

USING ONLINE TOOLS TO ASSESS CONSUMER PERCEPTIONS OF CLASS- ACTION FOOD LITIGATION

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INTRODUCTION

Class-action litigation in the area of food and agriculture is on the rise. These food class-action lawsuits (“FCAs”) are often highly contentious cases that evidence great rifts in public perception. For every person who supports FCAs on the grounds they protect consumers or challenge corporate power, there may be several people who argue that FCAs are frivolous, benefit only plaintiffs’ lawyers, and are evidence of our overly litigious society.

While these basic public perceptions about class-action litigation generally and FCAs specifically are commonly known, little research has been carried out to understand or measure them in any systematic manner.² In fact, scholars³ and government agencies⁴ alike have noted that research on consumer perceptions

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² *Cf. generally* Doris Van Doren et al., *The Effect of a Class Action Suit on Consumer Attitudes*, 11 J. PUB. POL’Y & MARKETING 45 (1992) (studying and reporting the perceptions of class-action litigation among consumers who had participated in such litigation).

³ Stephen Meili, *Collective Justice or Personal Gain? An Empirical Analysis of Consumer Class Action Lawyers and Named Plaintiffs*, 44 AKRON L. REV. 68 (2011) (recommending more research to better understand consumer perceptions of class-action litigation).

⁴ Notice, Agency Information Collection Activities; Proposed Collection; Comment Request, 80 Fed. Reg. 25676 (May 5, 2015) (revealing the FTC’s plans to conduct “an Internet-based consumer research study to explore consumer perceptions of class action notices”). The FTC’s methodology and expectations provide affordances and limitations similar to those employed by and described

of class actions is limited. I intend this Article to begin to address this deficit in our understanding of consumer perceptions of class-action litigation generally, and FCAs more specifically.

I do not intend for this short Article to be a conclusive exploration of consumer perceptions of class actions, nor of FCAs. Rather, this Article will establish a methodology and a framework for future research in this nascent area of legal research. The tool this Article uses to establish this approach centers on assessing consumers' online expressions of their perceptions of one type of class-action litigation, namely FCAs.

Part I of this Article introduces research into online tools for assessing consumer perceptions of their food experiences. Part II details how these online tools may be used to assess consumer perceptions of FCAs across nearly every stage of litigation. Part III assesses briefly what the data presented in Part II establishes about consumer perceptions of FCAs. Part IV discusses the need for future research and suggests avenues for such inquiry. Finally, this Article concludes that websites, mobile applications ("apps"), message boards, and other user-focused online environments are a valuable and overlooked tool for better understanding (and shaping action based on) consumer perceptions of FCAs.

I. USING ONLINE TOOLS TO ASSESS CONSUMER PERCEPTIONS OF FOOD EXPERIENCES

Consumers regularly share and discuss their impressions about their purchasing experiences through a variety of online tools. These expressive and discursive online mediums include websites, message boards, and apps.

One of the best known of these tools is Yelp, which exists both as a website and an app. Yelp allows consumers to rate their experiences at restaurants, stores, service providers, parks, and other businesses and places. In addition to giving users the ability to express their perceptions in the form of a rating, Yelp allows consumers to comment on their experiences. Consumer reviews of restaurants are one of the most popular features used by Yelpers (as users of Yelp are known).⁵

in this Article. *See id.* (noting that the anonymous Internet responses "provide useful insights into consumer understanding of the claims being considered" but are "not generalizable to the U.S. population" as a whole).

⁵ *An Introduction to Yelp Metrics as of March 1, 2018*, YELP, <https://www.yelp.com/factsheet> (reporting that seventeen percent of Yelp reviews focus on restaurants) (last visited Sept. 15, 2018).

While Yelp and other similar online tools are useful and fun, they also boast important real-world functionality beyond their ability to identify mere consumer preferences for, say, one restaurant over another restaurant. Researchers increasingly rely on online tools such as Yelp to study consumer habits, perceptions, and experiences. In fact, sufficient research has been published to date such that one may conclude these online tools have become a regular and reliable means for researchers to better understand a number of consumer experiences and perceptions pertaining to food. For example, at a time when most Americans use the internet—and, specifically, social media⁶—a growing body of literature has identified online tools as a useful vehicle for tracking and better understanding outbreaks of foodborne illness.⁷

II. WHAT ONLINE TOOLS SHOW ABOUT CONSUMER PERCEPTIONS OF FCAs

Class-action litigation traces its origins back hundreds of years to “group litigation,” which typically centered on agriculture.⁸ Many researchers who focus on FCAs today point to the rise of class-action suits targeting food labeling—particularly use of the term “natural”—and trace the origins of FCAs to approximately one decade ago.⁹ But FCAs have existed for at least a quarter century. Consider, for example, an FCA filed in 1990

⁶ Aaron Smith & Monica Anderson, *Social Media Use in 2018*, Pew. Res. Ctr., (Mar. 1, 2018), www.pewinternet.org/2018/03/01/social-media-use-in-2018/ (finding that more than two-thirds of American adults use Facebook; thirty-five percent use Instagram; and nearly one in four use Twitter).

⁷ See, e.g., Bridget M. Kuehn, *Agencies Use Social Media to Track Foodborne Illness*, 312 JAMA 117 (2014), <https://jamanetwork.com/journals/jama/article-abstract/1885471>; Cassandra Harrison et al., *Using Online Reviews by Restaurant Patrons to Identify Unreported Cases of Foodborne Illness—New York City, 2012–2013*, 63 MORB. MORTAL. WKLY. REP. 441 (2014); Elaine O.Nsoesie et al., *Preventive Medicine Online Reports of Foodborne Illness Capture Foods Implicated in Official Foodborne Outbreak Reports*, 67 PREVENT. MED. 264 (2014).

