

IN THE CIRCUIT COURT OF COOK COUNTY
STATE OF ILLINOIS
CHANCERY DIVISION

MIGUEL ALEJANDRO,)
FAUSTO FERNOS,)
each individually and on behalf of all)
others similarly situated,)
Plaintiffs,)
v.)
MARS WRIGLEY CONFECTIONERY US, LLC,)
Defendant.)

Case No.

Judge:

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiffs Miguel Alejandro and Fausto Fernos (hereinafter “Plaintiff Alejandro,” “Plaintiff Fernos,” or, collectively, “Plaintiffs”), individually and on behalf of all others similarly situated, by and through their undersigned counsel, upon personal knowledge as to themselves and their own acts, and upon information and belief as to all other matters, including the investigation of their Counsel, bring this Class Action Complaint against Mars Wrigley Confectionery US, LLC, (hereinafter “Mars” or “Defendant”). Plaintiffs allege as follows:

INTRODUCTION

1. This is a consumer class action brought on behalf of consumers who purchased Defendant’s Snicker’s Protein Bars (hereinafter the “Snicker’s Protein Bars”).
2. Defendant has engaged in unfair and/or deceptive business practices by misrepresenting the nature and quality of its Snickers Protein Bars and has been unjustly enriched at the expense of Illinois consumers, including Plaintiffs.

3. Defendant makes false and misleading claims on the labels of its Snickers Protein Bars.

4. Additionally, Defendant does not comply with federal and parallel state regulations regarding the testing methodology of its protein content and daily value percentage, making the Snickers Protein Bar's protein content claims false and misleading.

5. Plaintiffs and each of the Class members suffered an injury in fact caused by the false, fraudulent, unfair, deceptive, and misleading practices set forth herein, and seek compensatory and other damages provided by relevant statute or common law.

PARTIES, JURISDICTION, AND VENUE

6. Plaintiff Miguel Alejandro is an individual citizen of the State of Illinois. Plaintiff Alejandro resides in Lake County, Illinois. At relevant times, Plaintiff Alejandro purchased the Snickers Protein Bar on or about April 2015 to February 2018 at a Walmart, Jewel, and Walgreens in Waukegan, Illinois.

7. Plaintiff Fausto Fernos is an individual citizen of the State of Illinois. Plaintiff Fernos resides in Cook County, Illinois. Plaintiff Fernos purchased the Snickers Protein Bar on or about March 2017 at a CVS in Evanston, Illinois.

8. Defendant Mars Wrigley Confectionery US, LLC is a Delaware corporation with a principal place of business at 100 International Drive, Mt. Olive, NH 07828. Defendant may be served through its registered agent, C T Corporation System, 208 South LaSalle Street, Suite 814, Chicago, Illinois 60604.

9. This Court has personal jurisdiction over Defendant because Defendant conducts business in Illinois. Defendant has distributed and sold the Snickers Protein Bars in Illinois. Defendant has sufficient minimum contacts with the State of Illinois, and/or sufficiently avails

itself to the markets of this State through its sales and distribution of products within this State to render the exercise of jurisdiction by the Court permissible.

10. Venue is proper in this Court pursuant to 735 ILCS 5/2-102(a) as Defendant's registered office is located in Cook County, Illinois at 208 South LaSalle Street, Suite 814, Chicago, Illinois 60604.

GENERAL ALLEGATIONS

11. Whey is a complete protein source, meaning it contains all the essential amino acids needed to build protein-based compounds such as muscle tissue, skin, fingernails, hair and enzymes. It is especially rich in branched-chain amino acids – leucine, isoleucine, and valine – which are metabolized directly within the muscles (as opposed to being processed in the liver first).

12. Sales of whey protein products are expected to grow 62% and reach U.S. \$7.8 billion by 2018.¹ However, due to the high level of competition in the market and the escalating price of wholesale whey protein, sellers' profit margins are slim.

13. Defendant designed, manufactured, warranted, advertised, and sold the Snickers Protein Bars throughout the United States, including the State of Illinois, and continues to do so.

14. The Snickers Protein Bars contain collagen protein – protein that is not the same quality as whey protein, or even casein.

