

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

Kelsey Gancarz, individually and on behalf of
all others similarly situated,

Plaintiff,

- against -

Beech-Nut Nutrition Company,

Defendant

Class Action Complaint
Case No.: 1:21-CV-0258 (TJM/CFH)

Jury Trial Demanded

Plaintiff alleges upon information and belief, except for allegations pertaining to plaintiff, which are based on personal knowledge:

1. Beech-Nut Nutrition Company (“defendant”) manufactures, distributes, labels and sells baby food products in numerous forms, i.e., pouches, purees, snacks, etc., under its Beech-Nut brand (“Products”).
2. Defendant knows consumers value representations that the Products do not contain specific ingredients or components, as shown by its statements they are free from GMOs, artificial preservatives, artificial colors, and artificial flavors.
3. Consumers expect the food they feed their infants and toddlers to be free from any substances which can have significant and dangerous health consequences.
4. The Food and Drug Administration (“FDA”) and the World Health Organization (“WHO”) declared arsenic, lead, cadmium, and mercury “dangerous to human health, particularly to babies and children, who are most vulnerable to their neurotoxic effects.”¹

¹ See *Baby Foods Are Tainted with Dangerous Levels of Arsenic, Lead, Cadmium, and Mercury*, Staff Report (“House Report”), Subcommittee on Economic and Consumer Policy of the Committee on Oversight and Reform, at 2, February 4, 2021, available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2021-02-04%20ECP%20Baby%20Food%20Staff%20Report.pdf>.

5. These four heavy metals “can harm a baby’s developing brain and nervous system” and cause negative impacts such as the “permanent loss of intellectual capacity and behavioral problems like attention-deficit hyperactivity disorder (ADHD).”²

6. Arsenic exposure creates a risk of “respiratory, gastrointestinal, hematological, hepatic, renal, skin, neurological and immunological effects, as well as damaging effects on the central nervous system.”³

7. The FDA has set the maximum allowable arsenic levels in bottled water at 10 ppb of inorganic arsenic and is also considering limiting the action level of arsenic in rice cereal for infants to 100 ppb.⁴

8. Lead exposure harms children’s brain and nervous systems and is associated with a range of negative health outcomes including “behavioral problems, decreased cognitive performance, delayed development, and reduced postnatal growth.”⁵

9. Young children are vulnerable to lead because the physical and behavioral effects of lead occur at lower exposure levels in children than in adults.

10. EPA has set the maximum contaminant level goal for lead in drinking water at zero because lead is toxic metal that can be harmful to human health even at low exposure levels.

11. The Agency for Toxic Substances and Disease Registry states that there may be no threshold for lead with regards to developmental impact on children.

12. Mercury increases the risk for cardiovascular disease and can cause vision,

² Healthy Babies Bright Futures Report, at 6.

³ House Report, at 10 (quoting Miguel Rodríguez-Barranco et al., *Association of Arsenic, Cadmium and Manganese Exposure with Neurodevelopment and Behavioural Disorders in Children: A Systematic Review and Meta-Analysis* (June 1, 2013) (online at <https://pubmed.ncbi.nlm.nih.gov/23570911/>)).

⁴ FDA, Draft Guidance for Industry: Inorganic Arsenic in Rice Cereals for Infants: Action Level (Apr.2016), <https://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/UCM493152.pdf>.

⁵ House Report, at 11.

intelligence, and memory problems for children exposed in utero.

13. The FDA has set a maximum mercury level in drinking water to 2 ppb.

14. Cadmium is linked to neurotoxicity, anemia, liver disease, cancer, and kidney, bone, and heart damage.

15. Health and environmental regulatory bodies have set maximum cadmium levels in drinking water to 3 and 5 ppb.

16. A recent report by the U.S. House of Representatives' Subcommittee on Economic and Consumer Policy, Committee on Oversight and Reform, revealed that defendant's "[i]nternal company standards permit dangerously high levels of toxic heavy metals" in their Products.

17. Defendant's internal limit for inorganic arsenic is 3,000 ppb and has used ingredients with as much as 913.4 ppb arsenic.

18. Defendant sold Products which contained upwards of 148 ppb cadmium, above its internal limit of 9 ppb.

19. Defendant's internal limit for lead is 5,000 ppb, far beyond any existing regulatory standard and its Products contained as much as 886.9 ppb lead.

20. Though defendant conducts some testing for these substances, the products are sold to consumers regardless of the level of heavy metals they contain.

21. Defendant only tested the ingredients it used instead of the finished products.

22. Defendant claims their Products are tested for heavy metals and that they abide by the highest testing standards in the industry.

23. Defendant's Products tout the simple nutritious ingredients they purportedly contain, while omitting any reference to the dangerous levels of heavy metals they also contain.

24. Defendant knows that consumers expect to purchase baby foods that will not cause

harm or risk of harm, and that assurances of quality induce them to pay more than they otherwise would.

