

United States District Court
Eastern District of New York

1:19-cv-00249

Ronnie Elliott individually and on behalf of
all others similarly situated

Plaintiff

- against -

Food For Life Baking Co., Inc.

Defendant

Complaint

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

1. Food For Life Baking Co., Inc. (“defendant”) manufactures, markets and distributes breakfast cereal products (the “Products”) under the brand, “Ezekiel 4:9,” sold to consumers by third-parties from brick-and-mortar stores and online.

2. The Products are available in no fewer than nine varieties in boxes of 16 oz. (454g): Almond Flake, Almond Sprouted Whole Grain, Cinnamon Raisin Whole Grain, Flax & Chia Sprouted Flake, Flax Sprouted Whole Grain, Original Flake, Raisin Flake and Original Sprouted Whole Grain and

3. The common front label representations include “Ezekiel 4:9” “Sprouted Grain Crunchy Cereal” “The Live Grain Difference” text corresponding to Chapter 4, Section 9, of the Book of Ezekiel in the Old Testament, “*As described in the Holy Scriptures: Take also unto thee Wheat and Barley and Beans and Lentils and Millet and Spelt and put them in one vessel and made bread of it.*”



4. The back of the box representations are presented under the heading, “The Live Grain DIFFERENCE” and states the Products “are made from sprouted organic live grains, legumes, and seeds, and *contain absolutely no flour.*”

5. The back of the box declares that “Sprouting is the only way to release all of the vital nutrients stored in whole grains,” and that their process “unlock[s] [in the grains] dormant food energy and maximize nutrition and flavor.”

6. The result is that “Beneficial enzymes are activated which cause the grains to sprout and become a living food,” which “increases valuable nutrients and also causes a natural change

that promotes a more efficient assimilation of protein and carbohydrates” (bioavailable).

7. These properties of the sprouted grains, the Products declare “You can see, taste, and smell the live grain difference,” “Your body and taste buds will know the difference.”

Back of the Box

The Live Grain
DIFFERENCE™

DID YOU KNOW?
Food For Life Ezekiel 4:9® sprouted grain crunchy cereals are made from sprouted organic live grains, legumes, and seeds, and *contain absolutely no flour.*
Sprouting is the *only way* to release all of the vital nutrients stored in whole grains.
We add just the right amount of water to healthy, whole, organically grown grains to *unlock dormant food energy* and maximize nutrition and flavor.
Beneficial enzymes are activated which cause the grains to sprout and become a *living food.*
The enzymatic action increases valuable nutrients and also causes a natural change that promotes a *more efficient assimilation of protein and carbohydrates.*
Our exclusive *slow baking* technique helps preserve valuable nutrients and retain important natural fiber and bran.

YOUR BODY and TASTE BUDS will KNOW the DIFFERENCE.
The natural whole grain goodness and energy source of crunchy Ezekiel 4:9® cereal is a great way to start the day off right.
~ Ezekiel 4:9® cereal can be enjoyed as a hot or cold breakfast cereal.
~ Top with fresh fruit for a healthy snack anytime, such as after a workout or in the evening.
~ Hot Cereal Lovers combine Ezekiel 4:9® cereal with a rice milk, soy milk or coconut juice, and heat.

OUR CEREALS CONTAIN
NO REFINED SUGAR,
PRESERVATIVES, ARTIFICIAL
COLORS OR FLAVORS,
NO SHORTENING AND
NO CHOLESTEROL.
You can see, taste, and smell
THE LIVE GRAIN DIFFERENCE™
of our crunchy cereals.

TRY OUR OTHER THREE FLAVORS:
ORIGINAL, ALMOND, AND
CINNAMON RAISIN.

YUMMY & EASY RECIPES
~ Make Ezekiel 4:9® Apple Crisp combining small pieces of apples with cereal, cinnamon and cashew butter.
~ Create your own Ezekiel 4:9® Granola Bars using cereal, honey and peanut butter and refrigerating until hardened.
~ Make Ezekiel 4:9® Sprouted Grain Muffins using cereal plus spelt flour instead of wheat flour in your favorite muffin recipe.

TO FIND OUT MORE ABOUT OUR PRODUCTS, SCAN THIS QR CODE WITH YOUR SMARTPHONE.

8. Cereals, grains, pseudocereals, and pulses are important components of most diets, providing good sources of energy, as well as macro- and micronutrients.

