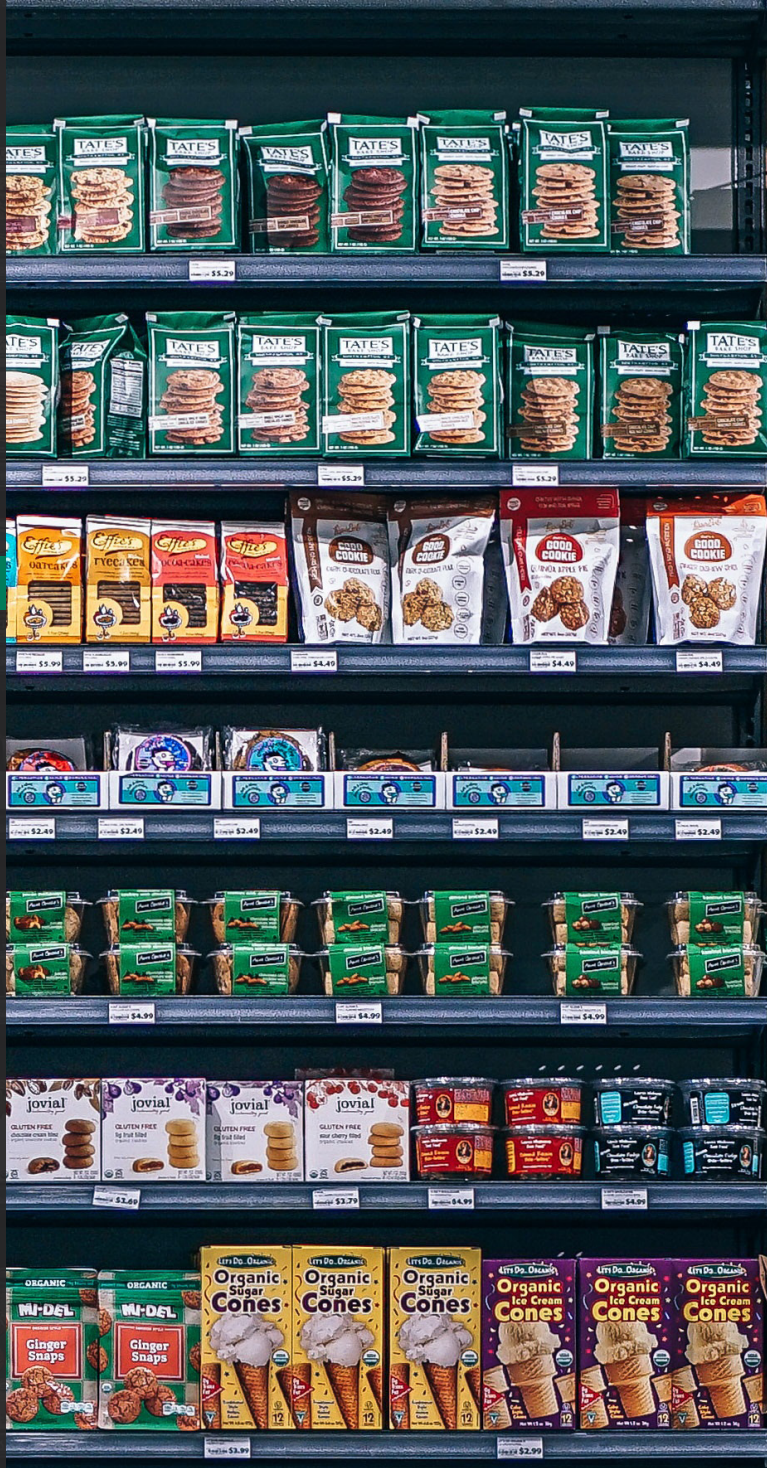
ALSTON & BIRD

FOOD & BEVERAGE DIGEST

AUGUST 2020

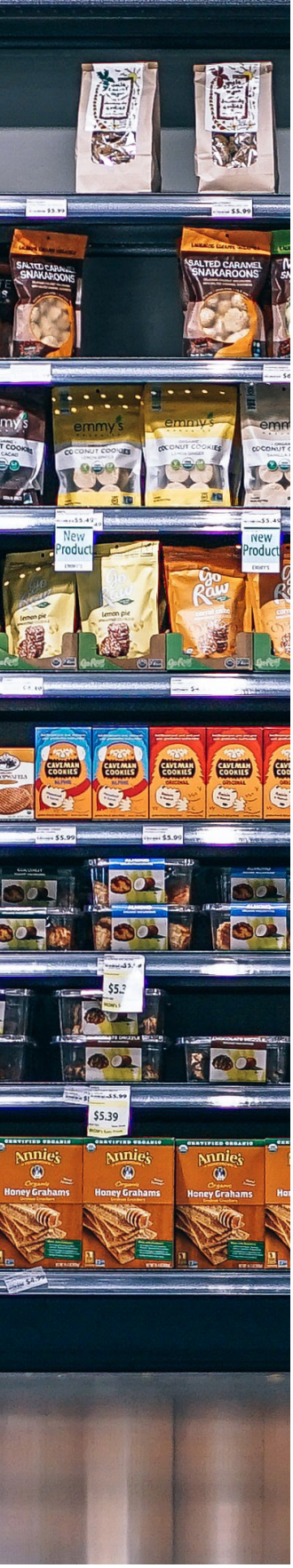


Edition Facts

4 Sections This Edition
Cases Per Section 1-7

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Motion for Summary Judgment	100%
Appeals	100%



FOOD & BEVERAGE DIGEST

New Lawsuits Filed

Limited-Ingredient Dog Food in the Doghouse

Hill v. Canidae Corporation, No. 5:20-cv-01374 (C.D. Cal. July 9, 2020).

Unhappy pet owners lodged a putative class action against Canidae, alleging that the dog manufacturer's "limited ingredient" products (like "Grain-Free PURE Real Bison, Lentil, and Carrot Recipe Dry Dog Food" and "Grain-Free PURE Real Salmon and Sweet Potato Recipe Dry Dog Food") mislead consumers into thinking they do not contain soy or chicken.

The complaint alleges that the product labeling does not identify soy or chicken, which appeals to dog owners in search of products low in soy and chicken to prevent a range of health issues, allergies, or nutritional deficiencies stemming from their pets' diets. However, according to an