

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

ALEXA BORENKOFF, On Behalf of Herself,
and All Others Similarly Situated,

Plaintiff,

-against-

BUFFALO WILD WINGS, INC., and BLAZIN
WINGS, INC.,

Defendants.

Case No.: 7:16-cv-08532-VB

**AMENDED CLASS
ACTION COMPLAINT**

JURY TRIAL DEMANDED

Plaintiff Alexa Borenkoff (“Plaintiff”), by her undersigned counsel and on behalf of herself and all others similarly situated, complaining of deceptive trade practices relating to Defendants Blazin Wings, Inc. and Buffalo Wild Wings, Inc.’s material misrepresentations and omissions which deceived vegetarians into choosing, consuming and paying for items cooked in beef tallow, alleges the following upon personal knowledge on her own acts, and upon information and belief, based on the investigation conducted by her counsel, on all other allegations:

NATURE AND SUMMARY OF THE ACTION

1. This is an action against Defendants Blazin Wings, Inc. and Buffalo Wild Wings, Inc. (collectively “BWW”) alleging violations of the New York General Business Law (“GBL”) § 349 and unjust enrichment. The classes (a restitution class and an injunctive relief class) comprise of vegetarians who ate at a BWW restaurant (the “Classes”).

2. A large and growing segment of our population are vegetarian. BWW is deceiving these consumers because it does not list beef tallow as an ingredient, disclose using beef tallow on its menu, or reference using beef tallow, and the industry standard is to not use beef tallow.

Vegetarians are choosing, consuming, and paying for items cooked in beef tallow they would not have purchased.

3. The Classes purchased food and paid prices they would not have otherwise because of BWW's material misstatements and omissions. The Classes have been damaged and BWW unjustly enriched. Injunctive relief is necessary to prevent future injuries and continuing harm.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action under the Class Action Fairness Act of 2005 and 28 U.S.C. § 1332(d) because the aggregate amount in controversy exceeds \$5,000,000 and there is diversity between a Plaintiff and a Defendant.

5. Venue is proper in this District under 28 U.S.C. § 1391(b). BWW conducts substantial business in this District, has significant contacts with this District, and otherwise purposely avails itself of the markets in this District, through its promotion, sale, and marketing.

PARTIES

6. Plaintiff Alexa Borenkoff is an adult individual and a resident and citizen of New York. Ms. Borenkoff brings this proceeding in an individual capacity and on behalf of all others similarly situated.

7. BWW are Minnesota corporations, with their principal place of business and headquarters in in Minneapolis, Minnesota. BWW is an owner, operator and franchisor of BWW restaurants.

SUBSTANTIVE ALLEGATIONS

A. Background

8. BWW is a growing owner, operator and franchisor of BWW restaurants. BWW was founded in 1982 and opened the first BWW restaurant on the Ohio State University campus. BWW now has 1,180 restaurants, and has set a goal of having 1,700 restaurants across North

America in the next 10 years. The company's international expansion began in Canada and continued into Mexico, the Middle East, the Philippines and Panama.

9. A large and growing segment of our population are vegetarian. In 2009, one percent of the United States population reported eating vegetarian. Now, five percent of the United States population is vegetarian.

10. People are vegetarian for several reasons, including better health (lower cholesterol, reduced risk of heart diseases, reduced risk of cancer, higher life expectancy, etc.), and concern for animals.

11. Further, many religions have dietary restrictions. The restrictions include, the food (e.g. no pork products), the way meat is slaughtered (e.g. halal meat), the way food is stored and cooked (e.g. kosher), how the cooking tools are cleaned (e.g. kosher), and how the food is served (e.g. on trays uncontaminated by non-kosher food).

12. A diet conforming to one's religious beliefs is a right protected by the First Amendment.

B. BWW's Material Misrepresentations and Omissions Deceived Vegetarians Into Choosing, Consuming, and Paying For Items Cooked in Beef Tallow

13. BWW's menu lists the ingredients for its food items. BWW menu omits that it uses beef tallow to fry non-meat foods. BWW's menu does not list or reference using beef tallow.

