ALSTON & BIRD

# FOOD & BEVERAGE DIGEST

APRIL 2023

## Edition Facts

2 Sections This Edition
Cases Per Section 8-10

**Reading Calories 0**

| | % reading value |
|---|---|
| New Lawsuits Filed | 100% |
| Motions To Dismiss | 100% |

# New Lawsuits Filed

## *Pea-king* Behind the Label: Plaintiff Claims Plant-Based Protein Is Whey Below Par

*Luna v. Brad's Raw Chips LLC*, No. 3:23-cv-00926 (N.D. Cal. Mar. 1, 2023).

A California plaintiff alleges that the protein advertisements on the defendant's snack products are un-bean-lievable. Alleging the defendant's products are stuffed with "low-quality proteins," he claims the plant-based ingredients don't actually provide as much digestible protein as they claim.

The defendant prominently advertises the amount of protein on the front of each package for these snacks. However, according to the complaint, these claims are a mis-steak because plant proteins can't actually be fully digested or absorbed by the human body. By the plaintiff's calculation, at most only 85% of the protein derived from the kale, sunflower seed, and chickpeas that form the base of the products can be easily digested. Under this theory, the plaintiff alleges the defendant's front-of-pack advertisement of the amount of protein per bag is misleading because it does not divulge the true amount of protein by percent daily value (%DV) the products actually provide. The complaint alleges violations of FDA rules, California's consumer protection statutes, Pennsylvania's Unfair Trade Practices and Consumer Protection Laws, and unjust enrichment.

---

## Pop! Goes the Nutrient Claims

*Cogswell v. Lesserevil LLC*, No. 1:23-cv-00311 (E.D. Cal. Mar. 1, 2023).

In a new complaint worthy of a motion picture itself, one California-based plaintiff takes aim at a defendant food manufacturer for allegedly misleading customers about the ingredients and healthfulness of its popcorn products. According to the complaint, the defendant produced a marketing and advertising campaign focused on claims that appeal to health-conscious consumers. And the defendant wasn't very subtle, advertising its products as "healthier, less processed, [and] earth friendly" and including additional nutrient content claims like organic, vegan, 40% less fat, and 20% fewer calories.

According to the complaint, once consumers pull back the curtain on those claims, they'll find high amounts of unsafe fats, which can lead to severe health issues such as "coronary heart disease—the number one killer of Americans every year." So dramatic. But the complaint doesn't stop there. According to the allegations, the defendant's "healthy" snacks contain more saturated fat per serving (5 grams) than an entire large order of McDonald's french fries (3 grams)! Based on these allegations, the plaintiff seeks to represent nationwide, multistate, and California classes to pursue claims for unjust enrichment and violation of various states' consumer protection statutes.

---

## Tonic Touted as Healthy Alcohol Alternative Is Allegedly Highly Addictive

*Torres v. Botanic Tonics LLC*, No. 3:23-cv-01460 (N.D. Cal. Mar. 28, 2023).

The plant-based wellness industry is under fire after a scathing complaint in the Northern District of California alleged that a plant-based tonic secretly contains highly addictive opioids. The new complaint alleges that the defendant manufactures a "wellness" tonic that purports to contain kava, a harmless, plant-based ingredient, and "other herbs." The defendant purportedly advertises the tonic as a healthy alternative to alcohol and has allegedly partnered with college students and social media influencers to tout its benefits in supporting individuals' sobriety. Yet according to the complaint, the primary ingredient in the wellness tonic is a dangerous opioid known as kratom, which both the FDA and DEA have allegedly flagged as a highly addictive substance. The complaint points to numerous online reviews of the wellness tonic that criticize its highly addictive properties, and the named plaintiff, who is in recovery for alcohol addiction, alleges that he quickly became addicted to the drink upon first trying it as an alternative to alcohol.

The plaintiff further alleges that he relied on the defendant's purported representations of the wellness tonic's healthful properties when he purchased the drink. Based on these allegations, the plaintiff brings claims for unfair and fraudulent business acts and practices, false advertising, common-law fraud, breach of the implied warranty of merchantability, and unjust enrichment. He also seeks injunctive relief to prohibit further conduct by the defendants.

---

## Plaintiff Claims Cake Loaf Buttered Up Consumers

*Bradby v. Bimbo Bakeries USA Inc.*, No. 1:23-cv-00522 (D. Md. Feb. 26, 2023).

A Maryland-based plaintiff alleges in a recent class action complaint that the defendant's "All Butter Loaf Cake" buttered up consumers by not disclosing on the product's front label that the product's buttery taste was "derived in part from artificial flavoring." While the product's ingredient list identifies "artificial flavors," the plaintiff "expected" that butter would be the product's "main shortening ingredient and that its butter taste was only from butter." The plaintiff also avers that state and federal regulations required the defendant to state on the product's front label that the product was "Artificially Flavored." The complaint, filed by Spencer Sheehan, asserts a barrage of claims, including violation of state consumer protection laws, breach of express and implied warranty, violation of the Magnuson–Moss Warranty Act, negligent misrepresentation, fraud, and unjust enrichment. The plaintiff seeks to represent Maryland and multistate consumer fraud classes.

---

## Consumer Wants a Sugar Shake Smackdown

*Bates v. Abbott Laboratories.*, No. 1:23-cv-00387 (N.D.N.Y. Mar. 27, 2023).

