

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

THE NATIONAL CONSUMERS)	
LEAGUE,)	
)	
)	
Plaintiff,)	Case No. 2013-CA-006548 B
)	
v.)	
)	
BIMBO BAKERIES USA)	
Defendant.)	
_____)	

FIRST AMENDED COMPLAINT

Plaintiff, the National Consumers League (“Plaintiff”), by and through its counsel, brings this action against Defendant Bimbo Bakeries USA, (“Defendant”) on behalf of the general public, alleges the following based upon information, belief and the investigation of counsel:

NATURE OF THE CASE

1. Plaintiff brings this action on behalf of the general public of the District of Columbia to redress the pervasive pattern of fraudulent, deceptive, and otherwise improper marketing practices regarding the sale of Thomas’ Light Multi-Grain Hearty Muffins and Sara Lee Classic Honey Wheat bread.

2. Defendant deceives consumers into believing that Thomas’ Light Multi-Grain Hearty Muffins and Sara Lee Classic Honey Wheat bread contain significant amounts of whole grain, when, in fact, they are predominantly composed of ordinary refined flour (also known as “wheat flour” or “enriched wheat flour”) and have minimal, if any, whole grain.

3. Defendant deceives D.C. consumers into believing the muffins and bread referenced herein contain significant amounts of a variety of whole grains or whole wheat. But unlike the bread sold in D.C. by many of Defendant's competitors, which do in fact contain significant amounts of whole grain, Defendant's bread does not.

4. Plaintiff brings claims for violations of the D.C. Consumer Protection Procedures Act, D.C. Official Code §§ 28-3901 *et seq.* Plaintiff seeks restitution, damages, injunctive relief in the form of an order requiring the cessation of the unlawful marketing alleged herein and corrective advertising, and attorneys' fees and costs of this suit.

JURISDICTION

5. This Court has subject matter jurisdiction over this action, and venue is appropriate in this Court, pursuant to D.C. Code § 11-921 and §28-3905(k)(1).

6. This Court has personal jurisdiction over Defendant pursuant to D.C. Code § 13-423. This Court has personal jurisdiction over the parties because, *inter alia*, Defendant markets its products in Washington, D.C., is engaged in deceptive schemes and acts directed at – and having the intended effect of – causing injury to persons residing in, located in, or doing business in Washington, D.C.

7. Plaintiff is headquartered in Washington, D.C.

8. A substantial part of the actions which gave rise to Plaintiff's causes of action occurred in this jurisdiction.

PARTIES

9. Plaintiff, the National Consumers League, is a 501(c)(3) non-profit organization located at 1701 K Street N.W., Suite 1200, Washington, D.C. 20006.

10. Plaintiff focuses its advocacy on consumer protection, including efforts to promote accurate labeling on food products. Plaintiff has purchased Thomas' Light Multi-Grain Hearty Muffins and Sara Lee Classic Honey Wheat bread.

11. Defendant is Bimbo Bakeries USA ("Bimbo") with corporate headquarters at 255 Business Center Drive, Horsham, PA 19044.

THE INTERESTS OF NCL & THE GENERAL PUBLIC

12. Defendant deceptively marketed Thomas' Light Multi-Grain Hearty Muffins and Sara Lee Classic Honey Wheat Bread to District of Columbia residents by fostering the false impression that they contained substantial amounts of a variety of whole grains or whole wheat.

13. Upon information and belief, Defendant has caused damage and adverse effects to residents of this District.

14. Plaintiff acts for the benefit of the General Public as a Private Attorney General pursuant to District of Columbia Code §28-3905(k)(1).

15. The NCL has worked diligently to promote accurate labeling of consumer goods. It has investigated, publicized, and/or litigated on mislabeling for lemon juice, vine-ripened tomatoes, extra-virgin olive oil, sunflower seeds, false health claims on cereal, and adulterated honey.

SUBSTANTIVE ALLEGATIONS

A. Thomas' Light Multi-Grain Hearty Muffins

16. Consumers in the general public of the District of Columbia, relying on Defendant's representations, purchased Thomas' Light Multi-Grain Hearty Muffins with the reasonable expectation that the muffins contained substantial amounts of whole grains, i.e., at least 51% of the product is whole grain or contains at least 8 grams of whole grains per ounce as specified in the U.S. Dietary Guidelines.

