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United States District Court
Southern District of New York

1:19-cv-11878-GHW

Michael Williams, individually and on
behalf of all others similarly situated,

Plaintiff,

- against -

Krispy Kreme Doughnut Corporation,

Defendant

First Amended Complaint

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

1. Krispy Kreme Doughnut Corporation (“defendant”) manufactures, distributes, markets, labels and sells single serving apple pies under its “Krispy Kreme” brand (“Product”).
2. The Product is available to consumers from retail and online stores of third-parties and is sold 4 OZ (113.4g).
3. The relevant front label representations include Krispy Kreme, “Glazed Apple Pie,” “Original Glazed Flavoring,” “Made with Real Fruit Filling and Other Natural Flavors,” pictures of what appear to be whole and cut Granny Smith apples and the pie filling.



4. The representations are misleading because the Product contains artificial flavors and non-apple flavors not disclosed to consumers.

5. Consumers have a hierarchy when it comes to the source of a food's flavor.

6. The preference is for foods which get their taste from a characterizing food ingredient, i.e., strawberries in a strawberry shortcake, apples in apple pie.

7. Natural flavors "almost always cost[s] much more than an artificial flavor," so companies and consumers are willing to pay higher prices for the real thing – orange flavor from oranges and vanilla flavor from vanilla, as opposed to orange flavor synthesized from lemons or vanillin (the main flavor molecule in vanilla) derived from wood pulp or petroleum derivatives.¹

8. Nielsen has reported that 62% of consumers say they try to avoid artificial flavors.²

9. Another study by New Hope Network concludes that "71% of consumers today are avoiding artificial flavors."³

10. Label Insight determined that 76% of consumers avoid products with artificial

¹ David Andrews, [Synthetic ingredients in Natural Flavors and Natural Flavors in Artificial flavors](#), Environmental Working Group (EWG).

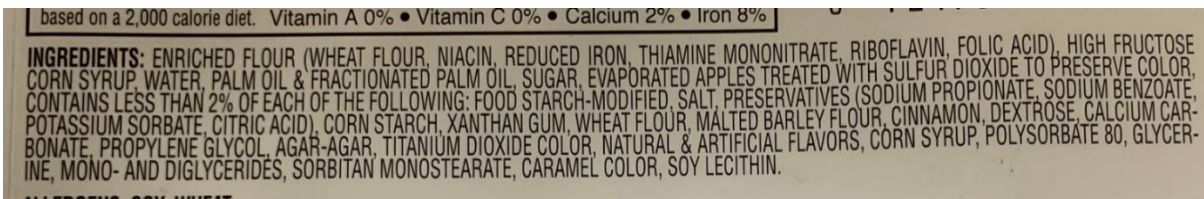
² Nielsen, [Reaching For Real Ingredients: Avoiding The Artificial](#), Sept. 6, 2016.

³ Alex Smolokoff, [Natural color and flavor trends in food and beverage](#), Natural Products Insider, Oct. 11, 2019.

flavors.⁴

11. The Product's label makes direct representations about its "distinguishable characterizing flavors," apple and glaze. *See* 21 C.F.R. § 101.22(i) (requiring declaration of flavor to truthfully indicate whether the product's flavor is from the characterizing food ingredient or from natural or artificial source materials); *see also* 21 C.F.R. § 101.22(i)(3)(ii) (required labeling where product contains more than one characterizing flavor).

12. The Product's representations are misleading because despite the front label representations of "Made with Real Fruit Filling and Other Natural Flavors," "Original Glazed Flavoring" and images of green apples, it contains artificial flavors



INGREDIENTS: ENRICHED FLOUR (WHEAT FLOUR, NIACIN, REDUCED IRON, THIAMINE MONONITRATE, RIBOFLAVIN, FOLIC ACID), HIGH FRUCTOSE CORN SYRUP, WATER, PALM OIL & FRACTIONATED PALM OIL, SUGAR, EVAPORATED APPLES TREATED WITH SULFUR DIOXIDE TO PRESERVE COLOR, CONTAINS LESS THAN 2% OF EACH OF THE FOLLOWING: FOOD STARCH-MODIFIED, SALT, PRESERVATIVES (SODIUM PROPIONATE, SODIUM BENZOATE, POTASSIUM SORBATE, CITRIC ACID), CORN STARCH, XANTHAN GUM, WHEAT FLOUR, MALTED BARLEY FLOUR, CINNAMON, DEXTROSE, CALCIUM CARBONATE, PROPYLENE GLYCOL, AGAR-AGAR, TITANIUM DIOXIDE COLOR, **NATURAL & ARTIFICIAL FLAVORS**, CORN SYRUP, POLYSORBATE 80, GLYCERINE, MONO- AND DIGLYCERIDES, SORBITAN MONOSTEARATE, CAMEL COLOR, SOY LECITHIN.