15. Collagen protein is not a complete protein with all of the essential amino acids the body needs.

16. In short, collagen protein is an inferior protein.

¹ *Consumer Awareness Strengthens Sports Nutrition Market*, NATURAL PRODUCTS INSIDER (Oct. 16, 2014), <http://www.naturalproductsinsider.com/News/2014/10/Consumer-Awareness-Strengthens-Sports-Nutrition-M.aspx>. (last visited March 29, 2018).

17. The Food, Drug, and Cosmetic Act (hereinafter the “FDCA”) requires a more sophisticated form of protein testing for products that make a “protein claim” – a value of protein content made on the front of a product label.

18. This testing methodology is called the Protein Digestibility Amino Acid Corrected Score (hereinafter “PDCAAS”), which measures the quality of the protein contained in a product.

19. The PDCAAS has been adopted by the Food and Agriculture Organization of the United Nations and the World Health Organization as the preferred method for the measurement of the protein value in human nutrition, and directly referenced in the FDCA.

20. The PDCAAS calculation referenced under the FDCA is:

$$PDCAAS (\%) = \frac{\text{mg of limiting amino acid in 1 g of test protein}}{\text{mg of same amino acid in 1 g of reference protein}} \times \text{fecal true digestibility (\%)} \times 100$$

21. The PDCAAS method does not simply calculate protein by nitrogen, as Defendant would like, but rather by this equation, which requires the manufacturer to determine the amount of essential amino acids contained within a product.

22. This testing method ensures that consumers are being informed about the “quality” of the protein that a product actually has.

23. Despite having knowledge that miscalculating the Daily Value Percentage (hereinafter “% DV”) of protein and under-dosing the protein content is misleading to consumers, Defendant continues to advertise, distribute, label, manufacture, market, and sell the Snickers Protein Bars in a misleading and deceptive manner in order to increase its sales and maximize profits.

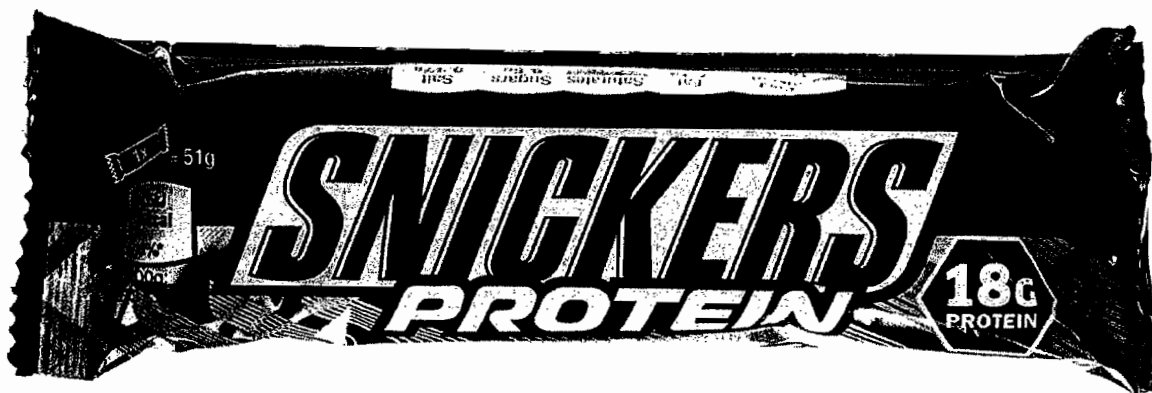
24. Accordingly, Defendant’s consumers pay an inflated price for the Snickers Protein Bars, which deliver less actual and quality protein than they reasonably expect to receive.

DEFENDANT'S FALSE CLAIMS OF PROTEIN CONTENT AND DAILY VALUE PERCENTAGE OF PROTEIN

25. The United States Food and Drug Administration (the "FDA") has published "A Food Labeling Guide, Guidance for the Industry," a food labeling guide that specifically addresses nutrition labeling when protein claims are made. According to the FDA:

[t]he percent of the DRV is required if a protein claim is made for the product or if the product is represented or purported to be for use by infants or children under 4 years of age. Based on current scientific evidence that protein intake is not a public health concern for adults and children over 4 years of age, and because of the costs associated with a determination of the Protein Digestibility Corrected Amino Acid Score (PDCAAS), FDA has determined that declaration of the percent of the DRV for protein need not be provided when a claim is not made."