17. Via use of the product name Thomas' Light Multi-Grain Hearty Muffins, Defendant conveys to reasonable consumers that the muffins contains a significant amount of a variety of whole grains. But there is only a minimal amount of whole grain in this product.

18. Indeed, based on the ingredients for the Light Multi-Grain Hearty Muffins (which are listed on the product package and website in descending order of predominance by weight), there is actually more cellulose fiber and yeast than any of the ingredients that are *potentially* whole grain, let alone actually whole grain. *Potential* whole grain ingredients appear in boldface type.

Unbleached enriched wheat flour [flour, malted barley flour, reduced iron, niacin, thiamin mononitrate (vitamin B1), riboflavin (vitamin B2), folic acid], water, modified food starch, polydextrose, wheat gluten, cellulose fiber, farina, yeast, **cornmeal**, preservatives (calcium propionate, potassium sorbate, sorbic acid,), whey (milk), salt, **rye**, malt extract, grain vinegar, monocalcium phosphate, **ground corn**, datem, sodium stearoyl lactylate, ethoxylated mono-and diglycerides, **brown rice**, **oats**, xanthum gum, **triticale**, soy flour, mono-and diglycerides, sucralose, **barley**, flaxseed, **millet**, nonfat milk.¹

19. Guidance from the Food and Drug Administration explains that the term "whole grains" includes seven of the grains listed on Defendant's label—assuming they are in whole and not processed form: barley, corn, rye, rice, oats, triticale and millet. However, according to the

¹ See Exhibit 1.

FDA, the corn meal and barley are unlikely to be whole grain. FDA, *Draft Guidance: Whole Grain Statements Q & A* 4 and 5.

20. Even if the remaining five grain ingredients in the Light Multi-Grain muffins are actually whole grain and are added together, they would still not constitute a significant amount of whole grain given their lack of predominance in the ingredient list.

21. A comparison of the ingredients statement of Thomas' regular Multi-Grain Muffins (as reproduced from its website) and the Light variety indicates that the regular version contains 8 grams of whole grain, the majority of which is attributable to the whole wheat in that product:

UNBLEACHED ENRICHED WHEAT FLOUR [FLOUR, MALTED BARLEY FLOUR, REDUCED IRON, NIACIN, THIAMIN MONONITRATE (VITAMIN B1), RIBOFLAVIN (VITAMIN B2), FOLIC ACID], WATER, **WHOLE WHEAT FLOUR**, SUGAR, FARINA, SOYBEAN OIL, YEAST, FLAXSEED, WHEAT GLUTEN, PRESERVATIVES (CALCIUM PROPIONATE, SORBIC ACID), SALT, **RYE, CORN CEREAL**, DEXTROSE, **GROUND CORN**, MALT, MONOGLYCERIDES, **BROWN RICE, OATS, SOYBEANS, TRITICALE, BARLEY, MILLET**, CARMEL COLOR, NONFAT MILK, SOY FLOUR, WHEY.²

22. Given that there is no whole wheat whatsoever in the Light variety, and all of the other potential whole grain ingredients are present in minute amounts comparable to the amounts listed for the regular "Made With Whole grains" variety, the muffins contain substantially less than 8 grams of whole grain per 57 gram (2 oz.) serving, let alone the 51% of product weight or 8 grams per ounce which is considered to be a significant amount under the U.S. Dietary Guidelines.

² <http://www.thomasbreads.com/products/multi-grain-english-muffins> (bold added to indicate potential whole grains).

23. The packaging for the Light Multi-Grain Hearty Muffins is confusingly similar to the regular version and prominently displays the same multi-grain claim, on the same section of the package.



24. However, the (false) implication and impression by the packaging is clear: the Light and regular muffins are the same except for calorie content—not whole grain content.

25. Defendant knowingly exploits the product name “Multi-Grain” to deceive consumers into believing its Light Multi-Grain Hearty Muffins contain significant amounts of whole grain—like the higher calorie version.

