# Introduction to F&B Advertising: An Ounce of Prevention

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# The Importance of Compliant Advertising

- Educates, motivates customers; drives sales
- But advertising is a magnet for litigation
- Government and competitor enforcement
- Class Action Litigation
- **Today:** FTC basics; Lanham Act basics; SRO Basics; and state consumer class actions

# Federal Trade Commission

- Federal Trade Commission Act:  15 U.S.C. §§41-58
- §45(a)(1):  Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
- §45a: FTC has authority over product labels to the extent that they display “Made in the U.S.A.”
- Rule and Guides:  https://www.ftc.gov/enforcement/rules/rules-and-guides
- Advertising guidance on “green” claims, endorsements & testimonials.
- No private right of action

# FTC or FDA: Who regulates what?

- FDA: regulates labels, websites cited on labels
- FTC: regulates advertising other than label claims
- FDA/FTC Memorandum of Understanding: https://www.fda.gov/about-fda/domestic-mous/mou-225-71-8003
- Often regulate together
- Joint warning letter to CBD Mfr: https://www.ftc.gov/system/files/attachments/press-releases/ftc-fda-warn-florida-company-marketing-cbd-products-about-claims-related-treating-autism-adhd/cbd_warning_letter_10-22-19.pdf
- Joint warning letters to dietary supplement Mfrs: https://www.steptoe.com/en/news-publications/government-issues-warnings-on-dietary-supplements-whats-next.html

# “Deceptive Acts and Practices”

- FTC Statement on Deception (10/14/83): https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception
- *First*, there must be a representation, omission or practice that is likely to mislead the consumer.
- *Second*, we examine the practice from the perspective of a consumer acting reasonably in the circumstances. If the representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of that group.
- *Third*, the representation, omission, or practice must be a "material" one.
- “Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark. Is it therefore an actionable deception to advertise "Danish pastry" when it is made in this country.? Of course not.”

# Prior/Substantiation Requirement

- Advertisers must have substantiation for claims at the time they are made.
- FTC Policy Statement (11/23/84): https://www.ftc.gov/public-statements/1984/11/ftc-policy-statement-regarding-advertising-substantiation
- Practical Guidance: https://www.ftc.gov/sites/default/files/attachments/training-materials/substantiation.pdf

- *FTC v. QT Inc.* 512 F. 3d 858 (7th Cir. 2008) (dismantles quack studies for benefits of bracelets that purportedly relieved pain; also finding the "placebo effect" an insufficient scientific basis to substantiate claims.)
- *Pom Wonderful LLC v. FTC*, 777 F. 3d 478 (D.C. Cir. 2015) (debunks scientific basis for claimed health benefits of pomegranate juice, but rejected FTC's "two RCT studies" standard.)

# Exemplar: Federal Trade Commission v. Gerber Products

- FTC brought action against Gerber for claiming that its “Good Start” prevents allergies, or reduces risk.
- FDA had previously rejected most of Gerber’s application to make a qualified health claim, finding that only one claim about dermatitis had scientific support, which it characterized as “very little.”
- Gerber advertised allergy and FDA approval claims.
- FTC filed Complaint in 2014: https://www.ftc.gov/news-events/press-releases/2014/10/ftc-charges-gerber-falsely-advertising-its-good-start-gentle
- Consent Judgment entered in 2019: https://www.ftc.gov/news-events/press-releases/2019/07/ftc-approves-stipulated-order-settling-charges-against-gerber
- Gerber agreed to refrain from allergy and disease prevention claims until they were supported by random, double blind, placebo controlled study.

# Actions Between Competitors: Lanham Act

- 15 U.S.C. §1051 et seq.
- 15 U.S.C. §1127(a)(1)(B): Right of action for businesses where a speaker makes false or misleading descriptions/representations of fact in commercial advertising, which misrepresent the nature, characteristics, qualities of the speaker's goods, or those of another.
- Exemplar Cases
- *Pom Wonderful LLC v. Coca Cola Co*., 134 S. Ct. 2228 (2014) (Coca cola's images on label of Minute Made pomegranate blend, although compliant with FDA regulations, could nevertheless be misleading; Lanham Act and FDCA operate in parallel; competitors, more than FDA, are in position to detect and curtail advertising deceptive to consumers.)
- *Mead Johnson & Company v. Abbott Laboratories*, 201 F. 3d 883 (7th Cir. 2000) (truthful information is not actionable just because it is misunderstood by listeners)

# National Advertising Division

- Lanham actions are extremely expensive to prosecute.
- BBB National Programs runs NAD: https://bbbprograms.org/programs/nad/nad-contact-us
- Industry Self Regulatory Organization – allows competitors a fast and comparatively inexpensive forum to challenge claims of competitors.
- NAD also has authority to conduct its own investigations.

