ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

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Edition Facts

3 Sections This Edition
Cases Per Section 1-13

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions To Dismiss	100%
Class Certification	100%
Settlement	100%

New Lawsuits Filed

Beverage Manufacturer Allegedly Drops the Ball on "Healthy" Claims

Gumner v. Pepsico Inc., No. 8:23-cv-00332 (C.D. Cal. Feb. 24, 2023).

A major drink manufacturer is being called out for a purported technical foul by a California-based plaintiff. According to a new suit filed in the Central District of California, the defendant misbrands its Gatorade Fit drinks because the products are marketed and labeled as "Real Healthy Hydration" and as being an "Excellent Source of Vitamin A & C," but do not meet the specific requirements necessary to make these claims. According to the plaintiff, these claims swing and miss because "Gatorade Fit is essentially water that is flavored with a small amount of watermelon juice concentrate and citric acid." While the defendant attempts to bulk up its product with added electrolytes and by fortifying it with a number of vitamins, the plaintiff cries "foul!" because absent that fortification, the products would not provide 10% or more vitamin A or C, the requisite amount for making such claims. The plaintiff also urges that the products are not eligible for fortification because they do not meet any of the four circumstances that permit fortification under the FDA's policy.

The plaintiff claims that he bit hard on the defendant's ball fake and that had he known of the alleged chicanery, he would not have purchased the product or would have been willing to pay less for it, absent the misbranded claims. The complaint pursues causes of action under California's Unfair Competition Law and unjust enrichment and seeks injunctive relief to prevent the continued sale of the purportedly misleading beverage. It's unclear whether the named plaintiff's claims are a slam dunk, but we'll make sure you have front row seats to see whether his claims are able to advance to the round of discovery.

Will It Pasta the Authenticity Test?

Salouras v. Barilla America Inc., 2023CH01397 (Ill. Cir. Ct. Feb. 14, 2023).

An Illinois plaintiff likely longing for her time spent studying abroad in *Firenze* cries "mamma mia!" over labeling claims by the defendant pasta manufacturer that allegedly led her to believe that its pasta products were authentic products of Italy. As everyone clearly knows, "the general Italianness" of a product influences consumers' overall evaluation of a product, and here, the plaintiff alleges the labeling claim that the pasta products are "ITALY's #1 BRAND OF PASTA" convinced her that the products were authentic pastas from Italy. That's despite the "made in the USA with USA and imported ingredients" disclaimer featured on the back of the products' labels.

The plaintiff claims that the labeling representation, along with green, white, and red colors from Italy's national flag, led her to believe the products were made in Italy with authentic Italian ingredients. While the plaintiff now knows the truth about the products, she seeks injunctive relief, claiming that she is at risk of "reasonably, but incorrectly, assuming that Defendant has fixed the Products" such that she may buy them again believing they are no longer falsely advertised and warranted. We'll keep an eye on whether that claim makes it through the strainer at the motion to dismiss stage.

Curiously, she also claims that the representation runs afoul of the FTC's "Made in USA" guidelines because the products are manufactured outside of Italy with ingredients not sourced from Italy. To her success on that claim, we wish plaintiff "*buona fortuna*." The plaintiff alleges that this false, misleading, and deceptive labeling allows the pasta manufacturer to increase profits and gain an unfair competitive advantage. She asserts claims under Illinois' Consumer Fraud and Deceptive Business Practices Act, unjust enrichment, and breach of express warranty on behalf of herself and other similarly situated individuals in the State of Illinois.

Plaintiff Perplexed by Pretzel Packaging

Payne v. Campbell Soup Co., No. 1:23-cv-01210 (S.D.N.Y. Feb. 13, 2023).

A New York–based plaintiff is tied in knots over pretzel packaging. The complaint alleges that three of the defendant's pretzel products are misleadingly labeled as being made with "whole grain" or "real honey" because, according to the complaint, the products' ingredient list identifies "enriched wheat flour" and "brown sugar" as the primary ingredient and sweetener. Despite alleging that the ingredient list identifies "well-known" whole grain substitutes and processed sweeteners, the plaintiff alleges that she was misled into purchasing these pretzel products because she believed they were "predominately" [*sic*] made with whole grain flour or "primarily" sweetened with real honey. The plaintiff alleges violation of various state consumer protection statutes and the New York General Business Law on behalf of a putative nationwide class and a New York subclass.

