

United States District Court
Eastern District of New York

1:18-cv-03529

Michael Pizzirusso individually and on
behalf of all others similarly situated

Plaintiff

- against -

Complaint

Chicago Bar Company, LLC

Defendant

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

1. RX Bar (“defendant”) manufactures, distributes, markets, labels and sells food bars which have attributes of snack and nutrition foods.
2. The Products are available in two product lines, “RXBAR” and “RXBAR Kids.”
3. The Products are characterized by their austere principal display panel representations which include the brand name, the number of protein grams (12 G. PROTEIN BAR for RXBAR 7 G. PROTEIN BAR for RXBAR Kids), a vertical list of components in the Products along with a number corresponding to same, a prominent statement disclaiming the presence of harmful, undesirable, less-valued ingredients (styled as “No B.S.” on the RX Bar and “No Bad Stuff” on the RXBAR Kids) and the flavor/variety designation (i.e., Blueberry for RXBAR and Berry Blast for RXBAR Kids).

RXBAR

RXBAR Kids



4. The Products contain common ingredients, declared in the same fashion across the RXBAR (top) and RXBAR Kids (bottom).¹

¹ Ingredients: Dates, Egg Whites, Almonds, Cashews, Blueberries, Natural Blueberry Flavor; Ingredients: Dates, Egg Whites, Almonds, Cashews, Strawberries, Raspberries, Blueberries, Natural Strawberry Flavor, Natural Raspberry Flavor, Natural Raspberry Flavor, Natural Blueberry Flavor.

INGREDIENTS:
Dates, Egg Whites, Almonds, Cashews, Blueberries, Natural Blueberry Flavor.
Contains: Eggs, Almonds & Cashews
Quantities of ingredients listed on front determined by net weight.

INGREDIENTS:
Dates, Egg Whites, Almonds, Cashews, Strawberries, Raspberries, Blueberries, Natural Strawberry Flavor, Natural Raspberry Flavor, Natural Blueberry Flavor.
Contains: Eggs, Almonds & Cashews.
Quantities of ingredients listed on front determined by net weight.

5. Defendant’s marketing message is built around the promotion of “real” ingredients and alludes to other companies that “hide” unfavorable or artificial ingredients deep in their ingredient list on the back of the package.

What's Inside

No surprises here. One look at our wrapper, and you can see what we're all about.



**We tell you what's
on the inside on
the outside.**

We're upfront about what's in our bars,
what's not, and what RXBAR stands for.

WHAT'S INSIDE



We don't claim to be a prescription for anything. But we do promise to give you clean food you can count on. We're upfront and honest about everything we do, from the inside out.

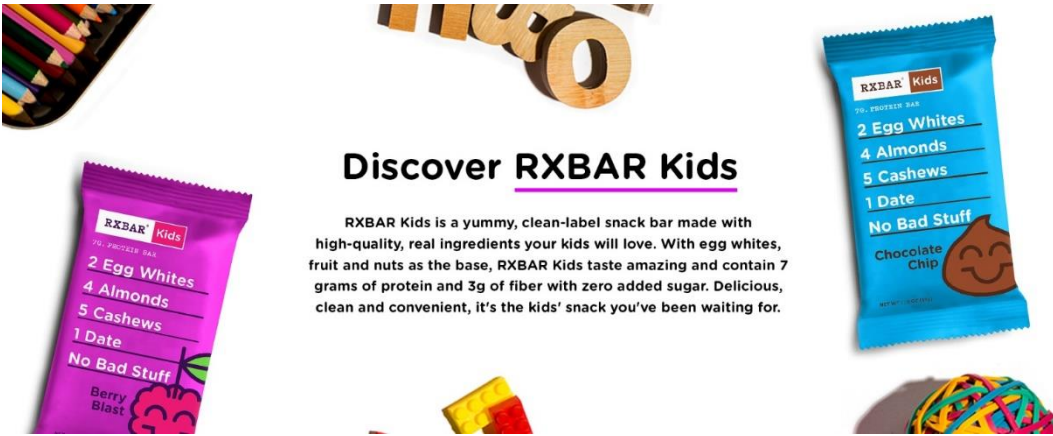


A (healthy) obsession for quality.

Yes, we make protein bars. But really, we're in the egg business, and the date business, and the nut business. You get the idea. We keep things simple so the core ingredients are everything. We take a hands-on approach to ensure each and every product we put our name on lives up to our high standards for taste, quality, and nutrition.