# NAD Procedures

- Procedural guidance: http://asrcreviews.org/asrc-procedures/
- Challenger initiates process by filing a letter complaint, 20 pages or less, with supporting evidence.
- NAD decides whether to open a proceeding (several limitations on what it will handle.)
- Advertiser gets 15 business days for its response;
- Challenger gets 10 business days for a reply.
- Advertiser gets 10 business days for a sur-reply.
- A meeting with the parties may occur.
- NAD issues decision within 20 days of last submission or meeting.
- Advertiser makes a statement where NAD concludes that claims not substantiated.
- Possibility of appeal to National Advertising Review Board (NARB)

# NAD Wrinkles

- Decisions are made public through press statements and in case reports, available by subscription.
- If advertiser declines to abide by decision, NAD may report it to relevant government agencies.
- Failure to abide by agreement to modify advertising can also result in referral.
- Parties may not issue press releases regarding decisions, cannot mischaracterize proceeding or outcome.

# *Campbell v Progresso*

# Appeal to Small Town Values

- NAD Case 5940 (3/16) - Campbell Soup challenge to Progresso's "Vineland NJ" claims.

| "Vineland NJ – Home of Progresso" | "Vineland NJ – where P Light soups are Made" | "Vineland is where great produce is sourced" |
|---|---|---|
| OK | needed to be qualified | Not OK |

# Children's Advertising Review Unit (CARU)

- Also run by BBB National Programs
- Focuses on advertising to children below 12, and privacy of children below 13.
- Same dispute resolution procedures as NAD.
- CARU Guidelines: https://www.asrcreviews.org/wp-content/uploads/2012/04/Self-Regulatory-Program-for-Childrens-Advertising-Revised-2014-.pdf
- Provide substantive guidance on:
  - preventing deception
  - proper nutrition and diet
  - endorsements
  - sweepstakes and contests
  - safety

# Kellogg Fruit Snacks Made With "Real Fruit"

- 2016 Case – CARU monitoring of advertising
- Front package said "Made with Real Fruit" inside image of an apple
- Side package revealed fruit content was 20%.
- CARU recommended changes in light of implied message that amount of fruit was substantial.
- Kellogg agreed to the change.
- Press release: http://asrcreviews.org/caru-recommends-kellogg-revise-product-packaging-for-fruit-flavored-snacks-company-agrees-to-do-so/

# Conflict driving F&B Class Actions

- **Consumers want:**

- Healthy
- Simple
- Inexpensive
- Transparent

- **Food production is:**

- Industrial
- Technology/Science based
- Beyond experience of public

# Dispute as to health benefits?

- What's healthy and what isn't?
  - Saturated fats/nuts?
  - GMOs?
  - Organic?
  - Added Sugar/HFCS?

# Features of F&B Class Litigation

- Most cases involve small per person damages
- Big multipliers – lots of people, many sales
- Allege false, deceptive, misleading, illegal, “unfair” conduct
- “You charged a premium,” “I wouldn’t have paid as much,” etc…
- Damages - full or partial refunds, agreements to discontinue claims
- Settlements driven by corporate risk – where potential damages are huge, even bogus claims can win hefty payments

# California's Unfair Competition Law (B&PC §17200)

- Prohibits any "Unlawful, unfair or fraudulent business act or practice, and unfair, deceptive, untrue or misleading advertising."
- Permits equitable relief, including injunctions and restitution "as may be necessary to restore to any person any money or property which may have been acquired by means of unfair competition."
- Deception – "likely to mislead a substantial portion of the target audience."
- Reliance not required except for class representative.
- Materiality viewed under objective standard.
- Unlawfulness claims often rest on alleged regulatory violations.
- Lack of substantiation not a basis for a claim of deception.

