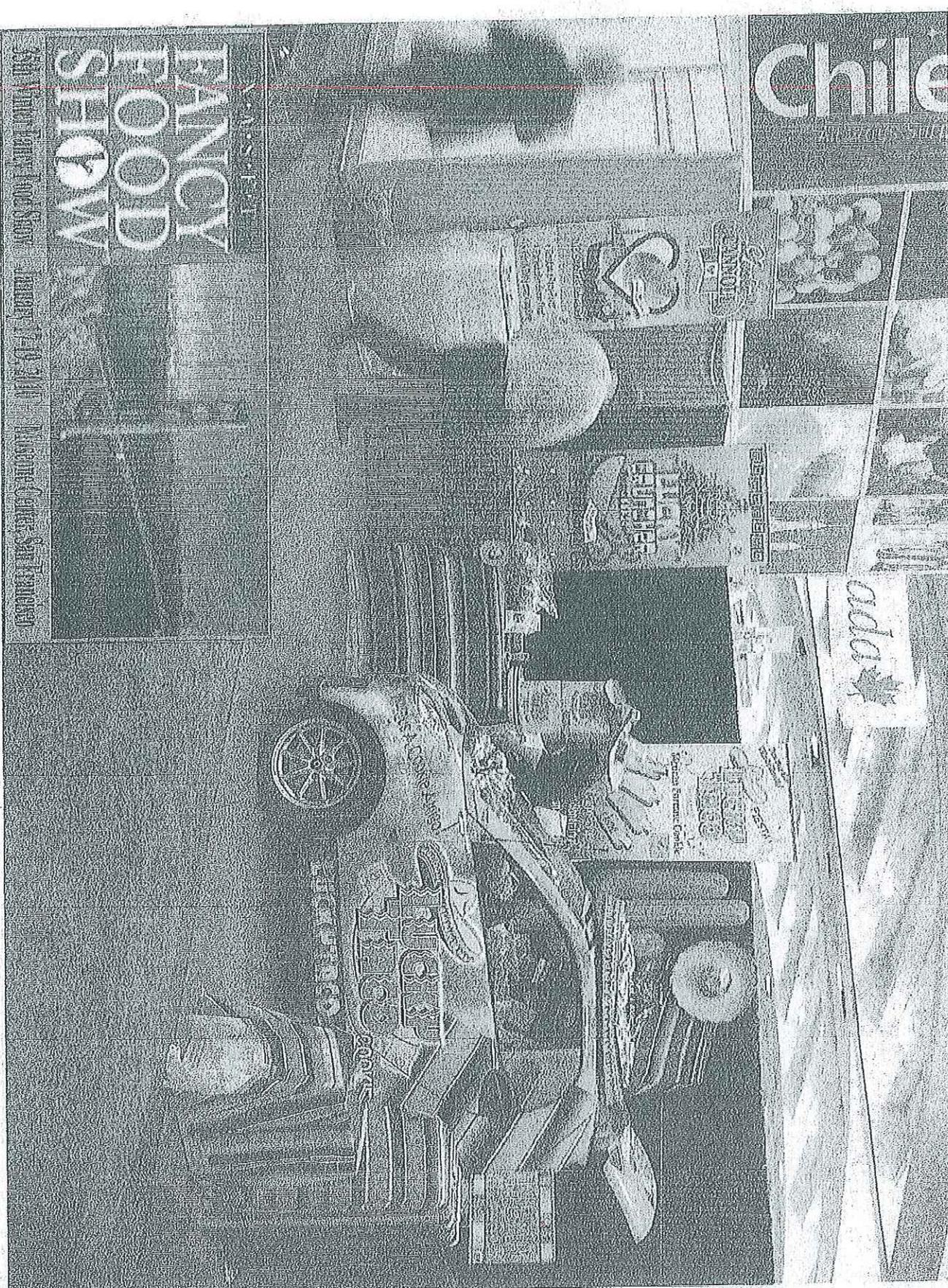


LUCKY COOKIE COMPANY Products

Chile

FANCY FOOD SHOW

San Francisco Food Show | August 2-11 | Moscone Center San Francisco



Lucky Cookie Company - Projected Gross Profit

Gross Profit

Production Split	Daily PV 50,000 pc.	Daily PV 100,000 pc.	Daily PV 200,000 pc.	
Bulk Cookies: \$.02 ea.	33%	16,500pc/ \$330	33,000pc./ \$660	66,000pc./ \$1,320
Bag cookies is \$.155 ea.	33%	16,500pc/ \$907	33,000pc./ \$1,815	66,000pc./ \$3,630
50 Pack Sombbrero: \$.1095 ea.	33%	16,500pc/ \$1,567	33,000pc/ \$3,1350	66,000pc./ \$6,2700
Decorative Gift Package: \$.095 ea.	0%	0	0	0
DAILY TOTAL:		\$2,804	\$5,608	\$11,216
MONTHLY(20 Day) :		\$56,080	\$112,160	\$224,320
MONTHLY(30 Day) :		\$84,120	\$168,240	\$336,480

*Note: These numbers are predicated on the investment of a Matrix Horizontal Package Machine at the cost of \$132,800 (with a capacity to package 1 million cookies per day at 15 cookies per bag).

Additional Note: To increase cookie production by 180,000 cookies per day will require an additional capital expense of \$220,000. This would include an additional packaging machine to individually wrap each cookie.

Lucky Cookie Company - Projected Cost vs. Return

Simplified Overview

BULK

Cost of cookie with over-wrap packaging	\$ 0.026 ea