⁸ See Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 872 (1977) (“[E]very sixteenth- and seventeenth-century case of group litigation I have found involves the members of rural agricultural communities. . .”) (emphasis in original).

⁹ See, e.g., *The Food Court*, U.S. Chamber Inst. For Legal Reform, (Feb. 2017) https://www.instituteforlegalreform.com/uploads/sites/1/TheFoodCourtPaper_Pages.pdf (suggesting the rise of FCAs came “[a]bout five years” ago).

involving Washington State apple growers¹⁰ and the Sun Orchard orange juice salmonella litigation filed in 1999.¹¹

FCAs began to expand in the early 2000s, thanks to a series of fast food-related obesity FCAs. Two FCAs in particular are noteworthy here. In the first, an obese NYC man, Caesar Barber, sued several fast-food chains in 2002, claiming the companies and their food were responsible for his obesity.¹² One year later, a pair of obese New York City teens sued McDonald's on similar grounds.¹³

The purpose of FCAs today often vary dramatically from lawsuit to lawsuit. Some suits are intended to make large numbers of consumers whole; to force a company to change its labeling or recipe; or to fill perceived gaps in regulations. Some suits seek to achieve more than one of these objectives.

FCAs are an ideal tool for exploring broader class-action issues for many reasons. Most notably, nearly every American is a consumer of commercial food and a plaintiff (or potential plaintiff) in an FCA. In addition, FCAs touch on many different areas of law and are directed at a variety of targets, including restaurants and restaurant chains, farms and farmers, grocers, food manufacturers, pesticide manufacturers, prisons, government, nonprofit groups, and the media.

Though little research has focused on consumer perceptions of FCAs, fewer scholars still have examined the relationships between consumer perceptions and online tools such as social media.¹⁴ For this Article, I chose to focus chiefly on social-media

¹⁰ See Daniel P. Puzo, *Apple Growers to File Lawsuit in Alar Dispute*, L.A. TIMES, (Nov. 20, 1990), articles.latimes.com/1990-11-20/news/mn-5090_1_apple-growers (“Washington state apple growers said they intend to seek \$250 million in damages from CBS-TV’s ‘60 Minutes’ program and the Natural Resources Defense Council, an environmental group, for ‘product disparagement’”).

¹¹ Assoc. Press, *Salmonella Outbreak*, KITSAP SUN, (July 1, 1999), https://products.kitsapsun.com/archive/1999/07-01/0055_salmonella_outbreak__seattle_boy_.html.

¹² Assoc. Press, *Man Sues Fast-Food Chains for His Obesity*, L.A. TIMES, (July 27, 2002), articles.latimes.com/2002/jul/27/business/fi-rup27.9

¹³ Marc Santora, *Teenagers’ Suit Says McDonald’s Made Them Obese*, N.Y. TIMES, (Nov. 21, 2002), <https://www.nytimes.com/2002/11/21/nyregion/teenagers-suit-says-mcdonald-s-made-them-obese.html>.

¹⁴ See, e.g., Jeremy R. McClane, *Class Action in the Age of Twitter: A Dispute Systems Approach*, 19 HARV. NEGOT. L. REV. 213, 240-242 (2014) (exploring, in part, the impact on public perception of protest actions within various social media forums). Notably, though, debates over the plausibility of

posts from a variety of mainstream-news outlets of varying sizes. I examined posts by these news providers on two of the most popular social-media platforms: Facebook and Twitter. I examined FCAs at various stages of litigation, including immediately after the filing of an FCA and following a verdict or settlement. Because class-action litigation generally and FCAs specifically are intended in large part to benefit consumers, assessing their perception of FCAs should help policymakers, scholars, the media, and the public to understand better whether or not consumers believe such litigation truly benefits them.

A. Subway Hit with ‘Footlong’ FCA

i. Case Summary

In 2013, a man posted a photo on Facebook¹⁵ of a Subway “footlong” sub sandwich alongside a measuring stick beside it showing that the sub was not quite a foot long.¹⁶ The photo helped form the basis of the FCA against Subway that followed.¹⁷ The suit argued Subway had engaged in false advertising by claiming incorrectly that its “footlong” sub was twelve inches in length. Though the parties reached a settlement in 2016, a federal judge threw out the settlement in 2017, stating the settlement conferred no benefits on the plaintiffs and instead benefited only the plaintiffs’ attorneys.¹⁸

social media as a tool for identifying the perceptions and other characteristics of potential jurors have existed for years. *See, e.g.*, The Legal Intelligencer, *Should Lawyers Refrain from ‘Scouring’ Jurors’ Social Media?*, Blank Rome, (May 10, 2016), <https://www.blankrome.com/publications/should-lawyers-refrain-scouring-jurors-social-media> (exploring whether “jurors’ online profiles and social media can—and, equally importantly, should—be ‘scour[ed] over’ by trial lawyers and jury consultants”).

¹⁵ Jonathan Stempel, ‘Worthless’ Subway ‘Footlong’ sandwich settlement is thrown out: U.S. Court, Reuters, (Aug. 25, 2017), <https://www.reuters.com/article/us-subway-decision-footlong-idUSKCN1B52H6>.

¹⁶ *See* Kim Janssen, *Lawsuit over Subway ‘Footlong’ Subs was a ‘Racket’ Benefiting Only Lawyers, Judge Says*, CHI. TRIB., (Aug. 25, 2017), www.chicagotribune.com/news/chicago-inc/ct-subway-footlong-scam-0827-chicago-inc-20170825-story.html.

¹⁷ *See* Stempel, *supra* note 15 (“The litigation began after Australian teenager Matt Corby in January 2013 posted a Facebook photo showing a Footlong sandwich he bought was only 11 inches long, not 12.”).

