

## 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](http://perkinscoie.com/foodlitnews) for more information.

### RECENT SIGNIFICANT RULINGS

#### Class Certification Denied In Popcorners "All Natural" Suit

*Nguyen v. Medora Holdings, LLC*, No. 5:14-cv-00618 (N.D. Cal.): The Court declined to certify declaratory and injunctive relief classes in this putative class action alleging that Defendant's popped corn chip products labeled "All Natural" are misleading because they contain GMOs. The Court found that Plaintiffs lacked Article III standing because there was no evidence of a concrete legal harm and no evidence of a sufficient likelihood that Plaintiffs will again be wronged in a similar way. Specifically, the Court found that there was no injury-in-fact because while Plaintiffs alleged that they paid Defendant a price premium and that they were misled into buying Popcorners, the evidence showed that Plaintiffs consumed other GMO-containing products and that Defendant's sales increased after the "all natural" label was removed. Additionally, the Court concluded that there was no likelihood of future harm because Plaintiffs failed to express any intent to buy Popcorners in the future, as Defendant changed the label in late 2013, and because Plaintiffs presented no evidence to suggest that there was any "threat" that Defendant would change its label back to include an "all natural" statement. [Order](#).

#### Court Denies Motion to Dismiss in Probiotic Beverage False Advertising Suit

*Torrent v. Yakult U.S.A., Inc.*, No. 8:15-cv-00124 (C.D. Cal.): The Court denied Defendant's motion to dismiss in this putative class action where Plaintiff contended that Defendant violated California's UCL by claiming that its probiotic beverages are beneficial to digestive and immune system health, when such claims are contrary to scientific evidence.

The Court found that Plaintiff's allegations that Defendant's claims about the health benefits of its products were sufficiently plausible to support a UCL cause of action. The Court also found that allegations regarding how and where the claimed misrepresentations were made met pleading requirements under Fed. R. Civ. P. 9(b). Finally, the Court found Plaintiff had properly alleged Article III standing, when he claimed that Defendant's representations induced him to purchase a product he otherwise would not have. [Order](#).

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### **Court Grants in Part and Denies in Part Motion to Dismiss in Instant Noodles False Advertising Suit**

*Guttman v. Nissin Foods Company, Inc.*, No. 4:15-cv-00567 (N.D. Cal.): The Court granted in part and denied in part Defendant's motion to dismiss in this putative class action alleging violations of California's UCL, raising claims of nuisance and breach of implied warranty, based on claims that Defendant's instant noodles are labeled as "Trans Fat: 0g" when they contain partially hydrogenated oil.

First, the Court dismissed Plaintiff's UCL (fraudulent and unlawful prongs), FAL, CLRA, and breach of express warranty claims because they were preempted by 21 C.F.R. § 101.9(c)(2)(ii). Section 101.9(c)(2)(ii), which governs nutrition facts, provides that the content of a serving containing less than 0.5 grams of trans-fat shall be expressed as zero. The Court distinguished *Reid v. Johnson & Johnson*, 780 F.3d 952 (9th Cir. 2015), where Defendant labeled products as "No Trans Fat" and "trans fat-free," by reasoning that the FDA has issued warning letters that these statements are unauthorized nutrient-content claims, but no such letter has been issued regarding "0g Trans Fat."

The Court declined to find, however, that Plaintiff's "unfair prong" UCL claim, which alleges that trans-fat is a poisonous ingredient was preempted, because the Court reasoned the claim was about use, not labeling. Similarly, the Court declined to dismiss the breach of implied warranty of merchantability claim, after finding Plaintiff's allegations that products containing trans-fat are not fit for human consumption plausible.

Finally, the Court dismissed the nuisance claim, without leave to amend, because Plaintiff had not suffered a specific personal injury that is different from harm suffered by all consumers of Defendant's products. [Order](#).

### **Denial of Class Certification in Tomato Products False Advertising Suit**

*Kosta v. Del Monte Corp.*, No. 4:12-cv-01722 (N.D. Cal.): For the third time, the Court denied class certification in this national class action raising claims under California's UCL, FAL and CLRA. Plaintiffs allege that Defendant's tomato products — which feature labels making antioxidant claims and statements that the products are a "natural source" of lycopene, with "no artificial flavors or preservatives" — are misbranded, as the products contain ingredients such as citric acid and high fructose corn syrup. Plaintiffs also claim that Defendant's SunFresh and FruitNaturals products are deceptively labeled as "fresh" and needing refrigeration.

In rejecting Plaintiffs' third bid for class certification, the Court found that the numerosity and adequacy requirements were met. The Court did not find, however, that the class representatives satisfied the typicality requirement, because some representatives testified that they did not see some of the allegedly misleading statements and claims when they purchased the products-at-issue. The Court also concluded that the class was not ascertainable because the lawsuit involves a variety of products and not all products contain the challenged claims.

