

United States District Court
Eastern District of New York

2:18-cv-0809 () ()

Jackie Sanabria, individually and on behalf of
all others similarly situated,

Plaintiff

- against -

Complaint

Simple Mills Inc.,

Defendant

Plaintiff Jackie Sanabria (“plaintiff”) individually and on behalf of all others similarly situated, by attorneys, alleges upon information and belief, except for those allegations pertaining to plaintiff, which are based on personal knowledge:

1. Simple Mills, Inc. (“defendant”) manufactures and sells products identified as “Almond Flour Crackers” (the “Almond Products”) and “Sprouted Seed Crackers” (the “Sprouted Products”) under the “Simply Mills” brand (the “Products”).

2. The varieties within each product line are no fewer than the following:

<u>Almond Products</u>	<u>Sprouted Seed Products</u>
Fine Ground Sea Salt	Everything
Farmhouse Cheddar	Garlic & Herb
Rosemary & Sea Salt	Jalapeño
Sundried Tomato & Basil	Original
Cracked Black Pepper	
Smoky BBQ Cheddar	

3. The Products are sold to consumers through third-parties via brick-and-mortar stores and online, and directly by defendant’s website.

4. The Almond Products and Sprouted Seed Products have specific representations which are consistent across the varieties of those products, except for those

elements which depict that specific variety (i.e., Farmhouse Cheddar, Garlic & Herb).

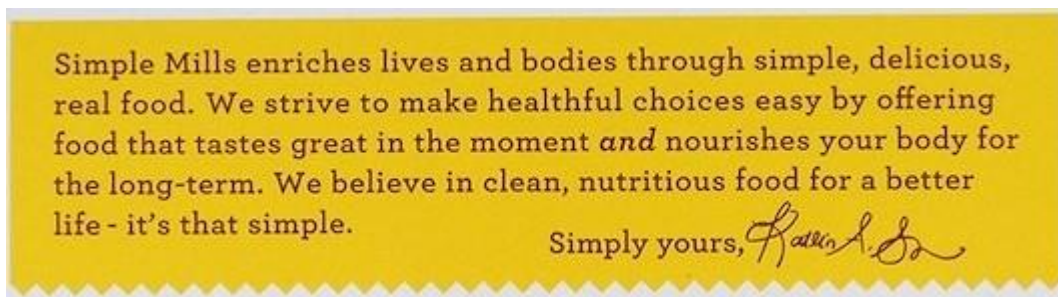
Almond Products



Sprouted Seed Products




5. The Products' identical representations include the upper part of the back of the box which says "Simple Mills enriches lives and bodies through simple, delicious real food... We believe in clean, nutritious food for a better life – it's that simple... Simply yours, [Name]."



6. The lower part of the back of the box describes their respective ingredients.

Almond Products



Ingredients you'll fall in love with.

We are picky about what goes into our products ... and proud of it! Only the highest-quality natural ingredients are used - nothing artificial, ever. Fun facts about some of our ingredients:

- ALMONDS:** Did you know that the hull around almonds feels fuzzy, kind of like a peach? That's because they are related! The almond tree is actually a member of the same family of trees as peaches, plums, apricots and cherries.
- SUNFLOWER SEEDS:** In many cultures, sunflowers are symbols of good luck. Eating sunflower seeds, planting them in your garden, or sleeping with them under your pillow are all believed to bring good fortune your way. Not surprisingly, our vote is to eat them.
- FLAX SEEDS:** King Charlemagne believed so strongly in the benefits of flax seeds that he passed laws requiring his subjects to consume them. While we're not passing any laws, we're definitely with the King on this one.
- CASSAVA:** Cassava is a root vegetable native to South America and was one of the first cultivated plants in the Western Hemisphere. It's also one of the most drought-tolerant crops in the world.

Sprouted Seed Products



Why Sprout? CHIA

Our team picks every ingredient with a purpose, and in this case, we sprout them, too.

Did you know that seeds have protective barriers that keep the good stuff (like nutrients) inside?

The sprouting process removes this layer, making the seed's vitamins and minerals more accessible to your body.

Plus, these sprouted seeds have higher protein and fiber, and a lower glycemic index than their non-sprouted buddies. So sprout up! And snack on.

HIGH IN ALA OMEGA-3s - 1,000 MG -

OUR ALL-STAR SEED LINEUP ★★★

- SUNFLOWER SEEDS
- FLAX SEEDS
- CHIA SEEDS
- HEMP SEEDS

Some fresh topping ideas for all our

7. The Almond Products state “Only the highest-quality natural ingredients are used – nothing artificial, ever.”

8. The Sprouted Products state that “seeds have protective barriers that keep the good stuff (like nutrients) inside” and that “[T]he sprouting process removes this layer, making the seed’s vitamins and minerals more accessible to your body.”

9. The most predominant ingredients for the Almond Products is “Nut and Seed Flour Blend (almonds, sunflower seeds, flax seeds) and for the Sprouted Seed Products is “Sprouted Seed Blend (sunflower, flax, chia).”

