

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 RULINGS

Court Asks the FDA If It Will Provide Guidance on Evaporated Cane Juice

Swearingen v. Healthy Beverage, No. 13-cv-4385 (N.D. Cal.); *Swearingen v. Late July Snacks LLC*, No.13-cv-04324 (N.D. Cal.): As we previously reported [here](#), several courts in the Northern District of California have invoked the primary jurisdiction doctrine to dismiss or stay evaporated cane juice cases pending FDA action. Recently, the Court requested that the Commissioner of the FDA inform the Court whether a final determination regarding ECJ "is feasible within agency priorities and resources" and whether "the FDA is likely to issue any further guidance regarding ECJ within the next 180 days." [Healthy Beverage Order](#); [Late July Snacks Order](#).

Court Grants Preliminary Approval of Settlement in "All Natural" Corn Starch Case

Teufel v. Karlin Foods Corp., No. 1:14-cv-23100 (S.D. Fla.): The Court granted motion for preliminary settlement approval in putative class action alleging that Defendant advertises its Great Value Corn Starch as "All Natural," and sells it at a premium, when in fact it contains unnatural, synthetic, artificial, and/or genetically modified cornstarch. The terms of the settlement are as follows: Defendant agreed to stop labeling the product as "All Natural," to pay up to \$515,000 to members of the settlement class (\$1.00 per purchase, capped at \$2.00 without proof of purchase and \$8.00 with proof of purchase, per member) but no more than \$825,000 for payments to settlement class and administrative expenses combined. Defendant also agreed to pay no more than \$160,000 in fees and expenses and a \$5,000 service award to the named Plaintiff. [Order](#).

Court Leaves Standing and Choice of Law Questions for Class Certification Stage

Peterson v. CJ America, Inc., No. 3:14-cv-2570 (S.D. Cal.): The Court granted in part and denied in part Defendant's motion to dismiss or, in the alternative, motion to strike, in putative class action alleging that several of Defendant's prepackaged food products were mislabeled as having "NO MSG ADDED" and "100% all natural ingredients" when the products contain several ingredients that have MSG. The Court declined to dismiss the case for lack of standing, finding that whether Plaintiff has standing to bring claims for products he did not actually purchase is better resolved at the class certification stage. The Court did, however, strike Plaintiff's request for injunctive relief, finding that Plaintiff

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failed to allege facts indicating that he would purchase the products in the future if labeled correctly. The Court also declined to dismiss on the grounds that no reasonable consumer would be deceived by the “NO MSG ADDED” label because it would not lead them to believe that a product contains no MSG at all. Finally, the Court declined to dismiss or strike Plaintiff’s nationwide class allegations finding that the issue of whether California’s choice of law analysis should apply is better left for the class certification stage. [Order](#).

Court Grants Partial Summary Judgment to Plaintiffs Based on Violations of COPA

Brown v. Hain Celestial Group, Inc., No. 11-cv-03082 (N.D. Cal.): The Court granted partial summary judgment to Plaintiffs in this putative consumer class action asserting violations of California CLRA, UCL, and COPA based on allegations that Defendants sold two lines of cosmetics using the word “organic” on their labels, although they contained less than 70% organic ingredients as required under COPA. The court agreed with Plaintiffs that a COPA violation alone was sufficient to establish deception and reliance under the UCL. The Court ruled that the legislature’s decision to prohibit the sale, labeling, or representation of products as organic when they contain less than 70% organic ingredients “establishes as a matter of law that violations of COPA are material misrepresentations.” [Order](#).

NEW FILINGS

Marentette v. Abbott Laboratories, Inc., No. 15-cv-2837 (E.D.N.Y.): Putative class action alleging that Similac and Advance Organic Infant Formulas allege that Abbott misleadingly markets the formulas as “organic” when in fact the formulas contain “a spectacular array and substantial amount of ingredients prohibited in organic foods.” [Complaint](#).

O'Brien v. Kind, LLC, No. 1:15-cv-3699 (S.D.N.Y.): Putative class action alleging violations of various California and New York laws based on claims that KIND bars are mislabeled as “Healthy,” “+,” “Plus,” “No Trans Fats” and/or “Good Source of Fiber” because they do not meet the necessary requirements. [Complaint](#).

Wiley v. Lenny & Larry's Inc., No. CGC-15-545875 (Cal. Super.): Putative false advertising action class action alleging breach of express warranty, and violations of California’s CLRA and UCL, based on claim that Defendant’s high protein muffins and brownies are labeled as “All Natural” and “No GMOs,” but in fact contain genetically modified, unnatural, synthetic, and heavily processed ingredients. [Complaint](#).

Hasemann et al v. Gerber Products Co., No. 1:15-cv-02995 (E.D.N.Y.): Putative class action alleging violations of Florida’s DUTPA and false advertising statutes, as well as analogous Wisconsin statutes, based on claim that Defendant promotes its infant formula products as reducing the risk of developing allergies, when they do not. [Complaint](#).

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Row v. Conifer Specialties, Inc., No. 1522-CC09720 (Mo. Cir. Ct.): Putative class action asserting violation of Missouri Merchandising Practices Act and claim for unjust enrichment, based on allegations that defendant represents its biscuit mix product as “All Natural” when it contains SAPP. [Complaint.](#)

Colazzo v. Inko’s Tea, LLC et al, No. 1:15-cv-03070 (E.D.N.Y.): Putative class action asserting violations of various consumer protection statutes, as well as negligent misrepresentation, breach of express warranty, and unjust enrichment based on allegations that defendant represents its tea beverages as “100% Natural and 100% All Natural” when they contain ascorbic acid (vitamin C). [Complaint.](#)

Environmental Research Center v. Nutrivo LLC, No. RG-15771826 (Cal. Super. Ct.): Complaint asserts violations of Proposition 65 based on allegation that defendant fails to warn that its food supplement products contain lead and cadmium. [Complaint.](#)