# Consumer Legal Remedies Act (CLRA) – Civ. Code §1750

- **Prohibits specific practices including**
  - Misrepresenting source, sponsorship, approval or certification of goods
  - Deceptive statements/designations of origin
  - Representing that goods have characteristics, ingredients, benefits, quantities they do not
  - Misrepresenting goods are of particular standard, quality, grade
  - Advertising goods without intent to sell as advertised

- **Private right of action requires "damage"**
  - Reliance required but rebuttable presumption based on "materiality"
  - Wide range of remedies
  - Pre-suit notification required to state claim for damages
  - Attorneys fees for prevailing plaintiff

# FIELD GUIDE
# TO F&B CLASS ACTION LAWSUITS

And why most of them are **stupid**

# “FALSE AND MISLEADING TO A REASONABLE CONSUMER”

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# Is this a healthy product?

# What about this one?

# I Only Eat “Natural” Products

# Does Your Food Contain Nasty Stuff?

# Is HFCS “Natural”?

# “Simply” not true?

# Is It "All Natural Fruit" If It Contains Synthetic Citric and Ascorbic Acid?

# What is “Real Ginger”?

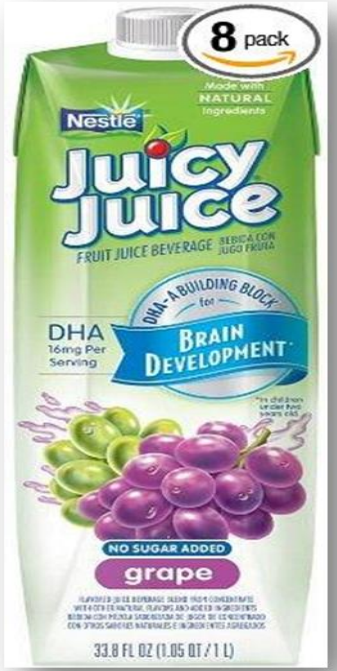
# A Marketing Term that Occasionally Makes Something Sound More Appetizing – “Handmade”

