

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

KEVIN PHUNG, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

THE QUAKER OATS COMPANY, a
New Jersey corporation,

Defendant.

Case No.:

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff Kevin Phung (“Plaintiff”), individually and on behalf of all others similarly situated, upon personal knowledge of facts pertaining to him and on information and belief as to all other matters, by and through undersigned counsel, brings this class action complaint against The Quaker Oats Company (“Defendant” or “Quaker”).

NATURE OF THE ACTION

1. This consumer class action arises out of Defendant’s misbranding and false advertising of its line of products sold as Quaker Oats Maple & Brown Sugar Instant Oatmeal (the “Products”). Defendant’s representations and advertisements stating that the Products are made with maple syrup or maple sugar are false, misleading, and deceptive.

2. Defendant advertises, markets, and sells the Products nationwide, including throughout California. Defendant prominently displays on the Products and in advertisements the claim that maple syrup or maple sugar (hereinafter collectively referred to as “maple”) is an ingredient.

3. As a natural sweetener, maple is generally recognized as a healthier and more nutritious alternative to other sweeteners.

4. Contrary to Defendant's representations, the Products do not contain maple. The representations that the Products are made with maple are false, misleading, and deceptive.

5. As a result of the false, misleading, and deceptive messages, Defendant induced Plaintiff and the other Class members to purchase the Products, which they would not have purchased had they known the Products contained no maple.

6. Plaintiff brings this action on behalf of himself and all other similarly situated consumers to prevent Defendant from further deceiving consumers, to correct the false perception that Defendant has created in the minds of consumers, and to obtain redress for having suffered harm by purchasing Defendant's Products.

JURISDICTION AND VENUE

7. The Court has original subject matter jurisdiction over the case under 28 U.S.C. § 1332(d) because the case is brought as a class action under Fed. R. Civ. P. 23, at least one proposed class member is of diverse citizenship from Defendant, the proposed Class includes 100 members or more, and the aggregate amount in controversy exceeds five million dollars, excluding interest and costs.

8. The Court has personal jurisdiction over Defendant because Defendant is headquartered and transacts continuous and systematic business in Illinois.

9. Venue is proper pursuant to 28 U.S.C. § 1391 because Defendant resides within this judicial district.

PARTIES

10. Plaintiff Kevin Phung is a citizen of San Diego, California. Plaintiff regularly purchased Quaker Oats Maple & Brown Sugar Instant Oatmeal at stores in or around his home near the Mission Valley neighborhood of San Diego, including the Rite Aid located at 535 Robinson Ave on May 2, 2016. He made these purchases about once every two months.

11. When Plaintiff learned through Internet news articles that the Products did not contain maple, he was surprised by the reports. Plaintiff has not purchased the Products since learning that they contained no maple.

12. Defendant The Quaker Oats Company is a New Jersey corporation headquartered in Chicago, Illinois. Defendant promotes, distributes, markets, and sells the Products and many other products to consumers throughout the United States.

FACTUAL ALLEGATIONS

13. The Quaker Oats Company markets a variety of food products nationwide, including its line of Quaker Oats Maple & Brown Sugar Instant Oatmeal. Nationwide distribution of maple & brown sugar-flavored instant oatmeal commenced in 1970.

14. Since at least around 1995, Defendant has embraced a strategy of marketing its oatmeal products as healthy. Defendant claims its products were the first to receive FDA approval for food-specific health claims in 1997.

15. Maple is generally considered to be healthier and more nutritious than other sweetener options. Some reported benefits of maple include fifty-four antioxidants, and high levels of vitamins like riboflavin and minerals like zinc and manganese.

16. Maple syrup is derived from the sap of maple trees. The sap is extracted by drilling a hole in the trunk of a maple tree and is processed by heating. The heat evaporates water

and thickens the sap into a concentrated syrup. According to the FDA, maple syrup contains 66% by weight of soluble solids derived solely from such sap.

17. Maple sugar is what remains after all the water in maple sap has been boiled off.

18. The Products include Quaker Oats products sold under the names: Maple & Brown Sugar Instant Oatmeal (Classic Recipe), Maple & Brown Sugar High Fiber Instant Oatmeal, Maple & Brown Sugar Gluten Free Instant Oatmeal, Maple & Brown Sugar Lower Sugar Instant Oatmeal, Maple & Brown Sugar Weight Control Instant Oatmeal, and Maple & Brown Sugar Organic Instant Oatmeal.

