ALSTON & BIRD

FOOD & BEVERAGE DIGEST

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Edition Facts

3 Sections This Edition
Cases Per Section 1-7

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Motion for Sanctions	100%

New Lawsuits Filed

There's Just No Whey

Rodriguez v. Mars Wrigley Confectionery US LLC, No. 1:23-cv-04422 (S.D.N.Y. May 25, 2023).

Class action, party of one? This could be the first, unless formidable plaintiffs' attorney Spencer Sheehan can locate other New Yorkers who purchased the defendant's popular Cheddar Cheese Combos snack not merely for "the taste of cheese," but because they "valued its nutritional attributes such as its protein content, vitamins and minerals."

The plaintiff claims that the labeling on the defendant's Combos Stuffed Snacks is misleading because it notes that it is "made with REAL CHEESE" and prominently features a block of fresh cheddar. And while the complaint itself reveals that the product is, in fact, made with cheese products, it alleges that the "dairy products solids" disclosed on the label fall well short of the alleged "promise" that Combos "would contain a significant, predominant and/or absolute amount of real cheese." After all, consumers value snack foods with ingredients they know and recognize, like cheese (this according to Sheehan's premier unbiased source—a "food industry executive with the international dairy conglomerate Kerry Inc.").

The plaintiff seeks to represent a New York class of similarly situated purchasers and brings claims for violation of the New York General Business Law, breach of warranty, fraud, and unjust enrichment.

No Rest Days for This Fitness Enthusiast (or His Friend)

Scheibe v. Lifeaid Beverage LLC, No. 3:23-cv-00840 (S.D. Cal. May 8, 2023).
Scheibe v. Perfect Keto Group LLC, No. 3:23-cv-00839 (S.D. Cal. May 8, 2023).

The lawsuit-pumping plaintiff we first covered a few months back (and again last month) apparently does not believe in rest days. But rather than super-setting lawsuits on his own this month, he found a spotter (who curiously shares the same last name). According to the complaints, both plaintiffs have "recently sought to lose weight and gain muscle" and "carefully review[] labels" to ensure that they "consume[] only natural ingredients and avoid[] artificial flavors and ingredients."

Unsurprisingly, both have the same attorney and nearly identical (i.e., copied and pasted) complaints, which (also unsurprisingly) feature nearly identical claims as the original plaintiff's prior suits challenging the "naturally flavored" labeling of various dietary supplements. As with those prior claims, the new suits claim the supplement labels are misleading because the supplements contain DL-malic acid, an allegedly artificial flavoring that the plaintiff argues is not a "natural flavor" as defined by federal and state regulations. The plaintiff seeks to represent a nationwide class alleging violations of California's Business & Professions Code, the state's Consumers Legal Remedies Act, unjust enrichment, and breach of express warranty.

Despite claiming that he "reviewed the labels on the Products prior to his purchase," and setting aside the small fact that he's filed numerous previous lawsuits on this exact theory, the plaintiff claims he "reasonably understood Defendant's 'Naturally Flavored' and 'No Artificial Flavors' statements" to mean that the products contain only natural flavorings. And like his prior complaints, he alleges he would not have purchased the products had he known the truth about them. At this point, we're going to go ahead and question the plaintiff's standing to pursue his injunctive relief claims.

Suga, Suga, How You Get So High?

Franco v. Chobani LLC, No. 1:23-cv-03047 (N.D. Ill. May 15, 2023).

A large household-name yogurt manufacturer likely turned sour after it got hit with a class action complaint filed in Illinois over the company's "Zero Sugar" yogurt product. The plaintiffs took issue with the marketing of the Zero Sugar yogurt product because every serving of the product is allegedly sweetened with 4 grams of allulose, "a naturally occurring *sugar* found in figs, raisins, wheat, maple syrup, and molasses."

The complaint cites marketing of the product with claims that it has "zero sugar" and "no sugar" as the product being "intentionally mislabeled and intended to deceive" consumers. According to the complaint, "[t]here is no such thing as 'zero sugar' allulose; it doesn't exist." The complaint states that allulose, as a monosaccharide, has a nearly identical chemical makeup as fructose and therefore fits the FDA's codified definition of sugar. But to avoid any preemption arguments, the plaintiffs plainly state that they "are suing for violation of statutory state law," not "any violation of FDA regulations," "because they were tricked into buying a product deceptively labeled 'zero sugar' and 'no sugar' that is actually made by adding sugar as a sweetener."