# FALSE/MISLEADING B/C BENEFITS NOT SUBSTANTIATED

# Does the Product Have Enough of The Good Stuff to Produce A Benefit?

# Or does it give you something you already have enough of?

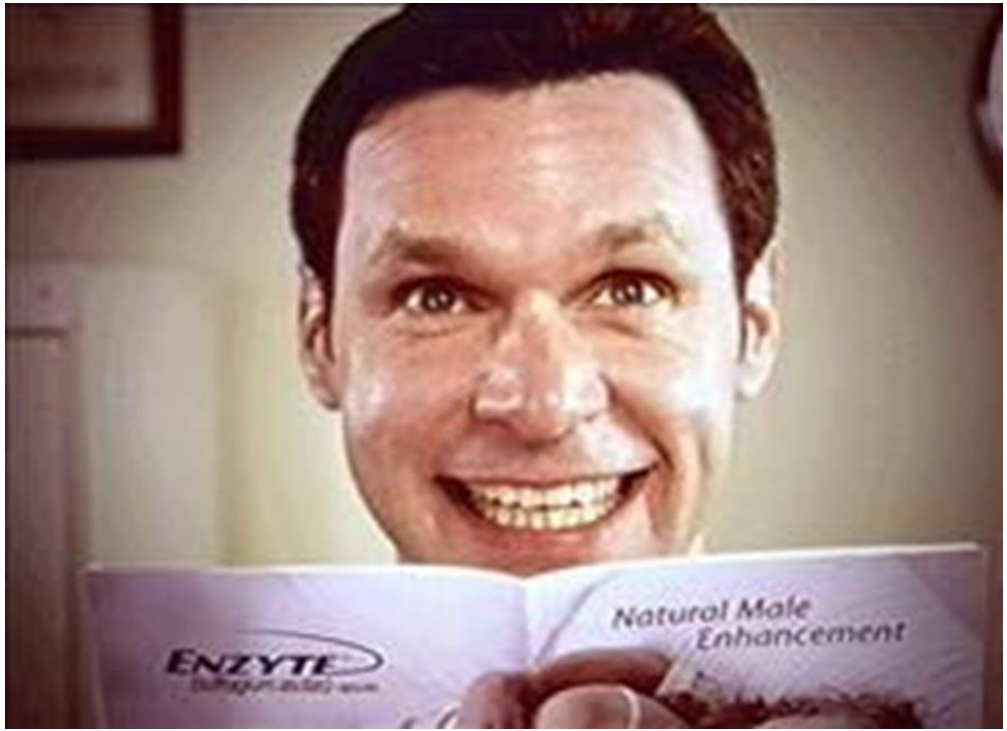

# Has the benefit been proven?



# In the amount delivered?

# In the right age group?

# “Structure and Function” – Some products just don’t work as advertised

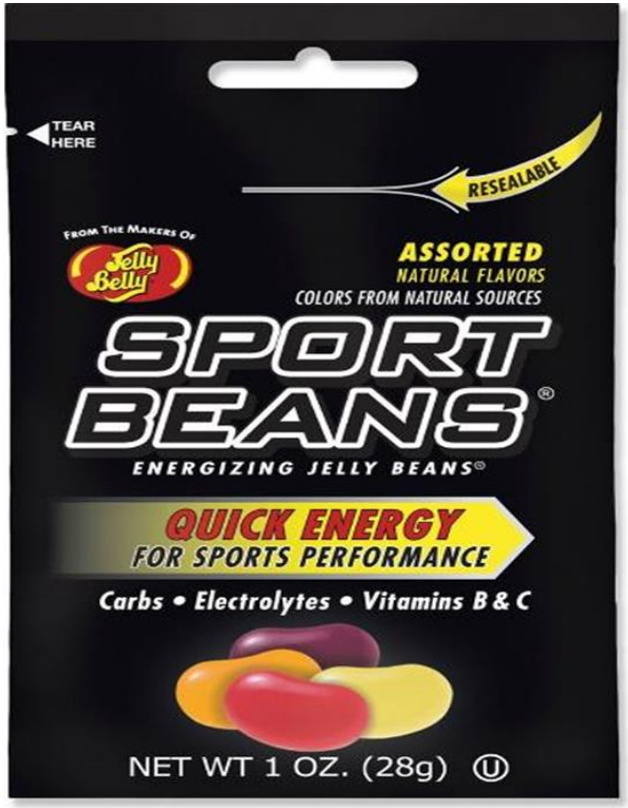


# But then again, who would ever want to file a proof of claim?!

# STATEMENTS OF IDENTITY

# I Love Evaporated Cane Juice But I Hate Sugar!

# Wait, There's Sugar in Jelly Beans?!



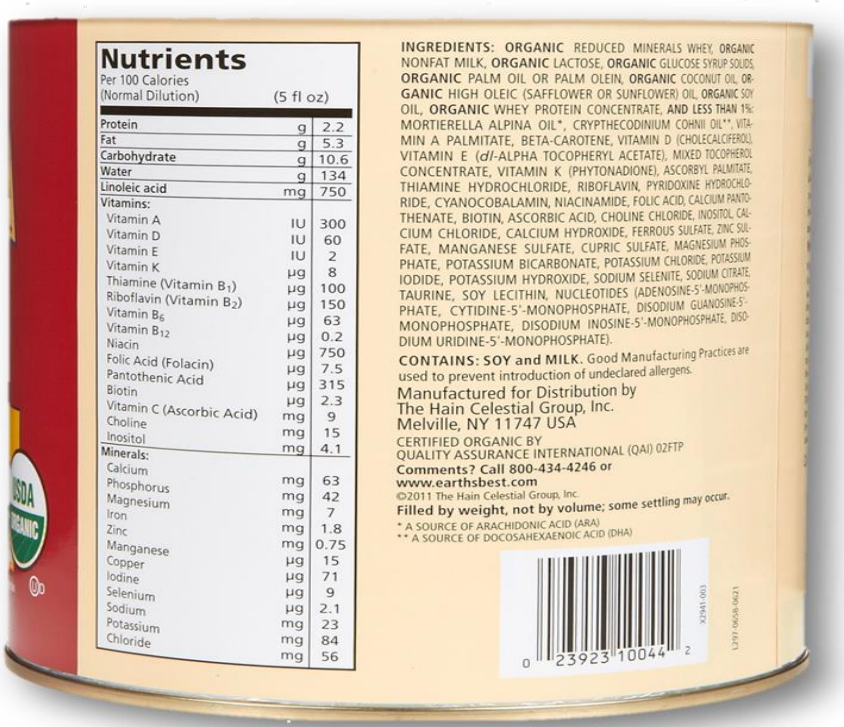
# Is the Olive Oil Still Virgin?