19. The packaging prominently states that the Products are “Quaker Instant Oatmeal, Maple & Brown Sugar.”

20. These representations convey to consumers that maple is an ingredient in the Products.

21. Contrary to Defendant’s representations and the consumer perception created by such representations, the Products do not contain maple. Rather, the ingredients for the classic recipe of the Products consist of whole grain rolled oats, sugar, natural and artificial flavor, salt, calcium carbonate, guar gum, caramel color, niacinamide, reduced iron, vitamin A palmitate, pyridoxine hydrochloride, riboflavin, thiamin mononitrate, and folic acid.

22. Defendant’s statements and the Products’ name are false, misleading, unfair, deceptive, and intended to induce consumers to purchase the Products.

23. Plaintiff and the other Class members have been exposed to and have seen Defendant’s false statements. They reasonably relied on Defendant’s representations and purchased the Products. Had Plaintiff and the other Class members known that the Products contained no maple, they would not have purchased the Products.

24. A reasonable consumer would consider the presence or absence of maple—a premium ingredient—in a food product to be material.

25. Plaintiff and the other Class members purchased one or more Products on account of Defendant's false, misleading, and deceptive representations and suffered damages. As a result of Defendant's false, misleading, unfair, and deceptive practices, Defendant was able to sell more Products at a higher price, which Plaintiff and the other Class members paid.

CLASS ALLEGATIONS

26. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P. 23, on behalf of a Class defined as follows:

All persons who purchased in the State of California Quaker Oats Maple & Brown Sugar Instant Oatmeal, Quaker Oats Maple & Brown Sugar High Fiber Instant Oatmeal, Quaker Oats Maple & Brown Sugar Gluten Free Instant Oatmeal, Quaker Oats Maple & Brown Sugar Lower Sugar Instant Oatmeal, Quaker Oats Maple & Brown Sugar Weight Control Instant Oatmeal, or Quaker Oats Maple & Brown Sugar Organic Instant Oatmeal for their own use or that of a member of their household and not for resale.

Excluded from the Class are: (i) Defendant and its officers and directors, agents, affiliates, subsidiaries, authorized distributors, and dealers, (ii) all Class Members that timely and validly request exclusion from the Class, and (iii) the Judge presiding over this action.

27. Certification of Plaintiff's claims for class-wide treatment is appropriate because Plaintiff can prove the elements of their claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claims.

28. The members of the Class are so numerous that joinder of the Class members would be impracticable. On information and belief, Class members number in the thousands for each Class sought. The Products are marketed and sold throughout California.

29. Common questions of law and fact exist as to all Class members and predominate

over questions affecting only individual Class members. Such common questions of law or fact include, *inter alia*:

- A. Whether Defendant engaged in the conduct alleged herein;
- B. Whether the name of the Products is deceptive;
- C. Whether Defendant misrepresented the Products' contents;
- D. Whether Defendant's misrepresentations were false or misleading;
- E. Whether Defendant's representations relating to the Products created an express warranty;
- F. Whether Plaintiff and the other Class members paid for a product that they did not receive;
- G. Whether Plaintiff and the other Class members have been damaged and, if so, the extent of such damages;
- H. Whether Defendant unjustly retained a benefit conferred by Plaintiff and the other Class members; and
- I. Whether Plaintiff and the other Class members are entitled to equitable relief, including but not limited to, restitution, disgorgement, and injunctive relief.

30. Defendant engaged in a common course of conduct giving rise to the legal rights sought to be enforced by Plaintiff individually and on behalf of the other Class members. Similar or identical statutory and common law violations, business practices, and injuries are involved. Individual questions, if any, pale in comparison, in both quality and quantity, to the numerous common questions that dominate this action.

31. Plaintiff's claims are typical of the claims of the other Class members he seeks to represent because, among other things, Plaintiff and the other Class members were injured through the substantially uniform misconduct described above. Plaintiff is advancing the same claims and legal theories on behalf of himself and all other Class members, and no defense is

available to Defendant that is unique to Plaintiff.

32. Plaintiff is an adequate Class representative because he will fairly represent the interests of the Class. Plaintiff has retained counsel with substantial experience in prosecuting consumer class actions. Plaintiff and counsel are committed to prosecuting this action vigorously on behalf the Class they seek to represent, and have the resources to do so. Neither Plaintiff nor counsel has any interest adverse or antagonistic to those of the Class.

33. A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The damages or other detriment suffered by Plaintiff and the other Class members are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendant, so it would be impracticable for Class members to individually seek redress for Defendant's wrongful conduct. Even if Class members could afford individual litigation, the court system should not be required to undertake such an unnecessary burden. Individualized litigation would also create a potential for inconsistent or contradictory judgments, and increase the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties and provides the benefits of a single adjudication, economies of scale, and comprehensive supervision by a single court.

