# Food Litigation Newsletter
# August 5, 2013

ISSUE NO. 16

## 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

**VitaRain "Natural" Caffeine Claims Against Costco Rules Preempted**

In *Maple v. Costco Wholesale Corp.,* 12cv5166 (E.D. Wash.), plaintiffs alleged that VitaRain Tropical Mango Vitamin Enhanced Waster Beverage was marketed as a "natural" product but in fact contained large amounts of "synthetic" caffeine in alleged violation of Washington consumer protection statutes. Plaintiffs argued that the products were required to disclose on the front label that the drink contains caffeine and to disclose the relative amount of caffeine in the drink. Costco moved to dismiss, arguing both that the labeling requirements proposed by plaintiff were preempted by federal law and that the complaint failed to satisfy minimum pleading standards. The court agreed, holding that federal regulations expressly covered the labeling requirements plaintiffs sought to impose, ruling that plaintiffs' efforts to impose additional requirements were expressly preempted. The court also dismissed plaintiffs' state law claims as inadequately pled, largely based on a lack of causation. Order.

**Court Refuses To Certify Most "All Natural" Claims Against Kashi and Bear Naked**

In *Bates v. Kashi Co.,* No. 11cv1967 (S.D. Cal.) and *Thurston v. Bear Naked, Inc.,* No. 11cv2890 (S.D. Cal.), the court used identical reasoning to grant in part and deny in part motions for class certification. In *Kashi*, plaintiffs sought certification of two nationwide classes of purchasers of various Kashi products which contain a wide variety of allegedly "synthetic" ingredients: those labeled "Nothing Artificial" and those labeled "All Natural." Similarly, plaintiffs sued Kashi subsidiary Bear Naked and sought certification of national classes of purchasers of products labeled "natural." In both cases, plaintiffs alleged that the products contained "synthetic" ingredients inconsistent with "natural" representations. Other than a few of the challenged ingredients, the court found in both cases that that plaintiffs had failed to establish that "natural" has a sufficiently-common meaning to consumers: "Plaintiffs fail to sufficiently show that 'All Natural' has any kind of uniform definition among class members, that a sufficient portion of class members would have relied to their detriment on the representation, or that Defendant's representation of 'All Natural' in light of the presence of the challenged ingredients would be considered a material falsehood by class members."

The classes the court certified were much more limited than those sought by plaintiffs, including a California-only "Nothing Artificial" class of purchasers of ten Kashi products labeled "All Natural" and a California-only class of Bear Naked products, which included ingredients that are either defined by federal regulation as "synthetic" or which do not meet Kashi's own definition of "natural." According to the court, the phrase "Nothing Artificial" "has a clearly ascertainable meaning; namely, that the product contains no artificial or synthetic ingredients." Bates, Thurston.

**New York Appellate Court Affirms Dismissal Of Soda Ban**

In *In re New York Statewide Coalition of Hispanic Chambers of Commerce v. New York Department of Health & Hygiene*, 2013 NY Slip Op 05505 (July 30, 2013), the New York City Board of Health voted to limit the maximum self-service size for sugary drinks at 16 ounces, with carve-outs for alcoholic drinks, milkshakes, sports and energy drinks, and mixed coffee drinks. Petitioners moved to strike the regulation, arguing that the executive branch of New York's city government lacked authority to enact the regulations without action by the Board of Supervisors. The trial court agreed, and struck down the ban, which the appellate division of the Supreme Court affirmed. The appellate court found that the law's exemptions doomed it, noting that "[t]he selective restrictions enacted by the Board of Health reveal that the health of the residents of New York City was not the sole concern. . . . If it were, the 'Soda Ban' would apply to all public and private enterprises in New York City." Order.

**Federal Court Stays "All Natural" Case To Allow FDA To Exercise Jurisdiction**

In *Barnes v. Campbell Soup Co.,* 12cv5185 (N.D. Cal.), the plaintiffs allege that various Campbell soups are falsely labeled "all natural" because they contain genetically modified ("GM") corn. In the original complaint, the plaintiffs included allegations against soups containing chicken, with labels regulated and approved by the USDA. In light of Campbell's motion to dismiss, plaintiffs amended and attempted to dismiss all chicken soups. They failed, and one named soup contained chicken. As a result, while the court allowed the case to proceed based on similar soups not purchased by the named plaintiff, the court held chicken-based products preempted by the Federal Meat Inspection Act and the Poultry Products Inspection Act. However, the court rejected the argument that the USDA's mark of inspection on Campbell's chicken soup extends to or preempts claims asserted against Campbell's vegetable soups, deferring to the FDA. However, while the court would not dismiss the claims as preempted, the court concluded that allowing the action to proceed would undermine the FDA's primary jurisdiction, noting "The FDA has refrained from instituting a direct regulation or federal requirement requires companies to disclose GMOs as 'unnatural' ingredients on its product. This inaction, nonetheless, does not remove the presumption that Congress squarely empowered that authority to the FDA pursuant to the FDCA and NLEA." As a result, the court granted the motion to dismiss and stayed the action for six months to allow the FDA to determine whether a soup could be labeled "all natural" if it contains GM corn. Order.

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**Case Will Proceed Against Organic Milk With Omega-3 Brain Health Claims**

In *In re: Horizon Organic Milk Plus DHA Omega-3 Marketing & Sales Practice Litig.*, 12md02324 (S.D. Fl.), plaintiffs allege that five cow- and soy-milk products fortified with algae-based DHA Omega-3 ("DHA") and labeled "DHA Omega-3 Supports Brain Health" violate the consumer production statutes of Florida, California and four other states. Plaintiffs argue that defendant's representation that the DHA in its products "supports brain health" is false and that the competent, scientific evidence shows that defendant's claim that DHA supports brain health is false. The court granted in part and denied in part the motion to dismiss. The court conducted an extensive analysis of plaintiffs' claims under each state's law, largely denying the motion to dismiss. Because the dismissals were without prejudice, moreover, the core of plaintiffs' case will likely proceed in each action. Order.

**Court Refers Evaporated Cane Juice Claims To The FDA, Then Vacates Order**

In *Kane v. Chobani*, No. 12cv2425 (N.D. Cal.), after the court granted in part a motion to dismiss claims related to defendants' use of evaporated cane juice on Greek yogurt labels, the court denied plaintiff's motion for a preliminary injunction seeking to bar Chobani from selling their yogurts as currently labeled and requiring the removal and recall of products currently on the market. After the parties indicated their intention to seek reconsideration of the Court's ruling, the court vacated the order partially dismissing the complaint pending further briefing. Order.

## Regulatory Updates

**Starbucks Updates Advertising Language for Verisimo Single-Serve System**

*Kraft Foods Group, Inc. v. Starbucks Corp.*, Case Report #5609, NAD/CARU Reports (July 2013): Kraft challenged the truth of, and supporting evidence for, certain advertising claims for Starbucks' Verismo single-serve coffee system before the National Advertising Division ("NAD"). The NAD determined that Starbucks provided sufficient evidence to support some of the challenged claims about the product, including the claim "With rich espresso, high-quality Arabica coffee, and the creamy foam of pure 2% milk, your favorite Starbucks beverages come together at the touch of a button." However, the NAD determined that Starbucks' evidence was not sufficient to support certain implied comparative messages conveyed by the challenged ads, namely claims that lattes made with the Verismo product are comparable in quality to lattes served in Starbucks' cafes. The NAD therefore approved Starbucks' decision to discontinue claims such as "coffeehouse quality" and "made to café standard." Link to NAD press release.

**FDA Proposes Two New Rules For Foreign Food Supply Safety**

On July 26, 2013, the FDA proposed for comment two new rules implementing the Food Safety Modernization Act (FSMA). The rules are aimed at foreign supply of food products and are intended to further the goal of the FSMA to ensure safety in food supply through preventative measures. One rule establishes Foreign Supplier Verification Program regulations, applicable to entities that import food products into the United States. The other rule establishes a program for

accreditation of third-party auditors of foreign facilities and the food products they produce, and for the bodies accrediting such auditors. Together, the rules are expected to impose costs on industry in excess of $500 million per year. Comments are due by November 26, 2013.