Bulk cookie (600 per Case) Wholesale Distributor Price.....	\$ 0.046 ea
Minus cost of goods.....	\$ 0.026 ea

Gross Profit Per Cookie: \$.02 ea.

15 PACK BAG

Cost of cookie with over-wrap packaging	\$ 0.026 ea
Pack-Out 15 per pack	\$ 0.39 (15 Pk.)
Coast of Retail Display Packaging	\$ 0.10 ea

Total Cost : \$ 0.49 Per 15 Pk. Bag

Wholesale Price (15 pack bag).....	\$ 1.40 ea
Minus cost of goods	\$ 0.49

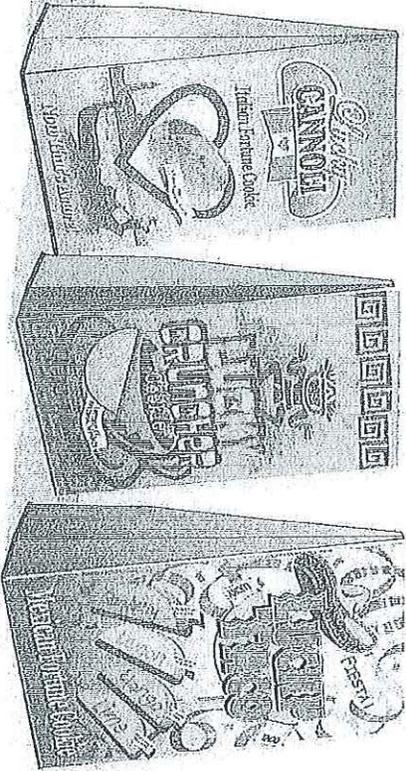
Gross Profit per Bag: \$.91ea.

Lucky Cookie Company - Bulk Cookie Production Capacity

Factory Capacity with New Cookie Machine: 10,000 CPH (Cookies per Hour)

1 Shift Daily (8hrs.)		2 Shifts		3 Shifts	
80,000 cookies	160,000 cookies	240,000 cookies			
5 Days per Week	5 Days Per Week	5 Days Per Week			
400,000 cookies	800,000 cookies	1,200,000 cookies			
6 Days per Week	6 Days Per Week	6 Days Per Week			
480,000 cookies	960,000 cookies	1,440,000 cookies			
7 Days per Week	7 Days Per Week	7 Days Per Week			
560,000 cookies	1,120,000 cookies	1,680,000 cookies			

Lucky Cookie Company - Primary Markets Served



Grocery Stores

Convenient Stores

Specialty Food Store

Restaurants

Coffee Shops

Party Stores

Ad Specialties

Private Label

Lucky Cookie Company - Item Line-Up

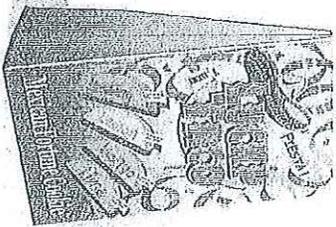
Single Wrap - Bulk Cookies: \$.02 ea. (Wholesale: \$.07)

