ALSTON & BIRD

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Edition Facts

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Cases Per Section 3-10

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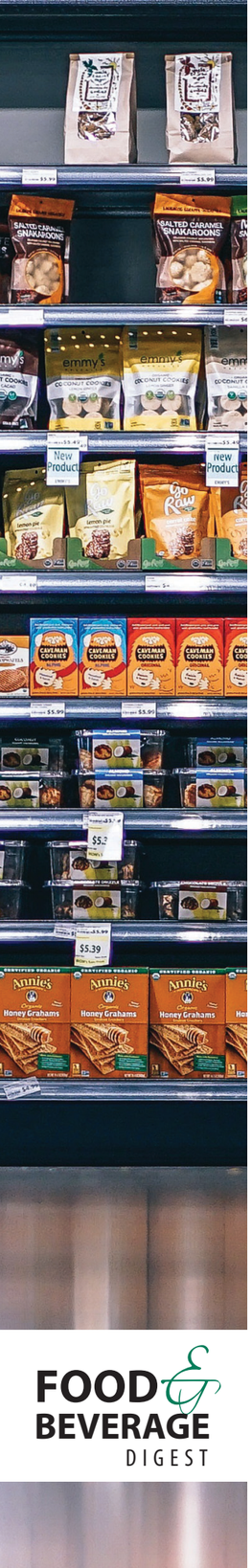
New Lawsuits Filed	100%
Motions To Dismiss	100%



New Lawsuits Filed

It's All Greek to Me

Gallagher v. Lactalis American Group Inc., No. 1:22-cv-00614 (W.D.N.Y. Aug. 14, 2022).

Famed Greek philosopher Aristotle once said, "No great mind ever existed without a touch of madness." Famed recipient of orders dismissing his fanciful complaints, Spencer Sheehan has filed a class action complaint on behalf of a Florida resident claiming that a leading cheese manufacturer misleads consumers by marketing feta cheese that is not actually made in Greece.

The complaint cites the product's use of the letter "E" in Greek font, the description of the manufacturer as "Europe's leading cheese expert," and the use of olive branch wreaths on the label to suggest that customers expect that they are buying cheese actually made in Greece, when in reality the product is crafted in the United States. As further evidence, the complaint cites such unassailable sources as a clip-art example of Greek letters, a picture of Lebron James with a wreath on his head at the Olympics, and unattributed quotes from consumers. All of this, the plaintiff alleges, led her to believe the product was made in Greece and to overpay as a result.

The plaintiff seeks to represent both a Florida class and a multistate class consisting of Alabama, Georgia, South Carolina, Tennessee, and Utah residents who purchased the product, and asserts claims for violations of unidentified state consumer protection statutes, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

A motion to dismiss is believed to brie in the works.

I Can't Believe It's Not (Almond) Butter!

Reyes v. Upfield US Inc., No. 7:22-cv-06722 (S.D.N.Y. Aug. 8, 2022).

At first it was nutty almond butter encroaching on the mighty peanut's territory. Now, almonds in oil form have slipped into margarine and vegetable oil spreads. But does it make those margarine and other buttery spreads a more natural, healthier alternative to butter? You butter not believe it, says Spencer Sheehan. On August 8, 2022, a New York plaintiff represented by Sheehan filed suit in the Southern District of New York, alleging that a large-scale margarine manufacturer is misleading consumers about the health benefits of its butter-like products containing almonds.

According to the complaint, the average person consumes six pounds of butter per year (versus just three pounds of margarine and butter spreads) because consumers understand that butter is a more natural and therefore healthier topping when making those Saturday morning bagel runs. Now, the complaint contends, a large-scale margarine manufacturer is seeking to butter up consumers even more by adding almond oil to its product, making it even healthier. Yet, according to the plaintiff, the amount of almond oil in the product is de minimis.

The plaintiff contends that the manufacturer's advertising—including pictures of an almond, almond leaf, and almond flower on the product's label—is therefore deceptive. She seeks damages for violations of various state consumer protection statutes, as well as breach of express and implied warranties, fraud, and unjust enrichment. She seeks to represent a nationwide class and a statewide class of New York consumers.

Too Latte to Apologize

Kominis v. Starbucks Corp., No. 1:22-cv-06673 (S.D.N.Y. Aug. 5, 2022).
McAllister v. Starbucks Corp., No. 2:22-at-00832 (E.D. Cal. Aug. 8, 2022).