26. The Snickers Protein Bars have protein claims on the front packaging – "18G PROTEIN" – and therefore are required to have the percentage of the Daily Reference Value (hereinafter "DRV") listed in the Nutritional Facts section:



27. Upon information and belief, for some of his purchases, in the Nutritional Facts section of the Snickers Protein Bars purchased by Plaintiff Alejandro, there was no DRV for protein, in violation of Federal and State law.

28. Additionally, upon information and belief, for some of his purchases, in the Nutritional Facts section of the Snickers Protein Bars purchased by Plaintiff Alejandro, there was

an incorrectly calculated DRV for protein, which was artificially and misleadingly elevated, as Defendant did not provide results from the PDCAAS testing method, in violation of Federal and State law.

29. In the Nutritional Facts section of the Snickers Protein Bars purchased by Plaintiff Fernos, there was, upon information and belief, no DRV for protein, in violation of Federal and State law.

30. In the alternative, if there was a DRV for protein listed on the Nutritional Facts label of the Snickers Protein Bars purchased by Plaintiff Fernos, it was incorrectly stated as 36%, which was artificially inflated and was misleadingly elevated, and was not a reflection of the PDCAAS testing method, in violation of Federal and State law.

31. The PDCAAS measures protein quality based on human essential amino acid requirements and our ability to digest it.

32. The PDCAAS test protein is compared to a standard amino acid profile and is given a score from 0 – 1.0, with a score of 1.0 indicating maximum amino acid digestibility.

33. Common protein supplements (whey, casein, and soy) all received 1.0 scores.

34. Meat and soybeans (0.9), vegetables and other legumes (0.7), and whole wheat and peanuts (0.25 – 0.55).

35. The PDCAAS is currently considered the most reliable score of protein quality for human nutrition.²

² Pasha Gurevich, *Protein Quality-The 4 Most Important Metrics*, LABDOOR MAGAZINE (May 20, 2014), <https://labdoor.com/article/protein-quality-the-4-most-important-metrics>.

36. The PDCAAS shall be determined by the methods provided in sections 5.4.1, 7.2.1, and 8.00 in “Protein Quality Evaluation, Report of the Joint FAO/WHO Expert Consultation on Protein Quality Evaluation,” Rome, 1990. 21 C.F.R. § 101.9(c)(7)(ii).

37. Defendant has failed to comply with the section for PDCAAS and determining the protein content making up the % DV.

38. Upon information and belief, at relevant periods, Defendant did not test for individual amino acids, and it did not use the proper factors as referred to in the FDCA.

39. Therefore, Defendant violated of 21 C.F.R. § 101.9(c)(7)(ii).

40. Further, collagen protein, in the form of “hydrolyzed collagen,” one of the ingredients listed under the “ingredients” of the Snickers Protein Bars, has a PDCAAS of 0.

41. When protein is listed as a percent of the 50-gram DRV and expressed as % DV, the % DV is calculated by correcting the actual amount of protein in grams per serving by multiplying the amount by its amino acid score corrected for protein digestibility, dividing by 50 grams, and converting to a percentage. 21 C.F.R. § 101.9(c)(7)(ii).

42. If Defendant had made no protein content claim on the label of the Snickers Protein Bars, it could legally abstain from providing a % DV.

43. However, given that Defendant’s Snickers Protein Bars contain a protein claim on the labels (“18G PROTEIN”) and Defendant fails to provide the % DV in the Nutrition Facts section or unlawfully inflates the % DV of the protein in the Snickers Protein Bars, Defendant is in violation of its statutory obligation under the FDCA to determine the protein content and % DV by using the PDCAAS, and provide said information on the Nutritional Facts label, which it did not.

44. Because the PDCAAS is used to determine “protein quality,” Defendant intentionally excluded the PDCAAS for the Snickers Protein Bars.

45. The Snickers Protein Bars protein label claims are objectively false because the PDCAAS was not tested for properly by Defendant.

46. Defendant’s false, deceptive and misleading label statements violate 21 U.S.C. § 343(a)(1) and the so-called “little FDCA” statutes adopted by many states,³ which deem food misbranded when “its labeling is false or misleading in any particular.”