Although the complaint acknowledges that the company includes a disclaimer in the product's ingredient list, denoting that the milk and juice ingredients include "a dietarily insignificant amount of sugar," the complaint alleges that the ingredient list does not include "any asterisk or notation for allulose" on the ingredients list. The complaint alleges violations of several states' consumer fraud acts and false advertising laws, as well as a claim for unjust enrichment.

Spicy Allegations

Henderson v. Blue Diamond Growers, No. 5:23-cv-00289 (M.D. Fla. May 8, 2023).

A Florida consumer filed suit against the manufacturer of a popular brand of flavored almond snacks, alleging that the labeling of its "Habanero BBQ" almonds is misleading because it fails to disclose that the habanero flavor is derived from artificial sources. According to the complaint, the plaintiff "expected the Product's habanero chili pepper taste" to come from habanero chili peppers. And while the complaint admits that the ingredient list contains "habanero chile peppers," it alleges there is "only slightly more" habanero chili pepper than malic acid, an artificial ingredient allegedly used to impart the flavor of habanero chili peppers.

A discerning label-reader, however, might notice that malic acid is listed *after* a more prominent source of the product's habanero flavor—habanero chile pepper. While the plaintiff does not contend that the pepper itself is artificial, it urges the court to find that there ought to be more. Talk about a hot take! The consumer bases his claim off purported "laboratory analysis" that allegedly confirmed the malic acid used in the product was artificial DL-malic acid rather than naturally occurring L-malic acid, and that because the product does not disclose the artificial nature of its flavoring, it is misbranded under federal statute and misleading to consumers.

Readers may recall that the plaintiff's counsel, Spencer Sheehan, previously had a complaint dismissed in New York for failing to reveal the source of its purported "laboratory analysis," even after being permitted two chances at repleading from the court. While one might expect to find more detailed allegations regarding the purported testing, the complaint is noticeably lacking any sourcing for its single conclusory paragraph about that testing.

Based on those allegations, the plaintiff brings claims for violation of Florida's Deceptive and Unfair Trade Practices Act, other state consumer protection statutes, false advertising, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment. He seeks to represent a Florida class and a multistate class.

Plaintiff Brings Spicy New Suit About Chili Peppers

Reyes v. Badia Spices Inc., No. 1:23-cv-03607 (E.D.N.Y. May 15, 2023).

It's summer and the temperatures are already rising, but one New York consumer is looking to crank up the heat even further on a spice manufacturer for allegedly misleading consumers about the place of origin of its "New Mexico Chili" product. The plaintiff contends that the defendant manufactures and sells a brand of dried chili peppers bearing indigenous markings and labeled as "New Mexico Chili," when the product is not, in fact, grown in New Mexico. The complaint details the long lineage and importance of New Mexico chile, including how the state has passed laws to "protect the public against chili peppers marketed as being from New Mexico if they were not grown and harvested there." According to the complaint, the New Mexico chile industry, which employs thousands and brings in billions of dollars in revenue for the state, is threatened by companies selling lower-priced imported chilis from China, India, and Mexico. The plaintiff claims that even the product's back labeling doesn't disclose the true origin of the product, rather one must visit the defendant's website to see that the chili peppers' country of origin is really Mexico, not New Mexico.

Based on these allegations, the New York–based plaintiff contends she would not have purchased the product had she known it originated in Mexico. She seeks to represent New York and multistate classes of similarly situated purchasers and brings claims for violations of the New York General Business Law, violations of other states' consumer protection statutes, breaches of express warranty, the implied warranty of merchantability, violations of the Magnuson–Moss Warranty Act, fraud, and unjust enrichment.

I Like [Whole Wheat Buns] and I Cannot Lie!

Chandrasekera v. Whole Foods Market Group Inc., No. 1:23-cv-03767 (E.D.N.Y. May 19, 2023).

The plaintiff is no Sir Mix-a-Lot, but there is no denying she wants to mix it up after she bought the defendant's "Whole Foods Market Brioche Whole Grain Hamburger Buns." She claims that *over a year ago* she was in search of whole wheat buns and took a chance on the defendant's hamburger buns. Much to her alleged dismay, the plaintiff later realized that the defendant's products are mislabeled because they allegedly are not substantially made up of "whole grain" flour, but rather identify "enriched wheat flower" as the product's most predominant ingredient. Burdened with this knowledge for over a year, the plaintiff finally voiced her discontent with the defendant's product by (as one does) filing a putative class action in New York federal court.