6. Eggs are one of most important source of nutrients, providing proteins, lipids (essential unsaturated fatty acids (oleic acid and linoleic acid)) and vitamins like iron, phosphate and trace minerals.

7. Eggs contribute significantly during rapid growth of the body by providing essential nutrients and hence an excellent food for growing children and teenagers, as shown by defendant's marketing materials directed towards this age group.



8. An egg is composed of 9–11% eggshell, 60–63% egg white, and 28–29% egg yolk.
9. The main components are 12% lipids, 12% proteins, and around 75% water, carbohydrates and minerals.
10. Proteins are distributed throughout the egg, but most of them are present in the egg yolk (44%) and egg white (50%), the remaining 6% in the eggshell and eggshell membrane.
11. Reasonable consumers are familiar with egg whites, since they are often consumed for their protein content.
12. Defendant capitalizes on this association.



Egg Whites

Not all protein is created equal. We really like egg whites. They're cholesterol-free and their protein is easily absorbed by the body. Other less-complete proteins are not as easily processed, so much of that protein remains unused by the body. For us, that won't do. So, we've made egg whites, one of the best sources for natural protein, a core ingredient in RXBARs.

13. Egg whites are often converted to a liquid or powdered (dried) form to provide

convenience, portion control, product quality and uniformity.

14. Because egg whites serve the same function whether they are liquid, fresh or dried, they can be listed as “egg whites” on the ingredient list.²

15. Egg whites are required to be made in a standardized way with certain parameters because they are an important part of food production, from a family kitchen to commercial manufacturing.

16. When converted into the powdered form, a spray-drying process is used – liquid egg whites (droplets; 10–200 μm) are subjected high pressure (130–200 bar or 2000–3000 psi) and injected into hot air (160–194°C) for 12 seconds, evaporating the egg whites into powder.

17. The egg whites will be pasteurized for safety and will undergo glucose removal to prevent caramelization, the Maillard reaction (browning) and to ensure a product stability and consistency.

18. Whipping aids like sodium-lauryl-sulfate can be incorporated, to increase the egg whites’ utility in “whipping” things like batters, meringues, etc.

19. This ability to aid in air entrapment is invaluable in aerated food systems, because the introduction of air in the form of tiny bubbles is favored by proteins that, when adsorbed at the air-water interface, retain an appreciable proportion of their structure.

20. The proteins in egg whites help in providing structure to baked products because they coagulate, like the way gluten proteins do.

21. This is because the beaten egg whites incorporate air in tiny cells or bubbles, which cause expanding.

22. The functionality of egg whites is attributed not to any specific protein, but to the

² 21 C.F.R. § 101.4(b)(11).

entire white as a whole.

23. For instance, ovalbumin and ovotransferrin, the major proteins in egg white, and theoretically the proteins likely to contribute to foaming quality, actually showed poor foaming properties when utilized individually compared to the entire egg white. See A. Kato, Interactions of Egg White Proteins in: A. Gaonkar, ed., *Ingredient Interactions: Effects on Food Quality*, 1st ed. (1995) New York: Marcel Dekker, Inc., pp.357-396.

24. The different proteins are present in varying amounts and can perform different functions when separated from the egg white.

<u>Egg White Protein</u>	<u>Percent in Egg White</u>	<u>Functions/Uses</u>
ovalbumin	54	nutrient supplement
ovotransferrin	12	antimicrobial
ovomuroid	11	inhibit tumor growth, anticancer agent
ovomucin	3.5	tumor suppression agent
lysozyme	3.5	food preservative

25. The above proteins are separated from the egg whites through treating the albumen with an equal volume of saturated ammonium sulfate.

26. This causes the globulin fraction to precipitate together with lysozyme, ovomucin and other globulins, while the major portion of the egg white remains in solution.

27. Defendant does not utilize egg white powder in its complete form, which would have entitled it to utilize the name “egg whites” to refer to the subject ingredient.

28. Instead, defendant utilizes one or more of the egg white fractions, but not the entire egg white, which is not consistent with the requirements that egg whites refer to the liquid egg albumen separated from yolks, adequately treated and modified for its intended purpose (pasteurization to destroy bacteria, whipping aids if necessary).

29. It is not possible for the Products to contain “egg whites” as that term is understood

by consumers and regulations because the foaming properties of egg whites would limit the ability to blend it with the other ingredients.

30. Defendant is likely aware of its use of the term “egg whites” as opposed to “egg white protein powder” because prior iterations of its packaging used a correct term.