Plaintiff Allegedly Leans on Cough Syrup's Relief Claims

Batey v. GSK Consumer Health Inc., No. 4:23-cv-04031 (C.D. Ill. Feb. 18, 2023).

An Illinois-based plaintiff alleges that the defendant's cough relief syrup is misleadingly packaged and sold because it (1) promises cough relief while being sold under the Robitussin brand alongside traditional, over-the-counter cough suppressants; (2) promises cough relief due to its honey and ivy leaf ingredients; and (3) states that it does not contain artificial preservatives. The plaintiff claims the labeling, which describes the product as a "dietary supplement," is misleading because it is sold under the Robitussin brand, "synonymous with cough syrup for over 50 years."

According to the complaint, the cough relief claims are false and deceptive because dietary supplements may not contain such cough relief claims without being authorized through an FDA approval process. The complaint also alleges that the back label fails to adequately disclaim the cough relief claim, that there is no credible evidence to support the claim that honey and ivy leaf extract provide cough relief, and that the "free from artificial colors, flavors & preservatives" claim is false because the product "contains citric acid, an artificial ingredient which serves multiple preservative functions."

Based on these claims, the plaintiff seeks to represent Illinois and multistate consumer fraud classes and brings a now-familiar set of claims: 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.

Real Pies Deserve *Butter*

White v. Schwans Consumer Brands Inc., No. 2:23-cv-00147 (E.D. Wis. Feb 4, 2023).

When you think "butter," what comes to mind? For one Wisconsin-based plaintiff, the answer is "state fairs of lore" and farm-fresh food traditions that have persisted "since the dawn of recorded history." This plaintiff brings an action against a consumer food company for misleadingly marketing its frozen apple pie as having a crust made with real butter. In reality, the product's primary crust-based ingredient is "palm oil," with a "negligible" amount of butter involved. The complaint walks through the science behind butter's crucial role in the pie's crust—the *best* part of a pie and one not to be trifled with. The plaintiff asserts that using palm oil instead of butter denies the crust the pie-fect nutritional, flaky, organoleptic, and sensory attributes that consumers expect and deserve from a pie crust labeled as "made with real Butter." The plaintiff brings this action on behalf of a Wisconsin class and on behalf of a consumer fraud multistate class, claiming violation of state consumer protection laws, breaches of express warranty and implied warranty, negligent misrepresentation, and unjust enrichment.

Portion Control Gone Awry

Valencia v. Snapple Beverage Corp., No. 7:23-cv-01399 (S.D.N.Y. Feb. 19, 2023).

A parched plaintiff alleges that a beverage company misleadingly sells fruity beverages labeled as "All Natural" when the beverages actually include citric acid, a non-natural ingredient used as a preservative. The complaint also takes issue with the inclusion of "vegetable and fruit juice concentrates (for color)," not because that coloring is from non-natural sources, but because it is not from apple and pear juices and because it is allegedly used to make the product look darker, "like it contains more apple juice than it does."

In an interesting twist, the plaintiff also claims that the labeling is misleading because the Nutrition Facts list the calories and nutrients based on both an 8 oz serving size and the full 16 oz bottle. According to "evidence," while consumers "may hope to consume" only a serving size, most consumers cannot help themselves from consuming full containers of delicious fruity beverages (and the additional calories within them). Because federal requirements set the reference amount customarily consumed for noncarbonated beverages at 12 oz, the plaintiff claims the 16 oz bottle is the real serving size. The plaintiff brings a variety of claims on behalf of a New York class and a consumer fraud multistate class, including violation of state consumer fraud acts, breaches of express and implied warranty, fraud, and unjust enrichment.

From the Smokehouse to the Doghouse

Zapadinsky v. Blue Diamond Growers, No. 2:23-cv-00231 (E.D. Wis. Feb. 19, 2023).

