

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

THE NATIONAL CONSUMERS)	
LEAGUE,)	
)	
Plaintiff,)	Case No. 2013 CA 006550 B
)	
v.)	
)	
FLOWERS BAKERIES, LLC,)	
)	
Defendant.)	
_____)	

FIRST AMENDED COMPLAINT

Plaintiff, the National Consumers League (“Plaintiff”), by and through its counsel, brings this action against Defendant Flowers Bakeries, LLC (“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 Nature’s Own Honey Wheat Bread, Home Pride Butter Top Wheat Bread, and Whitewheat® Brand Bread and Buns.

2. Specifically, Defendant deceives D.C. consumers into believing its Whitewheat® Brand Bread and Hot Dog and Hamburger buns actually contain the specialty grain known as “white wheat”—a grain in increasingly high demand from consumers. In fact, Defendants’ Whitewheat bread and buns have no “white wheat” and consist primarily of ordinary refined wheat flour, also known as “wheat flour,” or “enriched wheat flour.” In other words, these

Whitewhat Brand breads are no different from basic white breads in terms of their whole grain content.

3. In addition, Defendant deceives consumers into believing the Nature's Own Honey Wheat Bread and Home Pride Butter Top 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 amounts of whole grain.

4. Defendant deceives D.C. consumers into believing the breads referenced herein contain significant amounts of whole grain. But unlike the breads sold in D.C. by many of Defendant's competitors, which do in fact contain significant amounts of whole grain, Defendant's breads do not.

5. 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, *inter alia*, an order requiring the cessation of the unlawful marketing alleged herein and corrective advertising, and attorneys' fees and costs of this suit.

JURISDICTION

6. 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).

7. 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.

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

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

PARTIES

10. 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.

11. Plaintiff focuses its advocacy on consumer protection, including efforts to promote accurate labeling and branding of food products. Plaintiff has purchased (a) Nature's Own Whitewheat Bread (b) Nature's Own Honey Wheat Bread (c) Nature's Own Honey Wheat Specialty Bread, and (d) Home Pride Butter Top Wheat Bread.

12. Defendant is Flowers Bakeries, LLC, with corporate headquarters located at 1919 Flowers Circle, Thomasville, GA 31757-1137.

THE INTERESTS OF NCL & THE GENERAL PUBLIC

13. Defendant deceptively marketed its Whitewheat Brand Bread and Buns to District of Columbia residents by fostering the false impression that they contain the grain known as white wheat, when, in fact, they contain none.

14. Defendant deceptively marketed its Nature's Own Honey Wheat Breads and Home Pride Butter Top Wheat Bread to District of Columbia residents by fostering the false impression that they contained substantial amounts of whole wheat.

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

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

17. The NCL has worked diligently to promote accurate labeling and branding 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. Whitewheat

18. “White wheat “is a term that refers to albino wheat and is a whole grain that is lighter in color and milder in flavor than traditional whole wheat. Experts consider white wheat and traditional whole wheat to be nutritionally the same.¹



19. Defendant’s “Whitewheat” brand is designed to capitalize on consumers’ growing demand for true white wheat products. Such “white wheat” products are now being marketed to consumers who do not like the taste or appearance of darker whole grain bread.

20. A Wichita State University study compared hamburger buns made from whole white wheat, “regular” whole wheat, and refined wheat. Overall, people preferred whole white

¹ E.g. <http://wholegrainscouncil.org/whole-grains-101/whole-white-wheat-faq> (explaining that white wheat is akin to “albino wheat”); see also Milling & Baking News, p. 6 (February 21, 2012) (advertisement for Cargill’s “Horizon Milling’s WheatSelect® white spring whole wheat flour).

wheat bread over the two alternatives. More than half of respondents said that they would purchase the whole white wheat buns, versus 46% for the “regular” whole wheat and 40% for the refined wheat buns.²

21. Research is still ongoing for consumer preference of whole white wheat, but the growing number of whole white wheat products on the market speaks to the growing consumer demand for the milder, sweeter taste of white wheat over traditional whole grain wheat products.