A New York–based plaintiff lashed out against the manufacturer of the Ensure brand of nutrition shakes for misrepresenting the products' "healthfulness" because the products contain up to 22 grams of added sugars. Apparently buzzing on her ill-begotten sugar high, the plaintiff alleges that the defendant deceives consumers through health and wellness labeling representations such as "#1 Doctor Recommended Brand," "Complete, Balanced Nutrition for everyday health," and drink "2 bottles per day as part of a healthy diet" because the shakes contain way more than the recommended amount of added sugar per serving. According to the complaint's 183 paragraphs, too much sugar is bad for you! The plaintiff focuses much more of her 40-page complaint on the ills of added sugar on society (including its harms to the "gut barrier"!) than on her actual claims.

But after providing that helpful health lesson, the plaintiff ultimately alleges that it is misleading for the defendant to claim that its drinks provide "complete" and "balanced" nutrition when 16.4% to 40% of the products' calories come from added sugar, when the FDA, the World Health Organization, and the Dietary Guidelines for Americans recommend limiting added sugar consumption to less than 5–10% of daily calories for a healthy diet. The plaintiff also claims that the defendant's representations and omissions were designed to convey "the same material messages regarding the healthfulness of the" shakes and caused consumers, such as herself, to spend more money than they otherwise would have on the products. Based on these allegations, the plaintiff seeks to certify a New York class of consumers, alleging violation of New York consumer protection laws, breach of express warranty, negligent misrepresentation, intentional misrepresentation, and unjust enrichment.

---

## Yo Ho, Yo Ho, and a Bottle of *Liqueur*?

*Golston v. Bumbu Rum Company LLC*, No. 1:23-cv-00241 (W.D.N.Y. Mar. 18, 2023).

The Rum Runner himself, Spencer Sheehan, is back on the high seas to protect the fabled "Original Craft Rum" name. Continuing his quest to oust any imposters, Sheehan has filed some *spirited* claims for false advertising, breach of warranty, negligent misrepresentation, fraud, and unjust enrichment on behalf of a New York citizen who claims a liquor manufacturer falsely markets and labels its flagship rum product.

According to the complaint, the defendant's marketing scheme misleads consumers because its flagship rum product is conspicuously advertised as "Original Craft Rum" and "premium rum" in advertising and point-of-sale displays. The spirit includes less-conspicuous text describing it as a "Rum with Natural Flavors," but according to the complaint, even that description is misleading. The plaintiff alleges that the product not only has a lower ABV than federal and state regulations allow for classification as a distilled spirit but cannot qualify as rum due to the added sugar and flavorings that make it "closer to a cordial or liqueur." Buccaneers have staged a mutiny for less! The plaintiff alleges that he paid more than he otherwise would have if he'd known that the product did not actually qualify as rum and asserts that more than $5 million (a veritable treasure) is at stake.

The plaintiff seeks to represent a statewide class of New York purchasers as well as a multistate class of purchasers from Arkansas, Kansas, Montana, Nebraska, North Dakota, Oklahoma, and Utah. The plaintiff and the putative multistate class originally sought to have the defendant walk the plank but have settled for damages in light of being landlocked.

---

## Lait Français

*Piotroski v. La Fermière Inc.*, No. 2:23-cv-01578 (E.D.N.Y. Feb. 28, 2023).

A New York plaintiff likely longing for her time spent studying abroad in Paris filed a class action based on labeling claims by the defendant yogurt manufacturer that allegedly led her to believe that its yogurt products were authentic products of France. According to the complaint, the yogurt label states the product is "Naturally French," the brand name is French, and the jars resemble those used to sell yogurt in France, representations that are all allegedly false and misleading because the products are manufactured in New York.

As a result, the plaintiff alleges that consumers are induced into paying more for the product than they normally would. Accordingly, she seeks to represent a statewide class of New York purchasers, basing her suit on violations of state business law, including false labeling, false advertising, and deceptive and misleading practices.

---

## Magique or Magic? Crème or Cream? Plaintiff Targets French Origin Claims

*Faris v. Petit Pot Inc.*, No. 2:23-cv-01955 (N.D. Cal. Mar. 16, 2023).

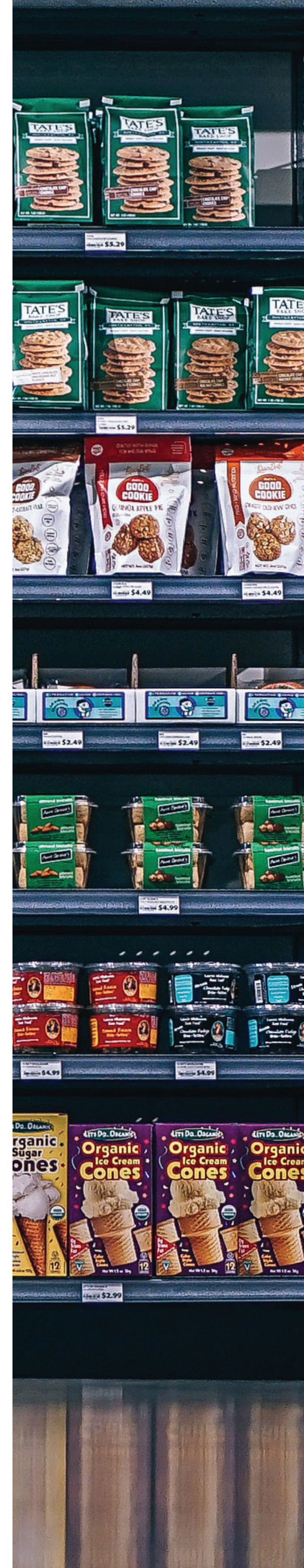
A manufacturer of "Pot de Crème" dessert products faces a putative class action challenging the products' labeling and advertising as misleading consumers into thinking the products are made in France when they are not. The plaintiff points to the product label's "French Dessert" claim, the use of an image of a figure wearing a French beret, and the packaging's statement, "A Taste of Magique," among other representations, as misleading to consumers. The plaintiff seeks to certify both nationwide and California classes and asserts violations of California's consumer protection laws, breach of implied warranty, fraud, unjust enrichment, and intentional and negligent misrepresentation.

