

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

RYAN HARDY, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

OLE MEXICAN FOODS, INC.,

Defendant.

Civil Action No.: 1:21-cv-1261

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Ryan Hardy (“Plaintiff”), on behalf of himself and all others similarly situated, brings this class action against Ole Mexican Foods, Inc. (“Defendant”), on behalf of himself and all others similarly situated, and alleges upon information and belief the following:

INTRODUCTION

1. Plaintiff brings this consumer protection and false advertising class action lawsuit against Defendant regarding its misleading business practices, with respect to the sale of its La Banderita tortilla products. The tortilla products at issue in this case are La Banderita Burrito Grande, La Banderita Sabrosísimas Corn, La Banderita Taco Size Flour Tortillas, and La Banderita Whole Wheat Fajita (the “Products”).

2. Specifically, Defendant has marketed and sold these Products with labeling, packaging, and advertising that leads consumers to believe that they are made in Mexico, when in fact, they are not. To accomplish this, the front label of the Products prominently use the Mexican flag in the center of the package, Spanish phrases like “El Sabor de Mexico!” (meaning “A taste of Mexico”), and a logo that displays the Mexican flag with the word “Authentic.”

3. Tortillas are a staple of Mexican cuisine and are considered to have originated in Mexico.¹ The people of Mexico have a long history with tortillas and are generally credited with having perfected the art of making them.

4. Because of this, consumers value tortilla products that are authentically made in Mexico. Had Plaintiff and other consumers known that the Products were not made in Mexico, they would not have purchased the Products or would have paid significantly less for them. Therefore, Plaintiff and other consumers have suffered an injury-in-fact as a result of Defendant's deceptive practices.

5. Thus, Plaintiff, on behalf of himself and all others similarly situated, brings this case seeking damages, restitution, declaratory and injunctive relief, and all other remedies this Court deems appropriate.

JURISDICTION AND VENUE

6. The Court has original jurisdiction under 28 U.S.C. § 1332(d)(2) because the matter in controversy, exclusive of interest and costs, exceeds the sum or value of \$5,000,000, this is a class action in which there are more than 100 Class members, and at least some Class members are citizens of states different from Defendant.

7. This Court has personal jurisdiction over Defendant because Defendant intentionally avails itself of the markets in New York through the promotion, marketing, and sale of the Products in New York to render the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

¹ <http://www.latortillaoven.com/history/> (last visited December 3, 2021).

8. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(a) and (b)(2) because a substantial part of the events and omissions giving rise to these claims occurred in this District. Plaintiff resides and purchased the Product in this District.

PARTIES

9. Plaintiff Ryan Hardy (“Mr. Hardy”) is a citizen of and resides in Buffalo, New York. On or about December 2018, Mr. Hardy, purchased the La Banderita Taco Size Flour Tortillas at a Tops Friendly Markets or Wegmans grocery store in West Seneca, New York. In purchasing the Product, Mr. Hardy saw and relied on Defendant’s references to the Mexican flag, the phrase “A Taste of Mexico!”, the brand name “La Banderita,” and the word “Authentic.”

10. Based on these front-label representations, Mr. Hardy believed he was purchasing tortillas made in Mexico. However, unbeknownst to Mr. Hardy, the Product is not made in Mexico. Mr. Hardy would not have purchased the Product or would have paid significantly less for it had he known that it was not made in Mexico. Therefore, Mr. Hardy suffered an injury-in-fact and lost money as a result of Defendant’s misleading, false, unfair, and fraudulent practices, as described herein.

11. Despite being misled, Mr. Hardy would purchase the Product in the future if the Product was in fact made in Mexico. While Mr. Hardy currently believes the Product is not made in Mexico, he lacks personal knowledge as to Defendant’s specific business practices, leaving doubt in his mind as to the possibility that in the future the Product might conform to the representations made on the front label of the Product, and might actually be made in Mexico. This uncertainty, coupled with his desire to purchase the Product, and the fact that he regularly visits stores which sell the Product, is an ongoing injury that can and would be

rectified by an injunction enjoining Defendant from making the false and/or misleading representations alleged herein. In addition, Class members will continue to purchase the Products, reasonably but incorrectly believing that they are made in Mexico, absent an injunction. Further, money damages alone are an inadequate remedy, as Class members will continue to purchase the Products.

12. Defendant Ole Mexican Foods, Inc. maintains its principal place of business in Norcross, Georgia. Defendant sells a line of products under the brand name La Banderita. The La Banderita products are available at grocery retailers in New York, and include products like tortillas, chorizo, chips, and salsas. Defendant, directly and/or through its agents, is responsible for the manufacturing, packaging, marketing, distribution, and sale of the Products in New York.

FACTUAL ALLEGATIONS

13. Tortillas are a staple of Mexican cuisine. They are flat, thin, and circular, similar to a thin flatbread. Typically, they are made from either corn or flour, and used in a variety of ways.²

14. Tortillas are considered the national bread of Mexico and are “increasing in popularity throughout the world,” with most of the tortillas in the world being produced in Mexico.³

15. At all relevant times pertaining to this Complaint, the Products were sold in New York, and across the United States at grocery chains, and other retailers.

² See Hartley, Alto, *A Brief History of the Tortilla*, February 16, 2018 available at <https://althartley.com/a-brief-history-of-the-tortilla/#:~:text=According%20to%20legend%2C%20tortillas%20were,some%20sort%20of%20maize%20bread> (last visited December 3, 2021)

³ See L.W. Rooney, et al., *Grain-Based Products and Their Processing*, <https://www.sciencedirect.com/topics/food-science/tortilla> (last visited December 3, 2021).

16. The packaging of the Products, regardless of size or variety (e.g., corn tortillas and flour tortillas) all contain the same misleading representations on the front label of the Products, regarding the Mexican origin of the Products. Specifically, the front label of the Products all contain:

- (a) the phrase “El Sabor de Mexico!” or “A Taste of Mexico!”
- (b) a Mexican flag on the front and center of the packaging; and
- (c) the brand name “La Banderita” meaning “the flag”, which is a reference to the Mexican flag displayed prominently on all the Products (the foregoing representations are herein collectively referred to as the “Mexican Representations”).

17. In addition, some of the Products also contain a circular logo on the front label of the Products, with the Mexican flag and the word “Authentic.” Several of the Products also contain Spanish words or phrases, on the front label of the Products, such as “Sabrosissimas” and “Tortillas de Maiz.”

18. The foregoing representations, on the front label of the Products, taken in isolation and as a whole, create the misleading impression that the Products are made in Mexico, even though they are not.

19. Examples of the front label of each Product are included in the following pages:

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