The complaint asserts claims for violations of various states' consumer protections statutes on behalf of a nationwide class, as well as violations of New York General Business Law Sections 349 and 350 on behalf of a New York subclass. Among other relief, the complaint seeks compensatory, statutory, and punitive damages, as well as an award of attorneys' fees and costs.

Soup du Jour

Morris v. Zoup! Fresh Soup Co. LLC, No. 5:23-cv-11242 (E.D. Mich. May 26, 2023).

In this *suit* of the day, the plaintiffs take aim at the soups advertised and sold by the defendant retailer at its various in-store locations. According to the complaint, the defendant advertises its soups for sale by the ounce on signs posted to consumers behind the store counter. The complaint claims that the defendant's soups are sold in standardized cartons and are filled to a pre-marked "fill-to" line that appears on each carton. But the plaintiffs contend that the defendant retailer consistently underfills its soup cartons, leaving consumers with 18.75% less soup than expected based on the in-store representations. The plaintiffs seek to represent a nationwide class of purchasers, as well as Michigan and Illinois subclasses of purchasers. They assert claims for violation of Michigan and Illinois state consumer protection statutes, breaches of express and implied warranty and merchantability, negligent misrepresentation and omissions, fraud, and unjust enrichment. But until this one is decided—*soup's on!*

Motions to Dismiss

Procedural Posture: Granted

Federal Judge Fed Up with de Minimis Ingredient Claims

Guzman v. Walmart Inc., No. 1:22-cv-03465 (N.D. Ill. May 15, 2023).

Last month, we wrote about a federal judge from the Northern District of Illinois requiring notorious plaintiffs' attorney Spencer Sheehan to file an exhibit detailing all the product labeling claims he's filed and noting which had survived a motion to dismiss. We also noted that the judge's minute orders were filled with punny language, making our jobs of spicing things up much easier. But wait—there's more!

After dismissing one of Sheehan's recent consumer class action complaints, which alleged that consumers were misled into believing that the defendant's product contained more olive oil than the label "Mayo with Olive Oil" purportedly suggested, the same judge ordered Sheehan to file a spreadsheet identifying every case he had filed since 2020 where the plaintiff alleged that "the consumer expected more than a de minimis amount of 'Ingredient X' in a product." Regarding the actual case before the court, the judge quipped that the plaintiff's "theory of the case was past its prime from the very moment that it arrived in the federal courthouse" because the court had recently dismissed two other cases filed by Sheehan "alleging that a label was deceptive because the consumer expected a certain amount of an ingredient in a product." As explained in those prior orders, the "Mayo with Olive Oil" label was not misleading as a matter of settled law.

Moving beyond the court's dismissal of the claims at issue, the court noted that it had "gone round and round the carousel" with plaintiff's counsel on similar claims and called out Sheehan's "notoriety" for filing a litany of consumer class action complaints about product labeling, many of which "have suffered the judicial equivalent of a crash landing, or perhaps an explosion on the launch pad." After reiterating lawyers' obligation to file cases in good faith under Rule 11, the court ordered Sheehan to produce the Excel file. Such an order was warranted, according to the court, because Sheehan "has become a wrecking ball when it comes to imposing attorneys' fees on other people," so it was worth considering "who should pay for the cleanup." Even more pointedly, the court noted that Sheehan "has taken everyone on a ride," so it was his responsibility to "show who should pay for the ticket."

Plaintiff's Firm Finds Itself in a Sticky Situation After Court Pops the Bubble on Gum-Flavoring Suit

Lesorgen v. Mondelēz Global LLC, No. 3:22-cv-50375 (N.D. Ill. May 19, 2023).

"Sprawling allegations," "the proverbial kitchen sink," "blunderbuss pleading," and "spaghetti … thrown at walls"—a district court reached *way* back into its thesaurus to find the most colorful descriptions for how it felt about a recent putative class action brought by Sheehan & Associates.

In the complaint, the plaintiff alleged that she was deceived by a gum label sporting a blue leaf with condensation bubbles. According to the plaintiff, while the label does not contain the word "mint" or "peppermint," she still purchased the gum believing that it was flavored by real mint or peppermint because consumers associate the bubbles on the blue leaf with the "cooling sensation" of mint-based products. She brought claims for purported violations of Illinois and similar state consumer fraud acts, as well as for breach of warranty, misrepresentation, and unjust enrichment.