Adding to a growing line of suits challenging smoke-flavored snacks, Spencer Sheehan of Sheehan & Associates P.C. has filed a new class action complaint on behalf of a Wisconsin-based plaintiff against a large snack-food manufacturer, challenging the labeling of its Smokehouse almond products. While the complaint blows a considerable amount of smoke itself (*see* a historical explanation of the origins of smoked almonds and six different dictionary definitions of "smokehouse"), it alleges that the defendant misleads consumers through the branding of its Smokehouse almond line, both with the name "Smokehouse" and the use of a red and orange ribbon "evocative of fire." The plaintiff claims that he was misled into believing that the almonds were actually smoked in a smokehouse, when in reality they get their flavor from added natural hickory smoke flavor and that the labeling is deceptive because it does not contain disclaimers that the almonds are "naturally flavored" or "smoke flavored," like some of the defendant's competitors' products.

According to the complaint, added smoke flavor is unable to make the product taste like it was made in a smokehouse, which deprives consumers of the more than "400 flavor compounds" created when foods are made in a smokehouse. The plaintiff claims this is what really burned him, because he thought he was paying more for a product that was made in a smokehouse, but because it is not, he missed out on the well-known flavor compounds all reasonable consumers expect to hit their taste buds in "smokehouse" products: "pyrazines, aliphatic, aromatic hydrocarbons, alcohols, organic acids, esters, furans, phenols, carbonyl and non-carbonyl compounds, and various oxygen- and nitrogen-containing heterocyclic compounds"—you know, those common flavor profiles we've all grown to know and love in our smoked foods.

The complaint alleges violations of the Wisconsin Unfair Trade Practices Act, breach of express and implied warranty, negligent misrepresentation, fraud, and unjust enrichment. In addition to a Wisconsin subclass, the plaintiff also seeks to represent a rather unique class consisting of purchasers from "the" Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, and Arizona, and alleges violations of the analogous consumer protection statutes.

Hard Liquor Hard Deke

Del Rosario v. Sazerac Co., No. 1:23-cv-01060 (S.D.N.Y. Feb. 8, 2023).

A New York consumer is crying foul over an alcoholic beverage company's advertising and marketing stunt. The plaintiff claims that the design of the defendant's mini Southern Comfort brand alcoholic beverage bottles was misleading because while the mini SoCo bottles look almost identical to the larger bottles of its namesake's hard liquor, the minis merely contain a whiskey-flavored malt beverage rather than the real hard stuff. The plaintiff was allegedly duped based on the similarity of the bottles and assumed the formulations were the same. However, the fine print reveals the real gameplan: whiskey is the alcohol of choice in the large bottles, but the minis utilize malt as the main alcohol base and are flavored with a de minimis amount of "natural" whiskey.

The plaintiff also alleges that the statement of composition creates the false impression that the beverage is barrel aged by listing the presence of "Oak Extract." Consumers were allegedly harmed because they paid a premium for these liquor look-alikes, assuming they contained more than a de minimis amount of distilled spirits. The plaintiff also alleges that the alcoholic beverage company adds the small amount of whiskey after fermentation to avoid paying taxes. As a malt beverage, the mini alcoholic beverages are able to be sold in locations outside liquor stores (e.g., gas stations and convenience stores) that would otherwise be prohibited by state regulations. The plaintiff seeks to represent New York and multistate classes of purchasers, basing her suit on violations of state-law claims, consumer protection statutes, breaches of warranties, unjust enrichment, and fraud.

Consumer Claims Fruit-Flavored Kombucha Is a Fairy Tale

Lawley v. Humm Kombucha LLC, No. 6:23-cv-00170 (D. Or. Feb. 3, 2023).

It's a tale as old as time: A consumer buys a flavored product, believes the product contains the ingredients mentioned in the flavor, and is *shocked* to find out the product does not actually contain such ingredients, leading to a class action complaint against the product's manufacturer. Sound familiar? We've covered a number of flavoring claims over the years, with vanilla ice cream suits likely topping the charts for this type of claim, but this latest target of consumers' ire is a popular kombucha beverage brand. The plaintiff claims that the defendant's line of kombucha beverages is misleading because they do not contain many of the ingredients mentioned or pictured on the product's front label. For example, according to the plaintiff, flavors like "Blueberry Mint" contains no blueberry or mint, "Pineapple Jalapeno" contains no pineapple, "Blood Orange" contains no blood orange (or any orange), and "Magical Lemon Cupcake" contains no lemon (the suit is silent on whether the consumer was satisfied with the amount of magic in the product).

