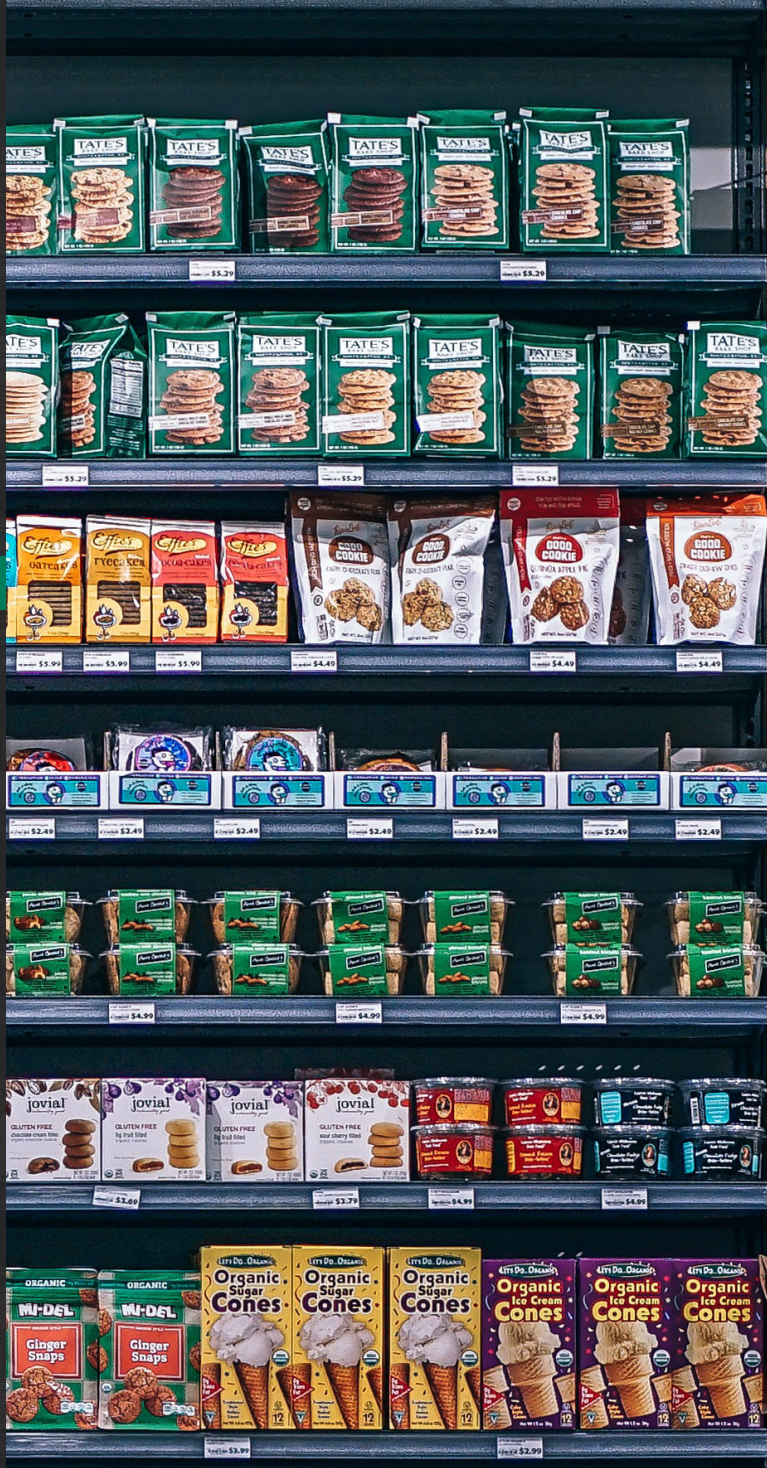
ALSTON & BIRD

FOOD & BEVERAGE

DIGEST

JULY 2023

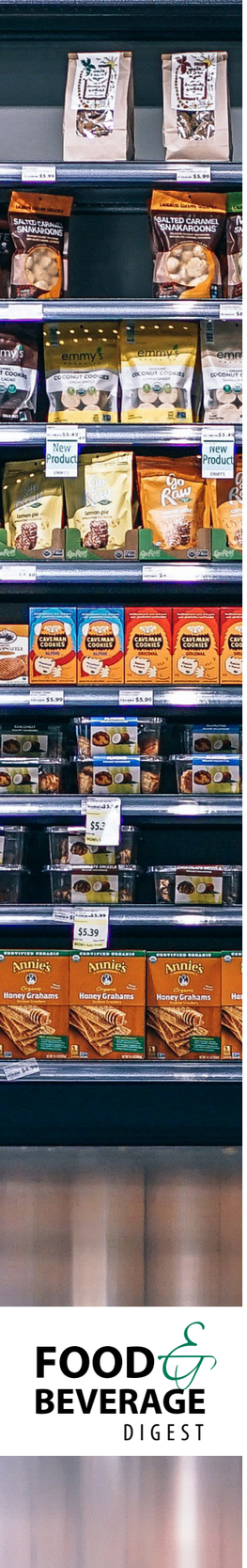


Edition Facts

4 Sections This Edition
Cases Per Section 1-11

Reading Calories 0

	% reading value
New Lawsuits Filed	100%
Motions to Dismiss	100%
Voluntary Dismissals	100%
Settlements	100%