# Don’t Call Me “Honey”

# FAILURE TO CONFORM TO CERTIFICATION REQUIREMENTS

# I Wanted Organic!

# This Stuff Has A Lot of Ingredients With Funny Names (All Required By Law)



**Nutrients**

Per 100 Calories (Normal Dilution) (5 fl oz)

| | | |
|---|---|---|
| Protein | g | 2.2 |
| Fat | g | 5.3 |
| Carbohydrate | g | 10.6 |
| Water | g | 134 |
| Linoleic acid | mg | 750 |
| Vitamins: | | |
| Vitamin A | IU | 300 |
| Vitamin D | IU | 60 |
| Vitamin E | IU | 2 |
| Vitamin K | µg | 8 |
| Thiamine (Vitamin $B_1$) | µg | 100 |
| Riboflavin (Vitamin $B_2$) | µg | 150 |
| Vitamin $B_6$ | µg | 63 |
| Vitamin $B_{12}$ | µg | 0.2 |
| Niacin | µg | 750 |
| Folic Acid (Folacin) | µg | 7.5 |
| Pantothenic Acid | µg | 315 |
| Biotin | µg | 2.3 |
| Vitamin C (Ascorbic Acid) | mg | 9 |
| Choline | mg | 15 |
| Inositol | mg | 4.1 |
| Minerals: | | |
| Calcium | mg | 63 |
| Phosphorus | mg | 42 |
| Magnesium | mg | 7 |
| Iron | mg | 1.8 |
| Zinc | mg | 0.75 |
| Manganese | µg | 15 |
| Copper | µg | 71 |
| Iodine | µg | 9 |
| Selenium | µg | 2.1 |
| Sodium | mg | 23 |
| Potassium | mg | 84 |
| Chloride | mg | 56 |

**INGREDIENTS:** **ORGANIC** REDUCED MINERALS WHEY, **ORGANIC** NONFAT MILK, **ORGANIC** LACTOSE, **ORGANIC** GLUCOSE SYRUP SOLIDS, **ORGANIC** PALM OIL OR PALM OLEIN, **ORGANIC** COCONUT OIL, **ORGANIC** HIGH OLEIC (SAFFLOWER OR SUNFLOWER) OIL, **ORGANIC** SOY OIL, **ORGANIC** WHEY PROTEIN CONCENTRATE, **AND LESS THAN 1%:** MORTIERELLA ALPINA OIL*, CRYPTHECODINIUM COHNII OIL**, VITAMIN A PALMITATE, BETA-CAROTENE, VITAMIN D (CHOLECALCIFEROL), VITAMIN E (*dl*-ALPHA TOCOPHERYL ACETATE), MIXED TOCOPHEROL CONCENTRATE, VITAMIN K (PHYTONADIONE), ASCORBYL PALMITATE, THIAMINE HYDROCHLORIDE, RIBOFLAVIN, PYRIDOXINE HYDROCHLORIDE, CYANOCOBALAMIN, NIACINAMIDE, FOLIC ACID, CALCIUM PANTOTHENATE, BIOTIN, ASCORBIC ACID, CHOLINE CHLORIDE, INOSITOL, CALCIUM CHLORIDE, CALCIUM HYDROXIDE, FERROUS SULFATE, ZINC SULFATE, MANGANESE SULFATE, CUPRIC SULFATE, MAGNESIUM PHOSPHATE, POTASSIUM BICARBONATE, POTASSIUM CHLORIDE, POTASSIUM IODIDE, POTASSIUM HYDROXIDE, SODIUM SELENITE, SODIUM CITRATE, TAURINE, SOY LECITHIN, NUCLEOTIDES (ADENOSINE-5'-MONOPHOSPHATE, CYTIDINE-5'-MONOPHOSPHATE, DISODIUM GUANOSINE-5'-MONOPHOSPHATE, DISODIUM INOSINE-5'-MONOPHOSPHATE, DISODIUM URIDINE-5'-MONOPHOSPHATE).

