

COMMENT

UNDER PRESSURE FOR REFRESHERS: STARBUCKS IS THE LATEST OF MANY CORPORATIONS FACING CLASS ACTION SUITS FOR FALSE ADVERTISING

JASMINE TERESA CHEN*

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INTRODUCTION

Consumers are familiar with being disappointed by a product not worth its price tag. Perhaps you discovered your expensive “100% extra virgin olive oil” was diluted with vegetable oil or that your “grass-fed” beef came from a grain-fed animal. Not long ago, I entered a Starbucks café and ordered a Strawberry Açai Refresher based on the açai fruit’s reputation as a “superfood.” Curious, I asked the barista if it contained both strawberries and açai, receiving a confident “yes” before I proceeded with my order. Unbeknownst to me, other Starbucks consumers, and apparently the Starbucks baristas, the Strawberry Açai Refresher contains

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no açai. Instead, it primarily consists of water, sugar, white grape juice concentrate, and few other ingredients.¹ Despite its name, the only trace of strawberry in the beverage is the freeze-dried strawberries sprinkled into it.² There is zero trace of açai.³ Other Refresher beverages similarly lack key ingredients boasted in their namesake titles;⁴ the Mango Dragonfruit Starbucks Refresher contains no mango,⁵ and the Pineapple Passionfruit Starbucks Refresher contains no passionfruit.⁶

The lack of fruits in Starbucks Refreshers is what the FDA refers to as “economically motivated adulteration” or “food fraud,” a practice that captures nearly \$40 billion annually.⁷ This occurs when someone intentionally leaves out, takes out, or substitutes a valuable ingredient or part of a food.⁸ According to the FDA, a company that mixes grape juice into their “100%” pomegranate juice commits food fraud; using dyes to give spices a certain color, especially when the color strongly impacts the perception of quality, is another example.⁹

Starbucks now faces a class action lawsuit challenging the product names considering the missing fruits: açai, mango, passionfruit.¹⁰ In her complaint, named plaintiff Joan Kominis alleges that the Refreshers containing their advertised fruits was a significant factor in her, and other class members’, decision to purchase the drink.¹¹ She claims that the açai, mango, and passionfruit are characterized as premium ingredients for each of their known health benefits.¹² This lawsuit echoes similar criticism

1. *Strawberry Açai Starbucks Refreshers Beverage, Full Nutrition & Ingredients*, STARBUCKS, <https://www.starbucks.com/menu/product/2121342/iced/nutrition> [<https://perma.cc/87T7-9VDG>].

2. *Id.*

3. *See id.*

4. *Mango Dragonfruit Starbucks Refreshers Beverage, Full Nutrition & Ingredients*, STARBUCKS, <https://www.starbucks.com/menu/product/2122725/iced/nutrition> [<https://perma.cc/QW7K-KSBX>]; *Pineapple Passionfruit Starbucks Refreshers Beverage, Full Nutrition & Ingredients*, STARBUCKS, <https://www.starbucks.com/menu/product/2123675/iced/nutrition> [<https://perma.cc/DQB7-DMWN>].

5. *Id.*

6. *Id.*

7. U.S. FOOD & DRUG ADMIN., *Economically Motivated Adulteration*, <https://www.fda.gov/food/compliance-enforcement-food/economically-motivated-adulteration-food-fraud> [<https://perma.cc/PKS9-4UYW>]. *See infra* note 119 and accompanying text.

8. *Id.*

9. *Id.*

10. Complaint, *Kominis v. Starbucks Corporation*, No. 1:22-cv-06673 (S.D.N.Y. Aug. 5, 2022).

11. *Id.* at ¶ 5.

12. *Id.* at ¶ 20.

Starbucks faced in 2015 over the lack of real pumpkin in its Pumpkin Spice Latte.¹³ Class action suits alleging false advertising, misleading labeling, and other deceptive trade practices are familiar to many major brands; in the past five years, cases were brought against companies, including Annie's,¹⁴ Dunkin' Brands, Inc.,¹⁵ Tropicana Manufacturing Company,¹⁶ Ghirardelli,¹⁷ Whole Foods,¹⁸ Panera Bread,¹⁹ General Mills,²⁰ Kodiak Cakes,²¹ Kraft,²² to name a few.

Virtually every major consumer corporation has been accused of misbranding, and federal inaction to establish tighter food labeling requirements has led to inconsistent state labeling standards.²³ Defendant companies can then turn to federal preemption provisions to get state-law-based lawsuits dismissed.²⁴ State food labeling requirements are preempted under the federal Food Drug and Cosmetic Act (FDCA), and states are prohibited from adopting requirements other than those "identical to the requirement" established in federal law.²⁵ By preempting inconsistent state standards, the FDCA's "identical standards" requirement supposedly promulgates more uniformity, but plaintiffs unfairly bear the consequences.

This Comment examines FDA regulations imposed on food manufacturers and argues that the existing requirements fail to protect consumers as the regulatory scheme leaves cavernous gaps that state law

13. Craig Giammona, *Starbucks Pulls Artificial Coloring from Pumpkin Spice Latte*, BLOOMBERG (Aug. 17, 2015), <https://www.bloomberg.com/news/articles/2015-08-17/starbucks-pulls-artificial-coloring-from-pumpkin-spice-latte> [perma.cc/P3AL-HZWN]. Since 2015, in response to public criticism, Starbucks' Pumpkin Spice Latte's "pumpkin sauce has included real pumpkin puree, made from little kabocha pumpkins." See Heidi Peiper, *PSL Turns 20: The Story Behind Starbucks Pumpkin Spice Latte*, STARBUCKS (Aug. 23, 2023), <https://stories.starbucks.com/stories/2023/psl-turns-20-the-story-behind-starbucks-pumpkin-spice-latte/> [https://perma.cc/39QM-PVFF].

14. *Klausner v. Annie's, Inc.*, 581 F. Supp. 3d 538 (S.D.N.Y. 2022).

15. *Grabowski v. Dunkin' Brands, Inc.*, No. 17 C 5069, 2017 WL 6059966 (N.D. Ill. Dec. 7, 2017).

16. *Willard v. Tropicana Mfg. Co., Inc.*, 577 F. Supp. 3d 814 (N.D. Ill. 2021).

17. *Cheslow v. Ghirardelli Chocolate Co.*, No. 19-CV-07467-PJH, 2020 WL 2113834 (N.D. Cal. May 4, 2020).

18. *Campbell v. Whole Foods Mkt. Grp., Inc.*, 516 F. Supp. 3d 370 (S.D.N.Y. 2021); *Cerretti v. Whole Foods Mkt. Grp., Inc.*, 2022 WL 1062793 (N.D. Ill. Apr. 8, 2022).

19. *Tabler v. Panera LLC*, 2019 WL 5579529 (N.D. Cal.); *Izquierdo v. Panera Bread Co.*, 450 F.Supp.3d 453 (2020).

20. *Backus v. Gen. Mills, Inc.*, No. 15-CV-01964-WHO, 2018 WL 6460441 (N.D. Cal. Dec. 10, 2018).

