

United States District Court
Eastern District of New York

1:19-cv-00302

Keith Kennedy individually and on behalf
of all others similarly situated

Plaintiff

- against -

Mondelēz Global LLC

Defendant

Complaint

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

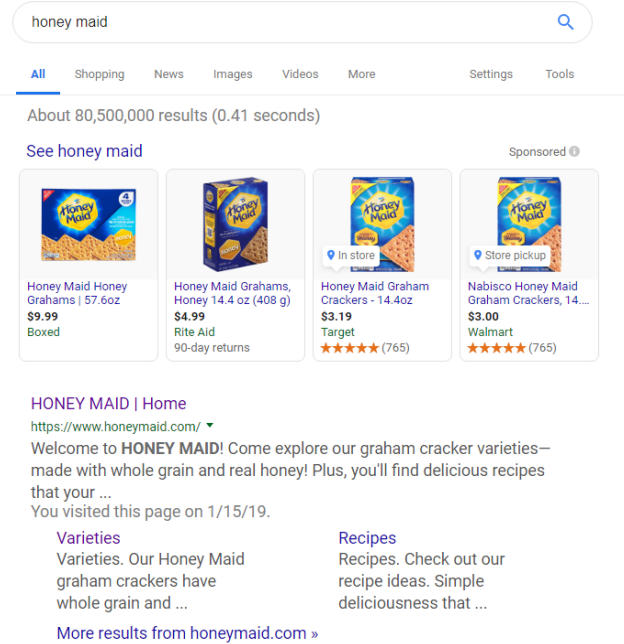
1. Mondelēz Global LLC (“defendant”) manufactures, markets and distributes snack products under the brand, “Honey Maid” (the “Products”), sold to consumers by third-parties from brick-and-mortar stores and online.
2. The Products purport to be graham crackers and are available in no fewer than 12 varieties, including original, vanilla, chocolate and cinnamon.
3. The Honey Maid brand has existed for almost 100 years and is synonymous with graham crackers, similar to other well-known consumer brands like Kleenex (facial tissues) and Vaseline (petroleum jelly).¹
4. The common front label representations include “Honey Maid,” “Made with Real Honey,” “8g of Whole Grain per 31g serving,” “No High Fructose Corn Syrup,” the flavor variety, if any, and a statement of identity that the Products are “Grahams.”
5. In extra-label representations, the Products are referred to as “graham crackers.”

