ALSTON & BIRD

FOOD & BEVERAGE DIGEST

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Edition Facts

3 Sections This Edition
Cases Per Section 1-10

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions To Dismiss	100%
Settlements	100%

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New Lawsuits Filed

Chewing Gum Targeted for False Advertise-mint

Davis v. The Pur Company (USA) Inc., No. 6:22-cv-06430 (W.D.N.Y. Oct. 10, 2022).

At some point, many of you may have pondered whether chewing gum is considered a food. Technically, it is, according to the FDA. And so, as with all other foods, esteemed plaintiff's counsel Spencer Sheehan has targeted gum for making representations about its flavors. According to one New York putative class action against a gum manufacturer, the defendant falsely labeled its gum as "peppermint gum," despite the alleged absence of "peppermint" on the product's ingredient list. According to the complaint, the plaintiff expected the taste of her gum to come exclusively or predominantly from *peppermint* (which she claims is more natural and nutritious), but the packaging's ingredient list only identifies that the product contains "natural flavors" (which she claims is less natural and nutritious than pepperminty peppermint). The complaint relies on a flavor expert's opinion to contend that the defendant's ingredient list should at least contain peppermint extract or peppermint oil.

The plaintiff seeks to represent a New York class and consumer fraud multistate class for claims for breaches of express and implied warranties, negligent misrepresentation, fraud, and unjust enrichment.

Not So "Naturally French"

Manier v. La Fermiere Inc., No. 5:22-cv-01894 (C.D. Cal. Oct. 27, 2022).

In a new complaint in California federal court, a California-based Francophile proclaims "*Vive la France*!" on behalf of beret-wearing, baguette-carrying Francophiles everywhere by attacking the defendant's use of the phrase "Naturally French" on the front label of its yogurt products. According to the plaintiff, the words "Naturally French" tragically mislead consumers to believe that the yogurt products are made in France. But *au contraire*! The yogurts are actually made right here in the U.S. of A.—and more specifically in a not-so-predominantly-French-speaking neighborhood of New York. The complaint cites a magazine article discussing Americans' "rising demand" for foods "Made in France," as well as the front label's absence of words, such as "French style" or "French type," that the plaintiff claims would make clear to consumers like her that the product is not, in fact, made in France. According to the plaintiff, the defendant makes a profit "off the booming market for foreign made goods" by misrepresenting the yogurt products' country of origin and charging a price premium. *Bof*!

The plaintiff seeks to represent a nationwide class, asserting claims for breach of warranty and unjust enrichment, and a California subclass, asserting claims for violation of California consumer protection laws.

Consumer Pouts over Lack of Protein in Powdered Breakfast Mix

Benzin v. Nestlé Healthcare Nutrition Inc., No. 1:22-cv-00747 (W.D.N.Y. Oct. 1, 2022).

Seeking products packed with protein while making "quick purchasing decisions at the store," a New York plaintiff claims she was duped by the front labeling on Carnation Breakfast Essentials powdered drink mix, which advertises "13g protein." According to the complaint, the plaintiff saw that representation and figured the product, as sold, contained that amount of protein. However, disclosures on the front labeling also explained that those amounts were "per prepared serving" and provided the instructions to "just add milk."

While the plaintiff claims she knew the product she was buying was a powdered drink mix, she allegedly figured that she could mix it with whatever she wanted, including water, and still get the as-advertised 13g of protein. Despite claiming that consumers must "scrutinize the back of the package" to see that the drink powder only contains 5g of protein before being mixed with milk, she claims that the instruction to "just add milk" is inconsistent with information in a separate call-out on the product's packaging comparing the amount of vitamin D in the drink mix to milk alone because consumers will allegedly not think they need to add milk to the product given that the label compares the product to milk. But that close "scrutiny" only requires a quick glance at the nutritional facts panel, containing two columns comparing the product's nutrients as sold with those once prepared with a serving of milk.

Closing out her qualms with the label, the plaintiff claims there are no instructions on how consumers can ultimately obtain the 13g of protein, as advertised, including no instructions about what kind of milk to add. Accordingly, the plaintiff claims the labeling representations are misleading and the defendant was able to sell the product at a price premium, resulting in additional profits. She seeks to certify a class of New York consumers as well as a consumer fraud multistate class to pursue causes of action under New York's General Business Law, various states' consumer fraud statutes, breaches of warranty, fraud, and unjust enrichment.

