

## 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

#### Court Grants Summary Judgment Based on Reasonable Consumer Standard

*Rahman v. Mott's LLP*, No. 13cv3482 (N.D. Cal.): In a putative class action alleging that Mott's apple juice--labeled "no sugar added"--violates FDA regulations because it contains concentrated fruit juice, plaintiff alleged causes of action under California's UCL, FAL, CLRA, as well as common law negligent misrepresentation and breach of quasi-contract. The court granted the defendant's motion for summary judgment on plaintiff's FAL, CLRA, and negligent misrepresentation claims, as well as plaintiff's claims under the fraud and unfair prongs of the UCL. The court ruled that the plaintiff had failed to show that the "no sugar added" label is misleading to a reasonable consumer. The defendant's expert testified that a survey showed that consumers did not rely on the "no sugar added" claim when purchasing its apple juice, whereas plaintiff's expert criticized the defendant's study but did not assert any independent facts or data or conduct his own survey. [Order](#).

#### Class Partly Decertified in Dole "All Natural" Case

*Brazil v. Dole Food Company, Inc. et al*, No. 5:12-cv-01831 (N.D. Cal.): A federal judge granted in part and denied in part a motion to decertify in this putative class action asserting that defendant's fruit products are misbranded as "all natural." In decertifying the damages class, the court ruled that plaintiff's damages report had failed to ascertain the price premium attributable to the "all natural" label by controlling for other variables that could also impact pricing of the products, such as advertising expenditures. The report author also failed to verify whether competing products actually made "all natural" claims or not, did not account for the possibility that packaging may make more than one claim (i.e. "all natural" and "sugar free"), and did not account for variations in how different products were packaged. [Order](#).

#### Milk Advertising Class Action Dismissed

*Ruiz v. Darigold, Inc./Northwest Dairy Association*, No. 2:14-cv-01283 (W.D. Wash.): A federal judge dismissed a putative class action alleging that defendants sell milk products falsely advertised as having been produced in an environment that is safe for animals, healthy for consumers, and respectful of workers' rights. The court held that plaintiff had failed to show that a reasonable consumer would be misled, as the

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statements identified as ‘misleading’ were not shown to be false. For example, the court found that many of the statements pertaining to animal treatment were “aspirational” in nature, and not intended to reflect the company’s current practices. With regard to claims alleging false designation of geographic origin, the court ruled that plaintiff had failed to allege any such representation or the falsity thereof. [Order](#).

### Class Certification Rejected in Skinnygirl Advertising Suit

*Langendorf v. Skinnygirl Cocktails, LLC et al*, No. 1:11-cv-07060 (N.D. Ill.): A federal court rejected class certification in a class action alleging false advertising based on the use of preservatives in a drink mix labeled “all natural.” The court held that the proposed class failed to meet the ascertainability requirement, as plaintiff proposed no method for identifying members of the class other than to suggest that retail records existed showing who purchased the product. The court also held that named plaintiff was not an adequate representative, citing potential conflicts of interest arising out of the close working relationship between her attorney and her father. [Order](#).

### Truvia “Natural” Class Action Settlement Approved

*Howerton v. Cargill, Inc.*, No. 1:13-cv-00336 (D. Haw.): A federal judge in Hawaii granted final approval to a settlement ending a class action over whether Truvia sweetener products were mislabeled as “natural” as two of the ingredients—stevia leaf extract and erythritol—are processed by using fermentation and dextrose derived from GMO corn. Defendant agreed to change its marketing and labeling, contribute \$6.1 million to a settlement fund, and pay any judicially approved incentive awards and reasonable attorneys’ fees and costs in an amount not to exceed \$1.83 million. [Order](#).

### Tortilla Chips Class Settlement Preliminarily Approved

*Klacko v. Diamond Foods, Inc.*, No. 14cv80005 (S.D. Fla.): A judge preliminarily approved the proposed class settlement in this action alleging defendant’s Tia’s-brand tortilla chips were mislabeled “all natural” when they contain synthetic and artificial ingredients, including maltodextrin and dextrose. Under the terms of the settlement, the defendant agreed to pay up to \$2,750,000 to provide compensation to claimants, up to \$775,000 for attorneys’ fees, and to place restrictions on suppliers. [Order](#).