independent analysis of the ingredients, these products allegedly contain material amounts of soy and chicken. The plaintiffs seek to certify nationwide, California, and New York classes, raising claims under California and New York consumer protection and food labeling laws and common-law claims.

Hand Sanitizer Is No Pandemic Panacea

Moreno v. Vi-Jon Inc., No. 3:20-cv-01446 (S.D. Cal. July 27, 2020).

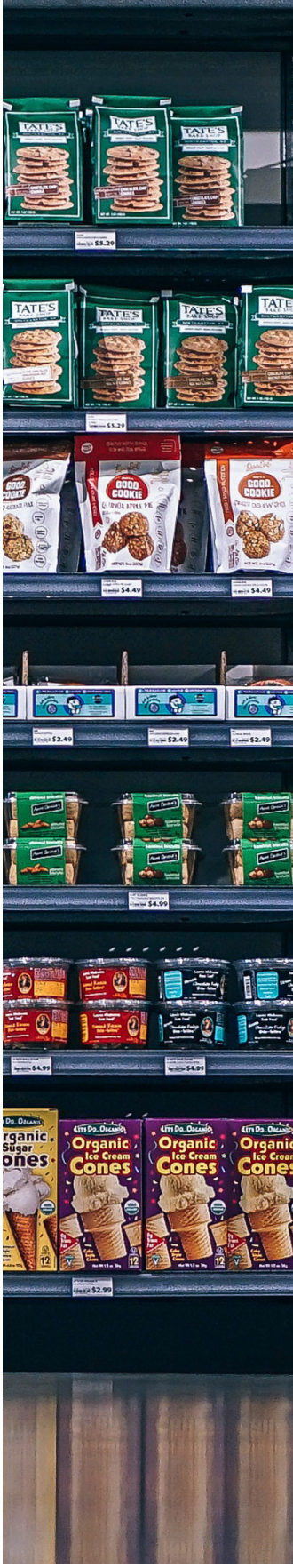
A plaintiff has filed a COVID-19-related putative class action against Vi-Jon Inc., a manufacturer of hand sanitizers sold under store brand names at national pharmacy chains. This class action follows a string of class actions filed over companies' claims that their hand sanitizers kill various germs that lead to disease. "Never has it been more saliently demonstrated that consumers rely on hand sanitizers to 'kill germs' on their hands in order to protect themselves from infection," states the complaint. Yet the plaintiff alleges that Vi-Jon deceived him by claiming its products "eliminate more than 99.99% of many common harmful germs and bacteria."

