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United States District Court
Southern District of New York

1:20-cv-06831

Darlene Wallace, individually and on behalf
of all others similarly situated,

Plaintiff,

- against -

Wise Foods, Inc.,

Defendant

Class Action Complaint

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

1. Wise Foods, Inc. (“defendant”) manufactures, distributes, markets, labels and sells cheddar and sour cream potato chips purporting to be flavored without artificial flavor contributing to the characterizing flavor under the Wise brand (“Products”).
2. The Products are available to consumers from retail and online stores of third-parties and are sold in sizes including bags of various sizes including 2.75, 4.75 and 8.75 OZ.
3. The relevant front label representations include the brand, “Cheddar & Sour Cream,” “Flavored,” and an orange-yellowish color pattern.



4. Cheddar cheese flavor is complex mixture of taste sensations, known for its “sharp, pungent flavor” yet also having a “buttery and milk taste.”¹

5. Scientists have concluded that the unique flavor of cheddar cheese is due to its fatty acids, butyl alcohol, carbonyls, diacetyl and acetoin.²

¹ Cheddar cheese, https://en.wikipedia.org/w/index.php?title=Cheddar_cheese&oldid=941301433 (last visited Mar. 2, 2020); <https://www.keystonefarmscheese.com/cheddar-cheese>

² E.A. Foda, et al. "Role of fat in flavor of Cheddar cheese." *Journal of Dairy Science* 57.10 (1974): 1137-1142; T. K. Singh et al., "Flavor of Cheddar cheese: A chemical and sensory perspective." *Comprehensive reviews in food science and food safety* 2.4 (2003): 166-189 (describing principal flavor compounds produced from metabolism of citrate, which occurs when making cheddar cheese).

6. Diacetyl is “an important aroma compound in butter, margarine, sour cream, yogurt, and a number of cheeses, including Cheddar.”³

7. Diacetyl and other butter compounds are “an essential part of the flavor complex of Cheddar cheese.”⁴

8. A scientist who developed a lexicon for description of cheddar cheese flavor included aromatics associated with diacetyl and milkfat/lactones as being representative of cheddar flavor.⁵

9. The Product’s label makes direct representations with respect to one of its “distinguishable characterizing flavors,” cheddar cheese, through the statement “Cheddar & Sour Cream.” *See* 21 C.F.R. § 101.22(i) (requiring declaration of flavor to truthfully indicate whether the product’s flavor is from the characterizing food ingredient or from natural or artificial source materials); *see also* 21 C.F.R. § 101.22(i)(3)(ii) (required labeling where product contains more than one characterizing flavor).

10. The front label also contains the term “Flavored” which tells consumers that the Product’s flavor does not only come from the characterizing food ingredients of cheddar cheese and sour cream.

11. However, the front label fails to inform consumers that the Product contains artificial flavor which “simulates, resembles or reinforces the characterizing flavor.” *See* 21 C.F.R. § 101.22(i)(2).

12. The ingredient list on the back shows the ingredients in order of predominance by weight. 21 C.F.R. § 101.4(a)(1).

³ Stephanie Clark et al. "Diacetyl in foods: a review of safety and sensory characteristics." *Comprehensive Reviews in Food Science and Food Safety* 14.5 (2015): 634-643.

⁴ Harold E. Calbert, and Walter V. Price. "[A study of the diacetyl in cheese. I. Diacetyl content and flavor of Cheddar cheese.](#)" *Journal of Dairy Science* 32.6 (1949): 515-520.

⁵ Tim Steury, [The cheddar cheese lexicon](#), Washington State University Magazine.

13. The first two ingredients – potatoes and vegetable oil – are essential to making potato chips, as the slices of potatoes are cooked in vegetable oil.