21. *Stewart v. Kodiak Cakes, LLC*, 537 F. Supp. 3d 1103 (S.D. Cal. 2021).

22. *Lemke v. Kraft Heinz Food Co.*, No. 21-CV-278-WMC, 2022 WL 1442922 (W.D. Wis. May 6, 2022).

23. See *infra* Part II(A).

24. *Nacarino v. Kashi Co.*, 77 F.4th 1201 (9th Cir. 2023).

25. 21 U.S.C. § 343-1(a)(3).

causes of action must fill. This Comment suggests that the FDA should ban companies from including certain foods in names and labels when the product does not actually contain any of the depicted fruit, or any fruit at all. It might implement this by severing a product's "statement of identity" from its nutrition label and produce more specific requirements concerning the statement of identity alone. The goal of any restructuring should be to prevent adverse economic and health effects caused when companies reach into consumers' pockets under the guise of food fraud.

Part I of this Comment provides a brief overview of the statutory and regulatory background that supports the foundation of food labeling regulation. Part II evaluates the problem with the current regulatory framework and argues the need for nutrition label accuracy by highlighting the economic and lifelong impacts on consumers who are misled into purchasing products with misleading labels and hidden disclosures. Part III acknowledges other scholars' recommendations to ameliorate this issue and contributes to existing solutions by offering three new recommendations in response to limitations in the regulatory structure. First, the FDA could allow for private actions under the FDCA, or simply let the states handle labeling standards. Second, the FDA could act more expeditiously and issue a warning letter to Starbucks and other corporations concerning the potentially misleading nature of their product titles. Third, the FDA could categorically ban companies from including certain foods in names and labels when the product does not actually contain any of the depicted fruit, or any fruit at all. This Comment is the first to offer this specific collection of recommendations and proposed solutions.

I. THE PARALLEL ROLES OF THE FDA AND FTC IN CONSUMER PROTECTION REGULATION

The United States Federal Food and Drug Administration (FDA) and the Federal Trade Commission (FTC) cooperate in parallel. The FDA retains sole power over product labeling²⁶ and assumes responsibility for protecting the public health by ensuring the safety of our nation's food supply.²⁷ As described by the Supreme Court, the FDA is "intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was,

26. Memorandum of Understanding Between the Federal Trade Commission and the Food and Drug Administration, 36 Fed. Reg. 18,539, 18,539 (Sept. 16, 1971).

27. 21 C.F.R. § 101.1; *FDA History*, U.S. FOOD & DRUG ADMIN., (June 29, 2018), <https://www.fda.gov/about-fda/fda-history> [<https://perma.cc/L4MN-CZN5>].

and not upon misrepresentations as to character and quality.”²⁸ Put simply, the FDA exists to protect consumers.²⁹

The Federal Food, Drug, and Cosmetic Act (FDCA), passed in 1938, empowers the FDA to define standards for food quality and food labels.³⁰ The FDCA expressly forbids misbranding food by means of false or misleading labeling.³¹ Labels not bearing the common or usual name of the food, if one exists,³² or food comprised of two or more ingredients lacking the common or usual name of each such ingredient, demonstrate ways that a food or beverage is misbranded.³³ The regulatory scheme also includes a sweeping provision that deems a product “misbranded” if its label is “false or misleading in any particular.”³⁴

The Nutrition Labeling & Education Act (NLEA) made several major amendments to the FDCA³⁵ aimed to establish uniform labeling as a more effective means of reconciling different labels for different state markets. The NLEA’s changes included (1) mandating that the FDA require and oversee nutrition labeling for all food products; (2) establishing requirements for packaged food labels, providing for the listing of additional ingredients, mandatory components of standardized food, certified color additives, and the percent of fruit or vegetable juice; and (3) adding a clause to the FDCA that expressly preempts some state law pertaining to food labeling requirements.³⁶ This preemption clause prevents states from imposing requirements that are of the type, but “not identical to,” corresponding FDCA requirements for food and beverage labeling.³⁷

The FDCA “notably does not provide a right of action under which members of the public can sue to enforce the Act.”³⁸ Since the FDCA forecloses private actions, individuals seek relief under state consumer

28. *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 409 (1914).

29. *See id.*

30. Amy-Lee Goodman, *A Natural Stand Off between the Food and Drug Administration and the Courts: The Rise in Food-Labeling Litigation & the Need for Regulatory Reform*, 60 B.C. L. REV. 271, 278 (2019).

31. 21 U.S.C. §§ 301–399(f), 343.

32. 21 U.S.C. § 343(i)(1).

33. 21 U.S.C. § 343(i)(2).

34. 21 U.S.C. § 343(a).

35. *See* 21 U.S.C. § 343-1; Sylvia Zarski, *Can You Judge Your Food by Looking at its Cover? How Courts’ Application of Federal Preemption Allows Misleading Food Labeling to Slip Through the Regulatory Cracks*, 64 DEPAUL L. REV. 1119, 1122.

36. *Id.*; 21 U.S.C. § 343-1(a).

37. 21 U.S.C. § 343-1(a); *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 109 (2014).

38. Zarski, *supra* note 35 at 1119; *see* Kathryn B. Armstrong & Jennifer A. Staman, *Enforcement of the Food, Drug, and Cosmetic Act: Select Legal Issues*, CONG. RSCH. SERV. (Feb. 9, 2018), <https://sgp.fas.org/crs/misc/R43609.pdf> [perma.cc/Z9QK-JT49].

protection laws.³⁹ Enforcement of the FDCA otherwise lies almost exclusively with the federal government.⁴⁰ Plaintiffs thus often turn to common law tort claims and state consumer protection statutes as the only means to pursue remedies for a company's alleged misbranding that otherwise violates the FDCA.⁴¹ This preemption provision "creates not uniform labeling, but a uniform barrier against responding to a variety of deceptions that may arise in the marketplace."⁴² The inconsistent collection of state standards resembles a deflated soufflé, unable to achieve its full potential due to a lack of cohesion, as different jurisdictions vary in their preemption analysis approach. This regulatory gap leaves plaintiffs without proper recourse, and quietly turns a blind eye to potentially prohibited conduct.

Like the FDA, the FTC also serves to protect consumers.⁴³ While the FDA retains sole power over product labeling, the FTC has exclusive reign over the advertising of FDA products.⁴⁴ The FTC is empowered by Section 5(a) of the FTC Act to investigate and prevent unfair methods of competition, and unfair or deceptive acts or practices affecting commerce.⁴⁵ Through interagency agreements and informal contracts, the two agencies work to further their parallel purposes.⁴⁶ The deliberate misidentification of packaged food is one such area of enforcement that spans across both agencies, because food labels remain under the regulatory and statutory domain of the FDA, whereas food advertising is regulated by the FTC.⁴⁷

II. ANALYSIS

The current regulatory framework faces challenges due to the NLEA's preemption provision, which limits states' ability to set their own labeling standards, resulting in a patchwork of inconsistent regulations across the country. This is particularly evident in states with high numbers

39. *Id.*

40. Armstrong & Staman, *supra* note 38.

41. Jennifer L. Pomeranz, *A Comprehensive Strategy to Overhaul FDA Authority for Misleading Food Labels*, 39 AM. J.L. & MED. 617, 635 (2013).