47. Under the Illinois Food, Drug and Cosmetic Act, Illinois has expressly adopted the federal food labeling requirements as its own and has indicated that “[a] federal regulation automatically adopted pursuant to this Act takes effect in this State on the date it becomes effective as a Federal regulation.” 410 ILCS 620/21(j).

48. Thus, a violation of federal food labeling laws is an independent violation of Illinois law and actionable as such.

49. Further, as explained above, Defendant’s claims are misleading to consumers in violation of 21 U.S.C. § 343, which states, “[a] food shall be deemed to be misbranded—If (1) its labeling is false or misleading in any particular.”

50. Indeed, the Illinois Compiled Statutes have incorporated the exact language of the FDCA by expressly stating, “[a] food is misbranded - (a) If its labeling is false or misleading in any particular.” 410 ILCS 620/11.

51. The introduction of misbranded food into interstate commerce is prohibited under the FDCA and Illinois statute.

³ See, e.g., 410 ILCS 620/11.

52. Also, the Illinois Consumer Fraud and Deceptive Business Practices Act protects consumers when purchasing products, including Defendant's Snickers Protein Bars, and provides:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such a material fact”

815 ILCS 505/2.

53. Defendant intended for Plaintiffs and other Class Members to be misled.

54. Plaintiffs were in fact misled.

55. Defendant's misleading and deceptive practices proximately caused harm to the Plaintiff and the members of the Class.

CLASS ACTION ALLEGATIONS

56. Plaintiffs bring this action on behalf of himself and pursuant to 735 ILCS 5/2-801 on behalf of a class defined as follows:

All persons in the State of Illinois who purchased the Snickers Protein Bars in Illinois, from three years preceding the filing of this action to the date that this matter is certified as a class action.

Excluded from the Class are Defendant's officers and directors, Plaintiffs' counsel, and any member of the judiciary presiding over this action.

57. **Numerosity:** The exact number of Class members is unknown and is not available to Plaintiffs at this time, but upon information and belief, there are in excess of forty potential class members, and individual joinder in this case is impracticable. Through discovery Plaintiffs believe that the number of class members can be ascertained and Class members may be identified through Defendant's records.

58. **Commonality and Predominance:** There are several questions of law and fact common to the claims of Plaintiffs and the Class members, and those questions predominate over any questions that may affect individual Class members. Common questions include, but are not limited to, the following:

- a. The true nature of the protein content in the Snickers Protein Bars;
- b. Whether the marketing advertising, packaging, labeling, and other promotional material for the Snickers Protein Bars are unfair or deceptive;
- c. Whether Defendant's actions violate the Illinois Consumer Fraud Act;
- d. Whether Defendant was unjustly enriched at the expense of the Plaintiffs and Class members; and
- e. Whether Plaintiffs and the Class members are owed damages, and what is the proper measure of damages for Plaintiffs and Class members.

59. **Adequacy of Representation:** Plaintiffs are adequate representatives of the Class as they are member of the Class and his interests do not conflict with the interests of the other members of the Class they seek to represent. Plaintiffs will fairly and adequately represent and protect the interest of the Class, and have retained competent counsel experienced in complex litigation and class actions. Plaintiffs and their counsel intend to prosecute this action vigorously for the benefit of all members of the Class. Accordingly, the interests of the members of the Class will be fairly and adequately protected by Plaintiffs and their counsel.

60. **Appropriateness:** Class proceedings are also superior to all other available methods for the fair and efficient adjudication of this controversy because joinder of all parties is impracticable. Even if Class members were able or willing to pursue such individual litigation, a class action would still be preferable due to the fact that a multiplicity of individual actions would likely increase the expense and time of litigation given the complex legal and factual controversies presented in this Class Action Complaint. A class action, on the other hand, provides the benefits

of fewer management difficulties, single adjudication, economy of scale, and comprehensive supervision by a single Court, and would result in reduced time, effort and expense for all parties and the Court, and ultimately, the uniformity of decisions.

CAUSES OF ACTION

COUNT I

Violation of the Illinois Consumer Fraud and Deceptive Practices Act 815 ILCS 505/1, *et seq.* Individually and on Behalf of the Class

61. Plaintiffs incorporate the allegations above as if fully set forth herein.

62. The Illinois Consumer Fraud and Deceptive Practices Act (the "ICFA"). 815 ILCS 505/1, *et seq.* prohibits the use of unfair or deceptive business practices in the conduct of trade or commerce.

