

ALSTON & BIRD

# FOOD & BEVERAGE

DIGEST

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## Edition Facts

3 Sections This Edition  
Cases Per Section 1-11

Reading Calories 0

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<a href="#">New Lawsuits Filed</a>	100%
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## New Lawsuits Filed

### Champagne Protein Problems (Plaintiff's Version)

*Miller v. Nature's Path Foods Inc.*, No. 4:23-cv-05711 (N.D. Cal. Nov. 6, 2023).

Back in [October](#), we told you about a protein protest pertaining to a producer of pasta products. It appears the protest has expanded, this time with a challenge to a breakfast and snack manufacturer's protein-packed labeling claims. Raising nearly identical allegations to the pasta case (and represented by the same attorneys), the California-based plaintiff claims that the defendant misrepresents the amount of protein consumers receive per serving. Relying on the same supporting allegations as the pasta suit, the plaintiff claims that manufacturers making protein content claims must disclose on the nutrition facts panel a "corrected" amount of protein per serving using the FDA's Protein Digestibility Corrected Amino Acid Score (PDCAAS) method.

The plaintiff makes the same allegation that because the manufacturer did not use the PDCAAS method, the protein quality claims on the front labels of the products are deceiving and consumers only receive about half the claimed amount of protein from the product's "low quality proteins." The plaintiff seeks to represent a nationwide class and California subclass, bringing claims for common-law fraud and unjust enrichment on behalf of the nationwide class and for violations of California consumer protection laws on behalf of the California subclass.

### Plaintiff Stung to Find Honey Flavor in Medication

*Taylor v. Reckitt Benckiser Pharmaceuticals Inc.*, No. 1:23-cv-08783 (E.D.N.Y. Nov. 29, 2023).

A plaintiff and putative class representative joined the swarm of litigants challenging front-label representations on over-the-counter cold and cough medications. In this latest lawsuit, the plaintiff alleges that the honey imagery on various Mucinex labels creates a buzz among health-minded consumers that the products contain straight-from-the-honeycomb sweetness and deploy honey's disease-fighting powers against the evils of colds and coughs.

To the plaintiff, honey is more than a goey golden glob; it is prized for its alleged medicinal properties. So like a bear to a beehive, the plaintiff was drawn to purchase those Mucinex products, only to discover later that honey was not on the ingredient list (oh, bother!). Had she known honey was not an ingredient, she alleges, she would have paid less for honey-flavored Mucinex or would not have purchased those products at all. She brings claims under the New York General Business Law, based on claims of deceptive acts and practices and false advertising.

### You Say Flavoring, I Say Preservative

*Lake v. Rowdy Beverage Inc.*, No. 3:23-cv-06114 (N.D. Cal. Nov. 27, 2023).

A manufacturer of caffeinated energy drinks has been jolted by another lawsuit alleging false labeling. The complaint, which contains similar allegations as one [filed last spring](#), claims that the manufacturer's inclusion of citric acid and ascorbic acid in its pink lemonade beverage renders its "No Preservatives" statement misleading. The plaintiff acknowledges those ingredients might act as flavoring agents, but argues they can also function as preservatives, even in small amounts, giving jitters to those who purchased the product relying on the "No Preservatives" representation. The plaintiff seeks to represent a class of consumers who purchased the beverage in California since November 2019, and he asserts numerous California state-law claims for unfair business practices and deceptive advertising, as well as for unjust enrichment.

### Protein Content Allegations On the Rise

*Perez v. Middle East Bakery Inc.*, No. 5:23-cv-02326 (C.D. Cal. Nov. 13, 2023).

In another protein-content labeling case, a California consumer alleges a bread manufacturer is serving up a half-baked truth about the amount of protein in its whole wheat bread products. The putative class action suggests the bakery defendant here might be kneading the facts, alleging that the protein source—primarily whole wheat flour—lacks the essential amino acids needed for a proper rise in protein content after digestion. The plaintiff alleges that the protein content displayed on the products does not match the protein that is 100% digestible. Based on the misleading representations, he asserts claims for violations of California consumer protection statutes on behalf of a proposed California class. We'll keep you updated as this case continues to bake and as additional plaintiffs seek to challenge similar protein-content labeling claims on other products.

### Cut Me Some Slack!

*Reyes v. Tootsie Roll Industries Inc.*, No. 23STCV27601 (Cal. Sup. Ct. Nov. 9, 2023).

Rarely is a plaintiff that graces these pages described as a true believer, but this California candy consumer is breaking the candy-coated mold. The plaintiff sued the defendant candy manufacturer over the packaging of its Blow Pop Minis product, alleging that the defendant engages in misleading advertising by concealing the amount of candy—and relatedly, the amount of slack-fill—in the product's packaging. According to the plaintiff, only about 15% of the product's packaging is filled with candy, and because the packaging lacks any indication of the actual fill, consumers are misled to believe they are purchasing more candy than they actually receive.