42. Charles P. Mitchell, *State Regulation and Federal Preemption of Food Labeling*, 45 FOOD DRUG COSM. L.J. 123, 140 (1990).

43. *What the FTC Does*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/media-resources/what-ftc-does> [perma.cc/DLA9-ZPHY] (last visited Apr. 6, 2024).

44. Memorandum of Understanding, *supra* note 26.

45. Section 5(a) of the FTC Act provides that "unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful." 15 U.S.C. § 45(a)(1).

46. Teresa M. Schwartz, *Protecting Consumer Health and Safety: The Need for Coordinated Regulation Among Federal Agencies*, 43 GEO. WASH. L. REV. 1031 (1975).

47. John Spink & Douglas C. Moyer, *Defining the Public Health Threat of Food Fraud*, 76 J. FOOD SCI. R157, R162 (2011).

of food-related class action lawsuits, such as California, New York, Florida, and Illinois.⁴⁸

However, concerns about inconsistent state standards should not diminish the critical need for accurate nutrition labels. Beyond potential legal action, inaccurate or misleading labels can have significant economic and personal consequences for consumers. Misled by hidden disclosures or false information, individuals may make unhealthy dietary choices that impact their well-being throughout their lives. Therefore, ensuring accurate and transparent nutrition labeling remains paramount, regardless of the regulatory framework's structure. This is crucial for empowering consumers to make informed decisions about their food choices and promoting public health overall. Current regulations fall short in promoting transparency for consumers as they allow manufacturers to name their products after ingredients present in negligible amounts, potentially misleading consumers about the product's composition.

A. No Proper Binding Agent: The NLEA Perpetuates Inconsistent State Standards

The NLEA's purpose is to establish national uniform nutrition labeling⁴⁹ to avoid state-by-state variations in substantive standards.⁵⁰ However, because plaintiffs achieve very little success pursuing claims under state laws that are consistently preempted,⁵¹ they are forced to turn to their state's deceptive trade acts⁵² and tort laws for recovery. This precipitates a new problem: plaintiffs bringing similar claims may receive different treatment as circuits disagree on whether the in-state causes of action are preempted by the NLEA.⁵³

48. Robert Guite, Sascha Henry, and Skyler Hicks, *Food & Beverage Industry's 2022 Litigation Outlook*, FOOD MFG. (Jan. 5, 2022), <https://www.foodmanufacturing.com/labeling/article/21977542/food-beverage-industrys-2022-litigation-outlook> [<https://perma.cc/Q9HN-T294>]. See also *Food & Consumer Packaged Goods Litigation 2022 Year in Review*, PERKINS COIE (Mar. 2023), <https://www.perkinscoie.com/images/content/2/6/261453/2022-Food-and-CPG-Litigation-YIR-Report-1.pdf> [perma.cc/8ZW3-BYC8].

49. See 21 U.S.C. § 343-1.

50. See *Reynolds v. Wal-Mart Stores, Inc.*, No. 4:14CV381-MW/CAS, 2015 WL 1879615, at *13 (N.D. Fla. Apr. 23, 2015), citing *POM Wonderful LLC*, 573 U.S. at 115.

51. See *supra* Part I.

52. See generally CAROLYN CARTER, CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS (March 1, 2018), https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf [<https://perma.cc/Z5JJ-777U>].

53. See *infra* Part II(B).

Three quarters of food-related class actions are filed in California, New York, Florida, and Illinois.⁵⁴ California has become the epicenter of this “all natural” litigation, derisively known as the “Food Court.”⁵⁵ The prevalence of these lawsuits is attributable to the state’s large population and plaintiff-friendly consumer protection laws, making California an attractive venue for litigation.⁵⁶ For example, California’s main UDAP statute, the Unfair Competition Law (UCL), “broadly prohibits unlawful, unfair, or fraudulent business practices and deceptive advertising,” and “is not undercut by exemptions for particular businesses.”⁵⁷

By contrast, New York’s UDAP statute does not specifically prohibit “unfair practices.”⁵⁸ Another weakness lies in the procedural hurdles that New York courts impose “on consumers seeking remedies for deceptive practices”⁵⁹ —the consumer must show that the practice has a broader impact on consumers at large, and must threaten the public interest, such as potential danger to public health or safety.⁶⁰ When shouldered entirely by consumers, this burden can be “so time-consuming and expensive as to make individual consumer redress impossible.”⁶¹

Floridian plaintiffs face a unique problem. A consumer who brings—and loses—a UDAP claim can be required to pay tens of thousands of dollars in the challenged business’s attorney fees.⁶² Whether the claim was brought in good faith or for a relatively small amount of money is irrelevant to the consumer’s fate.⁶³ Florida’s UDAP statute thus “provides only weak remedies for consumers and suffers from a constricted scope.”⁶⁴

Towards the other end of the spectrum, the Illinois UDAP statute avoids most of the weaknesses that hinder other states’ statutes. In stark

54. JAMES T. O’REILLY & KATHARINE A. VAN TASSEL, *FOOD AND DRUG ADMINISTRATION* § 10:61 (4th ed. 2023-2).

55. Vanessa Blum, *Welcome to the Food Court*, ALM MEDIA NEWS (Mar. 1, 2013), <https://www.bloomberglaw.com/document/X3BS662S000000?jsearch=1202590635560#jcite> [perma.cc/BH6B-VMNS].

56. Neil Popovic & Paul Seeley, ‘All-Natural’ Litigation, *FOOD & DRINK MAG.*, Summer 2014, https://www.sheppardmullin.com/media/article/1317_All%20Natural%20Litigation.pdf [perma.cc/3PH4-RC6K].

57. Carter, *supra* note 52, at 54.

58. *Id.* at 60.

59. *Id.*

60. *Id.*; see *N. Am. Olive Oil Ass’n v. D’Avolio Inc.*, 457 F. Supp. 3d 207, 229 (E.D.N.Y. 2020) (“An allegation of a defendant’s act of deception is not sufficient by itself to state a claim. The alleged act ‘must have a broader impact on consumers at large’ and must ‘threaten the public interest, such as potential danger to public health or safety.’”).

61. Carter, *supra* note 52, at 38 (citing *Fitzgerald v. Chase Home Fin., LLC*, 2011 WL 9195046 (S.D.N.Y. Feb. 28, 2011)).

62. *Id.* at 2.

63. *Id.*

64. *Id.* at 55.

contrast to its Floridian counterpart, the Illinois Supreme Court has held that trial courts should only impose fee awards against consumers in cases where the consumer has proceeded in bad faith, or where the case was frivolous.⁶⁵ The Illinois UDAP statute also allows the attorney general to adopt rules prohibiting emerging forms of deception and unfairness. A fifty-state evaluation of UDAP laws by the National Consumer Law Center highlights Illinois as an example “to the rest of the country of how to strengthen state-level consumer protection.”⁶⁶

B. “Fruit” or Fiction? Under the Current Regulatory Scheme, the Same Product May Be Mislabeled in One State but Not Another.

