



## Food, Cosmetics & Dietary Supplements

### Overview

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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**

- “U.S. Regulatory Landscape: What to Know Before Marketing Probiotics,” Healthy Skin Microbiome Summit (June 2021) – Ronie Schmelz
- “Clean Beauty Claims: Regulation, Transparency and Certifications,” 2nd Annual Clean Beauty Connect Virtual Summit (June 2021) – Ronie Schmelz
- “Claims and Descriptions: A Legal Opinion on What You Can and Cannot Say,” CBD Expo Midwest 2021 (April 2021) – Ronie Schmelz
- “Greenwashing,” Moderator, Hairstory Studio Sustainable Beauty Summit (April 2021) – Ronie Schmelz
- “The Farm Bill Has Passed: How Will Federal Refinement of Rules & Regulations for CBD and Hemp Oil Affect the Cosmetics, Personal Care Products and Dietary Supplements Industries?”, Beauty & Supplement Regulatory Exchange, Washington, D.C. (November 2019) – Ronie Schmelz
- “The Legality of CBD: Separating Fact from Fiction,” 2019 In-House Counsel Summit, Tucker Ellis LLP, Cleveland, Ohio (November 2019) – Ronie Schmelz
- “How to Tap into the CBD Beauty Trend the Right Way!”, Webinar, Cosmetics Design (October 2019) – Ronie Schmelz

- “Marketing Probiotic Products: Careful What You Say!”, Skin Microbiome Congress 2019, San Francisco, California (September 2019) – Ronie Schmelz
- “CBD and Cosmetics: Separating Fact from Fiction,” Intermountain West Society of Cosmetic Chemists (IMWSCC), Park City, Utah (August 2019) – Ronie Schmelz
- “CBD and Beauty: The Next \_\_\_\_ Year(s),” Cosmoprof North America 2019, Las Vegas, Nevada (July 2019) – Ronie Schmelz
- “CBD and Cosmetics: Separating Fact from Fiction,” California Society of Cosmetic Chemists, Malibu, California (May 2019) – Ronie Schmelz
- “The Business Side of CBD: Contracts, Liabilities and More,” California Society of Cosmetic Chemists, Malibu, California (May 2019) – Paul Malie
- “Riding the Coattails: The Latest Developments in Class Action Litigation Affecting the Cosmetics Industry,” ACI Cosmetics & Personal Care Products – Legal, Regulatory and Compliance, New York, New York (March 2019) – Ronie Schmelz
- “Cosmetics 101: How to Market Cosmetics Without Attracting Unwanted Attention From Regulators and Consumer Lawyers,” Fashion Institute of Design & Merchandising (FIDM) (March 2019) – Ronie Schmelz
- “Welcome to 2019! What’s New?”, Natural and Organic Health and Beauty Alliance Webinar (January 2019) – Ronie Schmelz
- “Regulatory Challenges: Probiotic Beauty Products,” 2nd Skin Microbiome Congress, San Francisco, California (September 2018) – Ronie Schmelz
- “High on Beauty: The Cannabis Dilemma,” Cosmoprof North America, Las Vegas, Nevada (July 2018) – Ronie Schmelz
- “FTC Spotlight,” co-presented with Richard L. Clelland, Division of Advertising Practices, Federal Trade Commission, Natural Product Association’s (NPA) “The Big Natural,” Las Vegas, Nevada (June 2018) – Ronie Schmelz
- “Cosmetic Sciences: Skin Care Ingredients, Skin Conditions and Regulatory Issues for Cosmetic Professionals,” UCLA Extension, Los Angeles, California (April 2018) – Ronie Schmelz
- “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
- “Regulatory and Legal Challenges Facing Subscription Commerce Businesses: What Can You Do to Reduce Your Legal Exposure?”, SUBCOM 2018 East, New York, New York (March 2018) – Ronie Schmelz
- “How to Market Cosmetics Without Attracting Unwanted Attention from Regulators and Consumer Lawyers,” Fashion Institute of Design & Merchandising, Los Angeles, California (March 2018) – Ronie Schmelz
- “NPA Prop 65 Webinar,” Natural Products Association (December 2017) – Matt Kaplan

- “Regulatory, Compliance, and Legal Challenges for Subscription Businesses: What You Should Know to Reduce the Risk of Exposure,” SUBCOM 2017: The Subscription Commerce Summit, San Francisco, California (November 2017) – Ronie Schmelz
- “Lessons Learned: How to Market ‘Natural’ Products Without Drawing the Attention of Regulators and Class Action Lawyers,” 2017 Suppliers’ Day Exhibition of the Society of Cosmetic Chemists, Long Beach, California (October 2017) – Ronie Schmelz
- “What Women Want From Naturals,” Panelist, Cosmoprof North America Las Vegas, Las Vegas, Nevada (July 2017) – Ronie Schmelz
- “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
- “Claim Substantiation: Best Practices for Avoiding Unwanted Attention from Government Regulators and Private Plaintiff Lawyers,” New York Society of Cosmetic Chemists, Edgewater, New Jersey – Ronie Schmelz (September 2016)
- “Natural Beauty: The Wave of the Current Beauty Industry,” The Fashion Group International of Los Angeles, Inc. (FGI) and the Fashion Institute of Design & Merchandising (FIDM), Los Angeles, California – Ronie Schmelz (December 2015)
- “Claims Substantiation: Best Practices for Avoiding Unwanted Attention from Government Regulators and Private Plaintiff Lawyers,” New York Society of Cosmetic Chemists (September 2016)
- “Advertising in Regulated Industries,” BAA Marketing Law Conference (November 2015) – Matt Kaplan
- “Regulatory Update: Strategies for Avoiding Class Actions and Complying with FDA and FTC Guidelines,” Society of Cosmetic Chemists (SCC) Suppliers’ Day, Long Beach, California (October 2015) – Ronie Schmelz
- “Proposition 65 Recent Developments,” Valley Industry & Commerce Association (VICA), Encino, California (September 2015) – Ronie Schmelz
- “Knowledge is Power: What you Need to Know to Protect Your Business,” Panel Participant, Cosmoprof North America (July 2015) – Ronie Schmelz
- “Is Your Business Ready for the US Marketplace?”, Panelist, Sabor Latino, Latin Food Industry Trade Show (May 2015) – Matt Kaplan
- “Proposition 65 and Its Impact on the Cosmetics Industry,” ICMAD Cosmetic Technical/Regulatory Forum, Newport Beach, CA (February 2015) – Ronie Schmelz
- “California Privacy & Advertising Laws ~ How Are They Different...,” Brand Activation Association/PMA Marketing Conference, Chicago, IL (November 2014) – Ronie Schmelz
- “Prop 65 – Updates, Wins and What You Must Know,” ICMAD West Coast Business Meeting, Los Angeles, CA (October 2014) – Ronie Schmelz
- “Are You Ready to Import into the USA?”, ICMAD Cosmoprof North American Conference, Las Vegas, NV (July 2014) – Ronie Schmelz

- “California Prop 65 & Consumer Class Actions in the Cosmetics Industry,” ICMAD FDA Cosmetics Regulation Workshop, New York, NY (April 2014) – Ronie Schmelz
- “Proposition 65 Update,” Grocery Manufacturer’s Association (GMA) Annual Litigation Conference, Dana Point, CA (February 2014) – Matt Kaplan
- “Around the Beauty World in 60 Minutes: A Prop 65 Alert,” Cosmoprof North America (July 2013) – Ronie Schmelz
- “ABA May 2013 Consumer Protection Update,” ABA Section of Antitrust Program (June 2013) – Ronie Schmelz
- “The Evolution of Consumer Fraud Class Actions against the Food Industry,” Challenges Facing the Food & Beverage Industries in Complex Consumer Litigations, New York, NY (June 2013) – Matt Kaplan
- “Presenting Food Science to the Judge or Jury,” ABA Section of Litigation’s Food & Supplements Third Annual Workshop, Oak Brook, IL (June 2013) – Dick Dean

#### **TRADE ORGANIZATION PARTICIPATION**

- Association for Corporate Growth (ACG)
- Bay Area Beauty Association (BABA)
- Beauty Industry West (BIW) – Legal Advisor to the Board
- Cosmetic Executive Women (CEW)
- Cosmoprof North America
- Dairy, Deli Bakery Council of Southern California
- Expo West and Engredea
- The Fashion Group International (FGI)
- Food Industry Business Roundtable
- Independent Cosmetic Manufacturers and Distributors (ICMAD)
- International Trademark Association
- Natural Products Association (NPA)
- Personal Care Products Council (PCPC)
- Provisors Food Affinity Group
- Society of Cosmetic Chemists (National Affiliate)

#### **PUBLICATIONS**

- “Report on the FDA Cannabis Hearing: Passionate Presenters Urge Clarity in Regulation of Complex Industry,” *Westlaw Expert Analysis* (July 2019) – Ronie Schmelz and Vicky Vance
- “FDA Cannabis Regulation: Help Us Make Your Voice Heard,” Tucker Ellis Client Alert (April 2019) – Ronie Schmelz and 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 and Ryan Evans
- “The California Consumer Privacy Act of 2018: How Can Businesses Use Consumer Data?”, *Nutrition Industry Executive* (January/February 2019) – Matt Kaplan and Ryan Evans
  - “Congress Passes Farm Bill Legalizing Hemp, Opening the Gate for Use of CBD in Consumer Products,” Tucker Ellis Client Alert (December 2018) – Ronie Schmelz
  - “Sifting Through the Weeds: A Primer on Federal Laws and CBD Oil,” *Nutrition Industry Executive* (September 2018) – Ronie Schmelz and Edward Racek
  - “Courts Split on the Viability of Claims Challenging ‘Hypoallergenic’ Labeling,” Tucker Ellis Client Alert (July 2018) – Ronie Schmelz and Avril Love
  - “When Supplement Product Advertising Goes Too Far,” *Nutrition Industry Executive* (January/February 2018) – Anne Cruz and Matt Kaplan
  - “Regulatory Oversight of Supplement Industry Continues,” *Nutrition Industry Executive* (September 2017) – Ronie Schmelz and Anne Cruz
  - “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 and Ronie Schmelz
  - “FTC Distinguishes Between ‘Natural’ and ‘All Natural,’” Tucker Ellis Client Alert (July 2016) – Ronie Schmelz and Amanda Villalobos
  - “Federal Jury Clears Leading Homeopathic Flu Remedy Manufacturer in Class Action Trial,” Tucker Ellis Client Alert (June 2016) – Ndubisi Ezeolu, Matt Kaplan, and Ronie Schmelz
  - “‘Evaporated Cane Juice’ – FDA Releases Final Guidance Critical of the Term,” Tucker Ellis Client Alert (May 2016) – Ndubisi Ezeolu and Matt Kaplan
  - “FTC Targets ‘All Natural’ and ‘100% Natural’ Products and Defines Terms,” Tucker Ellis Client Alert (April 2016) – Ronie Schmelz
  - “Website ‘Terms of Use’ May Not Bind Users,” *Nutraceuticals World* (March 2016) – Matt Kaplan and Ronie Schmelz
  - “FDA Warning Letters Target Internet Testimonials,” *Nutraceuticals World* (February 2016) – Matt Kaplan and Ronie Schmelz
  - “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, Matt Kaplan, and Ronie Schmelz
  - “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 and Ronie Schmelz

- “Seller Beware!! What You Need to Know About Prop 65 Before Selling Products to California Consumers,” Cosmoprof North America eNewsletter (April 2015) – Ronie Schmelz
- “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 and Ronie Schmelz
- “FDA Issues Proposed Rule on Topical Anti-Microbial OTC Drug Products,” ICMAD Digest (February 2014) – Ronie Schmelz
- “Recent FTC Settlements Alert,” ICMAD Digest (February 2014) – Ronie Schmelz
- “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
- “Cosmetics E-tailers at Risk Amid Trending Auto-Renewal Class Actions,” The Rose Sheet (April 2015) – Ronie Schmelz
- “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

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- Represent consumer product, cosmetic, skin care, and hair care companies in nationwide consumer class actions challenging their use of the term “natural”
- Represent cosmetic and skin care companies in nationwide consumer class actions challenging product efficacy claims under false advertising, consumer legal remedies, and unfair business practices acts
- Defend companies in consumer class actions under California Automatic Renewal Law
- Counsel clients on the marketing of consumer products containing cannabis/hemp
- Represent international skin care company in nationwide consumer class action challenging advertising and disclosure practices
- Represent food company in nationwide consumer class action challenging use of the term “No Trans-Fat” on product labels
- Represent leading manufacture 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
- Analyze studies and conduct risk analyses to advise dietary supplement companies on claim substantiation support
- Assist start-up cosmetic device company with obtaining provisional patent and capital raise
- Advise international personal care company on requirements for entering U.S. market, including advertising and regulatory review
- Advise foreign client on importing and marketing medical foods in the U.S.
- Represent international skin care company in nationwide class action challenging consumer disclosures
- 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
- Represent skin care company in personal injury actions
- 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
- Prepare non-disclosure and customer purchase order documentation 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
- Represent online retailer of health and dietary supplements in online counterfeiting case; successfully shutdown counterfeiter's website, Facebook, and Twitter accounts
- Obtained dismissal of trademark infringement action on behalf of regional brewery

- Defend company in customs investigation and audit of business operations in dispute over duty exemption and valuation claims, NAFTA eligibility, and accuracy of prior disclosures
- 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
- Counsel hair color company on regulatory and patent issues