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Additionally, the Court found that Plaintiffs failed to demonstrate common questions of law and fact sufficient to support class certification. In the Court's view, the variations between the labels of the challenged products were so great that at least half would not evidence the violations alleged. Similarly, Plaintiffs failed to show that their claims were material; because Plaintiffs did not offer a method of proving that a reasonable consumer would find the challenged statements deceptive and material to their purchasing decision, which could be applied to the entire class. [Order.](#)

### Denial of Motion for Reconsideration in Baby Food False Advertising Suit

*Zakaria v. Gerber Products Co.*, No. 2:15-cv-00200 (C.D. Cal.): The Court denied Defendant's motion for reconsideration of an earlier order denying a motion to dismiss in this putative class action alleging Defendant's violated California's UCL, FAL, and CLRA, when they advertised their baby food products as helping to prevent infants from developing allergies. The Court rejected Defendant's argument that *In re GNC Corporation*, No. 14-1724, 2015 WL 3798174 (4th Cir. June 19, 2015), represented a change in the law.

First, the Court ruled that the Fourth Circuit's conclusion that consumers accusing manufacturers of making false advertising statements must show that no reasonable expert would agree with the statements was inconsistent with California precedent and not binding. Second, the Court noted that Plaintiff does not allege that all experts agree that Defendant's product lacks a health benefit, but rather that the product in fact lacks that benefit. Third, the Court found that Plaintiff's asserted theories of liability went beyond a claim that Defendant knowingly made a false statement about its product. [Order.](#)

### Kellogg Wins Partial Judgment On The Pleadings In Gardenburger Suit

*Mohamed v. Kellogg Co.*, No. 3:14-cv-02449 (S.D. Cal.): A federal judge granted in part and denied in part Defendants' motion for judgment on the pleadings in this putative class action alleging that Defendant labels its Gardenburger products "made with natural ingredients" and "real good ingredients" when they in fact contain synthetic ingredients such as Hexane Processed Soy Ingredients. Finding that Plaintiff had not alleged any intention to purchase Gardenburgers in the future, the Court ruled that she lacked standing to seek injunctive relief. The Court otherwise found that the Plaintiff had sufficient standing, as she merely needed to show that she paid a price premium due to the alleged misrepresentations. The Court likewise rejected arguments that Plaintiff failed to allege that Kellogg made statements likely to deceive a reasonable consumer, holding that the issue was factual in nature and not capable of resolution on a motion to dismiss. [Order.](#)

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### Kind Bar Cases Consolidated

*Kind Litigation*: the Judicial Panel on Multidistrict Litigation ordered the consolidation of at least 11 proposed class actions accusing Kind LLC of falsely labeling its snack bars as "healthy" despite little nutrients and high saturated fat content to the Southern District of New York for pretrial proceedings. [Order](#).

### Pierogies Class Suit Survives Dismissal

*Steinberg v. Ateeco, Inc.*, No. 0:15-cv-60973 (S. D. Fla.): A federal judge denied a motion to dismiss this putative class action alleging that Defendant's Mrs. T's Pierogies are mislabeled because they have improper serving sizes, understate the amount of calories and fat, and fail to provide the required disclosure regarding sodium content. Finding that Plaintiff sufficiently pleaded state law claims, identifying the applicable FDA regulations and indicating how the practices alleged were likely to mislead consumers. The Court likewise declined to grant the motion as to Plaintiff's unjust enrichment claim, reasoning that Plaintiff was entitled to plead an equitable cause of action in the alternative to her statutory claims. [Order](#).

### Salad Dressings Removed to Federal Court

*Gonzalez v. Del Sol Food Co., Inc.*, No. 2:15-CV-05435 (C.D. Cal.): Removal of putative class action alleging violations of California's FAL, CLRA, UCL, and breach of express warranty based on the claim that Defendant deceptively labels its Brianna's Fine Salad Dressings as "All Natural," when in fact (1) they contain canola oil, white vinegar, and soy sauce that is made from genetically modified crops, (2) the canola oil and vinegar is heavily processed and bears no chemical resemblance to the genetically modified crops from which they are derived, and (3) they contain additives such as maltodextrin, tocopherols, xanthan gum, dextrose, and citric acid. [Removal](#).

### NEW FILINGS

*Bunting v. McCormick & Co., Inc.*, No. 3:15-cv-01648 (S.D. Cal.), *Marsh v. McCormick & Co., Inc.*, No. 2:15-cv-01625 (E.D. Cal.), *Esparza v. McCormick & Co., Inc.*, No. 2:15-cv-05823 (C.D. Cal.): Multiple putative class actions alleging violations of various state consumer protection statutes as well as common law claims, alleging that consumers that purchased Defendant's ground pepper product were misled when Defendant's reduced the content of its ground pepper tins by 25%, but did not reduce the size of the tins. [Bunting](#), [Marsh](#), [Esparza](#).