But this plaintiff isn't here for some big reward or class settlement—she's here for sweet, sweet justice. In boldface type, the complaint states, "Plaintiff brings this lawsuit as an





individual action with the hope that Defendant will accept responsibility for its actions and take all appropriate remedial measures.” But be warned, “[i]f Defendant refuses, Plaintiff will amend this Complaint to assert claims on behalf of a class.” While the plaintiff alleges that she “was genuinely interested in consuming and enjoying the product,” she also revealed that she “is a consumer rights ‘tester’ who creates public benefit by ensuring that companies comply with their obligations under California law”—a role that is alleged “both necessary and appropriate.” Truly, the hero that the Blow Pop community deserves.

The complaint alleges causes of action for common-law fraud and violation of California’s Consumers Legal Remedies Act. If the plaintiff’s demands aren’t met, she threatens to bring the claims on behalf of a class of California consumers.

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## Florida Consumer Went CoCo over Coconut Water Flavors

*Diaz v. Coco5 Inc.*, No. 23-CA-016723 (Fla. Cir. Ct. Nov. 20, 2023).

This holiday season, a Florida consumer was not *berry* merry after purchasing several fruit-flavored coconut drinks. The consumer filed a class action in Florida against a sports recovery beverage manufacturer that labels and sells several fruit-flavored coconut water drinks.

The complaint alleges the products’ labeling is misleading and deceptive because the products’ front labels “prominently and conspicuously” promote the drinks’ fruit flavors: Cherry, Passion Fruit, and Pineapple, without more conspicuously disclosing that the products derive their characterizing flavors from “Natural Flavors,” rather than from the fruits themselves. While the complaint recognizes that “Natural Flavors” are disclosed on the ingredient lists, the complaint alleges the principal display panels (front labels) notably omit any qualification through use of the word “flavor” or “flavored.” The complaint alleges the products are not compliant with Florida’s food labeling laws and asserts claims under Florida’s Deceptive and Unfair Trade Practices Act and false advertising law, as well as for unjust enrichment.

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## Pickle Pandemonium Moves to Federal Court

*Mayer v. Patriot Pickle Inc.*, No. 1:23-cv-01299 (W.D.N.Y. Dec. 15, 2023).

A New York–based plaintiff sued a pickle manufacturer based on claims the defendants misleadingly market various kinds of Wahlburgers pickles as “all natural” and as containing “no preservatives” even though the pickle products contain sodium benzoate, an alleged preservative. The complaint alleges that the defendants admitted that their products contain sodium benzoate in declarations filed in a related lawsuit.

The plaintiff initially filed this action in New York state court, but two defendants later removed the case to federal court. The plaintiff seeks to represent a class of all New York consumers who purchased the pickle products and asserts claims for violations of the New York General Business Law based on alleged deceptive acts and practices, false advertising, and breach of express warranties and unjust enrichment.

## Preservative-Free Claims Are Getting Cheesy

*Galbreth v. Kraft Heinz Co.*, 23CV051576 (Cal. Sup. Ct. Nov. 16, 2023).

*Hayes v. Kraft Heinz Co.*, 2023LA001257 (Ill. Cir. Ct. Nov. 21, 2023).

A pair of consumers filed class actions in California and Illinois state courts, claiming they were misled by the defendant’s “no preservatives” claims on certain mac n’ cheese products. The Golden State consumer claims she relied on the mac n’ cheese product’s representations that they contained “No Artificial Flavors, Preservatives, or Dyes,” but later learned that the products allegedly contain synthetically manufactured citric acid, a well-known preservative. The complaint alleges that because the products use a purported synthetically manufactured form of citric acid, the representations that the product contains “No Artificial Flavors, Preservatives, or Dyes,” is false and misleading because citric acid allegedly “functions as a preservative in the Products regardless of whether” the defendant intended it to. Based on those allegations, the complaint alleges violations of California’s Consumers Legal Remedies Act, California’s Unfair Competition Law, and breach of express warranty.

Less than a week after the defendant was hit with the California suit, an Illinois consumer filed a similar class action challenging the “No Artificial Preservatives” claim on 10 mac n’ cheese products based on the inclusion of the alleged “synthetic preservatives sodium phosphate and sodium triphosphate.” Similar to the California lawsuit, the Illinois complaint claims those ingredients function as preservatives in the challenged mac n’ cheese products. The complaint alleges that reasonable consumers were deceived by the manufacturer’s false “no preservatives” labeling statements and seeks recovery under the Illinois Consumer Fraud and Deceptive Business Practices Act, common-law fraud, and unjust enrichment.

Just in time for Christmas, both cases were removed to federal courts and then consolidated in the Northern District of Illinois.

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## Return the Change, Ya Filthy Animals

*Jack v. Stop & Shop Supermarket Co.*, No. 818611/2023E (N.Y. Sup. Ct. Nov. 20, 2023).

Another holiday season is in the books, and many consumers likely took advantage of the numerous sales and discounts offered by retailers across the country. But, embodying the generous spirit of the holiday season, Spencer Sheehan of Sheehan & Associates, P.L.C., is here to warn consumers that some sales aren’t all they’re cracked up to be. In a lawsuit filed on behalf of a New York resident, Sheehan contends that a New England–based grocer is misleading customers by marking up its original grocery prices before putting the same items on sale. According to the complaint, the grocer uses terms such as “sale,” “coupon,” “save,” and “discount” to entice its customers into buying more groceries, but unbeknownst to those unwary customers, the former, full-price items were purportedly not as high as advertised.

The complaint contends that the bona fide pricing mix-up is not just Scrooge-worthy, it gives rise to a class action. Accordingly, the plaintiff seeks to represent a class of New York consumers who purchased items from the grocer on sale and bought more of the items than they otherwise would have, had the former prices been at bona fide levels.





## Consumer Complains That Defendant’s “100% Fruit Juice” Label Is Over the Top

*Madole v. Tops Markets LLC*, No. E181624/2023 (N.Y. Sup. Ct. Nov. 11, 2023).

A putative class action complaint filed in New York state court alleges that the defendant’s “Chunky Mixed Fruit in 100% Fruit Juice from Concentrate” is mislabeled because the solution that the fruits are packaged in also includes added water, ascorbic acid, and citric acid. The representation that the mixed fruits are contained in “100% Fruit Juice from Concentrate,” according to the complaint, is misleading because consumers also receive these unexpected ingredients (instead of only fruit and fruit juice concentrate). Seeking to represent a class of all aggrieved New York purchasers of the product, the plaintiff asserts putative class claims for violations of New York’s statutory consumer protection and agriculture and markets laws, as well as fraud. The complaint prays for damages and attorneys’ fees and costs.

## No Preservative Claims Create a Sticky Situation

*Smith v. Gerber Products Co.*, No. 7:23-cv-09834 (S.D.N.Y. Nov. 7, 2023).

A baby-food giant faces a different kind of meltdown as two New York consumers claim the yogurt baby food isn’t just melting in tiny mouths but also in the face of ingredient controversy. The complaint points out that despite the product labels claiming “just goodness,” “NO artificial flavors,” “NO artificial sweeteners,” and “NO preservatives,” the ingredients include citric acid, ascorbic acid, and sodium ascorbate.

The consumers further claim that the defendant’s use of parentheses in listing ascorbic acid as “Vitamin C (Ascorbic Acid)” under the heading “Vitamins & Minerals” is misleading. They argue that consumers may pay less attention to it because it appears as a subheading and is less conspicuous than the more familiar term “vitamin C.” The lawsuit asserts that regardless of whether these chemicals are added for preservation or flavor, they still qualify as preservatives.

The complaint includes four counts alleging unjust enrichment, breach of express warranty, and violations of New York consumer protection statutes. In addition to seeking class certification and damages, the consumers request an order to stop the defendant’s alleged misleading advertising practices and require the company to conduct a corrective advertising campaign.

## Motions to Dismiss

**Procedural Posture:** Granted in Part

## Door Closing on Equitable Relief Claims Sonner Rather Than Later

*Gunner v. PepsiCo Inc.*, No. 8:23-cv-00332 (C.D. Cal. Nov. 29, 2023).

The third try was not a charm for a plaintiff suing a beverage manufacturer for mislabeling its Gatorade Fit product as “healthy” in alleged contravention of federal regulatory requirements governing beverages fortified with vitamins and minerals. In his third amended complaint, the plaintiff asserted a single claim under California’s Unfair Competition Law (UCL), which only provides for equitable relief.

Relying on the Ninth Circuit’s recent decision in *Sonner v. Premier Nutrition Corp.*, the court found it could not entertain the plaintiff’s UCL claim because he had not shown he lacked an adequate remedy at law—the test for equitable jurisdiction in federal courts. The court rejected the plaintiff’s argument that it would have been more difficult to obtain a legal remedy under a different cause of action: the fact that one remedy may be simpler or easier to obtain does not demonstrate that the plaintiff lacks an adequate remedy at law. The court likewise rejected the plaintiff’s claim that the measure of damages under other statutes and the measure of equitable restitution under the UCL were substantively different.