31. Consumers would not be as drawn to a product which boldly promoted the presence of “Egg White Protein Powder.”

32. Furthermore, parents correctly wouldn’t want to buy their young children foods which contained concentrated protein powders, for a variety of reasons related to normal adolescent and child development.

33. Moreover, the fruit pieces incorporated into the Products are “infused” (flavored) with sweetening agents such as apple juice concentrate, contrary to defendant’s labels and

messaging which emphasize “real fruit” to provide flavor.



Fruits

We use real fruit, naturally. We use real fruits like apples, blueberries and pumpkins (yes, pumpkin is considered a fruit) to provide flavor and texture to our bars.

34. Excluding tax, the Products cost no less than \$4.99, a premium price compared to other similar products.

Jurisdiction and Venue

35. Jurisdiction is proper pursuant to 28 U.S.C. § 1332(d)(2).

36. Upon information and belief, the aggregate amount in controversy is more than \$5,000,000.00, exclusive of interests and costs.

37. This Court has personal jurisdiction over defendant because it conducts and transacts business, contracts to supply and supplies goods within New York.

38. Venue is proper because plaintiff and many class members reside in this District and defendant does business in this District and in New York.

39. A substantial part of events and omissions giving rise to the claims occurred in this District.

Class Allegations

40. The classes consist of all consumers in the following states: all , New York who

purchased any Products with actionable representations during the statutes of limitation.

41. A class action is superior to other methods for fair and efficient adjudication of this controversy.

42. The class is so numerous that joinder of all members, even if permitted, is impracticable, as there are likely hundreds of thousands of members.

43. Common questions of law or fact predominate and include whether the representations were likely to deceive reasonable consumers and if plaintiff(s) and class members are entitled to damages.

44. Plaintiff(s) claims and the basis for relief are typical to other members because all were subjected to the same representations.

45. Plaintiff(s) is/are an adequate representative because his/her/their interests do not conflict with other members.

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

47. Individual actions would risk inconsistent results, be repetitive and are impractical to justify, as the claims are modest.

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

49. Plaintiff(s) seeks class-wide injunctive relief because the practices continue.

Parties

50. Plaintiff is a citizen of Richmond County, New York.

51. In 2017, plaintiff purchased one or more of the Products personal consumption, for no less than \$4.99, excluding tax, at a store located within their respective districts.

52. Defendant is an Illinois limited liability company with no members being citizens of

New York.

53. Plaintiff paid this premium because prior to purchase, plaintiff saw and relied on the misleading representations.

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

54. Plaintiff incorporates by references all preceding paragraphs.

55. Defendant’s acts, practices, advertising, labeling, packaging, representations and omissions are not unique to the parties and have a broader impact on the public.

56. Plaintiff desired to purchase a healthy food bar which provided nutritional value derived from foods in the forms promoted by defendant (i.e., egg whites, non-juice infused fruit pieces) and believed that he/she did so based on the representations of defendant.

57. Defendant’s representations are false, unfair, deceptive and misleading for the reasons described herein.

58. The representations and omissions were relied on by plaintiff and class members, who paid more than they would have otherwise, causing damages.

Negligent Misrepresentation

59. Plaintiff incorporates by references all preceding paragraphs.

60. Defendant misrepresented the composition of the Products by promoting its honesty and transparency with respect to its ingredients when in fact, the Products mislabel their ingredients which are contained therein.

61. By emphasizing the “look at us, nothing to hide” approach, reasonable consumers will take up defendant, thinking, “what could they be hiding if they’re so upfront? Sure, this makes sense.”

62. Defendant had a duty to disclose, in a manner prescribed by law, that its Products did not contain ingredients as it represented them.

63. At the time of the representations, defendant knew or should have known same were false or misleading.

64. Defendant negligently misrepresented and/or negligently omitted material facts.

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

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

Breach of Express Warranty and Implied Warranty of Merchantability

67. Plaintiff incorporates by references all preceding paragraphs.

68. Plaintiff incorporates by references all preceding paragraphs.

69. Defendant manufactures and sells food protein bar products purporting to consist of “real” ingredients instead of the concentrated protein powders (which are not permitted to be labeled under the “egg whites” name.

70. Defendant warranted to plaintiff and class members that the Products were made of such, and other ingredients, when they were not.