25. No reasonable consumer seeing defendant's marketing would expect the Products to contain heavy metals above trace levels.

26. Had plaintiff and the proposed class members known the truth, they would not have bought the Products or would have paid less for them.

27. As a result of the false and misleading representations, the Products are sold at premium prices, approximately no less than no less than \$1.79 for jars of 4 OZ, excluding tax, compared to other similar products represented in a non-misleading way, and higher than they would be sold for absent the misleading representations and omissions.

Jurisdiction and Venue

28. Jurisdiction is proper pursuant to Class Action Fairness Act of 2005 ("CAFA"). 28 U.S.C. § 1332(d)(2).

29. Under CAFA, district courts have original federal jurisdiction over class actions involving (1) an aggregate amount in controversy of at least \$5,000,000; and (2) minimal diversity.

30. Plaintiff is a citizen of Massachusetts.

31. Defendant Beech-Nut Nutrition Company is a Delaware corporation with a principal place of business in Amsterdam, Montgomery County, New York.

32. Diversity exists because plaintiff and defendant are citizens of different states.

33. Upon information and belief, sales of the Products and any available statutory and other monetary damages, exceed \$5 million during the applicable statutes of limitations, exclusive of interest and costs.

34. Venue is proper because a substantial part of the events or omissions giving rise to the claim occurred here and Defendant's principal place of business is in the Northern District of New York, Montgomery County.

Parties

35. Plaintiff is a citizen of North Adams, Berkshire County, Massachusetts.

36. Defendant Beech-Nut Nutrition Company is a Delaware corporation with a principal place of business in Amsterdam, Montgomery County, New York.

37. Defendant's "Beech-Nut" is a leading baby food brand.

38. Defendant's use of the words "Organics" and "Naturals" in the names of its Products represents they are high quality and will not contain harmful or potentially harmful components.

39. The Products are sold to consumers from retail and online stores of third-parties across the country.

40. Plaintiff bought the Products on one or more occasions within the statute of limitations for each cause of action alleged, from one or more locations, such as Walmart, 1415 Curran Memorial Hwy, North Adams, MA 01247, numerous times over the past year, for the consumption of children.

41. Plaintiff bought the Products at or exceeding the above-referenced price because she wanted to buy a product with the qualities and attributes represented herein and relied upon what the label indicated and omitted.

42. Plaintiff would not have purchased the Products in the absence of defendant's misrepresentations and omissions.

43. The Products were worth less than what plaintiff paid and she would not have paid as much absent defendant's false and misleading statements and omissions.

44. Plaintiff intends to, seeks to, and will purchase the Products again when she can do so with the assurance that Products' labeling is consistent with its composition.

Class Allegations

45. The class will consist of all purchasers of the Products who reside in Massachusetts and Maine during the applicable statutes of limitations.

46. Plaintiff seeks class-wide injunctive relief based on Rule 23(b) in addition to a monetary relief class.

47. Common questions of law or fact predominate and include whether defendant's representations were and are misleading and if plaintiff and class members are entitled to damages.

48. Plaintiff's claims and basis for relief are typical to other members because all were subjected to the same unfair and deceptive representations and actions.

49. Plaintiff is an adequate representative because her interests do not conflict with other members.

50. No individual inquiry is necessary since the focus is only on defendant's practices and the class is definable and ascertainable.

51. Individual actions would risk inconsistent results, be repetitive and are impractical to justify, as the claims are modest relative to the scope of the harm.

52. Plaintiff's counsel is competent and experienced in complex class action litigation and intends to protect class members' interests adequately and fairly.

53. Plaintiff seeks class-wide injunctive relief because the practices continue.

New York General Business Law (“GBL”) §§ 349 & 350
(Consumer Protection Statutes)

54. Plaintiff incorporates by reference all preceding paragraphs.

55. Plaintiff and class members desired to purchase products without high levels of toxic heavy metals.

56. Defendant’s acts and omissions are not unique to the parties and have a broader impact on the public.

57. Defendant misrepresented the Products through its statements, omissions, ambiguities, half-truths and/or actions.

58. Defendant intended that plaintiff and the Class rely upon defendant’s deceptive conduct, and a reasonable person would in fact be misled by this deceptive conduct.

59. Defendant knew or should have known that its representations and omissions about the Product’s contents were material and likely to mislead consumers.

60. Plaintiff and class members would not have purchased the Products or paid as much if the true facts had been known, suffering damages.

Breaches of Express Warranty, Implied Warranty of Merchantability
and Magnuson Moss Warranty Act, 15 U.S.C. §§ 2301, et seq.

61. Plaintiff incorporates by reference all preceding paragraphs.

62. The Products were manufactured, labeled and sold by defendant and warranted to plaintiff and class members that it possessed substantive, functional, nutritional, qualitative, compositional, organoleptic, sensory, physical and health-related attributes which it did not.