Consider two cases challenging the label of a cereal snack produced by Gerber Products Company.⁶⁷ This cereal snack, named “Gerber Graduates Puffs,” was made with whole grains and sold in a variety of flavors including Banana, Sweet Potato, Blueberry, Peach, and Apple.⁶⁸ However, aside from the Peach Puffs, none of the Graduates Puffs actually contained any fruits or vegetables. Plaintiff Nancy Henry filed suit against Gerber in Oregon state court, alleging that Gerber unfairly represented the Puffs products as having “particular characteristics, ingredients, benefits, or qualities that they do not have.”⁶⁹ Henry sought recovery under provisions of Oregon’s Unfair Trade Practices Act (UTPA).

Gerber argued Henry’s UTPA claim under Oregon law was federally preempted, specifically by the FDCA.⁷⁰ The Oregon District Court sided with Gerber, acknowledging that certain FDA regulations⁷¹ “plainly allow a manufacturer to use the name and image of a fruit on a product’s packaging to describe the products ‘characterizing flavor,’ even if the product does not actually contain any of the depicted fruit, or indeed any fruit at all.”⁷² The court also declined to adopt Henry’s reasoning that her claims arise under the FDCA’s “catch-all” provision, which prohibits any labeling that is “false or misleading in any particular.”⁷³ The court explained that, although the FDCA prohibits labels from being false or misleading, aspects of labels that are required or permitted by the FDCA or FDA regulations are “by definition, are not considered false or

65. *Id.* at 35.

66. *Id.* at 3.

67. *Henry v. Gerber Prod. Co.*, No. 3:15-CV-02201-HZ, 2016 WL 1589900 (D. Or. Apr. 18, 2016).

68. *Id.* at *1.

69. *Id.*

70. *Id.* at *5.

71. 21 C.F.R. § 101.22(i)(1)(i), (iii).

72. *Henry*, 2016 WL 1589900 at *6.

73. *Id.* at *7; 21 U.S.C. § 343(a).

misleading under federal law.”⁷⁴ Nor could Henry “save her claims against Gerber by asserting that the Puffs labels run afoul of the FDA’s ‘characterizing ingredient’ regulations” under 21 C.F.R. section 102.5(b), which requires that the characterizing ingredient of the product, determined by weight, must be included on the product’s label if the label would otherwise create an erroneous impression that the characterizing ingredient “is present in an amount greater than is actually the case.”⁷⁵ In so concluding, the *Henry* court noted that, while other states adopted statutes that expressly mirror the FDCA and provide a private cause of action for enforcing the state’s version of the requirements, Oregon had not adopted such a statutory scheme.⁷⁶ Finally, according to the court, the FDA’s true purpose of labeling regulations “is to privately enforce alleged violations of the FDCA, rather than to bring a claim for unfair and deceptive business practices.”⁷⁷

To hold in accordance with the FDA that a product named after fruits non-existent in its ingredients as not misleading reflects an outcome contrary to the FDA’s purpose to protect consumers.⁷⁸ The same Gerber cereal snacks were at issue in the San Francisco County Superior Court of California one month before *Henry*.⁷⁹ Like *Henry*, plaintiffs invoked section 102.5 on the ground that the cereal snack packaging created “an erroneous impression that the pictured fruits and vegetables are characterizing ingredients and are present in the product.”⁸⁰ Unlike the *Henry* court, which firmly rejected this argument,⁸¹ the Superior court deemed plaintiffs’ argument under section 102.5 “sufficient.”⁸² In sum, the Oregon District Court and the San Francisco County Superior Court of California were both asked to determine whether the Gerber “Puffs” products’ labeling was misleading. In Oregon, it was not; in its neighbor state of California, it was. The NLEA’s preemption provision thus precipitates inconsistent results, despite intending to prevent exactly this outcome.

74. *Id.* (quoting *Red v. The Kroger Co.*, No. CV 10-01025 DMG MANX, 2010 WL 4262037, at *5 (C.D. Cal. Sept. 2, 2010).

75. *Id.* at *8; 21 C.F.R. § 102.5(b). Section 102.5(b) states that the “common or usual name of a food shall include the percentage(s) of any characterizing ingredient(s) or component(s) when the proportion of such ingredient(s) or component(s) in the food has a material bearing on price or consumer acceptance or when the labeling or the appearance of the food may otherwise create an erroneous impression that such ingredient(s) or component(s) is present in an amount greater than is actually the case” (emphasis added).

76. *Id.*

77. *Id.*

78. *See supra* notes 28–29 and accompanying text.

79. *Gyorke-Takatri v. Nestle USA*, No. CGC-15-546850, 2016 WL 3763380 (Cal. Super. Mar. 01, 2016).

80. *Id.* at *2.

81. *See supra* notes 69–77 and accompanying text.

82. *Gyorke-Takatri*, 2016 WL 3763380 at *2.

Further, for all three of the main Refreshers, one ingredient present in its namesake title exists only in the freeze-dried form.⁸³ Starbucks' attorneys argued that Kominis' claims fail because "no reasonable consumer would be misled by the flavor names of the Starbucks Refreshers."⁸⁴ The United States District Court for the Southern District of New York disagreed. On September 18, 2023, Judge John Cronan determined that "a significant portion of reasonable consumers could find [the name] misleading."⁸⁵

C. Tell Me the Fruit: An FDA-Compliant Statement of Identity on a Mixed Fruit or Vegetable Juice Beverage Can Still Be Misleading

Under the FDA's food label requirements, the name of a food or beverage product is also known as its statement of identity and must appear on the product's front label.⁸⁶ The name that should be used as the product's statement of identity should be "the name established by law or regulation, or in the absence thereof, the common or usual name of the food, if the food has one. . ."⁸⁷ Where there is none, then an appropriate descriptive name—that is not misleading—should be used.⁸⁸

For diluted multiple-juice beverages or blends of single-strength juices like Starbucks Refreshers, FDA regulation provides that "names of juices must be in descending order of predominance by volume, unless the label indicates that the named juice is used as a flavor."⁸⁹ Next, "if the label represents one or more but not all the juices (except in the ingredient list), then the name must indicate that more juices are present."⁹⁰ In a diluted juice blend where one or more, but not all, of the juices are named on the label other than in the ingredient statement, and where the named juice is not the predominant juice, the common or usual name for the product must either indicate that the beverage is flavored with the named juice or declare the amount of the named juice in a five-percent range.⁹¹ Finally, if a beverage contains no fruit, but the labeling or flavor of the beverage implies that fruit juice may be present, the label must declare that

83. *Id.*

84. Defendant's Memorandum of Law in Support of Defendant Starbucks Corporation's Motion to Dismiss Complaint, 2022 WL 16698980 (S.D.N.Y.) (Trial Motion, Memorandum and Affidavit), Sept. 15, 2022.

85. *Kominis v. Starbucks Corp.*, No. 22 CIV. 6673, 2023 WL 6066199, at *6 (S.D.N.Y. Sept. 18, 2023).

86. 21 C.F.R. § 101.3.