New Lawsuits Filed

A Spoonful of Sugar Won't Make These Allegations Go Down

Dorsey v. Arizona Beverages USA LLC, No. 1:23-cv-01729 (D. Md. June 27, 2023).
Hoffman v. Arizona Beverages USA LLC, No. 6:23-cv-01213 (M.D. Fla. June 29, 2023).

Spencer Sheehan isn't going to sugarcoat things. Last month, Sheehan filed a pair of suits alleging that a half-and-half iced tea and lemonade beverage (the widely popular "Arnold Palmer") contains excess amounts of calories and sugar. With nearly identical lawsuits, the Sheehan-led plaintiffs allege that the defendant flubbed it by labeling the Arnold Palmer as a "lite" beverage. As alleged in the complaints, however, sources like the Oxford English Dictionary, Food & Drug Administration, and various state authorities have limited the term "lite" to specific levels of sugar in food and drink products. The complaints claim that the defendant's lite Arnold Palmer—which contains 18 grams of sugar per serving and 30 grams of sugar per bottle—adds insult to injury (pouring sugar in the wound) because it cannot be considered a lite beverage.

The complaints argue that the maker of the lite Arnold Palmers shouldn't get a mulligan for allegedly misrepresenting its contents and posing a health risk for consumers. The suits seek to certify state-specific classes (Maryland and Florida) for claims under the states' consumer protection statutes, false and misleading advertising, breach of contract, breaches of express and implied warranty, fraud, and unjust enrichment. Stay tuned to see if this sugar crush rushes into discovery or finds a motion to dismiss bunker.

Authenticity: It's *Chili* at the Top

Salvaggio v. McCormick & Company, No. 6:23-cv-06334 (W.D.N.Y. June 18, 2023).

A salty New York consumer has enlisted Spencer Sheehan and his team to *pepper* the manufacturer with allegations in a *spicy* new putative class action. The consumer was *hot—seeing red*, if you will—after discovering that a large spice manufacturer's "New Mexico Chile Pods" products are not grown or harvested in New Mexico (allegedly). The plaintiff claims that the spice manufacturer sells peppers labeled as "New Mexico Chile Pods" and promoted them as "Authentic – The Original and Preferred For More than 30 Years," which are allegedly "deceptively misdescriptive" because the product is not grown or harvested in New Mexico (allegedly).

But where is the *smoke* for this purported labeling *fire*? Armed with decidedly unspicy "information and belief" allegations, the complaint relies on the absence of an official "New Mexico Certified Chile" certification mark on the product, and it claims that an "authentic" seal on the product is "but a self-designated indication." Next, the complaint is positively *ignited* about an FDA-mandated disclosure about the place of business of the product's manufacturer, packer, or distributor, claiming that the spice manufacturer's statement that the product is "Packed in USA" is tantamount to an admission the product is not grown in the United States. The plaintiff seeks to represent New York and multistate classes of consumers who are similarly hot under the collar about their New Mexico chile pods.

If you're suddenly experiencing déjà vu, thinking "I've heard this before," you are not entirely wrong. The June 2023 edition of the *Digest* featured an article on a similar lawsuit filed in May 2023 with identical claims.

Déjà Vu All Over Again

Smith v. Sazerac Company Inc., No. 9:23-cv-80876 (S.D. Fla. Jun. 5, 2023).

Speaking of déjà vu, are you longing for another entry in the long line of Fireball cases? How about perusing the allegations of yet another complaint from Spencer Sheehan? Well, you've come to the right place, because Sheehan is back with another near-copy-and-paste job filed in the Southern District of Florida alleging that the defendant's Fireball Cinnamon product misleads consumers into believing they're purchasing Fireball Cinnamon Whisky.

Just how similar, you wonder? We're glad you asked. A previous complaint—the "Goodness Gracious, *No* Balls of Fire" article from our May 2023 edition—featured the same consumer review (noting the lack of a "great ball of fire traversing your neck") and the same geographic landmarks (i.e., that Poughkeepsie, NY is "[n]ot far from this Court" and a radio station in Albany, NY being "[u]p in the Capital Region") that presumably would play slightly better with a federal judge in New York than in West Palm Beach.

