

Food Litigation Newsletter

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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 Strikes Class Allegations Against Nestle as a Matter of Law

The Court in *Trazo v. Nestle USA, Inc.*, No. 12cv2272 (N.D. Cal.) granted a motion to strike class allegations, ruling that the plaintiffs' complaint did not describe a certifiable class as a matter of law, because the class described necessarily to satisfy the typicality, ascertainability, or commonality requirements of Rule 23 of the Federal Rules of Civil Procedure. The motion to strike was part of defendant's motion to dismiss, which the court granted in part and denied in part. Plaintiffs sought to represent a national class of consumers who purchased any of a variety of Nestle products labeled or advertised as "No Sugar Added" but which contain concentrated fruit juice or other added sugars; listing "Evaporated Cane Juice" as an ingredient; or labeled or advertised as "All Natural" or "Natural," but which contain artificial ingredients, flavoring, added coloring, and/or chemical preservatives, among other claims. The ruling on the motion to dismiss rejected all preemption arguments other than those directed to claims seeking to regulate labels claiming a product is a "source" of an antioxidant and USDA-approved labels of Hot Pockets and Lean Pockets. But the court found that the complaint failed to assert sufficient facts to state claims against some products, while leaving the core of the complaint undamaged. [Order](#).

Complaint that Fails to Specify Products or Marketing Statements Dismissed

In *Keczer v. Tetley USA, Inc.*, No. 12cv2409 (N.D. Cal.), the court granted a motion to dismiss a complaint alleging that defendant's tea products included unlawful antioxidant, nutrient content, and health claims on labels and the defendant's website. The court dismissed breach of warranty claims with prejudice and dismissed the remaining claims, brought under California's consumer protection statutes, without prejudice for failing to satisfy pleading requirements imposed by Rule 9 of the Federal Rules of Civil Procedure. The court's concluded that the complaint's use of the term "misbranded

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food products,” which was defined to include but was not limited to tea products identified by name, was not sufficiently specific. According to the court, by failing to identify with precision the products or label statements at issue, the complaint failed “to unambiguously specify the particular products that have [allegedly] violated particular labeling requirements.” [Order](#).

Complaint Dismissed for Lack of Specificity in Product, Representations, and Reliance

The court overseeing *Smedt v. The Hain Celestial Group*, No. 12cv3209 (N.D. Cal.) dismissed a complaint alleging that a wide variety of unrelated products, including coconut water, potato chips, and vegetable strips violate a variety of California consumer protection statutes, including listing evaporated cane juice as an ingredient; making “all natural” claims where the products include chemical food coloring or preservatives; and making allegedly unauthorized trans fat claims. The court said 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.” The court also dismissed breach of warranty claims. [Order](#).

California Federal Court Allows “Antioxidants” Class Complaint to Move Forward

In *Clancy v. The Bromley Tea Co.*, 12cv2003 (N.D. Cal.), the court granted in part and denied in part the defendant’s motion to dismiss nationwide class claims on teas labeled as natural source of antioxidants. Although the court dismissed warranty and unjust enrichment claims, it denied the motion to dismiss for lack of standing claims based on products the named plaintiffs did not purchase the products or advertisements they did not see. The court also allowed the nationwide class to proceed under California law despite the absence of any significant connection between the defendants and the state, although it noted that it would use its case management authority to curtail unnecessarily expensive discovery. [Order](#).

Uncertainty About Future FDA Regulation Leads Court to Deny Conagra’s Stay Petition

The court in *In re Conagra Foods*, 11cv05379 (C.D. Cal.) denied Defendant’s request for an order staying the case under the Primary Jurisdiction Doctrine, ruling that since the FDA had declined a primary jurisdiction referral to address whether beverages containing high fructose corn syrup could be labeled “all natural” in *Coyle v. Hornell Brewing*, Conagra failed to present evidence showing the FDA would respond differently in this case regarding Wesson cooking oils labeled as “100% Natural” but containing genetically-modified corn and soy. The court noted that the prospect of FDA action was “uncertain.”

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The court further declined to defer to recent opinions in the U.S. District Court for the Northern District of California holding otherwise, noting that Northern District decisions were not binding on a Central District court. [Order.](#)

Court Grants Preliminary Approval to *Naked Juice* Class Settlement

The court in *Pappas v. Naked Juice Co.*, 11cv8276 (C.D. Cal.) granted preliminary approval to the nationwide settlement of six coordinated cases alleging that Naked Juice labels falsely claimed the products were “all natural” but contained synthetic ingredients such as ascorbic acid and beta carotene, or included GMO ingredients, or were made from concentrate. In preliminarily approving the class settlement, the court rejected three sets of objections to the settlement, first finding that the attorneys’ fees were within the reasonable settlement range. Second, the court found that the *cy pres* distribution—to IOLTA, legal aid programs and the Mayo Clinic—was legal under *Dennis v. Kellogg Co.* because the funds would be used for consumer protection education. Third, the court rejected complaints about the sufficiency of notice. [Order.](#)

NEW FILINGS

O’Shea v. Campbell Soup, 13cv4887 (D.N.J.): Plaintiff alleges that Campbell’s products with “Heart-Check Mark” certification misrepresents nutritional content of processed foods by leading consumers to believe products meet American Heart Association’s heart-healthy nutritional guidelines. [Complaint.](#)

Griffith v. Gruma Corp., 13cv80791 (S.D. Fla.): Plaintiff alleges violations of Florida’s consumer protection statutes based the marketing of Mission brand chips as “All Natural” when they include genetically-modified corn. [Complaint.](#)

Figy v. Amy’s Kitchen, No. 13cv3816 (N.D. Cal.): Plaintiff alleges that various Amy’s Kitchen products (allegedly) unlawfully list “evaporated cane juice” as an ingredient. [Complaint.](#)