**CONTAINS: SOY and MILK.** Good Manufacturing Practices are used to prevent introduction of undeclared allergens.

Manufactured for Distribution by
The Hain Celestial Group, Inc.
Melville, NY 11747 USA

CERTIFIED ORGANIC BY
QUALITY ASSURANCE INTERNATIONAL (QAI) 02FTP

**Comments? Call 800-434-4246 or www.earthsbest.com**



**Filled by weight, not by volume; some settling may occur.**

* A SOURCE OF ARACHIDONIC ACID (ARA)
** A SOURCE OF DOCOSAHEXAENOIC ACID (DHA)

0 23923 10044 2

# $7.5 MM Settlement

# DECEPTIVE

# Real Fruit?


Welch's
FAMILY FARMER OWNED
MIXED FRUIT
Fruit Snacks
100% Vitamin C
25% Vitamins A & E
FAT FREE
Gluten Free
No Preservatives
Made With
REAL Fruit

# And this?

# Unkind to Kind?

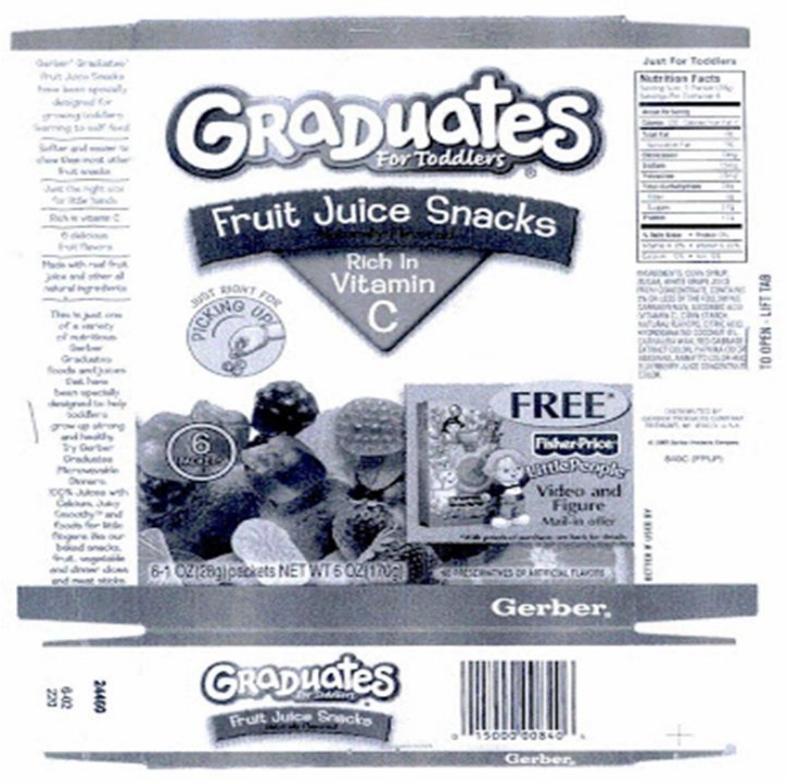
# INCONSPICUOUS DISCLAIMER OR QUALIFYING INFORMATION

# This is what customers saw in the store.

# On-line Disclaimers Said This

- “The meat and dairy products we buy come from animals that are not genetically modified. But it is important to note that most animal feed in the U.S. is genetically modified, which means that the meat and dairy served at Chipotle are likely to come from animals given at least some GMO feed.”
- “Many of the beverages sold in our restaurants contain genetically modified ingredients, including those containing high fructose corn syrup, which is almost always made from GMO corn.”

# *Williams v Gerber*: what's the label for?



# ALLEGED EXPOSURE TO TOXINS/ADULTERANTS

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# Glyphosate


Cheerios
General Mills
FAMILY SIZE 18 OZ
Cheerios
Toasted Whole Grain Oat Cereal
made with 100% WHOLE GRAIN OATS
CAN HELP lower CHOLESTEROL
SIMPLY MADE
Gluten Free
GROWN. MILLED. TOASTED.
NO ARTIFICIAL FLAVORS
NO ARTIFICIAL COLORS
PER 1 CUP SERVING
100 CALORIES
0.5g SAT FAT
140mg SODIUM
1g SUGARS
NET WT 1 LB 2 OZ (18 OZ) (510g)

# Apple Juice Contains Arsenic?

# Walgreen's Apple Juice

- Alleged to contain arsenic above levels approved by FDA for water.