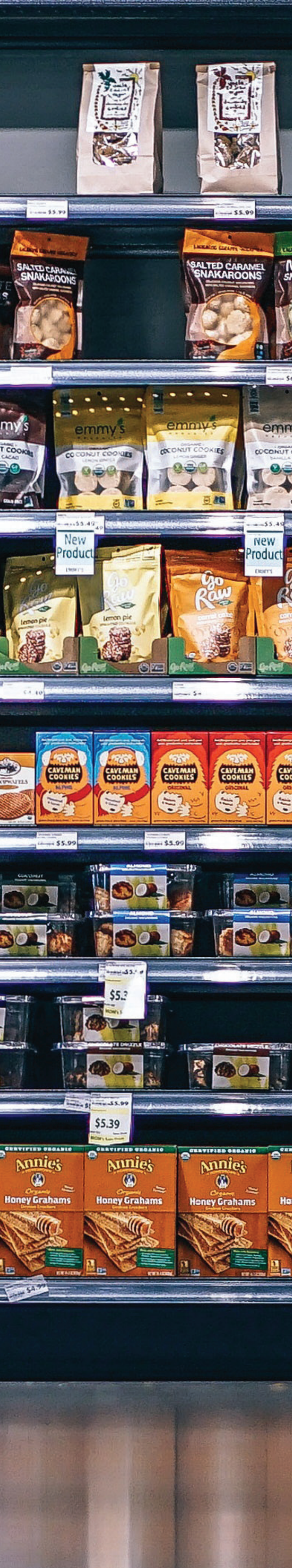
---

## Gum Chewer Snaps over Sugar-Free Gum

*Quilez v. Mondelēz Global LLC*, No. 1:23-cv-01889 (S.D.N.Y. Mar. 6, 2023).

Chewing gum isn't just about blowing bubbles for this plaintiff! A gum chewer based in New York is behind a recent suit in New York federal court alleging that the defendant's "Sugar Free Gum with Xylitol" deceives consumers into thinking its gum reduces levels of oral bacteria and plaque. According to the complaint, gum-chewing consumers expect





their gum to be sweetened "predominantly or exclusively" with xylitol—an ingredient that purportedly provides certain oral health benefits—because the xylitol ingredient is called out on the product's front label. However, the plaintiff contends that the defendant's gum only contains a de minimus amount of xylitol and relies instead on sorbitol as its primary sweetening ingredient. This, according to the plaintiff, practically extinguishes any oral health benefits from the gum through its xylitol. The complaint asserts putative class claims on behalf of purchasers from New York and various other states for violation of statutory consumer protection statutes, breaches of express and implied warranties, fraud, and unjust enrichment. The complaint also seeks compensatory and punitive damages along with attorneys' fees and costs.

### A Not-So-Minty-Fresh Suit

*Reynolds v. Mondelēz Global LLC*, No. 5:23-cv-00087 (N.D. Fla. Mar. 27, 2023).

The infamous plaintiffs' attorney Spencer Sheehan is at it again with a freshly minted class action targeting a chewing gum manufacturer for representations made about the gum's flavor. Reminiscent of similar lawsuits that Sheehan has filed against a mint ice cream manufacturer and this same gum manufacturer, Sheehan's most recent mint-based pleading alleges that the defendant misleads consumers by failing to disclose that the gum is artificially flavored.

Although the words "mint" and "peppermint" are absent from the packaging of the "original" flavor gum, the plaintiff argues that mint is the characterizing flavor of the gum—pointing to the label's imagery of a peppermint leaf as support. The plaintiff claims that this label is misleading because the mint taste comes from *artificial* flavoring without the product's label stating so. The plaintiff alleges that the gum sells at a higher price than similar products represented in a non-misleading way and at a higher price than it would be sold without the misleading representations and omissions. The plaintiff seeks to represent a Florida class and consumer fraud multistate class and pursue claims for breaches of express and implied warranties, negligent misrepresentation, fraud, and unjust enrichment.

## Motions to Dismiss

**Procedural Posture:** Granted

### District Court Dismisses Mozzarella Suit as Too Cheesy

*Smith v. General Mills Sales Inc.*, No. 1:22-cv-01529 (N.D. Ill. Mar. 3, 2023).

