

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

THE NATIONAL CONSUMERS LEAGUE)
1701 K Street, #1200, NW,)
Washington, District of Columbia 20006)

Plaintiff,)
v.)

Civil Action No. ~~005211-00~~

KELLOGG COMPANY,)
One Kellogg Square)
P.O. Box 3599)
Battle Creek, Michigan 49016)

Defendant.)

FILED
CIVIL ACTIONS BRANCH
JUL 22 2009
SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
WASHINGTON, DC

Plaintiff, the National Consumers League by its undersigned attorneys, brings this action on behalf of the General Public of the District of Columbia against Kellogg Company, and its wholly owned subsidiaries ("Defendant"), and alleges the following:

INTRODUCTION

1. This action is brought by Plaintiff on behalf of the General Public of the District of Columbia pursuant to District of Columbia Code §28-3905(k)(1). Plaintiff National Consumers League is a non-profit organization located in the District of Columbia.

2. Defendant falsely represented to consumers, through marketing and advertising campaigns, that its Frosted Mini-Wheats® breakfast cereal product improved children's attentiveness by 20% when it did not. Defendant touted such false product attributes in order to induce parents into purchasing Frosted Mini-Wheats® for their children. The D.C. Public was damaged by Defendant's misrepresentations.

Case: 2009 CA 005211 B
0035342234
DK4: CABCONF

JURISDICTION AND VENUE

3. Jurisdiction of this Court is founded on D.C. Code § 11-921. This Complaint arises under the District of Columbia Consumer Protection Procedures Act, D.C. Code § 28-3901 *et seq.* and the Court, therefore, has subject matter jurisdiction thereunder.

4. Venue is proper in this District. The claims asserted in this complaint arise, in part, within this District. Plaintiff resides in this District and seeks to represent residents of this District who have purchased Kellogg's® Frosted Mini-Wheats® cereal from the Defendant. Many of these transactions occurred in retail stores located in this District. Defendant transacts business in this District and has caused injury within this District.

5. As a result of the facts alleged in this Complaint, this Court has personal jurisdiction over the Defendant. The Defendant sells and markets its products to stores and consumers in the District of Columbia. The Defendant has transacted business in the District of Columbia; caused tortious injury in the District of Columbia via acts or omissions occurring therein; and derived substantial revenue from products sold in the District of Columbia.

PARTIES

6. Plaintiff, National Consumers League, is a non-profit, 501(c)(3) organization located in the District of Columbia at 1701 K Street, #1200, NW, Washington, District of Columbia 20006. Plaintiff has not purchased Kellogg's® Frosted Mini-Wheats® cereal, but brings this action as a private attorney general on behalf of the General Public of the District of Columbia pursuant to District of Columbia Code § 28-3905(k)(1).

7. Defendant Kellogg Company ("Kellogg") is incorporated under the laws of the State of Delaware and with its principal office or place of business at One Kellogg Square, P.O. Box 3599, Battle Creek, Michigan 49016. In 2007, Defendant was the largest cereal company in

the US with a market share of over 34%. With revenues of \$12.8 billion in 2008, Defendant was also the largest cereal company in the world. Approximately \$3.2 billion of that total is attributable to Defendant Kellogg's net cereal sales.

THE INTERESTS OF THE GENERAL PUBLIC

8. Defendant Kellogg marketed its Frosted Mini-Wheats® to District of Columbia residents with false representations that the cereal would improve children's attentiveness by 20%.

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

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

FACTUAL BACKGROUND

11. Defendant began selling its breakfast cereal, Frosted Mini-Wheats®, in the 1970s. Frosted Mini-Wheats come in a number of varieties: Bite Size Frosted Mini-Wheats, Bite Size Frosted Blueberry Muffin, Bite Size Frosted Cinnamon Streusel, Bite Size Frosted Chocolate, Bite Size Frosted Maple & Brown Sugar, Bite Size Frosted Strawberry Delight, Bite Size Frosted Vanilla Crème, Frosted Mini-Wheats Big Bite, Unfrosted Mini-Wheats, Little Bites Chocolate, Little Bites Honey Nut. The price of Frosted Mini-Wheats® ranges from approximately \$3 to \$5 a box.