But that was not the end of the story. The court found that although the plaintiff had an adequate damages remedy under other statutes, that did not require dismissal of his UCL claim for future equitable relief—which the other statutes did not authorize. The defendant did not challenge the plaintiff’s standing to pursue prospective injunctive relief, though courts are increasingly finding that once-deceived plaintiffs lack standing to pursue such relief once they are made aware of how to properly interpret a label (and do not need to first purchase the product to determine if it complies with its labeling). In addition, the court allowed the plaintiff to amend his complaint to add legal claims. But as the plaintiff himself argued, those claims would be more difficult to prove than his UCL claim.

## Voluntary Dismissals

Here is your monthly shortlist of the voluntary dismissals entered in some of the cases we’ve covered over the years:

[\*Wright v. Costco Wholesale Corp.\*](#), No. 1:22-cv-04343 (N.D. Cal. Nov. 9, 2023) – Filed 7/27/2022.

[\*Reyes v. Badia Spices Inc.\*](#), No. 1:23-cv-03607 (E.D.N.Y. Dec. 10, 2023) – Filed 5/15/2023.

[\*Chandrasekera v. Whole Foods Market Group Inc.\*](#), No. 1:23-cv-03767 (E.D.N.Y. Dec. 11, 2023) – Filed 5/19/2023.

[\*Correa v. Pacific Coast Producers\*](#), No. 4:23-cv-04035 (N.D. Cal. Dec. 11, 2023) – Filed 8/9/2023.



## But Wait ... There's More!

### A New Year's Toast for the Vanilla Vigilante

*Brownell v. Starbucks Coffee Co.*, No. 5:22-cv-01199 (N.D.N.Y. Nov. 30, 2023).

*Ashley Furniture Industries LLC v. Sheehan*, No. 188052803 (Fl. Cir. Ct. Dec. 14, 2023).

There is no denying that Spencer Sheehan has changed the food and beverage litigation landscape. There also is no denying that Sheehan's 2023 has been one of the most up and down years in recent memory.

Affectionately dubbed the "[Vanilla Vigilante](#)," Sheehan has led the crusade against hundreds of food and beverage products. The multiyear litigation filing spree caught the eye of the mainstream media, with [The New York Times](#), [The New Yorker](#), and the [New York Post](#) covering Sheehan's work in 2023. If Sheehan has a publicist, they deserve a raise (or at least a subscription to the jelly of the month club) because none of this coverage has mentioned the 2023 headwinds for Sheehan.

It's no secret that Sheehan is on the naughty list. See [Santiful v. Wegmans Food Markets Inc.](#), No. 7:20-cv-02933 (S.D.N.Y. Jan. 28, 2022); [Karlinski v. Costco Wholesale Corp.](#), No. 1:21-cv-03813 (N.D. Ill. July 21, 2022); and [Matthews v. Polar Corp.](#), No. 1:22-cv-00649 (N.D. Ill. Mar. 22, 2023). And 2023 closed with Sheehan facing little cheer and a lot of disgruntlement (both from the bench and from defendants he has sued).

In *Brownell v. Starbucks Coffee Co.*, a New York federal court issued a show-cause order to Sheehan why it should *not* sanction him for pursuing frivolous litigation after it dismissed allegations about added potassium in coffee that were based on little more than a hunch and a vague reference to "laboratory analysis." In response to the show-cause order, Sheehan first submitted a five-page letter brief, only to engage separate legal counsel to file another five-page letter as a supplemental submission. Not buying Sheehan's cup of holiday cheer, the district court held him in contempt for filing a "complaint without any studies, relevant caselaw, or reasonable interpretations of the wording on the Product label to support the allegations contained within." Savoring one morsel of good news—the court reserved decision on the nature of the final sanctions.

In the midst of this action, a defendant in another Sheehan-led case (Ashley Furniture) filed an amicus brief against Sheehan. It seems, however, that the sanctions order didn't create quite enough holiday magic for the furniture company, so it filed a *lawsuit* against Sheehan for malicious prosecution. The case alleges that Sheehan "failed to conduct even a cursory investigation before making [the] false allegations" when he initiated a multistate putative class action based on an extended warranty that had nothing to do with the furniture manufacturer. The furniture manufacturer seeks to recover over \$100,000 in legal fees it incurred in preparing a motion to dismiss the Sheehan-filed complaint.

With a hopeful eye to 2024, we would be remiss in not raising a toast befitting Sheehan's truly roller coaster year (and his recent interest in [Napoleon](#)).

"In victory, you deserve Champagne, in defeat, you need it."  
– Napoleon Bonaparte

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