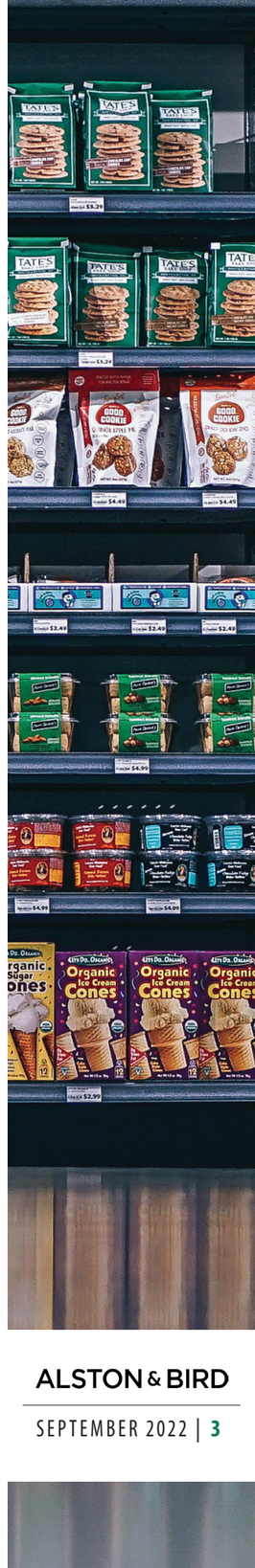
It's often said that it takes two to *mango*. Maybe that's why a *pear* of nearly identical class action complaints asserting claims for false and deceptive advertising have been filed against one of the nation's leading coffee chains alleging that its popular Refresher drinks don't contain *both* of the drinks' namesake fruits. Consumers are allegedly going *bananas*, because the defendant's Mango Dragonfruit, Pineapple Passionfruit, and Strawberry Acai Refresher drinks contain no mango, no passionfruit, and no acai, respectively. While the drinks *do* contain dragonfruit, pineapple, and strawberry, the plaintiffs state that consumers expect the products to contain *all* of the fruits advertised in the products' flavor names—a point the defendant counters in its motion to dismiss, arguing that reasonable consumers would not be deceived by the names of the beverages' respective flavors that appear on the defendant's menu boards. Nevertheless, the suit claims that the drinks are made predominantly of water, sugar, and grape juice concentrate, rather than the namesake fruits in the beverages' flavor names.

The complaints separately bring claims under New York and California law, alleging a veritable cornucopia of violations of state consumer protection statutes, *peach* of warranty, unjust enrichment, and fraud. As mentioned, a motion to dismiss was recently filed in the New York action, so only time will tell if this complaint will bear any fruit.

Sugar Pie, Honey *None?*

Cosgrove v. Kashi Sales LLC, No. 1:22-cv-00760 (W.D. Mich. Aug. 20, 2022).

Another health bar manufacturer finds itself in a sticky mess thanks to a recent class action complaint filed in Michigan federal court that alleges the defendant's "Honey Almond Flax" bars are mislabeled because consumers are led to believe that honey is the primary ingredient when, in fact, the product only contains a "negligible and de minimis" amount of honey. In addition to taking issue with the product's name, the plaintiff also complains that the representation "Made With Wildflower Honey" alongside "different hues of amber, evocative of honey" is false and misleading because honey is not a significant or exclusive sweetening ingredient. Based on these allegations, the plaintiff seeks to represent classes



from Florida and various other states of all persons who purchased the product. The plaintiff alleges violation of Florida and other state consumer protection statutes, breach of warranties, negligent misrepresentation, fraud, and unjust enrichment. The complaint seeks injunctive relief, compensatory and punitive damages, and attorneys' fees and costs.

Another Graham Cracker Not All That It's Cracked Up to Be?

Brockington v. Dollar General Corp., No. 1:22-cv-06666 (S.D.N.Y. Aug. 5, 2022).

Similar to recent challenges to other graham cracker products, another manufacturer faces a class action challenging its graham cracker product's front-of-pack claims. The plaintiff claims the product's labeling representations, including the phrases "Honey Graham Crackers," "Made with Real Honey," and "Contains 8g of whole grain per serving," as well as an image of a dripping honey dipper, are deceptive because they mislead consumers into thinking the product contains whole graham flour as its primary grain and honey as its primary sweetening ingredients instead of enriched flour and sugar.

According to the complaint, whole grains contain fiber and other important nutrients, whereas enriched grains, listed as the first ingredient on the back panel ingredient list, lack many of the same important nutrients. The suit claims that because the product highlights the 8 grams of whole grains and uses a whole grain ingredient, "graham," in its name, consumers expect that the product will be primarily made with whole grains. Accordingly, the complaint claims that consumers are unable to know what percentage of the weight of the serving size of the product is attributable to grain content compared to its other ingredients. Likewise, the plaintiff complains that the honey-related representations are misleading and suggests to consumers that honey—a healthier sweetening ingredient than sugar—is the primary sweetener when, in fact, sugar is listed as the predominant sweetening agent on the ingredients list.