While deferring on the question of class standing, the court ground its teeth on the plaintiff's claims, concluding they all failed on the merits because the product's label hinted—at most—that its *flavor* was mint, rather than its ingredients. Echoing another judge's recent warning to Sheehan about Rule 11, the court previewed that it may take Sheehan more than a pair of scissors to get out of a sticky situation if he continues his filing blitz in the Northern District of Illinois.

Money-Back Guarantee Sours Standing in Honey-Lemon Cough Drop Suit

Valiente v. Publix Super Markets Inc., No. 1:22-cv-22930 (S.D. Fla. May 24, 2023).

A Florida federal court has tossed a class action alleging that a label that offers an unconditional money-back guarantee for the product is deceptive, determining that the plaintiff lacks Article III standing. The plaintiff alleged that the defendant's honey-lemon cough drops deceived consumers into believing the product contains "a non-de minimis amount of lemon ingredients" and is capable of soothing bronchial passages. Based on these allegations, the plaintiff sought monetary damages—the amount he purportedly overpaid for the product—as well as injunctive relief.

In dismissing the case, however, the court found that the plaintiff alleged no facts supporting that he had standing in the case. The court was little soothed that the plaintiff "completely ignore[d]" the defendant's point that he could not have incurred money damages when, in the same breath (the same cough?), the labeling provided a "money-back guarantee." Worse, the plaintiff provided only conclusory allegations that he paid a "price premium." Flimsy allegations founded on the plaintiff's "subjective, personal expectations," observed the court, are not sufficient to support Article III standing. Finally, the court found that the plaintiff's request for injunctive relief failed because he would now be aware of any purportedly misleading advertising.

Procedural Posture: Denied

Turning Lemons into a Class Action

Bardsley v. Nonni's Foods LLC, No. 7:20-cv-02979 (S.D.N.Y. May 18, 2023).

Back in May 2020, we first wrote about Spencer Sheehan's renewed love of challenging artificial flavorings in this putative class action concerning a biscotti manufacturer's lemon-

flavored cookies. In this suit, the plaintiff alleges that the defendant's Limone Biscotti are not just like someone's grandma used to make because grandma's cookies would have been mainly flavored by real lemon.

Three years and two motions to dismiss later, a New York federal court has ruled that it has subject-matter jurisdiction over the case because the plaintiff has adequately alleged the biscotti are not predominantly flavored by lemons and that the potential class damages may exceed $5 million. Alleging a price premium theory, the court bit on the plaintiff's claims that she relied on the label's representations to expect that the product's lemon flavor was derived from real lemons, rather than artificial lemon flavorings.

Evaluating the renewed motion to dismiss under the Class Action Fairness Act (CAFA), the court held that the lemon cookie connoisseurs who were allegedly deceived may be eligible to recover greater than three times their actual damages if the violation is found to be knowing or willful under New York General Business Law Sections 349(h) and 350-e(3). The court calculated the plaintiff has met the $5 million CAFA threshold by multiplying the number of units of the biscotti sold to New York customers by the total possible number of statutory damages per sale. The case can now proceed on the remaining New York law claim, with the plaintiff saying *grazie a mille* to the court.

Things Are Heating Up in California

McKay v. Sazerac Company Inc., No. 3:23-cv-00522 (N.D. Cal. May 17, 2023).

As readers of this *Digest* are undoubtedly aware, a slew of lawsuits have been filed over the marketing and sale of mini Fireball Cinnamon, the still cinnamony—but very much *not* whisky containing—malt beverage cousin to the tailgating favorite Fireball Cinnamon Whisky. Last month, the Northern District of California issued the first ruling on a motion to dismiss that we've seen thus far in these cases. And in the Golden State, the heat is on.

Distilling the allegations, the plaintiff complains of same same, but different. The malt beverage label allegedly is misleading because it contains substantially similar imagery, coloring, and packaging as its party-hard whisky-bearing cousin, which deceives consumers into believing the malt beverage both actually contains whisky and is as strong as the whisky Fireball product. Denying the defendant's motion to dismiss, the district court concluded these allegations stood a *shot*.

First, the court rejected the defendant's "safe harbor" defense, reasoning that the product's certificate of label approval just was not high enough proof to constitute sufficiently "formal" agency action to invoke the safe harbor defense under California consumer protection laws. Second, the court concluded that the complaint sufficiently alleged that the mini Fireball label and package (specifically, the name "Fireball," the defendant's trademark fire-breathing dragon, the phrase "RED HOT," the color scheme, burnt edging on the label) are "affirmatively misleading" because of the strong similarities to the whisky-based product.