"100% Misleading!" Cracks New Cracker Complaint

Wallenstein v. Mondelēz International Inc., No. 3:22-cv-06033 (N.D. Cal. Oct. 13, 2022).

A pair of plaintiffs allegedly seeking a healthy snack has lodged a new complaint against a major snack manufacturer, claiming that the defendant's Wheat Thins crackers prominently display "100% Whole Grain" on the front, side, and back labels of its products' boxes, despite being primarily composed of cornstarch—a *refined* grain. According to the complaint, the "100% Whole Grain" representation misleads consumers to believe that 100% of the grain ingredients in the crackers are whole grains, when the crackers actually contain cornstarch. The complaint alleges that the "100% Whole Grain" claim is a pillar of the Wheat Thins brand

and is uniform across the marketing and labeling for the Wheat Thins product line. As a result of this allegedly misleading marketing campaign, the plaintiffs allege that the defendant was able to charge a price premium for its products and that the plaintiffs did rely on the representation when purchasing the crackers, allegedly paying more than they otherwise would have. The plaintiffs seek to represent a multistate California and New York class of purchasers, or a single-state class of California or New York purchasers. The plaintiffs assert claims for violation of California's and New York's consumer protection laws, as well as breach of express warranty.

Tipsy Plaintiffs Want to Put a Lid on Kombucha Product

Burke v. Tribucha Inc., No. 5:22-cv-00406 (E.D.N.C. Oct. 6, 2022).

Several plaintiffs filed suit in North Carolina federal court, alleging that a defendant kombucha manufacturer falsely represents its kombucha (yes, that fermented, effervescent tea) products as non-alcoholic, when the beverages allegedly contain more than twice the alcohol allowed for non-alcoholic beverages. What tipped these unsuspecting kombucha sippers off to the allegedly heightened amount of alcohol in the products? Well, according to one Tennessee-based plaintiff, he "felt the effects of alcohol" after consuming the allegedly-infringing product but claims that he was "unaware that he was experiencing the effects of alcohol … because the Products did not bear the proper warnings and disclosures."

Despite that plaintiff's high-gravity claims, other plaintiffs allege that the defendant failed to disclose the accurate amount of alcohol contained in the products and falsely claimed that the kombucha product "contains a trace amount of alcohol." The complaint also points to laboratory testing that suggests the product contained, or would contain before its expiration date, an alcohol content greater than 0.5%—making the product an alcoholic beverage and subject to the laws and regulations governing alcoholic beverages.

The complaint explains that, depending on how the kombucha is manufactured and stored, fermentation can continue to occur within a kombucha bottle after the time of bottling, increasing the percentage of alcohol by volume in the beverage after the product leaves production. While some kombucha manufacturers have found ways to stop this continued fermentation (including pasteurization) or placed the federally mandated warning for alcoholic beverages on their products, the complaint alleges that the defendant "has apparently chosen a third path" and continues to brew raw, unpasteurized kombucha that allows it to continue fermenting into an alcoholic beverage without the federally mandated warnings for alcoholic beverages. The plaintiffs seek to represent a national class of purchasers, a consumer fraud multistate class, and a multistate express warranty class, as well as subclasses for five different states. The plaintiffs assert claims for violation of state consumer protection laws, breach of express and implied warranty, fraud, and unjust enrichment.

Not "Mint" to Be

Martinez v. Unilever United States Inc., No. 1:22-cv-05664 (N.D. Ill. Oct. 15, 2022).

An Illinois-based plaintiff alleges that an ice cream manufacturer's "Mint Chocolate Chip" ice cream is misleadingly labeled because it leads consumers to believe that the ice cream's mint flavoring comes from mint ingredients rather than other sources. According to the complaint, the product's front label, the description as "Cool mint ice cream," the absence of any qualifying terms such as "flavored," and the images of two mint leaves "tell" consumers that the product's mint taste comes from mint ingredients and that the ice cream contains a non-negligible amount of mint ingredients.

