

United States District Court
Eastern District of New York

1:19-cv-00721

Walter Faison individually and on behalf of
all others similarly situated

Plaintiff

- against -

Complaint

Russell Stover Chocolates LLC and
Ghirardelli Chocolate Company

Defendant

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

1. Russell Stover Chocolates LLC and Ghirardelli Chocolate Company (“defendants”) manufacture, package, market, distribute and sell chocolate products (the “Products”) to consumers, by third-parties, from brick and mortar stores and online, and sell directly to consumers from stores and their websites.

2. The Products are contained in packaging of various sizes – rectangular, square and bottle boxes, “purse” boxes and standup or tent bags.

3. The Products include 100% Unsweetened Cocoa, Premium and Caramel Chocolate Assortment Squares, Russell Stover Fine Assorted Chocolates, Masterpiece Timeless Collection and Whitman Sampler Assorted Chocolates.

4. Despite the differences in the sizes of the various containers and the names of the Products, they are alike in that their packaging is predominately empty.

5. This is accomplished through the large void spaces which comprise most of the packaging interior around the actual few items contained therein.

6. The products' packaging contains void space not visible to consumers, causing them to believe the chocolate contents filled all, most, or more of the packaging than they actually did.

7. Defendants possessed information that was not prominent, definite and conspicuous, and was contrary to the guidelines established by the National Institute of Standards and Technology (NIST) Handbook for measurement of the weight of the Products

8. The Products were packaged in non-conforming type packages which contained extra space by volume and/or sidewalls in the interior of the package.

9. The sidewalls and volume provided no benefit to the contents of the packaging and only served to mislead consumers.

10. The packaging was constructed so they could be formed and filled such that the reasonable consumer would be misled as to the quantity and/or amount of its contents.

11. The containers misstated the correct weight and height of the Products as indicated on the front of the packaging.

12. The Products contain other representations which are misleading and deceptive.

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

Jurisdiction and Venue

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

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

16. This court has personal jurisdiction over defendants because they conduct and transact business, contract to supply and supply goods within New York.

17. Venue is proper because plaintiff and many class members reside in this District and

defendants do business in this District and in New York.

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

Parties

19. Plaintiff is a citizen of Queens County, New York.

20. Defendant Russell Stover, LLC is a Missouri limited liability company with no member thereof a citizen of New York.

21. Defendant Ghirardelli Chocolate Company is a California corporation with a principal place of business in San Leandro, California.

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

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

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

Class Allegations

25. 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.

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

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

28. 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.

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

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

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

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

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

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

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

35. Plaintiff incorporates by references all preceding paragraphs.

36. Defendants' representations are false, unfair, deceptive and misleading

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

38. Plaintiff desired to purchase products which contained more chocolate items than were actually within the packaging and was reasonably expected based on the height, weight and other indicia.

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

Negligent Misrepresentation

40. Plaintiff incorporates by references all preceding paragraphs.

41. Defendants misrepresented the quantity of the Products.

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

43. This duty is based, in part, on defendants' outsized role in the consumer chocolate market and the knowledge that consumers were not able to individually examine or shake the packaging to ascertain the excessive non-functional slack fill.

44. Defendants negligently misrepresented and/or negligently omitted material facts.

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

46. 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

47. Plaintiff incorporates by references all preceding paragraphs.

48. Defendants manufacture, label and sell chocolate products packaged and labeled in a way to prevent consumers from realizing the contents of the packaging are less than represented to be.

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

50. The Products did not conform to their affirmations of fact and promises, wholly due to defendants' actions.

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

Fraud

52. Plaintiff incorporates by references all preceding paragraphs.

53. Defendants' purpose was to mislead consumers who seek quick convenient purchases of packaged chocolate products for personal consumption and use, and knew consumers were incapable of ascertaining the deceptive packaging without having purchased the Products.

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

55. Plaintiff and class members observed and relied on defendants' packaging and claims, causing them to pay more than they would have, entitling them to damages.

Unjust Enrichment

56. Plaintiff incorporates by references all preceding paragraphs.

57. 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: February 5, 2019

Respectfully submitted,

Sheehan & Associates, P.C.

/s/Spencer Sheehan

Spencer Sheehan (SS-8533)

505 Northern Blvd., Suite 311

Great Neck, NY 11021

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Levin-Epstein & Associates, P.C.

Joshua Levin-Epstein

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New York, NY 10119

(212) 792-0046

1:19-cv-00721
United States District Court
Eastern District of New York

Walter Faison individually and on behalf of all others similarly situated

Plaintiff

- against -

Russell Stover Chocolates LLC and Ghirardelli Chocolate Company

Defendants

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: February 5, 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
Walter Faison individually and on behalf of all others similarly situated
(b) County of Residence of First Listed Plaintiff Queens
(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
Russell Stover Chocolates LLC and Ghirardelli Chocolate Company
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
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 02/05/2019 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

Walter Faison individually and on behalf of all others similarly situated

Plaintiff(s)

v.

Russell Stover Chocolates LLC and Ghirardelli Chocolate Company

Defendant(s)

Civil Action No. 1:19-cv-00721

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

Russell Stover Chocolates LLC
C/O C T CORPORATION SYSTEM
120 SOUTH CENTRAL AVE
CLAYTON, MO 63105

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

UNITED STATES DISTRICT COURT

for the
Eastern District of New York

Walter Faison individually and on behalf of all others similarly
situated

Plaintiff(s)

v.

Russell Stover Chocolates LLC and Ghirardelli Chocolate
Company

Defendant(s)

Civil Action No. 1:19-cv-00721

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

Ghirardelli Chocolate Company
C/O C T CORPORATION SYSTEM
1111 139TH AVENUE
SAN LEANDRO CA 94578

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