22. The following products are examples of white breads actually made with whole white wheat flour: Schmidt Old Tyme 100% Whole Grain Made With White Wheat, and Safeway Made with Whole Grain White Bread.

23. Defendant’s Whitewheat Brand Bread actually contains:

Unbleached enriched flour (wheat flour, malted barley flour, niacin, reduced iron, thiamin mononitrate, riboflavin, folic acid), water, sugar, wheat gluten, fiber (contains one or more of the following: soy, oat, cottonseed, or cellulose), yeast, contains 2% or less of each of the following: calcium sulfate, soy flour, salt, calcium carbonate, soybean oil, cultured wheat flour, calcium carbonate dough conditioners (contains one or more of the following: sodium stearoyl lactylate, calcium stearoyl lactylate, monoglycerides, mono- and diglycerides, distilled monoglycerides, calcium peroxide, calcium iodate, datem, ethoxylated mono- and diglycerides, enzymes, ascorbic acid), vinegar, guar gum, citric acid, monocalcium phosphate, sodium citrate, soy lecithin, niacin, iron (ferrous sulfate), thiamine hydrochloride, riboflavin, folic acid, ammonium sulfate, natamycin (to retard spoilage).

24. As is clear from the above, Defendant’s “Whitewheat Bread” contains neither white wheat nor any whole wheat at all.

25. Reasonable consumers purchase Whitewheat bread and buns with the understanding that they contain white wheat, based on the prominent Whitewheat name featured on Defendant’s packaging. In fact, the breads have none.

² <http://wholegrainscouncil.org/whole-grains-101/whole-white-wheat-faq> (“Is There Any Hard Data on Consumer Preferences For Whole White Wheat?”).

26. Defendant calls its ordinary white bread “Whitewheat” in an attempt to confuse consumers who associate white wheat with the lighter variety of whole wheat called “white wheat.”

27. Defendant further fosters this confusion by referring to its Whitewheat bread as a “healthy white” bread.

B. Nature’s Own & Nature’s Own

28. Via use of the product name Nature’s Own Honey Wheat, combined with the depiction of sheaves of wheat and a claim that “[A] slice or two of this bread each day is a delicious way to add healthy grains to your diet,” Defendant conveys to reasonable consumers that the bread contains a significant amount of whole grain wheat.



29. But, there is a minimal amount of whole grain in the bread.

30. Indeed, based on the ingredients (which are listed on the product package in descending order of predominance by weight), there is actually *more sugar and honey* in the Honey Wheat bread than any whole wheat:

Unbleached enriched flour (wheat flour, malted barley flour, niacin, reduced iron, thiamin mononitrate, riboflavin, folic acid), water, honey, sugar, wheat gluten, whole wheat flour, rye flour, wheat bran, contains 2% or less of each of the following: yeast, soy flour, salt, soybean oil, dough conditioners (contains one or more of the following: sodium stearoyl lactylate, calcium stearoyl lactylate, monoglycerides, mono-and

diglycerides, distilled monoglycerides, calcium peroxide, calcium iodate, datem, ethoxylated mono- and diglycerides) enzymes, ascorbic acid), cultured wheat flour, vinegar, calcium sulfate, yeast food (ammonium sulfate), monocalcium phosphate, soy lecithin, calcium carbonate.³

31. Defendant knowingly exploits the product name “Honey Wheat” to deceive consumers into believing its Nature’s Own bread contains significant amounts of whole grain.

32. Indeed, Defendant uses the very same name, “Honey Wheat,” to describe a different bread, which is part of its “Premium Specialty” line—a *bread that actually does contain significant amounts of whole grain*:



33. In an apparent comparison to the other “Honey Wheat” bread that it sells (the Nature’s Own Honey Wheat bread that is one of the subjects of this lawsuit), Defendant states: “Nature’s Own Honey Wheat Specialty Bread offers *the same perfect blend of wholesome wheat sweetened with honey, but with a heartier texture and more whole grain per slice.*”⁴

³ Since the filing of the initial Complaint, Nature’s Own has removed the controversial dough conditioner azodicarbonamide from the product.

⁴ <http://www.naturesownbread.com/products/PremiumSpecialty/HoneyWheatSpecialBread/>.