13. Artificial flavor refers to "any substance, the function of which is to impart flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy products, or

⁴ Thea Bourianne, [Exploring today's top ingredient trends and how they fit into our health-conscious world](#), March 26-28, 2018.

fermentation products thereof.” *See* 21 C.F.R. § 101.22(a)(1).

14. These artificial flavors simulate, resemble and reinforces the characterizing apple and glaze flavor, yet this is not disclosed to consumers. *See* 21 C.F.R. § 101.22(i)(2); *compare with* 21 C.F.R. § 101.22(i)(1) (“no artificial flavor which simulates, resembles or reinforces the characterizing flavor”).

21 These undisclosed artificial flavors, upon information and belief, include ethyl valerate, the flavor compound most associated with green apple flavor and benzaldehyde.

15. Consumers will not know even if they look on the ingredient list that the artificial flavor affects the characterizing flavor.

16. Consumers, including Plaintiff, expect the Product’s apple and glazed flavor to come only from natural sources and be made by a natural process and do not expect the product to have artificial flavor which affects the main flavors of the food.

17. Defendant’s branding and packaging of the Product is designed to – and does – deceive, mislead, and defraud plaintiff and consumers.

18. Defendant sold more of the Product and at higher prices than it would have in the absence of this misconduct, resulting in additional profits at the expense of consumers.

19. The value of the Product that plaintiff purchased and consumed was materially less than its value as represented by defendant.

20. Had plaintiff and class members known the truth, they would not have bought the Product or would have paid less for them.

21. As a result of the false and misleading labeling, the Product is an sold at a premium price, approximately no less than \$2.99 per 4 OZ, excluding tax, compared to other similar products represented in a non-misleading way, and higher than the price of the Product if it were

represented in a non-misleading way.

Jurisdiction and Venue

22. Jurisdiction is proper pursuant to Class Action Fairness Act of 2005 (“CAFA”). 28 U.S.C. § 1332(d)(2)

23. Under CAFA, district courts have “original federal jurisdiction over class actions involving (1) an aggregate amount in controversy of at least \$5,000,000; and (2) minimal diversity[.]” *Gold v. New York Life Ins. Co.*, 730 F.3d 137, 141 (2d Cir. 2013).

24. Plaintiff Michael Williams is a citizen of New York.

25. Defendant Krispy Kreme Doughnut Corporation, is a North Carolina corporation with a principal place of business in Winston-Salem, Forsyth County, North Carolina and is a citizen of North Carolina.

26. “Minimal diversity” exists because plaintiff Michael Williams and defendant are citizens of different states.

27. Upon information and belief, sales of the Product in New York exceed \$5 million per year, exclusive of interest and costs, and the aggregate amount in controversy exceeds \$5 million per year.

28. Venue is proper in this judicial district because a substantial part of the events or omissions giving rise to the claim occurred in this District, *viz*, the decision of plaintiff to purchase the Product and the misleading representations and/or their recognition as such.

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

Parties

30. Plaintiff Michael Williams is a citizen of Bronx, Bronx County, New York.

31. Defendant Krispy Kreme Doughnut Corporation is a North Carolina corporation with a principal place of business in Winston-Salem, North Carolina, Forsyth County and is a citizen of North Carolina.

32. During the relevant statutes of limitations, plaintiff purchased the Product within his district and/or State for personal and household consumption and/or use in reliance on the representations of the Product.

33. Plaintiff Michael Williams purchased the Product on one or more occasions and at one or more locations, during the relevant period, at Penn Station in the summer of 2019.

34. Plaintiff bought the Product at or exceeding the above-referenced price because he liked the product for its intended use and relied upon the front label claims to expect its taste only came from the identified front label ingredients – apple and natural glaze.

35. Plaintiff was deceived by and relied upon the Product's deceptive labeling.

36. Plaintiff would not have purchased the Product in the absence of Defendant's misrepresentations and omissions.

37. The Product was worth less than what Plaintiff paid for it and he would not have paid as much absent Defendant's false and misleading statements and omissions.

38. Plaintiff intends to, seeks to, and will purchase the Product again when he can do so with the assurance that Product's labels are consistent with the Product's components.

Class Allegations

39. The class will consist of all purchasers of the Product who reside in New York during the applicable statutes of limitations.

