

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

Ninth Circuit Reverses Dismissal Based on Standing, Preemption

Reid v. Johnson & Johnson and McNeil Nutritionals, LLC, No. 12-56726 (9th Cir.): The Ninth Circuit reversed and remanded the district court's order dismissing the case for lack of standing. The Ninth Circuit held that the "reasonable consumer" standard is used to determine violations of the UCL, CLRA, and FAL, but not Article III standing. The appellate panel found that Article III standing requires only individual reliance, which Plaintiff had proved. The Ninth Circuit also reversed the district court's findings regarding preemption, holding that Plaintiffs' trans fat claims were not preempted, and affirmed the lower court's finding that the primary jurisdiction doctrine does not bar Plaintiffs' action because an interim final rule from the FDA was already in place and the agency previously declined to approve "no trans fat" language. [Opinion.](#)

Court Applies Common Sense Standard in Dismissing 'No Refined Sugars' Case

Ibarrola v. Kind LLC, No. 3:13cv50377 (N.D. Ill.): The Court granted Defendant's motion to dismiss with prejudice in a putative class action alleging claims under the Illinois Consumer Fraud Act, common law fraud, breach of warranty, and unjust enrichment, claiming that Defendant's use of evaporated cane sugar and molasses in its products was misleading and the products were misbranded because they were labeled as containing "no refined sugars." The Court concluded that a reasonable consumer would not be deceived by the "no refined sugars" statement when the ingredient list contained "evaporated cane sugar" and "molasses." On the breach of warranty claim, the Court held that Plaintiff failed to give defendant reasonable notice, which is a pre-litigation requirement in Illinois, and dismissed that claim. Because it dismissed the fraud and warranty claims, the Court also dismissed the unjust enrichment claim. [Order.](#)

Court Grants Final Approval to Settlement in Flax Milk Class Action

Madenlian v. Flax USA Inc., No. SACV13-1748 (C.D. Cal.): The Court granted the parties' motion for final approval of settlement in a putative class action alleging violations of California's UCL, FAL, and CLRA based on Defendant's alleged misuse of the phrase "All Natural" on its Flaxmilk products. Defendant agreed to establish a settlement fund of \$260,000. Defendant also agreed to cease using the phrase "all natural" on any printed flax milk packaging, and the Court approved attorney fees of \$70,000 with and a \$5,000 incentive award for Plaintiff. [Order.](#)

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Preliminary Approval to Settlement in Jamba Juice Smoothie Kits Case

Lilly v. Jamba Juice Co., No. 13-cv-02998 (N.D. Cal.): The Court granted Plaintiff's motion for preliminary settlement approval for injunctive relief in a putative class action asserting claims under California's UCL, FAL, and CLRA based on allegations that Defendants' smoothie kits are falsely labeled as "All Natural" because they contain synthetic and processed ingredients. Defendants will re-label the challenged products to exclude the description "All Natural," will pay each Plaintiff an amount not to exceed \$5,000 and will pay attorneys' fees of \$425,000. [Order](#).

NEW FILINGS

Hun and Paul v. Kashi Co., No. 1:15-cv-01391 (E.D.N.Y.): Putative class action alleging breach of express warranty, unjust enrichment and violations of New York's GBL for deceptive acts and false advertising and New Jersey's TCCWNA based on claims that Defendant packaged, marketed, distributed and sold products labeled "All Natural" or "Nothing Artificial" when the products actually contain synthetic chemicals. [Complaint](#).

Consumer Advocacy Group, Inc. v. Bodega Latina Corporation, No. BC575811 (Cal. Super. Ct.): Complaint alleging violations of Proposition 65 based on claims that Defendants' caramel coating contains lead. [Complaint](#).

Davis v. Hampton Creek, Inc., No. 15-05993CA01 (Fla. 11th Cir. Ct.): Putative class action alleging unjust enrichment and violations of the FDUTPA based on claims that Defendant's "Just Mayo" products do not actually contain any mayonnaise. [Complaint](#).

Teachout v. American Naturals Company LLC, No. 1522-CC00505 (Mo. Cir. Ct.) Putative class action alleging violations of the Missouri Merchandising Practices Act and Missouri common law based on claims that Defendant's Sof'ella brand of Sour Cream Coffee Cake Mix is labeled as "ALL NATURAL" when it contains sodium acid pyrophosphate. [Complaint](#).

Retta v. Millenium Products Inc., No. 2:15cv01801 (C.D. Cal.): Putative class action alleging violations of California's CLRA, UCL, and FAL and New York's DUTPA based on claims that Defendant's GT's Kombucha and Synergy beverages are mislabeled as containing antioxidants because they do not contain any nutrients that the FDA recognizes and approves of for labeling using the term "antioxidant." [Complaint](#).

Lawsuits filed against Wal-Mart and GNC related to the herbal supplement investigation: *Ellis v. Wal-Mart Stores, Inc.*, No. 15cv2167 (N.D. Ill.), *Howes v. General Nutrition Centers, Inc.*, No. 15cv2168 (N.D. Ill.), *McMahon v. Wal-Mart Stores, Inc.*, No. 15cv2198 (N.D. Ill.). [Ellis](#). [Howes](#). [McMahon](#).