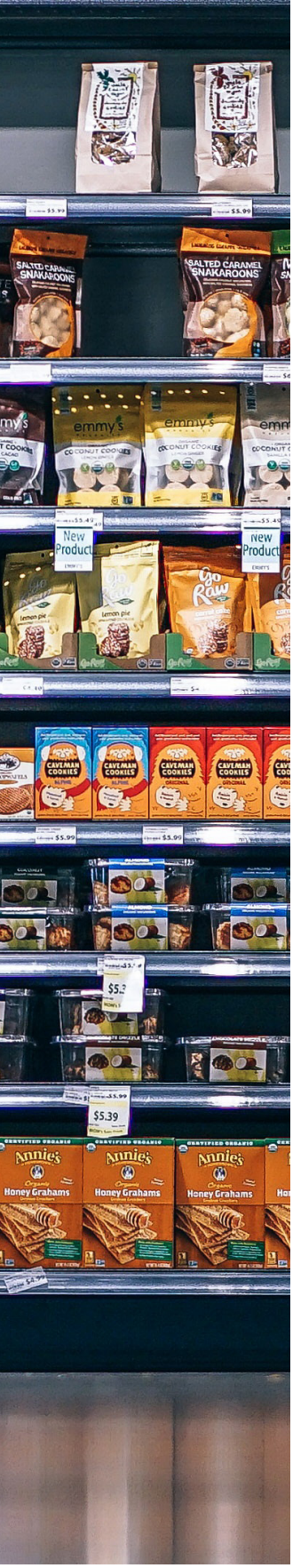
The complaint alleges that the hand sanitizers are ineffective against more than 0.01% of germs. For instance, the plaintiff alleges that Vi-Jon's products are "generally ineffective" at killing norovirus, which the CDC says accounts for about 50% of all food-related illness outbreaks in the U.S. The complaint lists other disease-causing organisms against which Vi-Jon's hand sanitizers are ineffective, such as poliovirus, human papillomavirus, influenza A, and hepatitis A. The plaintiff seeks an injunction correcting this false labeling and damages.

Coffee Servings Fracas Brewing

Lorentzen v. The Kroger Company, No. 2:20-cv-06754 (C.D. Cal. July 28, 2020);
Ferron v. Kraft Heinz Food Company, No. CACE-20-011985 (Broward Cnty., Fla. July 24, 2020).

Coffee consumers across the country are suing coffee manufacturers for allegedly misrepresenting the number of servings of ground coffee that their products can make. In step with this trend, plaintiffs in two putative class actions—one in federal court in California and one in state court in Florida—took aim at Kroger's in-house brand coffees and Maxwell House coffees. They allege that they purchased the ground coffee products after relying on the products' packaging about how many servings of coffee each product can make. They only later found out that those representations overstated the amount of coffee that could be made. The plaintiffs also allege that the manufacturers intentionally misrepresented the amount of coffee that can be brewed to induce consumers to purchase their products. The plaintiffs in the California action allege violations of California's consumer protection laws, whereas the plaintiffs in Florida allege violation of Florida's primary consumer protection statute.





FOOD & BEVERAGE DIGEST

Motions to Dismiss

Procedural Posture: Granted

Not Impossible – BK Consumers Could Have Had It Their Way

Williams v. Burger King Corporation, No. 1:19-cv-24755 (S.D. Fla. July 20, 2020).

Updating the December 2019 edition of the *Food & Beverage Digest*, Burger King now has won dismissal of a putative class action that alleged the fast-food chain misled vegan patrons into thinking its Impossible Whoppers were meat-free and would be prepared on a cooking surface separate from traditional beef patties. In dismissing the plaintiffs' breach of contract claim, the court found that consumers' presumption that the Impossible patties would be cooked on a different grill than traditional meat patties was improper and that preparation of the Impossible patties on a separate cooking surface was not an essential term of the existing contract between BK and its patrons. According to the court, had the plaintiffs wanted to, they could have taken Burger King up on its years-long slogan that the consumer can "Have it your way" by requesting a different cooking method, altering the terms of the contract. But as no alternative terms were requested, there could be no finding of a breach of contract.

The court also dismissed all the plaintiffs' consumer fraud claims, finding that Burger King promised nothing more than what it delivered—a non-meat patty—the "Impossible Whopper." The plaintiffs now will test their charbroiled theory with the Eleventh Circuit; they appealed the dismissal on August 18.

Complaint's Threadbare "Expert Analysis" Sinks Vanilla Ice Cream Suit

Steele v. Wegmans Food Markets Inc., No. 1:19-cv-09227 (S.D.N.Y. July 14, 2020).

As we have extensively covered in previous *Digests*, there has been a wave of litigation challenging food makers for purportedly misrepresenting vanilla content in their products (as well as making other purportedly false and deceptive "made with real" statements). Here, the plaintiffs alleged that, despite advertising its ice cream as containing vanilla, Wegmans uses a nonvanilla "natural flavor" for its vanilla taste rather than vanilla bean or vanilla extract. Although the complaint concedes that there is some vanilla in the offending ice cream, it contends that, based on an expert's mass spectrometry analysis, the amount of real vanilla is negligible.