The plaintiff argues that the beverages' taste instead comes from "natural flavors" and does not disclose that information on the label, leading consumers to believe that the taste comes from real ingredients like blueberries, mint leaves, pineapples, blood oranges, and *magical* lemons. The complaint compares the beverages to other kombucha products that either contain the ingredients mentioned in their name or disclose that the product is naturally flavored. And according to the complaint, the defendant began rebranding the products as "flavored" after receiving the plaintiff's California Consumers Legal Remedies Act letter in November 2022. The plaintiff seeks to certify a California class of consumers, alleging violation of California consumer protection laws and breach of implied warranty.

Fitness Enthusiast Pumps More Lawsuits Than Iron

Scheibe v. Alacer Corp., No. 3:23-cv-00026 (S.D. Cal. Jan. 6, 2023).
Scheibe v. Bare Performance Nutrition LLC, No. 3:23-cv-0047 (S.D. Cal. Jan. 11, 2023).
Scheibe v. 1st Phorm International LLC, No. 3:23-cv-00215 (S.D. Cal. Feb. 6, 2023).
Schiebe v. Livwell Products LLC, No. 3:23-cv-00216 (S.D. Cal. Feb. 6, 2023).
Scheibe v. Muscle Feast LLC, No. 3:23-cv-00217 (S.D. Cal. Feb. 6, 2023).
Scheibe v. Performance Enhancing Supplements LLC, No. 3:23-cv-00219 (S.D. Cal. Feb. 6, 2023).
Scheibe v. Fit Foods Distribution Inc., No. 3:23-cv-00220 (S.D. Cal. Feb. 6, 2023).

A plaintiff describing himself as "a college student who has recently sought to lose weight and add muscle mass" should probably spend more time in the gym and less time with his attorneys. Over a one-month period, this college-goer pumped out some serious legal super sets, serving *seven* different lawsuits on various manufacturers of nutritional supplement products. Hopefully the plaintiff's gym routine has more variety than his suits, which identically challenge the inclusion of DL-malic acid, a synthetic flavoring, in the products despite advertisements and labeling representations that claim the products contain "clean" ingredients or "natural" flavoring. The plaintiff claims that the labels are also misleading because they designate the ingredient by its generic name, malic acid (which is naturally occurring in fruits) as opposed to *DL*-malic acid, which the plaintiff claims is an artificial flavoring derived from petrochemicals. As support for these claims, the plaintiff contends that DL-malic acid is not a "natural flavor" as the term is defined by federal and state regulations and is not derived from a natural source, such as a fruit or vegetable.

In two of the complaints *(Performance Enhancing Supplements* and *Fit Foods)*, the plaintiff seeks to certify a California class, alleging violations of California consumer protection laws, unjust enrichment, and breach of express warranty. In the other five complaints, the plaintiff seeks to certify a nationwide class and a California subclass and asserts similar claims. While we might need a new fitness tracker to keep up with this plaintiff's stack of legal activity, we'll be sure to provide updates on whether the plaintiff is able to achieve his ~~fitness~~ *legal* goals.

Consumers Claim They Deserve *Butter*

Winans v. Ornua Foods North America Inc., No. 2:23-cv-01198 (E.D.N.Y. Feb. 14, 2023).

A proposed class action alleges a food manufacturer falsely markets its product as containing "pure Irish butter," despite containing potentially harmful artificial additives. According to the complaint, the butter products "are prominently labeled as containing 'PURE IRISH BUTTER' when, in fact, the Products contain per- and polyfluoralkyl substances ('PFAS'), a category of synthetic chemicals that are, by definition, artificial."

Like some of the butter products, the plaintiffs were *salty* over the absence of disclosures of the presence of the PFAS on the product's labeling, if the defendant was aware of it, and claim that if the PFAS "made its way into the Products by accident," then surely it was the result of "poor manufacturing processes by either Defendant and/or their agents."The plaintiffs plainly believe that customers deserve *butter* and allege that the defendant intentionally uses the words "pure Irish butter" to drive sales and increase profits. The suit alleges several claims, including violations of New York's Deceptive Trade Practices Act and New York's General Business Law, as well as claims for breach of express warranty, negligent misrepresentation, and unjust enrichment. Only time will tell how this suit will *churn* out.

