

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

District Court Dismisses and Stays False Labeling Case Against Nature's Path

Leonhart v. Nature's Path Foods, Inc., No. 13-cv-00492 (N.D. Cal.): The Court granted Defendant's motion to dismiss Plaintiff's claims that Defendant's cereal products are misleadingly labeled as low sodium, and granted Defendant's motion to stay pending the Ninth Circuit's resolution of appeals pending in *Jones v. ConAgra Foods, Inc.*, Case No. 14-16327, and *Brazil v. Dole Packaged Foods*, Case No. 14-17480. The Court dismissed Plaintiff's "low sodium" claims with leave to amend because the complaint failed to allege adequate details to determine whether Defendant's label was authorized under federal law, which would mean Plaintiff's claim is preempted.

The Court also stayed the case pending the appeals of *Jones*, in which the plaintiff challenges the district court's application of the ascertainability and predominance requirements of Rule 23 and the standing requirements for California consumer protective statutory claims, and *Brazil*, in which the plaintiff challenges the district court's dismissal of his unjust enrichment claims as duplicative of his statutory claims, standing for a California Unfair Competition Law claim, and rejection of his damages model. First, the Court noted the Plaintiff failed to identify any particular harm that would result from a stay and failed to address the fact that the Court had already stayed Plaintiff's evaporated cane juice claims. Second, the Court found that, depending on the results of the appeals, both parties would be in danger of expending resources unnecessarily absent a stay. Finally, the Court found that guidance from the Ninth Circuit would aid in the orderly, just resolution of the case. *Order*.

FDA Issues New Guidance concerning Food Allergen Labeling Exemptions

The FDA issued a new guidance concerning food allergen labeling exemptions. The finalized exemption rules allow food manufacturers to avoid labeling products with common food allergens including peanuts, milk, and eggs, if the manufacturer can show that the allergens have been modified to neutralize their threat to consumers. *Guidance*.

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Ninth Circuit Vacates Class Certification in Nutritional Beverage Case

Cabral v. Supple LLC, No. 5:12-CV-00085 (9th Cir.): The Ninth Circuit vacated class certification and remanded this putative class action asserting claims under California UCL, FAL, and CLRA based on claims that defendant deceptively markets its nutritional beverage as effective at treating joint pain when they are not. The court determined that there was insufficient support for the notion that all class members had seen the alleged misrepresentations, making it improper for the trial court to have presumed that all purchasers relied on the alleged misrepresentations. [Order](#).

Court Denies Motion to Dismiss on Primary Jurisdiction Grounds

Zakaria v. Gerber Products Co., No. 2:15-cv-00200 (C.D. Cal.): The court denied a motion to dismiss on primary jurisdiction grounds in this putative class action asserting claims under California UCL, FAL, and CLRA. In denying the motion, the court held that the issue of whether defendant's product claims were false and misleading was neither an issue of first impression nor a complex one requiring deference to agency expertise. The court also rejected arguments that plaintiff's complaint was insufficient as it referred to some advertisements plaintiff had not seen, and did not link plaintiff's purchasing decision to the FDA and FTC's regulatory proceedings cited in the complaint. It was enough, the court held, that the complaint alleged that plaintiff relied on the alleged misrepresentations when she purchased the products. [Order](#).

Court Grants Class Certification in Kraft Foods Cheese Case

Morales et al v. Kraft Foods Group, Inc. et al., No. 2:14-CV-04387 (C.D. Cal.): The court granted class certification in this putative class action alleging claims under California's UCL, FAL, and CLRA for false and misleading advertising of cheese labeled "all natural" despite containing artificial ingredients such as food coloring. The court concluded that the materiality of the "natural" representation and reliance on it by a reasonable consumer could be tried class-wide, rejecting Kraft's arguments on ascertainability and lack of predominance. The court narrowed the proposed class to people who purchased the product. [Order](#).

NEW FILINGS

Cavanagh v. Kind, LLC, No. 1:15-cv-04064 (S.D.N.Y.): Plaintiff claims Defendant falsely labels its KIND bars as being "healthy" and made with "All Natural" ingredients, when in fact they contain synthetic ingredients including soy lecithin, soy protein isolate, and palm kernel oil. On behalf of putative a nationwide class and California subclass, Plaintiff asserts claims for breach of express and implied warranties, unjust enrichment, intentional and negligent misrepresentation, and violation of various California consumer protection statutes. [Complaint](#).

Walker v. ConAgra Foods, Inc., No. 3:15-cv-02424 (N.D. Cal.): On behalf of a putative nationwide class, Plaintiff claims Defendant falsely markets Crunch 'n Munch as free of trans fat when it actually contains partially hydrogenated oil, a source of artificial trans fat.

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Plaintiff alleges violations of various California consumer protection statutes and breach of express and implied warranty claims. [Complaint.](#)

Martin v. Colgate-Palmolive Co., et al., No. 155419 (N.Y. Sup. Ct.): Plaintiff claims Defendants deceptively marketed their Tom's of Maine toothpaste products as "Natural" when in fact they contain non-natural, chemically processed ingredients like glycerin and sodium lauryl sulfate. On behalf of a putative class of New York consumers, Plaintiff alleges violations of New York's Deceptive Acts or Practices Law, as well as negligent misrepresentation, express warranty, and unjust enrichment claims. [Complaint.](#)

Rodriguez, et al. v. Nature's Bounty, Inc., No. 1:15-cv-04547 (S.D.N.Y.): Plaintiffs claim Defendant deceptively packaged its Nature's Bounty nutritional supplement products in misleadingly large bottles that contained excessive empty space and/or non-functional slack-fill. On behalf of a putative nationwide class and subclasses of New York, New Jersey, and California consumers, Plaintiffs alleges claims for negligent misrepresentation, unjust enrichment, and violations of consumer protection statutes of New York, New Jersey, California, Florida, Illinois, and Michigan. [Complaint.](#)

Korn, et al. v. Snyder's-Lance Inc., No. 3:15-cv-02593 (N.D. Cal.): On behalf of a putative class of California consumers, Plaintiffs claim Defendant's snack products, including various types of Snyder's of Hanover pretzels, are deceptively marketed and advertised as "natural" when they contain genetically-modified, artificial, or synthetic ingredients in violation of various California consumer protection statutes. [Complaint.](#)

Hobbs v. Irene's Bakery and Gourmet Kitchen, Inc., No. 15L313 (Ill. Cir. Ct.): On behalf of a putative class of Illinois consumers, Plaintiff claims Defendant's Black & White Cookies are deceptively labeled as "all natural" when they contain sodium acid pyrophosphate, a synthetic chemical. Plaintiff asserts claims for unjust enrichment and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. [Complaint.](#)

Workman v. Plum Inc., et al., No. 3:15-cv-02568-JCS (N.D. Cal.): On behalf of a nationwide class, Plaintiff claims Defendants' Plum Organics products are deceptively labeled and marketed in violation of California law as being "premium, nutritious organic" baby food and kid snack products that contain primarily healthy, high-value ingredients like blueberries, green beans, quinoa, and kale, when in fact the products largely consist of "sugary apple juice or apple puree." [Complaint.](#)

Osborne v. Kraft Foods Group Inc., No. 3:15-cv-02653-JCS (N.D. Cal.): On behalf of a class of California consumers, Plaintiff alleges Defendant deceptively labels its "Capri Sun 100% Juice" products as "All Natural" when they contain unnatural, synthetic, artificial, and/or genetically-modified ingredients, including citric acid and "Natural Flavor." Plaintiff asserts claims for violation of various California consumer protective statutes, breach of express warranty, and negligent misrepresentation. [Complaint.](#)

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Backus v. H.J. Heinz et al., No. 3:15-cv-02738 (N.D. Cal.): Putative class action alleging violations of California UCL and FAL, as well as breach of express and implied warranty, based on claims that defendant markets its Easy Fries and Easy Tater Tots as free of trans fat when in reality they contain “dangerous levels of trans fat.” [Complaint.](#)

Vega-Encarnacion v. Ghirardelli, No. 3:15-cv-01821 (D. P.R.): Putative class action alleging breach of express warranty and unjust enrichment based on claims that Ghirardelli’s white chocolate products did not contain chocolate or white chocolate, but were instead “artificial” and “imitation.” The claims are nearly identical to those in the recently settled *Miller v. Ghirardelli Chocolate Co.*, No. 3:12cv04936 (N.D. Cal.). [Complaint.](#)

Bassolino v. Whole Foods Group Inc., No. 23469/2015E (N.Y. Sup. Ct.): Following on the heels of an investigation by the New York City Department of Consumer Affairs, this putative class action asserts claims under New York GBL, New York Executive Law, as well as unjust enrichment and breach of contract based on claims that defendant falsely labeled and overstated the weights of its pre-packaged products. [Complaint.](#)

Hu v. Perfetti Van Melle USA, Inc., No. 1:15-cv-03742 (E.D.N.Y.): Putative class action alleging violations of consumer protection statutes of New York, California, Illinois, Michigan, Florida, New Jersey, and Washington D.C., based on claims that defendants sell their chewing gum products in brightly colored, non-transparent wrappings so that consumers won’t notice the containers contain less products than claimed. [Complaint.](#)

Hu v. The Hershey Co., No. 1:15-cv-3741 (E.D.N.Y.): Putative class action alleging violations of consumer protection statutes of New York, California, Illinois, Michigan, Florida, New Jersey, and Washington D.C., based on claims that defendant’s “Ice Cubes” gum packages conceal the smaller amount of product contained in the boxes. [Complaint.](#)