A district court rejected another one of Spencer Sheehan's cheese-y suits. It's the mozzarella cheese—or lack thereof—in the defendant's popular brand of Totino's Pizza Rolls that had Sheehan and Co. up in arms this time. In the suit, the plaintiff contends that based on the pizza roll box, which reads "CHEESE" and "Naturally Flavored" on the front label, she expected the pizza rolls to contain a non de minimus amount of "traditional cheese." Instead, the plaintiff contends, the rolls contain primarily "imitation mozzarella cheese," composed of vegetable oils and chemicals. According to the complaint, this representation is misleading because the label should have displayed the percentage of real cheese in the rolls and disclosed the presence of imitation cheese on the label. But imitation is, of course, the sincerest form of flattery, and the district court was nonplussed by the plaintiff's outrage over imitation mozzarella. In granting the defendant's motion to dismiss, the court picked apart the plaintiff's allegations as thoroughly as a kid making sure there are no olives in his pizza.

The court disagreed with the plaintiff's claims that the pizza roll packaging was misleading and held that the plaintiff failed to allege that reasonable consumers would expect the pizza rolls to contain more real cheese than fake cheese. The court stated that none of the dictionary definitions proffered by the plaintiff in the complaint defined pizza "as containing a certain *amount* of traditional cheese" and that federal regulations do not have a standard of identity for pizza. The court also held that the pizza rolls "Cheese Naturally Flavored" representation would not lead reasonable consumers to expect real cheese to predominate over imitation cheese. The court acknowledged that a representation like "Real cheese" or "100% cheese" may alter the analysis, but the plaintiff here failed to explain why the "naturally flavored" representation would lead consumers to expect a certain amount of real cheese in the product. The court also held that the defendant was not required to disclose the percentage of real cheese in the pizza rolls, finding that cheese was not a characterizing ingredient in the "Cheese Naturally Flavored" pizza rolls. The court stated cheese may be a characterizing ingredient in "Cheese Pizza Rolls," but the plaintiff purchased "pizza rolls" with "cheese" as a "natural flavor," moving the product outside the federal requirements.

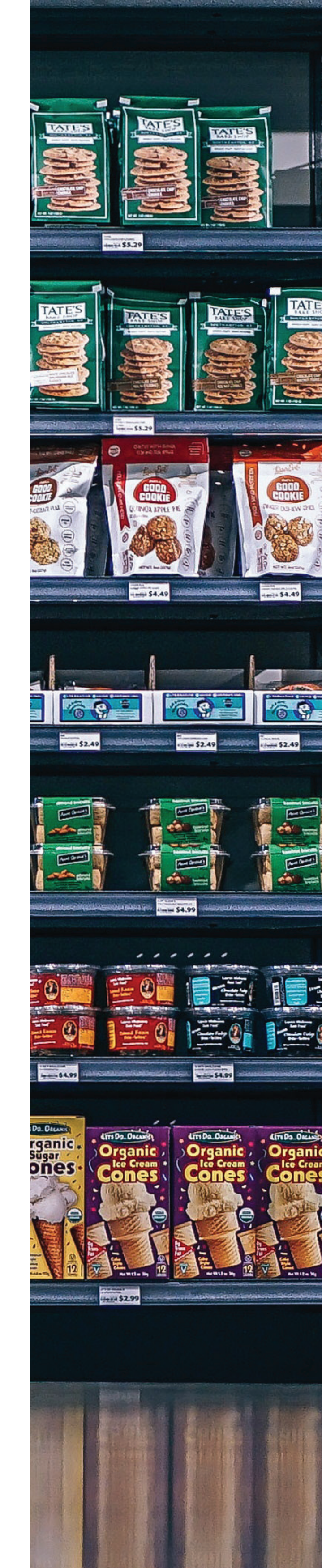
The plaintiff's Illinois consumer protection claim was dismissed without prejudice, as were her claims for fraud, unjust enrichment, and injunctive relief. But the court dismissed *with* prejudice the plaintiff's warranty and negligent misrepresentation claims. Despite being provided the opportunity to amend, Sheehan must have advised his cheese-seeking client to graze elsewhere—a notice of voluntary dismissal was filed shortly after receiving the court's order.

### Pressed Powder Cosmetic Suit Needs a Touch-Up, Court Says

*Solis v. Coty Inc.*, No. 3:22-cv-00400 (S.D. Cal. Mar. 7, 2023).

A California federal court dismissed a putative class action challenging the labeling of the defendant's CoverGirl makeup product. As we continue to keep tabs on the recent litigation trend concerning PFAS (aka "forever chemicals"), it remains evident that it's not just food and beverage manufacturers battling this new wave of litigation. The underlying complaint in this case targeted the defendant's pressed powder cosmetic product, alleging the product was falsely marketed as "safe" and "sustainable" despite the persisting presence of PFAS in the makeup product. Based on those allegations, the plaintiff had alleged 15 causes of action on behalf of herself, a nationwide class, and a California subclass.

The defendant's motion to dismiss argued that the plaintiff had no Article III standing to pursue her claim because she did not sufficiently allege that she suffered any economic harm



from purchasing the product. The plaintiff postured that she did have standing under the benefit of the bargain and overpayment theories, but the court wiped off those allegations, holding (1) the product itself and the product page on the website did not affirmatively represent the pressed powder as "safe" just because it was advertised as "dermatologically tested"; and (2) the plaintiff could not have overpaid for the cosmetic product because the label disclosed that PTFE (a PFAS chemical) was an ingredient in the pressed powder. Finding that the plaintiff failed to satisfy Article III's case-or-controversy requirement, the court granted the motion to dismiss in full for lack of subject-matter jurisdiction. While the court was quick to toss the claims, it did so without prejudice, giving the plaintiff a chance to retouch her allegations in an amended complaint, though it appears the plaintiff decided to forgo that opportunity and voluntarily dismissed the case.