The plaintiff argues that by omitting the word "flavored," consumers are not alerted that the product's taste is not from mint ingredients, despite her acknowledgement that the ingredient list does not identify any mint ingredients. That fact aside, she still allegedly expected the ice cream to contain a "non-negligible amount of mint ingredients to provide its mint taste" and claims that by using a less expensive natural flavor, the defendant was able to charge a price premium for its product. The plaintiff asserts violations of state consumer protection laws, breach of express and implied warranty, violation of the Magnuson–Moss Warranty Act, negligent misrepresentation, fraud, and unjust enrichment, and she seeks to represent both an Illinois and multistate consumer fraud class.

Is a Cheese Producer Blowing Smoke About Its Flavoring?

Buechler v. Albertsons Companies Inc., No. 1:22-cv-02717 (D. Md. Oct. 21, 2022).

A Maryland-based plaintiff represented by Spencer Sheehan attempts to smoke out some allegedly misleading advertising by the owner of Lucerne brand dairy products. The plaintiff's allegations are framed with the traditional Sheehan-isms that fill so many similarly styled complaints: useless definitions, pseudo-intellectual explanations of chemical compounds, and in this case, quotes from "cheese industry observers."

Looking to produce some sparks, the complaint alleges that the labeling on the defendant's Lucerne brand of pasteurized processed Gouda cheese is misleading because it states that the product is "smoked." The complaint claims that, in reality, the cheese slices get their smoky flavor and appearance from two additives: liquid smoke and annatto color. The plaintiff alleges that the product's labeling should instead state that the cheese is made "with added smoke flavor," "[with] natural smoke flavor," or "flavor added" to comply with FDA regulations. The plaintiff, a man of apparently particular taste and smoky demeanor, "wanted more than a smoky taste but a product that was smoked over hardwood" and alleges that he overpaid for the liquid-smoke-flavored product.

The plaintiff seeks to represent a class of purchasers in Maryland, as well as a multistate consumer fraud class of purchasers from Alaska, Arizona, D.C., Hawaii, Idaho, Montana,

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Nebraska, Nevada, New Mexico, South Dakota, and Wyoming—a veritable charcuterie board of states, if you will. In addition to violations of these states' consumer protection statutes, the complaint alleges causes of action for breach of warranty, negligent misrepresentation, fraud, and unjust enrichment.

"Carbon Neutral" ≠ "Carbon Free"

Dorris v. Danone Waters of America Inc., No. 7:22-cv-08717 (S.D.N.Y. Oct. 13, 2022).

A California plaintiff goes green, filing suit against a bottled water manufacturer for allegedly misrepresenting its bottled products as being environmentally friendly. The plaintiff alleges that the defendant falsely labels its bottled water as "carbon neutral," which allegedly misleads consumers to believe that the product is sustainable and that it will not leave a carbon footprint. But according to the complaint, the defendant's bottled water is *not* carbon neutral because it still causes carbon dioxide to be released into the atmosphere and any "offsets" to carbon dioxide emissions will take place several years down the road. The complaint goes on to contend that the defendant's use of a carbon neutral claim on its product labels without defining exactly what "carbon neutral" means to the consumer qualifies as a misrepresentation. The plaintiff claims that although the definition of "carbon neutral" technically means "having or resulting in no net addition of carbon dioxide to the atmosphere," consumers understand "carbon neutral" to mean something very different. That is, consumers mistakenly understand "carbon neutral" to mean "carbon zero" or "carbon free."

Based on those allegations, the plaintiff seeks to represent a nationwide class of purchasers and a subclass of California purchasers. She asserts claims for violation of California and New York state consumer protection laws, breach of express and implied warranty, unjust enrichment, and fraud.

Consumer Won't Let Sleeping Dogs Lie

Carmen v. Zesty Paws LLC, No. 1:22-cv-05529 (N.D. Ill. Oct. 9, 2022).

"Every dog must have his day" may be this plaintiff's motto because, like a dog with a bone, it seems he will not let this one go. The latest chase involves a case against a defendant pet supplement manufacturer. According to the most recent complaint, the defendant's pet supplements are a *bone*-a-fide disappointment on two fronts. First, the plaintiff alleges that, based on independent lab testing of two of the defendant's pet supplements, the products contain almost none of the active ingredients (chondroitin and probiotics) represented on their packaging. Second, the plaintiff alleges that the defendant's labeling claims, such as "No Artificial Flavors or Preservatives" and "Human-grade ingredients," and display of the National Animal Supplement Council's gold "Quality Seal" mislead consumers to expect a "higher quality" product than the ones they receive. The complaint alleges that consumers expect the product to contain the "listed amount of key active ingredients" *and* that the product will be free from harmful contaminants, but that lab testing allegedly shows that the products contained higher amounts of aerobic microbial counts per gram than is recommended for this category of products.