40. Plaintiff seek class-wide injunctive relief based on Rule 23(b) in addition to a monetary relief class.

41. Common questions of law or fact predominate and include whether defendant's representations were and are misleading and if plaintiff and class members are entitled to damages.

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

43. Plaintiff is an adequate representatives because his interests do not conflict with other members.

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

45. Individual actions would risk inconsistent results, be repetitive and are impractical to justify, as the claims are modest relative to the scope of the harm.

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

47. Plaintiff seeks class-wide injunctive relief because the practices continue.

New York General Business Law ("GBL") §§ 349 & 350,
(Consumer Protection Statute)

48. Plaintiff incorporates by reference all preceding paragraphs.

49. Plaintiff and class members desired to purchase and consume products which were as described and marketed by defendant and expected by reasonable consumers, given the product type.

50. Defendant's acts and omissions are not unique to the parties and have a broader impact on the public.

51. Defendant misrepresented the substantive, quality, compositional and/or environmental attributes of the Product.

52. The amount and proportion of the characterizing component, apples and natural glaze, has a material bearing on price and consumer acceptance of the Product and consumers do not artificial flavors where a product's characterizing flavor are not designated as such.

53. The front label omits qualifying terms required to modify a characterizing flavor's representation when such flavor is not provided exclusively by the characterizing food ingredients.

54. The front label gives the impression the Product has more of the characterizing ingredient than it does.

55. Plaintiff relied on the statements, omissions and representations of defendant, and defendant knew or should have known the falsity of same.

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

Negligent Misrepresentation

57. Plaintiff incorporates by reference all preceding paragraphs.

58. Defendant misrepresented the substantive, quality, compositional and/or environmental attributes of the Product.

59. The front label gives the impression the Product has more of the characterizing ingredient than it does.

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

61. This duty is based on defendant's position as an entity which has held itself out as having special knowledge and experience in the production, service and/or sale of the product type.

62. The representations took advantage of consumers' cognitive shortcuts made at the point-of-sale and their trust in defendant, a well-known and respected brand or entity in this sector.

63. Plaintiff and class members reasonably and justifiably relied on these negligent misrepresentations and omissions, which served to induce and did induce, the purchase of the Product.

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

Breaches of Express Warranty, Implied Warranty of Merchantability and Magnuson Moss Warranty Act, 15 U.S.C. §§ 2301, et seq.

65. Plaintiff incorporates by reference all preceding paragraphs.

66. The Product was manufactured, labeled and sold by defendant or at its express directions and instructions, and warranted to plaintiff and class members that they possessed substantive, quality, compositional and/or environmental which they did not.

67. Defendant had a duty to disclose and/or provide non-deceptive descriptions and marketing of the Product.

68. The front label gives the impression the Product has more of the characterizing ingredients than it does.

69. This duty is based, in part, on defendant's position as one of the most recognized companies in the nation in this sector.

70. Plaintiff provided or will provide notice to defendant, its agents, representatives, retailers and their employees.

71. Defendant received notice and should have been aware of these misrepresentations

due to numerous complaints by consumers to its main office over the past several years regarding the Product, of the type described here.

72. The Product did not conform to its affirmations of fact and promises due to defendant's actions and were not merchantable.

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

Fraud

74. Plaintiff incorporates by reference all preceding paragraphs.

75. Defendant misrepresented the substantive, quality, compositional and/or environmental attributes of the Product.

76. The front label omits qualifying terms required to modify a characterizing flavor's representation.

77. The front label gives the impression the Product has more of the characterizing ingredient than it does.

78. Defendant's fraudulent intent is evinced by its failure to accurately identify the Product on the front label and ingredient list, when it knew its statements were neither true nor accurate and misled consumers.

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

Unjust Enrichment

80. Plaintiff incorporates by reference all preceding paragraphs.

81. Defendant obtained benefits and monies because the Product was 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 as representative and the undersigned as counsel for the class;
2. Entering preliminary and permanent injunctive relief by directing defendant to correct the challenged practices to comply with the law;
3. Injunctive relief to remove, correct and/or refrain from the challenged practices and representations, and restitution and disgorgement for members of the class pursuant to the applicable laws;
4. Awarding monetary damages and interest pursuant to the common law and other statutory claims;
5. Awarding costs and expenses, including reasonable fees for plaintiff's attorneys and experts; and
6. Other and further relief as the Court deems just and proper.

Dated: September 16, 2020

Respectfully submitted,

Sheehan & Associates, P.C.

/s/Spencer Sheehan

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E.D.N.Y. # SS-8533

S.D.N.Y. # SS-2056

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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 16, 2020

/s/ Spencer Sheehan
Spencer Sheehan