¹ <https://www.honeymaid.com/history>

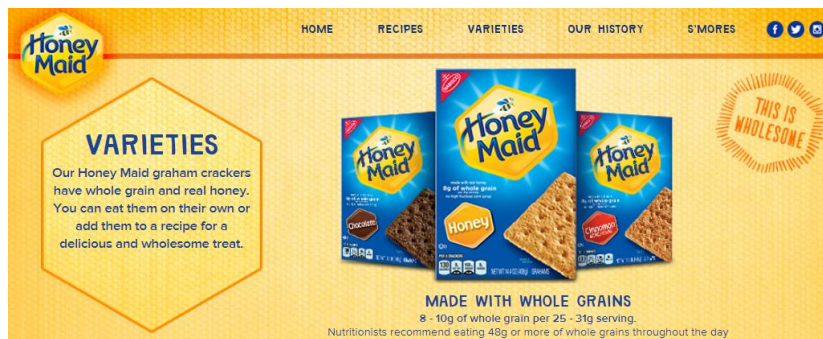
Front Label

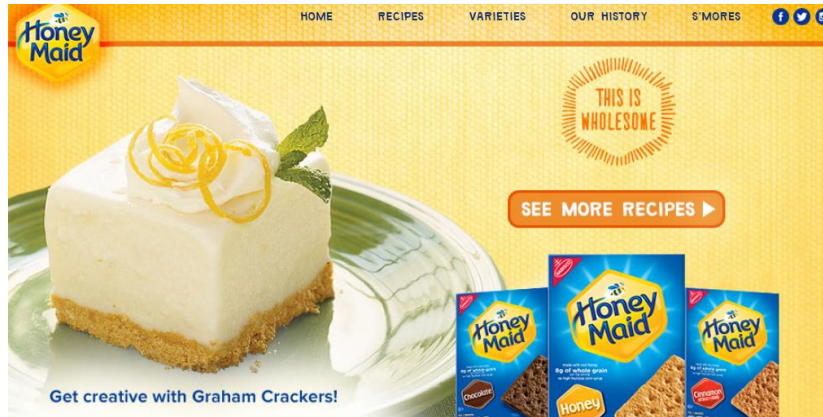


Google Search Results



6. Defendant’s website invites consumers to “explore our graham cracker varieties” and is replete with references to “graham crackers,” i.e., “Our Honey Maid graham crackers have whole grain and real honey” and “Get Creative with Graham Crackers.”





7. Leading retailers such as Target and Walmart list the Products as “Graham Crackers,” and while defendant may not own or operate those websites, it provides product descriptions, images and copy for those retailers to use.

Honey Maid Graham Crackers - 14.4oz

[Shop all Honey Maid](#)



Nabisco Honey Maid Graham Crackers, 14.4 Oz

★★★★ 117 reviews HONEY_MAID Walmart # 9576576

\$3.00 ~~\$3.28~~ \$0.21 / oz

Pack Size: Choose an option

Single	3 Pack
\$3.00	\$8.56

8. Consumers increasingly seek flours made from whole grain for its numerous health benefits compared to refined white flour, also referred to as unbleached enriched flour.

9. Graham flour is a type of coarse-ground whole wheat flour, made from the whole grain.

10. The net representations of “grahams” (on the label) and “graham crackers” (in other media) is misleading and deceptive, creating an erroneous impression that graham flour is the predominant or exclusive flour component, as opposed to white flour.

11. This is because the main ingredient in the Products is not graham flour but white flour (“unbleached enriched flour”), indicated on the ingredient list in miniscule font below the nutrition facts on the side panel.



INGREDIENTS: UNBLEACHED ENRICHED FLOUR (WHEAT FLOUR, NIACIN, REDUCED IRON, THIAMINE MONONITRATE {VITAMIN B1}, RIBOFLAVIN {VITAMIN B2}, FOLIC ACID), GRAHAM FLOUR (WHOLE GRAIN WHEAT FLOUR), SUGAR, CANOLA OIL, HONEY, LEAVENING (BAKING SODA AND/OR CALCIUM PHOSPHATE), SALT, SOY LECITHIN, ARTIFICIAL FLAVOR.

12. It is reasonable for consumers expect the Products’ composition to conform to their name because the term “graham” modifies “crackers” and even taken alone, “grahams” is understood to refer to snacks which have graham flour as the main flour ingredient.

13. “Grahams” is located on the label where consumers are accustomed to seeing an accurate description of the food, unadorned with elegant fonts and trade dress.

14. The term “grahams,” even without the secondary word, “crackers” is insufficient to put reasonable consumers on notice that the Products are not primarily derived from graham flour.

15. Since “grahams” occupies the place next to the factual net weight of the Product, 408g, and is in the same font, it is given a level of authoritativeness as to the Products’ true nature.

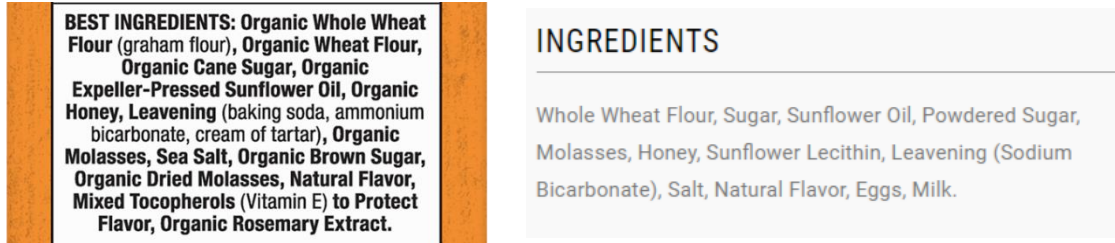
16. Unlike a scale for weight, there is no apparatus that has conclusively identified the Products as “grahams.”