26. Defendant deliberately places the Light Multi-Grain Muffins in its “Hearty” line which is described on its website as “better for you muffins.”

THOMAS® “BETTER FOR YOU” MUFFINS



<http://www.thomasbreads.com/products>.

27. By comparison, other products in its Hearty Muffin Line contain much higher amounts of whole grains, e.g, Thomas 100% Whole Wheat Made with Whole Grains English Muffins are 51% whole Grains.

28. Even the Original Thomas’ English Muffins Made with Whole Grain are not part of the Hearty Muffin line, although *they* contain whole wheat as the third ingredient in the ingredient statement (and thereby have more whole grains than the Light Multi-Grain).

29. Defendant deceives consumers by passing off multi-grain muffins that contain minimal (if any) amounts of whole grain, a feat that is made easier because many of the other multi-grain muffins and breads sold in Washington, D.C. with which defendant's products compete actually do provide significant amounts of whole grain. These products include: Giant Multigrain English Muffins, Fiber One 100 Calories Multigrain Bread, Nature's Own Healthy Multi-Grain Sandwich Rounds, and Arnold Nature's Harvest Light Multigrain Bread.

30. Research indicates that consumers tend to assume that multi-grain products contain large proportions of whole grain.³

31. The same research indicates that non-wheat grains are as likely to be refined as is wheat; thus multi-grain products are not necessarily whole grain products.⁴

B. Sara Lee Classic Honey Wheat Bread

32. Reasonable D.C. consumers purchased Sara Lee Classic Honey Wheat bread, based on label representations, with the belief that the bread contains substantial amounts of whole wheat.

33. The ingredient list for the Sara Lee Honey Wheat bread indicates that the most prevalent ingredient in Sara Lee's Classic Honey Wheat bread is refined wheat flour and that the bread has more yeast and honey than whole wheat:

Enriched wheat flour, [flour, malted barley flour, reduced iron, niacin, thiamin mononitrate (Vitamin B1), riboflavin (Vitamin B2), Folic Acid], water, yeast, honey, **whole wheat flour**, wheat gluten, sugar, wheat bran, soybean oil, salt, calcium propionate (preservative), datem, monoglycerides, cellulose gum,

³ <http://wholegrainscouncil.org/newsroom/blog/2012/02/abc-news-on-whole-grain-labeling>. The article references a national public opinion study which indicates that consumers overestimated the amount of whole wheat or whole grain in a product when shown packages that emphasized the word "wheat" or "multigrain." *See also* Milling & Baking News, Nutrition and Health, p. 48 (Feb. 21, 2012).

⁴ *Id.*

calcium sulfate, monocalcium phosphate, cornstarch, soy lecithin, citric acid grain vinegar, potassium iodate, soy flour.⁵

34. Indeed, Defendant deliberately takes advantage of the well-known consumer confusion about—and demand for—whole wheat products in choosing the term “wheat” as part of its product name.



35. Indeed, Defendant used the very same name, “Honey Wheat” to describe a different bread in its product line which is, in fact, whole wheat.

36. Defendant’s website described the Honey Wheat bread shown below as “our famously textured whole wheat bread.”⁶

⁵ See Exhibit 2 (Ingredients are bolded to indicate whole grains).

⁶ Since the filing of the lawsuit, Bimbo has removed this reference on its website and only identifies the Classic Honey Wheat bread.

SARA LEE® HONEY WHEAT BREAD

It's a wonder what that little drop of pure golden honey does when you add it to our famously textured whole wheat bread. It becomes Sara Lee® Honey Wheat Bread, a big favorite in our house... and probably in yours, too. That touch of sweetness makes each slice just blossom with rich, earthy goodness. All it needs is a little butter - but don't let us stop you from experimenting. Sara Lee® Honey Wheat Bread is great with everything.

- ♥ EXCELLENT SOURCE OF CALCIUM
- ♥ GOOD SOURCE OF VITAMIN D
- ♥ GOOD SOURCE OF FOLIC ACID
- ♥ NO ARTIFICIAL COLORS OR FLAVORS
- ♥ 0G TRANS FAT

UPC 7294560136



37. Defendant caused confusion when it did not provide information on its website for the similarly labeled “Sara Lee *Classic* Honey Wheat Bread” that is the subject of this suit.