The complaint relies on the refrain that the Fireball Cinnamon product's labeling is misleading, as is the fact that the malt beverage product is sold in "mini" bottles that are typically associated with distilled spirits. The plaintiff seeks to represent both a national class (for fraud and unjust enrichment) and a Florida subclass (for violations of Florida's consumer protection laws, fraud, and unjust enrichment). While we jest about the onslaught of complaints, this line of cases has been heating up, with one recently making it past the motion to dismiss stage.

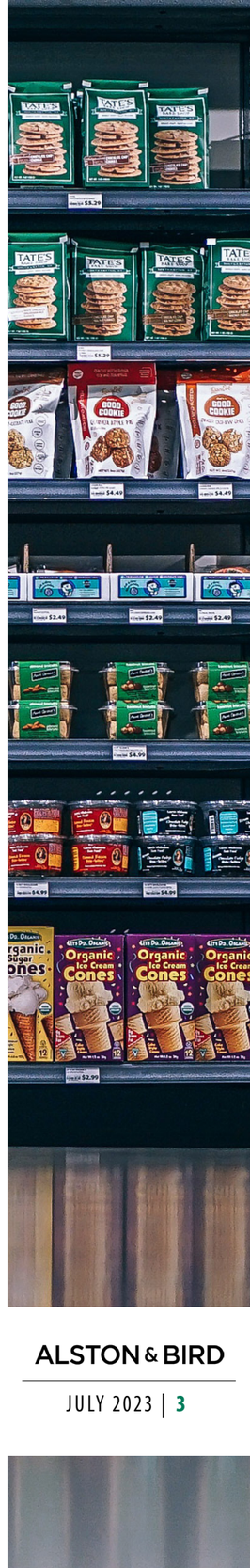
This Kombucha Lawsuit Is a Total Buzzkill

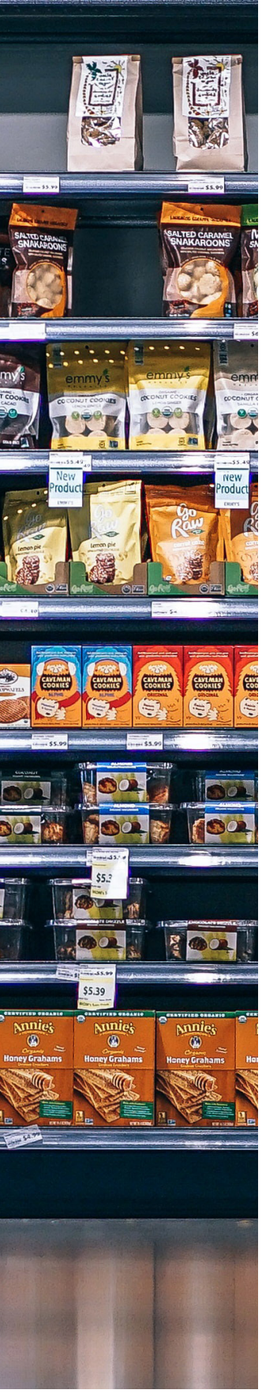
Renn v. Otay Lakes Brewery LLC, No. 3:23-cv-01139 (S.D. Cal. Jun. 20, 2023).

Call the fun police. A California resident has sued a line of canned alcoholic kombuchas because they are labeled as "good for you" and as promoting "health, balance, and goodness" in a fizzy—and boozy—beverage. No, lawyers are not in a fight against all things "health" and "goodness," though one could be forgiven for thinking so.

In reality, the complaint alleges, these prominently labeled "Alcoholic Kombucha" products are misleading because they contain *alcohol*—and alcohol can be bad for you. The plaintiff seeks to represent a nationwide class and a California subclass of purchasers of the kombucha products for violations of California's consumer protection laws, breach of warranty, misrepresentation, and unjust enrichment.

Though the complaint is replete with statistics on the deleterious health effects of alcohol consumption, the allegations about how consumers might be misled by the product's labeling are of a much lower proof. The defendant seems to think so—on July 14, it filed a motion to dismiss the allegations in their entirety. We'll keep an eye on these arguments.





Buyer Brings the Beef About Bundled Boondoggle

Cirrito v. GSK Consumer Health Inc., No. 1:23-cv-00491 (W.D.N.Y. June 5, 2023).

With summer in full swing, most are content to forget the sniffles and sneezes that inevitably accompany gray and gloomy weather. For one plaintiff in upstate New York, however, a break from cold and flu season is not a break from thinking about nonprescription treatments for the cold and flu. While the plaintiff does not challenge the benefits of bundling under a blanket with a cup of hot tea and a good book, she takes issue with a drug manufacturer's bundling of Theraflu with Emergen-C in a "convenience pack."

