ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

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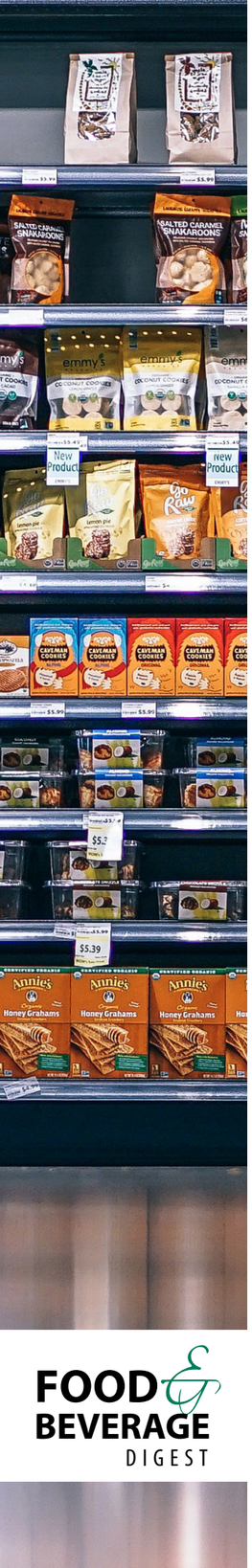
Edition Facts

5 Sections This Edition
Cases Per Section 1-10

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Class Certification	100%
Appeals	100%
Voluntary Dismissals	100%



New Lawsuits Filed

"No Artificial Flavor" Claim Attacked as Less than *Crystal* Clear

Phillips v. Kraft Heinz Foods Company, No. 8:23-cv-01741 (M.D. Fla. Aug. 4, 2023).

A flavored-drink enthusiast claims that he was duped by allegedly murky representations on the packaging of the defendant's Crystal Light drink enhancers. Specifically, the plaintiff points to labeling claims that the products contained "No Artificial Flavors," were made with "Natural Flavor with Other Natural Flavors," and included pictures of "plump blueberries and ripe raspberries" that were allegedly misleading because the product's label fails to disclose the presence of malic acid. The plaintiff claims that he knows the malic acid was of the synthetic, non-natural, variety because laboratory analysis "concluded or *would conclude*" that the malic acid is the artificial DL-malic acid.

According to the complaint, consumers are more frequently turning to flavored drink enhancers because they "want more from their water because of its naturally 'plain' taste compared to the flavor of the sodas and fruit juices they are giving up" in exchange for a healthy alternative. But as the complaint alleges, consumers do not expect non-natural ingredients to be included in products like the Crystal Light flavor enhancers. In particular, the complaint avers that consumers are misled into believing the product's blueberry and raspberry taste is from blueberries, raspberries, or other natural flavoring ingredients—not added artificial flavoring ingredients like malic acid.

Based on these allegations, the plaintiff seeks to represent a putative class of Florida residents who purchased the products. The complaint asserts purported claims for violations of state consumer protection statutes, breaches of warranties, fraud, and unjust enrichment. The plaintiff prays for injunctive relief, monetary, statutory and punitive damages, and costs and attorneys' fees.

Plaintiff Picks Fight with Apple-Flavored Products

Griffin v. Publix Super Markets Inc., No. 8:23-cv-01490 (M.D. Fla. July 5, 2023).

Frequent readers of this digest are likely familiar with one of the plaintiffs' bar's *core* labeling complaints—the alleged omission of an artificial flavoring disclaimer for products containing malic acid. Consumers around the country have been *picking* fights with products from dietary supplements to fruit snacks to apple-cinnamon-flavored fruit and grain cereal bars.

The most recent suit doesn't take issue with the *amount* of apple flavoring present in the product—admitting that the cereal bars contain "apple puree concentrate"—rather, the suit claims that because the product contains DL-malic acid that imparts the flavor of apples, the word "Apple" is required by federal and state regulations to be accompanied by an artificial-flavor disclaimer. *Bobbing* for support of their allegations, the plaintiff conclusory claims that the malic acid used in the product was the artificial DL-malic acid version because… laboratory analysis. We'll see whether this judge decides to *bite* on that allegation (which fellow judiciaries have found *rotten*).

As with similar DL-malic acid suits, this plaintiff brings their claims on behalf of a putative class of consumers from Florida and Georgia and alleges violations of Florida and Georgia consumer protection statutes, breach of express warranty, fraud, and unjust enrichment.

Plaintiff Puckers After Purchasing Putatively Pseudo-Piquant Product

Jernigan v. GSK Consumer Health Inc., No. 6:23-cv-01640 (M.D. Fla. Aug. 26, 2023).