Almond Products



Sprouted Seed Products



10. The Products contain common ingredients such as “Tapioca,” “Cassava” and “Rosemary Extract (for freshness)” while the Sprouted Products include “Hemp Seeds.”

11. The Almond Products are misleading because the labels identify them as “Almond Flour Crackers” when they contain flours derived from non-almond sources, such as sunflower seeds and flax seeds.

12. Moreover, the almond flour which is present is not directly incorporated into the products as an ingredient, since it is already blended with other flour sources.

13. The result is that the almond flour's effect on the sensory, textural, organoleptic and structural qualities of the crackers are different from what it would otherwise be and contrasts with consumer expectations of a product purporting to, and containing, almond flour.

14. Plaintiff believed the Almond Products were made with only almonds as the flour source in the same way consumers would observe wheat flour crackers and reasonably expect they were composed of only flour derived from wheat.

15. Plaintiff desired to purchase a product that was only almond flour and believed that because the front label stated "Almond Flour Crackers" and "Sprouted Seed Crackers" that the exclusive flour ingredients in each would be almonds and sprouted seeds, respectively.

16. Excluding tax, the Products cost at least \$4.99 and upwards to approximately \$6.99, a premium price compared to other similar products.

Jurisdiction and Venue

17. Jurisdiction is proper pursuant to 28 U.S.C. § 1332(d)(2).

18. Upon information and belief, the aggregate amount in controversy is more than \$5,000,000.00, exclusive of interests and costs.

19. This Court has personal jurisdiction over defendant because it conducts and transacts business, contracts to supply and supplies goods within New York.

20. Venue is proper because plaintiff and many class members reside in this District and defendant has been doing business in this District and in New York.

21. A substantial part of events and omissions giving rise to the claims occurred in this District.

Class Allegations

22. The classes consist of all consumers in all states and all consumers in New York State who purchased any Products bearing any of the actionable representations herein during the statutes of limitation periods.

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

24. The class is so numerous that joinder of all members, even if permitted, is impracticable, as there are likely hundreds of thousands of members.

25. Common questions of law or fact predominate and include whether the representations were likely to deceive reasonable consumers and if plaintiff and class members are entitled to damages.

26. Plaintiff's claims and the basis for relief are typical to other members', owing to all being subjected to the same representations.

27. Plaintiff is an adequate representative because her interests do not conflict with other members.

28. No individual inquiry is necessary since the focus is only on defendant's practices and the class is definable and ascertainable.

29. Individual actions risk inconsistent results, would be repetitive and are impractical to justify, as the claims are modest.

30. Plaintiff's counsel is competent and experienced in complex class action litigation and intends to adequately and fairly protect class members' interests.

31. Plaintiff seeks class-wide injunctive relief because the practices continue, with the injunctive class maintained as a class action because it meets the same criteria as

the non-injunctive class.

Parties

32. Plaintiff is a citizen of Nassau County, New York.

33. Simple Mills, Inc. is a Delaware corporation with a principal place of business in Chicago, Illinois.

34. Plaintiff paid a premium relative to similar products because prior to purchase, plaintiff saw and relied on the front label claim that the Products were “Almond Flour Crackers.”

35. Plaintiff desired to purchase a product that was only almond flour and believed that because the front labels read “Almond Flour Crackers” and “Sprouted Seed Crackers” that the exclusive flour ingredients in each would be almonds and sprouted seeds, respectively.

36. In 2017, plaintiff purchased the Almond Products for no less than \$5.99, excluding tax, at a store within this District.

Violations of New York General Business Law §§ 349 & 350

37. Plaintiff repeats and realleges all allegations in foregoing paragraphs.

38. Defendant’s acts, practices, advertising, labeling, packaging, representations and omissions are not unique to the parties and have a broader impact on the public.

39. The representations as “Almond Flour Crackers” are false and misleading for the reasons described herein.

40. No reasonable consumer would expect a product described and identified as Almond Flour Crackers to also contain other non-almond flowers as part of the primary flour ingredient.

41. The representations and omissions were relied on by plaintiff and class members, who paid more than they would have without getting all they bargained for.

Breach of Express Warranty and Implied Warranty of Merchantability

42. Plaintiff repeats and realleges all allegations in foregoing paragraphs.

43. Defendant manufactures and sells crackers made from non-wheat flours.

44. Defendant warranted to plaintiff and class members that the Almond Products contained almond flour as its sole flour ingredient and did not contain flours derived from other ingredients.

45. The Products do not conform to their affirmations of fact and promises, wholly due to defendant's actions.

46. As a result, the Products lacked those attributes attributed by consumers to a product only containing almond flour.

47. Plaintiff and class members relied on defendant's claims, paying more than they would have otherwise.

Fraud

48. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

49. Defendant described and identified the Products as Almond Flour Crackers when it could have used different, non-misleading names.