According to the complaint, there is no proof that vitamin C supplements reduce cold and flu symptoms, despite the widespread belief that vitamin C helps fight the cold and flu. By selling Theraflu and Emergen-C together, the complaint alleges, consumers expect that Emergen-C is as effective at treating these symptoms as Theraflu, causing them to pay more for the bundle than they otherwise would have. The plaintiff brings claims for violation of the New York General Business Law and of consumer fraud statutes in six other states, breaches of warranty, fraud, and unjust enrichment, and she seeks to represent both a New York class and a consumer fraud multistate class. The complaint seeks monetary, statutory, and punitive damages, as well as an award of attorneys' fees and costs.

The Chronicles of a Plaintiff and a DL-Malic Acid Claim

Lozano v. Ferrara Candy Company, No. 2:23-cv-04670 (C.D. Cal. June 14, 2023).

Another month, another almost-identical DL-malic acid lawsuit brought by the same attorney. This time, neither our fitness enthusiast nor his friend are responsible. No, dear reader, this time we have an exciting new plaintiff. This plaintiff makes almost identical allegations as our fitness enthusiast and his friend, except that this lawsuit involves fruit snacks rather than dietary supplements.

The plaintiff makes the all-too-familiar argument that the fruit snacks' label is misleading because it claims that the products are "Naturally Flavored" and "Made With Real Fruit Juice" when in fact the products allegedly contain (drumroll please) DL-malic acid, an artificial flavoring. Like the fitness enthusiasts and friends of yore, the plaintiff makes the exact same arguments that DL-malic acid is artificial flavoring derived from petrochemicals and that it is not a "natural flavor" as defined by federal and state regulations. Similar to the other lawsuits, the plaintiff seeks to certify a California class, bringing claims under California's consumer protection laws, as well as unjust enrichment and breach of express warranty. Will this plaintiff be more successful than our fitness enthusiast and his friend (check out the Motions to Dismiss section to learn their fate)? Will there be another plaintiff thrown into the mix? Time will tell. One thing's for sure: the *Digest* will be covering it all.

Consumer to "Natural Flavored" Kombucha Drink: This Is Pear-sonal!

Dawson v. Better Booch LLC, No. 3:23-cv-01091 (S.D. Cal. June 12, 2023).

A California kombucha purchaser was pear-plexed when she learned that her "Golden Pear" kombucha drink did not contain real pears. While the ingredient list states that the drink contains "natural pear flavor," the plaintiff alleges that FDA regulations require the product to state that it is "naturally flavored" or "artificially flavored" on the front of the packaging. Comparing competitor products that contain this disclaimer or are otherwise free from "natural flavors," the plaintiff alleges this kombucha manufacturer reaps financial benefits at the expense of pear lovers in California and nationwide.

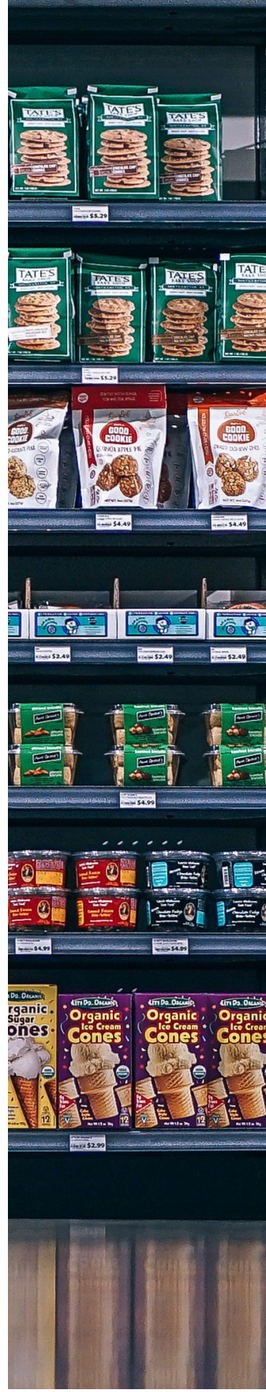
The complaint alleges that the plaintiff paid a premium for the popular drink product but would not have had she known that the flavor was derived from natural pear flavor, rather than real pears. The complaint raises claims for violations of various California consumer protection statutes, breach of express warranty, and unjust enrichment.

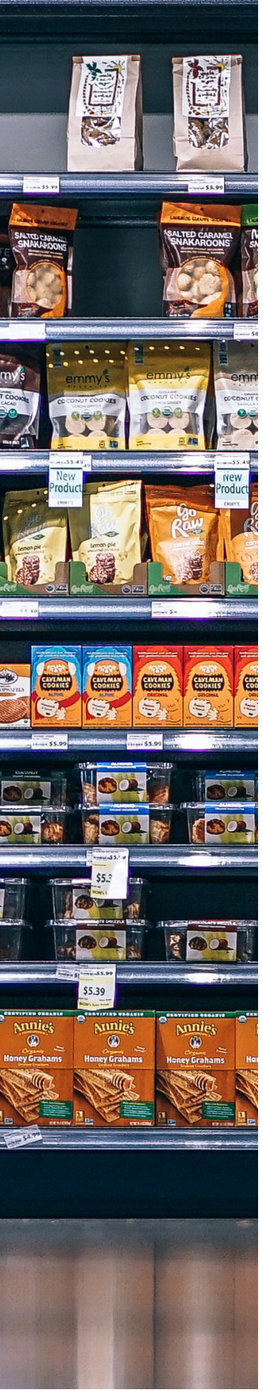
A Tale as Old as Time: A New Yorker Wants More Coffee

Nupp v. The J.M. Smucker Company, No. 4:23-cv-00443 (W.D. Mo. June 22, 2023).

We first covered this litigation against a coffee giant in June 2020 and again in May 2021 when several cases were consolidated into a multidistrict litigation in Missouri federal court. This complaint adds yet another suit to the (coffee) pot to try to save the plaintiffs' claims under New York consumer protection laws and for breach of warranty. In this new complaint, the plaintiff was sure to allege that she provided pre-suit notice to support her express and implied warranty claims in addition to allegations of violations of various New York consumer protection statutes.

Just nine days after the court granted the defendants' partial motion to dismiss in June 2023, plaintiffs' counsel was able to find another New Yorker who loves coffee and hates being misled (allegedly) about the amount of coffee the classic red can of coffee grounds can make. The complaint (just like others in the MDL) alleges that the prominent coffee manufacturer has deceived its customers by "grossly overstat[ing]" the number of cups of coffee the product can actually produce. The New York coffee drinker claims that the math isn't mathing—even if she followed the instructions on the product, the coffee can purportedly does not contain enough ground coffee to make the number of servings it claims on its packaging.





Lawsuit Claims Lozenges' Labeling (Cough) Drops the Ball

Jordan v. Ricola USA Inc., No. 3:23-cv-03212 (C.D. Ill. June 19, 2023).

A putative class action in Illinois federal court accuses a cough drop manufacturer of deceiving consumers into thinking its products' effectiveness is attributable to peppermint, sage, thyme, and linden flower, herbal ingredients whose images are depicted on the front label. Accompanying these images are the labeling claims "Cough Suppressant," "Oral Anesthetic," "Effective Relief," and "Made With Swiss Alpine Herbs." But according to the complaint, the herbs allegedly provide no therapeutic effect, and the products' back label identifies menthol as the only active ingredient. Based on these allegations, the complaint seeks to certify an Illinois class for claims for violation of Illinois's consumer protection laws and unjust enrichment.

Pop Goes the … PFAS?

Santiago v. Campbell Soup Co., No. 4:23-cv-03295 (N.D. Cal. June 30, 2023).

A pair of popcorn-loving plaintiffs claim in a new suit that the defendants' line of premium microwave popcorn products contains unlawful levels of per- and polyfluoroalkyl substances (PFAS)—so-called "forever chemicals" because they break down very slowly and can accumulate in the body. The complaint alleges that labeling claims such as "Premium," "100% Whole Grain," and "No Artificial Preservatives Flavors Dyes" mislead reasonable consumers to conclude that the products do not contain potentially harmful ingredients such as PFAS. Despite those claims, the plaintiffs allege that independent analytical testing demonstrated that the products contained over 175 times the permissible threshold of total fluorine content. Based on those claims, the plaintiffs seek to represent a California class of purchasers and allege violations of California's consumer protection laws and breach of implied warranties.

Malic Acid Flavoring on the DL

Lozano v. Pruvit Ventures Inc., No. 2:23-cv-04394 (C.D. Cal. June 5, 2023).

A California-based plaintiff alleges that certain of the defendant's dietary supplement powders are misbranded because the products' labeling claims represent that the products contain no artificial flavors, despite listing "malic acid" on the products' ingredient list. According to the complaint, independent third-party laboratory testing confirmed that the malic acid in these products is the synthetically derived DL-malic acid. The plaintiff further alleges that claims such as "no artificial flavors" are persuasive to consumers who seek out "clean" food and beverage products. And under FDA regulations, the plaintiff alleges that DL-malic acid cannot be considered a natural flavor, so its presence should have been disclosed to consumers and the products should have noted the use of artificial flavors.