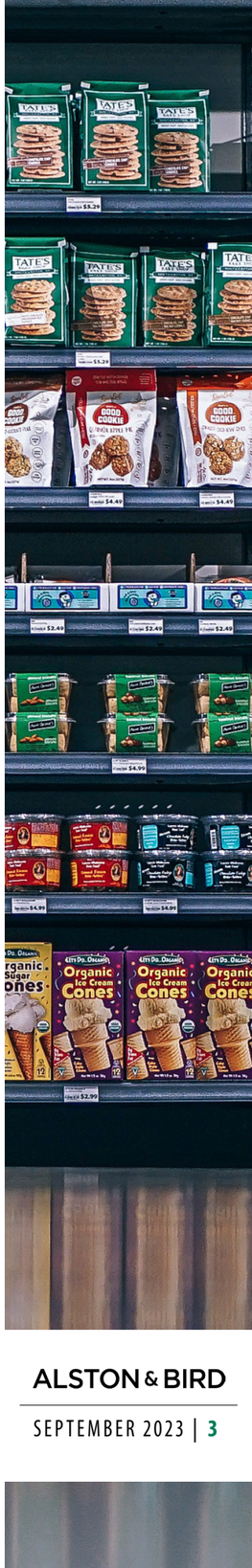
As immune systems—possibly with the help of Emergen-C's "Daily Immune Support"—continue to fend off illnesses, the Emergen-C manufacturer continues to fend off lawsuits about its promotion of the product. (In our previous edition, we discussed allegations about the allegedly deceptive nature of bundling Emergen-C and Theraflu in a "convenience pack.") A Florida plaintiff now counts herself among the many plaintiffs represented (naturally) by Sheehan & Associates accusing companies of falsely marketing their products as containing natural flavors. According to the plaintiff's tangy complaint, although the Emergen-C label promotes the raspberry-flavored product as containing "natural fruit flavors," the raspberry taste is allegedly derived in part from artificial flavoring ingredients. The plaintiff seeks to represent a class of Florida consumers who have allegedly soured on raspberry-flavored Emergen-C, and she asserts state-law claims of false, deceptive, or misleading advertising, as well as claims for breach of express warranty and fraud.

State Court Safe Haven?

Roberts v. Tops Markets LLC, No. TC230815-E5 (N.Y. Sup. Ct. Aug. 15, 2023).
Urena v. Beliv LLC, No. T230829-B911 (N.Y. Sup. Ct. Aug. 29, 2023).

As detailed in the next section, and as we've previously reported, Spencer Sheehan is not receiving the warmest of receptions from Article III judges in the Empire State. Somewhat curiously, we've noticed more state-court complaints popping up from Mr. Sheehan recently.

One complaint alleges that the manufacturer of Petit Nectar brand beverages violates federal and state regulations for the naming of juice blends containing various juices other than the named ingredients. According to the complaint, the defendant advertises its Strawberry Banana Nectar drink with pictures of strawberries and bananas, but lacks any statement revealing the addition of artificial flavoring, or that other types of fruit juices appear in the product more predominantly than strawberries and bananas. The complaint claims that the "fine print on the back of the can's ingredient list reveals" the alleged deception of the front label because it shows that "concentrated apple pulp" is the primary fruit ingredient, rather than the higher-valued strawberries and bananas. Based on those allegations, the plaintiff claims the defendant was able to sell the product at a premium price and lodges causes of action under New York's General Business Law and for breach of express warranty.



In another state court case—which like the first, seeks only to certify a class of aggrieved New Yorkers, rather than a nationwide class—the plaintiff claims that the defendant's labeling of its saltine crackers falsely represents the crackers as being "Made With Whole Grain Wheat." Are the crackers "made with whole grain wheat"? Well, yes. But that's not the point, this plaintiff cries. According to the complaint, the labeling violates state and federal regulations because it suggests the crackers are made with only or predominantly whole grain wheat, when in fact, non-whole-grain wheat is listed as the predominant ingredient on the back label ingredient list. Based on those claims, the plaintiff alleges violation of New York General Business and Agriculture & Markets laws as well as a claim for breach of express warranty.

Just as important as monitoring the success of these two complaints, we'll continue to keep tabs on whether Sheehan's scamper to state court proves any more successful than his recent forays in federal court.

A New York Tea Party Against the Tea-ranny of Origin Claims (Allegedly)

Piotroski v. Twinings North America Inc., No. 2:23-cv-05930 (E.D.N.Y. Aug. 4, 2023).

If you squint and tilt your head sideways, a putative class action brewing in federal court resembles the Boston Tea Party. Sure there are a few minor differences: switch out New York federal court for Boston harbor, a New York–based tea devotee for the Founding Fathers, a Delaware corporation for King George III, and the tyrannies of alleged price premiums and allegedly deceptive origin claims for violations of sovereignty. Beyond those little details, pretty much same same.