Based on these allegations, the plaintiff claims the products are less valuable than represented and that he and other consumers paid more for the crackers than they otherwise would have. The plaintiff seeks to certify a New York and multistate class of purchasers and asserts violations of New York and multistate law, breach of warranties, violation of the Magnuson–Moss Warranty Act, fraud, and unjust enrichment.

No Gold at the End of This Rainbow?

Thames v. Mars Inc., No. 4:22-cv-04145 (N.D. Cal. July 14, 2022).
Mignin v. Mars Inc., No. 1:22-cv-04243 (N.D. Ill. Aug. 11, 2022).

At the corner of corporate social responsibility and candy sales lies a pair of class actions challenging an ingredient in Skittles candy. The substance at issue in these suits is titanium dioxide (TiO2), an ingredient used to achieve the popular candy's rainbow of colors. According to the complaint, consumers may actually be tasting *too much* of the rainbow because TiO2 is "a known toxin" that is unsafe for human consumption.

The plaintiffs point to the defendant's 2016 public commitment to phase out TiO2 in its products, and they allege that titanium dioxide can accumulate in the body and potentially cause harm. Notwithstanding the presence of the substance on the ingredients list, the plaintiffs ultimately charge the defendant with failing to inform consumers of the potential negative implications of consuming this alleged toxin, thereby deceiving consumers by omission. The plaintiffs assert various violations of California and Illinois consumer protection laws and claims for breach of express and implied warranties. The plaintiffs also assert common-law claims for fraud, fraudulent concealment or omission, fraud in the inducement, and unjust enrichment.

Consumer White-Hot About Coffee Creamer Labeling

Sumner v. The Kroger Co., No. 3:22-cv-01950 (S.D. Ill. Aug. 21, 2022).

A class action filed in the Southern District of Illinois alleges that the defendant's coffee creamer products—which are advertised as "Ultra-Pasteurized" and "Coffee Creamer" without mentioning that they are actually "Non-Dairy"—deceive consumers into thinking the products contain cream, a dairy ingredient. In particular, the complaint alleges that consumers associate pasteurization with dairy beverages—although, in reality, other types of beverages are routinely subject to the process known as "pasteurization" (e.g., apple cider)—and, therefore, are paying more for the products than they otherwise would have if they knew the products did not contain dairy. As a result, the plaintiff alleges claims for violation of Illinois and other state consumer protections statutes, breach of warranties, negligent misrepresentation, fraud, and unjust enrichment. The plaintiff seeks to represent classes from Illinois and various other states and seeks injunctive relief, compensatory and punitive damages, and attorneys' fees and costs.

A Protest About Protein

Wollerman v. Silk Operating Co. LLC, No. 1:22-cv-02169 (D. Colo. Aug. 23, 2022).

One consumer is apparently salty about the label for a salted caramel almond creamer. In large font on the front of its almond creamer, a major beverage manufacturer advertises that the product contains "4g Protein." Directly adjacent to that representation is the phrase "8% DV Per 4 TBSP," and on the other side, an instruction to "[s]ee nutrition information for protein and added sugar content." The product's nutritional facts on the backside of the label differentiate the standard 1-tablespoon serving size from the suggested serving size of 4 tablespoons.

But despite the express distinction made in the dual-columned nutrition facts—which shows the amount of protein contained with each serving and the suggested 4 tablespoon serving size—one consumer has sued. In this Colorado lawsuit, the plaintiff alleges that the labels mislead consumers by providing a suggested use designation as part of the product's nutritional facts. According to the complaint, this dual-sided labeling deceives consumers into believing the product contains more protein—and less sugar—per serving than it

actually contains. The plaintiff contends that she paid a premium for the product under this mistaken assumption and seeks to represent two classes—one of nationwide consumers and the other of Massachusetts consumers—harmed by the purportedly false advertising. She seeks damages for violations of Colorado consumer protection statutes, as well as breach of express and implied warranty, fraud, and unjust enrichment.

In the spirit of this protein protest, the court struck the plaintiff's original complaint for failure to name the correct defendant. The plaintiff was ordered to clarify the correct defendant with the court and to file a copy of the complaint with the modified case name and caption.

Consumer Suit Tests the Limits of "Ain't No Laws"

Borovoy v. Mark Anthony Brands Inc., No. 1:22-cv-04251 (Aug. 11, 2022).

In 2019, the Kenosha, Wisconsin Police Department wanted to share an important message with the members of the community: "Recently we have heard the saying going around 'Ain't no laws when you're drinking Claws.' We are here to remind you that even when you're drinking White Claws, laws still do apply!"