63. The ICFA is to be liberally construed to effectuate its purpose.

64. Defendant intended that the Plaintiffs and each of the other members of the Class would rely upon its deceptive conduct, and a reasonable person would in fact be misled by this Defendant's deceptive conduct.

65. Defendant made a protein claim – 18G PROTEIN – and either wholly failed to list the %DV or listed a %DV that was unlawfully inflated by not using the required testing method (PDCAAS), which would have revealed that the Snickers Protein Bars used an inferior quality protein resulting in a lower quality protein bar.

66. Defendant mislabeled and misrepresented the nature and quality of its Snickers Protein Bars.

67. As a result of the Defendant's use or employment of unfair or deceptive acts or business practices, Plaintiffs and each of the other members of the Class have sustained damages in an amount to be proven at trial.

68. In addition, Defendant's conduct showed malice, motive, and the reckless disregard of the truth such that an award of punitive damages is appropriate.

69. Plaintiffs do not assert any claim or cause of action under the ICFA that differs from or is additional to the requirements of the FDCA and its implementing regulations.

WHEREFORE, Plaintiffs, individually and on behalf of the other members of the Class proposed in this Class Action Complaint, pray for judgment and relief against Defendant as follows:

- a) For an order declaring: (i) this matter is certified as a class action pursuant to 735 ILCS 5/2-801 and all requirements of that section are satisfied, and (ii) Plaintiff Alejandro and Plaintiff Fernos shall be appointed representatives for the Class and (iii) Plaintiffs' Counsel shall be appointed to serve as Co-Counsel for the Class;
- b) For an order awarding restitution of the monies Defendant wrongfully acquired by its illegal, unfair, and/or deceptive conduct;
- c) For compensatory, exemplary, and/or punitive damages, including any actual and statutory damages that can be claimed, as arising from Defendant's wrongful conduct and illegal conduct;
- d) For an award of reasonable attorneys' fees and costs and expenses incurred in the course of prosecuting this action; and
- e) For such other and further relief as this Court deems just and proper.

COUNT II
Unjust Enrichment

Individually and on Behalf of the Class

70. Plaintiffs incorporates the allegations set forth above as if fully set forth herein.

71. Plaintiffs and the other members of the Class conferred benefits on Defendant by purchasing the Snickers Protein Bars.

72. Defendant has been unjustly enriched in retaining the revenues derived from Plaintiffs and the other Class members' purchases of the Snickers Protein Bars.

73. Retention of those monies under the circumstances set forth herein is unjust and inequitable because Defendant's labeling of the Snickers Protein Bars was misleading to consumers, which caused injuries to Plaintiffs and the other members of the Class because they would have not purchased the Snickers Protein Bars or would have paid less for the Snickers Protein Bars if the true facts would have been known.

74. Because Defendant's retention of the non-gratuitous benefits conferred on them by Plaintiffs and the other members of the Class is unjust and inequitable, Defendant must pay restitution to Plaintiffs and other members of the Class for its unjust enrichment, as ordered by the Court.

WHEREFORE, Plaintiffs, individually and on behalf of the other members of the Class proposed in this Class Action Complaint, pray for judgment and relief against Defendant as follows:

- a) For an order declaring: (i) this matter is certified as a class action pursuant to 735 ILCS 5/2-801 and all requirements of that section are satisfied, and (ii) Plaintiff Alejandro and Plaintiff Fernos shall be appointed representatives for the Class and (iii) Plaintiffs' Counsel shall be appointed to serve as Co-Counsel for the Class;

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- b) For an order awarding restitution of the monies Defendant wrongfully acquired by its illegal, unfair, and/or deceptive conduct;
- c) For compensatory, exemplary, and/or punitive damages, including any actual and statutory damages that can be claimed, as arising from Defendant's wrongful conduct and illegal conduct;
- d) For an award of reasonable attorneys' fees and costs and expenses incurred in the course of prosecuting this action; and
- e) For such other and further relief as this Court deems just and proper.

JURY TRIAL DEMANDED

Plaintiffs demand a trial by jury on all issues so triable.

Dated: April 4, 2018

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