Third, the court found that the disclosures on the bottom of the Fireball Cinnamon product were insufficient to cure consumer deception. The "malt beverage" disclosure on the front label, reasoned the court, was ambiguous, and the "tiny print" that the product contained 16.5% alcohol by volume did not override the "flashier language" and design of the packaging. Finally, the court rejected the defendant's other contextual clues arguments, observing that reasonable consumers would "not necessarily" know that a gas station convenience store is prohibited from selling distilled spirits, look at nearby products to realize the mini Fireball did not contain whisky, or know of the defendant's distribution channels.

While this is only the first in what is expected to be a long line of rulings arising from similar facts, the court's ruling is sure to burn all the way down as the plaintiffs' bar continues to pursue these cases.

Motion for Sanctions

An Expensive End to This Fish Tale

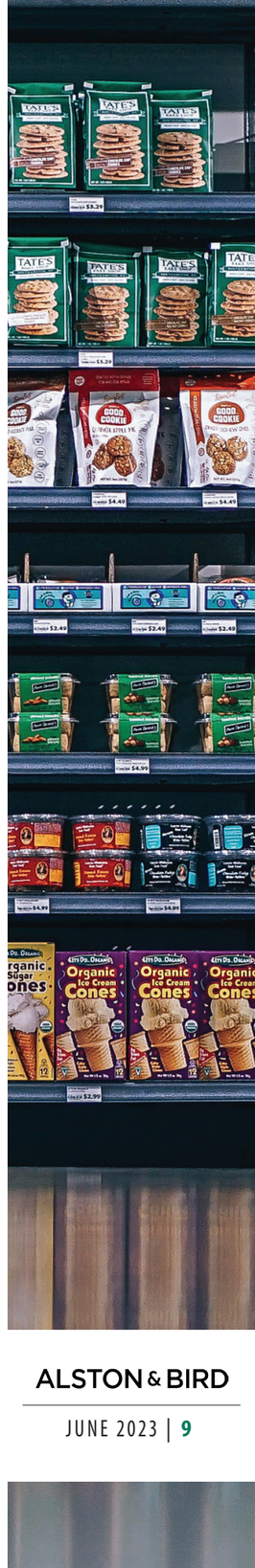
Amin v. Subway Restaurants Inc., No. 4:21-cv-00498 (N.D. Cal. May 4, 2023).

Be careful what you *fish* for! Defense counsel for a popular restaurant chain filed a motion for sanctions against the plaintiff's counsel, who captained a prolonged litigation voyage targeting the defendant's tuna. (Our readers will know this litigation well.) According to the defense's motion for sanctions, counsel for the plaintiff, despite purportedly knowing that their allegations held no water, filed no less than three "frivolous" complaints over a two-year period in bad faith, only to voluntarily dismiss their latest complaint in the eleventh hour right before the deadline for filing class certification motions. The voluntary dismissal, according to the defense, came at a convenient time for plaintiff's counsel, having been admonished recently by the court for their failures in discovery, which included whiffing on statutory deadlines and answering to the court for those failures.

The defense's motion argues that plaintiff's counsel knew nearly two years ago that their allegations about the defendant's tuna products—first, alleging that the defendant's tuna is not tuna at all; then, alleging that although the tuna *is* tuna, it is not the species or type of tuna that the plaintiff expected; and finally, alleging again that the defendant's tuna is not 100% tuna—were nothing but a load of *carp*.

Counsel for the defense claims that it produced extensive evidence and documentation detailing the defendant's tuna supply chain, which tracks the tuna from the ocean all the way to the restaurant, where it is prepared and sold to consumers. The defense argues that plaintiff's counsel blatantly ignored the evidence in front of them, choosing instead to keep swimming onward with claims they knew to be false. This, claims the defense, forced the defendant into two years of expensive, toilsome litigation that included motions practice, discovery, expert disclosures, and preparation for class certification. The defense requests sanctions of at least $617,955.49 against plaintiff's counsel.

The court set a hearing on the defense's motion for sanctions for later this summer. And you can bet your bottom sand dollar we'll will drop a line in a coming issue to cover the end of this tuna tale.



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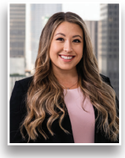

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