A New York–based plaintiff alleges that the defendant's packaging of its tea products misrepresents that the tea products are from London, England using phrases like "of *London*," "By Appointment to Her Majesty Queen Elizabeth II," and an apparent London, England mailing address. In reality, the complaint alleges, the tea products are produced in Poland. The plaintiff alleges that consumers prize authenticity of origin over quality as the prevailing purchasing criterion, so predictably, the defendant allegedly capitalized on its historic association with England to charge a price premium on its allegedly non-English tea products. The plaintiff seeks to represent a class of New York consumers who purchased the defendant's tea products for claims under New York's General Business Law and for unjust enrichment.

We will let this one steep a while longer to see if these allegations are nothing more than a tempest in a teapot or if they will tee up a New York class of tea partiers.

A New Face of "Where's the Beef?"

Siragusa v. Taco Bell Corp., No. 1:23-cv-05748 (E.D.N.Y. July 31, 2023).

There are three things every New Yorker knows they can count on when they're looking for something to eat in the Big Apple: a great slice, a famous bagel, and a Vegan Crunchwrap®.

Or at least, that's how it ought to be. But when one distraught (and hungry) New Yorker decided he wasn't getting the snacking satisfaction he was paying for, he filed suit, alleging that the defendant falsely advertises five of its signature items—the Crunchwrap Supreme®, Grande Crunchwrap®, Vegan Crunchwrap®, Mexican Pizza, and Veggie Mexican Pizza—as containing "double the amount" of beef and other ingredients than the actual product consumers receive. The complaint goes on to say that consumers receive "100% less" than what is advertised, which would be a real problem.

According to the complaint, the advertisements are unfair and financially damaging to consumers because they allegedly receive a product that is materially lower in value than what is promised. And while the complaint contains citations to online food reviewers complaining about receiving a less substantial product than expected, it is remarkably light on the plaintiff's own experience. In fact, the plaintiff included pictures comparing each of the products' advertisements with the actual product that *some customer* received, but only alleges that he bought a Mexican pizza that looked like the images posted by other customers. The plaintiff brings claims under the New York Deceptive Acts and Practices Act and seeks to represent a class of purchasers who bought any of the five menu items since July 31, 2020.

A Classic Cookie Conundrum

Cytryn v. Crumbl LLC, No. 8:23-cv-01218 (C.D. Cal. July 7, 2023).

It's not every day you come across someone willing to complain about a Peanut Butter Reese's cookie, let alone make a federal case out of it. But one plaintiff, who purports to be an "amateur elder athlete who is an intentional eater" has done just that. The plaintiff claims that she pays close attention to the nutritional information of the food she consumes to make sure that it aligns with her goals. Naturally, this health nut, who supposedly takes pains to count calories and make healthy choices, found herself in one of the defendant's popular cookie shops.

While one could easily chalk that inconsistency up to the well-needed and well-deserved "cheat day," the plaintiff actually claims that she was misled by the defendant's advertising that she alleges leads consumers to believe that the gourmet cookies available at the defendant's shops are low-calorie, healthier options than alternative cookies. Specifically, the plaintiff alleges that the defendant's published nutritional information discloses calories per serving and that she "reasonably understood Defendant's statement to mean that these cookies were one serving at most."

In reality, the defendant's cookies may contain as many four servings—so what the plaintiff allegedly believed was a 190 calorie cookie actually contained nearly a third of her daily calorie intake. Curiously, the plaintiff does not include any reference to the advertisements that she claims were misleading and led her to believe that the "cookies were one serving at most." If you are not familiar with the defendant's cookies, we invite you to find (or better yet, taste) one for yourself. You'll likely be led to believe many things about the palm-sized cookies, none of which are that they are only 190 calories.

Based on this alleged cookie caper, the plaintiff brings claims under California's consumer protection statutes, unjust enrichment, and breach of implied warranty. She seeks to represent a class of similarly situated California consumers of the defendant's delectable treats. The defendant recently filed a motion to dismiss the complaint, arguing that the plaintiff's theory is half-baked. We'll be sure to provide an update on which way this cookie crumbles.

Consumers Seeing Red Over Citric Acid in Their Canned Tomatoes

Onn v. Pacific Coast Producers, No. 5:23-cv-03524 (N.D. Cal. July 14, 2023).
Correa v. Pacific Coast Producers, No. 4:23-cv-04035 (N.D. Cal. Aug. 9, 2023).

