

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Monica Boswell, individually and on behalf of
all others similarly situated,

Plaintiff,

- against -

Bimbo Bakeries USA, Inc.,

Defendant

1:20-cv-08923-JMF

First Amended
Class Action Complaint

Jury Trial Demanded

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

1. Bimbo Bakeries USA, Inc. (“Defendant”) manufactures, labels and sells an “All Butter Loaf Cake,” purporting to be made with butter and not butter substitutes under its Entenmann's brand (“Product”).





2. Defendant's website states "[i]ndulge yourself with the rich taste of pure butter in our All Butter loaf."

ALL BUTTER LOAF CAKE

Indulge yourself with the rich taste of pure butter in our All Butter loaf.

3. "All Butter" tells consumers that no butter alternatives or substitutes will be used in the Product where butter is capable of being used.

4. Consumers prefer butter to chemically produced "vegetable" oils when baking for reasons including taste, health and avoidance of highly processed artificial substitutes for butter.

5. Butter is valued by consumers over vegetable oils because it does not contain trans fats in vegetable oils.

6. Butter is less processed, since it is made by churning cow's milk, instead of chemical reactions to make vegetable oils.
7. Butter is rich in nutrients like calcium and Vitamins A and D.
8. When making a pound cake, butter creates a cake that is softer and less dense than one using vegetable oils, because butter is solid at room temperature.
9. Butter adds fat and moisture which contributes to a pound cake's moist and sturdy structure and texture.
10. Vegetable oils reduce the fat content which provides a weaker and drier structure and texture, resulting in a pound cake that is less dense and less airy.
11. To describe a food's taste as "buttery" is a compliment, which refers to a light and fluffy texture, while "oily," as in "vegetable oil," describes a product with a waxy mouthfeel which leaves an aftertaste.
12. Butter costs more than vegetable oil alternatives, like soybean, palm or canola oil.
13. The Product's "All Butter Loaf Cake" name is misleading because even though it contains butter, it contains non-butter vegetable (soybean) oil ingredients.

INGREDIENTS: SUGAR, BLEACHED WHEAT FLOUR, EGGS, BUTTER, NONFAT MILK, WATER, FOOD STARCH-MODIFIED (CORN), SOYBEAN OIL, LEAVENING (SODIUM ACID PYROPHOSPHATE, BAKING SODA, MONOCALCIUM PHOSPHATE), GLYCERIN, SALT, SORBITAN MONOSTEARATE, ARTIFICIAL FLAVORS, POTASSIUM SORBATE (PRESERVATIVE), POLYSORBATE 60, XANTHAN GUM, MONO- AND DIGLYCERIDES, PHOSPHORIC ACID, CELLULOSE GUM, SOY FLOUR, COCONUT FLOUR. R19-310
CONTAINS WHEAT, SOY, MILK, EGG, COCONUT.

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14. Defendant did not have to name the Product “All Butter Loaf Cake,” but chose to, because this would be more enticing to consumers.

15. Long established FDA guidance on this issue recommends that where a food is labeled “Butter _____” or uses the word “butter” in conjunction with its name, reasonable consumers will expect all the shortening and flavoring comes from real butter.¹

16. To the extent the soybean oil is claimed to be used not as a shortening ingredient but for another purpose, such as coating a pan prior to baking, such an argument would be misleading.

17. This is because a high amount of vegetable oil is used ostensibly only for coating the pan, but it will necessarily become part of the finished product after it is baked.

18. The Product’s name, “All Butter Loaf Cake,” is deceptive and misleading to consumers because it gives the false impression it has more butter than it does.

19. The Product’s name violates New York State regulations, which require a food’s name to include the percentage of a characterizing ingredient when the proportion of that ingredient has a material bearing on price or consumer acceptance or when the labeling creates an erroneous impression that the product contains more of that ingredient than it does. *See* 1 NYCRR 259.1(a)(3) contained in Section 259.1 (“Packaging and labeling of food.”) (incorporating 21 C.F.R. § 102.5(b)).

20. Butter also is a source of flavor, due to more than 230 volatile compounds.

21. Artificial flavors are made from synthetic sources or through non-natural processes, such as chemical reactions, high heat and high pressure. *See* 21 C.F.R. § 101.22(a)(1).

¹ Compliance Policy Guide (“CPG”), [Sec 505.200. “Butter” Featured in Product Name](#), Center for Food Safety and Applied Nutrition, Office of Regulatory Affairs, March 1988 (“If the product contains both butter and shortening but a sufficient amount of butter to give a characteristic butter flavor to the product, an appropriate name would be ‘butter flavored _____’... if the product contains any artificial butter flavor it would have to be labeled in compliance with 21 CFR 101.22(i)(2).”).

22. Defendant was required to, but did not, accurately identify the Product’s flavor source on its front label.

23. For example, foods labeled as “Butter _____” are required to tell consumers if its taste is due to real butter or artificial butter flavor.

24. This is evident in any walk through a grocery store, shown in the images below.

25. For example, cookies and biscuits which tout “butter” conspicuously disclose that even if they contain real butter, their butter taste is from artificial flavor.



26. Snacks that emphasize “butter” are also truthful in telling consumers that their butter taste is from artificial flavors.



