

United States District Court  
Eastern District of New York

1:18-cv-2022

Anthony Medina individually and on behalf of  
all others similarly situated

Plaintiff

- against -

Complaint

That's It Nutrition, LLC

Defendant

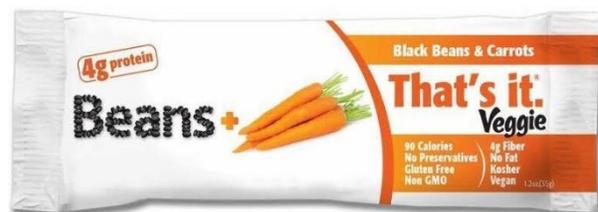
The above-named plaintiff individually and on behalf of all others similarly situated, by attorneys, alleges upon information and belief, except for those allegations pertaining to plaintiff, which are based on personal knowledge:

1. That's It Nutrition, LLC ("defendant") manufactures and sells snack food products under the brand "That's it" (the "Products").
2. The Products consist of (1) fruit bars, (2) fruit bars with added spicy ingredients, (3) chocolate-covered fruit pieces (4) vegetable bars.
3. The Products have common label representations across the varieties, except for those elements relating to that specific variety, such as the combination of fruits, vegetables and spices.
4. The Products are available in combinations of (1) apple and either another fruit type or a spice and (2) black beans and another vegetable type.

Fruit Bar



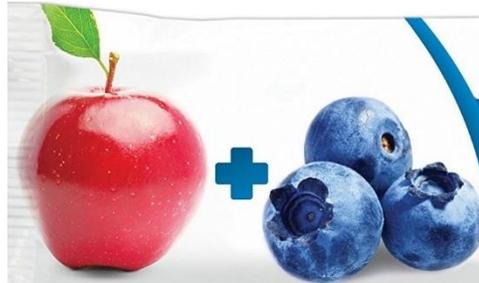
Vegetable Bar



5. The Bars are centered on the presence of the purported represented components, through the following representations:

Location

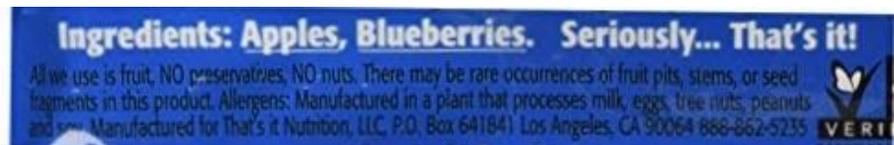
Representation



Front Label



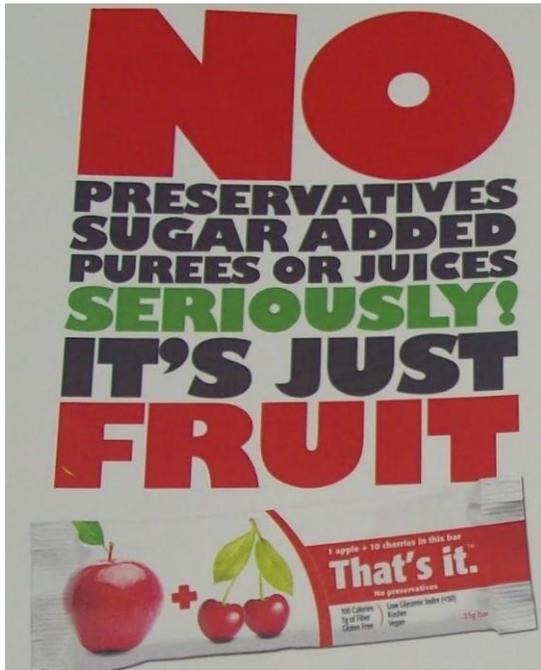
Ingredient List



6. The above-referenced representations, including but not limited to the image of a whole apple (or black beans) next to the other component ingredient, “1 apple + 20 blueberries in this fruit bar,” “That’s it,” “All Natural,” “No Preservatives,” “Raw,” promote the products as being directly made from ingredients which have been converted into the final product in a linear process.

7. In other words, the message is that defendant or any manufacturer was responsible for taking the whole intact fruit, washing it, dicing or chopping it, then mashing it together to form the final bar, so that the product can credibly attest that it contains ingredients identified by a collective name.

8. The Products other labeling claims affirm the above representations which state “No Purees or Juices,” “No Sulfur or Sulfites,” “No Sugar Added,” “No Preservatives,” the “2 ingredient snack,” “Just Fruit” and “Fruit is all we use.”