71. The Products did not conform to their affirmations of fact and promises, wholly due to defendant’s actions.

72. Plaintiff and class members relied on defendant’s claims, paying more than they would have otherwise.

Fraud

73. Plaintiff incorporates by references all preceding paragraphs.

74. Defendant’s purpose was to mislead consumers who seek healthy snack foods which are not made of artificial, chemical-sounding, un-pronounceable ingredients.

75. Defendant's intent was to dupe consumers with its transparency while slipping by the misrepresentations which cut to the core of the Products.

76. Plaintiff and class members observed and relied on defendant's claims, causing them to pay more than they would have otherwise, entitling them to damages.

Unjust Enrichment

77. Plaintiff incorporates by references all preceding paragraphs.

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

Jury Demand and Prayer for Relief

Plaintiff demands a jury trial on all issues.

WHEREFORE, plaintiffs pray for judgment:

1. Declaring this a proper class action, certifying plaintiff(s) as representative and the undersigned as counsel for the class;
2. Entering preliminary and permanent injunctive relief by directing defendant(s) to correct such practices to comply with the law;
3. Awarding monetary damages and interest, including treble and punitive damages, pursuant to the common law and GBL claims;
4. Awarding costs and expenses, including reasonable fees for plaintiffs' attorneys and experts; and
5. Such other and further relief as the Court deems just and proper.

Dated: June 15, 2018

Respectfully submitted,

Levin-Epstein & Associates, P.C.
/s/Joshua Levin-Epstein

Joshua Levin-Epstein
1 Penn Plaza, Suite 2527
New York, NY 10119
Tel: (212) 792-0046

Sheehan & Associates, P.C.
/s/Spencer Sheehan

Spencer Sheehan
891 Northern Blvd., Suite 201
Great Neck, NY 11021
Tel: (516) 303-0552
spencer@spencersheehan.com

1:18-cv-03529
United States District Court
Eastern District of New York

Michael Pizzirusso and Joanne Miller individually and on behalf of all others similarly situated

Plaintiffs

- against -

Chicago Bar Company, LLC

Defendant(s)

Complaint

Levin-Epstein & Associates, P.C.
1 Penn Plaza # 2527
New York, NY 10119
Tel: (212) 792-0046
Fax: (212) 563-7108

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information, and belief, formed after an inquiry reasonable under the circumstances, the contentions contained in the annexed documents are not frivolous.

Dated: June 15, 2018

/s/ Joshua Levin-Epstein
Joshua Levin-Epstein

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

Michael Pizzirusso individually and on behalf of all others similarly situated

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

(c) Attorneys (Firm Name, Address, and Telephone Number) Sheehan & Associates, P.C., 891 Northern Boulevard, Suite 201, Great Neck, NY 11021, (516) 303-0552, Levin Epstein & Associates, P.C., 1 Penn Plaza, Suite 2527, New York, NY 10119, (212) 792-0046

DEFENDANTS

Chicago Bar Company LLC

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 (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

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

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, etc.

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, 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

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 \$ 5,000,000.00 CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 06/15/2018 SIGNATURE OF ATTORNEY OF RECORD /s/ Joshua Levin-Epstein

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

CERTIFICATION OF ARBITRATION ELIGIBILITY

Local Arbitration Rule 83.10 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

I, Joshua Levin-Epstein, counsel for plaintiff, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

- monetary damages sought are in excess of \$150,000, exclusive of interest and costs,
- the complaint seeks injunctive relief,
- the matter is otherwise ineligible for the following reason

DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

RELATED CASE STATEMENT (Section VIII on the Front of this Form)

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that " A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County? No
- 2.) If you answered "no" above:
 - a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County? No
 - b) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District? Yes

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County? _____

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

BAR ADMISSION

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

- Yes
- No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

- Yes (If yes, please explain)
- No

I certify the accuracy of all information provided above.

Signature: /s/ Joshua Levin-Epstein

UNITED STATES DISTRICT COURT

for the
Eastern District of New York

Michael Pizzirusso individually and on behalf of all others
similarly situated

Plaintiff(s)

v.

Chicago Bar Company, LLC

Defendant(s)

Civil Action No. 1:18-cv-03529

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

Chicago Bar Company, LLC
c/o C T CORPORATION SYSTEM
208 SO LASALLE ST, SUITE 814
CHIACGO, IL 60604

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are
the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12
(a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal
Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's
attorney, whose name and address are: Levin Epstein & Associates, P.C. 1 Penn Plaza, # 2527, New York, NY 10119

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint.
You also must file your answer or motion with the court.

DOUGLAS C. PALMER
CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk