

PAY ATTENTION TO YOUR LABELS! PUTATIVE CLASS ACTION AGAINST WHOLE FOODS' "HONEY GRAHAM CRACKERS" MOVES FORWARD

Hodgson Russ Food & Beverage Alert
February 17, 2021

Whole Foods was sued in the Southern District of New York in a proposed class action lawsuit for claims it made on its 365 Brand "Organic Honey Graham Crackers." According to plaintiff, the potential class representative, the packaging for this product would have led a reasonable consumer to believe that the crackers were sweetened primarily with honey (as opposed to sugar) and that they were made with whole-grain flour (as opposed to "white" or refined flour). In actuality, according to plaintiff, the crackers were made with refined flour and the principal sweetener was cane sugar. Whole Foods moved to dismiss, but the court sided with plaintiff on her key claims, finding that she adequately pleaded a violation of New York General Business Law §§ 349 and 350, prohibiting deceptive acts and false advertising. See *Campbell v. Whole Foods Market Group, Inc.*, 2021 WL 355405 (S.D. N.Y. Feb. 2, 2021).

With respect to plaintiff's claim that the packaging suggested the product contained more whole grain flour than refined flour, the court noted that "graham" refers to whole wheat flour and, "[a] consumer who knows that 'graham' refers to 'whole wheat' flour is likely to read the product packaging as a description of the crackers' ingredients: honey and graham." *Id.* at *5. Moreover, referencing the graphics on the packaging, the court noted that the "honey" and "graham" were equally sized and a uniform color and font and preceded the word "crackers." A reasonable consumer, according to the court, could "view each of those items as a description of the ingredients in the crackers described below each of those prominent terms." *Id.* The court found it irrelevant whether a consumer could determine from the ingredient label that refined flour was the principal ingredient. Significantly, the court rejected the conclusion reached in *Kennedy v. Mondelez Glob. LLC*, 2020 WL 4006197 (E.D. N.Y. July 10, 2020), where a Magistrate Judge dismissed a similar claim because he did not find that the terms "graham" or "graham cracker" suggested whole wheat flour and, instead, referenced a specific type of cracker.

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As far as the primary sweetener in the product, the court found that a reasonable consumer would view the honey on the packaging to refer to honey as an ingredient. The design of the packaging suggested that honey was an ingredient, with the graphics treating the words "graham" and "honey" as the same and the front of the box featuring a honey dipper in a bowl of honey. Whole Foods argued that, since there *was* honey in the product, the packaging was not deceptive. But the court rejected this argument, relying on a Second Circuit decision in which the appellate court noted that "[s]uch a rule would permit Defendant to lead consumers to believe its Cheez-Its were made of whole grain so long as the crackers contained an iota of whole grain, along with 99.999% white flour. Such a rule would validate highly deceptive marketing." *Campbell*, 2021 WL 355405, at *10 (quoting *Mantikas v. Kellogg Co.*, 910 F.3d 633, 638 (2d Cir. 2018)).

The court did, however, dismiss plaintiff's remaining claims, including negligent misrepresentation, breach of express warranty, breach of the implied warranty of merchantability, and fraud. With respect to the fraud claim, the court found that plaintiff's allegation of fraudulent intent – Whole Food's knowledge of the falsity of the labelling – was insufficient. As the court noted, "while the existence of accurate information regarding the product's ingredients on the package does not stymie a deceptive labelling claim as a matter of law, it is certainly a substantial barrier to a plaintiff seeking to plead a claim of fraud." *Id.* at *12.

Hodgson Russ Insights – Notwithstanding the assertion of consumer confusion underlying this suit, there is an entire plaintiffs' bar dedicated to finding just these types of disparities in labelling. Plaintiffs' lawyers pay attention to these types of decisions – and you should too! Examine your packaging and the claims made regarding your products to ensure that they cannot be misconstrued in a way that leads to litigation and the attendant costs and resources required to defend a class action lawsuit. Additionally, consider employing independent focus groups as part of the marketing process to identify potential mislabelling.

If you wish to review your current labelling efforts, please contact [Reena Dutta](#) (716.848.1626), [Ryan Lucinski](#) (716.848.1343), [Sarah Miller](#) (716.848.1509), or any member of Hodgson Russ's [Food & Beverage](#) Practice.

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