Airlines
Packaged Meal Services
Schools
Restaurants



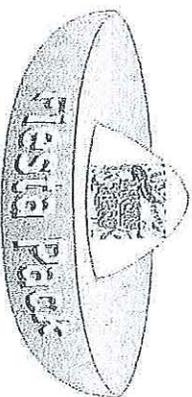
15pc. Bag cookies \$.055 ea. (Wholesale Price \$1.40/ Ret. \$2.99-\$3.49)

Grocery Stores
Bakery Stores
Convenience Stores



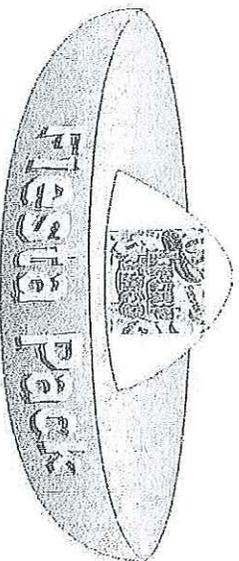
20pc. Mini Sombrero - Gift Package: \$.095 ea.(Wholesale Price \$2.45/ Suggested Retail: \$4.99)

Gift Basket Industry
Catering
Tourist Stops



50pc. Party Pack Sombrero: \$.095 ea. (Wholesale Price: \$6.50 / Suggested Retail: \$12.95 - \$14.95)

Party Stores
Mail Order Catalogs
Gift Shops



Lucky Taco Inc. – Projected Cost vs. Return



Bulk Product (350 Cookies/Case)

Figures based on production rate of 4000 cookies per hr

Cost of Ingredients.....	\$ 0.00069
Cost of Overwrap.....	\$ 0.00032
Cost message/fortune.....	\$ 0.00005
Cost of Shipping Box.....	\$ 0.001142
Cost of Pallet.....	\$ 0.000321
Cost of Overhead (Lease, Utilities).....	\$ 0.003125
Cost of LBP.....	\$ 0.01
Debt Service.....	\$ 0.00375

Total Cost per Cookie : 0.028938 cents

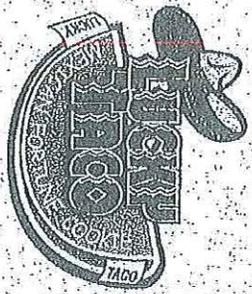
Case (350 cookies) \$10.13

Lowest Wholesale Price per case (shipping not included)..... \$20.00

Minus: cost of goods..... \$10.13

Gross Profit: \$9.87





Lucky Taco Inc. - Projected Cost vs. Return

Bulk Product (350 Cookies/Case)

Figures based on production rate of 6000 cookies per hr.

Cost of Ingredients.....	\$ 0.0069
Cost of Overwrap.....	\$ 0.0032
Cost message/fortune.....	\$ 0.0005
Cost of Shipping Box.....	\$ 0.001142
Cost of Pallet.....	\$ 0.000321
Cost of Overhead[Lease, Utilities].....	\$ 0.00208
Cost of LBR.....	\$ 0.0066
Debt Service.....	\$ 0.00208
<hr/>	
Total Cost per Cookie	.022823 cents
Case(350cookies)	\$7.98
Lowest Wholesale Price per case[shipping not included].....	\$20.00
Minus cost of goods.....	\$7.98

Gross Profit

\$12.02

Lucky Taco Inc. - Projected Cost vs. Return



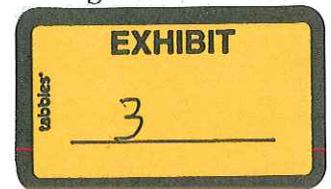
25 Count Gift Box

Figures based on production rate of 6000 cookies per hr.