## Court Skims Plaintiff's Milk Claims

*Bizco v. Ferrara Candy Co.*, No. 1:22-cv-01967 (N.D. Ill. Mar. 20, 2023).

An Illinois federal court dismissed a putative class action challenging the defendant's "Milk Maid" caramels. The complaint alleged that the product's label—which included the phrases "Rich and Creamy" and "Made With Real Milk" alongside a picture of a milk pitcher—misled the plaintiff into thinking that the product's fats came from milk fats when the fat content came from vegetable fats instead. But the court disagreed.

In dismissing the plaintiff's complaint, the court noted that the caramels' packaging made no representations about the type of milk the product is made with (stating only that the product is made with real milk) and that nothing on the packaging indicates that the caramels' fat content comes exclusively from a milk ingredient. The court deemed the plaintiff's "analytical jump—that 'made with milk' must mean 'made with milk fat'" as an interpretation unique to the plaintiff, finding that the plaintiff failed to show that reasonable consumers would be misled by the product's "Made With Real Milk" labeling. The court found the plaintiff's dictionary definitions proffered in support of her claims to be unpersuasive, noting that many of the definitions "reference milk, one of the Product's ingredients." The court also rejected the plaintiff's contention that the "Rich and Creamy" representation indicated that the caramels contained dairy ingredients with milk fat. According to the court, the "Rich and Creamy" representation amounted to mere puffery, operating as "a subjective description of quality." The court summarily dismissed the plaintiff's complaint with leave to amend, except for the plaintiff's negligent misrepresentation claim, which the court dismissed with prejudice. However, a notice of voluntary dismissal was entered just days before her amended complaint was due.

## You Can't Have Your Cake and Sue for It, Too

*Santiful v. Wegmans Food Markets Inc.*, No. 7:20-cv-02933 (S.D.N.Y. Mar. 10, 2023).

When the Southern District of New York gives you a recipe to follow, it's best to be meticulous. Spencer Sheehan filed the underlying case on behalf of two plaintiffs who alleged that the advertising of a regional grocery chain's store-brand gluten-free vanilla cake mix mislead consumers. According to the sweet-toothed plaintiffs, while the product's labeling states that it is "Naturally Flavored," the product contains 3.07 parts per *billion* ethyl vanillin, an allegedly unnatural additive. Finding the plaintiffs' allegations half-baked, the court earlier dismissed both an original and first amended complaint. In both the first and second amended complaints, the plaintiffs abandoned their earlier theory that a reasonable consumer would believe the product's flavoring comes predominantly from genuine vanilla extract and instead alleged simply that the "Naturally Flavored" label is false. But like a poorly kneaded dough, the allegations did not quite rise to the occasion.

The plaintiffs based their claim that the cake mix contained ethyl vanillin on a brief reference in the complaint to a laboratory analysis that purportedly identified the ingredients in the defendant's product. When the court dismissed the first amended complaint, it did so because the plaintiffs failed to include "information as to the testing methodology, the date, time, or place of the testing, who conducted the testing, and what the exact product tested was." Considering that the lab results "were interpreted solely by their attorneys," the court found that these allegations did not rise to the level of plausibility required to state a claim. The plaintiffs were granted leave to replead.

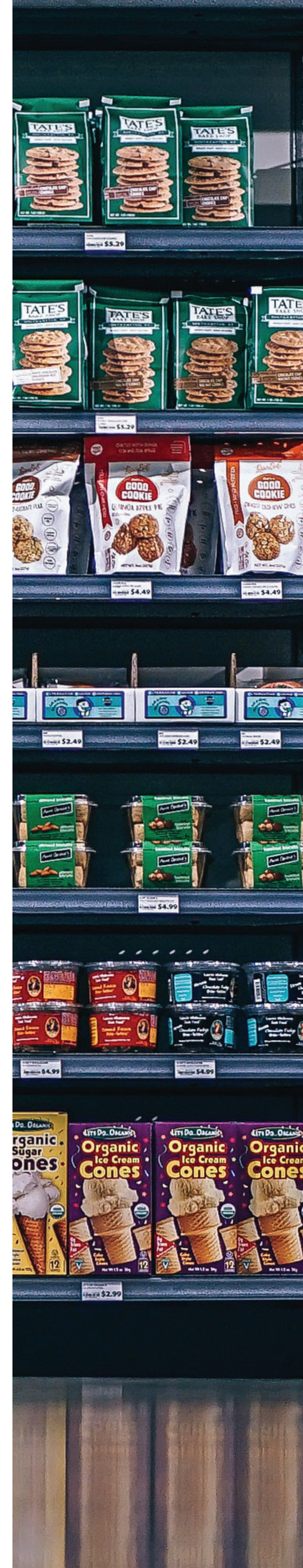
While an exacting attorney may have given thanks that the court disclosed the secret ingredient necessary to make the allegations stick, Sheehan took a different approach—he resubmitted the same lab analysis and again failed to include any of the details surrounding the testing. Unsurprisingly, the court (again) was not persuaded. The court found that the plaintiffs still failed to allege deceptive conduct or false advertising and dismissed the claims brought for violation of New York's General Business Law, breach of warranty, fraud, and unjust enrichment. And like a food critic with a grudge, the court dismissed those claims with prejudice, chastising Sheehan in the process: "where the Court has put Plaintiff on notice of the deficiencies in his original complaint and given him an opportunity to correct these deficiencies in an Amended Complaint, but Plaintiff has failed to do so, dismissal with prejudice is appropriate."