¹⁸ *See id.*

ii. Consumer Perceptions

On August 25, 2017, Reuters, the international news service, posted a link on the company's Facebook page to a Reuters article on the judge's recent action to dismiss the Subway lawsuit settlement.¹⁹ The Reuters Facebook post on the Subway settlement's dismissal received more than one-hundred comments from Facebook users and was shared by Facebook users more than fifty times.²⁰ The post also received more than 550 other user responses, in the form of optional user-selected emojis that Facebook users chose to represent their feelings about the judge's decision to throw out the settlement.²¹

Most of the Facebook users who commented on the post chose to express their perceptions about the validity of the litigation itself, rather than their perceptions of the judge's dismissal of the lawsuit settlement. The perceptions of these users were divided.

Among those who supported the plaintiffs' position, commenter Sarah Matthias wrote that "[i]f it's called a footlong it should be a foot long, that's a no brainer."²² Thirteen users "liked" Ms. Matthias's comment, while one "loved" it. Nine users "liked" commenter Joanne McIntyre's reply: "Lies in advertisement, isn't that the American way? Been so long since we have seen justice and any court enforcing the rule of law that this is just one more joke—on us."²³

¹⁹ See Reuters, 'Worthless' Subway 'Footlong' Sandwich Settlement is Thrown Out of Court, FACEBOOK, (Aug. 25, 2017), <https://www.facebook.com/Reuters/posts/1613871285299888> (last visited Sept. 15, 2018). Exploring the responses of those users who shared the post on their personal Facebook pages is beyond the scope of this Article and would be difficult to assess in any case, as the privacy settings many Facebook users employ do not allow a person who is not in their Facebook social network (e.g., is not a "friend") to view content on their personal Facebook page.

²⁰ *Id.*

²¹ *Id.* Those responses include ones from the six emojis Facebook currently lets users select: 1) like; 2) love; 3) haha; 4) wow; 5) sad; and 6) angry. Melissa Yang, *What Do Facebook Reactions' Faces Mean? Here's The Perfect Time To Bust Out Each Emoji*, BUSTLE, (Oct. 9, 2015), <https://www.bustle.com/articles/115959-what-do-facebook-reactions-faces-mean-heres-the-perfect-time-to-bust-out-each-emoji>. Facebook no longer lets users select a "yay" emoji. See Facebook.com (last visited Sept. 15, 2018). Notably, users may choose to comment, to choose an emoji response, to share a post to their own page, or to employ some combination of these three responses.

²² *Supra* note 19.

²³ *Id.*

Among those who supported the defendant's position, commenter Max Doumanian stated that "a 'foot' is not a precise measure. [N]o deception on the part of the company[.]"²⁴ Commenter Brenda Mae Wolfenbarger called the litigation "a ridiculous lawsuit[.]"²⁵ And commenter Karry Kratt Auby wrote that the judge's dismissal was evidence "[f]inally [of] some sanity on stupid lawsuits."²⁶

Several commenters were critical of the plaintiffs' attorneys. Commenter Justin Holmes stated that "[i]t's not really a vindication of subaway (sic), but a rebuke of the plaintiffs' lawyers for not actually getting anything for their clients[.]"²⁷ Commenter Harry Velez criticized "[b]ottom feeding [l]awyers[.]"²⁸

Others Facebook users were critical of the American legal system as a whole. Commenter Alan Brown wrote that "[f]inally a welcome bit of sanity from an otherwise pathetic court system[.]"²⁹ Commenter Max Skidelsky lamented that "[o]ur judicial system is broken[.]"³⁰ And still others were critical of those they perceive as abusing that system. Commenter Carlo Lato dubbed "America the frivolous lawsuit capital of the world!! How ridiculous!!"³¹

Of the more than 550 users who chose a Facebook emoji to express their feelings on the Reuters post, 354 Facebook users "liked" the post.³² Additionally, 168 users used the "haha" emoji to share their feelings. Two-dozen users chose the "wow" emoji. Eight users chose the "sad" emoji and six used the "angry" emoji.³³

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* Parsing the meaning of a "like" or other Facebook user emoji response is beyond the scope of this Article. Indeed, some argue that attempting to divine such meaning is nothing more than an exercise in futility. *See, e.g.*, Jason Abuzzese, *In Search of Meaning for the Facebook Like*, MASHABLE, (June 6, 2017), <https://mashable.com/2017/06/06/what-does-a-facebook-like-mean/#LTytKoApWSq0> ("Parsing intent from someone hitting a button on the Internet is, at best, a faulty calculus of context").

³³ *Supra* note 19.

B. bartaco Faces Hepatitis A FCA

i. Case Summary

In October 2017, the owners of a bartaco franchise in Port Chester, New York, part of a chain of taco eateries with locations in eight states, were sued after thousands of patrons were allegedly exposed to hepatitis A while dining at the restaurant.³⁴ Those who ate at the restaurant over a two-month period were advised to seek vaccinations from the local health department.

ii. Consumer Perceptions

Lohud, a Gannett-owned news outlet that serves three counties north of New York City, posted a video on the bartaco hepatitis A outbreak on its Facebook page on October 28, 2017. The post, made before any FCA was filed, garnered scant response; Facebook users added two comments and seven emojis to the post.³⁵

Three days later, on October 31, Lohud posted on its Facebook page news that an FCA had been filed against bartaco's owners by those who claim they may have been exposed to the hepatitis virus during one or more visits to bartaco.³⁶ That post announcing the FCA received far more consumer attention: 102 emoji responses, seventy-seven comments, and forty shares.³⁷ Comments ranged from anger directed toward bartaco over potential hepatitis exposure to outrage directed at those plaintiffs who had filed the lawsuit against bartaco.

Several commenters expressed support for bartaco and its owners. "So what did management do wrong? Did they know the person was infected? How are they in the wrong?" asked John Iorio.³⁸ John Norwood commented that bartaco's owners "did

³⁴ Dan Reiner, *Hepatitis: Class-Action Lawsuit Filed Against bartaco Owners*, LOHUD, (Oct. 31, 2017, 7:03 PM), <https://www.lohud.com/story/news/local/westchester/rye-brook-portchester/2017/10/31/bartaco-port-chester-lawsuit/819367001/>.

³⁵ Lohud, *Quick Facts on Hepatitis A*, FACEBOOK (Oct. 28, 2017), <https://www.facebook.com/lohud/posts/10155488854180033>. Neither comment expressed a substantive opinion about bartaco.

³⁶ LOHUD, *Hepatitis: Class-Action Lawsuit Filed Against bartaco Owners*, Facebook (Oct. 31, 2017), <https://www.facebook.com/lohud/posts/10155496814975033>.

³⁷ *Id.*

³⁸ *Id.*

nothing wrong[.]”³⁹

Other commenters suggested a lawsuit was misplaced in this case. One consumer who claimed to have eaten at the restaurant and to have sought medical treatment later on expressed support for bartaco. “There’s always that one person looking for \$\$,” wrote Angela Faillace. “My husband and I got our vaccinations end of story.”⁴⁰ Others echoed Faillace. “Why do so many people sue when the problem can be solved in other ways?” wondered Kate Smith Granados.⁴¹

The small number of those who expressed anger at bartaco included commenters who said they would no longer eat at the restaurant. One such commenter, Christopher Bones, who wrote simply “[b]ye bye Bar Taco[.]”⁴² But commenters such as Christine Chan, who characterized the lawsuit as “[j]ust a money grab” on the part of those suing the restaurant, were far more numerous.⁴³

C. Templeton Rye Hit with Place & Recipe FCA

i. Case Summary

In 2010, the makers of Templeton Rye, a Prohibition-era, Iowa-based whiskey maker, admitted that their spirits were not distilled in Iowa, as they had claimed, but were produced instead in Indiana.⁴⁴ Four years later, company officials again acknowledged this fact, along with the fact that Templeton Rye was not made with the original Prohibition-era recipe.⁴⁵ This time, those admissions made Templeton the target of an FCA that was filed in 2014.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See id.*

⁴⁴ Josh Noel, *Templeton Rye Reaches Lawsuit Settlement, Will Pay Refunds*, CHI. TRIB., (July 14, 2015), www.chicagotribune.com/dining/ct-templeton-rye-settlement-20150714-story.html.

⁴⁵ Grant Rodgers, *Templeton Rye Mised Consumers, Lawsuit Says*, DES MOINES REG., (Sept. 24, 2014), <https://www.desmoinesregister.com/story/news/crime-and-courts/2014/09/24/templeton-rye-lawsuit-iowa-recipe-consumer-fraud/16165957/?sf31551667=1>.

ii. Consumer Perceptions

On September 24, 2014, the *Des Moines Register* posted an article on its Facebook page announcing the filing of the FCA against Templeton.⁴⁶ The post received more than seventy user comments, more than one-hundred emoji responses—all of them “likes”—and was shared by users more than one-hundred times.⁴⁷ Based on their Facebook comments, consumer perceptions of this FCA varied widely.

Many commenters were critical of the plaintiff. “[S]tupid lawsuit. . . just shows people are greedy and looking for an easy dollar[,]” wrote commenter Daniel Schafer.⁴⁸ Commenter Bonnie Hoskins Phipps wrote “[g]reed greed greed. \$\$\$\$\$. Shame on you!”⁴⁹ Some were critical of the judicial system. Commenter Ann Danielson wrote “the lawsuit said it misled drinkers False . . . False OMG people you wouldn’t have drunk it if it came from Indiana???? The judge & courts should start throwing frivolous lawsuits out.”⁵⁰

Others took the opportunity to express criticism of class-action litigation. Commenter Mike Reitsma wrote “[y]ou knew that was coming. Class action suit. Lawyers get \$5,000,000 and customers get [fifty] cents.”⁵¹ Another commenter noted they opposed the Templeton FCA but supported other forms of class-action litigation. “What’s the big deal anyway?” asked commenter Joel Bader. “I’ll say it again—the class-action suits should be spared for more important matters[.]”⁵²

Still others offered pointed criticism of the attorneys who filed the lawsuit. “Is it deceitful and disappointing?” asked commenter Tyler Coleman. “Yes. Does it warrant a lawsuit that will only benefit a small handful of the people who might be unhappy with the revelation? Absolutely not.”⁵³

But other commenters slammed Templeton Rye for what they viewed as the company’s false and misleading claims. Commenter Ryan Meyer wrote that he had “no problem with

⁴⁶ Des Moines Reg., *Templeton Rye Misled Consumers, Lawsuit Says*, FACEBOOK (Sept. 24, 2014), <https://www.facebook.com/DesMoinesRegister/posts/10152778162414579>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

[Templeton] being made in Indiana[,] HOWEVER—using a stock [rye] recipe from Seagram’s and claiming it is your own (or, backpedaling, ‘inspired by’ your own?). That’s FRAUD.”⁵⁴ Commenter Adam Bowersox also felt Templeton had misled him. “I was a big fan of [T]empleton, and I gotta say that I kinda felt lied to. I don’t have a huge problem [] with the law suit.”⁵⁵

Some commenters took the opportunity to express a deeper understanding of damages and other class-action issues. “If you purchased the product because. . . you believed it was locally made then they deceived you into purchasing their product over another that you may have purchased,” wrote commenter Jack Johnson. “And that alternative choice may have been less expensive. There’s your injury.”⁵⁶ Another particularly eloquent commenter, Ross Anderson, offered a thoughtful 550-word response in which he blasted both Templeton’s marketing tactics and those who filed the FCA against Templeton: “I find the class action lawsuit to be completely over the top. I speak with my wallet and choose not to support T[empleton] in that fashionFalse I don’t feel the need to line lawyers’ pockets with even more money.”⁵⁷

D. Olympia Brewer Targeted with FCA Over ‘It’s the Water’ Tag

i. Case Summary

In 2018, Pabst, which brews Olympia beer, was sued over Olympia’s tagline: “It’s the Water.”⁵⁸ The suit alleges that Olympia’s use of the tagline is misleading because the beer is no longer brewed in or near its birthplace near Olympia, Washington, nor with water from an artesian spring that flows into Olympia.⁵⁹

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Lisa Fickenschner, *Pabst’s Olympia Beer Sued for False Advertising on ‘Pure Mountain Water,’* N.Y. POST (Mar. 21, 2018, 10:06 PM), <https://nypost.com/2018/03/21/pabsts-olympia-beer-sued-for-false-advertising-pure-mountain-water/>. My own perceptions of the lawsuit appear in the *New York Post* article. *Id.* (“I’m not sure the suit has meritFalse I live in Seattle, where Olympia is widely available as a cut-rate discount beer. You can get a six pack of 16-ounce cans for \$4 or \$5. No one is paying a premium for this beer”).

⁵⁹ Sam Stanton, *He Didn’t Like the Beer, So He Filed a Class-Action Lawsuit,* SAC. BEE (Mar. 19, 2018, 2:11 PM), <https://www.sacbee.com/latest-news/article205876699.html> (explaining how the plaintiff in this case has previously brought lawsuits like this against a food company and another

The plaintiff in the case, Brendan Peacock, has filed at least three FCAs in recent years.⁶⁰

ii. Consumer Perceptions

On March 22, 2018, the Spokane *Spokesman-Review* posted a link on the paper's Facebook page to the paper's coverage of the lawsuit.⁶¹ Interestingly, the *Spokesman-Review*'s Facebook post includes a rather pointed take on the lawsuit: "Most people who don't care for a beer they've purchased simply switch brands. Brendan Peacock goes a bit further. He sues."⁶² The newspaper's Facebook post received thirty-three comments, five shares, and more than forty emoji responses.⁶³

Many commenters offered withering criticism of this plaintiff. "Sounds like he doesn't have much of a life[.]" commenter Cal Diksen wrote of the plaintiff.⁶⁴ "Pathetic[.]" was all commenter Teresa McWain Roos wrote.⁶⁵ Commenter Drew Hall tagged a friend in his comments, Zach Hedquist, and asked simply "frivolous case?"⁶⁶ Hedquist drafted a one-word response to Hall: "exactly."⁶⁷ Commenter Diksen also criticized the plaintiff's attorneys, writing that this was "just another lawyer making money off of [bullshit]."⁶⁸

A handful of commenters did rise to defend the lawsuit. Commenter Doug Horne wrote that it "[s]ounds like he wants accountability for advertisers in the 'free market.' Good on him."⁶⁹ Another commenter referenced Olympia's well-known tagline, which lies at heart of the lawsuit. "It's the water," wrote commenter Mike Saul, "so if you[re] buying a half rack of [Olympia], you would expect it to be brewed with the water as advertised."⁷⁰

brewer).

⁶⁰ *Id.*

⁶¹ *Spokesman Rev., He Didn't Like the Beer, So he Filed a Class-Action Lawsuit*, FACEBOOK (Mar. 22, 2018), <https://www.facebook.com/spokesmanreview/posts/10155108907011721>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

Another source of consumer perceptions of the Olympia FCA is Beer Advocate, a leading online beer resource.⁷¹ Among other features, Beer Advocate's website hosts virtual community message boards where members may post and respond to beer-related content. On March 21, 2018, a Beer Advocate registered user who goes by the pseudonymous username "BeerGlassesCollector" posted the full text from and a link to an online Fox News story on the Olympia FCA.⁷² BeerGlassesCollector's post received fifty-five responses.⁷³

Many commenters were highly critical of the plaintiff, oftentimes using salty language. "The complaintant (sic) sounds like a pure dou[che]bag," Giantspace wrote, "I agree these companies might be leading people on with advertising but is anyone really buying a beer because it's brewed with water from X?"⁷⁴ Commenter LuskusDelph characterized the plaintiff as "a loser," and also took the opportunity to criticize the plaintiff's attorneys and litigation of this sort.⁷⁵ "Assclowns like this are a disgrace, and clearly are only out to make a buck (along with their lawyers, who are no better). Just another frivolous lawsuit[,]" LuskusDelph wrote.⁷⁶

Some commenters characterized the plaintiff as a serial litigant. "Beer lover? More like beer lawsuit lover," wrote commenter Jayspace.⁷⁷ Commenter VTBrewHound characterized the plaintiff as "overly litigious[.]"⁷⁸ Commenter FBarber characterized the litigant as "a professional plaintiff!"⁷⁹

Nevertheless, some commenters did suggest the lawsuit has merit. Commenter JackHorzempa asked if "maybe breweries should not mis-represent the beers they are producing?"⁸⁰ Commenter GuyFawkes asked rhetorically, "[T]hey were lying,

⁷¹ BEER ADVOCATE, <http://www.beeradocate.com> (last visited Sept. 15, 2018).

⁷² BeerGlassesCollector, *Beer Lover Sues Pabst Brewing Co., Says He Was 'Deceived' by False Advertising*, BeerAdvocate Forum (Mar. 21, 2018), <https://www.beeradocate.com/community/threads/beer-lover-sues-pabst-brewing-co-says-he-was-deceived-by-false-advertising.564437/>.

⁷³ *Id.* BeerGlassesCollector did not comment on the perceived merits of the litigation in their post (last visited Sept. 15, 2018).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

no?”⁸¹

E. Starburst Calorie Mislabeling Spurs FCA

i. Case Summary

In 2017, candy maker Wrigley was sued by a man who claimed the calorie information on the company’s Sour Gummy candies was incorrect.⁸² The suit alleges that the calorie count on the front of the packaging differed from that on the back-of-package, FDA-mandated nutrition label by several calories.⁸³

ii. Consumer Perceptions

On September 1, 2017, the *Chicago Tribune* posted links to its news story on the Starburst FCA on its respective Facebook and Twitter social media accounts. On Facebook, the post racked up more than 100 comments, 23 shares, and more than 170 emoji responses.⁸⁴ On Twitter, the post garnered 16 replies (equivalent to a comment on Facebook), 9 retweets (comparable to sharing a post on Facebook), and 25 likes (analogous to the same feature on Facebook).⁸⁵

Many of those who commented on the *Tribune*’s Facebook post expressed deep animosity toward the lawsuit and plaintiff. Commenter Jennifer Payton criticized the filing of the lawsuit, comparing it to “that ridiculous woman who was suing Starbucks for putting too much ice in her iced coffee.”⁸⁶ Commenter LeeLee Meister dubbed the suit “the most ridiculous thing I have seen.”⁸⁷ Others suggested the plaintiff who filed the suit should face fines.

⁸¹ *Id.*

⁸² Jonathan Bilyk, *Wrigley Co. Accused of Mislabeling Caloric Content of Starburst Gummy Candy in Class Action*, COOK CTY. REC. (Aug. 31, 2017), <https://cookcountyrecord.com/stories/511203192-wrigley-co-accused-of-mislabeling-caloric-content-of-starburst-gummy-candy-in-class-action>.

⁸³ *Id.*

⁸⁴ Chi. Trib., *Starburst Lawsuit: Calorie Counts are Off by 10 Per Serving*, FACEBOOK (Sept. 1, 2017), <https://www.facebook.com/chicagotribune/posts/10155695461783256>. The latter consisted of eighty haha responses, sixty likes, eighteen wows, and nine angry and four sad emojis.

⁸⁵ CHI. TRIB. (@chicagotribune), *Lawsuit Claims Starburst Calorie Counts are Off by 10 Per Serving*, TWITTER (Sept. 1, 2017, 6:17 a.m.), <https://twitter.com/chicagotribune/status/903577503016640512>.

⁸⁶ CHI. TRIB., *supra* note 84.

⁸⁷ *Id.*

Ginny Logsdon called the lawsuit “ridiculous” and suggested the plaintiff be “[f]ine[d] for bringing a frivolous lawsuit.”⁸⁸

Several commenters also attacked the attorneys representing the plaintiff in the case. “Lawyers who pursue these frivolous lawsuits should be disbarred,” wrote commenter Jennifer Payton.⁸⁹ “Nice money grab, a less talented lawyer needs to be creative to survive,” wrote Paul Hain.⁹⁰ “The kind of case that gives lawyers a bad name,” wrote David Shapiro.⁹¹ “This is some lawyer trying to make cash by ‘standing up for the little guy’ by taking 90 percent of whatever settlement 1 million people split,” wrote Marty Durbin.⁹²

Some commenters noted the burden that such “frivolous” litigation places on court system. “What a waste of court time,” wrote Todd VanSlyke.⁹³ Anita Meyer argued that “some people will just clog the courts with frivolous lawsuits[.]”⁹⁴ And commenter Paul Hain, who also blasted the plaintiff’s attorneys, argued that “[o]ur court system is over flowing with frivolous lawsuits[.]”⁹⁵

Only a few of the more than one-hundred commenters on the *Tribune*’s Facebook post expressed support for the lawsuit. “[T]ruth in advertising matters, and nutrition facts need to be taken more seriously,” wrote Ian Magruder.⁹⁶ “And huge companies should be allowed to falsely advertise?” asked Philip Jordan.⁹⁷

Those who responded on Twitter were also highly critical of the lawsuit. Twitter user Mary Zajakala (@mzajakala) blasted the suit as “a waste of everyone’s time. If you’re eating [S]tarbursts, are you really concerned about an extra 10 calories?”⁹⁸ User Tim W (@Tlwilli1) said the lawsuit revealed it was “amazing the petty things people will sue for.”⁹⁹

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Mary Zajakala (@mzajakala), TWITTER (Sept. 1, 2017, 1:17 PM), <https://twitter.com/mzajakala/status/903683199464861697>.

⁹⁹ Tim W. (@Tlwilli1), TWITTER (Sept. 1, 2017, 7:23 AM), <https://twitter.com/Tlwilli1/status/903594053589233664>.

Others expressed similar outrage. “Oh for crap[‘s sake. . . \$\$\$\$ hungry lawyers[.]” tweeted outraged user BettyLynn (@PatrioticChic).¹⁰⁰ “Sue Sue Sue, it’s freakin’ candy & it’s got calories #getoverit[.]” And user J Ack (@JAckLee414) blasted the court system, stating facetiously that cases like this one are “what should b[e] clogging up our corrupted courts[.]”¹⁰¹ No one who commented on the *Chicago Tribune’s* Twitter post expressed clear support for the lawsuit.¹⁰²

F. DQ Freezes Out App Users Who Sought Free Blizzards

i. Case Summary

In July 2018, a woman filed a putative FCA¹⁰³ in U.S. District Court in Oregon against Dairy Queen (“DQ”), an international chain of franchised¹⁰⁴ quick-service restaurants that features soft-serve ice cream, hot dogs, and other treats. Plaintiff Mariel Spencer claims DQ misled her and other users of its app by promising to provide a free Blizzard ice-cream treat to app users but failed in many cases to do so.¹⁰⁵ Spencer alleges that her app informed her that she could visit her local DQ in Banks, Oregon to obtain a free Blizzard but that when she went to that DQ location she was told they would not honor the offer.¹⁰⁶ While DQ advertised the promotion as available only at participating locations, the complaint alleges that many franchise locations the app claimed were participating in the free Blizzard offer did not in fact do so. Spencer seeks class-action status based on what she alleges in part are DQ’s engagement in unlawful trade practices and its unjust enrichment.¹⁰⁷

¹⁰⁰ BettyLynn (@PatrioticChic), TWITTER (Sept. 1, 2017, 8:28 AM), <https://twitter.com/PatrioticChic/status/903610587913048064>.

¹⁰¹ Jack Lee (@JAckLee414), TWITTER (Sept. 1, 2017, 6:19 AM) <https://twitter.com/JAckLee414/status/903578162411515904>.

¹⁰² *Id.*

¹⁰³ *See Spencer v. Int’l Dairy Queen*, No. 3:18-cv-1252 (U.S. Dist. Ct. Ore. filed July 13, 2018).

¹⁰⁴ *See, e.g.*, Contact Us, Dairy Queen <https://www.dairyqueen.com/us-en/Company/Contact-Us/> (last visited Sept. 14, 2018) (“DQ® restaurants are independently owned and operated franchised locations[.]”).

¹⁰⁵ Kevin Harden, ‘Free Blizzard’ Legal Fight Swirls Around DQ Smartphone App, PORTLAND TRIB. (July 26, 2018), <https://portlandtribune.com/pt/9-news/401902-298323-free-blizzard-legal-fight-swirls-around-dq-smartphone-app>.

¹⁰⁶ *Id.*

¹⁰⁷ *See generally Spencer v. Int’l Dairy Queen*, *supra* note 103.

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ii. Consumer Perceptions

The social-media perceptions of DQ consumers lie at the heart of this FCA. In fact, the class-action complaint itself declares that hundreds of consumers complained about the app's failure to secure them a free Blizzard within Google's app marketplace, where consumers may download apps to phones and mobile devices that run on Google's Android operating system.¹⁰⁸

The lawsuit contains embedded hyperlinks to complaints within Google's app marketplace and actual screenshots from eleven (of the purported hundreds) of presumed DQ consumer comments left on DQ's app page. Commenter BIL Schmitz dubbed the app promo "a scam."¹⁰⁹ Every other commenter quoted in the complaint also claims all of the DQ locations they visited refused to provide them with a free Blizzard.¹¹⁰

G. McDonald's Cheese Charges Add Up to FCA

i. Case Summary

In May 2018, a pair of South Florida residents filed suit in U.S. District Court in Florida against fast-food giant McDonald's.¹¹¹ The suit, which seeks class-action status, claims that McDonald's defrauded customers.¹¹² The suit also claims McDonald's was unjustly enriched because it regularly charged diners who order a Quarter Pounder hamburger without cheese the same as those who order a Quarter Pounder with cheese.¹¹³

ii. Consumer Perceptions

KIRO, a Seattle CBS television affiliate, posted a story about the McDonald's FCA on its Facebook page shortly after the FCA was filed.¹¹⁴ The KIRO story elicited 119 comments, eighty-

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See *Kissner v. McDonald's Corp.*, Case 0:18-cv-61026 (U.S. Dist. Ct. S.D. Fla., May 8, 2018).

¹¹² See Ron Hurtibise, *McDonald's Warns of 'Utter Chaos' if Refunds Ordered for Cheese-Less Quarter Pounders*, SOUTH FLA. SUN SENT. (July 2, 2018), www.sun-sentinel.com/business/fl-bz-mcdonalds-seeks-to-dismiss-qp-suit-20180702-story.html.

¹¹³ *Id.*

¹¹⁴ See KIRO 7 News, *Customers Forced to Pay for Cheese Sue*

three shares, and 376 emoji responses, including 135 likes, 169 haha emojis, forty-five wow emojis, fourteen angry emojis, nine sad emojis, and four love emojis.¹¹⁵ Most of the KIRO Facebook commenters sided with the hamburger chain. For example, commenter Garry Newell deemed the FCA “one idiotic lawsuit,” while Tonya Shellenberger declared it “stupid to go to court over .20 cents!”¹¹⁶ Dondi MacNair Budde declared that “[p]eople should be prosecuted for idiotic lawsuits.”¹¹⁷ A few commenters, though, saw merit in the suit. For example, commenter Michael Brandon criticized McDonald’s for “false advertising[,]” though he also commented that the millions of dollars sought by this particular FCA struck him as far too excessive.¹¹⁸

Notably, the *South Florida Sun Sentinel*, a leading local paper in the region, invited consumers to share their perceptions of the lawsuit using online tools, including social media.¹¹⁹ Not only did the paper actively invite readers to share such opinions in an article the paper published,¹²⁰ it also later reported on those perceptions.¹²¹

The methodology the *Sun Sentinel* used to gather consumer perceptions via social media is consistent with the methodology employed in this Article. Interestingly, the results this Article details are also consistent with the overarching results this Article describes. “Most readers agreed with McDonald’s that this appeared to be a frivolous claim,” the *Sun Sentinel* reported, giving several examples representing that perspective before turning to consumer responses that perceive the suit differently.¹²² “But while that sentiment was certainly in the majority, it was not

McDonald’s for \$5 Million, According to Lawsuit, FACEBOOK (May 28, 2018) <https://www.facebook.com/KIRO7Seattle/posts/two-mcdonalds-customers-with-a-beef-about-cheese-filed-a-federal-lawsuit-allegin/2103088139710928/>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* The article’s author invited readers to contact him with comments at his Twitter handle, @Daniel_Sweeney.

¹²⁰ Dan Sweeney, *Is This Cheesy McDonald’s Lawsuit Frivolous, or Have We All Been Paying Too Much for Our Burgers?*, SOUTH FLA. SUN SENT. (July 3, 2018), www.sun-sentinel.com/news/sound-off-south-florida/fl-reg-mcdonalds-cheese-lawsuit-20180703-story.html.

¹²¹ See Dan Sweeney, *Most Scoff at McDonald’s Cheese Lawsuit, But a Few are Lovin’ It*, SOUTH FLA. SUN SENT. (July 6, 2018), <https://www.sun-sentinel.com/news/sound-off-south-florida/fl-reg-mcdonalds-cheese-lawsuit-follow-20180706-story.html>.

¹²² *Id.*

universal.”¹²³

III. ASSESSING THE DATA ON CONSUMER PERCEPTIONS OF FCAs

FCAs make up a small (though significant) percentage of overall class-action litigation.¹²⁴ Yet, FCAs also have much broader applicability than do the leading category (labor or employment) of class-action lawsuits. This is due to the fact that all Americans are food consumers, while not even two-thirds of Americans are members of the workforce.¹²⁵ This factor makes FCAs an ideal tool for studying class-action litigation more broadly.

The data on consumer perceptions of FCAs used in this Article show that consumers are highly capable of and willing to consider the merits of this type of class-action litigation. Consumer perceptions are diverse, appear oftentimes to be well informed, are sometimes highly critical, and in many cases reflect commonly held public perceptions of FCAs and class-action litigation.

The data illustrates that consumers often express opinions on many facets of FCAs. Their comments focus on the role of plaintiffs, defendants, judges, and attorneys; the role and merits of FCAs and, more generally, class-action litigation as a category; and the role and state of the judicial system as a whole. Some consumers criticize what they perceive to be greed on the part of plaintiffs, plaintiffs’ attorneys, or corporations. Others address what they perceive as American litigiousness, the frivolous nature of FCAs, and the state of an overburdened, ineffective, or broken judicial system.

While it would be improper to draw any firm conclusions from such a small sample size, the data suggest, as in the bartaco example, that consumer perceptions (or the need to express those perceptions) may not take shape until an FCA is filed. It may also

¹²³ *Id.*

¹²⁴ *Cf.* Carlton Fields, *2017 Carlton Fields Class Action Survey* (2017), employeerightsadvocacy.org/wp-content/uploads/2017/09/2017-Carlton-Fields-Class-Action-Survey.pdf (noting employment and labor class-action litigation far outpace consumer-fraud and product-liability class actions, the latter two of which include many FCAs).

¹²⁵ See Jeff Cox, *Labor Force Increase is Biggest Since 2003 as Many Americans Finally Get Back to Work*, CNBC (Mar. 9, 2018), <https://www.cnbc.com/2018/03/09/labor-force-increase-is-biggest-since-2003-as-many-americans-finally-get-back-to-work.html> (noting that fewer than two-thirds of Americans are currently employed).

be the case that consumer perceptions of alleged wrongdoing by a food company are hardened by class-action litigation. Other evidence suggests that consumers may be more sympathetic toward a locally owned business than, for example, a national food company with no putative local roots.¹²⁶

IV. FUTURE AVENUES FOR RESEARCH INTO CONSUMER PERCEPTIONS OF FCAs

The growth of FCAs and of class-action litigation generally has not brought with it an increase in our understanding of consumers' perceptions of such litigation. The need for more research in this area is clear, regardless of one's opinions generally of such litigation. Establishing a better understanding of consumer perceptions can help buttress our knowledge of the characteristics of the reasonable consumer, qualities that lie at the heart of many class-action lawsuits.¹²⁷

Important research deficits that future scholars must address include the need for better and more extensive sampling; identifying and addressing problems of self-selection; and improving research and analytical methodologies. In the latter instance, an ideal analysis might be one that codes responses to each FCA across a variety of platforms and outlets and uses these to provide quantitative and qualitative data on consumer perceptions of individual lawsuits. This could allow researchers to compile and compare consumer perceptions across a variety of lawsuits.

In addition to exploring a range of categories of class-action litigation, future researchers may wish to assess consumer perceptions at various stages of such litigation more systematically. For example, this Article has explored consumer perceptions of FCAs across nearly every stage of litigation, including consumer complaints and potential litigation to court rulings that have both granted and reversed FCA settlements. Subsequent researchers may wish to examine whether, for example, consumer perceptions expressed via social media tend to differ or to follow particular patterns at various stages of litigation.

¹²⁶ See, e.g., Frank Newport, *Business Gets Bigger Even as Americans Prefer Small*, GALLUP, Aug. 22, 2017, <https://news.gallup.com/opinion/polling-matters/216674/business-gets-bigger-even-americans-prefer-small.aspx> ("Americans have 'a great deal' or 'quite a lot' of confidence in small business, more than three times the 21% confidence rating for big business."); Part II.B.i.

¹²⁷ See, e.g., *supra* note 10.

CONCLUSION

Little research to date has been carried out to understand or measure consumer perceptions of FCAs or class-action litigation in any systematic manner. This Article introduces a framework for using online tools as a mechanism to assess consumer perceptions of class-action litigation and offers several illustrative examples of online consumer perceptions of recent FCAs that have been reported in varying detail by the mainstream media.

As this Article details, websites, apps, message boards, and other online environments are a valuable and heretofore overlooked tool for better understanding consumer perceptions. In the future, scholars, litigators, lawmakers, and consumers alike can and should use online tools as a means to better understand both class-action litigation and consumers' perceptions of that litigation.

Online tools allow consumers to share their perceptions of FCAs and, more generally, of class-action litigation. As this Article describes, such perceptions pertain to many of the key issues in such litigation, from their merits and value to the state of the American judicial system. The value of consumers stating their perceptions about FCAs does not reside within the mere act of sharing such perceptions. Rather, the importance of sharing these perceptions may only be realized if leading legal, scholarly, and legislative actors in the field choose to study, understand, and learn from these perceptions. As calls for class-action reforms grow, those who establish and amend rules for; study; and participate in such litigation—among them policymakers, judges, attorneys, and scholars, respectively—should consider the perceptions and wishes of consumers to help inform the basis, shape, and parameters of any such reforms.