87. 21 C.F.R. § 102.3(b).

88. 21 C.F.R. § 102.3(d).

89. 21 C.F.R. § 102.33(b).

90. 21 C.F.R. § 102.33(c).

91. 21 C.F.R. § 102.33(d).

the beverage does not contain fruit juice.⁹² Although it is possible for a jury to conclude that a product's common or usual name does not sufficiently or accurately indicate that the named juice is present as a flavor or flavoring, misbranding claims rarely survive past a motion to dismiss.⁹³

Granting permission to name a beverage “pomegranate-blueberry” when the entire beverage contains less than 1% of pomegranate and blueberry combined allows for troubling practices. Products with FDA-compliant labels still lack transparency regarding its ingredients, causing consumers to be misled as to the product's true qualities.⁹⁴ Starbucks' Refreshers contain one ingredient listed in its title, even though it is possible for consumers to ask that the freeze-dried fruits are withheld from the beverage.⁹⁵ With or without the freeze-dried add-ins, the Refreshers are “predominately” white grape juice.⁹⁶ Further, given the current regulatory framework, Starbucks could alter their recipe to include a fraction of a percent of açai, mango, or passionfruit powder. If the added fruit is greater than 0%, their beverages are narrowly within the labeling and naming standards under the FDA.

In theory, preemption power is more efficient than reconciling different labels to different state markets.⁹⁷ National distribution hinges on product uniformity, and manufacturers cannot possibly comply with the myriad state laws establishing different labeling standards.⁹⁸ Despite its intended benefits, neither uniformity nor predictability has been achieved.⁹⁹ This represents a stark failure to protect public health, considering the NLEA has been in effect for over three decades. The FDA should thus revise and updates its guidelines to specify percentages that beverages must contain to honestly bear that ingredient in the product's name and increase that percentage to a non-immaterial amount. Without further action, the NLEA contains gaps that remain cavernous without guidance from the FDCA, leaving states to perform the patchwork.

D. First Amendment Limitations: Congress Shall Make No Law

92. 21 C.F.R. § 101.30(d).

93. See *Henry*, 2016 WL 1589900, at *8.

94. Jennifer Thurswell Radis, *The Lanham Act's Wonderful Complement to the FDCA: Pom Wonderful v. Coca-Cola Enhances Protection Against Misleading Labeling Through Integrated Regulation*, 47 LOY. U. CHI. L.J. 369, 372–73 (2015).

95. Starbucks allows its customers to customize beverages to their liking. See *supra* note 1.

96. *Id.*

97. James T. O'Reilly & Katharine A. Van Tassel, *The Future of FDA Preemption*, 3 FOOD & DRUG ADMIN. § 25:34 (2022).

98. Diana R. H. Winters, *The Magical Thinking of Food Labeling: The NLEA as a Failed Statute*, 89 TUL. L. REV. 815, 858 (2015).

99. *Id.* at 859.

Abridging the Freedom of Labeling?

Some companies have challenged the FDA's regulation of labeling on First Amendment grounds.¹⁰⁰ First Amendment jurisprudence protects consumers' right to receive accurate information and simultaneously protects speakers' right to share information.¹⁰¹ However, a speaker's right to free speech is not absolute.¹⁰² Certain categories of speech receive less protection than others; for example, commercial speech—speech that proposes a commercial transaction—is more easily regulated than some other forms of speech.¹⁰³ Product labels and advertising are two accepted forms of commercial speech.¹⁰⁴ First Amendment jurisprudence neither permits nor protects false or misleading claims.¹⁰⁵ The government's potential restriction on commercial speech is likewise subject to limitations.¹⁰⁶ For example, if the FDA imposes restrictions on Starbucks' Refresher labels, the FDA bears the burden of justifying it under the four-prong *Central Hudson* test. Under this test, a court must first determine whether the Starbucks' Refresher names are protected commercial speech; that “the communication is neither misleading nor related to unlawful activity.”¹⁰⁷ If the government passes the threshold inquiry, the imposed restriction survives only if (2) the government asserts a substantial interest to be achieved by the restriction; (3) the restriction directly advances the state interest involved; and (4) the restriction is not more extensive than is necessary to serve that interest.¹⁰⁸

The Northern District of California recently applied the *Central Hudson* test to determine whether the California Department of Food and Agriculture could prevent a company from naming its product “Cultured Vegan Plant Butter.”¹⁰⁹ Plaintiff in that case, Miyoko's Kitchen, “produces and sells a variety of plant-based, vegan products which are designed to resemble dairy products in appearance and taste.”¹¹⁰ However, the

100. See *infra* notes 109–116 and accompanying text.

101. Jennifer L. Pomeranz, *United States: Protecting Commercial Speech Under the First Amendment*, 50 J.L. MED. & ETHICS 265, 265 (2022) (“The United States is an outlier internationally because US law unquestionably protects commercial speech at the expense of public health.”).

102. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980) (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”).

103. *Id.*

104. Pomeranz, *supra* note 101, at 267.

105. See *Central Hudson*, 447 U.S. at 564.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Miyoko's Kitchen v. Ross*, No. 20-CV-00893-RS, 2020 WL 8361994, at *2 (N.D. Cal. Aug. 21, 2020).

110. *Id.* at *1.

Department had noted that “the product is not butter” and “may not imply it is ‘a dairy food without traditional dairy characteristics,’” and instructed Miyoko’s to remove five terms from the product’s label, including the word “butter.”¹¹¹ The Miyoko court found that the company’s “use of the word ‘butter,’ in immediate or close proximity to terms like ‘vegan,’ ‘made from plants,’ ‘cashew cream fermented with live cultures,’ and ‘cashew & coconut oil spread,’” did not constitute misleading commercial speech and passed the threshold inquiry under *Central Hudson*.¹¹² The court went on to conclude that Miyoko’s succeeded under factors two through four of *Central Hudson* for its use of the term “butter”;¹¹³ the Department could not produce “a moderate showing of the ban’s tendency to redress harms caused by Miyoko’s vegan butter in particular, if not the dairy-alternative market [at] large.”¹¹⁴ The court further concluded that omission of such a showing renders “it exceedingly difficult to ascertain the advancement of a legitimate governmental interest, to any degree, resulting from a proscription of Miyoko’s practice of labeling its spread ‘butter.’”¹¹⁵ Thus, the Department could not require Miyoko’s to remove the term from its product label without violating Miyoko’s constitutional rights.¹¹⁶

Should Starbucks make the same constitutional argument regarding its Refresher names, the company might not receive a result as favorable as Miyoko’s Kitchen. Miyoko’s use of other clarifying terms alongside the term “butter” contributed to its success in passing the first prong of the *Central Hudson* test. By contrast, Starbucks does not use any descriptive terms to illustrate the absence of the fruit that is listed in its title. In naming the Strawberry Açai Refresher, Starbucks placed the term “açai,” which *is not* an ingredient in the drink, alongside the term “strawberry,” which *is* an ingredient. The cafés provide no other indication or explanation to help the consumer discern which one of the fruits is not included in the drink. Regardless, if the FDA seeks to implement regulations to restrict what Starbucks may or may not name its beverages, it is possible for a court to conclude that the FDA has not met its burden under the *Central Hudson* test as courts strike a balance between First Amendment rights and consumer protection. However, courts and the government should consider how consumers are harmed at the expense of protecting Starbucks’ constitutional rights, and how lack of further restriction continues to perpetuate harm in allowing companies to charge consumers a premium price for an ordinary product without recourse.