34. Next, via use of the product name, Home Pride Wheat bread, and the statement that “[e]ating Grains, *especially whole grains*, as part of a healthy diet can help reduce the risk of chronic diseases such as diabetes, heart disease, some cancers, and obesity. And if you’re trying to slim down, *studies show that adding whole grains can help maintain a healthier body weight*” (emphasis added), Defendant conveys to reasonable consumers that the bread contains a significant amount of whole grain wheat.

35. The Home Pride Butter Top Wheat bread is part of the same product line as Home Pride Butter Top White Bread:



36. As the ingredient list for the Butter Top Wheat bread demonstrates, *there is actually more high fructose corn syrup and yeast than whole wheat* in the bread:

Unbleached enriched flour (wheat flour, malted barley flour, niacin, reduced iron, thiamin mononitrate, riboflavin, folic acid), water, high fructose corn syrup, yeast, whole wheat flour, rye flour, wheat bran, wheat gluten, molasses, contains 2% or less of each of the following: salt, butter (made from milk), soybean oil, cultured wheat flour, vinegar, honey, dough conditioners, (contains one or more of the following: sodium stearoyl lactylate, calcium stearoyl lactylate, monoglycerides, mono-and diglycerides, distilled monoglycerides, calcium peroxide, calcium iodate, datem, ethoxylated mono-and diglycerides, azodicarbonamide, enzymes, ascorbic acid), monocalcium phosphate,

wheat starch, soy lecithin, soy flour, calcium carbonate, ammonium sulfate, calcium sulfate.

37. Defendant attempts to differentiate the Home Pride Butter Top White and Wheat breads based on color, label, and package color, thereby indicating to reasonable consumers that the Home Pride Butter top Wheat bread is different as it contains significant amounts of whole grain. Both products, however, are essentially white breads.

38. Defendant deceives consumers by passing non-whole grain Nature's Own and Home Pride "wheat" breads off 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, Stroehmann's Wheat Made with Whole Grain; and Pepperidge Farm Light Style Soft Wheat.

39. As another example, the primary ingredient in Pepperidge Farm's Whole Grain Honey Wheat bread is whole wheat flour.⁵

40. Reasonable D.C. consumers purchase Nature's Own Honey Wheat and Home Pride Butter Top Wheat breads, based on label representations, with the belief that the breads contain substantial amounts of whole wheat.

41. In fact, the Nature's Own Honey Wheat has more honey and sugar than whole wheat, and Home Pride Bread has more yeast than whole wheat.

42. 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 names.

⁵ See <http://www.pepperidgefarm.com/ProductDetail.aspx?catID=750>

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

44. For example, in one study, consumers overestimated the amount of whole wheat in a product when shown packages that emphasized the word “wheat.”⁶

45. A consumer survey specifically regarding Home Pride Butter Top Wheat Bread found that 61% of consumers “mistakenly believed that at least half the grain in that product would be whole grain.”⁷

46. The last several years have seen a sustained upward trend in demand for whole grains.⁸

47. A survey of grocery shoppers found that whole grains and multigrain were the two product types experiencing the greatest growth in consumer demand.⁹

48. Nutritionists advise adults to eat several servings of whole grain each day.¹⁰

49. Since 2005, the Dietary Guidelines for Americans have advised consumers to “make at least half your grains whole.”¹¹

50. Defendant’s Nature’s Own website touts the importance of whole grains: “Amazingly most Americans barely eat 1 serving of whole grains a day.”

⁶ <http://wholegrainscouncil.org/newsroom/blog/2012/02/abc-news-on-whole-grain-labeling>. The article references a national public opinion study conducted for the Center for Science in the Public Interest, and submitted to the Food & Drug Administration on February 2, 2012, which indicates that consumers overestimated the amount of whole wheat in a product when shown packages that emphasized the word “wheat.” See also Milling & Baking News, Nutrition and Health, p. 48 (Feb. 21, 2012).

⁷ See http://wholegrainscouncil.org/files/CSPI_wgclaimsPR.pdf.

⁸ See <http://wholegrainscouncil.org/newsroom/whole-grain-statistics>.