CLAIMS

COUNT I

Violation of California Unfair Competition Law

34. Plaintiff repeats and realleges all preceding paragraphs as if fully set forth herein.

35. The California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* (“UCL”), prohibits any “unlawful,” “fraudulent,” or “unfair” business act or practice and any false or misleading advertising. Defendant engaged in unlawful, fraudulent, and unfair practices by, among other things, making the representations and omissions of material facts, as set forth more fully herein, and violating 21 U.S.C. §§ 343(a)(1), (c), Cal. Civ. Code §§ 1572, 1573, 1709, 1711, 1770(a); Cal. Health & Safety Code § 110765; Cal. Bus. & Prof. Code § 17200, *et seq.* and § 17500, *et seq.*; and the common law. Plaintiff, individually and on behalf of the other Class members, reserves the right to allege other violations of law, which constitute other unlawful business acts or practices. Such conduct is ongoing and continues to this date.

36. In the course of conducting business, Defendant committed unlawful business practices by, among other things, making the representations and omissions of material facts regarding the Products. These representations constitute a misbranding of the Product, as prohibited by § 110765 of the California Health & Safety Code, and the Food and Drug Administration’s regulations, 21 C.F.R. §§ 101.18. By representing the Products as containing maple when they do not, Defendant commits unlawful business practices prohibited by the California Business & Professions Code § 17200, *et seq.*

37. In the course of conducting business, Defendant committed unfair business practices, by among other things, making the representations and omissions of material facts regarding the Products in its advertising. There is no societal benefit from false advertising, only harm. Plaintiff and the other Class members paid for a lower value product that is not what it purports to be. While Plaintiff and the other Class members were harmed, Defendant was unjustly enriched by its false representations and omissions. As a result, Defendant’s conduct is

unfair and offended public policy. Defendant's conduct was immoral, unethical, oppressive, and unscrupulous and caused substantial injury to consumers.

38. In the course of conducting business, Defendant engaged in fraudulent business acts by, among other things, making the representations and omissions of material facts regarding the presence of maple in the Products.

39. Defendant's actions, claims, omissions, and misleading statements were also false, misleading, and likely to deceive consumers.

40. Plaintiff was deceived as a result of her reliance on Defendant's material misrepresentations and omissions. Plaintiff suffered in jury in fact and lost money as a result of purchasing the Products because of Defendant's unlawful, unfair, and fraudulent conduct.

41. Defendant knew or should have known that its material representations and omissions would be likely to deceive consumers.

42. As a result of its unlawful, unfair, and fraudulent business acts or practices, Defendant has reaped unjust revenue and profit.

43. Unless restrained and enjoined, Defendant will continue to engage in these unlawful, unfair, and fraudulent business acts or practices. Injunctive relief is appropriate.

44. Plaintiff and the other Class members seek restitution and disgorgement from Defendant of all money obtained from the unlawful, unfair, and fraudulent business acts or practices set forth above, injunctive relief prohibiting Defendant from continuing such practices, corrective advertising, and all other relief this Court deems just and appropriate.

COUNT II

Violation of the Consumers Legal Remedies Act

45. Plaintiff repeats and realleges all preceding paragraphs as if fully set forth herein.

46. Plaintiff and the other Class members are consumers, as defined by Cal. Civ. Code § 1761(d).

47. The Products are goods, as defined by Cal. Civ. Code § 1761(a).

48. Defendant violated and continues to violate the Consumers Legal Remedies Act by engaging in the following proscribed acts:

- a. Representing that the Products have characteristics, ingredients, uses, benefits, or quantities which they do not have;
- b. Representing that the Products are of a particular standard, quality, or grade when they are of another;
- c. Advertising goods with intent not to sell them as advertised;
- d. Representing that the Products have been supplied in accordance with a previous representation when they have not.

49. The foregoing acts were committed in connection with transactions with Plaintiff and the other Class members which were intended to result in, and did result in, the sale of the Products.

50. Defendant represented or omitted material facts regarding the maple content of the Products, as described above, when it knew, or should have known, that the representations were false and misleading and that the omissions were material.

51. Plaintiff, individually and on behalf of the other members of the Class, seeks an order enjoining further commission of the acts underlying this complaint, requiring corrective actions, and restitution and disgorgement.

52. Pursuant to § 1782 of the Consumers Legal Remedies Act, Plaintiff notified Defendant in writing by certified mail of the particular violations of the Act and demanded that

Defendant rectify the problems associated with the actions detailed above and give notice to all affected consumers of Defendant's intent to so act. A copy of the letter is attached hereto as Exhibit A.