14. BWW's nutritional information does not list or reference using of beef tallow.

15. The industry standard is to use non-beef cooking oil to fry items.

16. Because the industry standard is to use non-beef cooking oil to fry items, a reasonable consumer would not expect non-meat items to be fried in beef tallow.

17. Because BWW does not list beef tallow as an ingredient, disclose its use on the menu, or reference using beef tallow in a manner that a reasonable consumer could find,

vegetarians are purchasing items, such as the garden crasher, Mediterranean salad, roasted garlic breaded mushrooms, cheese curds, corn tortilla chips and red salsa, potato wedges, French fries, ultimate cheese sampler, etc., that are cooked in beef tallow.

18. Vegetarians would not choose and pay BWW's price for these items if BWW disclosed using beef tallow.

19. A reasonable vegetarian consumer would be deceived by BWW's material misrepresentations and omissions because its use of beef tallow to fry non-meat items is unusual.

C. Because Of BWW's Material Misrepresentations and Omissions, Plaintiff Purchases, Consumes and Pays for Food Cooked in Beef Tallow

20. Plaintiff is a vegetarian.

21. In or about January 2015, Plaintiff visited a BWW in Rockland County New York.

22. In or about January 2015, Plaintiff visited a BWW in Westchester County New York.

23. On both occasions, she chose, consumed and paid for French fries and mozzarella sticks.

24. BWW does not disclose these items are cooked in beef tallow.

25. If BWW had properly disclosed these items were cooked in beef tallow, Plaintiff would not have chosen, consumed and paid a premium for these items.

26. The cost of the items Plaintiff purchased was effected by BWW material misrepresentations and omissions.

27. BWW continues to make these material misrepresentations and omissions.

28. BWW fraudulent practices are ongoing, and continue to present adverse effects.

29. Plaintiff is still exposed to BWW's material misrepresentations and omissions.

D. BWW Uses Beef Tallow To Fry All Items

30. Failing to reveal the existence and extent of using beef tallow was a material omission of fact relating to the sale of BWW's food.

31. Despite not listing beef tallow as an ingredient or disclosing its use on its menu, BWW admits using beef tallow to cook all fried items, averring that "there is no legal requirement to post such usage on the menu."

E. BWW's Material Misrepresentations and Omissions Regarding Beef Tallow Inured the Class and Unjustly Enriched BWW

32. The Classes purchased items believing they had the qualities they sought based on BWW's material misrepresentations and omissions, but the food was actually unsatisfactory described.

33. Plaintiff and members of the Classes would not have purchased these items absent BWW's material misrepresentations and omissions.

34. BWW practice is ongoing.

35. The frequency of injuries creates the likelihood of future injury.

36. BWW uniform practice is misleading to a reasonable consumer.

37. Plaintiff and members of the Classes lost money because of BWW's deception.

38. Plaintiff and members of the Classes altered their position to their detriment and suffered damages in an amount equal to the amount they paid to BWW.

39. Plaintiffs were reasonably diligent consumers, but did not discover BWW's use of beef tallow until after their purchases. Because of BWW's material omissions, certain Class members still do not know about BWW use of beef tallow and continue to purchase items they would not otherwise purchase.

40. Plaintiff was unaware she was purchasing items cooked in beef tallow until after purchasing, consuming and paying for these items.

41. Plaintiff, in exercising reasonable diligence, could not have discovered BWW's deceptive practices earlier.

42. Because of BWW's material omission, vegetarians paid BWW for food they would not have otherwise ordered.

43. The Classes were damaged, BWW was unjustly enriched, and BWW should be required to properly disclose its use of beef tallow.

F. BWW Is Knowingly Misleading Non-Meat Eating Customers For Profit

44. BWW knows consumers are being deceived and injured, refuses to properly disclose using beef tallow to cook non-meat items, and is profiting from its ongoing and uniform deception.

