

Food Litigation Newsletter

September 30, 2013

ISSUE NO. 20

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 Partially Pops Plaintiffs' Claims in *Wrigley*

Gustavson v. Wrigley Sales Co., No. 12cv1861 (N.D. Cal.): The Court granted in part defendants' motions to dismiss a class complaint alleging that Wrigley and Mars gums and candies are "misbranded" where allegations included claims related to listing of "flavinols" in dark chocolate products, calorie-related nutrition claims, and violations of federal standards for "low calorie," "sugar free," and serving size claims. The Court held that claims concerning calorie-related statements on chocolate, the standard of identity for milk chocolate, and low calorie statements about sugar free gum are expressly preempted by the Federal Food, Drug, and Cosmetic Act, and dismissed the breath mint serving size claim under the doctrine of primary jurisdiction. The Court declined to dismiss plaintiffs' other claims and rejected defendants' preemption arguments. [Order.](#)

Lack of Standing Dooms Plaintiff's Yogurt Claims

Kane v. Chobani, No. 12cv2425 (N.D. Cal.): After considering defendant Chobani's motion for reconsideration, the Court granted Chobani's motion to dismiss the second amended complaint, which had alleged misleading labeling based on "evaporated cane juice," "no sugar added," and "all natural" labels. The Court held that plaintiffs lacked standing to bring claims based on California's Unfair Competition, Consumer Legal Remedies, and False Advertising laws because the laws require actual reliance and economic injury, but the complaint failed to plead reliance on defendants' alleged representations in a coherent manner and failed to show how defendants' statements deceived plaintiffs. The Court further found that plaintiffs failed to adequately demonstrate standing with regard to products they did not purchase but that were included in the complaint. [Order.](#)

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Court Stands By its Partial Class Certification Order

Astiana v. Kashi Co., No. 11cv1967 (S.D. Cal.): The Court denied all parties' motions after defendant moved for modification of class definition and plaintiffs moved for reconsideration following the Court's certification of a limited class related to Kashi's labeling of its cereals and other products as "nothing artificial" and "all natural." Defendant also sought a stay of trial court proceedings while it sought an appeal under Rule 23(f). Plaintiffs' motion for partial reconsideration was based on the theory that the Court erred by excluding the ingredient potassium bicarbonate from the "All Natural" class. Conversely, Kashi's motion for modification of the class argued that the ingredients calcium pantothenate and pyridoxine hydrochloride should not have been included in the "All Natural" class. The Court denied all motions because its class certification order "was not predicated on a technical parsing of the federal regulations surrounding organic products" but rather was a class for "three ingredients that reasonable consumers could plausibly consider to be material misrepresentations by Kashi." The court also rejected Kashi's stay request based on its argument that increased litigation costs would cause irreparable injury. [Order](#).

Court Partially Dismisses *Dole* Complaint

Brazil v. Dole Food Co., 12cv1831 (N.D. Cal.): The Court granted in part and denied in part Dole's second motion to dismiss "all natural" claims focused on labeling as "fresh," containing antioxidants, sugar-free and other nutrient-content claims related to frozen berries and other fruit products. The Court allowed claims to proceed based on products the plaintiff did not purchase, finding that the labels of the un-purchased products were "substantially similar" to purchased products, which the court held could satisfy standing standards on the low standard governing a motion to dismiss. However, the Court would not allow plaintiff to rely on statements the plaintiff did not see, concluding that California's consumer protection statutes require actual reliance. The Court further rejected challenges based on FRCP 9 and preemption, and refused to strike nationwide class allegations. [Order](#).

NEW FILINGS

Swearingen v. Santa Cruz Natural, Inc., No. 13cv4291 (N.D. Cal.): On behalf of a putative nationwide class of consumers, Plaintiffs allege that Santa Cruz Natural violated California's Consumer Legal Remedies Act and Unfair Competition Law by falsely listing "evaporated cane juice" as an ingredient in its sodas. Plaintiffs base their allegations on FDA warning letters to other companies using the term, under the theory that evaporated cane juice is just sugar. [Complaint](#).

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Richards v. Safeway, No. 13cv4317 (N.D. Cal.): On behalf of a putative California class and a nationwide class of consumers, Plaintiff alleges that Defendant's frozen waffles labeled were falsely and misleadingly labeled "100% Natural" when they contained sodium acid pyrophosphate, a "synthetic" ingredient. Most "synthetic" cases have moved beyond the pleadings, including cases alleging that products containing sodium acid pyrophosphate cannot be labeled "all natural." There are a bunch of allegations based on website disclosures the complaint does not allege the plaintiffs relied upon, but this will likely move to discovery. Plaintiff's putative California class seeks relief based on violations of state consumer protection statutes and its nationwide class seeks relief based on common law fraud and other violations. [Complaint](#).

Swearingen v. Late July Snacks, No. 13cv4324 (N.D. Cal.): Plaintiffs allege that Late July's cracker and chips products violated California's Consumer Legal Remedies Act and Unfair Competition Law by falsely and misleadingly listing "evaporated cane juice" as an ingredient when evaporated cane juice is allegedly just sugar. [Complaint](#).

Swearingen v. Amazon Preservation Partners, Inc., No. 13cv4402 (N.D. Cal.) and *Swearingen v. Healthy Beverage, LLC*, No. 12CV4385 (N.D. Cal.): Companion complaints alleging that defendants' products were "misbranded" because they listed "evaporated cane juice" as an ingredient rather than sugar. [Amazon Complaint](#), [Healthy Beverage Complaint](#).