14. All ingredients from “Salt” to “Disodium Guanylate” are part of the seasoning used to give the chips their flavor.

POTATOES, VEGETABLE OIL (CONTAINS ONE OR MORE OF THE FOLLOWING: CORN, COTTONSEED, SUNFLOWER OR CANOLA OIL), SALT, WHEY, CHEESE FLAVOR, CHEDDAR CHEESE (CULTURED MILK, SALT, ENZYMS), MALTODEXTRIN, SALT, NONFAT DRY MILK, DISODIUM PHOSPHATE, MONOSODIUM GLUTAMATE (FLAVOR ENHANCER), CITRIC ACID, YELLOW 5, YELLOW 6, LACTIC ACID, SOUR CREAM FLAVOR [SOUR CREAM (CREAM, CULTURES, LACTIC ACID), NONFAT MILK, CITRIC ACID, DISODIUM PHOSPHATE, NATURAL FLAVOR], PARTIALLY HYDROGENATED COTTONSEED OIL, ONION POWDER, NATURAL FLAVOR, BUTTERMILK POWDER, CITRIC ACID, MODIFIED CORN STARCH, MALTODEXTRIN, SODIUM CITRATE, YELLOW 6 LAKE, SUGAR, YELLOW 5 LAKE, YEAST EXTRACT WITH NATURAL AND ARTIFICIAL FLAVOR, MILK POWDER, SODIUM CASEINATE, DISODIUM INOSINATE AND DISODIUM GUANYLATE (FLAVOR ENHANCERS).

INGREDIENTS: POTATOES, VEGETABLE OIL (CONTAINS ONE OR MORE OF THE FOLLOWING: CORN, COTTONSEED, SUNFLOWER OR CANOLA OIL), SALT, WHEY, CHEESE FLAVOR, CHEDDAR CHEESE (CULTURED MILK, SALT, ENZYMS), MALTODEXTRIN, SALT, NONFAT DRY MILK, DISODIUM PHOSPHATE, MONOSODIUM GLUTAMATE (FLAVOR ENHANCER), CITRIC ACID, YELLOW 5, YELLOW 6, LACTIC ACID, SOUR CREAM FLAVOR [SOUR CREAM (CREAM, CULTURES, LACTIC ACID), NONFAT MILK, CITRIC ACID, DISODIUM PHOSPHATE, NATURAL FLAVOR], PARTIALLY HYDROGENATED COTTONSEED OIL, ONION POWDER, NATURAL FLAVOR, BUTTERMILK POWDER, CITRIC ACID, MODIFIED CORN STARCH, MALTODEXTRIN, SODIUM CITRATE, YELLOW 6 LAKE, SUGAR, YELLOW 5 LAKE, MILK POWDER, **YEAST EXTRACT WITH NATURAL AND ARTIFICIAL FLAVOR**, SODIUM CASEINATE, DISODIUM INOSINATE AND DISODIUM GUANYLATE (FLAVOR ENHANCERS).

15. Though the seasoning contains numerous sub-ingredients, it is accurately not separately identified by the term “Seasoning” followed by sub-ingredients in parentheses.

16. The allowance for listing sub-ingredients in parentheses only applies where:

An ingredient which itself contains two or more ingredients and which has an established common or usual name, conforms to a standard established pursuant to the Meat Inspection or Poultry Products Inspection Acts by the U.S. Department of Agriculture, or conforms to a definition and standard of identity established pursuant to section 401 of the Federal Food, Drug, and Cosmetic Act [,shall be designated in the statement of ingredients on the label of such food by either of the following alternatives:]

21 C.F.R. § 101.4(b)(2)

17. The options for labeling such ingredients permit:

declaring the established common or usual name of the ingredient followed by a parenthetical listing of all ingredients contained therein in descending order of predominance except that, if the ingredient is a food subject to a definition and standard of identity established in subchapter B of this chapter that has specific labeling provisions for optional ingredients, optional ingredients may be declared within the parenthetical listing in accordance with those provisions [or]

By incorporating into the statement of ingredients in descending order of predominance in the finished food, the common or usual name of every component of the ingredient without listing the ingredient itself.

21 C.F.R. § 101.4(b)(2)(i)-(ii).

18. Because “Seasoning” is not a food’s “established common or usual name,” nor “conforms to a standard established pursuant to the Meat Inspection or Poultry Products Inspection Acts by the U.S. Department of Agriculture, or [conforms to] a definition and standard of identity established pursuant to section 401 of the Federal Food, Drug, and Cosmetic Act, its components are “split” into the overall list of ingredients.

19. However, some of the components of the seasoning are listed with sub-ingredients, such as “Cheddar Cheese (Cultured Milk, Salt, Enzymes)” and “Sour Cream (Cream, Cultures,

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