## Federal Court Serves Up a "Healthy" Dismissal

*Seljak v. Pervine Foods LLC*, No. 1:21-cv-09561 (S.D.N.Y. Mar. 3, 2023).

A New York federal judge granted a motion to dismiss a class action filed against a defendant food company concerning representations made for the sale of the defendant's FITCRUNCH Whey Protein Baked Bar and FITBAR energy bar products. The plaintiffs alleged that the defendant misleads consumers into believing its protein bars are "healthy" by using "FIT" in the product names. But according to the underlying complaint, the bars contain between 8 and 18 grams of fat, exceeding the permissible level of fat in products permitted to be labeled as "healthy" under the FDA's existing definition of the term. Based on those allegations, the plaintiffs filed claims for violations of California, New York, and Illinois business laws; violations of California's false advertising laws; breach of express warranty; and unjust enrichment.

The court dispatched the plaintiffs' injunctive relief claims because they only alleged a past injury and failed to establish a real or immediate threat of future injury. The court also found



that the plaintiffs' argument that the defendant's use of the term "FIT" was an implied nutrient content claim that fails to meet the Federal Food, Drug, and Cosmetic Act's definition of "healthy" was preempted by federal law. However, the court found that the plaintiffs' claim that the use of the term "FIT" was false or misleading was not covered by the Nutrition Labeling and Education Act's express preemption provision and turned to the merits of the plaintiffs' state and common-law claims based on that argument.

But the court found that those claims easily failed on the merits because the protein bars' labels were not misleading as a matter of law. The court pointed to the product packaging, which conspicuously did not contain the term "healthy" or any health-related terms (e.g., "healthful" or "healthier") as well as the fact that those terms were not included in any product advertisements cited in the complaint. The court explained that the product labels' use of representations and images of desserts (e.g., a cookie) and flavor profiles that sound like desserts (e.g., "Milk & Cookies"), were further bases for concluding that a reasonable consumer would not be misled into believing that the bars are "healthy." The court further noted that the number of calories in many of the protein bars is higher than the number of calories found in a candy bar and that the fat and calorie content of the bars was readily available for the consumer to view on the nutrition facts panel, facts that cured any potential consumer confusion and supported the court's finding that no reasonable consumer viewing the label would believe that FITCRUNCH products are "healthy." Accordingly, the court dismissed both the plaintiffs' statutory and common-law claims and denied the plaintiffs' request for leave to amend.

---

**Procedural Posture:** Granted in Part

## District Court Stunts Baby-Food Suit's Growth

*Howard v. Gerber Products Co.*, No. 3:22-cv-04779 (N.D. Cal. Mar. 29, 2023).

A California federal judge partially dismissed a putative class action filed against a defendant baby food manufacturer. According to the complaint, the defendant mislabeled its products by making nutrient content claims prohibited by the FDA and misled consumers into believing that its baby food products provide health benefits to children. The complaint originally targeted a wide array of the defendant's baby and toddler food products. But in a brief six-page order, the court trimmed the lawsuit, allowing only the plaintiff's claims relating to the defendant's products sold in individual purée pouches to advance. The court concluded that for these individual pouch products, the plaintiff plausibly alleged that these products "are bad for children," but the court found that the plaintiff had not plausibly alleged the same for the defendant's non-pouch products.

Focusing on the individual pouch products, the court held that the defendant's statements—"Grow Strong," and "Wonderfoods awaken toddler's love for nutritious foods"—constituted implied nutrient content claims and appeared next to claims about the product's nutrients. The court rejected the defendant's argument that these statements were "general dietary guidance," finding that the representations suggested to consumers that these food products "are useful in maintaining healthy dietary practices."

However, the court acknowledged that the plaintiff failed to adequately allege that *all* of the defendant's pouch products were problematic. The judge noted that some of the pouches did not make any nutrient content claims, such as the products that made only "bare references to the nutrients" contained in their pouches (e.g., "Organic for Toddlers Banana Raspberry & Yogurt pouch" or "VeggiePower pouches"). But the court found that other pouches could mislead consumers about the nutrient content claims based on representations, such as "nutritious, plant-based, and specially designed to provide 2 grams of protein." These, according to the court, function as implied nutrient content claims, violating FDA regulations.

Despite dismissing the plaintiff's complaint in part, the court granted leave to amend to cure the complaint's deficiencies. However, the plaintiff must be content proceeding only on her pouch-based claims, because she forewent the opportunity to file an amended complaint, prompting the defendant to file an answer to the remaining claims in the initial complaint.

---

**Procedural Posture:** Denied

## "Natural" Vitamins Suit Lives to See Another Day

*Corpuz v. Bayer Corp.*, No. 3:22-cv-01085 (S.D. Cal Feb. 28, 2023).

A judge in the Southern District of California denied a motion to dismiss a suit filed against a vitamin manufacturer that alleged that the company's vitamins were falsely labeled as "natural" based on the presence of synthetic (non-natural) ingredients.