*Consumer Advocacy Group, Inc. v. Takara Sake USA, Inc., et al.*, No. RG15777687 (Cal. Super. Ct.): Plaintiff alleges violations of California's Proposition 65 based on claims that Defendants do not warn consumers that their alcoholic beverages contain lead. [Complaint](#).

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*Environmental Research Center v. Living Ecology, Inc.*, No. RG15778780 (Cal. Super. Ct.): Plaintiff alleges that Defendant violated California's Proposition 65 by failing to warn that its Organic Food Bars contain cadmium. [Complaint.](#)

*Galabov v. Burger King Corp. & Bridgette Foods, LLC*, No. 406779 (Md. Cir. Ct.): Putative class action alleging violations of Maryland's Consumer Protection Act, unjust enrichment, and breach of contract. Plaintiff claims that Defendants advertise their hot dogs as being "100% beef" when they contain pork. [Complaint.](#)

*Gyorke-Takatri, et al. v. Nestle USA, Inc., et al*, No. CGC15-546850 (Cal. Super. Ct.), *Savalli v. Nestle USA, Inc. and Gerber Products Co.*, No. 0:15-cv-61554 (S.D. Fla.): Multiple putative class actions alleging violations of California and Florida's consumer protection statutes, as well as common law claims. Plaintiffs claim that Defendants' Gerber Graduates Puffs are marketed as though they contain significant amounts of fruits and vegetables, when the products only contain trace amounts of those ingredients. [Complaint.](#)

*Leining v. Foster Poultry Farms, Inc.*, No. BC588004 (Cal. Super. Ct.): Putative class action alleging violations of California's CLRA, as well as for negligent misrepresentation, breach of express warranty, and breach of implied warranty of merchantability. Plaintiff claims that Defendant labels its chicken as American Humane Certified when the chickens were not treated humanely. [Complaint.](#)

*Magier v. Tribe Mediterranean Foods, Inc.*, No. 1:15cv5781 (S.D.N.Y.): National putative class action with New York subclass, alleging violations of the Magnuson-Moss Warranty Act, New York's GBL, along with breach of express warranty, breach of the implied warranty of merchantability, unjust enrichment, intentional and negligent misrepresentation, and fraud claims. Plaintiff contends that Defendant advertises its hummus products as "All Natural" when they contain genetically modified ingredients and synthetic chemicals. [Complaint.](#)

*Moran v. Good Health Natural Products, Inc.*, No. BC588986 (Cal. Super. Ct.): Plaintiff brings a putative class action asserting claims under California's UCL, FAL, CLRA, as well as breach of warranty, unjust enrichment, fraud, negligent misrepresentation, and breach of contract. Plaintiff alleges that Defendant labels its snacks "All Natural," "100% Natural," "healthy," "wholesome" and "made with whole wheat" when they contain a combination of sunflower, oil, corn syrup, canola oil, citric acid, ascorbic acid, maltodextrin, dextrose, potassium chloride, lactic acid, malic acid, evaporated cane sugar, folic acid, thiamin mononitrate, riboflavin, niacin, and paprika extract. [Complaint.](#)

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### CONTACTS

#### DAVID BIDERMAN

Partner

Los Angeles and San Francisco

+1.310.788.3220

#### CHARLES SIPOS

Partner

Seattle

+1.206.359.3983

#### BREENA ROOS

Counsel

Seattle

+1.206.359.6225

*Reynolds v. Baker Mills, Inc.*, No. 1522-CC10181 (Mo. Cir. Ct.): Putative class action alleging violations of Missouri's Merchandising Practices Act and unjust enrichment based on the claim that Defendant's Kodiak Cakes Big Bear Brownies are marketed as "All Natural," although they contain sodium acid pyrophosphate. [Complaint.](#)

*Walker v. B&G Foods, Inc. and B&G Foods North America, Inc.*, No. 3:15-cv-03772 (N.D. Cal.): Putative class action alleging violations of California's UCL, FAL, CLRA, and breach of express and implied warranties based on claims that two varieties of defendants' Ortega taco shells contain partially hydrogenated oil ("PHO"). [Complaint.](#)

*Zieroff v. New Hope Mills Manufacturing, Inc.*, No. 1522-CC10185 (Mo. Cir. Ct.): Plaintiff brings a putative class action alleging that Defendant's Sweet Seasons Quick Bread Mixes are marketed as "All Natural" although they contain sodium acid pyrophosphate, a synthetic chemical. Plaintiff brings raises claims under Missouri's Merchandising Practices Act and for unjust enrichment. [Complaint.](#)