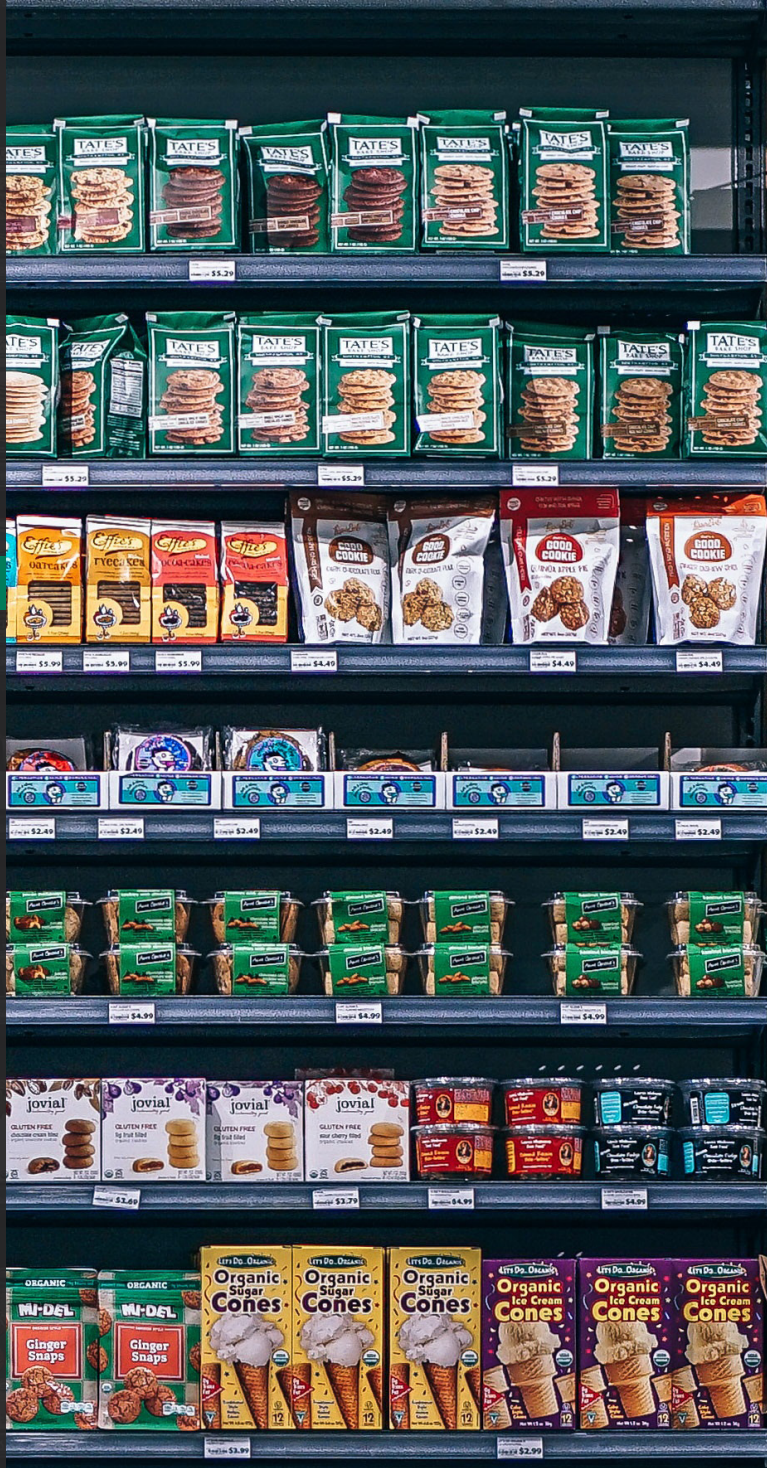
ALSTON & BIRD

FOOD & BEVERAGE DIGEST

NOVEMBER 2020

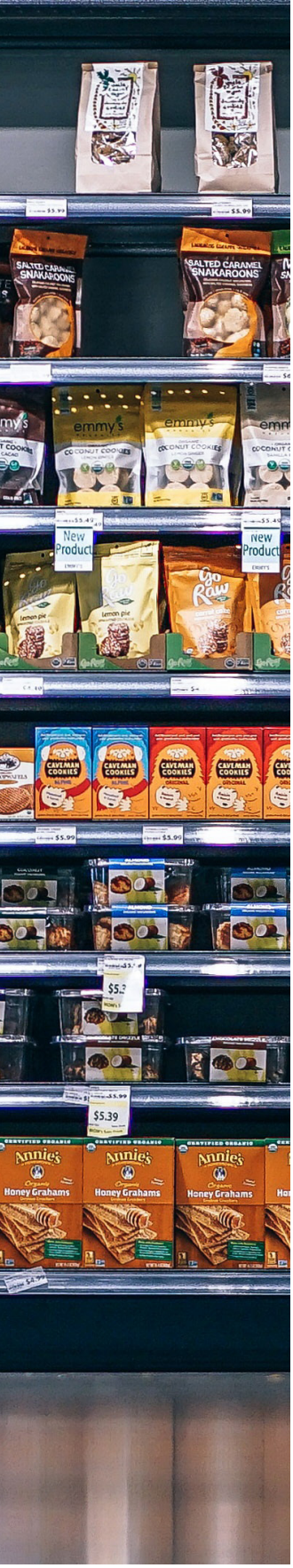


Edition Facts

3 Sections This Edition
Cases Per Section 1-7

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motion to Dismiss	100%
Appeals	100%



FOOD & BEVERAGE DIGEST

New Lawsuits Filed

Vegetable Oils Not Butter than the Real Thing

Boswell v. Bimbo Bakeries USA Inc., No. 1:20-cv-08923 (S.D.N.Y. Oct. 25, 2020).

Kamara v. Pepperidge Farm Inc., No. 1:20-cv-09012 (S.D.N.Y. Oct. 28, 2020).

A pair of new lawsuits filed in the Southern District of New York allege that when it comes to a shortening ingredient, there's really nothing "butter" than the real thing. Incensed that Bimbo Bakeries' Entenmann's brand "All Butter Loaf" pound cake and Pepperidge Farm's "Golden Butter" crackers are not baked exclusively with butter as their shortening ingredient, two plaintiffs have slapped the companies with nearly identical suits. Those suits allege that consumers prefer the taste and health benefits of butter for baking compared with chemically produced vegetable oils that may be highly processed. According to the new suits, representations such as "All Butter Loaf Cake" and "Golden Butter" crackers are misleading because butter is not the sole shortening ingredient in the product. Those labeling representations allegedly are designed to—and do—deceive, mislead, and defraud plaintiffs and consumers into either purchasing or paying more than they otherwise would for the products. Both plaintiffs seek to certify a class of similarly situated New York consumers in their pursuit of classwide injunctive and monetary relief against the defendants.

Sticky New Lawsuit for Fruit Snack Manufacturer

Klausner v. Annie's Inc., No. 7:20-cv-08467 (S.D.N.Y. Oct. 11, 2020).

