

Food Litigation Newsletter



THIS NEWSLETTER AIMS to keep those in the food industry up to speed on developments in food labeling and nutritional content litigation.

ABOUT
Perkins Coie's Food Litigation Group defends packaged food companies in cases throughout the country.

Please visit our website at perkinscoie.com/foodlitnews for more information.

RECENT SIGNIFICANT DEVELOPMENTS AND RULINGS

"Wildly Nutritious" Fruit Lawsuit Ends With Dole's Victory on Summary Judgment

Brazil v. Dole Packaged Foods, LLC, No. 5:12-cv-01831 (N.D. Cal.): After partially decertifying a putative class action alleging that Dole's fruit products are misbranded as "all natural," Judge Lucy Koh granted Dole's Motion for Summary Judgment, bringing to an end the lengthy *Brazil v. Dole* litigation.

Judge Koh found that plaintiff failed to present evidence demonstrating that a reasonable consumer would be misled by the "all natural" label because he had not shown that consumers believed "all natural fruit" did not contain citric acid and ascorbic acid. While the named plaintiff himself testified that he was misled, the court pointed out that the law requires more than a few isolated examples of actual deception and concluded that plaintiff's testimony was insufficient to ward off summary judgment. Moving on to the question of whether there was any evidence that Dole violated any underlying law, the court held that California's Sherman Law required plaintiff to show the label was misleading and deceptive to consumers. And because he had not, plaintiff's UCL claim based on "unlawful" acts failed as a matter of law. On these two bases, the court granted summary judgment and entered judgment in favor of Dole, concluding the *Brazil* case. [Order](#).

Chocolate Case Tapered and Stayed Pending Ninth Circuit's Ruling in *ConAgra*

Gustavson v. Mars, Inc., No. 5:13cv4537 (N.D. Cal.): Plaintiff alleged that Mars misbrands its chocolate products by making misleading nutrient content and calorie claims and by failing to identify polyglycerol polyricinoleic acid (PGPR) as an ingredient on its labelling. Following discovery, plaintiff voluntarily dismissed her claims related to flavanols and PGPR on the grounds that discovery had caused her to believe those claims were "questionable." On plaintiff's remaining claims related to Mars' nutrient and calorie claims, the court granted Mars' motion to stay the case pending the Ninth Circuit's upcoming decision in *Jones v. ConAgra Foods, Inc.*, No. 14-16327 (9th Cir. filed July 14, 2014). The *ConAgra* decision is expected to give district courts substantial guidance as to Rule 23's "ascertainability" requirement, the court's predominance analysis, the effect of Comcast on proposed damages models, and

Food Litigation Newsletter

CONTACTS

DAVID BIDERMAN

Partner

Los Angeles and San Francisco
+1.310.788.3220

CHARLES SIPOS

Partner

Seattle
+1.206.359.3983

JACQUELINE YOUNG

Associate

San Francisco
+1.415.344.7056

standing requirements for injunctive relief under California's UCL, FAL, and CLRA. In light of the expected controlling authority on these points and the early stage of the Mars litigation, the court concluded it would best serve the interests of the parties and judicial economy to grant Mars' motion to stay. [Order](#).

Plaintiff Dismisses "All Natural" Case

Livingston v. Fullbar, LLC, No. 14-cv-62430 (S.D. Fla.): Plaintiffs in *Livingston v. Fullbar* alleged violations of Florida consumer protection laws based on claims that defendant's Fullbar nutrition bars were mislabeled as "100% natural" and "all natural" when they in fact contain synthetic ingredients. The parties stipulated to voluntary dismissal of the action.

Another Food Class Action Stayed Pending Ninth Circuit's Guidance in *ConAgra*

Parker v. J.M. Smucker Co., No. 13-cv-0690 (N.D. Cal): A federal judge has ordered a stay of proceedings pending action by the Ninth Circuit in *Jones v. ConAgra*. Plaintiff in the *Parker* action alleges that various Crisco products labeled are "all natural" but contain GMO corn, soy or canola. The court ordered a stay of these proceedings in light of the fact that the Ninth Circuit decision expected in *ConAgra* could resolve three issues critical to the *Parker* case: (1) what standard the court should apply to determine whether a "precise, objective, and presently ascertainable" class exists; (2) what impact did *Comcast v. Behrend* have on plaintiff's damages allegations; and (3) whether plaintiff lacks standing to seek injunctive relief based on products she has not alleged any intent to purchase in the future. [Order](#).