The district court, however, found the expert's alleged analysis to be the complaint's undoing and dismissed the plaintiffs' claims. It reasoned that the analysis provided by the consumers' expert was insufficient to prove the absence of vanilla in the challenged ice cream products. Instead, the expert's analysis may simply have not been sensitive enough to pick up all the chemical markers of vanilla, leaving the court to speculate on the makeup of the vanilla flavoring. The court also determined that the product's labeling was factually true and not deceptive because neither the label nor the ingredients list states that the ice cream uses vanilla bean or extract.

Victory Still Sweet in Chocolate-less Chip Suit (Again)

Cheslow v. Ghirardelli Chocolate Company, No. 4:19-cv-07467 (N.D. Cal. July 17, 2020).

In the latest development in the cocoa-free white baking chips suit (which we have covered in previous *Digests* here and here), victory still tastes sweet to the Ghirardelli Chocolate Company, which won a bid to dismiss with prejudice a putative class action complaint alleging that the chocolate manufacturer duped consumers into thinking its cocoa-free white baking chips actually contained chocolate.

On the previous motion to dismiss, the district court found that reasonable consumers wouldn't have been misled by the product's packaging, noting that the words "chocolate" and "cocoa" don't appear anywhere on the packaging. The district court warned that it was "skeptical" that the plaintiffs could amend their complaint to state a viable claim for relief, and the plaintiffs did not convince the district court otherwise. This time, the plaintiffs offered a consumer survey about purported consumer deception, which did little to improve their claims. "What's notable about the survey is not what it does allege but what it fails to address," the district court said. "As [Ghirardelli] points out, the survey only showed respondents the front panel of the product," and that "[b]y omitting the back panel, the survey deprived respondents of relevant information, namely the ingredient list." It dismissed the amended complaint, noting that the plaintiffs did not give "any reason for the court to change its findings."

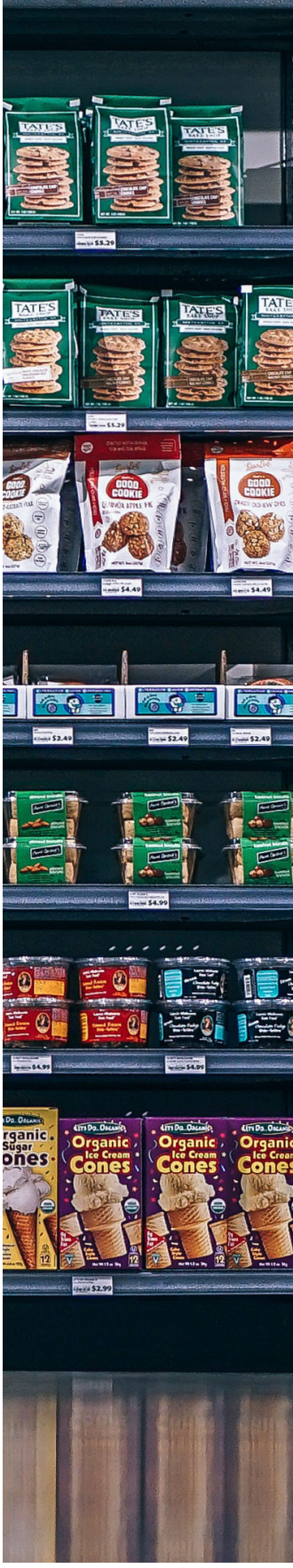
Sweet victory is not complete, however. The plaintiffs appealed the dismissal to the Ninth Circuit on August 14.

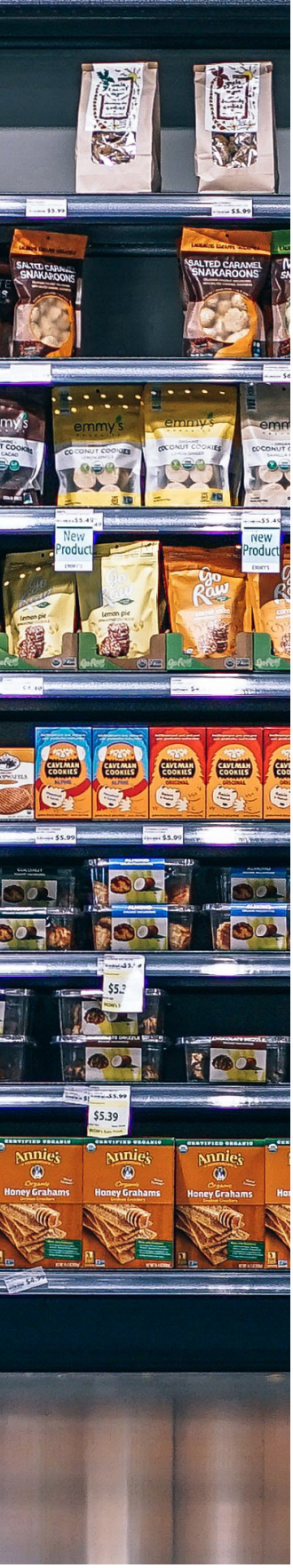
Oreo Speedwagon: "Made with Real" Words Ring True

Harris v. Mondelēz Global LLC, No. 1:19-cv-02249 (E.D.N.Y. July 28, 2020).

Alongside the wave of vanilla suits, cases challenging "Made with Real" labeling have also started to wind their way through the U.S. court system. Closely related to the vanilla suits, these cases generally claim that, contrary to a product's labeling, a majority of the product is not made with the listed ingredient or the product is made with a lower quality product. Here, the plaintiff targeted the dunk-able darling of kids and families everywhere: Oreos. The plaintiff alleged that the labeling on Oreos, "Always Made With Real Cocoa," is false and misleading because the cocoa used in Oreos is refined through the alkalizing process. According to the plaintiff, any reasonable consumer instead would understand "real cocoa" to refer to cocoa in an "unadulterated, non-artificially processed form."

But the district court observed that one allegation is fatal to the plaintiff's case: Oreos are, in fact, made with cocoa, so the label that Oreos are "Always Made With Real Cocoa" is a factually true statement. The district court also observed that just because the advertised ingredient is combined with another does not make a "made with real" labeling false or misleading. The district court dismissed the plaintiff's complaint and denied his request to amend because, given this factually true statement, any amendment would be futile.





FOOD & BEVERAGE DIGEST

Procedural Posture: Denied

Plain Vanilla Lack-of-Notice Argument Fails

Vizcarra v. Unilever United States Inc., No. 4:20-cv-02777 (N.D. Cal. July 16, 2020).

A California district court denied Unilever's motion to dismiss claims that its labeling and marketing of Breyers Natural Vanilla Ice Cream were false and misleading. Unilever markets the ice cream as containing "natural vanilla," and its labels contain pictures of vanilla beans and flowers alongside a scoop of vanilla ice cream. According to the plaintiff, this labeling and advertising represent that the ice cream's vanilla flavor is derived from the vanilla plant—which the plaintiff relied on when purchasing the ice cream.

The district court rejected Unilever's argument that the plaintiff failed to send it a demand letter under California's Consumer Legal Remedies Act, reasoning that Unilever had already received notice of these alleged practices in a separate letter from a different consumer before the filing of a similar lawsuit. The district court also rejected Unilever's argument that the plaintiff lacked standing to seek injunctive relief, reasoning that the plaintiff alleged that she was deceived by the "natural vanilla" labeling, relied on this labeling when she purchased the ice cream, and would purchase the ice cream in the future if it were truly flavored as labeled and advertised.

Lawsuit Seeking Venti-Sized Relief Proceeds

Adams v. Starbucks Corporation, No. 8:20-cv-00225 (C.D. Cal. July 9, 2020).

Despite the lack of any false advertisement, a California plaintiff plausibly alleged that she was deceived in the purchase of Starbucks venti-sized espresso beverages because "consumers have come to expect that as the beverage size increases, so too does the amount of coffee and caffeine." The plaintiff alleged that she was duped into thinking her venti espresso drink had more caffeine than its grande-sized counterparts, when in reality they contained the same amounts of espresso and caffeine.

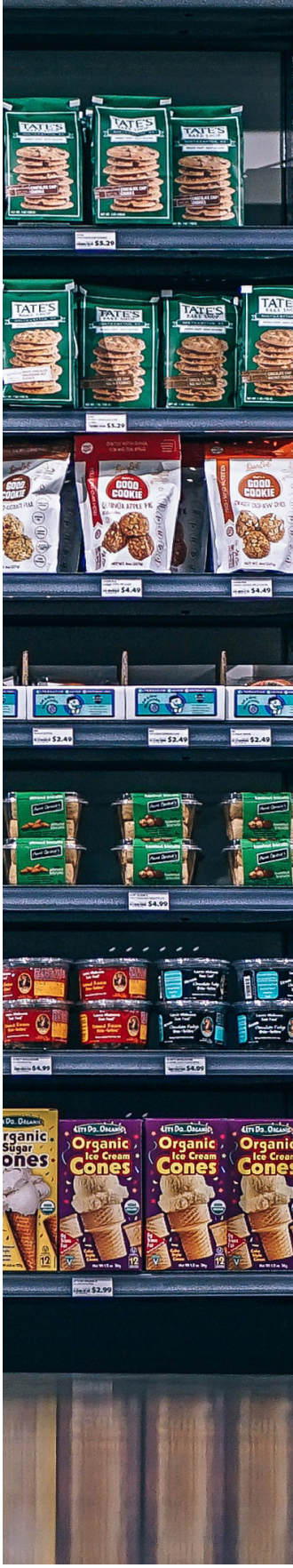
Even though Starbucks rightly pointed out that it did not make any representations concerning caffeine quantity, the district court concluded that the lawsuit could proceed. Perhaps most importantly, anecdotal posts from the plaintiffs'-counsel-driven website "Top Class Actions"—a website that matches lawsuits with consumers—seemed to cause the district court to wonder whether reasonable consumers had been deceived by the lack of difference in caffeine between the venti and grande sizes. The court concluded that when a bigger cup does not have more espresso, the seller may be engaged in a deceptive business practice. But notably, when a bigger cup has more ice and not more iced tea, the Ninth Circuit affirmed that it is not a deceptive business practice. *See Forouzesh v. Starbucks Corp.*, 714 F. App'x 776 (9th Cir. 2018).

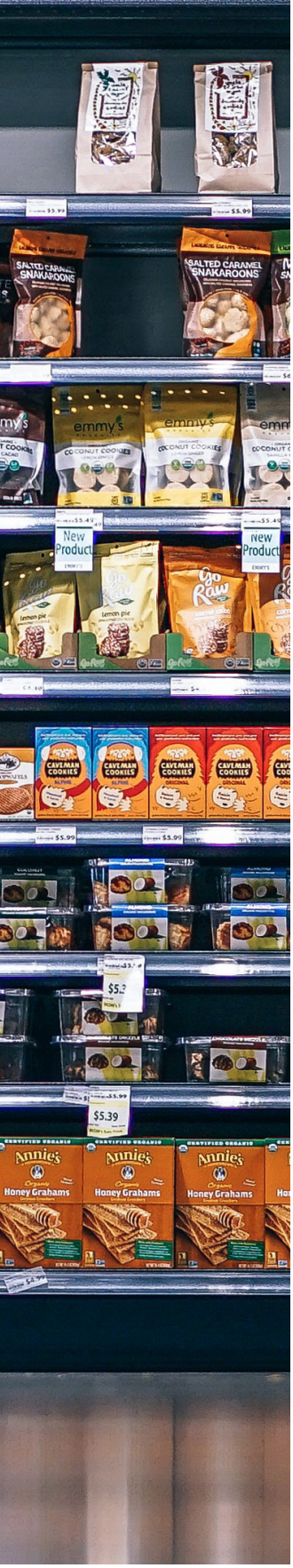
Debate on "Taste Sensations" and "Characterizing Flavors" Too Heady for Motion to Dismiss

Noohi v. The Kraft Heinz Company, No. 2:19-cv-10658 (C.D. Cal July 20, 2020).

Crystal Light's label indicates that the product contains "no artificial flavors." The plaintiffs filed suit against Crystal Light's manufacturer, contending that this labeling is false and misleading because Crystal Light allegedly contains DL-malic acid, a synthetically manufactured version of malic acid. The defendants moved to dismiss the complaint, arguing that the complaint failed to "adequately" allege that the malic acid is artificial or is even a flavor.

The district court rejected both arguments. First, it noted that despite the speculation on *why* the defendants opted to use DL-malic acid, the complaint alleges unequivocally that the defendants use DL-malic acid. Although allegations of *how* the plaintiffs discovered that malic acid was artificial undoubtedly would strengthen the complaint, the district court found that failing to include these allegations was not fatal at this stage. Second, the district court concluded that the defendants' nuanced arguments that DL-malic acid is not a flavor—which distinguished flavoring agents, flavor enhancers, and pH control agents—amounted to factual disputes unsuitable for a motion to dismiss. Indeed, the parties' arguments on the implications of "taste sensations" versus "characterizing flavors," the district court reasoned, only highlighted the factual nature of these arguments. Finally, the district court found that the defendants' personal jurisdiction challenge under *Bristol-Myers Squibb* was "premature" because no class had been certified and putative class members, therefore, are not parties to the action.