111. *Id.*

112. *Id.* at *4.

113. *Id.* at *5.

114. *Id.*

115. *Id.*

116. *Id.* at *6.

E. “Superfoods” are a Superscam: Food Fraud Affects the Global Food Industry Costing \$40 Billion Annually.

The need for labeling accuracy is more than mere gadflies infiltrating the Food Court with tiny briefcases and state-law lawsuits. Every consumer is at risk of suffering from economically motivated adulteration, or colloquially, food fraud.¹¹⁷ Behind a product’s misleading label or statement of identity is a company that pockets its customers’ dollars for sham ingredients.¹¹⁸ This egregious corporate conduct is more prevalent than widely acknowledged, likely because it is designed to avoid detection.¹¹⁹ Nonetheless, its impact is staggering: food fraud affects the global food industry at a cost of about \$10–\$15 billion annually; according to the FDA, some more recent expert estimates put the cost as high as \$40 billion per year.¹²⁰

In 2021, organic food sales in the United States generated \$57.5 billion,¹²¹ a figure predicted to have grown since then and shows no signs of decline.¹²² Empirical research suggests that “[c]onsumers perceive organic foods as more nutritious, natural, and environmentally friendly than non-organic or conventional foods.”¹²³ Non-use of pesticides, lower pesticide residues, and perceived freshness were other recorded motivations behind a consumer’s preference for organic foods to conventional foods.¹²⁴ Consumers who purchase organic foods thus pay for both the product and assurance that the product was “grown without the application of certain herbicides, pesticides, and fertilizers.”¹²⁵

117. *Economically Motivated Adulteration*, *supra* note 7.

118. *See id.* (“Economically motivated adulteration (EMA) occurs when someone intentionally leaves out, takes out, or substitutes a valuable ingredient or part of a food.”).

119. *Id.*

120. *Id.*

121. M. Shahbandeh, *Organic Food Sales in the U.S. from 2005–2021*, STATISTA (Oct. 10, 2022), <https://www.statista.com/statistics/196952/organic-food-sales-in-the-us-since-2000/> [perma.cc/JL6R-YKRX].

122. BlueWeave Consulting, *United State Organic Food Market Retains Robust Growth Amid the Pandemic: Projected to Grow at a CAGR of 8.7% during 2021–2027*, GLOBE NEWSWIRE (Jan. 25, 2022), <https://www.globenewswire.com/news-release/2022/01/25/2372820/0/en/United-State-Organic-Food-Market-Retains-Robust-Growth-Amid-the-Pandemic-Projected-to-Grow-at-a-CAGR-of-8-7-during-2021-2027-BlueWeave.html> [perma.cc/YU5X-MCHN].

123. Raghava R. Gundala & Anupam Singh, *What Motivates Consumers to Buy Organic Foods? Results of an Empirical Study in the United States*, PLOS (Sept. 10, 2021), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0257288> [perma.cc/G8V4-N2YQ].

124. *Id.*

125. Ian Parker, *The Great Organic Food Fraud*, NEW YORKER (Nov. 8, 2021), <https://www.newyorker.com/magazine/2021/11/15/the-great-organic-food-fraud> [perma.cc/AFP3-KJ98].

In some instances, this assurance results in nothing more than a story conjured up for unsuspecting consumers. For example, in the largest-known fraud in the history of American organic agriculture, Midwestern farmer Randy Constant sold nearly 11,500,000 bushels of non-organic grain to customers who believed that they were purchasing certified organic grain.¹²⁶ Prosecutors accused Constant “of causing customers to spend at least a quarter of a billion dollars on products falsely labeled with organic seals.”¹²⁷ Constant’s victims were not limited to those who purchased his grain; this scheme tainted other businesses along the same supply chain.¹²⁸ The fraudulently labeled grain was fed primarily to chickens and cattle, which were then either sold as organic meat or other organic products from the livestock despite not meeting the certification standards.¹²⁹ Consequently, thousands of consumers purchased what they believed was organic meat for a premium price across the country.¹³⁰ Although there is some dissension regarding whether organic foods really are more beneficial than conventional foods, the bottom line is that consumers did not receive what they believed they were paying for.

Some consumers express little surprise upon learning that the Starbucks’ Refreshers do not include açai, mango, or passionfruit.¹³¹ Perhaps these consumers readily expect large corporations to take advantage of their patrons. However, consumers can, and should, assert their entitlement to honest business conduct. For instance, Starbucks attorneys suggested that consumers can ask the “Starbucks barista questions about the ingredients therein when placing an order,” just as they may “inquire about and specify the kind of milk when ordering.”¹³² I tested this theory, even though no reasonable consumer is expected to search through Starbucks’ materials to find all possible disclaimers.¹³³ I ordered a Strawberry Açai Lemonade Refresher at a popular Starbucks location in Madison, Wisconsin. Following Starbucks’ suggestion, I asked the barista

126. Press Release, U.S. Attorney’s Office, Northern District of Iowa, Field of Schemes Fraud Results in Over a Decade in Federal Prison for Leader of Largest Organic Fraud Case in U.S. History (Aug. 19, 2019), <https://www.justice.gov/usao-ndia/pr/field-schemes-fraud-results-over-decade-federal-prison-leader-largest-organic-fraud> [perma.cc/HV87-Z9XX] [hereinafter Field of Schemes].

127. Parker, *supra* note 125.

128. *Id.*

129. Field of Schemes, *supra* note 126.

130. *Id.*

131. See Starbucks is Facing a Federal Lawsuit After Their Refresher Drinks Reportedly Found to be Missing Fruit Ingredients, REDDIT (Aug. 23, 2022), https://www.reddit.com/r/starbucks/comments/wvtzod/starbucks_is_facing_a_federal_lawsuit_after_their/ [https://perma.cc/7PTA-8HQ3].

132. Defendant’s Memorandum of Law in Support of Defendant Starbucks Corporation’s Motion to Dismiss Complaint, 2022 WL 16698980 (S.D.N.Y.) (Trial Motion, Memorandum and Affidavit), Sept. 15, 2022.

