ALSTON & BIRD

FOOD & BEVERAGE DIGEST

MARCH 2024

Edition Facts

4 Sections This Edition
Cases Per Section 1-13

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motion to Dismiss / Motion for Judgment on the Pleadings	100%
Voluntary Dismissals	100%

New Lawsuits Filed

Gluten-Free Complaint Also Detail Free

Martinez v. Philz Coffee Inc., No. CGC-24-611835 (Cal. Sup. Ct. Jan. 23, 2024).

A California plaintiff has sued a statewide coffee shop chain in a complaint that would be as well suited for the mystery section of a bookstore as it is for a class action filing. The crux of the complaint is that the coffee shop misleadingly advertised "a line of food" as gluten-free, when in fact it was allegedly not. What type of food? The complaint does not say. What was the gluten-containing ingredient? Again, the complaint does not say. Suspenseful, eh? How did the plaintiff learn the "Product" allegedly did contain gluten? Apparently because she suffered "substantial bodily symptoms and injuries after consuming" one "unit" of the product that was allegedly misrepresented as "gluten free," thus "proving" the product was "anything but safe to eat and clearly sold with ingredients that can trigger physical detriment and bodily harm, as well as other dangerous side effects, to humans." Clearly.

Without any further detail about what the "Product" was, what ingredients allegedly contained gluten, or how the plaintiff was able to trace her alleged allergic reaction to the coffee shop "Product," the complaint languishes on for 18 pages, seeks to certify a class of all Californians who purchased the "Product" at any point over the past four years, and asserts claims under California's consumer protection statutes and for unjust enrichment and common-law fraud.

"Made with Real Cheese" Claims Curdling in Federal Courts

Pistorio v. Mars Wrigley Confectionery US LLC, No. 2:24-cv-00090 (M.D. Fla. Jan. 29, 2024).

Sheehan and Associates P.C. may have found their new vanilla. Here at the *Digest*, we've been tracking "Made with Real Cheese" claims popping up in courts across the country, with many filed by none other than Spencer Sheehan himself. It's still too early to tell whether the Vanilla Vigilante will gain the affinity for cheese-related claims that he once held for all things vanilla flavored, but if the past two months are any indication, these recent filings could signal a new trend in the industry.

One of Sheehan's early targets was the popular pretzel filled snack Combos, which advertises its cheddar cheese flavor as having filling "Made with Real Cheese." Is real cheese included as an ingredient in the filling? Well, yes, but that's not the point, according to the Sheehan-filed complaint. The plaintiff claims that snack manufacturers recognize that "made with real cheese" claims add value to snacks previously written off by consumers as unhealthy because of the healthful nature of cheese and its healthy "indulgent properties" for consumers looking to still "treat themselves" a bit. The complaint claims that despite the front-of-package representation that the product is made with real cheese sitting atop a "freshly shredded block of bright orange cheddar cheese," the product really only contains less than 2% of a four-cheese blend, and that it is instead predominantly composed of "vegetable fats and cheese byproducts."

The plaintiff alleges that based on the "made with real cheese" representation, he expected the product's filling to be made predominantly or exclusively of real cheese, and that had he known the truth, he would have paid less for the product or would not have purchased it at all. The plaintiff seeks to certify a class of Florida consumers who also purchased the Combos cheddar cheese products and pursues claims under Florida's consumer protection statute and false advertising law.

Judging Fudge

Grimes v. Kilwins Quality Confections Inc., No. 2023CH10302 (Cir. Ct. Cook Cnty., Ill. Dec. 28, 2023).

A Florida-based plaintiff alleges that the defendant's Toppings and Shredded Chocolates food products materially overstate the actual product volume and number of servings in their containers, while at the same time *under*stating the calorie content of each serving. The plaintiff avers that the defendant has judicially admitted misbranding in another case in Illinois state court and argues that the defendant has begun "correcting" the relevant food products' labeling.

Notably, the plaintiff preemptively attempts to invoke the discovery rule to avoid statute of limitations concerns with her claims. The plaintiff argues that "it is not likely that a reasonable consumer of these products would ever discover the fact that the products contain less product by volume than represented" based on several assumptions: (1) multiple persons in a household "necessarily" use the same Toppings or Shredded Chocolate food product; (2) consumers of these products "are not likely to use the entire contents of the product at one time"; and (3) consumers of the product "are not likely to record the amount of product used from the container."

The plaintiff seeks to represent a nationwide class or, in the alternative, 27 different single-state classes of "[a]ll persons who purchased the mislabeled products and resided in [the relevant state] during the relevant period." The plaintiff has brought 27 separate claims for alleged violation of state consumer protection laws, as well as claims for breach of contract, unjust enrichment, and violation of the Illinois Food, Drug and Cosmetic Act.

Repackaged Claims Further Mania over Malic Acid

Bachelor v. Hannaford Bros. Co., No. 2024-50316 (N.Y. Sup. Ct. Jan. 22, 2024).

The mania over Taylor Swift and Travis Kelce might have reached manic proportions, but there's another coupling that might give them a run for their money – Spencer Sheehan and malic acid. Sheehan's dogged determination to deter the use of synthetic malic acid continues in this new suit, where he represents a putative class action plaintiff alleging that he would not have purchased a particular brand of blueberry granola bars had he known that the bars contained synthetic D-malic acid. According to the complaint, the granola bars are marketed as "naturally flavored" and "made with real fruit filling," leading the plaintiff to believe that the product contained *only* natural ingredients, not synthetic alternatives.

In support of his claims, the plaintiff goes into great detail explaining the science behind the chemical reaction that gives rise to D-malic acid, as opposed to its natural alternative. Based on his allegations that he was duped into believing the product contained only natural ingredients, he brings claims for alleged violations of New York General Business Law Sections 349 and 350 and New York Agriculture & Markets Law Section 201. The plaintiff seeks to represent a class of individuals in New York who purchased the product within the requisite statute of limitations.

Lawsuit Attempts to Put Popsicle Sales on Ice

Hurst v. Dreyer's Grand Ice Cream Inc., No. 24-cv-060203 (Cal. Super. Ct. Jan. 16, 2024).

A California plaintiff accused a defendant food manufacturer of misleading frozen fruit bar consumers by including the phrase "No artificial colors or flavors" on the side label of the bars' packaging. According to the plaintiff, independent testing revealed that one of the two challenged products contains DL-malic acid, a substance the plaintiff characterizes as an "artificial flavoring ingredient." (The complaint does not address the lack of testing for the second product; perhaps it melted while waiting its turn.) Even front-label depictions of fresh fruit were offensive to the plaintiff, as they allegedly give "the impression" that the fruit bars "are free from artificial flavoring ingredients." The plaintiff brings the typical flavors of claims for violations of California consumer protection laws and breach of warranty on behalf of a putative class of California consumers.

Trick or Treat?

Kelly v. The Hershey Company, No. 8:23-cv-02977 (M.D. Fla. Dec. 28, 2023).

The holidays can be a difficult time for many, but perhaps none more so than Halloween must be for this Florida-based plaintiff who takes aim at the allegedly deceptive sales practices of the defendant candy giant. Readers are likely familiar with the seasonal Reese's candy that hits shelves in late September – chocolate peanut butter cups in the shapes of pumpkins, bats, ghosts, and footballs. The packaging for the Halloween-themed candies shows eyes and mouths carved into the chocolate coating, while the Reese's Football packages show laces on the product. And while many surely welcome the whimsical packaging, this plaintiff alleges that she was deceived because the products themselves do not, in fact, have eyes, mouths, and laces carved into them. For example, the Reese's Pumpkins product looks more like a pumpkin than a jack-o-lantern. (She curiously does not complain that the candies don't *actually* have a bite taken out of them, as the packaging shows.)

The plaintiff asserts that she and others paid more for the products than they otherwise would have based on the deceptive labels and alleges a violation of the Florida Deceptive and Unfair Trade Practices Act. She seeks to represent a class of Florida-based purchasers who also respect the hallowed history of peanut-butter-cup-based artistic expression. No word yet on whether the plaintiff will also be bringing suit against her nine-year-old neighbor, who it turns out is not really a witch.

Glass Half Empty

Willis-Albrigo v. Motts LLP, No. 3:24-cv-00148 (S.D. Cal. Jan. 23, 2024).