50. Defendant's purpose was to mislead consumers who would be drawn to a product that contains non-wheat flours and who desired only almond flour crackers.

51. Defendant's intent was to distinguish its Products in the marketplace amongst the numerous other companies producing non-wheat flour products.

52. Plaintiff and class members observed and relied on the front label claim that the Products were Almond Flour Crackers, which they understood to mean that almond flour was the sole ingredient flour contained therein.

53. Plaintiff and class members paid more than they would have for the Products because of this mistaken belief, entitling them to damages.

Unjust Enrichment

54. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

55. Defendant obtained benefits and monies because the Products were not as represented, to the detriment and impoverishment of plaintiff and class members, who seek restitution and disgorgement of such inequitably obtained profits.

Jury Demand and Prayer for Relief

Plaintiff demands a jury trial on all issues.

WHEREFORE, plaintiff, individually and on behalf of all others similarly situated, prays for judgment:

1. Declaring this a proper class action, certifying plaintiff as representative and the undersigned as counsel for the class;
2. Entering preliminary and permanent injunctive relief by directing defendant to correct its practices to comply with the law;
3. Awarding monetary damages and interest, including treble and punitive damages, pursuant to the common law and GBL §§ 349, 350 claims;
4. Awarding costs and expenses incurred, including reasonable allowance of fees for plaintiff's attorneys and experts; and

5. Such other and further relief as the Court deems just and proper.

Dated: February 6, 2018

Respectfully submitted,

Levin-Epstein & Associates, P.C.

/s/Joshua Levin-Epstein
Joshua Levin-Epstein
1 Penn Plaza, Suite 2527
New York, NY 10119
Tel: (212) 792-0046
Fax: (212) 563-7108
joshua@levinepstein.com

Sheehan & Associates, P.C.

/s/Spencer Sheehan
Spencer Sheehan
891 Northern Blvd., Suite 201
Great Neck, NY 11021
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spencer@spencersheehan.com

2:18-cv-0809 () ()
United States District Court
Eastern District of New York

Jackie Sanabria, individually and on behalf of all others similarly situated,

Plaintiff,

- against -

Simple Mills, Inc.,

Defendant

Complaint

Levin-Epstein & Associates, P.C.
1 Penn Plaza
Suite 2527
New York, NY 10119
Tel: (212) 792-0046
Fax: (212) 563-7108
joshua@levinepstein.com

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information, and belief, formed after an inquiry reasonable under the circumstances, the contentions contained in the annexed documents are not frivolous.

Dated: February 6, 2018

/s/ Joshua Levin-Epstein
Joshua Levin-Epstein

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Jackie Sanabria individually and on behalf of all others similarly situated
(b) County of Residence of First Listed Plaintiff Nassau
(c) Attorneys (Firm Name, Address, and Telephone Number)
Levin Epstein & Associates, P.C., 1 Penn Plaza, Suite 2527, New York, NY 10119, (212) 792-0046

DEFENDANTS
Simple Mills, Inc.
County of Residence of First Listed Defendant
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 X 1
2 2
3 3
Incorporated or Principal Place of Business In This State
Incorporated and Principal Place of Business In Another State
Foreign Nation
PTF DEF
4 4
5 X 5
6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation - Transfer
8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 USC § 1332(d)(2)
Brief description of cause:
False advertising

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.
DEMAND \$ 5,000,000.00
CHECK YES only if demanded in complaint:
JURY DEMAND: X Yes [] No

VIII. RELATED CASE(S) IF ANY
(See instructions):
JUDGE
DOCKET NUMBER

DATE 02/06/2018
SIGNATURE OF ATTORNEY OF RECORD /s/ Joshua Levin-Epstein

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

CERTIFICATION OF ARBITRATION ELIGIBILITY

Local Arbitration Rule 83.10 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

I, Joshua Levin-Epstein, counsel for plaintiff, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

- monetary damages sought are in excess of \$150,000, exclusive of interest and costs,
- the complaint seeks injunctive relief,
- the matter is otherwise ineligible for the following reason

DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

RELATED CASE STATEMENT (Section VIII on the Front of this Form)

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that " A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County? No
- 2.) If you answered "no" above:
 - a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County? Yes
 - b) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District? Yes

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County? _____

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

BAR ADMISSION

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

- Yes
- No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

- Yes (If yes, please explain)
- No

I certify the accuracy of all information provided above.

Signature: /s/ Joshua Levin-Epstein

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of New York

Jackie Sanabria, individually and on behalf of all others similarly situated

Plaintiff(s)

v.

Simple Mills, Inc.

Defendant(s)

Civil Action No. 2:18-cv-00809

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Simple Mills, Inc. c/o The Corporation Trust Company Corporation Trust Center 1209 Orange Street Wilmington, DE 19801

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Joshua Levin-Epstein Levin Epstein & Associates, P.C. 1 Penn Plaza, Suite 2527 New York, NY 10119

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DOUGLAS C. PALMER CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk