

United States District Court  
Eastern District of New York

1:18-cv-05257

Keith Kennedy individually and on behalf  
of all others similarly situated

Plaintiff

- against -

Essentia Water, LLC

Defendant

Complaint

Plaintiff by attorneys allege upon information and belief, except for allegations pertaining to plaintiff, which are based on personal knowledge:

1. Essentia Water, LLC (“defendant”) manufactures, distributes, markets, labels and sells water products under the “Essentia” line in various sizes, including 33.8 oz (1 L).
2. The Products emphasize their ability to provide superior hydration, as measured by hydration markers, compared to non-Essentia products, thereby commanding a premium price.
3. The principal display panel contains the product name “Essentia,” the statements “overachieving H2O,” “Ionized Hydration,” “9.5 pH or higher” and the logo of a “plus symbol” squared off by red bars of varying length.



4. The Information panel contains the logo and descriptive text:

We're here to put a flag in the ground and tell the world that a better you starts with a better water. **#EssentiaNation**

What Makes Essentia Better? Our proprietary process turns water from any source into supercharged ionized alkaline water. It's even too pure to be tested by pH strips.



5. The digital and print promotional materials emphasize the Product's special ability to achieve hydration, beyond traditional tap or bottled water.



6. The Product's website claims to have scientific support for the claims it delivers superior hydration and boasts the support of medical doctors.

## overachieving H<sub>2</sub>O<sup>®</sup>

The result is supercharged ionized alkaline water that has been clinically shown to be more effective at rehydrating.\*

[LEARN MORE](#)

We believe proper hydration increases human potential. Essentia's proprietary ionization process creates a clean and smooth tasting 9.5pH or higher alkaline water that's better at rehydrating. We have backed it up with solid science.\* Essentia was included in the first ever hydration study of its kind.

The clinical trial, published in [the Journal of the International Society of Sports Nutrition \(JISSN\)](#), measured how well a leading bottled water and Essentia Water rehydrated participants after moderate aerobic exercise. The results showed that Essentia Water was more effective at rehydrating.\*

"These scientific findings reinforce feedback we've heard for several years from doctors, athletes, and all kinds of overachievers aiming to be at the top of their game. Essentia Water helps them rehydrate better," said Ken Uptain, founder and CEO of Essentia Water.

**Essentia is the only bottled water listed in the Physicians' Desk Reference, commonly recommended by physicians for hydration.**

7. Defendant's logo is a clever amalgam of the symbols for the International Red Cross and the Swiss Army knives made by the Victorinox company.
8. Consumers are familiar with the Red Cross logo being synonymous with "first aid."
9. Likewise, familiarity with the white Swiss Army Knife cross emblazoned on a red shield is a symbol of protection and ingenuity, since its namesake penknife incorporates several blades and other tools such as scissors and a screwdriver.

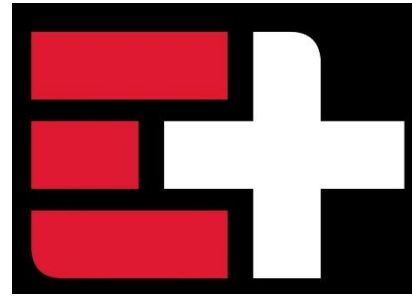
Red Cross



Swiss Army Knife



Essentia



10. Defendant's logo is viewed in conjunction with the claims that the Product's superiority in the realm of hydration is backed by scientific rigor, causing a reasonable consumer to believe that Essentia will be more effective and efficient in supplying hydration.

11. Defendant relies in part on its study, "Effect of electrolyzed high-pH alkaline water on blood viscosity in healthy adults" for support that Essentia, due to its pH, is superior to non-alkalinized water, for effectiveness of hydration. *Journal of the International Society of Sports Nutrition* 13.1 (2016): 45.

12. The study compared persons who consumed alkaline water with a control group that consumed purified reverse osmosis water, following dehydration because of exercise.

13. The conclusion was that the alkaline water supplied superior hydration, based on the reduction in blood viscosity vis-à-vis the control group.

14. Blood viscosity is influenced by hematocrit, red blood cell deformability, red blood cell aggregation, and plasma viscosity, but not impacted by discrete nutritional disturbances from consuming a non-medicinal beverage.

15. Moreover, dehydration can cause an increase in blood viscosity (thickness), so that an increase in water will reduce dehydration.

16. The study's conclusion – that the alkalized water reduced blood viscosity greater than the control water – is unrelated to the water being alkalized.

17. This is because the control group was given purified reverse osmosis water, which has had all minerals and electrolytes removed, while the alkalized water notably possesses electrolytes, though they are purportedly present “for taste.”

18. Alkalinity is in relation to “acidic” and these terms refer to the pH level of different types of foods and beverages.

19. The acidity or alkalinity of any solution is indicated on the pH scale ranges from 0 (strongly acidic) to 14 (strongly basic or alkaline).

20. A pH of 7.0 is neutral and pH of blood is slightly basic (7.35 – 7.45).

21. Food and beverages are unable to influence the pH of blood or intra- or extra-cellular liquids, as minor deviations cause serious sickness or death.

22. The lungs, kidneys and buffer systems to regulate the blood's acid-base balance.

23. The kidney responds to disturbances of the acid base balance through changes in H<sup>+</sup> secretion and HCO<sub>3</sub><sup>-</sup> reabsorption and production on a time scale of hours to days.

24. The respiratory center in the medulla oblongata of the brain responds to pH and CO<sub>2</sub> within minutes, adjusting the breathing rate.

25. The chemical buffer systems in both the extracellular and intracellular compartments act immediately to prevent excessive fluctuations of the blood pH.

26. The most important pH buffer system in the blood involves carbonic acid (a weak acid formed from the carbon dioxide dissolved in blood) and bicarbonate ions (the weak base).

27. All consumed food travels to the highly acidic stomach, with a pH of c. 3.0.

28. The low pH is necessary to break it down and sterilize any bacteria ingested.

29. After leaving the stomach, the matter goes to the intestines where it is neutralized and slightly alkalized by pancreatic solutions.

30. As a result, everything consumed - once it gets to the intestines—is roughly the same pH, regardless of its pH at the time it was consumed.

31. If the pH of blood changes slightly, it will cause serious medical disturbances requiring hospitalization.

32. Extracellular levels of other ions such as Na, K, Ca and inorganic phosphate are also barely affected by fluctuations in their respective nutritional intakes, unless their variations are very large in quantity and extend over prolonged periods.

33. The only impact of consuming a product with a pH of 9.5 or above would be to alter the pH of the excreted urine to be more alkaline.

34. Moreover, significant amounts of the Product would have to be consumed to even achieve such a transient change in the pH of the blood, which would be almost impossible to do in a short period of time before the body adjusts the pH back to its normal level.

35. The claims are literally false because all reasonable scientists agree that mammalian physiology allows for no causality between alkalized foods and a change in blood viscosity, especially none that can occur in a manner described in the study.

36. That the alkalized water in the study achieved a reduction in blood viscosity is of no significance because (1) any effect from the alkalinity of the water is negated by the acids present in the stomach and (2) the presence of electrolytes likely caused the water to be absorbed better by the body.

37. The latter reason is why global health organizations promote rehydration solutions which contain sodium and electrolytes to combat potentially fatal dehydration in developing countries as opposed to providing purified reverse osmosis water.

38. The studies purporting to substantiate defendant's claims are poorly designed, incredible and represent the view of a minority of scientists.

39. Defendant's representations that its Product is any more effective at providing hydration than other non-alkalinized due to its pH level are false and misleading.

40. Excluding tax, the Products cost no less than \$2.99 for 33.8 oz, a premium price compared to non-alkalinized water.

#### Jurisdiction and Venue

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

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

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

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

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

#### Class Allegations

46. The classes consist of all consumers in the following states: all, New York who purchased any Products with actionable representations during the statutes of limitation.

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



controversy.

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

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

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

51. Plaintiff(s) is/are an adequate representative because his/her/their interests do not conflict with other members.

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

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

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

55. Plaintiff(s) seeks class-wide injunctive relief because the practices continue.

#### Parties

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

57. Defendant is a Delaware limited liability company with its principal place of business in Bothell, Washington, California, and no member thereof is a citizen of New York.