45. A former BWW manager provided a declaration providing:

When I worked at Buffalo Wild Wings, I did not know that everything was fried in beef tallow. Based on my experience, restaurants overwhelmingly use non-beef cooking oils to fry foods, so Buffalo Wild Wings use of beef tallow cooking oil is unusual. Typically, customers who do not eat meat can consume fried non-meat items at fast food and chain restaurants because non-beef oils are typically used for frying. I believe Buffalo Wild Wings even listed certain items that had ingredients fried in beef tallow as "vegetarian" on the menu.

Buffalo Wild Wings does not disclose using beef tallow in a way that a customer would reasonably find. I did not know that Buffalo Wild Wings was frying non-meat foods in beef tallow until after my family and I consumed the food because it does not list beef tallow as an ingredient or disclose using beef tallow on its menu. The only reference to using it, is hidden on the allergen list on Buffalo Wild Wings website, but not eating meat is not an allergy issue.

Buffalo Wild Wings does not train its staff to disclose using beef tallow to fry non-beef items to customers. Many servers do not know beef tallow is being used, because its use is omitted from

Buffalo Wild Wings training materials and weeklong training program.

After learning that beef tallow was being used to fry non-meat items, I brought up my concerns to the Regional Manager. The Regional Manager said that Buffalo Wild Wings did not care that customers who do not eat meat are eating foods cooked in beef tallow because they did not have to disclose using it.

After my Regional Manager's response, I did internet research on this issue. My research found that McDonald's settle a lawsuit based in this exact situation: A U.S. court has approved a \$10 million settlement in a lawsuit by an Indian American against McDonald's Corporation for misleading customers who don't eat meat by using beef extracts in its fries. <http://www.rense.com/general31/tenm.htm>

After my research, I again raised my concerns, and the *McDonald's Vegetarian* case, with my Regional Manager.

The Regional Manager reiterated that Buffalo Wild Wings did not care it was misleading customers who do not eat meat by using beef tallow when frying non-meat items because they did not have to disclose it. The Regional Manager said the *McDonald's Vegetarian* case does not matter because "Buffalo Wild Wings has deep pockets."

Buffalo Wild Wings is knowingly misleading customers who do not eat meat by using beef tallow in its frying.

46. Because BWV use of beef tallow to fry non-meat items is so unusual, it has an affirmative obligation to disclose its use.

CLASS ACTION ALLEGATIONS

47. Plaintiff sues as a class action under Fed. R. Civ. P. 23, on behalf of a Classes defined as:

A. **Restitution Class** - All vegetarians (excluding officers, directors, agents, and employees of BWV) who purchased, on or after October __, 2013 (the "Class Period"), items cooked in beef tallow.

B. **Injunctive Relief Class** - All vegetarians (excluding officers, directors, agents, and employees of BWW) who purchased, on or after October __, 2010 (the “Class Period”), who commonly purchase BWW items cooked in beef tallow.

48. The Classes for whose benefit this action is brought are so numerous that joinder of all members is impracticable.

49. The proposed class is believed to be composed of thousands of people.

50. All members of the proposed Classes are ascertainable, and their purchases identifiable through records maintained by BWW, and debit and credit card records.

51. No violations alleged result from any oral communications or individualized interaction between class members and BWW.

52. Rather, all claims arise from the identical material omission of fact and common course of conduct alleged.

53. There are common questions of law and fact affecting the rights of the class, including:

- a) Whether BWW’s conduct constitutes the violations of law alleged ;
- b) Whether BWW acted willfully, recklessly, negligently, or with gross negligence in the violations of law alleged ;
- c) Whether Class Members are entitled to injunctive relief;
- d) Whether Class Members are entitled to restitution.
- e) Whether failing to reveal the use of beef tallow was an omission of material fact relating to the sale of goods and/or services within the meaning of GBL 349; and
- f) Whether BWW’s common course of conduct, as alleged, renders them liable to provide total or partial refunds under a theory of unjust enrichment or disgorgement.