"What's tomato with you?" asks two consumers bringing separate lawsuits against the same canned tomato manufacturer. The plaintiffs' complaints are almost identical (unsurprisingly, they're represented by the same New York–based attorneys) and allege that the manufacturer's canned tomatoes' label is deceiving to consumers because it contains a "no preservatives" claim while actually containing citric acid. According to the complaints, citric acid is included within the FDA's definition of a chemical preservative, and even if the citric acid does not function as a preservative in the products, it still qualifies as a preservative given that it has "the capacity or tendency to do so." The plaintiffs both seek to represent a nationwide class and a California subclass bringing claims under California's Unfair Competition Law, breach of express warranty, and unjust enrichment. On behalf of the California subclass specifically, both plaintiffs are bringing claims under California's False Advertising Law, and the plaintiff in *Onn* has brought an additional claim for violation of California's Consumers Legal Remedies Act.

Consumer Stirs the Proverbial Pot (or Fruit Cup) with Sugar Rush Controversy

Broussard v. Dole Packaged Foods LLC, No. 3:23-cv-03320 (N.D. Cal. July 3, 2023).

A pair of plaintiffs allege that the defendant markets certain packaged fruit snacks as healthy or beneficial to consumers' immune systems when the products contain between 29% and 96% "free" or "added" sugar (two distinct categories of sugar that the complaint caramelizes with the term "FA Sugar"). The plaintiffs allege that the defendant deceptively markets its snacks to parents as healthy for children when the defendant knows that its snack products are unhealthy. The plaintiffs' complaint cites a bevy of studies on the negative health effects of excessive sugar consumption to argue that the defendant's fruit snacks are not healthy. Accordingly, the plaintiffs allege that the defendant's health- and wellness-focused advertising is misleading to the public and violates state and federal food labeling regulations.

The plaintiffs seek to represent a nationwide class, as well as California and New York subclasses, of consumers of the defendant's products and have alleged 10 different claims, including violations of California's Unfair Competition and False Advertising laws, breach of express and implied warranties, unfair and deceptive business practices and false advertising under New York's General Business Law, unjust enrichment, and negligent and intentional misrepresentation.

Every sugar rush presumably ends in a sugar crash, or so the defendant hopes in a motion to dismiss filed on September 12.

Sugar Free, but Is It Healthy?

Prescott v. TC Heartland LLC, No. 5:23-cv-04192 (N.D. Cal. Aug. 17, 2023).
Prescott v. Abbott Laboratories, No. 5:23-cv-04348 (N.D. Cal. Aug. 24, 2023).

Move aside aspartame, sucralose is the next sugar-free alternative flavor of the day for the plaintiffs' bar! According to a new putative class action, the manufacturer of Splenda brand products has engaged in a "decades long consumer fraud" by marketing Splenda products to consumers as healthy alternatives to sugar. A similar complaint was filed by the same plaintiff against the manufacture of Glucerna brand shakes and powders.

Both complaints claim the products' primary ingredient, sucralose, has been shown to cause or worsen diabetes, among other harms, and points to findings that sucralose negatively affects blood sugar levels and gut health, despite labeling claims that the sucralose-containing products "help manage blood sugar" are "suitable for people with diabetes," and are "specifically designed for people with diabetes." According to the complaints, by labeling the products with the diabetes health claims, the defendants mislead reasonable consumers into believing the products are healthy sugar alternatives that provide diabetes and/or blood sugar management benefits, when they do not.

The Glucerna complaint also alleges that the product contains three other ingredients that are harmful to diabetics, making the claim that the products are "scientifically designed for people with diabetes" particularly egregious. Based on these allegations, the plaintiff seeks to represent nationwide and California classes of purchasers and alleges violations of California's consumer protection statutes, breach of express warranty, and unjust enrichment.

Motions to Dismiss

Procedural Posture: Granted

Trouble Still Brewing Following Dismissal of Bitter Coffee Dispute

Brownell v. Starbucks Coffee Company, No. 5:22-cv-01199 (N.D.N.Y. July 12, 2023).

A New York judge has told Spencer Sheehan not to bother him before he's had his morning coffee boost—and maybe not even then. The ubiquitous Sheehan, on behalf of a New York plaintiff, brought suit contending that a major coffee manufacturer was misrepresenting the

quality of its ground French roast because the product contained greater-than-expected potassium levels, which can cause health problems. The plaintiff also alleged that the product was composed of less than 100% Arabica ground coffee and that had she known so, she would have paid less for it.

In granting the defendant's motion to dismiss in its entirety, the court concluded that the plaintiff "narrowly" escaped dismissal for lack of standing, but her claims were ground into fine espresso powder on their merits. The court dismissed her New York statutory claim after noting that while the plaintiff pointed to a number of "recent reports based on laboratory analysis," she failed to cite to the reports or attach any of them to her complaint. The court likewise rejected her "vague allegations" that the ground coffee actually contained added potassium, but it ultimately concluded that even if those allegations were plausible, no reasonable person would conclude that the phrase "100% Arabica Coffee" meant that the product did not contain any vitamins or minerals such as added potassium. The plaintiff's warranty and common-law claims for fraud and unjust enrichment were similarly rejected like a lukewarm vending machine latte.