The plaintiff seeks to represent a both a nationwide class and California subclass and asserts claims for violations of the Texas Deceptive Trade Practices Act and California consumer protection statutes, unjust enrichment, and breach of express warranty.

Motions to Dismiss

Procedural Posture: Granted

Airy Rice Pilaf Allegations Dismissed as Weightless

Abbott v. Golden Grain Company, No. 4:22-cv-01240 (E.D. Mo. June 13, 2023).

A Missouri resident's rice pilaf allegations were dismissed with prejudice after the named plaintiff—who sought to represent a class of rice pilaf lovers—could only speculate about the harm he suffered when he received less rice than he purportedly bargained for. The plaintiff contended that he was "disappointed" that the box of rice pilaf he purchased was mostly empty, with only one-third of the box filled with uncooked rice, and claimed that the product's value "was materially less than its value as represented by Defendant." Based on those allegations, the plaintiff asserted claims for violation of the Missouri Merchandising Practices Act (MMPA), breaches of various warranties, negligent misrepresentation, fraud, and unjust enrichment.

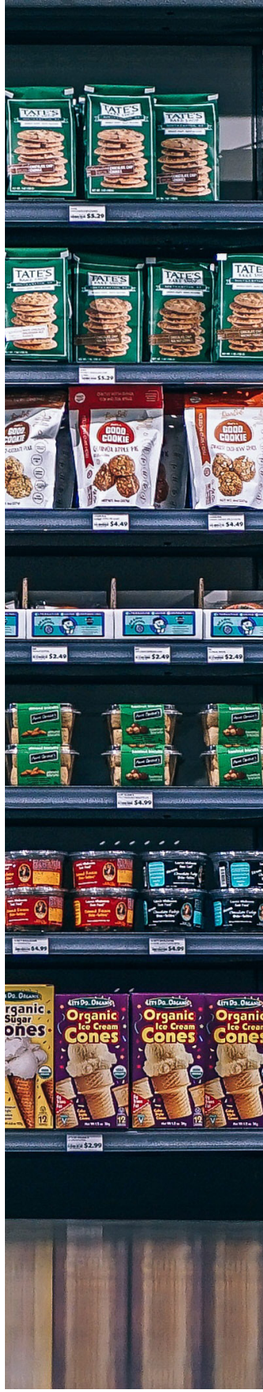
Despite accepting as true the plaintiff's well-pleaded factual allegations, the court explained that it could not credit the plaintiff's "speculation on the interplay between the price and size of" the rice packages. After providing a healthy serving of statutory interpretation, the court explained why it found no grain of truth in the plaintiff's allegations: the defendant accurately represented the product's contents by: (1) disclosing that it weighed 6.09 ounces; (2) using a fill line to show how much grain was inside; and (3) disclosing that the product was "sold by weight not by volume."

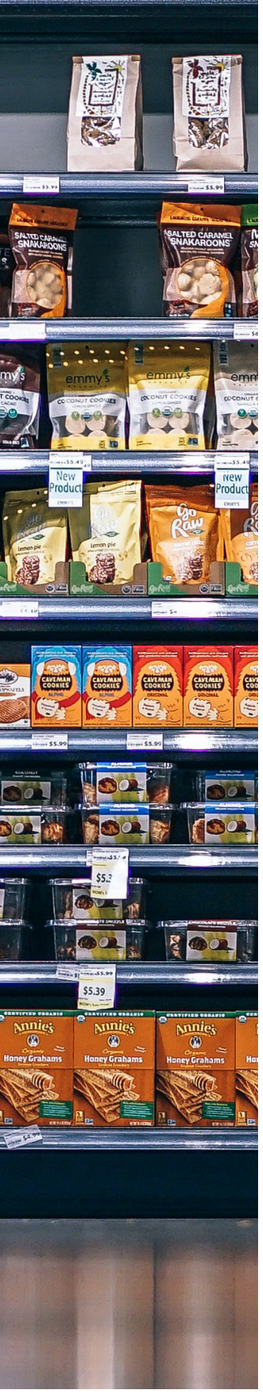
Accordingly, the court concluded that the plaintiff failed to identify an ascertainable loss for purposes of the MMPA because he did not plausibly allege that the defendant represented its package would contain more than 6.09 ounces of rice pilaf. Because the plaintiff ignored the prominent disclosures and failed to act as a reasonable consumer would—"[b]y reading the package"—the court determined that the plaintiff's allegations did not *rice* to the occasion. The court also poured out the plaintiff's warranty claims for failure to comply with Missouri's pre-suit notice requirements, his negligent-misrepresentation claim based on the economic-loss doctrine, and his fraud claim because he failed to plausibly allege a false representation, knowledge, intent, or injury.

