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United States District Court  
Southern District of New York

7:20-cv-04024-KMK

Theresa Sencen, individually and on behalf  
of all others similarly situated,

Plaintiff,

- against -

Dreyer's Grand Ice Cream Holdings, Inc.,

Defendant

First Amended Class Action  
Complaint

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

1. Dreyer's Grand Ice Cream Holdings, Inc. ("defendant") manufactures, distributes, markets, labels and sells ice cream bars purporting to be covered in milk chocolate, under the Häagen-Dazs brand ("Product").

2. The Product is available to consumers from retail and online stores of third parties and sold in 3 OZ bars, individually and in packages of three.

3. The relevant representations include "Häagen-Dazs," "Milk Chocolate," "dipped in, then drizzled in rich milk chocolate," a piece of chocolate and the Product.



4. The unqualified, prominent and conspicuous front label representations of the Product as “[Vanilla] Milk Chocolate” is false, deceptive and misleading because the “chocolate” contains ingredients consumers do not expect – vegetable oil.

5. Chocolate is made from cacao beans, which are not consumed by themselves – they are subject to fermentation, drying and roasting, which produces cacao nibs.

6. The nibs are then ground to produce cocoa mass or chocolate liquor, which is separated into components of cocoa solids and cocoa butter.

7. Consumers want chocolate in chocolate products to come from a real source (i.e., from cacao beans).

8. Chocolate provides greater satiety and a creamy and smooth mouthfeel compared to other ingredients which substitute for chocolate, like vegetable oils.

9. Vegetable oils provide less satiety than chocolate, a waxy and oily mouthfeel and leave an aftertaste.

10. Cocoa butter makes up about one-fourth of chocolate but costs more than three times as much as vegetable oil.

11. However, the taste of chocolate only from cacao beans is significantly different than when made from cacao beans and vegetable oils, since even a small amount of vegetable oil changes the mouthfeel from creamy and smooth to waxy and oily.

12. This taste sensation is the opposite of what consumers expect from a food labeled as “milk chocolate.”

13. Numerous studies have indicated that chocolate may be beneficial to the heart and arteries because of flavonoids, plant compounds from the cacao bean that contain antioxidants.

14. These flavonoids are activated when the cacao bean is transformed into cocoa butter.

15. Additionally, cocoa butter does not raise cholesterol or have any artery-clogging trans-fats which are present in vegetable oils

16. Though cocoa butter and vegetable oils both contain fat, the fat in cocoa butter is unsaturated and relatively healthy for the heart, in contrast to saturated fats in vegetable oils.

17. Consumption of vegetable oil is known to result in numerous health problems, like increased chances of heart disease.

18. Cocoa butter consumption in chocolate does not raise the levels of cholesterol the way vegetable oils do.

19. According to “Adulteration – The Dark World of ‘Dirty’ Chocolate,” “mixing unnatural ingredients with chocolate – with the intent of extending the quantity of raw product and defrauding customers – has a long history.”<sup>1</sup>

20. The result from blending cacao ingredients with vegetable oils is a “chocolate compound,” where chocolate liquor is replaced with cocoa powder, and cocoa butter with vegetable oil.

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<sup>1</sup> Chapter 47 in Chocolate – History, Culture, Heritage.

21. Since consumers were constantly being misled by chocolate products that contained lower quality ingredients, Congress established standards to prevent companies from substituting lower quality, cheaper ingredients like vegetable oils for chocolate ingredients without disclosing this prominently to consumers.

22. Where a product was real milk chocolate, its front label would say “milk chocolate.” *See* 21 C.F.R. § 163.130 (c) (“The name of the food is ‘milk chocolate’ or ‘milk chocolate coating’.”)

23. The optional ingredients in milk chocolate include cacao fat, nutritive carbohydrate sweeteners, spices, natural and artificial flavorings, dairy ingredients and emulsifying agents but not vegetable oils. 21 C.F.R. § 163.124(b).

24. Vegetable oils can be combined with chocolate, but because their addition to chocolate is significant to consumers, the food’s front label must indicate “milk chocolate and vegetable fat coating” or “milk chocolate and vegetable \_\_\_\_ oil coating.” 21 C.F.R. § 163.155(c) (the blank filled in with the type of vegetable oil used, i.e., soybean, palm, etc.).

25. These requirements prevented foods from being labeled with the unqualified designation of “milk chocolate” if they contained ingredients which substituted for chocolate ingredients like chocolate liquor and cocoa butter.

26. The chocolate standards have been in place for over fifty (50) years, and consistency with such labeling has benefitted consumers who otherwise would not be able to rely on a product’s representations.

27. These regulations effectively established custom and practice so that consumers’ experience with that custom and practice primes them to infer from a product’s labeling whether a product contains chocolate or is a chocolate mixture (compound) which contains vegetable oils.

28. The average consumer spends fifteen seconds deciding to purchase a specific product, which is why the front label is the most significant place to tell consumers what they are buying.

29. Over ten years ago in response to a proposal to modify the chocolate standards to allow vegetable oils, industry leader Mars Wrigley was adamant in its opposition, because it recognized what consumers wanted:

At Mars, the consumer is our boss, and American consumers are passionate about chocolate. They don't want anyone to change the chocolate they've enjoyed for generations...As a privately held company, we have the freedom to invest in the highest quality chocolate and deliver what consumers want.<sup>2</sup>

30. This opinion is consistent with a consumer survey of over four hundred Americans across demographic groups.

31. Approximately sixty (60) percent of respondents, when viewing Defendant's "Milk Chocolate" front label, expected the Product would only contain chocolate and not contain any vegetable oils.