⁹ See <http://wholegrainscouncil.org/newsroom/whole-grain-statistics>.

¹⁰ USDA, Dietary Guidelines for Americans 2010 at 36, available at www.dietaryguidelines.gov

¹¹ Make Half Your Grains Whole Conference Report, NPD Group April 2009; available at <http://wholegrainscouncil.org/files/3.AreWeThereYet.pdf>.

51. 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.

52. For example, in a February 10, 2012 conference call with investment analysts, George E. Deese, Flowers' chairman and chief executive officer stated: "For the fourth consecutive quarter, the [Direct-Store-Delivery] segment achieved improved volume trends, reflecting the strength of the Nature's Own brand and continued growth in new markets, *which offset lower sales of regional white breads.*" (emphasis added).¹²

53. 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

54. Following this advice, Flowers 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.

55. Flowers 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

56. 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

¹² See <http://www.flowersfoods.com/mobile/news.cfm?releaseID=1659304>.

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

¹⁴ *Id.* at 32.

provide at least 8 grams of whole grains per ounce-equivalent,¹⁵ supermarket aisles became flooded with products boasting the presence of whole grains, and restaurants and sandwich shops also began featuring whole grain products.¹⁶

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

58. The company website's "Nutrition Center" focuses on the importance of consuming whole grains, noting that: "Amazingly most Americans barely eat 1 serving of whole grains a day."

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

CAUSE OF ACTION

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

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

61. 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).

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

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>

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

63. 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).

64. 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:

(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.

65. Defendant violated these provisions by, *inter alia*, intentionally representing that its Nature’s Own Honey Wheat and Home Pride Butter Top Wheat contain significant amounts of whole wheat when in fact there is a minimal amount of whole wheat in the Honey Wheat or Butter Top Wheat breads, and by intentionally representing that its Whitewheat breads and buns contain “white wheat”, when in fact there is none.

66. Defendant violated these provisions by the use of innuendo or ambiguity to create a false impression that a) its Nature’s Own Honey Wheat bread had an amount of whole grains similar to its “specialty” Nature’s Own Honey Wheat bread; and b) its Home Pride Butter Top Wheat bread had significantly more whole grain and was otherwise superior to the Home Pride Butter Top White enriched white bread.

67. Defendant knew or should have known that consumers would consider its largely refined Honey Wheat, Whitewheat bread and rolls and Butter Top Wheat breads to contain substantial amounts of whole wheat and/or whole white wheat.

68. Defendant knew or should have known that consumers would consider its largely refined Nature's Own Honey Wheat, Whitewheat bread and buns and Home Pride Butter Top Wheat bread to contain a substantial amount of whole wheat and/or white wheat.

69. Defendant knew or should have known of the likelihood of confusion between its Whitewheat bread that contains no whole wheat or white wheat and other white wheat breads on the market.

70. Defendant knew or should have known of the likelihood of confusion between its Nature's Own Honey Wheat bread, which has a minimal amount of whole wheat and its Nature's Own Specialty Honey Wheat bread, which is composed primarily of whole wheat.

71. 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: June 28, 2014

REZVANI VOLIN P.C.

/s/ Tracy D. Rezvani

By: _____
Tracy D. Rezvani (Bar No. 464293)
1050 Connecticut Avenue, N.W.
Tenth Floor
Washington, D.C. 20036
Phone: (202) 350-4270 x101
Fax: (202) 351-0544
trezvani@rvrlegal.com

Jonathan K. Tycko (Bar No. 445851)
Jeffrey D. Kalief (Bar No. 983578)
Andrew J. Silver (Bar No. 1017462)
Tycko & Zavareei, LLP
2000 L Street NW, Suite 808
Washington, D.C. 20036
Phone: (202) 973-0900
Fax: (202) 973-0950
jytcko@tzlegal.com
jkaliel@tzlegal.com
asilver@tzlegal.com

*Counsel for Plaintiff the National
Consumers League*

CERTIFICATE OF SERVICE

I hereby certify that, on June 28, 2014, the foregoing First Amended Complaint was served on all counsel of record electronically via the CaseFileXpress system.

By: /s/ Tracy Rezvani