53. If Defendant fails to rectify or agree to rectify the problems associated with the actions detailed above and give notice to all affected consumers within thirty days of the date of written notice pursuant to § 1782 of the Act, Plaintiffs will amend this complaint to add claims for actual, punitive, and statutory damages, as appropriate.

54. Pursuant to § 1780(d) of the Act, attached hereto as Exhibit B is the Declaration of Erich P. Schork showing that this action has been commenced in the proper forum.

COUNT III

Breach of Express Warranty

55. Plaintiff repeats and realleges all preceding paragraphs as if fully set forth herein.

56. Defendant is a merchant of the Products.

57. Defendant made affirmations of fact directly to Plaintiff and the other Class members relating to and describing the Products that the Products were made with maple with the intention that they rely thereon.

58. Defendant's representations were affirmations of fact and descriptions of the Products that formed the basis of the bargain between Plaintiff and the other Class members and Defendant, creating an express warranty.

59. The Products' name "Quaker Instant Oatmeal, Maple & Brown Sugar" constitutes an express warranty that maple is an ingredient of the Products.

60. Defendant's Products were accompanied by an express warranty when placed in the stream of commerce by Defendant.

61. All conditions precedent have occurred or been performed.

62. Defendant breached the express warranty by selling Products that did not conform to the affirmations of fact and descriptions. The Products do not contain maple.

63. At the time of sale to Plaintiff and the other Class members, Defendant had actual knowledge that it breached express warranties with Plaintiff and the other Class members.

64. As the foreseeable and actual result of Defendant's breach of express warranty, Plaintiff and the other Class members were damaged in an amount that is the difference between the value of an instant oatmeal product containing maple and the Products Plaintiff and the other Class members actually received.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, respectfully requests that the Court enter judgment in his favor and against Defendant as follows:

- A. Certifying the Class under Federal Rule of Civil Procedure 23, as requested herein;
- B. Appointing Plaintiff as Class Representative and undersigned counsel as Class Counsel;
- C. Finding that Defendant engaged in the unlawful conduct as alleged herein;
- D. Awarding Plaintiff and the other Class members actual, compensatory, and consequential damages;
- E. Awarding Plaintiff and the other Class members statutory damages;
- F. Awarding Plaintiff and the other Class members declaratory and injunctive relief;
- G. Awarding Plaintiff and the other Class members restitution and disgorgement;
- H. Awarding Plaintiff and the other Class members exemplary damages, should the finder of fact determine that Defendant acted with malice or oppression;
- I. Awarding Plaintiff and the other Class members reasonable attorneys' fees, costs, and expenses; and

J. Granting such other relief as the Court deems just and appropriate.

JURY TRIAL DEMAND

Plaintiff, individually and on behalf of all others similarly situated, hereby requests a jury trial, pursuant to Federal Rule of Civil Procedure 38, on all claims so triable.

DATED: June 14, 2016

Respectfully submitted,

s/ Erich P. Schork

Ben Barnow
Erich P. Schork
Jeffrey D. Blake
Anthony L. Parkhill
Barnow and Associates, P.C.
One North LaSalle Street, Suite 4600
Chicago, Illinois 60602
(312) 621-2000 (p)
(312) 641-5504 (f)
b.barnow@barnowlaw.com
e.schork@barnowlaw.com
j.blake@barnowlaw.com
aparkhill@barnowlaw.com

Timothy G. Blood
Blood Hurst & O'Reardon, LLP
600 B Street, Suite 1550
San Diego, CA 92101
(619) 338-1100
tblood@bholaw.com

Aron D. Robinson
Law Office of Aron D. Robinson
180 West Washington Street, Suite 700
Chicago, Illinois 60602
(312) 857-9050 (p)
Adroblaw@aol.com

Plaintiff's Counsel

David Markham
Peggy J. Reali
The Markham Law Firm
750 B Street, Suite 1950
San Diego, CA 92101
(619) 399-3995 (p)
(619) 615-2067 (f)
dmarkham@markham-law.com
preali@markham-law.com

Patrick N. Keegan
James M. Treglio
Keegan & Baker, LLP
6156 Innovation Way
Carlsbad, CA 92009
(760) 929-9303 (p)
(760) 929-9260 (f)
pkeegan@keeganbaker.com
jtreglio@keeganbaker.com

Walter L. Haines
United Employees Law Group, P.C.
5500 Bolsa Ave., Ste. 201
Huntington Beach, CA 92649
888-474-7242 (p)
866-435-7471 (f)

Of Counsel