Total cost 25 cookies(25 x .028938).....	\$ 0.72
Cost of Additional LBR to Pack out box.....	\$ 0.10
Cost of 25 Ct. Box.....	\$ 0.28

Total Cost: 1.10 Per 25 Ct. Box

Lowest Wholesale Price per Gift Box.....	\$2.50
Minus cost of goods.....	\$1.10
Gross Profit:	\$1.40



Home Inspections, Compliance, Enforcement, and Criminal Investigations Compliance Actions and Activities Warning Letters 2012
Inspections, Compliance, Enforcement, and Criminal Investigations

Lucky Taco, Inc 4/2/12



Department of Health and Human Services

Public Health Service
Food and Drug Administration
Minneapolis District Office
Central Region
250 Marquette Avenue, Suite
600
Minneapolis, MN 55401
Telephone: (612) 334-4100
FAX: (612) 334-4142

April 2, 2012

WARNING LETTER

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Refer to MIN 12 - 30

Timothy P. McQuiston
President/Owner
Lucky Taco, Inc.
768 South Lake Street, P.O. Box 112
Hustisford, Wisconsin 53034

Dear Mr. McQuiston:

The Food and Drug Administration (FDA) conducted an inspection of your facility located at 768 South Lake Street, Hustisford, Wisconsin, on December 19-20, 2011. During the inspection our investigator collected documentary samples of your Lucky Cruncher Cookie (Java Mint Flavored) and Lucky Taco Mexican Fortune Cookie (Strawberry, Lemon, Lime and Mango flavored) fortune cookie products. Our review of your product labels reveals that your Java Mint flavored Lucky Cruncher Cookie and Lucky Taco Mexican Fortune Cookie products are in violation of the Federal Food, Drug, and Cosmetic Act (the Act) in that your products are adulterated and misbranded within the meaning of sections 402 and 403 of the Act, 21 U.S.C §§ 342 and 343, and the implementing regulations contained within Title 21, Code of Federal Regulations, Parts 74 and 101 (21 CFR 74 and 101). You may find the Act and the CFR through links on FDA's home page at www.fda.gov.

The violations of concern are as follows:

1. Your Java Mint flavored Lucky Cruncher Cookie product is adulterated within the meaning of section 402(c) of the Act, 21 U.S.C. § 342(c), because the product bears or contains a color additive which is unsafe within the meaning of section 721(a) of the Act, 21 U.S.C. § 379(a).

Section 721(a) deems a color additive to be unsafe unless its use is in conformity with the color additive's listing regulation. Specifically, the listing regulation for Yellow No. 5 requires that the color additive be listed by that name in the ingredient list on the labels of foods for human use, 21 CFR 74.705(d)(2). Your Java Mint flavored Lucky Cruncher Cookie product is manufactured with coffee liqueur flavor which contains Yellow 5; however, the labels for the finished products fail to declare the presence of Yellow 5 in the ingredient statements.

2. Your Lucky Taco Mexican Fortune Cookie products are misbranded within the meaning of section 403(w) of the Act, 21 U.S.C. § 343(w), in that the labels for this product fail to declare the presence of a major food allergen, milk, as required by section 403(w)(1) of the Act, 21 U.S.C. § 343(w)(1). Specifically, the ingredient, **(b)(4)**, which contains milk, is used in the manufacture of your Lucky Taco Mexican Fortune Cookie (strawberry, lemon, lime and mango flavored) product. Milk is not declared on the 25 count (4.4 oz.) or single-serving (.28 oz.) labels.

Section 201(qq) of the Act, 21 U.S.C. § 321(qq), defines as "major food allergens" milk, egg, fish, Crustacean shellfish, tree nuts, wheat, peanuts, and soybeans, as well as any food ingredient that contains protein derived from one of these foods, with certain exceptions, e.g. highly refined oils derived from a major food allergen. A food is misbranded under section 403(w) of the Act if it is not a raw agricultural commodity and it is, or it contains an ingredient that bears or contains, a major food allergen, unless either:

i) The word "Contains," followed by the name of the food source from which the major food allergen is derived, is printed immediately after or adjacent to the list of ingredients, section 403(w)(1)(A) of the Act, 21 U.S.C. § 343(w)(1)(A); or

ii) The common or usual name of the major food allergen in the list of ingredients is followed in parentheses by the name of the food source from which the major food allergen is derived (e.g. "flour (wheat)"), except that the name of the food source is not required when either the common or usual name of the ingredient uses the name of the food source or the name of the food source appears elsewhere in the ingredient list (unless the name of the food source that appears elsewhere in the ingredient list appears as part of the name of an ingredient that is not a major food allergen), section 403(w)(1)(B) of the Act, 21 U.S.C. § 343(w)(1)(B).