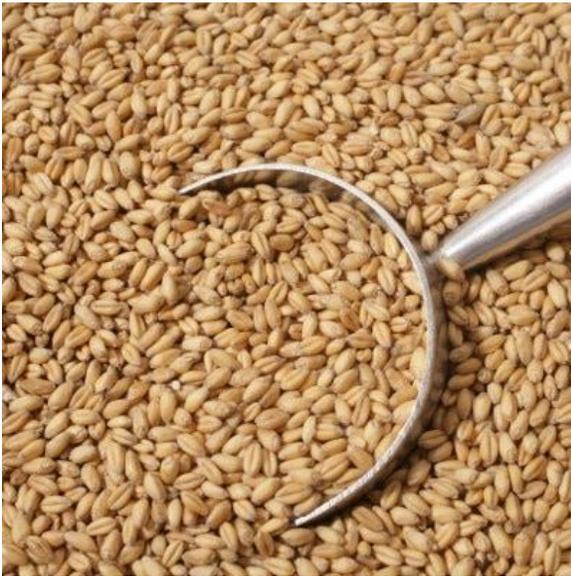
9. Studies have shown that consumers are seeking out more foods which have been

processed using natural methods, such as fermentation and germination (“sprouting”).

10. Sprouting refers to what happens to a grain or seed when it is soaked in water – its metabolic activity increases and its composition changes due to mobilizing its energy, or storage materials.

11. This is seen through the “sprout” or radicle, that emerges and becomes visible.

Non-Sprouted Wheat



Sprouted Wheat



12. The representations that sprouted grains contain more “vital nutrients” are implied references to protein and fiber, and claim to supply more nutritive value than non-sprouted counterparts.¹

13. During the sprouting process, the seed is utilizing its energy resources – carbohydrates and fat – resulting in a *decrease* in dry matter (carbohydrates).

14. This means that when nutrients and minerals are measured after sprouting, there will

¹ Nielson, M. T., et al. "Improvement of wheat protein quality by germination" several kinds of wheat sprouted at different temperatures and after 10 days, the seedlings were well developed and total nitrogen increased. and Miller, B. F., “Effects of sprouting on nutritional value of wheat,” *Tenth National Conference on Wheat Utilization Research, Tucson, Arizona. 1977.* wherein seven days of sprouting increased the protein content by an average of 10%.

be more nutrients *relative* to the overall remaining mass, since the dry matter has decreased, so the percentage of what remains automatically increases, even if the actual quantity remains constant.

15. In other words, the apparent increases in protein and other nutrients reflect a loss of carbohydrates (dry matter) during respiration, or an alteration of the nitrogenous substances, rather than an absolute or percentage increase in protein or nutrients.²

16. The Products' promotion of sprouted grains is implicitly compared to non-sprouted, and whole grains – i.e., describing “sprouting” as “the only way” to release all the nutrients stored in the “whole grains,” a “more efficient assimilation of protein and carbohydrates” and the “live grain difference.”

17. Use of the phrases “only way,” “more” and “difference” are terms of comparison and meant to demonstrate the Products' nutrient composition relative to non-sprouted grains, including whole grains.

18. The Products do not contain any reference food upon which the relative claims are based, which is misleading because there is no way to accurately evaluate the statements regarding the higher nutritional values of sprouted grains compared to non-sprouted grains.

19. The representations claim the nutrients present in the sprouted grains are of greater bioavailability (“more efficient assimilation of protein and carbohydrates”).

20. The association of sprouted grains with increased bioavailability is due to its purported ability to reduce the amount of antinutrients such as phytic acid, lectins and protease

² Chavan et al., "Nutritional improvement of cereals by sprouting," *Critical Reviews in Food Science & Nutrition* 28.5 (1989): 401-437 (attributing the increased amounts of protein, fat, fiber, and total ash (minerals) to the disappearance of starch); see also Klaus Lorenz et al., "Cereal sprouts: composition, nutritive value, food applications." *Critical Reviews in Food Science & Nutrition* 13.4 (1980): 353-385 (Increases in protein due to “loss of dry weight through respiration during germination. Thus, the germinated material would contain more seeds and, therefore, more nitrogen than ungerminated samples on a unit-weight basis. In other words, the apparent increases in protein may reflect a loss of carbohydrates during respiration or an alteration of the nitrogenous substances rather than an actual increase in protein.”).

inhibitors.

21. Antinutrients are believed to contribute to nutritional deficiencies in persons whose diets are centered on grains and legumes.

22. By removing the antinutrients, it is hypothesized that absorption of vitamins and minerals is increased.

23. The Products contain implied relative claims for decreased levels of antinutrients, through the statements promoting more efficient “assimilation.”