133. *Id.*; *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 939–40 (9th Cir. 2008).

if the beverage contained both strawberry and açai. The barista answered a resounding “yes” with no hesitation.¹³⁴ In a similar interaction at a Starbucks café in Philadelphia, Pennsylvania, the barista informed the inquirer that the Mango Dragonfruit Refresher was made from a base consisting of “mango dragonfruit juice, and the dragonfruit pieces are sprinkled on top.”¹³⁵ The barista neglected to disclose that the base is made with white grape juice concentrate.¹³⁶ I posed this question a third time to a Starbucks barista in California and received a similar response.¹³⁷ Although the baristas answered with varying degrees of clarity, none mentioned the absence of açai, mango, or passionfruit. Therefore, asking the Starbucks barista about the ingredients does not “sufficiently dispel” a consumer’s confusion about the ingredients therein. Any existing confusion remained clouded, and the likelihood that similarly inquisitive consumers will receive false information instead increases.¹³⁸

Consumers might mistakenly believe that food fraud only harms people economically, and that if they stay away from deceitful businesses, they will not be taken advantage of. On the contrary, a scientific liaison at U.S. Pharmacopeia warned that “the *best-case* scenario with food fraud is that you’re not getting what you paid for.”¹³⁹ Food fraud is more than the occasional extra dollars spent on one product; misleading labels and hidden disclosures can pose major health risks—and in some cases, death.¹⁴⁰ For example, tainted peanut butter led to the 2009 salmonella outbreak with more than 700 reported cases of salmonella poisoning in forty-six states, including nine deaths.¹⁴¹ Commenting on this case, U.S. Attorney Michael J. Moore of the Middle District of Georgia remarked

134. The barista did not provide any other disclosures regarding the beverage’s ingredients; for example, where one might find the list of ingredients or other nutritional information.

135. Interview conducted on Nov. 27, 2022.

136. *Id.*

137. In a similar instance in San Mateo, California on December 25, 2022, I asked the barista if the Pineapple Passionfruit Refresher beverage contained both pineapple and passionfruit. The barista did not answer as confidently as his Madison counterpart, but ultimately declared that the beverage is made from passionfruit juice, despite “passionfruit juice” not being listed as an ingredient. *See supra* note 4.

138. Defendant’s Memorandum of Law in Support of Defendant Starbucks Corporation’s Motion to Dismiss Complaint, 2022 WL 16698980 (S.D.N.Y.) (Trial Motion, Memorandum and Affidavit), Sept. 15, 2022.

139. Jennifer Schlesinger & Andrea Day, *Food Fraud Hurts Your Wallet and Makes You Sick*, CNBC (Nov. 19, 2016), <https://www.cnbc.com/2016/10/20/food-fraud-hurts-your-wallet-and-makes-you-sick.html> [perma.cc/7WWB-459C].

140. *See Economically Motivated Adulteration*, *supra* note 7.

141. Press Release, Office of Public Affairs, *Former Peanut Company President Receives Largest Criminal Sentence in Food Safety Case; Two Others also Sentenced for Their Roles in Salmonella-Tainted Peanut Product Outbreak*, (Sept. 21, 2015), <https://www.justice.gov/opa/pr/former-peanut-company-president-receives-largest-criminal-sentence-food-safety-case-two> [perma.cc/9J4G-JZKW].

that “the tragedy of this case is that. . . protecting the public lost out to increasing of profits.”¹⁴²

III. RECOMMENDATIONS

Although Starbucks is not necessarily part of a supply chain like Constant’s sham organic grain business, the consumers at the end of each transaction paid a premium price for a purportedly premium product. Constant’s customers believed they were paying for organic grain, or organic meat, or other organic products; Starbucks’ customers believe they are paying for açai, mango, and passionfruit. Neither purchasing group received what they believed they were paying for. The current regulatory framework allows for Starbucks to shirk its responsibility to customers in exchange for ill-gotten gains. After decades of litigation, Joan Kominis’ recent case against Starbucks Corporation invites inquiry into FDA regulation established for juice beverages. Kominis likely refrained from alleging any claims under the current regulatory framework for fear of being preempted. Her decision to pursue claims under one state’s UDAP laws illustrate the risk that similar facts may be interpreted differently under other states’ laws, when the FDA could bridge this gap with tighter regulation. Without clear guidance from the agency, consumers continue to lack proper understanding of the true meaning behind enticing labels. This results in overestimating the benefits or underestimating the risks from different types of foods.¹⁴³

Many scholars have advocated for logical change. One author suggested that the FDCA could be amended to allow a federal private right of action, which would “not only supplement the agency’s enforcement abilities but also provide the agency more control over private food litigation.”¹⁴⁴ Professor Melissa Mortazavi offered a different solution, arguing that allowing private litigation would force change.¹⁴⁵

Targeted regulatory change may be more effective. First, instead of amending the FDCA to allow a federal private right of action, perhaps the FDA could simply let the states handle labeling standards, since any official regulation from the FDA regarding product names is likely to be met with First Amendment concerns. As such, it is an admittedly difficult and unlikely resolution. Second, the FDA could act more expeditiously and issue a warning letter to Starbucks and other corporations concerning

142. *Id.*

143. Oren Bar-Gill, *Algorithmic Price Discrimination When Demand Is a Function of Both Preferences and (Mis)perceptions*, 86 U. CHI. L. REV. 217, 230 (2019).

144. Brett M. Paben, *Lack of Interest in Consumer Interests: FDA’s Narrow Perspective on Food Labeling and Label Statements Undermines a Century of Agency Leadership*, 13 RUTGERS J.L. & PUB. POL’Y 174, 209–10 (2015).

145. Melissa Mortazavi, *TORT AS DEMOCRACY: LESSONS FROM THE FOOD WARS*, 57 ARIZ. L. REV. 929, 969 (2015).

the (potentially) misleading nature of their product titles. Third, the FDA could categorically ban companies from including certain foods in names and labels when the product does not actually contain any of the depicted fruit, or any fruit at all. Although Professor Mortazavi rightfully suggests that private litigation may contribute slightly to shaping current labeling laws, the food and drink industry has only grown increasingly saturated with expensive litigation examining many of the same issues.¹⁴⁶

To effectuate a categorical ban, the FDA should first sever a product's "statement of identity" from its nutrition label and produce more specific requirements concerning the statement of identity alone. Second, coffee shop products should not be governed by the labeling standards established for restaurants and other retail establishments selling "away-from-home" foods. Under the FDA's general food labeling requirements, foods that provide no significant nutrition such as instant coffee (plain, unsweetened) and most spices are exempt from providing labels.¹⁴⁷ The food and beverages sold in coffee shops are ordinarily for immediate consumption, so these establishments would still be subject to lenient standards. Provided that these "other retail establishments" have neither already provided nutrition information nor made nutrition claims, coffee shops like Starbucks still retain their freedom from conforming to the standards for ordinary packaged foods, allowing the FDA to strike a balance between consumer protection and responsible industry practices.

The FDA's interest in promoting uniform labeling is best executed by amending their regulatory framework with consumer protection in mind. Since the FDA's preemption power is more efficient than reconciling fifty states' labeling and tort laws, the FDA should enhance consumer protection by promulgating more specific requirements for beverage labeling. As more cases are brought to the Food Courts, there appears to be growing discussion and regulation around what a beverage may or may not be called based on certain ingredients it *contains*, but far less discussion on beverage titles including the names of fruits that do not exist within the beverage. Consider the Gerber Graduates Puffs that were egregiously labeled with images of fruits when the product contained no fruits. This specific product highlighted the inconsistency between state courts, as the Oregon and California courts disagreed on whether the plaintiffs' claims were preempted.