The court left one final, sludgy surprise at the bottom of the plaintiff's cup—it ordered Sheehan to submit a brief explaining why he should not be sanctioned for violating Rule 11. The court noted that Sheehan had filed 18 class actions in the Northern District of New York since 2021, and not one had proceeded past the motion to dismiss stage. Further, the court observed that a sister court in the Southern District had already chastised Sheehan for filing numerous meritless cases throughout the Second Circuit. Sheehan promptly filed a response to the court's show cause order, but before the judge could rule on that, other counsel appeared on behalf of Sheehan, wrote to the court requesting permission to file a supplemental submission on behalf of Sheehan, and filed a supplemental brief on August 14 arguing that Sheehan should not be sanctioned under Rule 11.

Just over a week after that supplemental response, Ashley Furniture Industries moved for leave to file an amicus brief, submitting a letter to the court explaining that "it was one of apparently many victims of Mr. Sheehan's unethical and sanctionable pattern of filing frivolous lawsuits against deep pocket defendants in the hopes of extracting financial gain." AFI explained in the letter to the court that Sheehan had sued AFI in the Northern District of Florida and that the day after receiving the complaint, AFI reached out to Sheehan to explain that it did not own or operate any retail stores, and that Sheehan's retail-centric complaint was frivolous and should be withdrawn.

Rather than engaging, Sheehan responded to AFI curtly: "So go file your rule 11 motion I hear such sanctions threats from people like you all day long." AFI implored the court that "Mr. Sheehan's conduct is simply unbecoming of a lawyer, and he should be stopped." Sheehan's attorney shot back that AFI's submission "demonstrates an unwarranted and unreasonable vendetta against Mr. Sheehan" and should not be credited by the court. Suffice it to say, despite the underlying coffee claims being dismissed by the court, there's still a lot brewing in the Northern District of New York.

Microwavable Mac-and-Cheese Claims Cooked by Repeat Purchases

Ramirez v. Kraft Heinz Foods Co., No. 1:22-cv-23782 (S.D. Fla. July 27, 2023).

As lawyers who have lived their lives 0.1 hour at a time know, time is money. A named plaintiff took this adage to heart: she alleged that she paid a price premium for microwavable mac and cheese that couldn't be prepared in the advertised 3½ minutes. According to the plaintiff, she believed "READY IN 3½ MINUTES" meant she could go from opening the package to eating the cheesy shells in 210 seconds. But the 3½ minutes referenced on the label only covered microwave time, and not the time for additional steps like mixing in the powdered cheese sauce and waiting for it to thicken. The plaintiff claimed that as a result of the purportedly false and misleading statements, the product sold at a price premium.

The court found the plaintiff's allegations to be half-baked and dismissed her complaint because she failed to demonstrate any injury and therefore lacked standing to pursue any of her claims. Among other things, the court reasoned that the plaintiff made multiple purchases of the mac and cheese. This undermined her allegation that she would have paid less for the product or would not have purchased it had she known the truth about preparation time. This case serves as a good reminder that a plaintiff's own allegations can nuke a complaint. When the alleged deception is revealed by interacting with the product, and a plaintiff continued to make purchases, the plaintiff can't plausibly show she was deceived into paying a higher price.

Procedural Posture: Granted in Part

Order Turns Up the Heat for Consumer's Whopper-Sized Beef Against Burger Chain

Coleman v. Burger King Corporation, No. 1:22-cv-20925 (S.D. Fla. Aug. 23, 2023).

If you have frequented a quick-service restaurant (who hasn't?), do your sandwiches look as good on the menu as they do when they are assembled in the middle of the lunch rush, then crushed under the weight of multiple sandwiches, fries, condiments, and whatever items on your car's floorboard? Surely, speed—not exquisite craftsmanship—is the deciding factor for a quality sandwich.

At least one plaintiff disagrees. He claims in a putative class action that consumers should expect exactly what is shown on the menu and alleges that a global burger chain has violated those expectations by purportedly overstating the size of its burgers on its menu boards. And at least one judge thinks there is enough meat on these allegations to avoid a motion to dismiss. The court found it plausible that the appearance of the burger is an essential term of consumers' "contracts" with a *franchised* burger chain, reasoning that "we would think" that "a fifty-percent delta between what was promised and what was sold would probably vex most reasonable consumers." The court continued that "we [cannot] assume" that "most reasonable people would take lying down this incongruity between the amount of sustenance they were promised and the amount of sustenance they got."