38. Defendant knew, or should have known that the name of its *Classic* Sara Lee Honey Wheat Bread is deceptive and likely to mislead reasonable consumers into believing it has the same properties and ingredients as its whole wheat Honey Wheat bread.

39. Defendant deceives consumers by passing off its predominantly white bread as whole grain, a feat that is made easier because many of the other “wheat” breads sold in Washington, D.C., with which Defendant’s products compete, actually do provide significant amounts of whole grain. These products include: Ovenjoy Wheat Bread (Safeway brand); Giant Wheat, Strohmann’s Wheat Made with Whole Grain; and Pepperidge Farm Light Style Soft Wheat.

40. As another example, the primary ingredient in Pepperidge Farm’s Whole Grain

Honey Wheat bread is whole wheat flour.⁷

C. Whole Grain Market

41. Research indicates that consumers tend to assume that wheat products contain large proportions of whole grain.

42. For example, in one study, consumers overestimated the amount of whole wheat in a product when shown packages that emphasized the word “wheat.”⁸

43. A consumer survey specifically regarding a “Wheat Bread” found that 61% of consumers “mistakenly believed that at least half the grain in that product would be whole grain.”⁹

44. The last several years have seen a sustained upward trend in demand for whole grains.¹⁰

45. A survey of grocery shoppers found that whole grains and multigrain were the two product types experiencing the greatest growth in consumer demand.¹¹

46. Nutritionists advise adults to eat several servings of whole grain each day.¹²

47. Since 2005, the Dietary Guidelines for Americans have advised consumers to “make at least half your grains whole.”

⁷ See <http://www.pepperidgefarm.com/ProductDetail.aspx?catID=750>

⁸ <http://wholegrainscouncil.org/newsroom/blog/2012/02/abc-news-on-whole-grain-labeling>; Milling & Baking News, Nutrition and Health, p. 48 (Feb. 21, 2012).

⁹ See http://wholegrainscouncil.org/files/CSPI_wgclaimsPR.pdf.

¹⁰ See <http://wholegrainscouncil.org/newsroom/whole-grain-statistics>.

¹¹ See <http://wholegrainscouncil.org/newsroom/whole-grain-statistics>.

¹² USDA, HHS, *Dietary Guidelines for Americans 2010*, at 36, available at www.dietaryguidelines.gov.

48. By exploiting this confusion about, and demand for, whole grains, Defendant reaps increased profits by capitalizing on consumers' desires to avoid white breads, while still essentially selling them (cheaper to produce) white breads.

49. Bread industry experts note that the "key to reversing the tide of public opinion about bread is clear...The quicker we move to make the fresh bread category all about whole grains, the faster we will be able to address the negative press we are getting from the critics of bread..."¹³

50. Following this advice, Bimbo deceptively touts its breads as whole wheat, when in fact that is an ingredient it does not provide at all or only in insignificant amounts. Thus, it is able to derive sales it otherwise would not obtain from D.C. consumers.

51. Bimbo is motivated to pursue this deceptive scheme because whole grain breads require more ingredients that need to bind together than is the case with white bread—meaning a more complicated (and expensive) production process.¹⁴

52. Following the release of the USDA's Dietary Guidelines for Americans, which recommended products that contain at least 51% of total weight as whole grains or those that provide at least 8 grams of whole grains per ounce-equivalent,¹⁵ supermarket aisles became

¹³ See Milling and Baking News, Bread Product Perspective, *Millers see opportunity for baking despite alarming sales trends*, p. 1, 38 (February 21, 2012).

¹⁴ See <http://www.foodbusinessnews.net/News/News%20Home/Features/2012/2/Millers%20see%20opportunity%20for%20baking%20despite%20alarming%20sales%20trends.aspx?cck=1>

¹⁵ USDA, *Dietary Guidelines for Americans 2010*, <http://www.cnpp.usda.gov/publications/dietaryguidelines/2010/policydoc/chapter4.pdf>; <http://wholegrainscouncil.org/whole-grain-stamp/stamp-faq-manufacturers>

flooded with products boasting the presence of whole grains, and restaurants and sandwich shops also began featuring whole grain products.¹⁶

53. Defendant's website evidences its intention that consumers rely on these representations when making purchasing decisions.