32. These consumers will not feel they need to double check the ingredient list because the lack of any front label qualifying terms gives them the impression that milk chocolate means what it says – no vegetable oil ingredients.

33. However, the front label representations are misleading and at best, a "half-truth," because the chocolate contains ingredients not found in real chocolate – "Coconut Oil."

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<sup>2</sup> [Mars US Announces Support for Current Chocolate Standard of Identity](#), Press Release, September 17, 2007.

**INGREDIENTS: VANILLA ICE CREAM:**  
CREAM, SKIM MILK, SUGAR, EGG  
YOLKS, VANILLA EXTRACT. **MILK  
CHOCOLATE AND VEGETABLE OIL  
COATING:** MILK CHOCOLATE (SUGAR,  
WHOLE MILK POWDER, CHOCOLATE,  
COCOA BUTTER, SOY LECITHIN,  
VANILLA EXTRACT), COCONUT OIL.

**INGREDIENTS: VANILLA ICE CREAM:** CREAM,  
SKIM MILK, SUGAR, EGG YOLKS, VANILLA  
EXTRACT. **MILK CHOCOLATE AND VEGETABLE  
OIL COATING:** MILK CHOCOLATE (SUGAR,  
WHOLE MILK POWDER, CHOCOLATE, COCOA  
BUTTER, SOY LECITHIN, VANILLA EXTRACT),  
**COCONUT OIL.**

34. Defendant's ingredient list identifies the "chocolate" correctly as "Milk Chocolate and Vegetable Oil Coating," which means it knows the correct way to label the Product.

35. Defendant chose to omit from the front label – where consumers are primed to see it – what it discloses in the "fine print" on the back of the Product.

36. The presence of chocolate – understood as excluding vegetable oils – has a material bearing on price or consumer acceptance of the Product because chocolate provides greater satiety and a creamy and smooth mouthfeel compared to vegetable oils, which provide less satiety, a waxy and oily mouthfeel and leave an aftertaste.

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

38. 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.

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

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

41. As a result of the false and misleading labeling, the Product is sold at a premium price, approximately no less than \$6.49 for three 3 OZ bars, excluding tax, compared to other similar products represented in a non-misleading way.

42. If the Product was truthfully labeled, the price defendant could sell it at would be reduced.

#### Jurisdiction and Venue

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

44. 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).

45. Plaintiff Theresa Sencen is a citizen of New York.

46. Defendant Dreyer’s Grand Ice Cream Holdings, Inc., is a Delaware corporation with a principal place of business in Oakland, Alameda County, California and is a citizen of California.

47. “Minimal diversity” exists because plaintiff and defendant are citizens of different states.

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

49. 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. *See* 28 U.S.C. § 1391(b)(2).

50. Venue is further supported because many class members reside in this District.

#### Parties

51. Plaintiff Theresa Sencen is a citizen of Valley Cottage, Rockland County, New York.

52. Defendant Dreyer's Grand Ice Cream Holdings, Inc., is a Delaware corporation with a principal place of business in Oakland, California, Alameda County.

53. Defendant is the one of the world's largest ice cream companies.

54. During the relevant statutes of limitations, plaintiff purchased the Product within her district and/or State for personal consumption and/or use in reliance on the representations the Product contained chocolate, understood to specifically exclude vegetable oils.

55. Plaintiff bought the Product on one or more occasions, including in the summer and fall of 2019, at stores including ShopRite, 243 E, NY-59, West Nyack, NY 10994 because she liked the product type for its intended use and expected the coating to contain and be made with only chocolate and not substituted or lower quality ingredients, *viz*, vegetable oils.

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

#### Class Allegations

57. The class will consist of all purchasers of the Product in New York during the applicable statutes of limitations for each cause of action.

58. Plaintiff will seek injunctive relief under Rule 23(b).

59. 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.

60. 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.

61. Plaintiff is an adequate representatives because her interests do not conflict with other members.

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

63. 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.

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

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

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

66. Plaintiff incorporates by reference all preceding paragraphs.

67. 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.

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

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

70. The presence of chocolate – understood as excluding vegetable oils – has a material bearing on price and consumer acceptance of the Product for the reasons described herein.

71. The amount and proportion of the characterizing component, chocolate, has a material bearing on price or consumer acceptance of the Products because consumers are willing

to pay more for such Products.

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

73. 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

74. Plaintiff incorporates by reference all preceding paragraphs.

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

76. 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.

77. 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.

78. 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.

79. 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.

80. 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.

81. Plaintiff incorporates by reference all preceding paragraphs.

82. 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 it did not.

83. The presence of chocolate has a material bearing on price and consumer acceptance of the Product.

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

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

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

87. 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.

88. The Product did not conform to its affirmations of fact and promises due to defendant's actions and was not merchantable because it was not a chocolate product.

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

#### Fraud

90. Plaintiff incorporates by reference all preceding paragraphs.

91. Defendant's fraudulent statement include the knowing omission of the "Milk Chocolate and Vegetable Oil Coating" from the front label even though this appears on the ingredient list.

92. Defendant's fraudulent intent is evinced by its failure to accurately identify the

Product on the front labels, when it knew its statements were neither true nor accurate.

93. 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

94. Plaintiff incorporates by reference all preceding paragraphs.

95. 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, statutory damages under the GBL 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: December 14, 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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Theresa Sencen, individually and on behalf of all others similarly situated,

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- against -

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First Amended Class Action 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: December 14, 2020

/s/ Spencer Sheehan  
Spencer Sheehan