The first rule would establish Foreign Supplier Verification Program (FSVP) regulations, under which parties who import food into the United States would be required to perform certain risk-based activities to verify that the imported food has been produced in a manner that provides the same level of public health protection as that required of domestic food producers. The specific actions required would depend upon the type of food product (such as processed foods, produce, and dietary supplements), the category of importer, the nature of the hazard in the food, and who is to control the hazard (i.e., the importer or the supplier).

Under the proposed regulations, an importer would need to develop, maintain, and follow an FSVP for each food it imports. An FSVP would need to include the following steps:

**Compliance Status Review**: Importers would be required to review the compliance status of the food and the potential foreign supplier before importing the food and periodically thereafter.

**Hazard Analysis**: Importers would be required to analyze and assess the specific potential hazards associated with each food they import.

**Verification Activities**: Importers would be required to conduct activities that provide adequate assurances that the hazards identified as reasonably likely to occur are adequately controlled. Verification activities could include onsite auditing of foreign suppliers, sampling and testing of food, periodic review of foreign supplier food safety records, or other appropriate risk-based procedures.

**Corrective Actions**: Importers would be required to review complaints they receive concerning the foods they import, investigate the cause or causes of adulteration or misbranding in some circumstances, take appropriate corrective actions, and revise their FSVPs when they are inadequate.

**Periodic Reassessment of the FSVP**: Importers would be required to reassess their FSVPs within three years of establishing the FSVP, within three years of the last assessment, or sooner if they become aware of new information about potential hazards associated with the food.

**Importer Identification**: Importers would be required to provide identifying information to Customs for each food product they import.

**Recordkeeping**: Importers would be required to keep records of certain activities, including the foregoing.

The proposed rule is intended to be flexible considering the level of potential hazard and who is responsible for controlling it. The rule would also include relaxed requirements and exemptions for certain products, uses, and smaller suppliers. For further information on the proposed rule, click here.

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The second rule would establish a program for Accreditation of Third-Party Auditors for foreign food facilities and for the entities that accredit them. Importers will not generally be required to obtain certifications, but in certain circumstances the FDA may use certifications from accredited auditors in determining whether to admit certain imported food that the FDA has determined poses a safety risk or in determining whether an importer is eligible to participate in a voluntary program now under development for expedited review and entry of food.

The proposed rule contains requirements for accreditation bodies seeking recognition by the FDA as well as requirements for third-party auditors seeking accreditation. The proposed rule also contains requirements relating to auditing and certification of foreign food facilities and food and for notifying the FDA of conditions in an audited facility that could cause or contribute to a serious risk to the public health.

The FDA will use certifications issued by accredited third-party auditors for two purposes under FSMA. First, the Voluntary Qualified Importer Program (VQIP), which provides for expedited review and entry of food into the United States, requires participating importers to import food from certified facilities. Second, the FDA may require certification as a condition of entry for certain foods that FDA has determined pose a food safety risk. Such certifications may be provided by an accredited third-party auditor. Further, although the FSVP proposal, discussed above, does not require the use of accredited third-party auditors, the FDA anticipates that once the accreditation system is in place, importers may increasingly rely on audits by accredited third parties to meet their supplier verification requirements under FSVP.

For further information on the proposed rule, click here.

## New filings

*Dinsmore v. Robert's American Gourmet Foods*, No. 13cv5493 (C.D. Cal.): Plaintiffs allege that Pirate Booty snacks and other products sold by the defendants are falsely labeled "all natural" but made with GMO ingredients. Complaint.

*Goldberg v. Robert's American Gourmet Food LLC*, 13-cv-6623 (D.N.J.): Plaintiffs allege that Pirate Booty snacks and other products sold by the defendants are falsely labeled "all natural" but made with GMO ingredients. Complaint.

*Swearingen v. Yucatan Foods*, No. 13cv3544 (N.D. Cal.): Plaintiffs sued Yucatan alleging that the defendant's labeling its guacamole products as containing "evaporated cane juice" as opposed to sugar violates California's consumer protection statutes. Complaint.