54. Plaintiff is a member of the Classes she seeks to represent.

55. The claims of Plaintiff are not only typical of all Class members, they are identical.

56. All claims of Plaintiff and the Classes are based on the exact same legal theories.

57. Plaintiff has no interest antagonistic to, or in conflict with, the Classes.

58. Plaintiff will thoroughly and adequately protect the interests of the Classes, having retained qualified and competent legal counsel to represent her and the Classes.

59. BWW has acted and refused to act on grounds applicable to the Classes, making appropriate injunctive and declaratory relief for the Classes.

60. The prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications.

61. A class action is the only practical, available method for the fair and efficient adjudication of the controversy since the damages suffered by each class member will be limited and individual actions are not economically feasible.

62. Common questions will predominate, and there will be no unusual manageability issues.

63. By purchasing and/or consuming these items, all members of the Classes were subjected to the same wrongful conduct.

64. Absent BWW's material deceptions, misstatements, and omissions, Plaintiff and other members of the Classes would not have purchased these items.

65. Class representation is superior to other options for resolving the controversy. The relief sought for each Class member is small. Absent the availability of class action procedures, it would be infeasible for Class members to redress the wrongs done to them.

66. Class treatment is appropriate under FRCP 23(a) and both 23(b)(2) and 23(b)(3).

FIRST CLAIM
(Violation of N.Y. GBL § 349)

67. Plaintiff repeats and realleges every allegation contained above as if fully set forth.

68. Plaintiff and the other members of the Classes have been injured and suffered damages by violations of GBL § 349(a), which states: deceptive acts or practices in the conduct of any business, trade or commerce or in furnishing any service in this state are declared unlawful.

69. Defendant engaged in acts and practices in the State of New York that were deceptive or misleading in a material way, and that injured Plaintiff and the other members of the Classes.

70. Such acts and practices were likely to mislead a reasonable consumer acting reasonably under the circumstances existing.

71. Plaintiff and the other members of the Classes have been damaged by Defendants violations of GBL § 349, for which they seek recovery of the actual and/or statutory damages they suffered because of Defendant's willful and wrongful violations of GBL § 349, in an amount to be determined.

72. GBL § 349(h) provides that:

In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions.

73. Plaintiff and the other members of the Classes seek treble damages and an award of reasonable attorney's fees under GBL § 349(h).

SECOND CLAIM
(Unjust Enrichment)

74. Plaintiff repeats and realleges every allegation contained above as if fully set forth.

75. By its wrongful acts and the omissions of material fact it caused to be made, Defendant was unjustly enriched at the expense of, and to the detriment of, Plaintiff and members of the Classes.

76. Defendant's financial benefit was unjust because of the BWW's bad faith conduct.

77. Plaintiff, as a member of the Classes, seeks restitution from BWW, seeks an order disgorging all profits, benefits, and other compensation, obtained by the BWW due to their wrongful conduct, and injunctive and/or declaratory relief preventing this misconduct from continuing.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, prays for a judgment against Defendant:

- A) For an order certifying the Class, appointing Plaintiff as class representative, and appointing Plaintiff's law firm as Class counsel;
- B) For compensatory damages sustained by Plaintiff and the Classes;
- C) For compensatory damages and/or restitution or refund of all funds acquired by Defendants from Plaintiff and the Classes, and the general public because of Defendants' unlawful, unfair, fraudulent, deceptive and unconscionable practices described;
- D) For punitive and all other damages available to the Classes;
- E) For payment of costs of suit incurred;
- F) For both pre-and post-judgment interest on any amounts awarded;
- G) For payment of reasonable attorneys' fees and expert fees;
- H) For injunctive and declaratory relief; and
- I) For such other and further relief as the Court may deem proper.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all claims so triable.

Dated: April 3, 2017

THE BRAUNSTEIN LAW FIRM, PLLC

By: /s/ *Michael L. Braunstein*

Michael L. Braunstein
3 Eberling Drive
New City, New York 10956
(845) 499-2198

