

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

John Solak, individually and on behalf of all
others similarly situated,

Plaintiff,

- against -

Prestige Consumer Healthcare Inc.,

Defendant

3:22-cv-1357 (BKS/ML)

Class Action Complaint

Jury Trial Demanded

Plaintiff alleges upon information and belief, except for allegations about Plaintiff, which are based on personal knowledge:

1. Prestige Consumer Healthcare Inc. (“Defendant”) manufactures, labels, markets and sells “Wild Cherry” pectin lozenges shown with two cherries and a cherry leaf under the Luden’s brand (“Product”).



2. Flavoring in over-the-counter (“OTC”) drug products like demulcents is important to consumers even though it does not affect their therapeutic qualities.

3. While OTC products are not required to designate the source of their flavor in the same way as food, both are required to refrain from false and misleading representations.

4. According to research by Mintel, consumers have a hierarchy in their preferences for the source of a product’s taste.

5. First is when a product’s taste comes from its highlighted ingredient, such as cherry oil or cherry extract from cherries.

6. The second and third options are natural flavors from cherry and other natural sources and artificial flavors from non-natural sources.

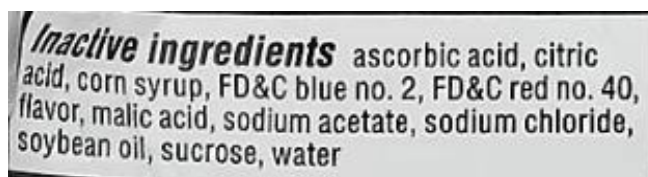
7. Surveys by Nielsen indicate that between sixty and eighty percent of consumers try and avoid artificial flavors, which is why the trade journal *Perfumer & Flavorist*, described “The Future of Artificial Flavors” as bleak.

8. The reasons expressed include their use of chemical compounds, believed to have negative health and environmental effects.

9. Avoiding artificial flavoring in OTC products is more important than in foods because the former are used when addressing medical conditions.

10. By describing the lozenges as “Wild Cherry” above two ripe picked cherries, consumers will expect its taste comes from cherry ingredients and lacks artificial cherry flavoring.

11. However, the ingredient list reveals the absence of cherry ingredients, with the cherry taste coming from “flavor [and] malic acid.”



Inactive ingredients: ascorbic acid, citric acid, corn syrup, FD&C blue no. 2, FD&C red no. 40, flavor, malic acid, sodium acetate, sodium chloride, soybean oil, sucrose, water

12. Based on laboratory and/or other analysis and information, the malic acid and/or flavor are from artificial sources, and impart a cherry taste to the pectin lozenges.

13. As a result of the false and misleading representations, the Product is sold at a premium price, approximately no less than \$2.59 for 30 lozenges, excluding tax and sales.

Jurisdiction and Venue

14. Jurisdiction is based on the Class Action Fairness Act of 2005 (“CAFA”). 28 U.S.C. § 1332(d)(2).

15. The aggregate amount in controversy exceeds \$5 million, including any statutory and punitive damages, exclusive of interest and costs.

16. Plaintiff is a citizen of New York.

17. Defendant is citizen of Delaware and New York because it is a Delaware corporation with a principal place of business in Westchester County, New York.

18. The class of persons Plaintiff seeks to represent includes persons who are citizens of different states from which Defendant is a citizen.

19. The members of the class Plaintiff seeks to represent are more than 100, because the Product is sold with the representations described here in grocery stores, drug stores, convenience stores, big box stores, and online, in the States Plaintiff seeks to represent.

20. Venue is in this District because a substantial part of the events or omissions giving rise to these claims occurred in Broome County, including Plaintiff’s purchase, reliance on the identified statements, and subsequent awareness these were false and misleading.

Parties

21. Plaintiff John Solak is a citizen of Binghamton, Broome County, New York.
22. Defendant Prestige Consumer Healthcare Inc. is a Delaware corporation with a principal place of business in Tarrytown, Westchester County, New York.
23. The Luden's brand of lozenges is one of the oldest in the world.
24. According to some, Luden's invented the lozenge category, and has built up goodwill and recognition.
25. Plaintiff purchased the Product at stores including CVS in Binghamton between 2020 and 2022, and/or among other times.
26. Plaintiff saw the two cherries and read "Wild Cherry" and believed the cherry taste was from cherry ingredients, not from artificial flavoring ingredients with no connection to cherries.
27. Plaintiff bought the Product at or exceeding the above-referenced price.
28. Plaintiff paid more for the Product than he would have had he known the wild cherry flavor was from artificial flavors from non-cherry sources, or would not have purchased it.
29. The value of the Product that Plaintiff purchased was materially less than its value as represented by Defendant.
30. Plaintiff chose between Defendant's Product and products represented similarly, but which did not misrepresent their attributes, features, and/or components.

Class Allegations

31. Plaintiff seeks certification under Fed. R. Civ. P. 23 of the following classes:

New York Class: All persons in the State of New York who purchased the Product during the statutes of limitations for each cause of action alleged; and

Consumer Fraud Multi-State Class: All persons in

the States of Texas, North Dakota, Wyoming, Idaho, Alaska, Iowa, Mississippi, Virginia, Arkansas, South Carolina, and Utah who purchased the Product during the statutes of limitations for each cause of action alleged.