Fitness Enthusiast Ordered to Re-rack

Scheibe v. Performance Enhancing Supplements LLC, No. 3:23-cv-00219 (S.D. Cal. June 5, 2023).

Fervent Digest readers will recall our coverage of the lawsuit-pumping plaintiff who has been super-setting lawsuits against a wide variety of dietary supplement makers, alleging that their naturally labeled products are misleading because the supplements contain DL-malic acid, an allegedly artificial flavoring (see here, here, and here for more). The complaints are essentially carbon copies of each other, consisting of identical allegations. While the plaintiff appears confident that his progressive overload strategy will work, one court ordered a deload week—dismissing his claims in full, but granting leave to structure a new program (amend).





In its dismissal order, the court first racked all seven of the plaintiff's claims for failing to satisfy the heightened pleading standard for fraud-based claims. Specifically, the court took issue with the complaint's laboratory-testing claims, pointing out that the plaintiff failed to plead what specific products were tested, when they were tested, and what laboratory performed the alleged testing. The court also found that, as we predicted, the plaintiff lacks standing to pursue injunctive relief, particularly because the plaintiff did not allege that he sought or intended to purchase the products again in the future. The court next dismissed the plaintiff's claims to the extent they sought equitable relief because the plaintiff failed to allege the inadequacy of a legal remedy. Closing out its own legal superset, the court determined that the plaintiff's claims were preempted by federal law because the product's listing of the ingredient as "malic acid" was consistent with the federal requirement that a food be listed by its common or usual name.

Taking full advantage of its ordered rest week, the plaintiff availed himself of the court's opportunity to amend his complaint. In his amended complaint, the plaintiff maintained much of his former program but added two new sets. First, he stated exactly which products were tested and when they were tested at the laboratory. However, he failed to identify which laboratory performed that testing. Second, he added an allegation that he was unable to rely on the products' advertising in the future and would not purchase the products although he "would like to."

We'll keep tabs on this plaintiff's legal fitness journey and be sure to alert readers whether the court approves the amended program.

Procedural Posture: Denied

A *Sweet* Result for a Monk-Fruit-Seeking Plaintiff

Scott v. Saraya USA Inc., No. 3:22-cv-05232 (N.D. Cal. June 5, 2023).

A California federal court crystallized the plaintiff's amended claims against a defendant manufacturer of monk fruit products in an order denying the defendant's motion to dismiss. After dismissing her claims once with leave to amend, the court gave the plaintiff some sugar, finding her amended allegations plausible. In the amended complaint, the plaintiff alleges that the defendant's monk fruit products misled consumers into believing that its products were sweetened predominantly or solely with monk fruit, despite the fact that the products' primary sweetening ingredient is erythritol, a sugar alcohol, and notably *not* monk fruit.

The plaintiff based her claims on the products' front-of-package statements that read "sweetened with monk fruit" and "no sugar added." In upholding the plaintiff's consumer protection claims, the court concluded that consumers would understand the defendant's labeling statements to mean that the products are not sweetened with sugar. Then consumers would see the only other "piece of information" about a sweetener alternative referencing "monk fruit" on the front label. Based on this, the court held that the plaintiff plausibly alleged that the front label could mislead reasonable consumers to believe that the defendants' products were sweetened only, or predominantly, with monk fruit.

Significantly, the court rejected the defendant's counterarguments claiming that the ingredient list on the back label discloses the presence of erythritol as the primary sweetener and dispels any alleged misrepresentation on the front label. Finding support in Ninth Circuit case law, the court held that the products' back-label ingredient list was not enough to save the affirmative misrepresentations on the products' front label and allowed each of the plaintiff's claims to survive dismissal. We'll keep tabs on this one, while the plaintiff rides her (monk fruit) sugar high in the meantime.

Voluntary Dismissals

A roundup of voluntarily dismissals entered in some of the cases we've covered over the last few summer months:

Sumner v. Kroger Co., No. 3:22-cv-01950 (S.D. Ill. June 13, 2023).

Batey v. GSK Consumer Health Inc., No. 4:23-cv-04031 (C.D. Ill. June 16, 2023).

Smith v. The Coca-Cola Co., No. 0:22-cv-61643 (S.D. Fla. July 11, 2023).

Manier v. La Fermiere Inc., No. 5:22-cv-01894 (C.D. Cal. May 2, 2023).