You may have seen a pickle in a Bloody Mary, but have you ever seen a Bloody Mary in a pickle? That is where these defendants find themselves after the plaintiffs alleged in a recent complaint that the defendants' Mr. & Mrs. T Original Bloody Mary Mix contains citric acid, despite being prominently labeled as containing "No Added Preservatives." Though citric acid is sometimes used as a flavor additive, the plaintiffs assert that it serves the function of a preservative, regardless of why it is included. The plaintiffs allege that the defendants engaged in false advertising, knowing that consumers seek out preservative-free, "clean label" products, and that reasonable consumers would not know that citric acid was a preservative, even if they took the opportunity to peruse the ingredients list.

The plaintiffs seek to represent both California and New York purchaser classes and allege a cocktail of statutory violations, including breach of express warranty and violations of all three prongs of California's Unfair Competition Law, False Advertising Law, Consumers Legal Remedies Act, and New York's deceptive trade practices act.

Icy Reception for Frozen Desert

Shuton v. Jonny Pops LLC, No. 24STCV02668 (Cal. Super. Ct. Feb. 1, 2024).

The only thing colder than popsicles in Southern California is one consumer's views of a certain manufacturer's fruit-flavored ice pops. Like the multiple layers of fruity flavor in each ice pop, the plaintiff stacks one allegation on top of another, contending in his class action complaint that the front-label imagery misled him into believing that both their sweetness and their flavor derived from natural fruit juice. The plaintiff also alleges that the product's nutrition facts are misleading because they are based on a serving size of one ice pop, which is less than half of the required 2/3 cup serving size, and because they fail to disclose that the ice pops contain less than 2% of some ingredients. The plaintiff seeks to recover the supposed premium he paid for the ice pops' purported "simple, wholesome ingredients," as well as a court order enjoining the manufacturer from continuing its alleged packaging and advertising misrepresentations, based on his claims under the California Consumers Legal Remedies Act, Unfair Competition Law, and False Advertising Law.

The Snack That Smiles Back but Contains Preservatives?

Ward v. Pepperidge Farm Inc., No. 1:24-cv-00078 (S.D.N.Y. Jan. 5, 2024).
McWhite-York v. Pepperidge Farm Inc., No. 4:24-cv-00231 (D.S.C. Jan. 15, 2024).

The happy goldfish snack that's been making waves in school lunch boxes is now swimming into a legal sea with two lawsuits, and it seems the plaintiffs aren't grinning back at their favorite aquatic-themed treat. Why the frowns? Well, it turns out these goldfish aren't as innocent as they look—the plaintiffs allege they've been hiding citric acid in their crunchy smiles. In both suits, the plaintiffs claim that the defendant's statement the product contains "No Artificial Flavors or Preservatives" is false and misleading based on its inclusion of citric acid as an ingredient that can act as both an artificial flavor enhancer and preservative. Each plaintiff seeks to represent a class of customers who purchased the goldfish snack nationwide, and in their individual suits, those who purchased the product in New York and South Carolina.

As we've seen recently, citric acid litigation for companies making "No Preservative" claims are facing a tidal wave of challenges. Plaintiffs are also adjusting allegations to preempt defendants' arguments that citric acid is used not as a preservative, but to impart flavor. In these complaints, both plaintiffs argue that the citric acid used in processed foods has gone through chemical processing that, even if used for flavor, makes the "No Preservative" statement false and misleading. Considering motions to dismiss, courts have found that similar plaintiffs' allegations of the function or type of the citric acid are sufficiently pleaded, making these cases tough to drown at the pleading stage.

A Fruit Gummy Fraud: "Synthetic" Flavoring Edition

Albright v. Solely Inc., No. 2422-CC00163 (City of St. Louis Cir. Ct. Jan. 26, 2024).

A consumer brought a putative class action in a Missouri state court alleging that a fruit gummies manufacturer is deceiving consumers by claiming that its gummies contain "No Artificial Colors or Flavors." Specifically, the complaint alleges that the label's claim of "No Artificial Colors or Flavors" is misleading because the gummies contain ascorbic acid. And while the complaint acknowledges that "ascorbic acid may be a source of Vitamin C," it alleges that *food-grade* ascorbic acid is a commercially manufactured, synthetic food additive. The plaintiff claims that using such a synthetic additive directly contradicts the express representation that the gummies contain no artificial colors or flavors. Additionally, the plaintiff alleges that because consumers like the plaintiff are increasingly interested in purchasing products without artificial colors and flavors, they are willing to pay a premium for the gummies or more for them than they otherwise would have had they known the truth. The plaintiff asserts a violation of Missouri's Merchandising Practices Act, breach of express warranty, and unjust enrichment, and she seeks to represent a Missouri class of consumers.

Phyllo Shells Are Allegedly Phylled with Sugar

Barry v. Athens Foods Inc., No. 24-cv-060755 (Cal. Sup. Ct. Jan. 22, 2024).

Alleging the usual suspects of California consumer protection statute violations, the plaintiffs here claim they were *phylled* with buyers' remorse when they realized the product's sugar-free claim is purportedly as flaky as the phyllo itself. The plaintiffs allege they viewed the product packaging, which states "0g Total Sugars," but later learned this was too sweet to be true because the product contains dextrose, maltodextrin, and enriched wheat flower.

Boldly stating "[d]iet-related diseases are a top cause of death," the plaintiffs, in an almost epic 14-page saga, link their complaint to a plethora of literature highlighting the perils of sugar. Finally tying the complaint back to the products at issue, the plaintiffs allege that they would not have purchased the product, would have purchased "a lesser quantity," or would not have paid a premium if the product were not mislabeled. They seek injunctive and declaratory relief, in addition to restitution for the amount paid as a premium over alternatives, or restitutionary disgorgement.

Friends Step Aside—Consumers Want "Indulgences with Benefits"

Ceciliano v. Nonni's Foods LLC, No. l-000246-24 (N.J. Super. Ct. Jan. 22, 2024).

Consumers demand "INDULGENCES WITH BENEFITS." No, this is not the title of the next hit reality dating show, but it is the opening header in a class action complaint filed in New Jersey Superior Court. And for this plaintiff, indulgence with benefits equals lemon biscotti … that actually contains lemon. Similar to allegations we've covered before, the plaintiff alleges that a defendant food manufacturer misleads consumers by labeling its "limone" (lemon) biscotti as "Baked With Real Lemons" and "Made With Real[] Lemon Zest Oil" when the products only contain "a mix of compounds intended to imitate a lemon taste, without any nutrients of real lemons." Images of lemons, lemon peels, and lemon rinds on the packaging add to the deception, according to this lemon-loving consumer. She brings New Jersey Consumer Fraud Act and unjust enrichment claims against the defendant on behalf of a putative class of New Jersey consumers. Will this plaintiff manage to turn her sour biscotti experience into sweet lemonade? Stay tuned for future episodes of *Indulgences with Benefits* to find out.

Dietary Supplements Are Just Another *VeggieTale*?

Spivey v. Evig LLC, No. 1:24-cv-00781 (N.D. Ill. Jan. 30, 2024).

An Illinois-based plaintiff in search of his ~~hairbrush~~ fruits and veggies complains that a defendant's dietary supplements mislead consumers into believing that the products offer "real food" and "real nutrition" to consumers, despite containing a significant amount of sugar. According to the complaint, the fruit-and-vegetable supplements are sold together in two bottles—one for fruits, one for vegetables—each with packaging that depicts images

of fruits or vegetables alongside the phrases "Real Food," "Real Science," and "Real Nutrition." The complaint contends that the defendant's marketing and promotional materials tout the supplements as offering a substitution for one's daily serving of fruits and vegetables with the added benefit of providing more energy and a "higher quality of life."

The issue, the complaint alleges, is that nearly 40% of the supplement is plain sugar that provides the body with nothing more than what may be a fleeting burst of energy. Before spelling out its own gripes with the product, the complaint first nods to a side battle the defendant faces with the FDA over allegedly unsupported claims related to the product's ability to treat and cure certain diseases. The complaint makes it a point to separate its own "health and well-being" claims from the other claims apparently under pursuit.

The plaintiff seeks to represent a nationwide class and a multistate class of all consumers who purchased the dietary supplements in Illinois and states with similar laws during the proposed class period. The plaintiff, in the alternative, seeks to represent an Illinois-only class. The plaintiff alleges a single count of violation of Illinois's Consumer Fraud Act. We're seeing a growing trend among plaintiffs who (like Cucumber Larry discovering he has no hair for his missing hairbrush) are surprised to discover their dietary supplements contain sugar. We'll continue to cover this trend for you and, perhaps, find other ways to pay homage to our childhood by evoking *VeggieTales*-like memories. After all, what more could you ask for?

