

# Food Litigation Newsletter

## April 15, 2013

ISSUE NO. 8

### 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.



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

### Recent significant developments and rulings

#### **Court Dismisses Labeling Claims Based On Products Plaintiffs Did Not Purchase, But Holds That California Food Labeling Regs Are Not Preempted By Federal Law**

*Wilson v. Frito-Lay North Am.*, No. 12cv1586 (N.D. Cal.): Plaintiffs in this food labeling action alleged that certain Frito-Lay products contain artificial ingredients, flavorings, coloring, and preservatives, and that the products' packaging falsely claims "0 grams trans fat," "No MSG," "low sodium," and that the products are "healthy." Defendants moved to dismiss, arguing that the federal Food, Drug, and Cosmetic Act ("FDCA") preempted the state law claims. Denying the motion in part, the court concluded that because California's food labeling regulations incorporate the FDCA, the complaint did not seek to impose stricter labeling requirements than required by federal law. The court granted dismissals of claims based on products plaintiffs did not purchase. The court rejected defendants' argument that the claims were implausible as a matter of law, concluding that "a reasonable consumer could interpret a bag of chips to claiming to have been 'Made with ALL NATURAL Ingredients' to consist exclusively of natural ingredients." [Link to the order.](#)

#### **Court Dismisses White Chocolate Labeling Claims, Holding That Plaintiff Lacks Standing To Sue For Products He Did Not Purchase**

*Miller v. Ghirardelli Chocolate Co.*, No. 12cv4936 (N.D. Cal.): For the second time, the court granted defendant's motion to dismiss, holding that the plaintiff lacks standing to sue for products he did not purchase. Plaintiff alleged that Ghirardelli's white chocolate products did not contain chocolate or white

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chocolate, but were instead “artificial” and “imitation.” Plaintiff sued for several “white chocolate” products, including those he never purchased. According to the court, the labeling on the non-purchased products was not sufficiently similar to those of the purchased products for plaintiff’s claims to survive standing analysis. The court denied the motion to dismiss, however, in other respects – rejecting an argument that California’s adoption of FDA regulations represented an unconstitutional abdication by the California Legislature. [Link to the order.](#)

### **Court Refuses to Parse Claims Concerning Non-Purchased Products; Dismisses Misbranding Complaint Entirely**

*Thomas v. Costco Wholesale Corp.*, No. 12cv2908 (N.D. Cal.): The court dismissed in entirety a complaint alleging misbranding of Kirkland food products. The complaint referred throughout to “Misbranded Food Products,” which included some products plaintiffs did not allege they purchased. According to the court, the use of “Misbranded Food Products” throughout the complaint “does not solely and entirely refer to specific and particular products” and therefore does not state a cause of action. Further, according to the court, the complaint’s failure to “clearly and unambiguously state which products contain which allegedly-unlawfully labeling” also renders the complaint defective. The court also faulted the complaint for not stating which products violate the specific provisions of California and federal law Plaintiff has put at issue and for failing to identify with clarity what specific products the named plaintiffs purchased. [Link to the order.](#)

### **Court Dismisses Tea Misbranding Suit For Failure To Plead With Specificity**

*Maxwell v. Unilever United States*, No. 12cv1736 (N.D. Cal.): Plaintiff in this case brought claims alleging misbranding of various Lipton tea products. Using the same reasoning here as in the Costco case above, the court dismissed the complaint for failure to plead with specificity. Applying Rule 9’s heightened pleading standard, the court ruled that the complaint “fails to unambiguously specify the particular products that have violated particular labeling requirements, the allegedly unlawful representations that were on the products, and the particular statements Plaintiff allegedly relied on when making her purchases.” [Link to the order.](#)

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### **Court Calls Food Labeling Plaintiffs' Request For Fees "Grossly Inflated," Awards Less Than 3% Of Amount Sought**

*Red v. Kraft Foods*, 10cv1028 (C.D. Cal.): The court ruled on plaintiffs' motion for attorneys' fees and costs, finding plaintiffs' request for \$3.25 million "grossly inflated," instead awarding approximately \$100,000. The suit involved labeling on various Kraft products, which plaintiffs alleged were misleadingly marketed as healthy. Kraft's defense of the action was largely successful, defeating three motions for class certification. The company did, however, voluntarily discontinue use of some of the labels objected to by plaintiffs. [Link to the order.](#)

### **New Filings**

*Fard v. Engelman*, No. BC504517 (Cal. Super., Los Angeles Co.) & *Kohan-Ghadosh v. Doheny Wholesale Meats*, No. BC504692 (Cal. Super., Los Angeles Co.): Both cases challenge the use of the "kosher" label on meat. The complaints allege that the meat was not "kosher" because it was delivered without the necessary supervision of a kosher overseer. [Link to Fard and Kohan-Ghadosh.](#)

*Gitson v. Clover-Stornetta Farms*, No. 13cv1517 (N.D. Cal.): Plaintiff alleges that 14 varieties of Clover-brand yogurt violate California's consumer protection statutes because the products' labels identify "evaporated cane juice" as an ingredient, which plaintiff's claim should instead be labeled "sugar." The complaint also alleges that the products' "all natural" labels are false or misleading because they contain "artificial" flavoring and coloring—including locust bean gum, tapioca starch, and elderberry and beet juice. [Link to the complaint.](#)

*Ebin v. Kangadis Food Inc.*, No. 12cv2311 (S.D.N.Y.): Plaintiff alleges that the makers of Capatriti blended oil products falsely brand their product "100% pure olive oil" when it is in fact an "industrially produced, chemically derived fat known as 'olive pomace oil' or 'olive residue oil.'" Plaintiff seeks a national class and a New York-only subclass. [Link to the complaint.](#)

*Allen v. Conagra Foods*, No. 13cv1603 (N.D. Cal.); *Allen v. Conagra Foods*, No. 13-cv-1279 (N.D. Cal. filed Mar. 21, 2013): Named plaintiff alleges, in successive complaints, that Parkay Spray is falsely labeled as "0 fat" and "0 calorie" despite

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containing 832 calories and 93 grams of fat per bottle. Plaintiff contends that the “0 calories” and “0 fat” representations are misleading because they are based on unrealistically small serving sizes. Plaintiff seeks a national class and California subclass. [Link to complaint 1 and complaint 2.](#)

*Singer v. WWF Operating Co.*, No. 13cv21232 (S.D. Fla.): Plaintiff in this putative class action alleges that Silk and Horizon-branded beverages list “evaporated cane juice” as an ingredient, instead of “sugar.” [Link to the complaint.](#)