24. Moreover, the quantity of antinutrients present in a relevant reference food are already “low,” which renders this claim misleading.

25. The Products claim that benefits are provided because the grains are a “living food” and touts the “live grain difference.”

26. This claim is misleading because by the time the sprouted grain is dried, grounded into flour and heated, any nutritional benefits which may have existed have been extinguished.

27. The Products contain misleading statements pertaining to the completeness of the proteins. (“We discovered when these six grains and legumes are sprouted and combined, an amazing thing happens. A complete protein is created that closely parallels the protein found in milk and eggs.”).

28. Excluding tax, the Products cost no less than \$6.99, a premium price compared to other similar products.

Jurisdiction and Venue

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

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

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

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

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

Class Allegations

34. 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.

35. A class action is superior to other methods for fair and efficient adjudication.

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

37. 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.

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

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

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

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

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

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

Parties

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

45. Defendant is a California corporation with its principal place of business in Corona, California (Riverside County).

46. In 2016, 2017 and/or 2018, plaintiff purchased one or more of the Products for personal consumption, for no less than \$6.99 per product, excluding tax, within this district and/or State.

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

48. Plaintiff would purchase the Products again if there were assurances that the Products' representations were no longer misleading.

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

49. Plaintiff incorporates by references all preceding paragraphs.

50. Defendant's representations are false, unfair, deceptive and misleading

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

52. Plaintiff desired to purchase products which were as described by defendant and expected by reasonable consumers, given the product type

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

Negligent Misrepresentation

54. Plaintiff incorporates by references all preceding paragraphs.

55. Defendant misrepresented the composition of the Products.

56. Defendant had a duty to disclose and/or provide non-deceptive labeling of the Products and knew or should have known same were false or misleading.

57. This duty is based, in part, on defendant's affirmative claim that the Products were living grains and that sprouting caused positive nutritional changes in the components of the Products, relative to non-sprouted similar products.

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

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

60. 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

61. Plaintiff incorporates by references all preceding paragraphs.

62. Defendant manufactures and sells Products which purport to be superior to non-sprouted products.

63. The Products, by their representations as a form of whole grains, warranted to plaintiff and class members that they contained nutrients in superior amounts and types relative to non-sprouted products.

64. Defendant warranted such attributes to plaintiff and class members, when this was not truthful and was misleading.

65. Defendant owed a special duty based on its special knowledge and position in the

sprouted grain category, to represent all of the facts, instead of only those which would be viewed favorably.

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

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

Fraud

68. Plaintiff incorporates by references all preceding paragraphs.

69. Defendant's purpose was to mislead consumers who seek products with more nutrients and are purportedly capable of achieving a beneficial effect to their health and bodily function.

70. Defendant's intent was to secure economic advantage in the marketplace against competitors.

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

Unjust Enrichment

72. Plaintiff incorporates by references all preceding paragraphs.

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

Jury Demand and Prayer for Relief

Plaintiff demands a jury trial on all issues.

WHEREFORE, plaintiff prays 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 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: January 13, 2019

Respectfully submitted,

Sheehan & Associates, P.C.

/s/Spencer Sheehan

Spencer Sheehan (SS-8533)
505 Northern Blvd., Suite 311
Great Neck, NY 11021
(516) 303-0552
spencer@spencersheehan.com

Levin-Epstein & Associates, P.C.

Joshua Levin-Epstein
1 Penn Plaza, Suite 2527
New York, NY 10119
(212) 792-0046
joshua@levinepstein.com

1:19-cv-00249
United States District Court
Eastern District of New York

Ronnie Elliott individually and on behalf of all others similarly situated

Plaintiff

- against -

Food For Life Baking Co., Inc.

Defendant

Complaint

Sheehan & Associates, P.C.
505 Northern Blvd., #311
Great Neck, NY 11021
Tel: (516) 303-0052
Fax: (516) 234-7800

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: January 13, 2019

/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
Ronnie Elliott 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., 505 Northern Boulevard, Suite 311, Great Neck, NY 11021, (516) 303-0552

DEFENDANTS
Food For Life Baking Co., 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 1
2 2
3 3
4 4
5 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
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 01/13/2019
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

Ronnie Elliott individually and on behalf of all others similarly
situated

Plaintiff(s)

v.

Food For Life Baking Co., Inc.

Defendant(s)

Civil Action No. 1:19-cv-00249

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Food For Life Baking Co., Inc.
C/O SCOTT M KRAUS
2991 E DOHERTY ST
CORONA CA 92879

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. 505 Northern Blvd., #311, 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