The plaintiff seeks to represent an Illinois and multistate class of purchasers . The complaint asserts claims for 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. Not to worry, we'll have our noses close to the ground on this one and will be sure to point out any updates in future editions.

More [Lawsuits], Please!

McMenamy v. Nestlé USA Inc., No. 5:22-cv-01053 (N.D.N.Y. Oct. 11, 2022).

A class action filed in New York federal court looks to stir up some claims about the representations on the front label of the defendant's Ovaltine brand drink mixes. The complaint claims the defendant's flavored drink mixes are falsely labeled as "A Good Source of 12 Vitamins & Minerals†" and as having "No Artificials‡." The daggers next to each statement correspond to smaller statements that appear directly below each claim on the front label "†WHEN PREPARED AS DIRECTED" and "‡WITH VITAMIN A, ZINC & COPPER." According to the complaint, the defendant's drink mixes are *not* a "good source" of vitamins and minerals because the product must be mixed with Vitamin A & D milk (an instruction that is allegedly relegated to the back of the container and "inconsistent and unclear").

The plaintiff also argues that the product's "No Artificials" label is misleading because it suggests that the product will not contain artificial ingredients (despite the daggered statement indicating only that the product contains "No Artificial Flavors or Sweeteners"). According to the complaint, that statement is misleading because the product contains bioengineered ingredients that consumers do not expect to find when purchasing this product, despite the product's ingredients label disclaiming that it "contains a bioengineered food ingredient." Based on these allegations, the complaint asserts putative class claims for violations of New York and various other states' consumer protection laws, breaches of warranty, negligent misrepresentation, fraud, and unjust enrichment. Among other relief, the complaint prays for compensatory and punitive damages, injunctive relief, and attorneys' fees and costs.

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Motions To Dismiss

Procedural Posture: **Granted**

Clock Strikes Midnight on Flavored Water Complaint (Possibly) Because It's No "Midnights"

Akers v. Costco Wholesale Corporation, No. 3:21-cv-01098 (S.D. Ill. Sept. 30, 2022).

An Illinois federal court dismissed a putative class action bubbling over with fanciful allegations. The complaint challenged the "carbonated flavored water" with "black raspberry flavor" representations on the defendant's flavored water product, claiming that these statements deceive consumers into believing that the water's flavor comes exclusively (or at least predominantly) from black raspberries. While these allegations are nothing new to federal courts, the complaint alleged a new claim: the label also deceptively conceals that the product is artificially flavored because it contains malic acid. Sidestepping the sea of FDA flavoring regulations and questions about whether malic acid serves as a flavor, flavor enhancer, or something else entirely, the district court simply concluded that the label does not mislead reasonable consumers. It pointed to a "common theme" in these flavoring suits, when the plaintiff conflates labeling about flavors in the product with a promise about its ingredients, is that the label makes no reference to natural fruit flavoring, real fruit, fruit juice, or any representations that the water had "natural" or "no artificial" flavors. The court, tracking other flavoring cases, decided to dismiss the plaintiff's fanciful and unreasonable interpretations.

Manufacturer of Toddler Food Products Crawls Out on Top

Davidson v. Sprout Foods Inc., No. 3:22-cv-01050 (N.D. Cal. Oct. 21, 2022).

A manufacturer of various baby and toddler food products, including pouches of puréed baby food, won a motion to dismiss claims that its products' labeling representations touting nutrient claims such as "3g of Protein" and "4g of Fiber" were fraudulent or unlawful under California law. The underlying complaint alleged that the labeling representations were deceptive, violated FDA regulations prohibiting manufacturers from including such claims on food intended for children under two, and were harmful for children, both nutritionally and developmentally, in part due to high levels of "free sugars" in the products because of the manufacturing and puréeing process.

The court had previously thrown out the plaintiff's fraud-based claims because "no reasonable consumer would be misled by the inclusion of truthful statements about nutrient contents on the front of the challenged labels." But even the plaintiff's second attempt was "still too mushy" to survive because, despite claiming the products were harmful to children, the plaintiffs failed to place their allegation in context by describing at what point "high" sugar content crosses into harmful levels and because the plaintiffs relied on speculative research conclusions and hypothetical scenarios as support. The court again tossed the plaintiff's fraud-based claims, though with leave to amend.

The plaintiff's "unlawful" claim under California's Unfair Competition Law fared even worse, as the court found it was preempted by federal law because it was premised on a violation of California's Sherman Food, Drug, and Cosmetic Law, which expressly adopts federal regulations that can only be enforced by the United States. The court dismissed the claim with prejudice. While the plaintiffs attempted to stand on a procedural argument that the defendant should be precluded from raising its preemption argument on its second Rule 12(b) motion when it had not done so in its first motion to dismiss, the court found that judicial economy weighed in favor of granting the motion because the defendant represented it would simply raise the preemption argument in a Rule 12(c) motion for judgment on the pleadings if it was barred from doing so at the motion to dismiss stage.

Finally, the court tossed the plaintiff's unjust enrichment claim because there was no underlying basis for recovery since the first four claims were already dismissed.

Procedural Posture: **Granted in part**

Court Puts Baby Formula Claims in Time Out

Martinez v. Mead Johnson & Company LLC, No. 5:22-cv-00213 (C.D. Cal. Oct. 22, 2022).

A district judge concluded that a California consumer's complaint did not have the formula for success, dismissing a large chunk of claims that the defendant misleadingly labels its Enfamil branded powdered infant formula. The underlying complaint threw quite the temper tantrum, complaining that it was deceptive or misleading to call the powdered formula "milk-based" when milk was only *one* of the ingredients and not the *primary* ingredient by weight. The plaintiff claimed that she was *shocked* and *dismayed* to learn that the primary ingredient on the ingredient label was corn syrup solids, as opposed to milk.

Before rocking to sleep most of the plaintiff's claims, the court provided a stern warning to food and beverage manufacturers everywhere by refusing to take judicial notice of the defendant's product label proofs because they were not court documents, they could have changed over time, and it was impossible for the court to know that the renditions of the labels presented were "unquestionably accurate representations of the labels that appeared on shelves across California during the relevant period." The court also refused to accept that the documents could be incorporated by reference to the complaint because the plaintiff did not refer extensively to any single label and only mentioned the name of each product once in her complaint.

Moving to the substance of the motion, the court dismissed the plaintiff's consumer protection claims because she failed to allege sufficient factual support about why a reasonable consumer would narrowly interpret the label as she had, explaining that her arguments about plausible misunderstanding were insufficient to satisfy the reasonable consumer test. For similar reasons, the court also dispatched the plaintiff's breach of warranty claims and intentional and negligent misrepresentation claims. The court did a bit of hand-holding through its analysis of the plaintiff's unjust enrichment claim by denying the defendant's motion to dismiss but instructing the plaintiff to clean up her pleading issues that generated

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confusion on whether the claim had been pleaded as a remedy as opposed to a claim for relief when she amends the complaint.

The court also held that the plaintiff did not have standing for injunctive relief because she was not at risk of further deception, though that holding did not apply to the putative classes, who would not necessarily be aware of the facts alleged in the complaint to assist them in avoiding any confusion based on the product labels. An amended pleading has not yet been filed, but we'll keep an eye on whether any of the plaintiff's claims are able to crawl forward.

Spaghett-about It, Court Says

Sinatro v. Barilla America Inc., No. 4:22-cv-03460 (N.D. Cal. Oct. 17, 2022).

Pasta la vista, baby! Well, at least in part. A California district court dismissed an appetizer-sized portion of a suit against a major pasta manufacturer. The suit, filed against a U.S.-based corporation that got its start as a pasta shop in Parma, Italy, alleged that the pasta maker was misleading consumers with its claims that it is "ITALY'S #1 BRAND OF PASTA®." As a result of that representation, according to the complaint, consumers purchased the products believing them to be composed of only authentic Italian ingredients. When in fact, the complaint alleges, the American-made, U.S.-packaged products are no more authentically Italian than, say, a college student who recently returned from a semester abroad in Florence, ahem, *Firenze*.