3. Your Lucky Taco Mexican Fortune Cookie 25 count and Lucky Cruncher Cookie 25 count product labels are misbranded within the meaning of section 403(r)(1)(A) of the Act, 21 U.S.C. § 343(r)(1)(A), because the labels bear nutrient content claims but do not comply with the applicable regulation. Specifically, your 25 count labels for your Lucky Taco Mexican Fortune Cookie and Lucky Cruncher Cookie products bear the implied nutrient content claims "Only 30 Calories per Cookie" and "Only 19 Calories per Cookie," respectively. Your claims implicitly characterize your products as a low calorie food. A "low calorie" claim may be made if a food with a reference amount customarily consumed (RACC) of 30g or less does not provide more than 40 calories per RACC and, except for sugar substitutes, per 50g. The RACC for cookies is 30g (see 21 CFR 101.12(b), Table 2). Based on your Lucky Taco Mexican Fortune Cookie and Lucky Cruncher Cookie product labels, a 5g serving of these products contain 30 and 19 calories, respectively; this equals about 180 and 114 calories per RACC, and about 300 and 190 calories per 50g, respectively. Therefore, under 21 CFR 101.13(i)(2), the products are required to carry a disclaimer adjacent to the claim, e.g., "Only 30 calories per serving, not a low calorie food." Because your products fail to bear the required disclaimer, they are misbranded within the meaning of section 403(r)(1)(A) of the Act.

4. Your Lucky Cruncher Cookie product is misbranded within the meaning of section 403(i)(2) of

the Act, 21 U.S.C. § 343(i)(2), in that it is fabricated from two or more ingredients, but the label fails to bear the common or usual name of each ingredient. Specifically, your Java Mint flavor Lucky Cruncher Cookie is made with coffee liqueur flavor which contains Red 40, Yellow 5, Yellow 6 and Blue 1; however, your 25 count label and single-serving label for the Java Mint flavor cookie fails to declare these colors. According to 21 CFR 101.4(b)(1), the name of an ingredient shall be a specific name and not a collective (generic) name, except that spices, flavorings, colorings and chemical preservatives shall be declared according to the provisions of 21 CFR 101.22. A color additive or the lake of a color additive subject to certification under section 721(c) of the Act shall be declared by the name of the color additive listed in the applicable regulation in Part 74 or Part 82 of this chapter, except that it is not necessary to include the "FD&C" prefix or the term "No." in the declaration, but the term "Lake" shall be included in the declaration of the lake of the certified color additive (e.g., Blue 1 Lake), 21 CFR 101.22(k)(2).

5. Your Lucky Taco Mexican Fortune Cookie 25 count product label is misbranded within the meaning of sections 403(a)(1) and 201(n) of the Act, 21 U.S.C. §§ 343(a)(1) and 321(n), in that the label is false or misleading because it fails to reveal the material fact that the identified flavors are artificially derived. As required by 21 CFR 101.22(i)(2), when a food contains any artificial flavor which simulates, resembles or reinforces the characterizing flavor, the name of the food on the principal display panel or panels of the label shall be accompanied by the common or usual name(s) of the characterizing flavor, in letters not less than one-half the height of the letters used in the name of the food and the name of the characterizing flavor shall be accompanied by the word(s) "artificial" or "artificially flavored," in letters not less than one-half the height of the letters in the name of the characterizing flavor, e.g., "artificial vanilla," "artificially flavored strawberry," or "grape artificially flavored." Your label bears a declaration of the flavors strawberry, lime, lemon, and mango and your products contain natural and artificial strawberry margarita flavor, natural and artificial lemon juice margarita flavor, natural and artificial lime margarita flavor, and natural and artificial mango flavor. However, the names of these flavors on your label are not accompanied by the word(s) "artificial" or "artificially flavored."

This letter may not list all the violations at your facility. You are responsible for ensuring that all of your products are in compliance with the applicable statutes and regulations administered by FDA. You should take prompt action to correct these violations. Failure to do so may result in regulatory action without further notice, such as seizure and/or injunction.