Still, the plaintiff could not bring breach of contract claims against the burger chain's advertisements because they were "solicitations" (not "binding offers") to contract. And the plaintiff's multistate consumer protection claims and bid to certify a 50-state class for violation of Florida's unfair and deceptive trade practices law were undercooked.

We suppose it is only fitting that the court employed the royal "we" for a case involving the king of burgers. But the court's order means that the crown will wear quite heavy indeed. On September 14, the plaintiff amended his complaint, bringing a slew of new putative class claims.

Court to Plaintiffs: Where's the Beef Against Large Grocer?

Safari v. Whole Foods Market Services Inc., No. 8:22-cv-01562 (C.D. Cal. July 24, 2023).

According to three named plaintiffs in the Central District of California, a large grocer falsely represented that its beef is antibiotic-free. According to the court, two of those plaintiffs are injury-free. One of them—an individual representing a putative class—allegedly purchased beef from a single location, believing it to be free from antibiotics, but she claimed she later learned about traces of antibiotics found in beef from some of the grocer's other locations. Without allegations that the beef she purchased came from the same supply chain as the allegedly antibiotic-tainted beef, however, the court served her a hard pill to swallow by dismissing her claims for lack of standing, albeit with leave to amend.

The other plaintiff to receive an inhospitable reception from the court—a national nonprofit that promotes animal protection and advocates for antibiotic-free meat—asserted organizational standing on behalf of the general public and sought damages for the money it spent to combat the grocer's purported misrepresentations. But the plaintiff corralled itself into its own abattoir. To maintain standing under a "diversion-of-resources" theory, an organizational plaintiff must show it incurred damages reallocating its resources to combat the challenged practices. For this plaintiff, such expenditures were "business as usual," undercutting its theory of standing. Nor was standing cured by its alleged reputational harm and frustration of mission caused by previously promoting the grocer's antibiotics-free meat—allegations undercut by the fact that it was purportedly responsible for exposing the grocer in the first place. In any event, the court called into question whether either theory of organizational standing remained viable in the wake of the Supreme Court's 2021 *Transunion LLC v. Ramirez* decision.

Not all the plaintiffs were prescribed strong medicine. The court allowed the claims of one individual plaintiff to proceed based on his allegations that he purchased beef from one location where beef tested positive for traces of antibiotics residue. In addition to its standing arguments, the defendant also moved to dismiss the remaining claims for failing to plead fraud with particularity under Rule 9(b) and because there is no stand-alone claim for unjust enrichment under California law. But the court put those arguments out to pasture, finding that the lone-remaining plaintiff had pleaded claims with the requisite particularity to meet the requirements of Rule 9(b) and that he may plead unjust enrichment as a "quasi-contract claim seeking restitution."

Procedural Posture: Denied

The Best Part of Waking Up Is Not a Half-Empty Cup

In re Folgers Coffee Marketing Litigation, No. 4:21-md-02984 (W.D. Mo. July 24, 2023).

A major coffee manufacturer is going to need a few more cups of joe to power through the pending multidistrict litigation against it after a district court allowed claims to proceed following production of expert reports. The plaintiffs' underlying complaint alleges that it was "*impossible*" to make as much coffee as the coffee manufacturer represented on the face of its coffee cannisters. In support of its claims, the plaintiffs retained an expert who conducted repeated analyses of the amount of coffee that could be brewed from the cannisters. Of note, the plaintiffs' expert opined that in 2 out of the 176 expert analyses she ran, the result was only a *negligible* shortage of coffee grounds. Attempting to roast the plaintiffs' claims based on that evidence, the defendants moved to dismiss the operative complaint in its entirety—arguing the plaintiffs' allegations of "impossibility" were directly contradicted by their own expert's ability to brew nearly the full amount of coffee on two occasions.

The court spit out the defendants' argument like it was week-old cold brew, concluding that the parties' expert testimony was not grounds to dismiss the complaint. But before the defense bar gets too jittery—the court's decision was primarily a procedural one. Dismissing based upon expert test results, the court found, was about as improper as getting a pumpkin spice latte in 95-degree heat in August. The expert reports were outside the four corners of the plaintiffs' operative complaint, and the defendants' request for judicial notice of the expert reports was likewise inappropriate. But a debate stronger than a Sumatra blend may still be brewing—in a footnote, the court noted that it would not have dismissed the plaintiffs' allegations even if it had considered the experts' test results because the complaint would, on the whole, remain plausible. For now, the case will proceed, so stay tuned for more hot-off-the-French-press news about this dispute.

Court Finds False Ad Suit Against Smokehouse Almonds Is Not *All* Smoke and Mirrors

Clark v. Blue Diamond Growers, No. 1:22-cv-01591 (N.D. Ill. July 5, 2023).

