

Food Litigation Newsletter

December 9, 2013

ISSUE NO. 24

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.



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 Food Labeling Complaint Because Plaintiff Can't Be Misled By Something He Didn't Read

Figy v. Amy's Kitchen, Inc., No. 3:13-cv-03816-SI (N.D. Cal.): The court dismissed a proposed class action accusing Amy's Kitchen of mislabeling its products as containing "evaporated cane juice" instead of sugar, finding the plaintiff failed to allege he read and relied on the ingredients list before purchasing the products. The court rejected plaintiff's argument that he did not need to show actual reliance in order to state a claim under the unlawful prong of California's Unfair Competition Law. Instead, the court concluded that actual reliance is necessary to satisfy the UCL's standing requirement. [Order](#).

Chipotle Defeats Class Certification in "Naturally Raised" Meat Lawsuit

Hernandez v. Chipotle Mexican Grill, Inc., No. CV 12-5543 DSF (JCx) (C.D. Cal.): The court denied class certification in a case alleging that Chipotle advertised its use of "naturally raised" meats but occasionally served conventionally raised meats when naturally raised meats were not available. Because Chipotle's alleged misconduct occurred only intermittently at different times at different stores for different meats, the court found customers would need to establish the date, location, and meat purchased for each transaction in order to have a valid claim. Such individualized details could not realistically be pinpointed and were not capable of class-wide proof. The court also found that questions existed as to whether individual customers saw point-of-purchasing signs advising of temporary shortages of naturally raised meats. Finally, the court further concluded that class treatment was improper because, given the difficulties in identifying legitimate claims, any class settlement could not be fairly distributed. [Order](#).

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In Monster Victory, Court Dismisses Energy Drink Suit

Fisher v. Monster Beverage Corp., No. 12cv2188 (C.D. Cal.): The court granted Monster's motion to dismiss plaintiffs' amended complaint, which alleged that the marketing of Monster Energy and Monster Rehab beverages was false and misleading under California's consumer protection statutes. The court had dismissed a previous complaint, finding that the allegations of harm were "attenuated and insufficient to establish an actual injury." Here, the court analyzed the amended complaint plaintiff by plaintiff, claim by claim, and dismissed the entire complaint without prejudice. The court took an aggressive approach to puffery claims, dismissing Monster's claims that its beverages "hydrate like a sports drink" and "rehydrate" as puffery as they are "difficult to measure concretely, and [have] no discernible meaning in the context of energy drinks or beverages." Further, the court affirmed its prior ruling that plaintiffs' claims were preempted by the NLEA to the extent that they were trying to regulate labeling "regarding the amount of caffeine or failure to warn" about caffeine. And finally, the court dismissed under the primary jurisdiction doctrine, noting the FDA's recent interest in resolving whether energy drinks contain unsafe levels of caffeine. [Order.](#)

Court Finds "Zero Impact" a Question for FDA

Watkins v. Vital Pharmaceuticals, Inc., No. 12cv9374 (C.D. Cal.): The court granted a motion to dismiss where plaintiffs allege that protein meal replacement bars sold under the "Zero Impact" label falsely suggest that the "zero" implies the products will have no impact, when in fact they "certainly have an impact on consumers' carbohydrate, sugar and overall caloric intake." The court dismissed under the primary jurisdiction doctrine, finding the question of whether the labels are misleading belonged to the FDA in the first instance. The court also noted that while the FDA has issued regulations regarding use of the term "zero," they were focused on factual claims like "zero calorie" and "zero sodium" and declined to apply the same regulatory framework to the term "zero impact" without a more definitive statement from the FDA. [Order.](#)

Coffee Suit Grinds to a Halt on Defendants' Motion for Summary Judgment

Suchanek v. Sturm Foods, Inc., No. 11cv0569 (S.D. Ill.): Plaintiffs sued under eight states' consumer protection statutes, alleging that defendants' Garden Square coffee products falsely represent the products to be freshly ground when they are, in fact, instant. The court had previously denied class certification and here,

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denied a motion for reconsideration. The court adhered to its previous ruling that that determination of liability required an individual determination. Defendant subsequently moved for summary judgment, arguing that the evidence established as a matter of law that the plaintiffs were neither deceived nor injured. On a named plaintiff-by-plaintiff basis, the court concluded that none of them read the labels at issue, or purchased the coffee for reasons unrelated to the brewed/instant issue, or understood the labels meant the product contained instant coffee. The Court added that, based on its review of the product packaging, it “is not designed to mislead consumers. It says what it is.” [Order](#).

Court Approves Class Action Settlement in Barbara’s Bakery Case

Trammell v. Barbara’s Bakery, Inc., No. 12cv2664 (N.D. Cal.): The court issued a Final Order Approving Class Action Settlement in this case in which plaintiffs allege defendant unlawfully labeled its products—cereals, bars, chips, and other snack foods—as “all natural” when they contained “synthetic” or “artificial” ingredients or GMOs. The settlement is for all products sold nationwide and covers more than 40 products. Defendant agreed to create a settlement fund of \$4 million to pay claims, and plaintiffs’ counsel were awarded \$1 million in costs and fees. Unclaimed funds, if any, will revert to Consumer Union and Action for Healthy Kids. [Order](#).