17. Dictionaries confirm what reasonable consumers expect when it comes to graham crackers, defining them as “a slightly sweet cracker made of whole wheat flour” and “a semisweet cracker, usually rectangular in shape, made chiefly of whole-wheat flour.”²

18. The term “grahams” or “graham crackers” to refer to the Products is also misleading because the the name is not uniform among all identical or similar products which are designated as “graham crackers,” where graham flour is the predominant flour.



² <https://www.dictionary.com/browse/graham-cracker>



19. The practice of passing off refined white flour mixed with small amounts of coarser bran (whole wheat) flour is a practice which has existed for over 100 years.³

20. While the form of the misleading practice has changed, deceptive representations of the amount of graham flour in products has not.

21. Excluding tax, the Products cost no less than \$2.99, a premium price compared to other similar products.

Jurisdiction and Venue

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

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

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

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

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

Parties

³ J.A. Le Clerc et al., “Graham Flour: A Study of the Physical and Chemical Differences Between Graham Flour and Imitation Graham Flours,” USDA Bureau of Chemistry Bulletin (164), Apr. 12, 1913

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

28. Defendant is a Delaware limited liability company with a principal place of business in Deerfield, Illinois (Lake County) and upon information and belief, no member of defendant is a citizen of New York.

29. In 2016, 2017 and/or 2018, plaintiff purchased one or more of the Products for personal consumption, for no less than \$2.99 per product, excluding tax, within this district and/or State.

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

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

Class Allegations

32. 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.

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

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

35. 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.

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

37. Plaintiff(s) is/are an adequate representative because his/her/their interests do not

conflict with other members.

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

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

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

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

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

42. Plaintiff incorporates by references all preceding paragraphs.

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

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

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

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

Negligent Misrepresentation

47. Plaintiff incorporates by references all preceding paragraphs.

48. Defendant misrepresented the composition of the Products.

49. 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.

50. This duty is based, in part, on defendant's "half-truth" that the Products were

“Grahams,” a clever description of the Products to avoid the more straightforward but glaringly deceptive name, “Graham Crackers,” conveniently used in off-label promotion.

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

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

53. 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

54. Plaintiff incorporates by references all preceding paragraphs.

55. Defendant manufactures and sells Products which purport to be derived predominantly from whole grain flour as opposed to white flour.

56. The Products, by their representations as “grahams” and “graham crackers,” warranted to plaintiff and class members that they contained nutrients such as fiber and protein in superior amounts to what they actually possessed, based on if they were primarily from whole grain flour.

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

58. Defendant owed a special duty based on its special role as the heir of a National Biscuit Company, to represent all of the facts, instead of only those which would be viewed favorably.

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

60. Plaintiff and class members relied on defendant’s claims, paying more than they

would have.

Fraud

61. Plaintiff incorporates by references all preceding paragraphs.

62. Defendant's purpose was to mislead consumers who seek products with more nutrients and higher quality ingredients which confer health benefits.

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

64. 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

65. Plaintiff incorporates by references all preceding paragraphs.

66. 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 15, 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-00302
United States District Court
Eastern District of New York

Keith Kennedy individually and on behalf of all others similarly situated

Plaintiff

- against -

Mondelēz Global LLC

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 15, 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
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., 505 Northern Boulevard, Suite 311, Great Neck, NY 11021, (516) 303-0552

DEFENDANTS
Mondelēz Global 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
Incorporated or Principal Place of Business In This State
Incorporated and Principal Place of Business In Another State
Foreign Nation

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. Includes various legal categories like Insurance, Motor Vehicle, Personal Injury, etc.

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 01/15/2019
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

Keith Kennedy individually and on behalf of all others
similarly situated

Plaintiff(s)

v.

Mondelēz Global LLC

Defendant(s)

Civil Action No. 1:19-cv-00302

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

Mondelēz Global 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. 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