9. These representations are intended to distinguish the Products from those fruit-based snacks which have been a staple of American school lunch boxes for decades – the fruit roll-up.

10. The ingredients in the fruit roll-up are fruit purees and juices, corn syrups, various forms of added sugars, pectins, artificial colors and flavors.

11. In contrast, the Products here convey the opposite impression to consumers, who are increasingly avoiding foods which are full of hard to pronounce, processed ingredients.

12. To meet this consumer demand and capture the formed fruit bar market, the ingredient list on the back of the label declares “apples” (Fruit Bars) or “black beans” (Vegetable Bars) followed by the second fruit or vegetable ingredient, i.e., “Blueberries,” or “Carrots,” or the name of the spice or flavoring.

13. This gives a reasonable consumer the impression that the raw material ingredients are, for example, whole apples and whole blueberries, at the point directly prior to their transformation into the Fruit Bar Products.

14. Federal regulations, mirrored by those of this state, require that the name ascribed to an ingredient is a specific name as opposed to a collective name (subject to certain non-applicable exceptions).

15. For example, tomatoes are used in food processing in numerous forms – tomato paste, tomato puree, tomato jam, tomato sauce, tomato powder, diced tomatoes, etc.

16. A typical bottle of tomato sauce lists ingredients such as “Tomato Puree (Water, Tomato Paste), Diced Tomatoes,” as opposed to the solitary word “tomatoes.”

17. This is because there are differences in the functional, sensory, textural, organoleptic, nutrient and other properties between the specific forms of an ingredient (i.e., tomato paste) and the collective name (“tomato”), which consumers understand as referring to a tomato that has not been processed.

18. By listing ingredients with a collective name, a reasonable consumer gets the impression that the raw material existed in its whole, intact form, which means the products are necessarily fresher because its component ingredients were not made years ago and sat on a warehouse shelf until the time they were used in the products.

19. It is misleading to list ingredients with a collective name because consumers are unable to distinguish the value, quality and nature of the actual ingredients prior to purchase.

20. This is especially relevant and material as consumers increasingly seek products made from whole, unprocessed ingredients as opposed to by-products or processed derivative ingredients.

21. Defendant's Products' listing of ingredients through the collective name of the fruits, vegetables and spices is deceptive, unlawful and misleading to reasonable consumers.

22. This is because defendant does not convert whole, intact fruits or vegetables into the final product.

23. If defendant began the bar production process with whole intact fruits, the ingredient list would indicate the presence of an additional binding ingredient such as a gel, pectin, juice concentrate or syrup, needed to keep the individual fruit matter together.

24. Neither defendant nor any of its manufacturing partner in a desert environment possesses the ability, technology, equipment and expertise to process whole apples, whether delivered from an orchard or cold storage.

25. As a result, the Products contain ingredients which have already been subjected to various levels of processing and transformation such that designating them by their collective name is misleading.

26. It is highly probable that the generic designation of "Apples" encompasses the presence of apple (and other fruit) powder.

27. Apple powder (and fruit powders generally) is used for its functional properties, including (1) binding the components together because it contains pectin, (2) aiding humectancy, (3) increasing fiber content, (4) controlling water activity and (5) assisting with pH regulation.

28. The most common ways to make fruit powder are drum drying and spray drying.

29. In both methods, the input is juice or puree from the subject fruit or vegetable.

30. Drum drying takes the liquid and applies it as a thin layer or sheet over the outer surface of large revolving drums which are heated through steam.

31. This causes the liquid to dry, before grinding or pulverization transforms it into a powder form.

32. Fruit powders made through spray drying typically uses concentrated fruit juice.

33. Juices from concentrates are those which have had their naturally occurring water removed through evaporation or by freezing out the water as ice.

34. Whatever form of juice concentration is applied, it is unlikely that the concentrate will closely resemble the unconcentrated form even when diluted back to its original state.

35. This is the result of the nutrients and flavoring agents being sensitive to processing conditions, which necessitates the addition of flavoring agents.

36. Spray drying brings the concentrated juice it into contact with hot gas, causing moisture to evaporate from the particles, and the dry powder particles are collected.

37. In whatever form of powder production used in the Products, they all involve juice and/or purees.

38. Since fruit powder is derived directly from juices and/or purees, it is deceptive and misleading for the Fruit Bar Products to promote the absence of juices and purees.