Section 743 of the Act (21 U.S.C. § 379j-31) authorizes FDA to assess and collect fees to cover FDA's costs for certain activities, including costs related to re-inspection. A re-inspection is one or more inspections conducted subsequent to an inspection that identified non-compliance materially related to a food safety requirement of the Act, specifically to determine whether compliance has been achieved. Re-inspection-related costs means all expenses, including administrative expenses, incurred in connection with FDA's arranging, conducting, and evaluating the results of the re-inspection and assessing and collecting the re-inspection fees, 21 U.S.C. § 379j-31(a)(2)(B). For a domestic facility, FDA will assess and collect fees for re-inspection-related costs from the responsible party for the domestic facility. The inspection noted in this letter identified non-compliance materially related to a food safety requirement of the Act. Accordingly, FDA may assess fees to cover any costs related to re-inspection.

We also have the following comments about your labels:

- You use the same label for your Lucky Taco Mexican Fortune Cookie single-serving packages regardless of which flavor is actually contained in the package. The ingredient statement declares Yellow 5, Yellow 6, Blue 1, Red 40, and caramel coloring; however, each flavor of cookie contains different colors. The declaration of specific colors on the label for a product that does not contain those specific colors is a false statement. Specifically,
 - A. The strawberry flavored cookie does not contain Yellow 5, Yellow 6 or caramel color.
 - B. The lemon flavored cookie does not contain Yellow 6, Blue 1, Red 40 or caramel color.
 - C. The lime flavored cookie does not contain Yellow 6, Red 40, or caramel color.

D. The mango flavored cookie does not contain Yellow 5, Blue 1, or caramel color.

- The declaration of total fat on the Lucky Cruncher Cookie 25 count label is not expressed in the correct increment. In accordance with 21 CFR 101.9(c)(2), if a serving contains less than 0.5g of total fat, the content must be expressed as 0.
- The declaration of sodium on the Lucky Cruncher Cookie 25 count label is not expressed in the correct increment. In accordance with 21 CFR 101.9(c)(4), if a serving contains less than 5 mg of sodium, the content must be expressed as 0.
- The Lucky Cruncher Cookie 25 count label appears to have several alternate principal display panels. In accordance with 21 CFR 101.105(e), the net quantity of contents should be duplicated on each principal display panel.
- The declaration of total fat on the Lucky Taco Mexican Fortune Cookie 25 count and single serving labels is not expressed in the correct increments. In accordance with 21 CFR 101.9(c)(2), if a serving contains less than 0.5g of total fat, the content must be expressed as 0.
- The declaration of protein on the Lucky Taco Mexican Fortune Cookie 25 count and single serving labels is not expressed in the correct increments. In accordance with 21 CFR 101.9(c)(7), if a serving contains less than 1g of protein, it may be expressed to the nearest gram (1 or 0) or as "less than 1 gram."
- The net weight declaration on the Lucky Taco Mexican Fortune Cookie 25 count label does not appear to be sufficiently separated from printed matter above, 21 CFR 101.105(f).

You should respond to this office in writing within 15 working days of receipt of this letter. Your response should outline the specific steps you have taken or will take to correct the noted violations and to prevent their recurrence. You should include in your response documentation, such as verification records and revised labeling, or other useful information that would assist us in evaluating your corrections. If you cannot complete all corrections before you respond, you should explain the reason for your delay and state when you will correct any remaining violations.

Your reply should be directed to Compliance Officer Rebecca L. Caulfield at the address indicated on the letterhead.

Sincerely,

/S/

Joann M. Givens
Acting Director
Minneapolis District

Close Out Letter

- Lucky Taco, Inc. - Close Out Letter 10/22/12¹

Page Last Updated: 11/01/2012

Note: If you need help accessing information in different file formats, see Instructions for Downloading Viewers and Players.

[Accessibility Contact](#) [FDA Careers](#) [FDA Basics](#) [FOIA](#) [No FEAR Act](#) [Site Map](#) [Transparency](#)
[Website Policies](#)

U.S. Food and Drug Administration
10903 New Hampshire Avenue
Silver Spring, MD 20993
Ph. 1-888-INFO-FDA (1-888-463-6332)
Contact FDA



For Government For Press

Combination Products Advisory Committees Science & Research Regulatory Information Safety
Emergency Preparedness International Programs News & Events Training and Continuing
Education Inspections/Compliance State & Local Officials Consumers Industry Health
Professionals FDA Archive



U.S. Department of **Health & Human Services**

Links on this page:

1. </ICECI/EnforcementActions/WarningLetters/2012/ucm326116.htm>