While federal courts across the country have been smoking out complaints filed by Spencer Sheehan left and right, one line of cases in which Sheehan and other plaintiffs' attorneys have been able to crack the nut on is "smokehouse" flavored products. An Illinois federal court has allowed a Sheehan-filed suit alleging consumers were misled into believing the defendant's "Smokehouse Almonds" are flavored in an actual smokehouse to proceed past the pleadings stage. Like its predecessors, the underlying complaint alleged that the product's "Smokehouse Almonds" label misleads consumers into believing that the almonds are flavored through a smokehouse process (instead of through added liquid smoke flavoring).

The complaint alleged claims for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, breach of express warranty, negligent misrepresentation, fraud, and unjust enrichment. The defendant moved to dismiss the complaint, arguing that the plaintiff

lacked Article III standing because she failed to allege any injury and that the product's label was not misleading because no reasonable consumer could interpret it to mean the almonds were smoked in an actual smokehouse.

The court first found that the plaintiff's allegation of an economic injury—that she didn't get what she paid for (almonds smoked in an actual smokehouse)—was sufficient to support standing, but found she lacked standing to pursue injunctive relief because she was aware of the alleged deception and therefore unlikely to suffer future harm.

Next, the court observed a split in authority from other federal district courts on the issue of whether the term "smokehouse" was misleading, but sided with the courts finding that a plaintiff's interpretation of that word was not unreasonable or fanciful. The court explained that the term "smokehouse" is not a term like "vanilla" or "strawberry" that is frequently used to describe a flavor; rather, it describes a "physical structure" used to flavor the almonds. This distinction was dispositive: the court found that a reasonable consumer could be misled by the product's label and allowed the plaintiff's statutory consumer protection claim and unjust enrichment claim to survive.

The court rejected the defendant's ingredients list argument, which sought refuge in the contents of back-label ingredients that disclose the source of the smoke flavor, because the Seventh Circuit rejects an ambiguity rule immunizing defendants from suit for ambiguous front labels based on its back-label ingredients. The court did, however, agree with the defendant that the plaintiff failed to sufficiently plead the balance of her claims sounding in fraud (finding the scienter allegations insufficient and conclusory) and breach of warranty (finding the plaintiff failed to provide pre-suit notice) and dismissed them as a result.

Class Certification

Spilling the Tea on the Ninth Circuit Class Cert. Echo Chamber

Banks v. R.C. Bigelow Inc., No. 2:20-cv-06208 (C.D. Cal. July 31, 2023).

Another day, another arguably less than "rigorous analysis" at class certification. A California district court certified a class of California purchasers of nine tea varieties under California consumer protection and common-law claims. The consumer challenged the defendant's *back of label* claim that the teas are "Manufactured in the USA" because some of the tea leaf preparation (growing, picking, rolling, drying, and sorting) occurred abroad.

Disappointingly, the court did not grapple with the more problematic issues with the plaintiff's class certification motion. Had it done so, it might have concluded that the plaintiff's motion was steeped in ambiguity and misdirection. First, the court brushed aside the predominance problems with a back of label claim, concluding "it is reasonable that at least some consumers noticed it." Second, the court was unconcerned with the plaintiff's expert survey, which was used to supposedly measure deception using flawed terms (like "processed") that were at least "not so ambiguous" as others that defeated predominance.

Third, the court expressly "declined to wade into the so-called debate" about the plaintiff's reliance on conjoint analysis under *Comcast v. Behrend*, concluding instead that the defendant failed to convince it otherwise.

There's no need to read the tea leaves here: the Ninth Circuit remains a plaintiff-friendly venue, and creativity will be needed to mount successful defenses to class certification bids.

Appeals

Back into the Oven—9th Circuit Reverses Dismissal of Consumer Fraud Case Over Premier White Morsels

Prescott v. Nestlé USA Inc., No. 22-15706 (9th Cir. Aug. 21, 2023).

We last checked in on litigation involving labeling claims of a confections giant's Toll House Premier White Morsels in May 2022 when for the second time, the California district court dismissed claims that the "white morsels" product was falsely advertised as "fake" white chocolate chips. In dismissing the second amended complaint, the district court found the plaintiff failed to state a plausible claim under California's reasonable consumer test as a matter of law and failed to allege standing to seek injunctive relief.

Over a year later, the Ninth Circuit has vacated and remanded the dismissal, finding that the district court did not have the chance to consider a decision from the California court of appeal decided shortly after. In a similar white morsel suit, the court of appeal held that the term "white" could reasonably be interpreted as shorthand for "white chocolate," and so the plaintiff did plausibly allege that a reasonable consumer could be misled by the white baking chips' advertising. There, the court held that whether the "white baking chip" label could lead a consumer to interpret the claim as a (non-misleading) adjective for the product's color, versus a (misleading) implication the product contains chocolate, turns on context.