39. The Fruit Bar Products incorporate apple pieces (dices or grinds) which have had their water removed through dehydration/evaporation.

40. The inclusion of dried apple (and other fruit/vegetable) ingredients – powders and pieces – means water must be added to reconstitute or rehydrate them, prior to the time the final product is finished.

41. The Products do not indicate the presence of water in the ingredient list, which is misleading.

42. The Products contain implied nutrient content and health claims which are misleading.

43. Defendant's representations have enabled them to command a substantial premium in comparison to alternative bar products which use specific instead of common names to designate their ingredients.

44. Excluding tax, the Products cost no less than \$1.99, a premium price compared to other similar products.

#### Jurisdiction and Venue

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

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

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

48. Venue is proper because plaintiff and many class members reside in this District and defendant does business in this District and in New York.

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

#### Class Allegations

50. The classes consist of (1) all consumers in all states and (2) all consumers in New York State who purchased any Products bearing any actionable representations during the statutes of limitation periods.

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

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

53. 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.

54. Plaintiff's claims and the basis for relief are typical to other members because all were subjected to the same representations.

55. Plaintiff is an adequate representative because his/her interests do not conflict with other members.

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

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

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

59. 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

60. Plaintiff is a citizen of Kings County, New York.

61. Defendant is a Delaware limited liability company with its principal office in Los Angeles, California and upon information and belief, no member thereof is a citizen of New York.

62. In 2017, plaintiff purchased the Product(s) for no less than \$1.99 per Product(s), excluding tax, at a store within this District.

63. Plaintiff paid this premium because prior to purchase, plaintiff saw and relied on the misleading representations.

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

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

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

66. The representations, descriptions and identifications of the Products and its ingredients are false and misleading for the reasons described herein.

67. 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

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

69. Defendant manufactures and sells bar products purporting to consist of only apples, black beans and other whole unprocessed ingredients, the implication being that the ingredients existed in their whole intact form prior to defendant or manufacturing partners transforming them into the products and warranted same to plaintiff and class members

70. Defendant and/or any production partners did not convert the ingredients into the form that they were ultimately incorporated into the Products.

71. Instead, defendant uses various specific processed forms of the various ingredients and denotes them by a collective name, i.e., "apples."

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

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

#### Fraud

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

75. Defendant described and identified the Products in a deceptive way when it could have used non-misleading terms, names or descriptions.

76. Defendant's purpose was to mislead consumers who increasingly seek products with transparent ingredients, which they are familiar with and do not possess complicated-sounding names, often associated with ingredients which have undergone significant processing or alteration prior to its inclusion in the product.

77. Defendant's intent was to distinguish its Products in the marketplace amongst the numerous other companies producing bar products.

78. Plaintiff and class members observed and relied on the representations.

79. Plaintiff and class members paid more than they would have due to the false representations, entitling them to damages.

#### Unjust Enrichment

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

81. 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 claims;
4. Awarding costs and expenses, including reasonable fees for plaintiff's attorneys and experts; and
5. Such other and further relief as the Court deems just and proper.

Dated: April 4, 2018

Respectfully submitted,

Levin-Epstein & Associates, P.C.

/s/Joshua Levin-Epstein

Joshua Levin-Epstein

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New York, NY 10119

Tel: (212) 792-0046

Sheehan & Associates, P.C.

/s/Spencer Sheehan

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Great Neck, NY 11021

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Eastern District of New York

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Anthony Medina individually and on behalf of all others similarly situated

Plaintiff

- against -

That's It Nutrition, LLC

Defendant

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Complaint

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

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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: April 4, 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
Anthony Medina individually and on behalf of all others similarly situated
(b) County of Residence of First Listed Plaintiff Kings
(c) Attorneys (Firm Name, Address, and Telephone Number)
Sheehan & Associates, P.C., 891 Northern Boulevard, Suite 201, Great Neck, NY 11021, (516) 303-0552, Levin Epstein & Associates, P.C., 1 Penn Plaza, Suite 2527, New York, NY 10119, (212) 792-0046

DEFENDANTS
That's It Nutrition, LLC
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 1 Incorporated or Principal Place of Business In This State
2 2 Incorporated and Principal Place of Business In Another State
3 3 Foreign Nation
PTF DEF
4 4
5 5
6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)
Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

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
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: Yes No

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

DATE 04/04/2018
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? No
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