After that important message fermented on social media for three years, an Illinois consumer is attempting to brew some damages based on the alleged labeling of the defendant's White Claw Surge hard seltzers. Her class action, filed in Illinois federal court, challenges a slew of (allegedly) false claims, so much so that one would almost think that she truly believed that the maker of the hard seltzers took the now-infamous phrase that there "ain't no laws" to heart. Her suit claims that the "natural lime" and "hint of natural lime" labels are false because the hard seltzers (allegedly) do not contain an appreciable amount of lime, only natural flavors. In addition, the plaintiff complains, the hard seltzers' statements "made pure" and "2g Carbs" are improper and misleading health claims because they (allegedly) conceal the harmful effects of alcohol and they—shockingly—contain calories. Even the nearly ubiquitous terms "Spiked Sparkling Water" and "Hard Seltzer" are not safe from the wave of allegations because the plaintiff alleges that these terms falsely imply that the products contain distilled spirits.

It would be a bold strategy for the defendant to file a single-sentence motion—"Ain't no laws."—and be done with it. As much as we would enjoy seeing that happen, however, we will check in to see whether the defendant submits a more legal (but no less emphatic) response.

Motions To Dismiss

Procedural Posture: **Granted**

Slack-Fill Pilaf Claims Lacking, Fail to "Rice" to the Occasion

Jacobs v. Whole Foods Market Group Inc., No. 1:22-cv-00002 (N.D. Ill. Aug. 16, 2022).

Judge Elaine Bucklo from the Northern District of Illinois dismissed a plaintiff's slack-fill claims against a private-label rice pilaf manufacturer, based primarily on the defendant's argument that the front, back, and side panels of each box contain conspicuous and accurate information about the product's weight and serving size, the number of servings each box yields when prepared, and how to prepare the product. In the underlying complaint, the plaintiff claimed that the defendant violated the consumer protection statutes and common law of Illinois and 15 other states by selling its private-label rice pilaf in boxes that are larger than necessary for the amount of product they contain. Specifically, the plaintiff complained that the rice boxes were misleadingly sized to fit store shelves rather than the volume of product they contain and that this practice was designed to deceive consumers by making the "shelves look full, which appeals to consumers and makes them willing to spend more money."

But the court wasn't buying that argument. Nor was the court swayed by the plaintiff's invocation of a Seventh Circuit case—*Benson v. Fannie May Confections Brands Inc.*—observing that the presence of an accurate net weight statement does not eliminate the misbranding that occurs when a container is made, formed, or filled to be misleading. *Benson*, the court reasoned, involved boxed, ready-to-eat chocolates, so a consumer might reasonably expect to be able to estimate the approximate number of chocolates in a box based on the box size.

But here, reasonable consumers surely understand that the rice pilaf sold in a box must be cooked in liquid before consumption, which would cause the rice to expand in volume. The size of the box only bears a loose relationship to the amount of cooked product, and a consumer would look elsewhere (i.e., the back panel) to determine the number of servings in each box. According to the court, because the serving size information "dispels any tendency to mislead that the box size alone might create, there is no deception as a matter of law."

The court also poured out the plaintiff's common-law fraud claim for similar reasons, dismissed claims for breach of express or implied warranties because the plaintiff failed to provide pre-suit notice and did not allege the boxes were not fit for the ordinary purposes as required for implied warranty claims, and dismissed his negligent misrepresentation claim based on the economic loss rule, which holds that a negligence cause of action cannot be sustained for the recovery of economic loss alone.

Procedural Posture: **Denied**

Court Bites on Plaintiffs' "Sustainably Sourced" Fish Suit

Spindel v. Gortons Inc., No. 1:22-cv-10599 (D. Mass. Aug. 24, 2022).

A defendant couldn't set the hook on a motion to dismiss in Massachusetts federal court. In their complaint, the plaintiffs alleged that the defendant seafood company falsely advertised its tilapia products as being "sustainably sourced" when, according to the plaintiffs, some of the fish produced by the defendant are allegedly raised in and sourced from certain industrial fish farms that use "unsustainable production methods." At a hearing on the motion, the defendant admitted that some of its fish products were sourced from fish farms, but the defendant maintained that these fish farms operate according to "industry best practices."

The Massachusetts district court acknowledged that any argument by the plaintiffs that only "wild" tilapia are "sustainable" would hold no water. But the court ultimately denied the defendant's motion to dismiss and held that the plaintiffs' assertion that the defendant's tilapia is sourced, at least in part, from unsustainable fish farms was "plausible" enough to survive a motion to dismiss at this stage. We'll keep a close eye as the plaintiffs keep reeling, and we'll let you know what, if anything, they're able to haul in with their "sustainably sourced" claims.

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