27. Cake mix described as “Butter Golden” tells consumers the truth of its butter taste – “Artificially Flavored.”



28. Most significantly, competitor “butter pound cake” state “Made With Real Butter” yet also tells consumers it is “[Naturally &] Artificially Flavored.”



29. As these products are represented as “Artificially Flavored,” consumers will not expect all their butter taste comes from real butter. *See* 21 C.F.R. § 101.22(i)(2) (requiring a food with artificial flavor that simulates the characterizing flavor be labeled as “Artificially Flavored”).

30. Though the Product contains some butter, its butter taste is provided by artificial butter flavor, shown on the ingredient list.

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31. The key odor compounds are diacetyl (buttery-like), butanoic acid (cheesy) and δ -decalactone (peach), and aldehydes, such as (E)- and (Z)-2-nonenal and (E,E)-2,4-decadienal.

32. However, artificial butter flavor uses only three compounds – diacetyl, acetylpropionyl and acetoin.

33. Analytical testing of the Product in 2020 and/or 2021 revealed levels of these three compounds which is only possible if they were added in their synthetic form to the pound cake.

34. For instance, real butter contains 7500 times less diacetyl than artificial diacetyl, so the extremely high level of diacetyl could only have come from this artificial flavor.

35. Because the Product has artificial butter flavors, diacetyl, it is deceptive and misleading to omit “Artificially Flavored” from the front label.

36. Reasonable consumers are not capable of determining that the Product contains artificial butter flavor.

37. At least seven out of ten consumers avoid artificial flavors because they have been linked to detrimental health effects, contain synthetic ingredients and are highly processed.

38. All demographics of consumers, from Generation Z to Baby Boomers – say they would pay more for foods with no artificial flavors because they are perceived as more natural.

39. Artificial flavors like diacetyl are classified by OSHA as a key contributor to adverse health effects, such as bronchiolitis obliterans, a rare and life-threatening form of non-reversible obstructive lung disease, and exposure to diacetyl has been linked to increased rates of Alzheimer’s Disease.

40. The Product lacks an authentic butter taste because of the absence of many critical odor-active compounds in butter, such as the many aldehydes.

41. The analytical testing showed the Product lacked the aroma compounds such as 3-

methylbutanoic acid, methional and/or 2,5-dimethyl-4-hydroxy-3-(2H)-furanone.

42. Federal and state law require the Product's front label to inform consumers that the Product contains artificial flavoring. 21 C.F.R. § 101.22(c).

43. Because the Product contains artificial flavor that "simulates, resembles or reinforces the characterizing flavor," the front label is required to state, "Artificially Flavored." 21 C.F.R. § 101.22(i)(2).

44. Defendant misrepresented the Product through affirmative statements, half-truths, and omissions.

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

46. 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.

47. The value of the Product that Plaintiff purchased and consumed was materially less than its value as represented by Defendant.

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

49. As a result of the false and misleading labeling, the Product is an sold at a premium price, approximately no less than \$3.99 per 11.5 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

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

51. 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).

52. Plaintiff is a citizen of New York.

53. Defendant Bimbo Bakeries USA, Inc., is a Delaware corporation with a principal place of business in Horsham, Montgomery County, Pennsylvania and is a citizen of Pennsylvania.

54. “Minimal diversity” exists because Plaintiff and Defendant are citizens of different states.

55. 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.

56. 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.

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

Parties

58. Plaintiff is a citizen of New York, New York County, New York.

59. Defendant Bimbo Bakeries USA, Inc. is a Delaware corporation with a principal place of business in Horsham, Pennsylvania, Montgomery County and is a citizen of Pennsylvania.

60. Defendant is part of the largest baking conglomerate in the world, Bimbo Bakeries, operated from Mexico.

61. Plaintiff Monica Boswell purchased the Product on one or more occasions, during the relevant period, at stores including but not necessarily limited to, Stop and Shop, 5716 Broadway, The Bronx, NY 10463, and among other times, purchased the Product between September 18, 2020 and October 18, 2020.

62. Plaintiff bought the Product at or exceeding the above-referenced price because she expected that “all butter” meant no butter alternatives would be in the product, like vegetable oils.

63. Plaintiff expected the Product would have a butter taste from butter instead of artificial butter flavors like diacetyl.

64. Plaintiff wanted to avoid butter alternatives like vegetable oil and synthetic butter flavor.

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

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

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

68. 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

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

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

71. 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.

72. 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.

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

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

75. 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.

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

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

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

78. Plaintiff incorporates by reference all preceding paragraphs.

79. 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.

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

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

82. The amount and proportion of the characterizing component, butter, has a material bearing on price and consumer acceptance of the Product and consumers do not expect butter alternatives where the label says, "All Butter."

83. Consumers do not expect artificial butter flavor when this is not mentioned on the front label, because they are accustomed to foods truthfully disclosing this fact.

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

85. 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

86. Plaintiff incorporates by reference all preceding paragraphs.

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

88. 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.

89. 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.

90. 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.

91. 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.

92. 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.

93. Plaintiff incorporates by reference all preceding paragraphs.

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

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

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

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

98. 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.

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

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

Fraud

101. Plaintiff incorporates by reference all preceding paragraphs.

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

103. 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.

104. 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

105. Plaintiff incorporates by reference all preceding paragraphs.

106. 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 2, 2021

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: April 2, 2021

/s/ Spencer Sheehan
Spencer Sheehan