Motion to Dismiss / Motion for Judgment on the Pleadings

Procedural Posture: Granted

Plaintiff's Allegations Are Toast After Court Bounces Jam Suit

Indiviglio v. B&G Foods Inc., No. 7:22-cv-09545 (S.D.N.Y. Dec. 29, 2023).

In the words of the immortal Bob Marley, "We're jamming and I hope the jam is gonna last." Unfortunately for one plaintiff, her complaint over allegedly mislabeled spreadable fruit products did not last. The product at issue contained fruit, juice concentrates, fruit pectin, citric acid, and natural flavor (as disclosed in the product's ingredient list). The plaintiff alleged that the product was mislabeled as containing "all fruit" and "sweetened only with fruit juice" because neither citric acid nor natural flavor can reasonably be described as fruit. Applying the reasonable consumer standard at the motion to dismiss stage, the court first explained that no reasonable consumer would open a jar of the cherry-flavored product and expect it to contain raw cherries. Rather, a reasonable consumer would understand that the "All Fruit spreadable fruit" product would consist only of fruit ingredients, as modified and processed to make the fruit spreadable.

The question at the heart of the complaint was thus whether citric acid or natural flavor could reasonably be considered fruit ingredients, given that both could be derived from sources other than fruit. The plaintiff alleged that while citric acid is an organic acid found in a variety of fruits, when "industry" uses citric acid as an ingredient, the acid is produced by fermentation of a fungus. But the generalized statement about "industry" was not specific enough to adequately allege the citric acid actually used in the product was industrially produced and not derived from fruit. Similarly, "natural flavor" refers to essential oils or extractives derived from spices, fruits or vegetables, edible yeast, or plant material. The plaintiff did not make any allegations about the source of natural flavor actually used in the product, so her assertion that the product contained non-fruit ingredients was "quintessentially conclusory." Accordingly, for this plaintiff, "jamming is a thing of the past."

Unspecified Testing Dooms Forever Chemicals Suit … For Now

Hernandez v. The Wonderful Co. LLC, No. 1:23-cv-01242 (S.D.N.Y. Dec. 29, 2023).

Forever chemicals are forever in the news these days, but a district court's most recent order may discourage putative plaintiffs from bringing claims about them. In this suit, the plaintiff alleges that she purchased pomegranate juice several times from a mass market retailer, relying on the beverage manufacturer's representations that the product was "all natural" and an "antioxidant superpower." But according to the complaint, the juice is no Captain America. Instead, the plaintiff contends that the drink is chock full of per- and polyfluoroalkyl substances (PFAS, also known as "forever chemicals"). To support her allegations, the plaintiff pointed to independent testing that showed levels of PFAS above what is acceptable under EPA standards.

Yet, just before the end of the year, the district court dismissed the plaintiff's claims. The court found that the tests were not of the particular bottles she consumed, and because she did not specify how many bottles were tested, who performed the independent tests, and what the results of the independent tests were, it could not plausibly conclude that the specific bottles she purchased and consumed contained PFAS. The court found that the plaintiff lacked Article III standing to pursue her claims. However, the plaintiff's claims were dismissed without prejudice; and not to be deterred, she has since refiled an amended complaint. Stay tuned to see whether this forever chemicals suit goes on forever.

Procedural Posture: Denied

Gummy Candy Producer Is Still in a Sticky Situation

Jackson v. Kervan USA LLC, No. 2:22-cv-01237 (N.D. Ala. Jan 12, 2024).

A federal judge in Alabama denied a candy producer's motion for judgment on the pleadings in a lawsuit alleging that there is nonfunctional slack-fill in boxes of its gummy candies. Even though the boxes of gummy candy contain quantitative information about the net quantity of contents, the sweet-toothed plaintiff alleged that a reasonable consumer would believe that the boxes are full or near-full (though she claims that they actually are 80% or more

empty). The candy-craving plaintiff claims that she would not have purchased the gummy candies had she known the truth about the amount of empty space in the box and claims that there was no opportunity for visual or audial confirmation of the quantity of gummy candies due to the opaque boxes and the packaging of the candies within the boxes. Based on these allegations, the plaintiff asserted claims for violation of the deceptive practice statutes of all 50 states, breaches of warranty and contract, and a claim for negligence.