Consumers Allege Defendant's "Total Lean" Protein Bars Are Totally Misleading

Mercado v. GNC Holdings LLC, No. 1:23-cv-01572 (S.D.N.Y. Feb. 24, 2023).

A class action complaint filed in New York federal court alleges the defendant's Total Lean protein bars are mislabeled because the products do not contain less fat than their competitors. According to the complaint, the defendant "markets and sells the products as 'lean' to impress upon the public that its products contain less fat than its competitors." But contrary to those representations, the complaint claims that the products are not lean because they do not contain any less fat than similar "non-lean" protein bars available in the marketplace. Based on these allegations, the plaintiffs allege putative class claims on behalf of a nationwide class and New York subclass for violation of New York's consumer protection statutes and breaches of express and implied warranties. The complaint seeks injunctive relief, restitution, compensatory and punitive damages, and attorneys' fees and costs.

Petulant Plaintiff Pouty About Pomegranate Juice

Hernandez v. The Wonderful Company LLC, No. 1:23-cv-01242 (S.D.N.Y. Feb. 14, 2023).

A New York-based plaintiff brings suit against a popular juice manufacturer, alleging that the defendant pomegranate juice manufacturer falsely labels and markets its product as being "healthy" and "all natural," despite purportedly containing PFAS. This suit adds to the growing list of PFAS suits against food, beverage, and cosmetic product manufacturers indicating that like PFAS themselves, these suits are here to stay.

According to the complaint, the defendant juice manufacturer markets and sells its pomegranate juice by targeting health-conscious consumers and using labeling statements such as "100% Pomegranate Juice," "Antioxidant Superpower," and "All Natural" to mislead consumers into believing its juice has certain health benefits and that the product is free from any artificial ingredients, including PFAS. The plaintiff argues that the product fails to disclose the presence of PFAS in the fruit juice and instead bolsters the health-conscious labeling claims both on the product packaging itself (e.g., "Drink It Daily. Feel It Forever.," "4 California Pomegranates," "No Sugar Added") and through online marketing efforts, including links to scientific studies that purportedly support the defendant's claims that the pomegranate juice product is a healthy choice for consumers. The plaintiff brings suit individually and on behalf of a national and New York class of purchasers. She asserts claims for violation of the Magnuson–Moss Warranty Act, violation of state consumer protection statutes, breach of express warranty, fraud, constructive fraud, and unjust enrichment.

Motions to Dismiss

Procedural Posture: Granted

"Natural Flavor" Malic Acid Suit Is Dead in the Water

Hoffman v. Kraft Heinz Foods Co., No. 7:22-cv-00397 (S.D.N.Y. Feb. 7, 2023).

Another "natural" flavoring malic acid suit bites the dust in New York federal court. In this suit, the plaintiff claimed that the defendant's "mango and peach" liquid beverage concentrate was falsely labeled as containing "natural flavor with other natural flavor." Based on "laboratory analysis," the plaintiff claimed that the flavor enhancer product contained the artificial form of malic acid (DL-malic acid), as opposed to the naturally occurring form (L-malic acid). According to the plaintiff, consumers expect that only natural ingredients compose the product's taste and that the defendant's ingredients list should disclose the artificial form of the product's malic acid ingredient. But the federal court wouldn't bite. Dismissing the complaint, the court concluded that the plaintiff's reference to "laboratory analysis" as support for the contention that the defendant's flavor enhancer concentrate contained the artificial form of malic acid was not enough to survive a motion to dismiss. The court concluded that the plaintiff failed to "raise[] 'any factually substantiated allegations' that the Product contains artificial malic acid, rather than natural malic acid," leaving this "natural flavoring" suit dead in the water.

Procedural Posture: Granted in Part

Court Cuts Mac & Cheese Sellers Some Slack … For Now

Sinatro v. Mrs. Gooch's Natural Food Markets Inc., No. 3:22-cv-03603 (N.D. Cal. Feb. 16, 2023).

