

## 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 DEVELOPMENTS AND RULINGS

#### Voluntary Dismissal in Frito-Lay Pretzel Case

*Figy v. Frito-Lay North America, Inc.*, No. 3:13-CV-3988 (N.D. Cal.) Plaintiffs filed a notice of voluntary dismissal in a putative class action alleging claims under California's UCL, FAL, and CLRA, claiming that defendant's pretzel products are misrepresented as being "Made with All Natural Ingredients" when in fact they contain "artificial, synthetic and unnatural ingredients" and are further misbranded as being "Low Fat" or "Fat Free" without directing consumers to the sodium content information as required under federal law. [Order](#).

#### Court Denies Motion to Dismiss in Florida "Natural" Action

*Dye v. Bodacious Food Co.*, No. 9:14cv80627 (S.D. Fla.) The court denied defendant's motion to dismiss in a putative class action alleging that defendant advertises its cookies as "all natural," when in fact they contain GMOs and synthetic ingredients. The court rejected the primary jurisdiction doctrine argument, relying upon the fact that the FDA does not regulate the use of "natural" as it applies to food products. The court also rejected defendant's standing argument, holding that Florida's DUTPA allows injunctive relief even if the remedy may not benefit the individual consumer who filed the suit. The court also rejected the argument that there could be no misrepresentation where the products' packaging discloses the actual ingredients in the products, holding that the statement "all natural" could mislead a consumer even if disclosures about ingredients were made on a product's packaging. [Order](#).

#### Court Embraces Standing Argument in Beer Case

*Marty v. Anheuser-Busch Cos.*, No. 13cv23656 (S.D. Fla.) The court denied in part and granted in part defendant's motion to dismiss in a putative class action alleging that Anheuser-Busch misled consumers and charged a premium price for Beck's beer by marketing it as a German beer when it is actually manufactured in the United States. First, the court rejected defendant's claim that no reasonable consumer could believe that the product was brewed in Germany. Second, the court rejected defendant's safe-harbor argument, holding that the alleged omissions and misrepresentations were not based on any labels approved by a federal agency, and

## Food Litigation Newsletter

the safe harbor provisions of the relevant state consumer protection statutes were thus not triggered. The court also rejected defendant's argument that plaintiffs had not alleged actual harm, recognizing the "premium price" theory of damages. Addressing defendant's standing arguments, the court granted the motion to dismiss and noted that the complaint failed to allege facts showing that plaintiffs will likely face a real or immediate threat of future injury. [Order.](#)

### Court Denies Preemption Arguments But Dismisses Kellogg in Kashi Case

*Eggnatz v. Kashi Co.*, No. 12cv21678 (S.D. Fla.) The court granted in part and denied in part defendant's motion to dismiss a putative class action alleging that Kashi products were mislabeled as "all natural" despite containing GMOs. The court rejected defendant's preemption argument, holding that GMO-based claims are not preempted by FDA policy or regulations in that FDA had not taken a stance on the GMOs in their definition of "natural." The court further rejected defendant's argument that plaintiffs' claims regarding vitamins and hexane-processed soy are preempted, finding that plaintiffs sufficiently alleged that a reasonable consumer would not expect such ingredients in food labeled "all natural." The court then held that plaintiffs sufficiently pled their claims with sufficient specificity. The court dismissed all claims for Kashi products that plaintiffs did not allege they purchased. Finally, the court dismissed as to Kellogg, the parent of Kashi, because plaintiffs did not allege that Kashi was a "mere instrumentality" or "alter ego" of Kellogg. [Order.](#)

### No Class Certification in Del Monte Case

*Kosta v. Del Monte Corp.*, No. 12cv1722 (N.D. Cal.) The court denied plaintiffs' motion for class certification without prejudice in a putative class action alleging that more than a dozen Del Monte products were wrongly labeled as "all natural" (but contained synthetic ingredients and processing) and "fresh" (but contained pasteurized products or preservatives) and were mislabeled related to serving size. The court based its order on the fact that plaintiffs had stipulated to narrowing the scope of the claims against defendant, rendering much of the evidence and arguments in the class certification briefing unhelpful or irrelevant. [Order.](#)

### Court Grants Preliminary Approval of Red Bull Settlement

*Careathers v. Red Bull N. Am. Inc.*, No. 1:13cv369 (S.D.N.Y.) The court granted preliminary approval of a class settlement. Pursuant to the proposed settlement, all persons who purchased at least one Red Bull beverage dating from January 1, 2002 who submitted a valid claim could receive either a \$10 reimbursement or free Red Bull products to be selected by the class member up to a \$15 retail value. Defendant would establish a settlement fund of \$13 million in cash and free products. Any remnants would be disbursed first in pro rata shares to any valid claimants, or if the remainder is less than \$100,000, then it would be distributed in cy pres to a charitable organization "mutually agreed upon by the parties." [Order.](#)

## Food Litigation Newsletter

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### NEW FILINGS

*Pettinga v. B&G Foods, Inc.*, No. 9:14cv81159 (S.D. Fla.) Putative class action alleging violations of Florida's DUTPA, negligent misrepresentation, breach of express warranty, unjust enrichment and violation of the Magnusson-Moss Warranty Act, claiming five of defendants' products (Pancake & Waffle Mix, Melba Toast, Mini Bagel Crisps, Pita Chips, and Taco Seasoning Mix) are labeled "all natural" when they contain artificial ingredients. [Complaint.](#)

*Park v. Knudsen & Sons, Inc.*, No. BC556802 (L.A. Superior Ct.) Putative class action alleging claims under California's UCL, FAL, CLRA, and negligent misrepresentation and breach of quasi-contract, claiming that Defendant's 100% juice products are falsely labeled "No Sugar Added" in violation of FDA requirements and related regulations and that the label led consumers to wrongly believe that the Knudsen juice products contained less sugar than other comparable 100% juice products. [Complaint.](#)