



## Food & Beverage ADVISORY ■

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### Failed Motion to Dismiss in Hard Seltzers Case Offers Hard Lessons for Beverage Company

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In an effort to capture market share in a hard seltzers market that could top \$13 billion in 2022, new entrants to the hard seltzers space are increasingly positioning their alcoholic beverage products as though they are traditional beverage products. Plaintiffs have taken notice, and given a significant development in a hard seltzer case (*Marek v. Molson Coors Beverage Company*, No. 3:21-cv-07174 (N.D. Ca.)), the broader alcohol industry should too.

Two plaintiffs filed a putative class action challenging Vizzy Hard Seltzer for claiming on its front label that it is allegedly fortified “with Antioxidant Vitamin C from acerola superfruit.” The complaint alleges that this “fortification claim” violates California’s Sherman Law as unlawful conduct because it runs afoul of the FDA’s fortification regulations. At the same time, this statement allegedly constitutes a false, implied health claim because it misleads consumers into falsely believing that the hard seltzer is healthy—or at least healthier—than competitors’ products. The defendant moved to dismiss these allegations as overserved, pointing out that the hard seltzer’s label cannot violate the FDA’s fortification policy because the label does not use the exact words found in the policy and cannot mislead consumers because it is *technically* true (the hard seltzer does contain Vitamin C from the dried powder of fruit).

The district court, however, found that these technical arguments were overliteral and focused too much on semantics and truthiness. Taking a more practical approach, the district court cited FDA industry guidance in observing that the FDA has suggested it is inappropriate to fortify alcoholic beverages with vitamins and minerals, in line with its efforts to promote the “rational addition of nutrients to foods” and police against “deceptive or misleading claims for certain foods.” It also rejected the defendant’s argument that the hard seltzer’s antioxidant statement is permissible under other FDA regulations, dispensing it with a practical observation that compliance with one regulation does not mean compliance with another. The district court was equally skeptical of the defendant’s argument that the fortification policy did not apply simply because the Vizzy label used the word “with” instead of the policy’s express use of the words “added” or “plus.” After all, synonyms are synonyms.

After upholding the plaintiffs’ Sherman Law claim for violation of the FDA’s fortification policy, the district court also concluded it was plausible that the statement “with Antioxidant Vitamin C from acerola superfruit” constitutes a deceptive implied health claim. Here, the defendant turned to arguing that reasonable consumers could not be misled

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because the general consuming public knows that consuming alcohol isn't great for one's health. But this commonsense argument, the district court observed, ignores critical factors. The FDA itself acknowledged that the fortification of alcoholic beverages could be misleading, and at a minimum, it was plausible that reasonable consumers could interpret a product promoted as containing vitamins, antioxidants, and a superfruit as being healthy (when it's not).

## Key Takeaways

As this putative class action case enters discovery, the alcohol industry should take notice of the district court's order. First, producers should take extra care when evaluating labels for implied claims, particularly for implied health claims. [We previously emphasized](#) the value in a formalized labeling review process because "even an accurate beverage label cannot offer a silver-bullet defense if a plaintiff challenges other elements of the packaging or marketing—the 'overall appearance'—as potentially misleading to consumers." This suit illustrates that principle. Taking a page out of food and beverage class litigation, the plaintiffs targeted a category of implied health claims and have gained access to discovery as a result.

Second, this case offers important lessons in defending against alcohol false labeling claims on a motion to dismiss. While the defendant made no express "health" claim here, within context, the court sustained the complaint because a reasonable consumer could have read an implied health claim into the label. The defendant's technical arguments fell before what the district court suggested were practical considerations about the overall impression of the hard seltzer's claims. When the defendant appealed to the district court's common sense, that argument also fell before the district court's analysis of the overall impression of the label. In false labeling claims, appeals to common sense can defeat allegations of deception under the reasonable consumer standard, but this suit shows that alcohol producers should make those arguments sparingly—and with a healthy dose of common sense.

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