The major pasta manufacturer moved to toss the claims like a thin-crust pie, seeking dismissal for lack of standing and failure to state a claim. The Northern District of California spat out the manufacturer's standing argument like a soured Chianti Classico, concluding that the plaintiffs had adequately alleged that they would not have paid as much for the products if they had known of their non-Italian origins. The court also reasoned that the plaintiffs had standing to allege a nationwide class of consumers and standing to bring suit for even those products they had not purchased, which featured the same misleading depiction. On the other hand, the court determined that the plaintiffs lacked standing to seek injunctive relief because they could no longer reasonably argue that they lacked notice of the products' allegedly inferior origins. Finally, the court rejected the manufacturer's arguments on the merits, preferring to let the parties' dispute age into discovery like a fine Italian vintage.

Bone-A-Fide Chicken Suit Gets District Court Sign-Off

Innovative Solutions International Inc. v. Houlihan Trading Co. Inc., No. 2:22-cv-00296 (W.D. Wash. Oct. 18, 2022).

Make no bones about it—the claims against one chicken producer are here to stay, at least for now. The plaintiff, a chicken-producing middleman that makes chili-lime-flavored chicken burgers for a major grocery chain, alleged in March 2022 that it was supplied with 240,000 pounds of "boneless" chicken for its burgers that was purportedly chock-full of chicken wings. When consumers found bones in their burger patties, an investigation purportedly led to

the conclusion that the entire quarter-million-pound shipment of chicken contained bone fragments. The plaintiff subsequently invited all of its producers to the Thanksgiving table, bringing suit against defendants at every level of the supply chain. A singular defendant (the original producer, processor, and packager of the chicken) moved to dismiss.

The defendant argued that the plaintiff could not succeed on its claims for breaches of express and implied warranty, negligent misrepresentation, negligence, and violations of the Washington Consumer Protection Act because it had no privity of contract with the defendant, nor did the defendant owe it any duty to properly label the product. But the court disagreed, permitting all claims against the defendant to proceed other than a negligence claim that was dismissed without prejudice due to a scrivener's error.

Procedural Posture: **Denied**

Butterless "Butter" Spray Suit Survives

Strow v. B&G Foods Inc., No. 1:21-cv-05104 (N.D. Ill. Sept. 30, 2022).

"*Butter is magic on a stick*." That's the opening line of an Illinois federal judge's opinion (or perhaps, more accurately termed, an *Ode to Butter*) denying the defendant's motion to dismiss and allowing the plaintiff's butter sorrows to live to see another day. The plaintiff's complaint alleged that the defendant's Crisco brand "Butter No-Stick Spray" misled consumers into believing the nonstick cooking spray contained butter, when, apparently, it did not. The defendant argued that no reasonable consumer would believe the nonstick cooking spray actually contained butter because the product was sold at room temperature.

But the court disagreed. Pointing to the cooking spray's use of the word "Butter" on the product's front label, the court held that it could plausibly lead reasonable consumers to expect that butter was a constituent ingredient. The court also emphasized that the "Natural & Artificial Flavor" claim accompanied by an image of butter on the spray can offered further reason for the court to deny the defendant's dismissal bid. While acknowledging that the product's can does say "0g Trans Fat," "For Fat Free Cooking," "0g Sat Fat," and "0 Calories," the court noted that these claims appeared in smaller print and posited that as such, they may not have been visible to an average consumer.

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Settlements

Parties Put the Lime in the "Healthy" Coconut, Call It Quits for Coconut Oil Suit

Testone v. Barlean's Organic Oils LLC, No. 3:19-cv-00169 (S.D. Cal. Oct. 25, 2022).

Parties to a class action pending in California federal court reached a $1,612,500 deal to settle consumer protection claims over the defendant's coconut oils, which the plaintiffs alleged were falsely labeled as "healthy" cooking oils. According to the underlying complaint, the oils were *less* healthy alternatives to other cooking products. The parties' proposed settlement covers customers who purchased the coconut oil products after January 24, 2015, and states that claimants may recover between $3.00 and $7.00 per unit purchased. The district judge granted the plaintiff's motion for preliminary settlement approval, staying further proceedings, and scheduling the final settlement approval hearing for early spring 2023.

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