In response to these allegations, the candy producer emphasized that disclosures on the boxes about the quantity and weight of the product are unambiguous and accurate, and the nutritional information on the boxes clearly states how many gummy candies are in each serving. The candy producer also alleges that any empty space, or slack-fill, in the packing of the gummy candies is a result of shipping requirements and the manufacturing process because gummy candies tend to stick to one another if packed too densely.

In denying the motion for judgment on the pleadings, the court noted that judgment on the pleadings was not appropriate because the sweet-toothed plaintiff had stated a plausible claim and that material facts remain in dispute.

Twice a Denial for Vitamin Manufacturer's Motions to Dismiss

Drake v. Bayer Corp., No. 3:22-cv-01085 (S.D. Cal. Jan. 5, 2024).

For one defendant, a vitamin a day cannot keep the unfavorable court rulings away. The Southern District of California has denied a drug manufacturer's second motion to dismiss a lawsuit accusing it of deceptively marketing its One A Day Natural Fruit Bites Multivitamin products. According to the allegations, the defendant's use of the word "natural" on the front labels of its products leads reasonable consumers to believe that the multivitamins do not contain non-natural, synthetic ingredients. The defendant moved to dismiss the initial complaint, which alleged a violation of California's Consumers Legal Remedies Act, but the court denied the motion, holding that the complaint plausibly alleged consumers were misled by the word "natural."

The plaintiffs amended their complaint to add two new plaintiffs and two new causes of action for false advertising under New York's General Business Law. The defendant again moved to dismiss, arguing that an intervening Ninth Circuit opinion, which decided that the term "Nature Fusion" on the front label of an unrelated product allowed for the inclusion of both natural and synthetic ingredients, required dismissal of the plaintiffs' claims. Not so, said the court. In denying the defendants' second motion to dismiss, the court held that the inclusion of the word "natural" on a product's front label is indeed likely to deceive a reasonable consumer.

The plaintiffs have since filed a second amended complaint following the voluntary dismissal of the original plaintiff.

Voluntary Dismisals

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

Leschiner v. Kellogg Sales Co., No. 1:22-cv-03464 (N.D. Ill. Jan. 2, 2024) – Filed 7/3/2022.

Forby Vickie v. SC BCP Acquisition Co. LLC, No. 23-LA-0420 (Ill. Cir. Ct. Jan. 2, 2024) – Filed 4/11/2023 [dismissed with prejudice].

McDowell v. McDonald's Corp., No. 1:22-cv-01688 (N.D. Ill. Jan. 9, 2024) – Filed 3/31/2022.

Scheibe v. Livwell Products LLC, No. 3:23-cv-00216 (S.D. Cal. Jan. 23, 2024) – Filed 2/6/2023.

Scheibe v. Fit Foods Distribution Inc., No. 3:23-cv-00220 (S.D. Cal. Feb. 27, 2024) – Filed 2/6/2023.

Scheibe v. Alacer Corp., No. 3:23-cv-00026 (S.D. Cal. Feb. 23, 2024) – Filed 1/6/2023.

Bullock v. Ocean Spray Cranberries Inc., No. 1:23-cv-12557 (D. Mass. Jan. 24, 2024) – Filed 10/27/2023.

Wright v. Ocean Spray Cranberries Inc., No. 3:23-cv-05627 (N.D. Cal. Mar. 6, 2024) – Filed 10/31/2023.

Checkout Lane

Upcoming Events | Click or Scan for Details

Attendance Calories	**0**
	% engaging value
Knowledgeable Speakers	**100%**
Current Topics	**100%**
Alston & Bird Approved	**100%**

April 30–May 1

ACI Advanced Summit on Food Law – Regulation, Compliance, and Litigation

Angela Spivey will speak at ACI's annual Food Law conference on the panel "The Fight Against Food Fraud: Tactical Tools for Minimizing Adulteration and Fostering Product Integrity in the Food Supply Chain."

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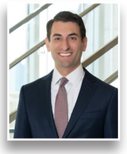

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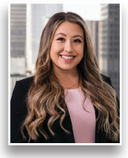

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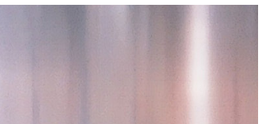
FOOD & BEVERAGE DIGEST



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