54. As a result of Defendant's false, deceptive, and misleading advertising, consumers do not receive the benefit of their bargains when they purchase the breads referenced herein.

CAUSE OF ACTION

D.C. Consumer Protection Act – D.C. Official Code §§ 28-3901, *et seq.*

55. Plaintiff incorporates by reference and realleges all previous paragraphs.

56. This Count is brought pursuant to the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code §28-3901 *et seq.* This Count is alleged against the Defendant on behalf of the General Public of the District of Columbia pursuant to District of Columbia Code § 28-3905(k)(1)(A)-(D).

57. Defendant is a "person" within the meaning of D.C. Official Code § 28-3901(a)(1), and provide "goods" within the meaning of § 28-3901(a)(7).

58. Plaintiff is a "non-profit organization" within the meaning of § 28-3901(a)(14) and a "public interest organization" within the meaning of §28-3901(a)(15).

59. D.C. Code § 28-3904 makes it an "unlawful trade practice ... whether or not any consumer is in fact misled, deceived or damaged thereby," to, among other things:

¹⁶ See Make Half Your Grains Whole Conference Report, NPD Group, April 2009; available at <http://wholegrainscouncil.org/files/3.AreWeThereYet.pdf>.

(a) Represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have;

(b) Represent that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another;

(e) Misrepresent as to a material fact which has a tendency to mislead;

(f) Fail to state a material fact if such failure tends to mislead;

(f-1) Use innuendo or ambiguity as to a material fact, which has a tendency to mislead;
and

(u) Represent that the subject of a transaction has been supplied in accordance with a previous representation when it has not.

60. Defendant violated these provisions by, *inter alia*, intentionally representing that its Sara Lee Honey Wheat bread contains significant amounts of whole wheat when in fact there is a minimal amount and by intentionally representing that its multigrain muffins contain significant amounts of whole grains when, in fact, they contain little if any whole grains.

61. Defendant violated these provisions by the use of innuendo or ambiguity to create a false impression that its Thomas' Light Multi-Grain Hearty Muffins had an amount of whole grains similar to its "regular" Multi-Grain Hearty Muffins and that its Sara Lee Honey Wheat Classic and Honey Wheat breads were identical.

62. Defendant knew or should have known that consumers would consider its largely refined Thomas' Light Multi-Grain Hearty Muffins and Sara Lee Classic Honey Wheat bread to contain substantial amounts of whole wheat and/or other whole grains.

63. Defendant knew or should have known of the likelihood of confusion between its multigrain muffins that contains minimal whole grains and other muffins and breads on the market.

64. Defendant knew or should have known of the likelihood of confusion between its Sara Lee Classic Honey Wheat, which has a minimal amount of whole wheat and its Honey Wheat bread, which is composed primarily of whole wheat.

65. Although reliance is not required by the CPPA, District consumers have nevertheless reasonably relied on Defendant's misrepresentations when purchasing Defendant's breads.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against the Defendant, and in favor of Plaintiff and the District of Columbia General Public, and grant the following relief:

- a) declaring that Defendant's conduct is in violation of the D.C. Consumer Protection Procedures Act;
- b) enjoining Defendant's conduct found to be in violation of the D.C. Consumer Protection Procedures Act and ordering corrective advertising or revised labeling;
- c) granting Plaintiff and the General Public of the District of Columbia restitution, treble damages or statutory damages in the amount of \$1,500 per violation, whichever is greater;

- d) granting Plaintiff its costs of prosecuting this action, including attorneys' fees, experts' fees and costs together with interest; and
- e) granting such other relief as this Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: July 14, 2014

REZVANI VOLIN P.C.

/s/ Tracy D. Rezvani

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of July 2014, a copy of the foregoing was served by CaseFileExpress upon all counsel of record in this proceeding.

/s/ Tracy D. Rezvani

Tracy D. Rezvani