12. At least since January 2008, Defendant has represented in various advertisements and commercials that "[a] clinical study showed kids who had a filling breakfast of Frosted Mini-Wheats® cereal improved their attentiveness by nearly 20 percent" when compared to kids who ate no breakfast. However, in the clinical study referred to in Defendant's advertisements,

only about half the kids who ate Frosted Mini-Wheats® cereal showed any improvement after three hours as compared to their pre-breakfast baseline. In fact, kids in the clinical study who ate Frosted Mini-Wheats® had an average of 10.6% better attentiveness three hours later than kids who had skipped breakfast. Indeed, relatively few kids – only approximately one in nine -- experienced 20% improved attentiveness in the study, and only one in seven kids who ate the cereal improved their attentiveness by 18%.

13. Defendant made similar claims on the top of the front and back panels of Frosted Mini-Wheats® cereal boxes:

“Clinically Shown to improve kids’ Attentiveness by nearly ... 20%*”

14. Defendant modified that statement with small type at the bottom of the back panel of Frosted Mini-Wheats® boxes which state the following:

Based upon independent clinical research, kids who ate Kellogg’s® Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit www.frostedminiwheats.com

15. In several television advertisements, the announcers stated: “A clinical study showed kids who had a filling breakfast of Frosted Mini-Wheats® cereal improved their attentiveness by nearly 20 percent.” Then Defendant flashed small font across the screen with the same modifying language found in ¶ 14’s block quote.

14. The Defendant’s website, www.mini-wheats.com included claims stating: “A breakfast of Frosted Mini-Wheats® is clinically shown to improve kids’ attentiveness by nearly 20%.*” The asterisk refers the reader to small font that contains the same language found in ¶ 14’s block quote.

15. Defendant’s website further advertised:

This is Mini™, reporting from an event that has captured our attention. A team of kids are attempting to show that a breakfast of Kellogg's® Frosted Mini-Wheats® cereal can help keep them attentive all morning long.

It was apparent from the first test that the Frosted Mini-Wheats® team's attentiveness was strong. And as the morning progressed, it didn't waiver [sic].

In the end, a round of enthusiastic cheers could be heard coming from the moms' viewing section as the 8-layers of whole grain fiber in Frosted Mini-Wheats® cereal proved to improve kids' attentiveness by nearly 20%*!

16. Defendant sponsored an advertisement on Google.com, causing a search for "frosted mini-wheats" to result in the display of the following link:

Frosted Mini Wheats®

www.mini-wheats.com Frosted Mini-Wheats® has clinically improved kids' attentiveness by 20%"

17. Defendant also posted its ubiquitous 20% improved attentiveness claim on milk carton labels.

18. Defendant further attempted to influence parents with the following print advertisement:

Does your child need to pay more attention in school? Use the following tips to help keep your little ones ahead of the class:
* * *

Start the Day with Breakfast. Kids need an energy boost after a long night's sleep. A recent clinical study showed that a whole grain and fiber-filled breakfast of Frosted Mini-Wheats helps improve children's attentiveness by nearly 20%.*

19. Defendant also lured parents with a press release on March 12, 2008, entitled: "HELP YOUR KIDS EARN AN "A" FOR ATTENTIVENESS WITH A BOWL OF FROSTED

MINI-WHEATS® CEREAL FOR BREAKFAST; Eating a Bowl May Increase Attentiveness by Nearly 20 Percent.” The press release stated:

Today’s parents are going to great lengths to help their kids do their best in school. They sign them up for tutoring services, buy special learning software and pack their schedules with enrichment activities. While all of these things are great, it’s important that parents not neglect one of the simplest ways to help ensure their kids do their best – a healthy breakfast.

A recent study commissioned by Kellogg helps demonstrate how eating a healthy, nutritious breakfast can help kids stay full and avoid the distraction of mid-morning hunger to help them do their best in school. The study, conducted by an independent research group, shows that eating a breakfast of **Frosted Mini-Wheats®** cereal helped improve kids’ attentiveness by nearly 20 percent.*

* * *

Keeping ‘Em Full and Focused

Kellogg recently commissioned research to measure the effect on kids of eating a breakfast of **Frosted Mini-Wheats®** cereal. An Independent research group conducted a series of standardized, cognitive tests on children ages 8 to 12 who ate either a breakfast of **Frosted Mini-Wheats®** cereal or water. The result? The children who ate a breakfast of **Frosted Mini-Wheats®** cereal had a nearly 20% improvement in attentiveness.

* Based upon independent clinical research, kids who ate Kellogg’s® Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit www.frostedminiwheats.com.