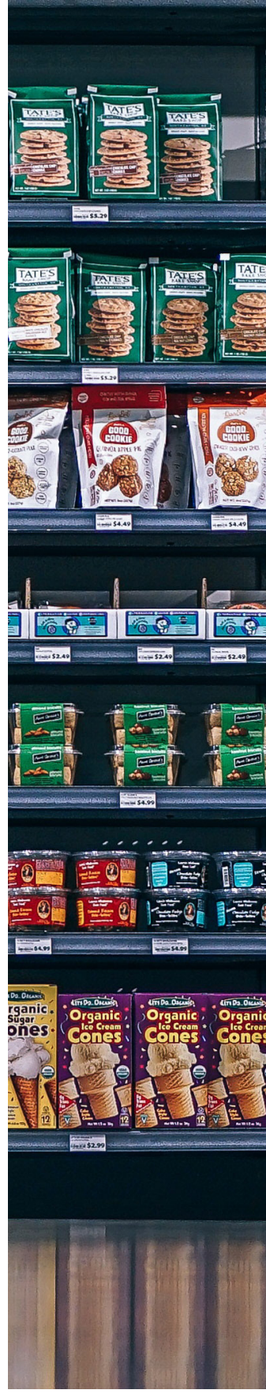
Settlements

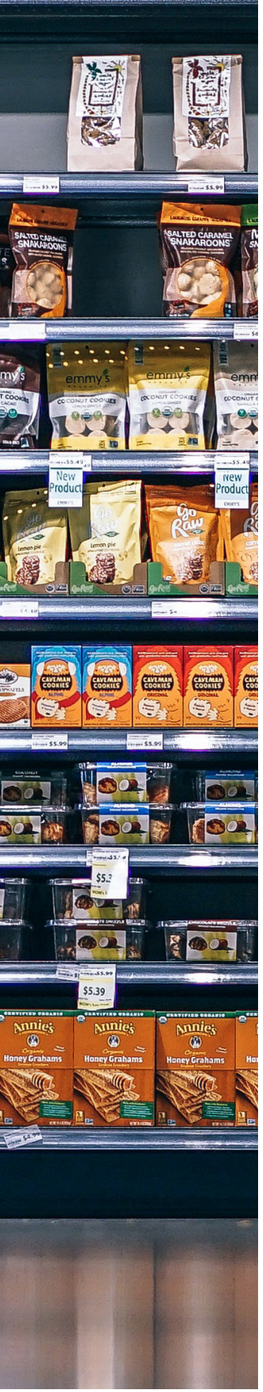
"Aged Vanilla" Case Matures Toward Settlement

Sharpe v. A&W Concentrate Co. and Keurig Dr Pepper Inc., No. 1:19-cv-00768 (E.D.N.Y. June 5, 2023).

This vanilla suit has finally reached the end of the road. After aging in federal district court for over four years, a lawsuit challenging soft drinks'"Made with Aged Vanilla" claims as deceptive appears close to resolution. The plaintiffs originally filed suit in 2019, claiming that two major beverage companies deceived consumers into believing that their root beer and cream soda were made with real vanilla, when they were actually made with a chemical flavoring compound manufactured to mimic the taste of vanilla. Settlement of this matter comes after the defendants' two separate attempts to dismiss the case, a motion for summary judgment, two motions for class certification, mediation, and discovery.

In its order granting preliminary approval of settlement, the court explained that the nationwide class covers all consumers in the United States who purchased the beverages from February 7, 2016 to June 2, 2023. Under the proposed $15 million settlement total, each class member will be refunded a minimum of $5.50 and up to $25 (provided they demonstrate proof of purchase), the three class representatives will receive an award of $5,000 each, and attorneys' fees and expenses will be determined before the hearing on final approval.





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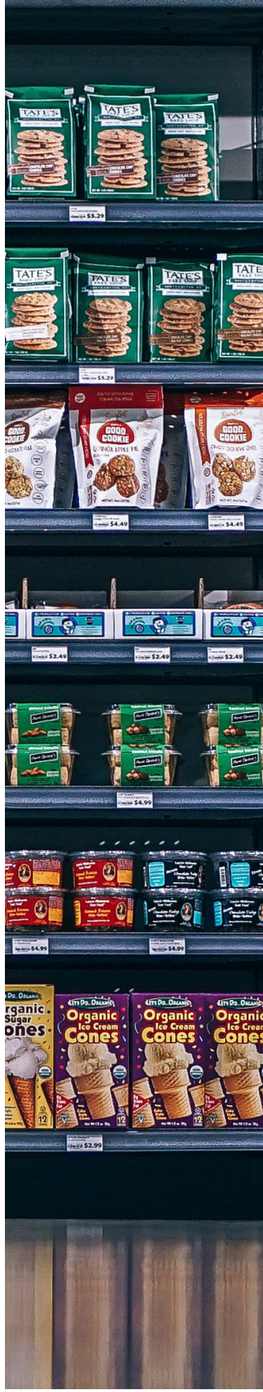
Learn more about our Food & Beverage Team



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