FOOD & BEVERAGE DIGEST

Motion for Summary Judgment

Procedural Posture: Granted

Court Dusts Pet Food Contaminants Suit

Weaver v. Champion Petfoods USA Inc., No. 2:18-cv-01996 (E.D. Wisc. July 8, 2020).

The plaintiff filed a putative class action alleging that the defendants' pet food was deceptively marketed as having various high-quality attributes (like the products are made with a "biologically appropriate nutritional philosophy," are made with "fresh" and "regional ingredients," and are "never outsourced"). In reality, the plaintiff alleged, the products contain undisclosed contaminants like heavy metals, pentobarbital (a euthanizing agent), and bisphenol-A (BPA) (a chemical used in the making of plastics and resins). As the case progressed, however, the district court began expressing its skepticism in the suit and winnowed away claims and allegations.

On the defendants' renewed motion for summary judgment, the district court found that it would be "extraordinary" to hold the defendants liable solely for the risk that their products contain unintended and non-harmful concentrations of the alleged contaminants, many of which are omnipresent in the environment and in all pet foods. The court considered that the "only way Plaintiff would be satisfied, it seems, is to require" manufacturers to include a disclosure of all unintended ingredients on product packaging. With a bit of sarcasm, the district court noted that this requirement would include "perhaps a piece of dust [that] entered the bag with the food itself, and dust is certainly not something a dog should eat." The court also sided with the defendants on the challenge to the product's "fresh" and "regional" claims, finding that neither statement was false or misleading because the descriptors could not apply to all ingredients, but rather only to those that are fresh or regionally sourced.

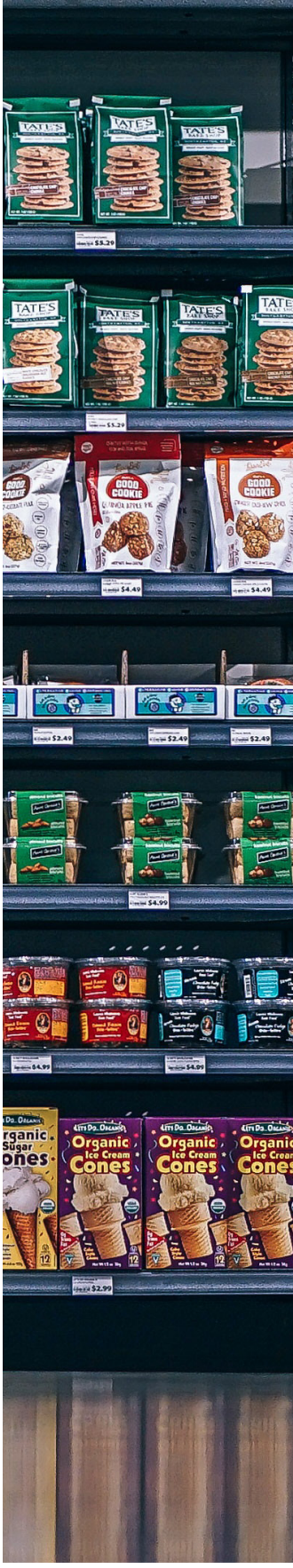
The plaintiff will have another chance to dust off its claims by appealing the district court's ruling to the Seventh Circuit.

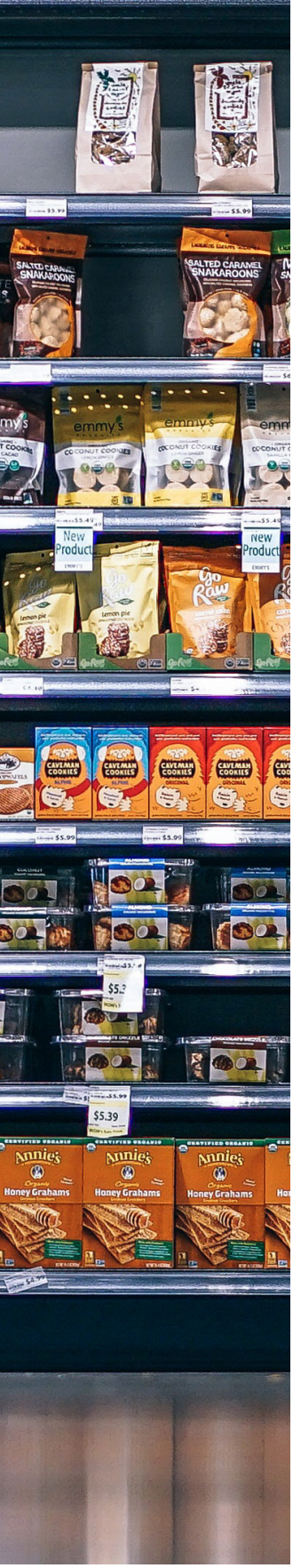
Consumer's "Pure" Honey Claims Are Purely Speculative

Tran v. Sioux Honey Association Cooperative, No. 8:17-cv-00110 (C.D. Cal. July 13, 2020).

