

# Food Litigation Newsletter

## September 3, 2013

ISSUE NO. 18

### 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.



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

#### Class Certification Denied in Case About Coffee

*McManus v. Sturm Foods, Inc.*, No. 11cv565 (S.D. Ill): The court denied certification of a class of consumers from 9 states who alleged that the company falsely represented that its coffee products were made from fresh ground coffee, when in fact the products were “instant” or “soluble” coffee. The Court rejected state law claims that required actual reliance, finding that the proposed class definition included consumers who knew or were indifferent to the product’s coffee content, precluding certification under Alabama, New York, New Jersey, North Carolina, Illinois and South Carolina law. Under California and New Jersey law, the court declined to presume reliance because the putative class included individuals who were not exposed to the alleged representations and therefore could not claim that they were misled. In light of these shortcomings, the court found that the individualized inquiry necessary to determine causation prevented a finding of predominance and superiority. [Order](#).

#### Court Dismisses Case Attacking Gerber’s Overall Marketing Message

*In re Gerber Probiotic Sales Practices Litigation*, No. 12cv0835 (D.N.J.): The court granted Gerber’s motion to dismiss, finding that the core of plaintiff’s complaint—that Gerber’s representations related to probiotic baby food were unsubstantiated—does not state a cognizable cause of action. According to the court, plaintiffs only had standing to sue for injuries caused by alleged misrepresentations, not Gerber’s “overall marketing message.” As a result, the court dismissed the complaint without prejudice, other than claims for lack of substantiation, which were dismissed with prejudice. [Order](#).

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### Court Denies Smucker's Motion to Dismiss

*Parker v. J.M. Smucker Co.*, No. 13cv1690 (N.D. Cal.): The court denied defendant's motion to dismiss Plaintiff's complaint, which alleges that four types of Crisco oil are labeled "all natural" in violation of California law because the oils are derived from genetically modified crops or are "heavily processed." The court allowed plaintiff to proceed against all four oils, even though she purchased only one, finding that there was sufficient similarity among the labels and products for plaintiff to have standing to sue on all four. The court also rejected defendant's preemption argument, finding that although a defendant may not be required to affirmatively disclose the presence of genetically modified ingredients, plaintiff's claim that the phrase "all natural" is false or misleading does not seek to impose labeling requirements that are different from federal labeling requirements. The court also allowed plaintiff's claim for breach of express warranty to proceed, holding that "'All Natural' is an affirmative representation about a product's qualities. . . ." Finally, the court rejected defendant's primary jurisdiction argument, noting that the FDA has declined to rule on "natural" labeling and referral could cause undue delay.

[Order.](#)

### NEW FILINGS

*Engurasoff v. The Coca Cola Co.*, No. 13cv3990 (N.D. Cal.): Plaintiff alleges that Coca Cola fails to state that its products contain artificial flavorings or chemical ingredients including phosphoric acid, rendering all such products misbranded under California law. [Complaint.](#)

*Figy v. Frito Lay North America*, No. 13cv3988 (N.D. Cal.): Plaintiff sues Frito North America, alleging that various Rolled Gold pretzel products violate California's consumer protection statutes because they are labeled "fat free" or something similar, which is precluded based on their sodium content. [Complaint.](#)

*Toscano v. Kangadis Foods*, No. 13cv5944 (S.D.N.Y.): Plaintiffs alleging that the defendant is marketing its Capatriti brand olive oil as "100% Pure Olive Oil" when it is in fact "olive-pomace oil," which is processed from olive pits, skins and pulp. [Complaint.](#)