A consumer of Annie's Fruit Snacks filed a putative class action against the company for violation of the New York consumer protection statute, negligent misrepresentation, breaches of express and implied warranties, and fraud. The basis? Not enough bunny fruit snacks. The plaintiff alleges that the box of Annie's she purchased was over 75% slack-fill. Within the box, there were only five pouches of gummies, each only half full. According to the complaint, Annie's should have been aware of the misrepresentations and known that the box failed to accurately describe its contents. The plaintiff contends that the slack-filled boxes were designed to deceive, mislead, and defraud the plaintiff and consumers, and she seeks to certify a class of New York purchasers.

Consumers Seek Organic Milk from Greener Pastures

Nilchian v. Organic Pastures Dairy Co. LLC, No. 30-20-01166856 (Cal. Sup. Ct. Oct. 23, 2020).

A putative class action filed in California state court alleges that Organic Pastures Dairy falsely advertises its milk products as being organic and from pasture-fed cows when, in fact, the milk comes from cows that do not have a 100% organic diet. The plaintiff claims that because the cows are actually fed up to 70% non-organic hay, the milk they produce cannot be considered "organic." According to the complaint, consumers are led to believe by

deceptive product labeling claims such as "Organic,""from Grass-Grazed Cows," and "Our cows graze (365/yr) on lush, green pastures" that the cows are exclusively pasture-fed. As further proof of the deceptive scheme, the complaint alleges that the company knows its milk is not organic because it has removed the "USDA Organic" representation from the product's label. The complaint asserts California statutory and common-law causes of action, seeks to certify a class of all California residents who purchased the milk products during the last four years, and prays for compensatory and punitive damages, restitution, and injunctive relief.

Breakfast Lovers Look to *SHINE* Light *ON* Whole-Grain Claims

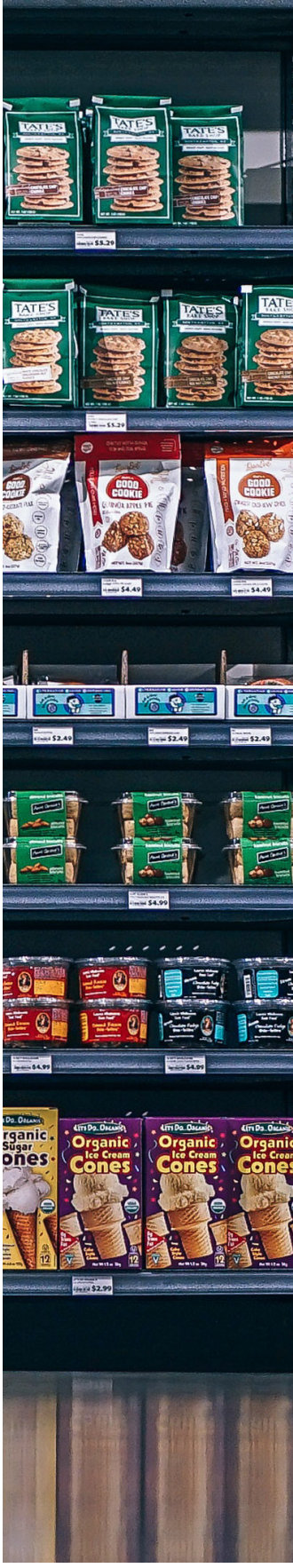
Wargo v. The Hillshire Brands Co., No. 7:20-cv-08672 (S.D.N.Y. Oct. 17, 2020).

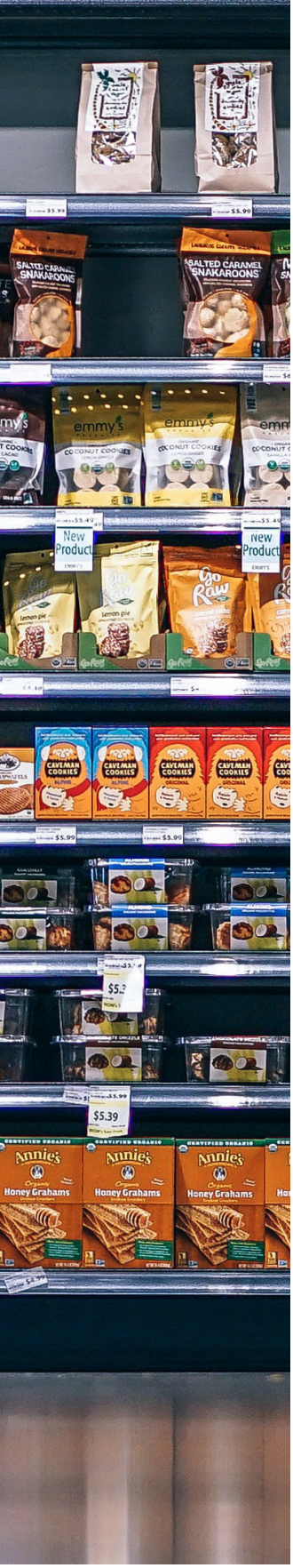
An upset breakfast lover claims Hillshire Brands deceptively labeled its Jimmy Dean brand of English muffin breakfast sandwich as "Made With Whole Grain," when in fact the first ingredient in the product is enriched wheat flour—a distinctly non-whole-grain food, and one consumers wouldn't expect from the product's marketing. According to the complaint, the claim "Made With Whole Grain," is misleading because the product's bread portion "contains mostly non-whole grains" and falls well below the USDA requisite amount for products sold with whole-grain claims. Alleging that the label contradicts consumer expectations for claims of whole-grain foods, the complaint further alleges that the defendant "deliberately capitalizes" on consumer misconceptions of whole-grain content and has sold more of the product at higher prices than it would have absent the labeling misrepresentations. The plaintiff seeks corrective action as well as injunctive and monetary relief.

Consumers Claim "Lite" Iced Tea Is a Bogey

Prater v. Arizona Beverages USA LLC, No. 1:20-cv-09108 (S.D.N.Y. Oct. 29, 2020).

A New York consumer has teed up a new class action complaint against Arizona Beverages, alleging the company deceptively labels its Arnold Palmer iced tea and lemonade to deceive consumers into thinking the beverages are "lite" when they actually contain a large amount of sugar. The new suit claims the defendant misleads consumers with labels like "Half & Half," "Arnold Palmer," and "Lite," which indicate the iced tea and lemonades are healthier and have fewer calories than similar products. But according to the complaint, there's quite a wedge between those claims and FDA requirements for nutrient content claims, which require a product to compare how "lite" it is to a reference product. The plaintiff claims Arizona Beverages gets no mulligan here and seeks to represent a multistate class of similarly situated consumers who also purchased the products and were misled by the challenged labels.





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Consumer Is Cold as Ice … Cream on Bars' Ingredients

Yu v. Froneri US Inc., No. 1:20-cv-08512 (S.D.N.Y. Oct. 13, 2020).