58. In 2017 and/or 2018, plaintiff purchased one or more of the Products for personal consumption, for no less than \$2.99 per 33.8 oz, excluding tax, at a store located within this district.

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

misleading representations.

New York General Business Law (“GBL”) §§ 349 & 350

60. Plaintiff incorporates by references all preceding paragraphs.

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

62. Plaintiff desired to purchase products which provided the benefits described by defendant.

63. Defendant’s representations are false, unfair, deceptive and misleading for the reasons described herein.

64. The representations and omissions were relied on by plaintiff and class members, who paid more than they would have otherwise, causing damages.

Negligent Misrepresentation

65. Plaintiff incorporates by references all preceding paragraphs.

66. Defendant misrepresented the ability of the Products to achieve the claimed effects.

67. Defendant had a duty to disclose, in a manner prescribed by law, that its Products were not capable of providing said effects.

68. At the time of the representations, defendant knew or should have known same were false or misleading.

69. Defendant negligently misrepresented and/or negligently omitted material facts.

70. Plaintiff reasonably and justifiably relied on these negligent misrepresentations and omissions, which served to induce and did induce, the purchase of the Products.

71. Plaintiff and class members would not have purchased the Products or paid as much if the true facts had been known, thereby suffering damages.

Breach of Express Warranty and Implied Warranty of Merchantability

72. Plaintiff incorporates by references all preceding paragraphs.

73. Defendant manufactures and sells waters which have a higher pH level than most water products.

74. Defendant warranted to plaintiff and class members that the Products were superior to non-alkaline waters in providing hydration, when this was not truthful and was misleading.

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

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

#### Fraud

77. Plaintiff incorporates by references all preceding paragraphs.

78. Defendant's purpose was to mislead consumers who seek foods which have a functional and beneficial effect.

79. Defendant is capitalizing on consumer's shift from sugary juices and carbonated soft drinks to calorie-free beverages with beneficial properties.

80. Plaintiff and class members observed and relied on defendant's claims, causing them to pay more than they would have otherwise, entitling them to damages.

#### Unjust Enrichment

81. Plaintiff incorporates by references all preceding paragraphs.

82. 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**, plaintiffs pray for judgment:

1. Declaring this a proper class action, certifying plaintiff(s) as representative and the undersigned as counsel for the class;
2. Entering preliminary and permanent injunctive relief by directing defendant(s) to correct such 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 plaintiffs' attorneys and experts; and
5. Such other and further relief as the Court deems just and proper.

Dated: September 19, 2018

Respectfully submitted,

Sheehan & Associates, P.C.

/s/Spencer Sheehan

Spencer Sheehan

891 Northern Blvd., Suite 201

Great Neck, NY 11021

Tel: (516) 303-0552

spencer@spencersheehan.com

Levin-Epstein & Associates, P.C.

/s/Joshua Levin-Epstein

Joshua Levin-Epstein

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New York, NY 10119

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joshua@levinepstein.com

1:18-cv-05257  
United States District Court  
Eastern District of New York

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Keith Kennedy individually and on behalf of all others similarly situated

Plaintiffs

- against -

Essentia Water, LLC

Defendant(s)

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Complaint

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Sheehan & Associates, P.C.  
891 Northern Blvd., #201  
Great Neck, NY 11021  
Tel: (516) 303-0052  
Fax: (516) 234-7800

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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: September 19, 2018

/s/ Spencer Sheehan  
Spencer Sheehan

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
Keith Kennedy 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,

DEFENDANTS
Essentia Water, 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
2 2
3 3
4 4
5 5
6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)
CONTRACT
PERSONAL INJURY
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 09/19/2018
SIGNATURE OF ATTORNEY OF RECORD /s/ Spencer Sheehan

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, Spencer Sheehan, 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/ Spencer Sheehan

UNITED STATES DISTRICT COURT

for the
Eastern District of New York

Keith Kennedy individually and on behalf of all others
similarly situated

Plaintiff(s)

v.

Essentia Water, LLC

Defendant(s)

Civil Action No. 1:18-cv-05257

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

Essentia Water, LLC
c/o THE CORPORATION TRUST COMPANY
CORPORATION TRUST CENTER 1209 ORANGE ST
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: Sheehan & Associates, P.C. 891 Northern Blvd., #201, Great Neck, NY 11021

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