Under the current framework, the FDCA has developed certain requirements with great specificity, while other terms remain undefined. For example, the term "fresh" was subjected to continuous use, thus

146. See Popovic & Seeley, *supra* note 56.

147. See Food Labeling Guide, Food and Drug Administration (Jan. 2013), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm461934.htm> [<https://perma.cc/3G9P-XMGK>].

confusing consumers when products were mislabeled.¹⁴⁸ Regulation remains nebulous regarding bakery items.¹⁴⁹ Under the existing framework, a bakery could make and sell pastries created from near-frozen dough, and still market the products as “fresh.”¹⁵⁰ Prior to the debate on what may be labeled “fresh,” lack of clarity of the term “natural” faced similar criticism. The FDA’s reluctance to provide a legal definition for the term “natural”¹⁵¹ afforded manufacturers great flexibility when labeling their products. Such loose regulation accepted products containing high fructose corn syrup—a compound produced by a complex scientific manufacturing process¹⁵²—to be labeled “natural.”¹⁵³ This unbridled freedom in labeling both confuses and takes advantage of consumers who make food-purchasing decisions based on label content, and willingly pay more for “natural” options.¹⁵⁴ Consumers are likewise willing to pay a premium for a product labeled “all-natural” when compared to the same product without an “all-natural” declaration.¹⁵⁵

Furthermore, these consumer preferences carry over to foods that are simply *perceived* as healthy.¹⁵⁶ In the past decade, the food industry has observed a massive increase in marketing “superfoods,” a term that originated as part of a food marketing strategy.¹⁵⁷ The term is generally used to describe sensationalized foods like blueberries, almonds,

148. Kole Lyons, *Fresh from the Freezer: Exploring the “Knead” for Transparent Bread Labeling*, 53 ARIZ. ST. L.J. 1359, 1388 (2021).

149. *See id.*

150. *Id.*

151. Shea Thompson, *Artificially Natural: Class Actions Lawsuits Attack Misleading Natural Claims in FDA’s Absence*, 47 IND. L. REV. 893, 894 (2014).

152. *High Fructose Corn Syrup Questions and Answers*, FDA (Jan. 4, 2018), <https://www.fda.gov/food/food-additives-petitions/high-fructose-corn-syrup-questions-and-answers> [<https://perma.cc/U39W-KRPC>].

153. Adam C. Schlosser, *A Healthy Diet of Preemption: The Power of the FDA and the Battle over Restricting High Fructose Corn Syrup from Food and Beverages Labeled Natural*, 5 J. FOOD L. & POL’Y 145, 147 (2009).

154. *Food Labels Survey*, CONSUMER REPS. NAT’L RSCH. CTR. (Apr. 16, 2016), https://www.ftc.gov/system/files/documents/public_events/975753/cr_intro_and_2016_food_survey.pdf [perma.cc/9J4G-JZKW].

155. *Study Finds Consumers Willing to Pay More for ‘All-Natural’ Labeled Foods*, INSTITUTE OF FOOD TECHNOLOGISTS (Feb. 22, 2017), <https://phys.org/news/2017-02-consumers-all-natural-foods.html> [perma.cc/8TZB-XSV5]; Katie Little, *Better Food, More \$\$: Do People Pony up?*, CNBC (Jan. 20, 2015), <https://www.cnbc.com/2015/01/16/better-food-more-do-people-pony-up.html#> [perma.cc/9J4G-JZKW].

156. *Superfood Powders Market Size, Share & Trends Analysis Report*, GRAND VIEW RSCH., <https://www.grandviewresearch.com/industry-analysis/superfood-powders-market> [perma.cc/PJ5P-G3DD] (last visited Jan. 22, 2023).

157. *Superfoods or Superhype?*, HARVARD T.H. CHAN SCH. PUB. HEALTH, <https://www.hsph.harvard.edu/nutritionsource/superfoods/> [perma.cc/E684-ZV9R] (last visited Jan. 22, 2023).

avocados, and broccoli.¹⁵⁸ The açai joins this list,¹⁵⁹ despite having “no definitive scientific evidence based on studies in people to support the use of açai for any health-related purpose.”¹⁶⁰ Yet, the number of açai products continues to increase annually.¹⁶¹ The ability to transform “superfoods” into super sales illustrates that “the term is more useful for driving sales than it is for providing optimal nutrition recommendations.”¹⁶² Companies know that “the title alone may cause people to focus on a few specific foods,”¹⁶³ and Starbucks is no exception.

CONCLUSION

Courts are often asked to adjudicate whether fruit names have been listed in the proper order, whether fruit juice percentages were properly disclosed, whether food and beverages containing high fructose corn syrup take away from a product’s “all natural” declaration, and to construe the meaning of other terms (“fresh,” “organic,” “natural,” “all-natural”). Further FDA inaction perpetuates consumer confusion as companies creatively skirt the truth behind their products. With such lenient standards, plaintiffs bringing individual causes of action face stiff challenges in avoiding preemption.

Further, food label surveys prove that consumers are more likely to purchase products labeled “natural,” “organic,” or “healthy,” and are also willing to pay a premium for these items. Consumers may believe they are purchasing higher-quality products, but their preferences potentially put them at risk of succumbing to food fraud as companies capitalize on consumer tendencies. Any formal regulation surrounding what a company may or may not name its products will be bound by constitutional concerns; thus, a balance must be struck between consumer protection and a company’s First Amendment rights. The current balance unacceptably allows companies to intentionally pocket consumers’ dollars by trapping them with misleading titles. One consumer’s isolated purchase of an açai-less Strawberry Açai Refresher may not warrant an overhaul of the

158. *Id.*

159. *Id.*; TechNavio, *Acai Berry Products Market*, PR NEWswire (June 10, 2022), <https://www.prnewswire.com/news-releases/acai-berry-products-market-45-of-growth-to-originate-from-south-america--by-application-and-geography---global-industry-analysis-size-share-growth-trends-demand-and-competitive-strategy-analysis-forecast-report-2021-to-202-301564934.html> [perma.cc/AVB4-KCHA]; Katherine D. McManus, *10 Superfoods to Boost a Healthy Diet*, HARVARD HEALTH PUBL’G (Oct. 23, 2022), <https://www.health.harvard.edu/blog/10-superfoods-to-boost-a-healthy-diet-2018082914463> [perma.cc/LDF7-2CLA].

160. *Acai*, NAT’L CTR. FOR COMPLEMENTARY & INTEGRATIVE HEALTH (Aug. 2020), <https://www.nccih.nih.gov/health/acai> [https://www.nccih.nih.gov/health/acai].

161. TechNavio, *supra* note 159.

162. *Superfoods or Superhype*, *supra* note 157.

163. *Id.*; *see* TechNavio, *supra* note 159.

regulatory scheme; however, economically motivated adulteration captures not only an aggregate amount of \$40 billion per year, but potentially also consumers' lives. More stringent FDA regulations would encourage greater transparency in food labeling, decrease consumer confusion, and increase consumer safety. In the meantime, perhaps Starbucks—and their consumers—would benefit from *refreshed* beverage names.