A California federal court grated down claims brought by three West Coast plaintiffs, granting the defendants' motion to dismiss in part. In their complaint, the plaintiffs alleged that the defendants' boxed mac & cheese products left much to be desired, claiming that the products contained 48–56% nonfunctional slack-fill in "rigid and opaque" packaging that misleads consumers about the amount of product in the actual package. The plaintiffs argued that the packaging disclosures of the net weights and serving sizes did not allow reasonable consumers to determine the amount of mac & cheese contained in the products' boxes. They also argued that the amount of product on the front or back labels of the products did not allow reasonable consumers to determine the amount of macaroni pasta pieces in the mac & cheese product compared to the size of the actual box.

Perhaps leaving the plaintiffs a little *bleu*, the court disagreed with the plaintiffs almost entirely. In its order, the court held that reasonable consumers would not be misled by the mac & cheese labeling. Comparing other slack-fill cases, the court determined that products commonly measured by their yield (like cake mix or mac & cheese) are not misleading when their labels accurately reflect what that approximate yield would be, such as in units of cups. The court concluded that the mac & cheese products at issue in this case appropriately disclosed the products' net weight, serving size, number of servings, preparation instructions,

and most significantly to the court, the approximate yield of the product in units. Therefore, the mac & cheese boxed products were not misleading to reasonable consumers, leaving the plaintiffs' consumer deception *rotten*. But that's not all the cheddar that the plaintiffs missed out on!

On jurisdictional grounds, the court also eliminated several defendants and several of the plaintiffs' claims asserted under other states' statutes and common law. The court shredded the plaintiffs' claim for injunctive relief for lack of standing, finding that because the plaintiffs are now aware of the actual amount of the product in each box of mac & cheese, they are not likely to be deceived again in the future. Not content to send the plaintiffs home hungry, the court did find that the plaintiffs sufficiently pleaded certain elements of their California UCL claim, their unjust enrichment claim, and their intentional misrepresentation claim. The court allowed the plaintiffs to amend their complaint, though after that grilling, they may be content to pick up their cheese board and head home.

Class Certification

Procedural Posture: Granted

We All Scream for Ice Cream

Vizcarra v. Unilever United States Inc., No. 4:20-cv-02777 (N.D. Cal. Feb. 24, 2023).

In a rare win for Spencer Sheehan and his flavor team, a California federal district judge granted a revised class certification bid for ice cream purchasers who claim they were deceived by the "Natural Vanilla" labeling on the defendant's ice cream product. The suit claims that the product's packaging—which depicts a scoop of ice cream with vanilla bean specks alongside two vanilla beans and vanilla flowers—misleads consumers to believe that the ice cream's vanilla flavor is derived exclusively from the vanilla plant. After initially denying class certification in October 2021, the plaintiff got a second lick at the scoop.

In denying the initial motion for class certification, the court held that the plaintiff's expert survey lacked a control variable and failed to isolate the statements at issue. This time around, the federal court found that the revised expert report survey adequately measured the effect of the vanilla representations on consumers' perceptions. The court concluded that the survey results could support the plaintiff's claim that a reasonable consumer was likely to be deceived by the defendant's vanilla representations on its ice cream.

Settlement

Coffee Farmers Have a Latte to Be Happy About

Corker v. L&K Coffee Co., No. 2:19-cv-00290 (W.D. Wash. Jan. 25, 2023).

Following on the heels of 11 previously approved settlements with other defendants, a Washington federal court granted approval of a final $6.15 million settlement, ending plaintiff coffee farmers' putative class action suit over the labeling of "Kona" coffee. The $6.15 million contributes to the more than $15.2 million obtained from other coffee manufacturers in prior settlements. The Hawaiian coffee farmers claimed that the defendant coffee companies falsely labeled their coffee products as being "Kona" or "Kona-blend," misrepresenting that the products are sourced from the Kona region of Hawaii. The plaintiffs are Hawaiian coffee farmers who grow the worldwide supply of Kona coffee in the Kona region.

In addition to the financial terms, the settlement also provides injunctive relief, including a requirement that the defendant coffee company will, among other things, state the minimum percentage of authentic Kona coffee beans contained in the defendant's coffee products. The settlement also memorializes the defendant's agreement to label as "Kona" or "Kona Blend" only the products that are certified as 100% Kona by the Hawaii Department of Agriculture. Attorneys' fees of class counsel and administrative costs will be paid from the settlement fund.

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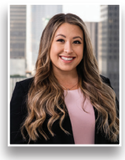

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