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United States District Court  
Eastern District of New York

1:20-cv-01852

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

Plaintiff,

- against -

Pervine Foods, LLC,

Defendant

Complaint

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

1. Pervine Foods, LLC (“defendant”) manufactures, distributes, markets, labels and sells cookies and cream whey protein baked bars, under Robert Irvine's Fit Crunch brand (“Product”).

2. The Product is available to consumers from retail and online stores of third-parties and is sold in bars of .88g (3.10 oz).

3. The relevant representations include “Robert Irvine's Fit Crunch,” “30g Protein,” “6g Sugar,” “Gluten Free” “Powered by FORTIFX,” “Cookies and Cream,” and a picture of the Product.



4. The ingredient list on the back panel states:

**INGREDIENTS:** PROTEIN BLEND (WHEY PROTEIN ISOLATE, WHEY PROTEIN CONCENTRATE), SOY PROTEIN ISOLATE, VEGETABLE OILS (PALM AND PALM KERNEL), VEGETABLE GLYCERIN, PALM OIL, SUGAR, MALTITOL, SORBITOL, GELATIN [BOVINE], CORN SYRUP, WATER, AND COCOA (PROCESSED WITH ALKALI). **CONTAINS 2% OR LESS OF THE FOLLOWING:** BROWN RICE FLOUR, EVAPORATED CANE JUICE, SUNFLOWER OIL, MONOGLYCERIDES, TAPIOCA STARCH, SOY LECITHIN, SALT, VANILLA, NATURAL FLAVORS, MALTODEXTRIN, SODIUM CASEINATE, PROPYLENE GLYCOL MONO-ESTERS, CHOCOLATE LIQUOR, BAKING SODA, CITRIC ACID, WHEY, BETA-CAROTENE, VITAMIN A PALMITATE, ACETYLATED MONOGLYCERIDES, MONO AND DIGLYCERIDES, POTASSIUM SORBATE, SUCRALOSE, NATURAL TOCOPHEROLS, ALMOND, PEANUT, AND SILICON DIOXIDE.

**INGREDIENTS:** PROTEIN BLEND (WHEY PROTEIN ISOLATE, WHEY PROTEIN CONCENTRATE), SOY PROTEIN ISOLATE, VEGETABLE OILS (PALM AND PALM KERNEL), VEGETABLE GLYCERIN, PALM OIL, SUGAR, MALTITOL, SORBITOL, GELATIN [BOVINE], CORN SYRUP, WATER, AND COCOA (PROCESSED WITH ALKALI). **CONTAINS 2% OR LESS OF THE FOLLOWING:** BROWN RICE FLOUR, **EVAPORATED CANE JUICE**, SUNFLOWER OIL, MONOGLYCERIDES, TAPIOCA STARCH, SOY LECITHIN, SALT, VANILLA, NATURAL FLAVORS, MALTODEXTRIN, SODIUM CASEINATE, PROPYLENE GLYCOL MONOESTERS, CHOCOLATE LIQUOR, BAKING SODA, CITRIC ACID, WHEY, BETA-CAROTENE, VITAMIN A PALMITATE, ACETYLATED MONOGLYCERIDES, MONO AND DIGLYCERIDES, POTASSIUM SORBATE, SUCRALOSE, NATURAL TOCOPHEROLS, ALMOND, PEANUT, AND SILICON DIOXIDE.

5. Consumers expect ingredients on a product to be declared by their common or usual name that describes their basic source, function and properties. *See* 21 C.F.R. § 101.4(a)(1).

6. Where an ingredient contains the term “juice,” consumers expect that ingredient to be derived from a consumable fruit or vegetable.

7. In fact, “juice” is defined as “the aqueous liquid expressed or extracted from one or more fruits or vegetables, purees of the edible portions of one or more fruits or vegetables, or any

concentrates of such liquid or puree.”<sup>1</sup>

8. Fruit and vegetable juices are consumed for their nutritive value as they contain many vitamins and minerals.

9. “Evaporated cane juice,” according to the FDA, “suggest[s] that the ingredients are made from or contain fruit or vegetable “juice” as defined in 21 CFR 120.1.”<sup>2</sup>

10. However, “evaporated cane juice” has little in common with the types of juices that Americans consume because it is another name for the ingredient commonly known as “sugar.”

11. The FDA concluded that where an ingredient is described as “evaporated cane juice,” consumers can be, and are misled because “cane juice” refers to a sweetener.

12. By declaring “sugar” by a term which fails to truthfully and non-deceptively describe the source, function and qualities of the ingredient, reasonable consumers are deceived into purchasing a product with added sugar as its second most predominant ingredient.

13. Given that the Product is marketed towards consumers looking to stay fit and healthy, consumers will expect that “evaporated cane juice” bears a relationship to an actual fruit or vegetable source they are familiar with.

14. This results in the impression that the Product is a better nutritional choice than other comparable products which truthfully and non-deceptively identify “sugar” on their ingredient lists.

15. The Product’s deceptive labeling is especially egregious because defendant sells products intended to appeal to health-minded consumers.

16. A growing number of consumers, including plaintiff, are paying more attention to the ingredients contained in the foods they eat and are shunning excess, added sugars due to their

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<sup>1</sup> 21 C.F.R. § 120.1(a).

<sup>2</sup> FDA Guidance, [Ingredients Declared as Evaporated Cane Juice](#) (May 2016).

association and contribution to ailments and conditions like coronary heart disease, obesity and diabetes.