A plaintiff has filed a putative class action in New York federal court against ice cream brand Häagen-Dazs alleging that the labels for its "Coffee Almond Crunch" ice cream bars do not accurately portray the indulgent, frozen snack's actual ingredients. According to the complaint, the defendant advertises its ice cream bars as containing "coffee ice cream dipped in rich milk chocolate, almonds, and toffee" and represents that the product contains "rich milk chocolate." These representations, the plaintiff contends, are deceptive because they don't disclose the presence of vegetable oil, specifically coconut oil, which the complaint calls a cheaper, lower-quality replacement for cacao fat that consumers would never expect to be in a product purporting to contain chocolate.

The complaint alleges that this packaging was designed to "deceive, mislead, and defraud" consumers, who would not have purchased the product, or would have paid less for it, had they known the truth about its chocolate content. The complaint also claims that consumers should not be forced to look over the ingredient list to determine if the labeling matches. The plaintiff seeks corrective action, injunctive relief, monetary damages, restitution, disgorgement, costs, and expenses, including attorneys' fees.

Vanilla Is the New Black

Myers v. Wakefern Food Corp., No. 7:20-cv-08470 (S.D.N.Y. Oct. 12, 2020).

Turnipseed v. Simply Orange Juice Co., No. 7:20-cv-08677 (S.D.N.Y. Oct. 19, 2020).

Nacarino v. Chobani LLC, No. 3:20-cv-07437 (N.D. Cal. Oct. 23, 2020).

Bradshaw v. Blue Diamond Growers, No. 1:20-cv-5125 (E.D.N.Y. Oct. 25, 2020).

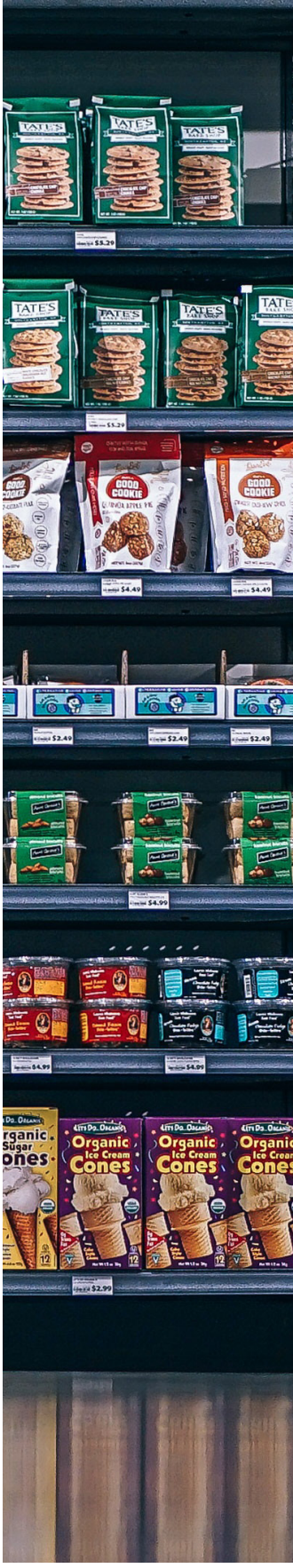
Collishaw v. Cooperative Regions of Organic Producer Pools, No. 7:20-cv-09009 (S.D.N.Y. Oct. 27, 2020).

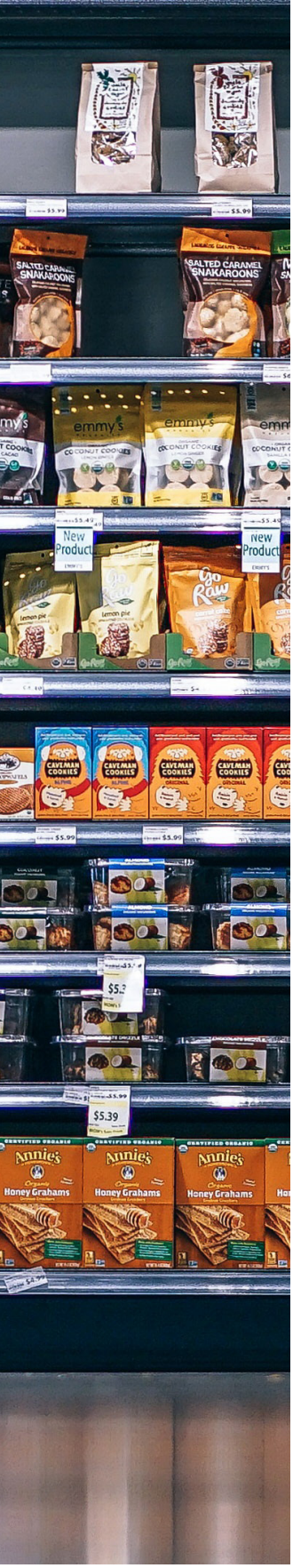
Farve v. Blue Diamond Growers, No. 3:20-cv-07570 (N.D. Cal. Oct. 28, 2020).

While most of us greeted October and the cool fall weather with thoughts of our favorite pumpkin-spice-flavored treats, the plaintiffs' bar had only one flavor on their mind—vanilla. Vanilla-related lawsuits are not new, and while we've covered numerous vanilla suits in this publication before, the frenetic pace at which new vanilla-related litigation was filed in October has shown that this litigation theme is more than a fall fad—it's a trend that here's to stay for a while. Vanilla-flavored litigation really began to pick up in mid-2019—with an early emphasis on vanilla-flavored ice creams—attacking the product flavoring as misleading and deceptive for leading consumers to believe the products were flavored exclusively with real vanilla. Within months, new vanilla-flavored litigation ballooned to attack a wide array of products, including yogurt, oatmeal, almond milk, soy milk, coffee creamers, cookies, protein beverages, coconut milk, and more. The pleadings in most vanilla-flavored suits follow largely the same outline, alleging that various vanilla-flavored products are misleadingly marketed to consumers as having a primary characterizing flavor of "vanilla" that comes from vanilla beans, from the vanilla plant, when in fact the products contain undisclosed artificial

vanilla flavors and less vanilla than consumers expect. Some complaints even allege that manufacturers "spike" their products with other inferior flavorings. This past month, various manufacturers of almond and coconut milks, Greek yogurt, cereal, soft drinks, and high-protein milk shakes fell victim to the plaintiffs' bar's new favorite charge—that they're falsely and deceptively advertising their vanilla-flavored products in order to deceive consumers into paying more than they otherwise would have if they had been aware of the true nature of the products' vanilla flavoring.

While a number of past vanilla suits have settled before the defendants filed an answer or motion to dismiss (MTD), more and more manufacturers are pressing forward with their MTDs, and it will be interesting to see whether judges begin to shelve these complaints or allow the plaintiffs' bar to carry on with their new favorite trend. Stay tuned for future updates as we continue to track these cases in federal courts across the country, and check out the next section to see how two recent cases fared at the motion to dismiss stage.





FOOD & BEVERAGE DIGEST

Motions to Dismiss

Procedural Posture: Granted

A Turning of the Tide? Vanilla Flavor Edition

Zaback v. Kellogg Sales Co., No. 3:20-cv-00268 (S.D. Cal. Oct. 29, 2020).

Many consider 2020 an annus horribilis for a host of reasons, not the least of which are the ongoing, specious attacks on products containing natural vanilla flavors (covered in the previous section). But while new vanilla-related suits flooded into courts at a frenetic pace this past month, manufacturers of vanilla-flavored products were treated to some good news out of the Southern District of California as a federal judge there recently dismissed one case among the litany of vanilla-flavor cases, both because the plaintiff's claims were not plausible and because the plaintiff did not establish that he lacked an adequate remedy at law. The court's first basis for dismissal did not rest on preemption grounds but instead on a failure to satisfy *Iqbal/Twombly*'s pleading standard. The court concluded there were no plausible allegations that the vanilla granola did not have sufficient vanilla to independently characterize the food. There were "no factual allegations of what practice Kellogg uses to put vanilla or vanilla flavoring in the Product or what, other than vanilla beans, might be in the Product." As a second ground for dismissal, the court relied on the recent opinion in *Sonner v. Premier Nutrition Corporation*, 971 F.3d 834 (9th Cir. 2020), to dismiss the CLRA, FAL, UCL, and unjust enrichment claims, which sound in equity. While the court granted leave to amend, granting the plaintiff a third bite at the pleading apple, *Sonner* has already been properly applied by numerous district courts in California to dismiss California consumer claims with prejudice when the plaintiff cannot establish a lack of adequate remedy at law. As always, we'll continue to keep close tabs on all vanilla-related litigation and continue to report on whether the tide may indeed be turning as more courts begin to issue rulings on motions to dismiss.

Court No-Reps Challenge to Vanilla-Flavored Protein Shake

Pichardo v. Only What You Need Inc., No. 1:20-cv-00493 (S.D.N.Y. Oct. 27, 2020).

While the motion to dismiss orders come nowhere close to keeping pace with the filing of new vanilla-related litigation, another vanilla-related case was dismissed this month when a New York federal district court tossed allegations that the use of the word "vanilla" on the defendant's vanilla-flavored protein shakes is false and misleading. The plaintiffs filed suit claiming that the use of the term "vanilla" is deceptive because reasonable gym goers (i.e., consumers) would be tricked into believing the shakes' vanilla flavor comes exclusively from vanilla extract and not from other sources.

But the district court rejected these allegations, observing that nothing on the product promises that the protein shakes would be flavored with only vanilla extract. The district court also found it implausible that consumers would leap to the conclusion that only vanilla extract is used to flavor a product, when even the complaint acknowledges that 98% of vanilla products do not use vanilla extract to impart a vanilla flavor. To the contrary, the district court reasoned, the protein shakes delivered exactly what they promised: vanilla *flavor*. The district court also rejected the plaintiffs' request for leave to amend the complaint,

citing "fundamental flaws" that would make any further amendment futile. If complaints could work out, this one shouldn't have skipped leg day.

Not Bugged by Pesticide Allegations, Judge Dismisses Complaint

Yu v. Dr Pepper Snapple Group Inc., No. 5:18-cv-06664 (N.D. Cal. Oct. 6, 2020).

A federal district court dismissed with prejudice a putative class action alleging that the defendants misled consumers by peddling apple juice and applesauce products with the representation "Natural" and/or "All Natural Ingredients," even though the products allegedly contained pesticide. The plaintiff alleged that he purchased Mott's Natural Applesauce and Natural Apple Juice in part in reliance on the defendants' representations that the products were natural. The defendants' applesauce and apple juice products, however, allegedly contained the synthetic insecticide acetamiprid.

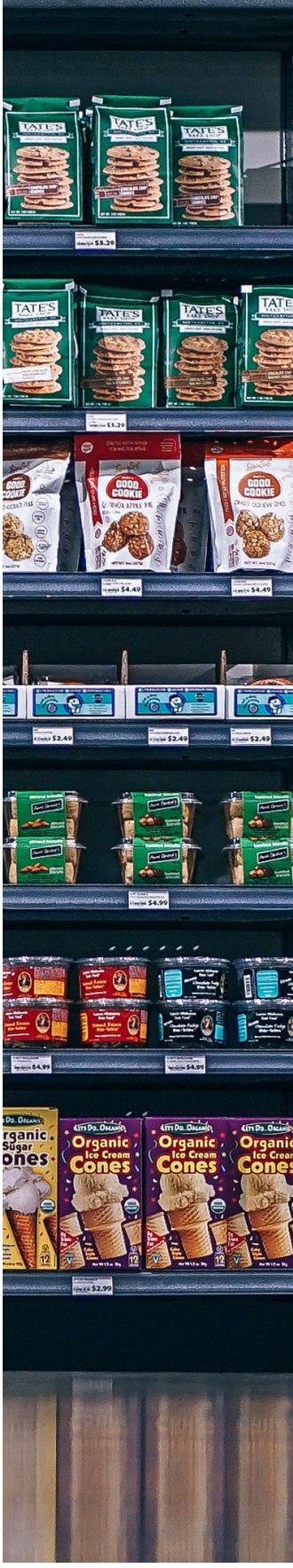
Although the plaintiff conceded that it was legal to use acetamiprid in connection with food products, he nevertheless claimed that reasonable consumers who read the "natural" labeling would expect the products to meet a higher standard than competing products not advertised as "natural"—and certainly would not expect the products to contain traces of a synthetic insecticide. The district court rejected this argument, joining a number of other federal courts in concluding that this type of allegation cannot plausibly lead a reasonable consumer to believe that the products labeled natural were free of any trace of pesticides whatsoever.

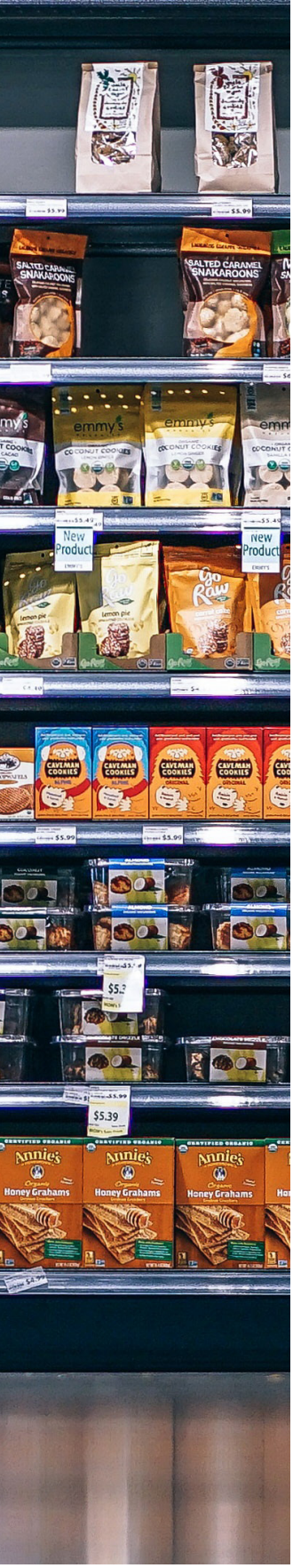
Basic Fraud Allegations Neutralize Malic Acid Suit . . . for Now

Gross v. Vilore Foods Company Inc., No. 3:20-cv-00894 (S.D. Cal. Oct. 28, 2020).

A California federal district court partially granted the defendant—a beverage distributor—its motion to dismiss the plaintiffs' claims that the distributor deceptively labeled a line of fruity beverage products. The plaintiffs claim that including on the beverages' labeling the names "Mango," "Apricot," and "Peach," depicting various fruits, and making "100% Natural" claims leads consumers to believe the beverages are only made of and flavored with natural juices. To the contrary, they contend, the products' labeling is false and misleading because—and only because—the beverage products contain dl-malic acid, which plaintiffs contend is an artificial flavor.

However, the district court concluded that these allegations failed to specify which entity engaged in the purported mislabeling (an additional distributor was also distributing products at issue), which labels were misbranded, and the time and manner in which the plaintiffs discovered the deception. Importantly too, the district court dismissed the plaintiffs' claims that the defendant's inclusion of "malic acid" on the ingredient statement was deceptive, pointing to other rulings that have concluded that FDA regulations do not require the defendant to list the specific form of malic acid used (e.g., dl-malic acid) on the ingredient statement. The court granted leave to the plaintiffs to file an amended complaint.





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California Law Stops at the California Border Even for California-Headquartered Defendants

Freedline v. O Organics LLC, No. 3:19-cv-01945 (N.D. Cal. Oct. 27, 2020).

Christmas came early to O Organics LLC, the maker of a kombucha product that allegedly exceeded the permissible alcohol-by-volume limits for a non-alcoholic beverage. In an opinion whose clarity and brevity should be prized by all, Judge James Donato of the Northern District of California ruled that while Rule 23 proceedings are the "optimal basis" for determining the appropriateness of national class allegations, and Rule 12(f) proceedings are suboptimal, Rule 12(b)(6) was nevertheless just right for this case. The court explained that "the putative class stops at the state border unless [the plaintiff] can establish that 'California law applies to all putative class members.'" This is true even in false advertising cases with a defendant headquartered in California because the last event for liability occurred where the products were purchased in reliance on the alleged false advertisements. So California law cannot apply to purchases of falsely advertised products outside California. While many courts make this determination at class certification, following *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 591 (9th Cir. 2012), Judge Donato rightly whittled down the case to a California-only putative class on the pleadings in light of the various differences between state laws.

Procedural Posture: Denied

Plaintiffs' Soup Suit Preserved

Vanlaningham v. Campbell Soup Co., No. 3:20-cv-00647 (S.D. Ill. Oct. 5, 2020).

Disgruntled consumers of Campbell's Soup's "Home Style" and "Slow Kettle" soup were recently served a victory when an Illinois federal judge denied Campbell's motion to dismiss the consumers' putative class action complaint. The plaintiffs had alleged that Campbell's labels and website misleadingly describe the soups as having no preservatives or artificial flavors. In reality, the plaintiffs allege, the soups contain both. The plaintiffs contend that the labels, which state "No Preservatives Added" and "No artificial flavors and no added preservatives or colors," are thus misleading.

Campbell's moved to dismiss because the Federal Meat Inspection Act and Poultry Products Inspection Act give the U.S. Department of Agriculture the authority to impose standards on meat and poultry labels. The court found this argument unpersuasive, reasoning that there was no indication that the federal authority applied to all food labels. The judge further found unpersuasive an argument by Campbell's that no reasonable consumer would have been misled by the labeling because the ingredients were contained on the back of the label. The motion to dismiss was denied in its entirety.

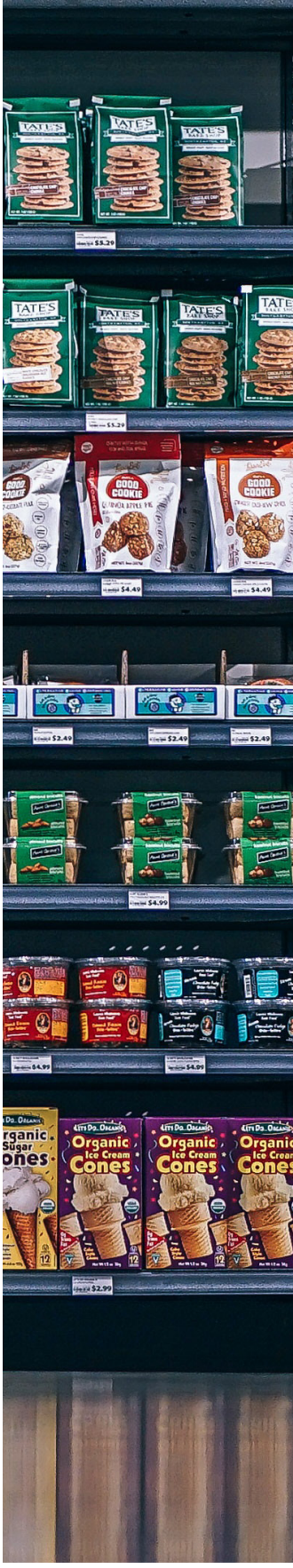
Appeals

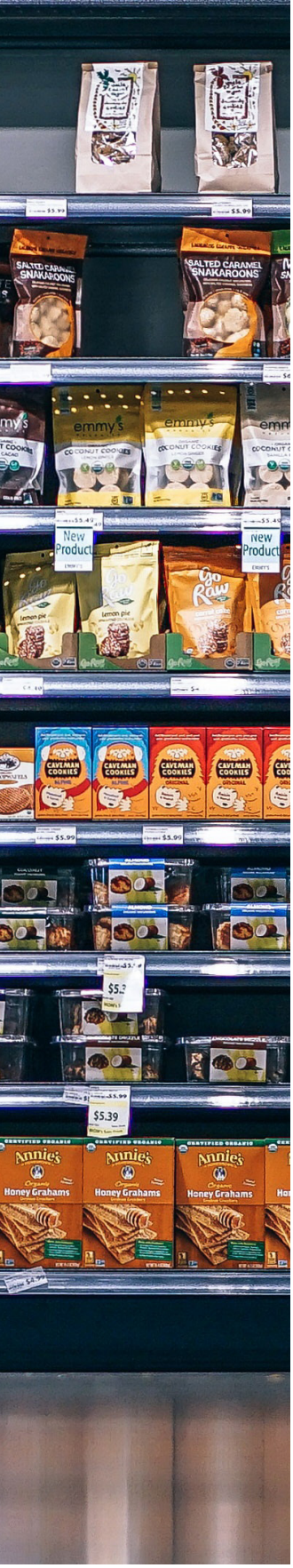
Court Slices and Dices Appeal of Fruit Puree Suit

Iglesias v. Welch Foods Inc., No. A159565 (Cal. Ct. App. Oct. 27, 2020) (unpublished opinion).

The plaintiff sued Welch Foods Inc. and Promotion in Motion Inc., alleging that the defendants' fruit snacks' labels stating "Fruit is our 1st Ingredient" is false and deceptive because the products list "fruit puree" and other non-fruit ingredients on the label. The plaintiff alleged that he would not have purchased the snacks had he known fruit was not actually listed. Promotion in Motion manufactured and distributed the fruit snacks at issue, but received the fruit puree from a separate supplier.

At the end of the first phase of a two-stage trial, the trial court concluded that the defendants properly listed "fruit puree" followed by a parenthetical of sub-ingredients in accordance with FDA regulations. The plaintiff appealed, contending that the trial court erred by failing to defer to the FDA's Compliance Policy Guide and by considering improper hearsay evidence. The court of appeal found that the trial court properly declined to refer to the Compliance Policy Guide because that guide did not address the use of the term "fruit puree" to describe a single fruit puree composed of various sub-ingredients. Although the court of appeal agreed that the trial court impermissibly considered hearsay evidence—one statement from a declaration of Promotion in Motion's COO opining on the composition of the puree supplied by a different company, even though the COO had no personal knowledge of its composition—it considered this error to be harmless because the composition of the puree was irrelevant to the case.





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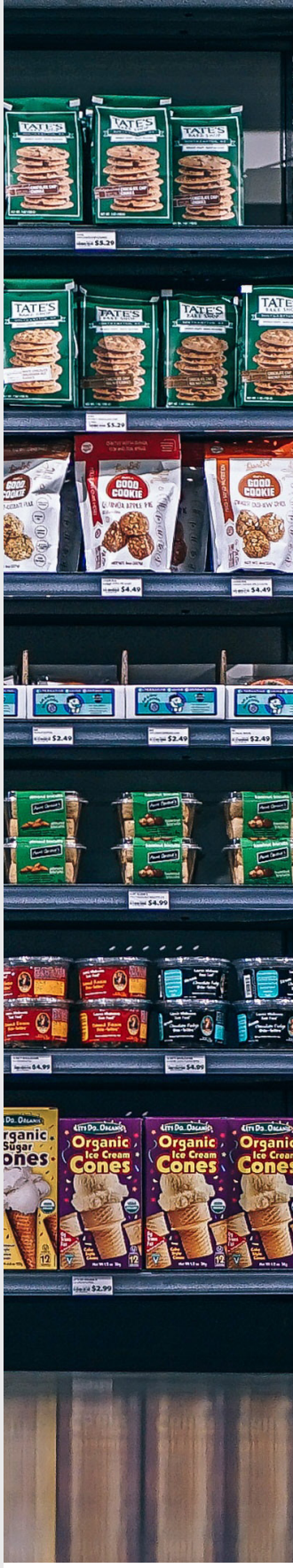
TATE'S
GOOD COOKIE
Organic Ice Cream Cones

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