In this case, the Ninth Circuit stated that the state case concerns "materially identical facts, claims, and arguments," and for that reason, the lower court should consider its impact in deciding whether the plaintiff failed to state a claim or had standing. Now it's back to the kitchen for the defendant to cook up a third batch of its motion to dismiss.

Weighty Opinion in Protein Case Bulks Up Front-of-Label/Back-of-Label Guidance

Nacarino v. Kashi Co., No. 22-15377 (9th Cir. Aug. 14, 2023).

A decision on preemption from the Ninth Circuit not only provides clarity on federal regulations for protein claims on product labels, it also reinforces important principles on the interplay of front-of-label claims and back-of-label claims. But first, a quick flashback to high school biology class to discuss protein. Protein is composed of amino acid chains and

can vary based on its digestibility and the types of amino acids it contains. This means that two foods that contain the same amount of protein by weight can differ based on how much of the protein the human body can absorb and how well the protein will fulfill a person's nutritional needs. In the consolidated cases before the court, the plaintiffs argued that front-of-label protein claims (e.g., "11g Protein") were misleading because they touted the quantity of protein while ignoring the quality of protein.

The Ninth Circuit found the plaintiffs' claims were preempted based on its interpretation of federal regulations on protein claims. The court read those regulations to allow a manufacturer to include a front-of-label protein claim expressing the quantity of protein in grams *as long as* the nutrition fact panel on the back label contained a "corrected" percent-daily-value protein measure, adjusted to reflect the quality of protein. In reaching this conclusion, the Ninth Circuit acknowledged its prior case law holding that manufacturers cannot mislead consumers on the front label and then rely on the nutrition facts panel to correct those misinterpretations.

But that's not what was happening here. The manufacturers were not misleading consumers because the front of the label did not make any representation about the quality of the protein—e.g., "11g High-Quality Protein" or "11g Digestible Protein." And the regulations specifically allow a claim of protein quantity (measured using the methodology the manufacturers used) as long as the adjusted percent-daily-value figure was included in the nutrition facts panel.

Voluntary Dismissals

Here's a rather long roundup of the voluntary dismissals entered in several of the cases we've covered over the years:

Zarinebaf v. Champion Petfoods USA Inc., No. 1:18-cv-06951 (N.D. Ill. July 17, 2023) – Filed 10/16/2018.

Morris v. Zoup! Fresh Soup Co. LLC, No. 5:23-cv-11242 (E.D. Mich. July 14, 2023) – Filed 5/26/2023.

Reynolds v. Mondelēz Global LLC, No. 5:23-cv-00087 (N.D. Fla. Aug. 3, 2023) – Filed 3/27/2023.

Quilez v. Mondelēz Global LLC, No. 1:23-cv-01889 (S.D.N.Y. Aug. 9, 2023) – Filed 3/6/2023.

Cirrito v. GSK Consumer Health Inc., No. 1:23-cv-00491 (W.D.N.Y. Aug. 18, 2023) – Filed 6/5/2023.

Perugia v. Mondelēz Global LLC, No. 5:23-cv-00069 (N.D.N.Y. Aug. 21, 2023) – Filed 1/20/2023.

Toribio v. The Kraft Heinz Co., No. 1:22-cv-06639 (N.D. Ill. Aug. 24, 2023) – Filed 11/29/2022.

Zapadinsky v. Blue Diamond Growers, No. 2:23-cv-00231 (E.D. Wis. Aug. 25, 2023) – Filed 2/19/2023.

Gibson v. Eagle Family Foods Group LLC, No. 1:22-cv-02147 (S.D. Ind. Sept. 8, 2023) – Filed 11/4/2022.

Lozano v. Ferrara Candy Co. Holdings Inc., No. 2:23-cv-04670 (C.D. Cal. Sept. 21, 2023) – Filed 6/14/2023.

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Angela Spivey and Sam Jockel will present at this conference hosted by Momentum Events.

October 26

[Food Label Seminars 2023]

Rachel Lowe and Sam Jockel will present the session "Sustainability & Environmental Marketing Claims" at the virtual Food Label Seminars hosted by Prime Label Consultants.

December 6

[PFAS Cross-Practice CLE Webinar]

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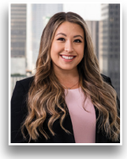
Contributing Authors

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



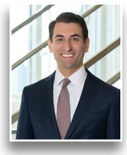
Samantha Burdick
+1 213 576 1190
sam.burdick@alston.com

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

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

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

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



Jonathan Hermann
+1 404 881 7275
jon.hermann@alston.com

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

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

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

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

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

Contributing Authors

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

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

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

ALSTON & BIRD