32. Common questions of issues, law, and fact predominate and include whether Defendant's representations were and are misleading and if Plaintiff and class members are entitled to damages.

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

34. Plaintiff is an adequate representative because his interests do not conflict with other members.

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

36. 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.

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

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

38. Plaintiff incorporates by reference all preceding paragraphs.

39. Plaintiff saw and relied on the label and believed the cherry taste was from cherry ingredients, not from artificial flavoring ingredients with no connection to cherries.

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

Violation of State Consumer Fraud Acts
(Consumer Fraud Multi-State Class)

41. The Consumer Fraud Acts of the States in the Consumer Fraud Multi-State Class are similar to the consumer protection statute invoked by Plaintiff and prohibit the use of unfair or deceptive business practices in the conduct of commerce.

42. The members of the Consumer Fraud Multi-State Class reserve their rights to assert their consumer protection claims under the Consumer Fraud Acts of the States they represent and/or the consumer protection statute invoked by Plaintiff.

43. Defendant intended that members of the Consumer Fraud Multi-State Class would rely upon its deceptive conduct, which they did, suffering damages.

Breaches of Express Warranty,
Implied Warranty of Merchantability/Fitness for a Particular Purpose
and Magnuson Moss Warranty Act, 15 U.S.C. §§ 2301, et seq.

44. The Product was manufactured, identified, marketed, and sold by Defendant and expressly and impliedly warranted to Plaintiff that the cherry taste was from cherry ingredients, not from artificial flavoring ingredients with no connection to cherries.

45. Defendant directly marketed the Product to Plaintiff through its advertisements and marketing, through various forms of media, on the packaging, in print circulars, direct mail, product descriptions, and targeted digital advertising.

46. Defendant knew the product attributes that potential customers like Plaintiff were seeking and developed its marketing and labeling to directly meet their needs and desires.

47. The representations about the Product were conveyed in writing and promised it would be defect-free, and Plaintiff understood this meant the cherry taste was from cherry ingredients, not from artificial flavoring ingredients with no connection to cherries.

48. Defendant's representations affirmed and promised that the cherry taste was from cherry ingredients, not from artificial flavoring ingredients with no connection to cherries.

49. Defendant described the Product so Plaintiff believed the cherry taste was from cherry ingredients, not from artificial flavoring ingredients with no connection to cherries, which became part of the basis of the bargain that it would conform to its affirmations and promises.

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

51. This duty is based on Defendant's outsized role in the market for this type of Product, the recognized Luden's brand.

52. Plaintiff recently became aware of Defendant's breach of the Product's warranties.

53. Plaintiff provided or provides notice to Defendant, its agents, representatives, retailers, and their employees that it breached the Product's warranties.

54. Defendant received notice and should have been aware of these issues due to complaints by third-parties, including regulators, competitors, and consumers, to its main offices, and by consumers through online forums.

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

56. The Product was not merchantable because it was not fit to pass in the trade as advertised, not fit for the ordinary purpose for which it was intended and did not conform to the promises or affirmations of fact made on the packaging, container, or label, because it was marketed as if the cherry taste was from cherry ingredients, not from artificial flavoring ingredients with no connection to cherries.

57. The Product was not merchantable because Defendant had reason to know the

particular purpose for which the Product was bought by Plaintiff, because he expected the cherry taste was from cherry ingredients, not from artificial flavoring ingredients with no connection to cherries, and he relied on its skill and judgment to select or furnish such a suitable product.

Fraud

58. Defendant misrepresented and/or omitted the attributes and qualities of the Product, that its cherry taste was from cherry ingredients, not from artificial flavoring ingredients with no connection to cherries.

59. Defendant was aware of studies and reports showing that consumers prefer when the source of flavoring comes from the highlighted ingredient and avoid artificial flavoring.

Unjust Enrichment

60. 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. Awarding monetary, statutory and/or punitive damages and interest;
3. Awarding costs and expenses, including reasonable fees for Plaintiff's attorneys and experts; and
4. Other and further relief as the Court deems just and proper.

Dated: December 16, 2022

Respectfully submitted,

/s/ Spencer Sheehan

Sheehan & Associates, P.C.

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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

John Solak, individually and on behalf of all others similarly situated

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

(c) Attorneys (Firm Name, Address, and Telephone Number)

Sheehan & Associates, P.C., 60 Cuttermill Rd Ste 412 Great Neck NY 11021 (516) 268-7080

DEFENDANTS

Prestige Consumer Healthcare Inc.

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)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions .

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input checked="" type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 INTELLECTUAL PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent-Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS		
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities-Employment <input type="checkbox"/> 446 Amer. w/Disabilities-Other <input type="checkbox"/> 448 Education	Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement		

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 U.S.C. § 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 \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

December 16, 2022

/s/ Spencer Sheehan

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT \$402.00 APPLYING IFP _____ JUDGE BKS MAG. JUDGE ML

ANYNDC-6134263