**AMUSING THOUGHTS:**
1. The Arsenic was probably NATURAL.
2. Probably ORGANIC (as opposed to inorganic).

# 100%- NOT Parmesan Cheese

# LABEL ERRORS

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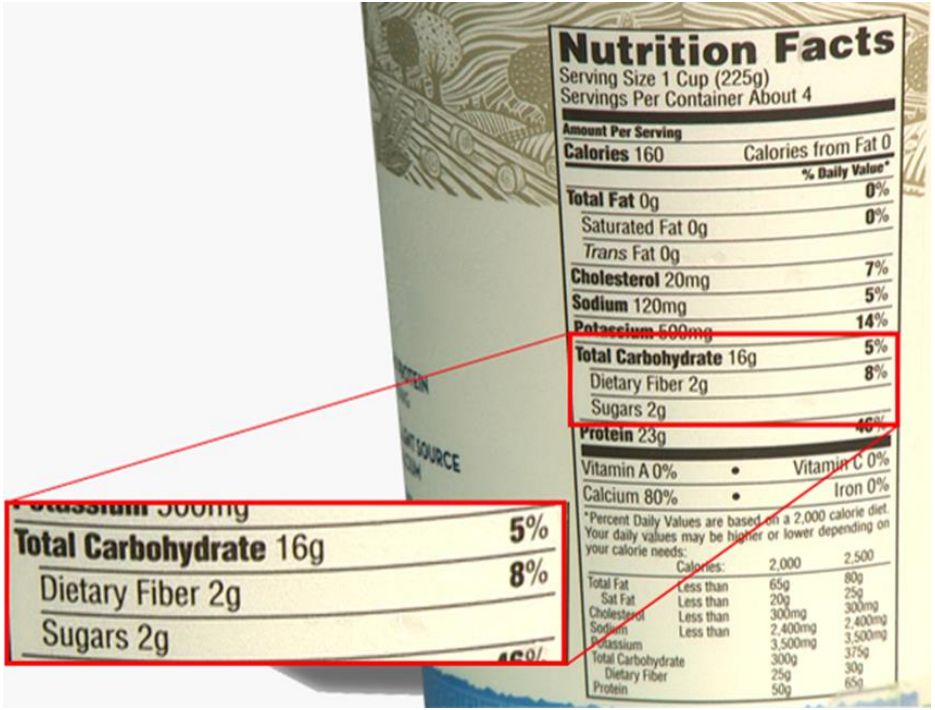
# Plain old mistakes – here, sugar in yogurt

6x > Sugar



# SERVING SIZE AND SLACK FILL

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# Inaccurate Weights and Measures

# 12 Million Reason$ that Charlie is $orry


Get $25 Cash

or

$50 in Product Coupons

# Cups Runneth Under

# Slack fill class actions…

- Too much (non functional) head room…

# Fool me once, fool me twice


★★★★★

# Size Matters –
# This  Footlong Is Only 11 Inches

# Allegedly Deceptive Trademarks

# A Trademark Can be An Advertisement

# Water from Poland Spring?

# DESIGNATIONS OF ORIGIN

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# Less Italian than “Imported from Italy” might suggest?

# Is this From Santa Fe

# Just Plain Silly

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# Another Illusion Shattered…

A fruit that is always in season.



OK, so maybe “Froot” was a clue.

# Well, Boo-Hoo, I’m a victim!

# The future? Expect more of this…

# Marketing departments will always market

- Food industry is highly competitive
- Public perception of link between diet and health has never been greater
- Key questions: what are the likely rewards of your claim, and what risk is your company willing to take?
- Making money is great, but not if you have to pay it back

# Motivated Adversaries

- Never assume that your practices/claims will escape scrutiny
- Class action lawyers will put you to your proof
- Product testing: trace substances, nutritional profile, etc.
- Required: Careful review of everything you say that consumers will see

# Strategies for staving off trouble

- Scrutinize Substantiation of Every Claim.
- Consider all reasonable interpretations of advertising terms
- Be especially cautious where a new claim or product feature is accompanied by a price change
- Labels are riskier than advertising
- Disclosures should **always be conspicuous**

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