NEW FILINGS

Ibarrola v. Kind, LLC, No. 13-cv-50377 (N.D. Ill.): Plaintiff alleges that various of Kind’s snack products are misbranded because they list “evaporated cane juice” as an ingredient instead of sugar. The complaint alleges various claims under Illinois law on behalf of a putative nationwide class. [Complaint](#).

Alamilla v. The Hain Celestial Co., No. 13-cv-05595 (N.D. Cal.): On behalf of a putative nationwide class, plaintiff alleges that defendants falsely label their juice products as “Unpasteurized,” “100% Raw,” and “Raw and Organic” when they are not. The complaint asserts violations of various California and federal warranty and consumer protection laws. [Complaint](#).

Haftevani v. Chaya Restaurant Group, No. BC529641 (Cal. Super., Los Angeles County): Plaintiff claims defendant’s restaurants sell menu items that purport to contain “Kobe” beef but do not because the importation of “Kobe” beef to the United States is prohibited. The complaint alleges California statutory and common law claims on behalf of a putative class of California consumers. [Complaint](#).

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Swearingen v. Conagra Foods, No. 13cv5322 (N.D. Cal.): Plaintiffs allege that vegetable oils marketed under the Fleischmann's and Orville Redenbacher's brands are "misbranded" under California law. On behalf of purchasers of these products and others that the complaint alleges are "substantially similar," plaintiffs seek redress for alleged violations of the UCL, CLRA and other California consumer protection statutes. The label statements at issue are "Excellent source of omega 3 ALA" and "0g Trans Fat." [Complaint](#).

Barron v. Snyder's Lance, Inc., No. 13-cv-62496 (S.D. Fl.): Plaintiffs allege that various Snyder's of Hannover pretzels, Cape Cod chips, Eat Smart snacks and Padrinos tortilla chips are sold in violation of Florida, California and New York consumer protection statutes because they contain artificial colors, GMO ingredients (e.g., canola oil, soy, corn), and "synthetic" ingredients (e.g., niacin, folic acid, dextrose). [Complaint](#).

Perera v. Pacific Foods of Oregon, No. 13cv1788 (C.D. Cal.): Plaintiff alleges that defendant falsely labels its Hemp Non-Dairy beverage and other products as "all natural" when it contains "artificial" ingredients and "evaporated cane juice" ("ECJ") rather than "sugar." [Complaint](#).

Salazar v. Honest Tea, Inc., 13cv2318 (E.D. Cal.): Plaintiff alleges that Honest Tea Honey Green Tea, which is marketed as a source of antioxidant green tea flavonoids, allegedly does not contain the amount of antioxidants touted on the label. Plaintiff bases the allegations on independent laboratory testing, which she alleges demonstrates that the bottled tea's total antioxidant flavonoids is 24% less than what was listed on the bottle. Plaintiff seeks certification of a nationwide class. [Complaint](#).

Von Slomski v. The Hain Celestial Group, Inc., No. 13cv1757 (C.D. Cal.): Plaintiff alleges that bagged teas and other beverages sold by defendant are falsely labeled "all natural" because they contain "pesticides, herbicides, insecticides, carcinogens, and/or developmental toxins" including some that violate federal standards or California's Proposition 65. The complaint lists more than 20 brands of pesticides, herbicides and other commercial chemicals, and includes a chart showing which products allegedly tested positive. [Complaint](#).

Garrison v. Whole Foods Market, Inc., No. 13cv5222 (N.D. Cal.): Plaintiff alleges that more than 10 of Whole Foods' house-brand baked goods are labeled "all natural" in violation of California consumer protection statutes because they include "synthetic" ingredients including sodium acid pyrophosphate and maltodextrin. [Complaint](#).

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Bontrager v. Intelligent Beverages, LLC, No. BC526990 (Cal. Super., Los Angeles County): Plaintiff alleges that the defendant's ResQWater falsely suggests that it does not contain sugar because its ingredients include "evaporated cane juice" but not sugar. [Complaint.](#)

Melvin v. Blue Diamond Growers, No. 13cv1746 (C.D. Cal.): Plaintiff alleges that Blue Diamond almond milks and other products are falsely labeled "all natural" when they contain synthetic ingredients as well as list "evaporated cane juice" as an ingredient. [Complaint.](#)

Anderson v. The Hain Celestial Group, Inc., No. 13cv1747 (C.D. Cal.): Plaintiff alleges that defendant's "Sunflower Dream" drink is labeled "all natural" but contains artificial ingredients and are labeled "ECJ" not "sugar." [Complaint.](#)

Madenlian v. Flax USA, Inc., No. 13cv1748 (C.D. Cal.): Plaintiff alleges that defendant's Flax USA Flaxmilk product is labeled "all natural" but contains artificial ingredients. [Complaint.](#)