20. On April 20, 2009, the Federal Trade Commission (“FTC”) published a Complaint against Kellogg Company for falsely claiming “that eating a bowl of Kellogg’s® Frosted Mini-Wheats® cereal for breakfast is clinically shown to improve kids’ attentiveness by nearly 20%.” See FTC Complaint No. 082 3145 (attached hereto as Exhibit A).

21. The FTC found: “[i]n truth and in fact, eating a bowl of Kellogg’s® Frosted Mini-Wheats® cereal for breakfast is not clinically shown to improve kids’ attentiveness by

nearly 20%”. The FTC Complaint alleges that, in fact, according to the clinical study referred to in Kellogg’s advertising, only about half the children who ate Frosted Mini-Wheats® for breakfast showed any improvement in attentiveness, and only about one in nine improved by 20 percent or more.

22. The FTC Complaint also alleged that Kellogg had represented that “eating a bowl of Kellogg’s® Frosted Mini-Wheats® cereal for breakfast is clinically shown to improve kids’ attentiveness by nearly 20% compared to kids who ate no breakfast.”

23. The FTC found: “[i]n truth and in fact, eating a bowl of Kellogg’s® Frosted Mini-Wheats® cereal for breakfast is not clinically shown to improve kids’ attentiveness by nearly 20% compared to kids who ate no breakfast.” The FTC further stated that the study on which Defendant relied on in its advertisements only showed that “kids who ate Frosted Mini-Wheats® had an average of 10.6% better attentiveness three hours later than kids who had skipped breakfast,” and, moreover, that “relatively few kids experienced better attentiveness near the 20% level.”

24. The FTC’s Complaint charged Defendant with engaging in “unfair or deceptive acts or practices” and “false advertising” in violation of the Federal Trade Commission Act (“FTCA”).

25. Contemporaneously with the publication of its Complaint against Kellogg, the FTC also published a settlement agreement entered into by Kellogg and the FTC. The settlement provided for the cessation of Kellogg’s false advertising regarding attentiveness improvements. However, the settlement does not provide any relief for the defrauded purchasers of Kellogg’s® Frosted Mini-Wheats®.

26. Currently, Defendant's website boasts that eating Kellogg's Frosted Mini-Wheats promotes: "Better Attentiveness: A clinical study showed kids who ate a filling breakfast of KELLOGG'S® FROSTED MINI-WHEATS® cereal had 11% better attentiveness compared to kids who missed out on breakfast." See <http://www.frostedminiwheats.com/study-hall>, available as of July 15, 2009.

27. Defendant knew, or should have known, that its statements misrepresented the clinical studies and that Frosted Mini-Wheats® did not have the purported affect on children's attentiveness.

28. Defendant's deceptive advertising had a material effect on purchasers of Kellogg's® Frosted Mini-Wheats®. As a result of Defendant's deceptive advertising, as set forth herein, members of the D.C. Public have been damaged.

COUNT I
(Violation of the District of Columbia Consumer Protection Procedures Act)

29. 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).

30. 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;
- (d) 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;
- (u) represent that the subject of a transaction has been supplied in accordance with a previous representation when it has not;

31. In marketing its Frosted Mini-Wheats®, Kellogg violated the above provisions of the District of Columbia Consumer Procedures Protection Act by, *inter alia*, falsely misrepresenting that eating a bowl of Kellogg's ® Frosted Mini-Wheats® cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20%.

32. Plaintiff, on behalf of the General Public of the District of Columbia, hereby seeks treble damages or statutory damages in the amount of \$1,500 per violation, whichever is greater, pursuant to D.C. Code § 28-3905(k)(1). Plaintiff and the General Public of the District of Columbia further seek reasonable attorneys' fees and costs plus interest.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against the Defendant, and in favor of Plaintiff and the D.C. 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;
- c) granting Plaintiff and the General Public of the District of Columbia 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

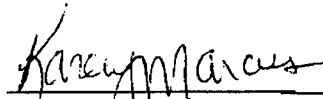
e) granting such other relief as this Court may deem just and proper.

JURY TRIAL DEMANDED

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

DATED: July 22nd, 2009.

FINKELSTEIN THOMPSON LLP



Donald J. Enright (#463007)

Karen J. Marcus (# 486435)

The Duvall Foundry

1050 30th Street, NW

Washington, DC 20007

(202) 337-8000

(202) 337-8090 fax

denright@finkelsteinthompson.com

kmarcus@finkelsteinthompson.com

Counsel for Plaintiff National Consumers League