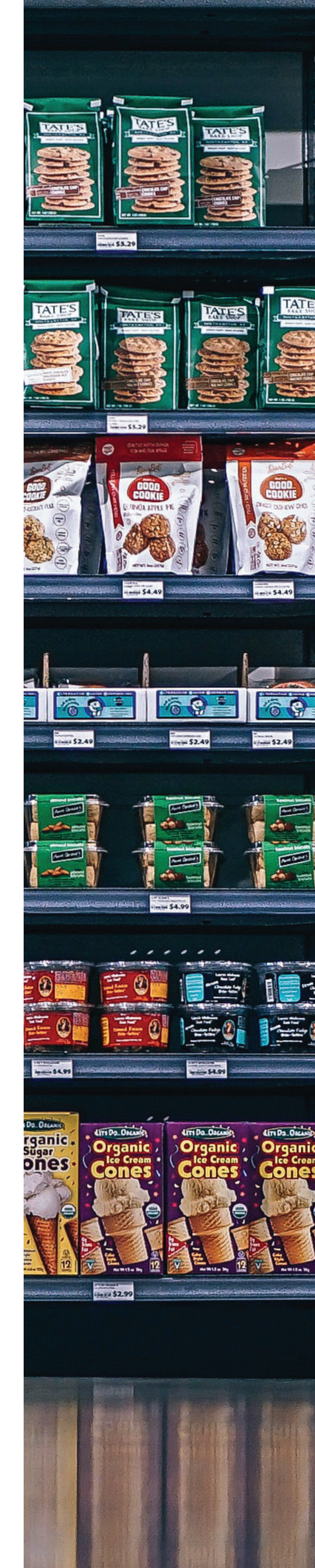
According to the underlying complaint, the defendant's use of the phrase "natural" on the front-of-package label of its vitamins misleads reasonable consumers to believe that the products will not contain "non-natural, synthetic ingredients." The plaintiff alleged the vitamins are "not natural" because they contain ingredients, including niacinamide and D-biotin, which are manufactured by complex chemical processes. In denying the motion to dismiss, the court determined that the plaintiff had alleged with sufficient plausibility that a reasonable consumer is likely to be deceived by the term "natural." The court specifically indicated that, while ingredient lists may be considered when determining whether a reasonable consumer would be misled, the product ingredient list is not a "shield for liability" in a deceptive advertising case. The court further noted that the FDA has not promulgated regulations formally defining the term "natural," which makes the outcome of this case a fact-intensive determination that depends on the specific circumstances of the case.

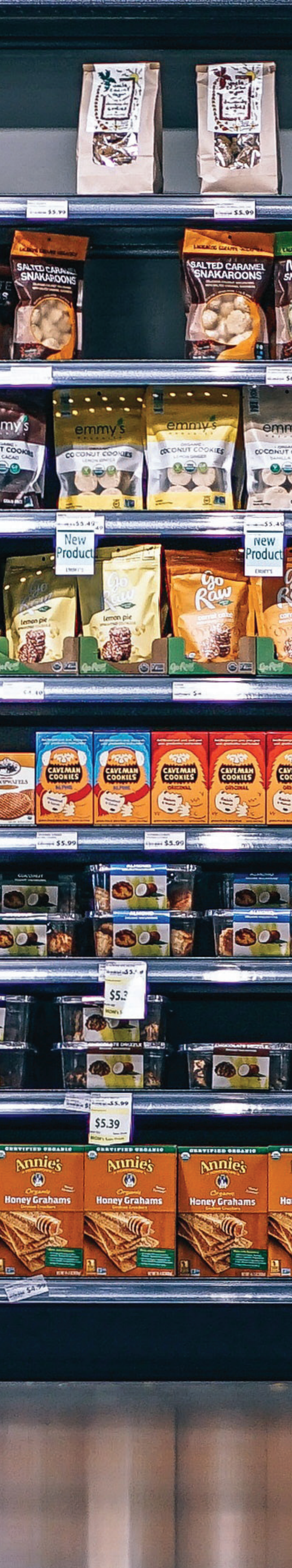
---

## A Nutritional High? More Like a (Plausibly Alleged) Nutritional Low!

*Brown v. Nature's Path Foods Inc.*, No. 4:21-cv-05132 (N.D. Cal. Mar. 29, 2023).

For consumers looking for that *nutritional* kind of high—not the other kind, what kind of publication do you think this is—the defendant's "Hemp Hearts" granola product is advertised as stacked with heady grains, fiber, and 10 grams of protein (per serving with ½ cup of skim milk).





Enter our abstemious plaintiffs, who possibly were looking for such a nutritional high. As they allege in a putative class action, however, they did not find it, nor did they find protein, apparently. Their buzz was unceremoniously harshed by none other than deception and price premiums. They allege that the defendant's labeling is deceptive because it (1) artificially inflates the importance of the amount of protein in the products by omitting a %DV disclosure; and (2) implies that all the protein comes from the granola, instead of needing a boost of milk to top off at 10 grams of protein.

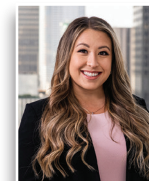
Whether or not these allegations may ultimately be trippin', a federal district court allowed them to proceed into discovery. Notably, it rejected the defendant's defense that an unambiguous disclaimer is readily visible on the front label because it appears immediately after the "10g Protein" claim. The court instead credited the plaintiffs' allegation that the disclaimer was "insufficiently prominent," apparently choosing not to weigh in on the "reasonable consumer" question at this stage. In a similar fashion, the court set "the ultimate strength of Plaintiffs' claim on the merits to the side" and concluded that the %DV allegations were a plausible claim for relief. Finally, the court sided with the plaintiffs on each of the defendant's remaining dismissal arguments—they had standing to pursue injunctive relief, they had standing to pursue claims against products they did not purchase, and their claims were not preempted.