A California federal district court granted summary judgment in favor of Sioux Honey Association Cooperative, finding its honey products are not falsely advertised as "pure." The plaintiff alleged that the honey maker's labeling is misleading under California consumer protection laws because the honey contains trace amounts (roughly 30–40 parts per *billion*) of glyphosate, the herbicide and drying agent that gained notoriety after a landmark jury verdict in 2019.

However, the district court concluded that no reasonable factfinder would find the "pure" labeling deceptive because the plaintiff failed to present any evidence that consumers are concerned with the trace amounts of glyphosate in the honey. According to the court, the survey commissioned by the class representative did not support her theory that average consumers would consider the honey to be "pure" only if it did not contain trace amounts of glyphosate. Because this survey failed to substantiate the plaintiff's theory of liability, there was no foundation for a factfinder to conclude that a reasonable consumer could be misled by the challenged labeling.





FOOD & BEVERAGE DIGEST

Appeals

Second Circuit on Past Purchaser Standing for Injunctive Relief Settlements: You've Had Your Fill

Berni v. Barilla S.P.A., No. 19-1921 (2nd Cir. July 8, 2020).

The Second Circuit issued an important ruling for those litigants who seek to settle with a class based on labeling changes alone (an injunctive relief settlement) pursuant to Rule 23(b)(2). The plaintiffs alleged that Barilla started selling specialty pastas (such as gluten-free or with added protein pastas) in the familiar blue Barilla pasta boxes but put less of those specialty pastas in the old box. Allegedly "expecting more pasta than they got," the plaintiffs filed a lawsuit in 2016 claiming Barilla's products included actionable, non-functional slack-fill.

Before a motion to dismiss could be heard, the parties reached a classwide settlement: Barilla would include a minimum "fill-line" on its boxes going forward to indicate how much pasta was contained inside and state on the box that its pasta is sold by weight and not by volume. The class settlement was approved, but a lone objector appealed.

The Second Circuit reversed the settlement approval, explaining that these past purchasers cannot obtain injunctive relief under Second Circuit law, including *Nicosia v. Amazon.com Inc.*, 834 F.3d 220 (2nd Cir. 2016), and cannot constitute a Rule 23(b)(2) class. It reasoned that past purchasers who want to buy more Barilla now know how much pasta is in the box: "Supposing that they have been deceived by the product's packaging once, they will not again be under the illusion that the boxes of the newer pastas are filled in the same way as the boxes of the older pastas." The court explained that there are no equitable exceptions to the injunctive relief law, even if it creates a catch-22 for purchasers who want to seek injunctive relief. Practically speaking, it will now be more difficult for companies to settle based on label changes alone under Rule 23(b)(2) in the Second Circuit..

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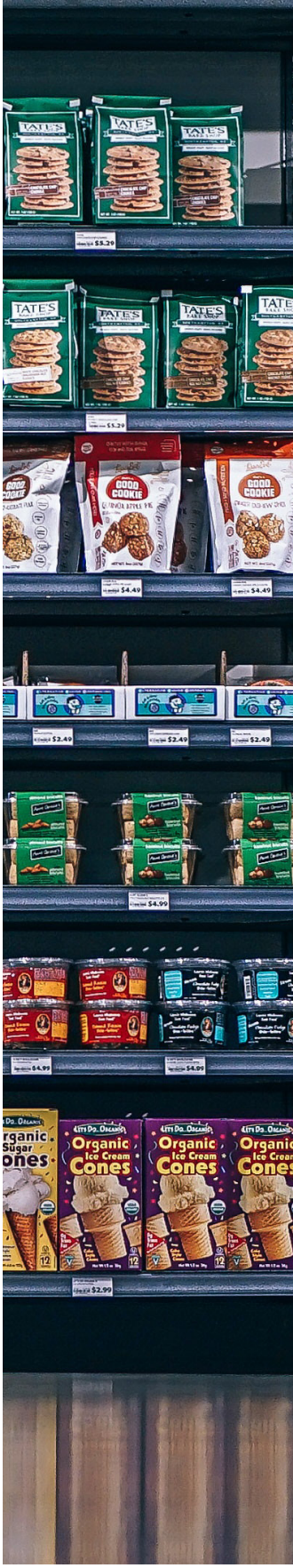

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