### NEW FILINGS

*McGee v. Diamond Foods, Inc.*, No. 3:14cv2446 (S.D. Cal.): This putative class action asserts that defendant’s popcorn products are injurious to consumers because they contain partially hydrogenated vegetable oils, which contain trans fats. [Complaint](#).

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*Cohen v. Xochitl Inc., Xochitl Gourmet Foods LLC*, No. 1:14cv23751 (S.D. Fla.): This putative class action alleges that defendants' tortilla chips are wrongly labeled "All Natural" and "No GMO" when they contain high levels of GMO corn. [Complaint](#).

*Daly v. Xochitl, Inc.*, No. 1:14-cv-6112 (E.D.N.Y.): This putative class action asserts that defendant claims that its corn chips are "all natural" when in fact most of the corn contained in the chips is genetically modified. [Complaint](#).

*Petkivicius v. Tyson Foods, Inc.*, No. 3:14-cv-4655 (N.D. Cal.): This putative class action alleges that defendant labels its frozen products as "100% natural" even though the corn and soy ingredients, as well as the feed given to the chickens, are genetically modified. [Complaint](#).

*Tran v. Blue Diamond Growers*, No. BC561217 (L.A. Sup.): This putative class action alleges false advertising based on defendant's claim that its crackers are "natural" when they contain artificial or synthetic ingredients such as disodium phosphate and xantham gum. [Complaint](#).

*Tran v. Good Karma Food Technologies, Inc.*, No. BC561218 (L.A. Sup.): This putative class action alleges false advertising based on defendant's claim that its flax milk beverages are "natural" when they contain artificial or synthetic ingredients such as tricalcium phosphate, xantham gum, Vitamin A palmitate, Vitamin D2, and Vitamin B12. [Complaint](#).

*Tran v. Snak-King Corp.*, No. BC561426 (L.A. Sup.): This putative class action alleges false advertising based on defendant's claim that its artichoke chips are "all natural" when they contain artificial or synthetic ingredients such as disodium phosphate. [Complaint](#).

*Tran v. Good Health Natural Products, Inc.*, No. BC561427 (L.A. Sup.): This putative class action alleges false advertising based on defendant's claim that its corn crisps are "all natural" when they contain artificial or synthetic ingredients such as disodium phosphate. [Complaint](#).

*Tran v. Front Range Snacks, Inc.*, No. BC561428 (L.A. Sup.): This putative class action alleges false advertising based on defendant's claim that its popcorn is "all natural" when it contains disodium phosphate. [Complaint](#).

*Silva v. Smucker Natural Foods*, No. 1:14-cv-6154 (E.D.N.Y.): This putative class action asserts that defendant's "Natural Brew" brand of root beer is not "natural," as it contains additives and artificial flavorings. [Complaint](#).

*Livingston v. Fullbar, LLC*, No. 14cv62430 (S.D. Fla.): This putative class action asserts defendant's Fullbar nutrition bars were mislabeled as "100% natural" and "all natural" when they contain synthetic ingredients and ingredients that are made from

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GMO soy. [Complaint.](#)

*Peterson v. CJ America, Inc.*, No. 14cv2570 (S.D. Cal.): This putative class action alleges that defendant's Annie Chun's Soup Bowls, Asian Noodle Bowls, and Ramen House prepackaged foods products were mislabeled as having "NO MSG ADDED" and "100% all natural ingredients" when the products contain several ingredients that have MSG. [Complaint.](#)

*Guttman v. Ole Mexican Foods, Inc.*, No. 14cv4845 (N.D. Cal.): This putative class action alleges that defendant markets its Xtreme Wellness tortillas as healthful and "Trans Fat Free" when they contain partially hydrogenated vegetable oils, which contain trans fats. [Complaint.](#)

*Werthe v. Gerber Products Co.*, No. 3:14-cv-08216 (D. Ariz.): This putative class action alleges that defendant fraudulently represents that its Good Start Gentle infant formula prevents or reduces the risk of developing allergies when it in fact does not. [Complaint.](#)