The district court cautioned that discovery may reveal these allegations are even less loaded (allegedly) than the product they challenge. Nevertheless, that is an issue—and trip—for another day.

## Contributing Authors

Angela Spivey
+1 404 881 7857
angela.spivey@alston.com

Samuel Jockel
+1 202 239 3037
sam.jockel@alston.com



Samantha Burdick
+1 213 576 1190
sam.burdick@alston.com

Barbara Jones-Binns
+1 202 239 3139
barbra.jones-binns@alston.com

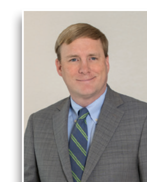
Sean Crain
+1 214 922 3435
sean.crain@alston.com

Taylor Lin
+1 404 881 7491
taylor.lin@alston.com

Reagan Drake
+ 1 404 881 7150
reagan.drake@alston.com

Rachel Lowe
+1 213 576 2519
rachel.lowe@alston.com

Lauren Funk
+1 404 881 7648
lauren.funk@alston.com

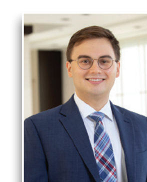


Andrew Phillips
+1 404 881 7183
andrew.phillips@alston.com

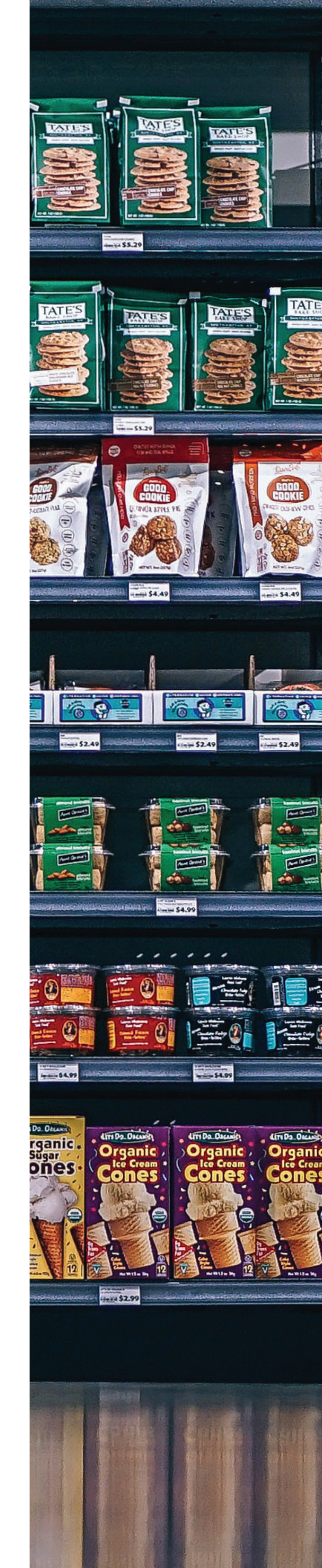
Jamie George
+1 404 881 4951
jamie.george@alston.com

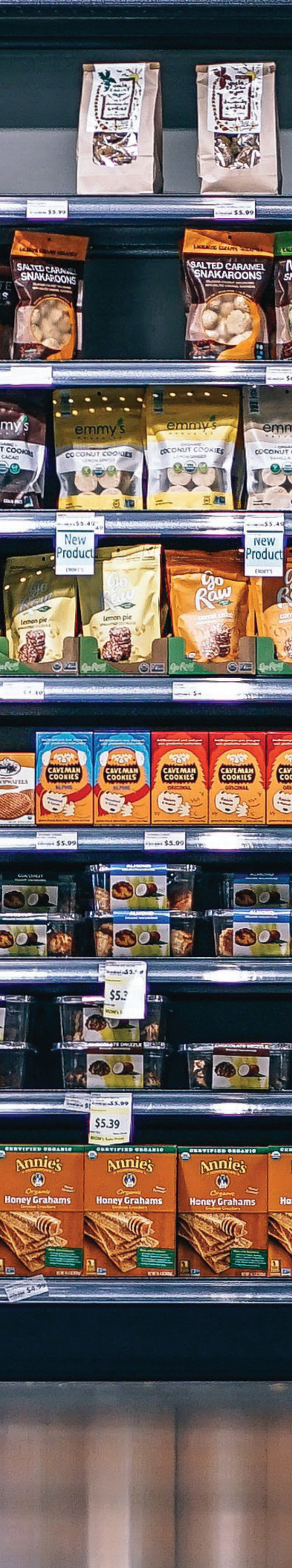
Alan Pryor
+1 404 881 7852
alan.pryor@alston.com

Danielle Kerker Goldstein
+1 404 881 7661
danielle.goldstein@alston.com



Jason Sigalos
+1 404 881 7844
jason.sigalos@alston.com



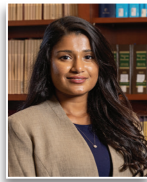

FOOD & BEVERAGE
DIGEST

# Contributing Authors

Troy Stram
+1 404 881 7256
troy.stram@alston.com

Amanda Newton Wellen
+1 404 881 4809
amanda.wellen@alston.com

Ashley Yull
+1 202 239 3289
ashley.yull@alston.com



Krupa S. Zachariah
+1 202 239 3241
krupa.zachariah@alston.com

Learn more about our Food & Beverage Team