17. The misleading ingredient name has a material bearing on price and consumer acceptance of the Product because consumers pay more for products with the positive qualities associated with actual juice, including naturally occurring vitamins and minerals.

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

19. 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 like plaintiff.

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

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

22. As a result of the false and misleading labeling, the Product is sold at a premium price, approximately no less than \$3.09 per bar of .88g (3.10 oz), excluding tax, compared to other similar products represented in a non-misleading way.

#### Jurisdiction and Venue

23. Jurisdiction is proper pursuant to 28 U.S.C. § 1332(d)(2) (Class Action Fairness Act of 2005 or "CAFA").

24. 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).

25. Plaintiff Michael Ring is a citizen of New York.

26. Defendant Pervine Foods, LLC is a Pennsylvania limited liability company with a principal place of business in Pittsburgh, Allegheny County, Pennsylvania and is a citizen of Pennsylvania and upon information and belief, at least one member of defendant is not a citizen of New York.

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

#### Parties

28. Plaintiff Michael Ring is a citizen of Brooklyn, Kings County, New York.

29. Defendant Pervine Foods, LLC is a Pennsylvania limited liability company with a principal place of business in Pittsburgh, Pennsylvania, Allegheny County.

30. During the relevant statutes of limitations, plaintiff purchased the Product within his district and/or State for personal consumption and/or use in reliance on the representations that he could identify the sources of the Product's sugar components from its ingredient list.

31. Plaintiff bought the Product because he liked the product type for its intended use and expected sugar to be identified by its common or usual name of "sugar."

32. Plaintiff would buy the Product again if assured the ingredient designations were truthful and not misleading.

#### Class Allegations

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

34. 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.

35. 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.

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

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

38. 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.

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

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

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

41. Plaintiff incorporates by reference all preceding paragraphs.

42. 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.

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

44. Defendant misrepresented the substantive, quality, compositional, organoleptic and/or nutritional attributes of the Product.

45. The presence of ingredients from fruit and vegetables, which is what evaporated cane juice is understood as, has a material bearing on price and consumer acceptance of the Product because consumers are willing to pay more for such products, believing them to possess the

positive qualities associated with fruits and vegetables, including vitamins, minerals and nutrients.

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

47. 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

48. Plaintiff incorporates by reference all preceding paragraphs.

49. Defendant misrepresented the substantive, quality, compositional, organoleptic and/or nutritional attributes of the Product.

50. The presence of ingredients from fruit and vegetables, which is what evaporated cane juice is understood as, has a material bearing on price and consumer acceptance of the Product because consumers are willing to pay more for such products, believing them to possess the positive qualities associated with fruits and vegetables, including vitamins, minerals and nutrients.

51. 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.

52. 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.

53. 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.

54. 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.

55. 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.*

56. Plaintiff incorporates by reference all preceding paragraphs.

57. The Product was manufactured, labeled and sold by defendant and warranted to plaintiff and class members that they possessed substantive, functional, nutritional, qualitative, compositional, organoleptic, sensory, physical and other attributes which they did not.

58. The presence of ingredients from fruit and vegetables, which is what evaporated cane juice is understood as, has a material bearing on price and consumer acceptance of the Product because consumers are willing to pay more for such products, believing them to possess the positive qualities associated with fruits and vegetables, including vitamins, minerals and nutrients.

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

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

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

62. 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.

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

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



Fraud

65. Plaintiff incorporates by reference all preceding paragraphs.

66. The presence of ingredients from fruit and vegetables, which is what evaporated cane juice is understood as, has a material bearing on price and consumer acceptance of the Product because consumers are willing to pay more for such products, believing them to possess the positive qualities associated with fruits and vegetables, including vitamins, minerals and nutrients.

67. Defendant's fraudulent intent is evinced by its failure to accurately identify the Product's ingredient list, which it knew were neither true nor accurate.

68. 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

69. Plaintiff incorporates by reference all preceding paragraphs.

70. 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: April 19, 2020

Respectfully submitted,

Sheehan & Associates, P.C.

/s/Spencer Sheehan

Spencer Sheehan

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

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

1:20-cv-01852  
United States District Court  
Eastern District of New York

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

Plaintiff,

- against -

Pervine Foods, LLC,

Defendant

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Complaint

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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: April 19, 2020

/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

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

(b) County of Residence of First Listed Plaintiff Kings (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Sheehan & Associates, P.C., 505 Northern Blvd Ste 311, Great Neck, NY 11021-5101, (516) 303-0552

DEFENDANTS

Pervine Foods, LLC

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

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, 6 Multidistrict Litigation

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 CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

DATE 4/19/2020 JUDGE SIGNATURE OF ATTORNEY OF RECORD /s/ Spencer Sheehan DOCKET NUMBER

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

**CERTIFICATION OF ARBITRATION ELIGIBILITY**

Local Arbitration Rule 83.7 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.

Case is Eligible for Arbitration

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?  Yes  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?  Yes  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  No
  - c) If this is a Fair Debt Collection Practice Act case, specify the County in which the offending communication was received:

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?  Yes  No

(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

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the
Eastern District of New York

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

Plaintiff(s)

v.

Pervine Foods, LLC,

Defendant(s)

Civil Action No. 1:20-cv-01852

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Pervine Foods, LLC

111 Terence Dr
Pittsburgh PA 15236-4133

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 Ste 311, Great Neck, NY 11021-
5101, (516) 303-0552

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.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk