

Food Litigation Newsletter

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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.



This newsletter aims to keep those in the food industry up to speed on developments in food labeling and nutritional content litigation.

DECISIONS

Ninth Circuit Affirms Lodestar Attorneys' Fees

In re: Ferrero Litig., No. 12-56469 (9th Cir.): The Ninth Circuit affirmed a district court's final settlement approval and award of attorneys' fees, over objection, in a putative class action alleging that defendant misrepresents the health benefits of its Nutella products. The settlement awarded \$550,000 in settlement funds, along with certain non-monetary relief, in contrast to \$1 million in attorneys' fees. The court held that the district court could properly rely on the lodestar method of awarding attorneys' fees rather than the typical 25% cap applied when the court relies on a percentage of the settlement fund. The court also found that notice was properly given and that there was no indication of collusion justifying overturning approval of the settlement, and refused to search for any. [Order](#).

Court Dismisses for Lack of Standing But Applies *Pom Wonderful* to Avoid Primary Jurisdiction

Ibarrola v. Kind LLC, No. 3:13-cv-50377 (N.D. Ill.): The court granted defendant's motion to dismiss in a putative class action alleging claims under the Illinois Consumer Fraud Act, common law fraud, and unjust enrichment, claiming that defendant's use of evaporated cane juice in its products was misleading and misbranded because plaintiff was not aware that ECJ was "sugar." First, the court found that plaintiff failed to plead an economic injury for standing purposes as she did not allege that she would have purchased no cereal or a cheaper cereal but for the misrepresentations, or that the products had no value. Further, plaintiff

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had insufficiently pled that she was deceived by the alleged misrepresentations because she did not contend that she believed the products to be sugar free, the product labels indicated that the products contained sugar, and plaintiff had failed to allege what she thought ECJ was if not sugar. Finally, the court dismissed the unjust enrichment claim because unjust enrichment is not a separate cause of action in Illinois. The court refrained from considering defendant's primary jurisdiction argument, citing the Supreme Court's recent decision in *POM Wonderful Order*.

Court Finds Pre-Answer Certification Motion Premature

Dye v. Bodacious Food Co., No. 9:14-cv-80627 (S.D. Fla.): The court rejected plaintiff's motion for class certification as premature in a recently filed putative class action alleging claims under Florida's DUTPA, negligent misrepresentation, breach of express warranty, a violation of Magnusson-Moss Warranty act, and unjust enrichment, claiming defendant advertises its cookies as "all natural," when in fact they contain GMOs and synthetic ingredients such as sugar, canola oil, dextrose, corn starch, and citric acid. Although plaintiff complained of concerns that defendants would "pick off" some of her claims, the court refused to rule on certification before responsive pleadings or any discovery had taken place. *Order*.

Court Relies on Plaintiff's Own Scientific Resources to Dismiss With Prejudice

Alamilla v. Hain Celestial Grp., Inc., 13-cv-5595 (N.D. Cal.): The court granted defendant's motion to dismiss with prejudice in a putative class action alleging claims under California's CLRA, UCL, and FAL, as well as a violation of Magnusson-Moss, breaches of express and implied warranties, and unjust enrichment, claiming that defendant misrepresented their juice products as "100% Raw," "Raw and Organic," and/or "Unpasteurized," among other similar representations, when in fact the juices are treated using pressurization that strips the products of nutritional value. The court reasoned that although plaintiffs' claim that the representations would lead a consumer to believe that the pressure treatment did not deprive the juice of its nutritional value in the same manner as pasteurization might be plausible on its face, the complaint

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incorporated by reference two articles that contradicted the claim. Specifically, the articles concluded that pressurization had “little or no effects on nutritional and sensory quality aspects of foods.” Thus, the court held, incorporating these articles demonstrates that plaintiffs have no claim, and dismissed with prejudice. [Order](#).

Court Stays Previously Dismissed ECJ Case

Figy v. Amy’s Kitchen, Inc., 13-cv-3816 (N.D. Cal.): The court granted in part and denied in part plaintiff’s motion to amend an earlier dismissal in a putative class action alleging claims under California’s UCL, FAL, CLRA, and a number of common law tort claims, alleging that defendant’s use of the term “organic evaporated cane juice” on its labels is misleading and violates the Sherman FDCA. The court denied the motion to the extent it sought to re-litigate the question of whether the FDA was actively considering the common and usual name of the ingredient at issue, but granted the motion to the extent that the court should have stayed the case rather than dismiss it without prejudice. Citing potential prejudice to the plaintiff—namely losing some claims to statutes of limitations and losing time off the class period—and a lack of prejudice to defendant, the court reversed the dismissal and stayed the case with a status hearing in six months. [Order](#).

NEW FILINGS

Epstein v. Aidells Sausage Co., No. 9:14-cv-80916 (S.D. Fla.): Putative class action alleging claims under Florida’s Deceptive and Unfair Trade Practices Act, negligent misrepresentation, breach of express warranty, violations of Magnusson-Moss, and unjust enrichment, claiming that defendant misrepresents its sausages as “all natural” when they contain unnatural, synthetic, artificial, and/or GMO ingredients including Cane Sugar, Soybean Oil, Salt, Citric Acid, Tequila, Sugar, Sodium Phosphate, Flavorings, Sodium Erythorbate, Sodium Nitrite, Maltodextrin and Modified Food Starch. [Complaint](#).

Segedie v. The Hain Celestial Grp., Inc., No. 7:14-cv-5029 (S.D.N.Y.): Putative class action alleging claims under California’s Organic Products Act, CLRA, FAL, and UCL, New York’s G.B.L. sec. 349, breaches of express and implied warranties, deceit and/or misrepresentation, fraudulent

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concealment, and constructive fraud under common law and under California Civ. Code secs. 1709 and 1573, unjust enrichment, negligence, and negligent misrepresentation, claiming that numerous of defendant's "Earth's Best" brand products—including infant foods, baby foods, kids' foods, baby care products, and home care products—were misbranded and misrepresented as being organic and/or natural when in fact they contain an array of ingredients (such as synthetic substances, artificial flavors, artificial preservatives, artificial colors, and toxic compounds) that federal law prohibits in organic foods. [Complaint](#).