63. The absence of toxic heavy metals was impliedly warranted because of the numerous health-related statements.

64. Defendant had a duty to disclose and/or provide non-deceptive descriptions and

marketing of the Products.

65. This duty is based on defendant's outsized role in the market for this type of Products.

66. Plaintiff provided or will provide notice to defendant, its agents, representatives, retailers and their employees.

67. Defendant received notice and should have been aware of these misrepresentations due to numerous complaints by consumers to its main office over the past several years regarding the Products.

68. The Products did not conform to its affirmations of fact and promises due to defendant's actions and were not merchantable.

69. Plaintiff and class members would not have purchased the Products or paid as much if the true facts had been known, suffering damages.

Negligent Misrepresentation

70. Plaintiff incorporates by reference all preceding paragraphs.

71. Defendant had a duty to truthfully represent the Products, which it breached.

72. This duty is based on defendant's position, holding itself out as having special knowledge and experience in the sale of the product type.

73. The representations took advantage of consumers' cognitive shortcuts made at the point-of-sale and their trust in defendant, a well-known and respected brand or entity in this sector.

74. Plaintiff and class members reasonably and justifiably relied on these negligent misrepresentations and omissions, which served to induce and did induce, the purchase of the Products.

75. Plaintiff and class members would not have purchased the Products or paid as much if the true facts had been known, suffering damages.

Fraud

76. Plaintiff incorporates by reference all preceding paragraphs.

77. Defendant misrepresented and/or omitted the attributes and qualities of the Products.

78. Defendant's fraudulent intent is evinced by its failure to accurately disclose the issues described herein, when it knew not doing so would mislead consumers.

79. Defendant was aware of these issues for almost two years yet failed to inform consumers.

80. Plaintiff and class members would not have purchased the Products or paid as much if the true facts had been known, suffering damages.

Unjust Enrichment

81. Plaintiff incorporates by reference all preceding paragraphs.

82. Defendant obtained benefits and monies because the Products were not as represented and expected, to the detriment and impoverishment of plaintiff and class members, who seek restitution and disgorgement of inequitably obtained profits.

Jury Demand and Prayer for Relief

Plaintiff demands a jury trial on all issues.

WHEREFORE, Plaintiff prays for judgment:

1. Declaring this a proper class action, certifying plaintiff as representative and the undersigned as counsel for the class;
2. Entering preliminary and permanent injunctive relief by directing defendant to correct the challenged practices to comply with the law;
3. Injunctive relief to remove, correct and/or refrain from the challenged practices and representations, and restitution and disgorgement for members of the class pursuant to the

applicable laws;

4. Awarding monetary damages, statutory damages pursuant to any statutory claims and interest pursuant to the common law and other statutory claims;
5. Awarding costs and expenses, including reasonable fees for plaintiff's attorneys and experts; and
6. Other and further relief as the Court deems just and proper.

Dated: March 4, 2021

Respectfully submitted,

Sheehan & Associates, P.C.

/s/Spencer Sheehan

Spencer Sheehan

60 Cutter Mill Rd Ste 409

Great Neck NY 11021-3104

Tel: (516) 268-7080

Fax: (516) 234-7800

spencer@spencersheehan.com

United States District Court
Northern District of New York

Kelsey Gancarz, individually and on behalf of all others similarly situated,

Plaintiff,

- against -

Beech-Nut Nutrition Company,

Defendant

Class Action Complaint

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60 Cutter Mill Rd Ste 409
Great Neck NY 11021-3104
Tel: (516) 268-7080
Fax: (516) 234-7800

Dated: March 4, 2021

/s/ Spencer Sheehan
Spencer Sheehan

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (See instructions on next page of this form.)

I. (a) PLAINTIFFS

Kelsey Gancarz, individually and on behalf of all others similarly situated

(b) County of Residence of First Listed Plaintiff Berkshire (Out of State)
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Sheehan & Associates, P.C., 60 Cutter Mill Rd Ste 409 Great Neck NY 11021-3104 (516) 268-7080

DEFENDANTS

Beech-Nut Nutrition Company

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (For Diversity Cases Only.)

(Check one box, only for plaintiff and one box for defendant.)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input checked="" type="checkbox"/> 4
Citizen of Another State	<input checked="" type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input checked="" type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities-Employment <input type="checkbox"/> 446 Amer. w/Disabilities-Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 USC § 1332

Brief description of cause:

False advertising

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$ 5,000,000

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

DATE 3/4/2021 JUDGE _____ DOCKET NUMBER _____
SIGNATURE OF ATTORNEY OF RECORD /s/ Spencer Sheehan

FOR OFFICE USE ONLY

RECEIPT # ANYNDC-5447276 AMOUNT \$402.00 APPLYING IFP _____ JUDGE TJM MAG. JUDGE CFH