Tucker Ellis LLP

Food, Cosmetics & Dietary Supplements

Overview

Tucker Ellis provides a wide range of legal services to food, beverage, cosmetics, personal care, and dietary supplements manufacturers, distributors, online and bricks-and-mortar retailers, and restaurants.

Our Food, Cosmetics & Dietary Supplements Group provides regulatory and business services to assist our clients in complying with state advertising laws and statutes and regulations enforced by the Federal Food and Drug Administration (FDA), the Federal Trade Commission (FTC), and other regulatory agencies. We represent clients in proceedings before the National Advertising Division of the Better Business Bureau (NAD) and the National Advertising Review Board (NARB). We also conduct advertising, claim substantiation, and labeling reviews to advise our clients on compliance with state and federal law.

Our trial attorneys defend clients in nationwide consumer class actions asserting misbranding, false advertising, and product labeling claims under consumer protection statutes, unfair business competition and false advertising laws, the California Consumer Legal Remedies Act, and the Lanham Act. We represent clients in disputes with vendors, customers, landlords, and other commercial entities, and we counsel clients on pre-litigation avoidance strategies.

Our corporate and business attorneys work with public and private companies – both established and start-ups – in all stages and aspects of their businesses, including formation; finance and growth capital; commercial contracts, distribution contracts, and licensing agreements; M&A and divestitures; real estate; tax; labor and employment; and ongoing operations. We regularly advise executive management and boards on corporate governance and legal compliance matters, and structure and implement compensation agreements and equity incentive arrangements.

Our intellectual property attorneys assist clients with developing and managing their portfolios and obtaining trademarks, copyrights, and patents in the United States and around the world. We have extensive experience protecting our clients' intellectual property rights and, where necessary, enforcing those rights in litigation. Our online brand protection team is highly effective in both finding and stopping problems that occur online. We also assist our clients in licensing, monetizing, and selling their intellectual property.

AREAS OF EMPHASIS

- Regulatory compliance, including FDA, FTC, Fair Packaging and Labeling, automatic renewal programs, and slack-fill requirements
- FDA and FTC enforcement actions
- California Proposition 65
- False advertising and labeling
- Advertising review and counseling
- Intellectual property and brand protection
- Licensing
- Litigation and dispute resolution
- Corporate formation, structure, financing, and growth capital
- Business services, including negotiation of NDA, manufacturing, supply, vendor, and distribution agreements
- Import/Export
- Insurance and risk management issues
- Environmental matters
- Real estate
- Labor and employment services
- Privacy and cyber security
- Product recalls
- Crisis management

SPEAKING ENGAGEMENTS

- "Food, Drugs, Cosmetics, Dietary Supplements, Advertising – and the Special Legal Rights of Senior Citizens: What All Senior Citizens Need to Know When They Make Decisions Regarding Their Purchases," Beverly Hills Bar Association (November 2020) – Matt Kaplan
- "The Business Side of CBD: Contracts, Liabilities and More," California Society of Cosmetic Chemists, Malibu, California (May 2019) – Paul Malie
- "A Deep Dive into Current State Level Priorities and Regulations," 5th Annual Legal, Regulatory, and Compliance Forum on Cosmetics & Personal Care Products," New York, New York (March 2018) – Matt Kaplan
- "NPA Prop 65 Webinar," Natural Products Association (December 2017) – Matt Kaplan
- "Advertising Risks and Brand Protection – Claim Substantiation, Enforcement, and Consumer Class Actions," 2016 In-House Counsel Summit, Tucker Ellis LLP, Cleveland, Ohio (October 2016) – Matt Kaplan
- "Advertising in Regulated Industries," BAA Marketing Law Conference (November 2015) – Matt Kaplan
- "Is Your Business Ready for the US Marketplace?", Panelist, Sabor Latino, Latin Food Industry Trade Show (May 2015) – Matt Kaplan

- "Proposition 65 Update," Grocery Manufacturer's Association (GMA) Annual Litigation Conference, Dana Point, California (February 2014) – Matt Kaplan
- "The Evolution of Consumer Fraud Class Actions against the Food Industry," Challenges Facing the Food & Beverage Industries in Complex Consumer Litigations, New York, New York (June 2013) – Matt Kaplan
- "Presenting Food Science to the Judge or Jury," ABA Section of Litigation's Food & Supplements Third Annual Workshop, Oak Brook, Illinois (June 2013) – Dick Dean

TRADE ORGANIZATION PARTICIPATION

- Cosmoprof North America
- Expo West and Engredea
- Food Industry Business Roundtable
- International Trademark Association
- Provisors Food Affinity Group

PUBLICATIONS

- "Hemp/CBD Companies: Make Your Voices Heard on USDA and DEA Regulations Restricting Hemp Production, Tucker Ellis Client Alert (October 2020) – Ed Racek
- "CBD in Consumer Goods: The Class Action Lawsuits Have Arrived," *Nutrition Industry Executive* (January/February 2020) – Matt Kaplan and Ed Racek
- "Report on the FDA Cannabis Hearing: Passionate Presenters Urge Clarity in Regulation of Complex Industry," *Westlaw Expert Analysis* (July 2019) – Vicky Vance
- "FDA Cannabis Regulation: Help Us Make Your Voice Heard," Tucker Ellis Client Alert (April 2019) – Ed Racek
- "Ninth Circuit Rules Supplement Companies Can Fend Off Challenges to Structure/Function Claims with Preemption Arguments, but That's No Defense to False Advertising," Tucker Ellis Client Alert (January 2019) – Matt Kaplan
- "The California Consumer Privacy Act of 2018: How Can Businesses Use Consumer Data?", *Nutrition Industry Executive* (January/February 2019) – Matt Kaplan
- "Sifting Through the Weeds: A Primer on Federal Laws and CBD Oil," *Nutrition Industry Executive* (September 2018) – Ed Racek
- "When Supplement Product Advertising Goes Too Far," Nutrition Industry Executive (January/February 2018) – Anne Cruz and Matt Kaplan
- "FDA Tackles Terrorism and Adulteration," Food Quality & Safety (September 2016) – Matt Kaplan
- "FDA's New Rule on Sanitary Transport of Food," Nutraceuticals World (September 2016) – Matt Kaplan
- "FTC Distinguishes Between 'Natural' and 'All Natural,'" Tucker Ellis Client Alert (July 2016) – Amanda Villalobos

- "Federal Jury Clears Leading Homeopathic Flu Remedy Manufacturer in Class Action Trial," Tucker Ellis Client Alert (June 2016) – Ndubisi Ezeolu and Matt Kaplan
- "'Evaporated Cane Juice' – FDA Releases Final Guidance Critical of the Term," Tucker Ellis Client Alert (May 2016) – Ndubisi Ezeolu and Matt Kaplan
- "Website 'Terms of Use' May Not Bind Users," Nutraceuticals World (March 2016) – Matt Kaplan
- "FDA Warning Letters Target Internet Testimonials," Nutraceuticals World (February 2016) – Matt Kaplan
- "Congress Loses Its COOL, Repeals Meat Labeling Rule," Law360 (February 2016) – Ndubisi Ezeolu and Matt Kaplan
- "FDA Warning Letters Target Internet Testimonials," Tucker Ellis Client Alert (January 2016) – Ndubisi Ezeolu and Matt Kaplan
- "For the COOL – Congress Repeals Country-of-Origin Labeling Rule for Beef and Pork," Tucker Ellis Client Alert (December 2015) – Ndubisi Ezeolu and Matt Kaplan
- "OEHHA Adds Aloe Vera, Non-Decolorized Whole Leaf Extract and Goldenseal Root Powder to List of Cancer-Causing Chemicals Under California Prop 65," Tucker Ellis Client Alert (December 2015) –Matt Kaplan
- "Subscription Services Beware! Failure to Follow Automatic Renewal Laws May Convert Your Sales into Unconditional Gifts to Your Customers!", Tucker Ellis Client Alert (February 2015) – Matt Kaplan
- "GM Foods: Can We Afford for States to Set Their Own Regulations?", Food Quality and Safety (December 2013/January 2014) – Jeff Whitesell and Don Butte
- "Finding the Sweet Spot in Evaporated Cane Juice Cases," Law 360 (November 2013) – Bill Dance
- "Keeping Tabs on 'Natural' Beauty and Food," Law 360 (June 2013) – Bill Dance and Matt Kaplan
- "The FDA Must Define 'Natural' Soon," Food Processing (May 2013) – Jeff Whitesell and Don Butte
- "FDA: You Can't Call HPP-treated Juice 'Fresh' … (But Can You Call It 'Raw'?)," Food Navigator (February 2014) – Bill Dance and Matt Kaplan

MEDIA QUOTES

- "Cosmetics Firms 'Chomping at the Bit' to Use CBD, but Do So at Own Peril, Attorney Says," HBW Insight (May 2019) – Ronie Schmelz
- "CBD Snacks, Beverages May Present Issues for Retailers," SnackingNews (April 2019) – Ronie Schmelz
- "Hazy Regulations, Huge Reward," Marijuana Venture and Green Entrepreneur (March 2019) – Ronie Schmelz
- "NYC Orders Restaurants to Stop Serving CBD," Vitamin Retailer (February 2019) – Ronie Schmelz

- "Nature's Bounty Wins in False Advertising Suit," Vitamin Retailer (January 2019) – Matt Kaplan
- "Nature's Bounty Prevails in False Advertising Suit – Again," Natural Products Insider (January 2019) – Matt Kaplan
- "More Health Care Products Offered in Latest 'Free Trial' Scam FTC Targets," *The Rose Sheet* (July 2018) – Ronie Schmelz
- "FTC Official Signals CBD Not Enforcement Priority," *Natural Products Insider* (June 2018) – Ronie Schmelz
- "House Cosmetic Bills Conflict on Preemption, Cast PCPSA as Compromise," The Rose Sheet (September 2016) – Ronie Schmelz
- "The US Microbead Ban: Are There Teeth, and Would PHAs Pass Through?", The Rose Sheet (July 2016) – Ronie Schmelz
- "California Appeals Court Says Skin Care Labeling Deal Was Fair," Law360 (June 2016) – Ronie Schmelz
- "FTC Action Against 'All Natural' Claims Likely to 'Embolden' Plaintiffs," The Rose Sheet (April 2016) – Ronie Schmelz
- "OEHHA Starts Prop 65 Rulemaking to Update Max Allowable Lead Level," The Rose Sheet (August 2015) – Ronie Schmelz
- "Cosmetics E-tailers at Risk Amid Trending Auto-Renewal Class Actions," The Rose Sheet (April 2015) – Ronie Schmelz
- "PAGA Case Not Removable Under CAFA; Statute, Rule 23 'More Dissimilar Than Alike'," Bloomberg BNA Class Action Litigation Report (March 2014) – Ronie Schmelz
- "Cosmetic Firms Held 'Hostage' By Prop 65 Litigators; Law Changes Possible," The Rose Sheet (September 2013) – Ronie Schmelz
- "Zhang Ruling Yanks Insurer Shield Against UCL Claims," Law360 (August 2013) – Ronie Schmelz
- "Food Companies Confront Spike in Consumer Fraud Lawsuits," Thomson Reuters (June 2013) – Matt Kaplan

Experience

- Represent consumer product, cosmetic, skin care, and hair care companies in nationwide consumer class actions challenging their use of the term "natural"
- Defend companies in consumer class actions under California Automatic Renewal Law
- Counsel clients on the marketing of consumer products containing cannabis/hemp
- Represent food company in nationwide consumer class action challenging use of the term "No Trans-Fat" on product labels
- Represent leading manufacturer of baby wipes in consumer class actions challenging use of the term "unscented"
- Defend protein powder company in class action alleging protein spiking and mislabeling

- Defend protein powder company in class action alleging false “Made in U.S.A.” claims
- Advise supplement company on FDA and FTC compliance and conduct advertising review of website and promotional material
- Counsel companies selling dietary supplements on proper labeling, advertising, and disclosure requirements
- Assist start-up cosmetic device company with obtaining provisional patent and capital raise
- Represent international skin care company in domain name disputes; recovered numerous domain names from infringing parties
- Develop online brand enforcement strategy for international skin care company
- Represent marketer and seller of vitamins, health supplements – including free testosterone boosters – and personal care products in class actions challenging claim substantiation, advertising, and consumer disclosure practices
- Conduct product labeling, advertising, and marketing reviews of personal care products, including cosmetics, skin care, and dietary supplements
- Conduct product labeling, advertising, and marketing reviews for food manufacturers
- Serve as mergers and acquisition counsel for buy and sell side for food companies
- Conduct FDA regulatory review of cosmetic, skin care, food, and supplement products
- Conduct patent review and prosecution for hair care product company
- Prosecute patent for chewing gum company
- Secured dismissal of Prop 65 action filed against foreign consumer products company
- Defend numerous companies across industry sectors, including cosmetic and health supplements companies in Prop 65 lawsuits
- Perform patent and trademark registration for cosmetic, skin care, and cosmetic device companies
- Advise clients on slack-fill packaging requirements
- Advise personal care companies on brand management strategies and review trademark and patent portfolios
- Defend online marketer and seller of health supplements in false advertising and unfair business practices class action alleging improper shipping & handling charges
- Obtained dismissal of trademark infringement action on behalf of regional brewery
- Obtained dismissal of class action false advertising, unfair competition (Business & Professions Code § 17200), and Consumer Legal Remedies Act case for national food manufacturer involving alleged violation of FDA nutritional content labeling requirements
- Negotiated non-payment dismissal of class action false advertising, unfair competition (Business & Professions Code § 17200), and Consumer Legal Remedies Act case for anti-wrinkle cream cosmetic manufacturer
- Manage the international trademark portfolios for cosmetic companies