

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 for more information.

RECENT SIGNIFICANT RULINGS

Court Narrows "All Natural" Class Action Against Safeway

Richards v. Safeway, No. 13-cv-04317-JD (N.D. Cal.): Several claims were dismissed from a class action in California federal court against Safeway. On behalf of a putative nationwide class, the lawsuit alleges that Safeway mislabeled its frozen waffles as "100% natural" when they in fact contain a chemical preservative. First, the court held that the plaintiff lacks standing to seek prospective injunctive relief because, now that he knows the products contain a preservative, "he cannot plausibly allege that he would purchase the products in the future even if they were properly labeled." Second, the court dismissed without prejudice all claims based on statements outside of those on the products' labels, such as statements on Safeway's website, because there was no allegation in the complaint that the plaintiff read and relied on any statements outside of the labels. Finally, the court dismissed the plaintiff's unjust enrichment claim based on the growing consensus that unjust enrichment is not a standalone cause of action under California law and because it was duplicative of the plaintiff's remaining statutory and common law claims. Plaintiff's claims for violations of California consumer protection statutes, fraud, negligent misrepresentation, breach of express warranty, and breach of contract remain. *Order.*

Nationwide Class Certified in Olive Oil Labeling Fight

Ebin v. Kangadis Family Management LLC, et al., No. 14-cv-01324-JSR (S.D.N.Y.) and *In re: Kangadis Food Inc.*, No. 14-72649 (REG) (Bankr. E.D.N.Y.): Despite a bankruptcy filing, class actions against the makers Capatriti-brand "100% Pure Olive Oil" are back on track following recent orders by a federal judge and federal bankruptcy judge. In December 2013, Judge Rakoff certified a national class of consumers in a lawsuit claiming that Kanagadis Food Inc. mislabeled its product as "100% Pure Olive Oil" when it is actually "olive-pomace oil" or "olive-residue oil." Kangadis Food Inc. subsequently declared bankruptcy and the plaintiffs amended their complaint to assert veil-piercing and alter ego claims against the company's individual and corporate owners. Ruling on the owners' motion to dismiss, Judge Rakoff dismissed direct liability claims against the individual owners, finding they

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cannot be individually liable for the company's alleged misrepresentations. However, the court rejected the argument that the bankruptcy filing stayed the veil-piercing claims, finding that an automatic bankruptcy stay only applies to a nondebtor defendant if the action would have an immediate economic impact on the debtor defendant. Similar to his December 2013 order, Judge Rakoff certified a nationwide class against the additional defendants. Rejecting defendants' argument that class members could not be easily ascertained or determined, Judge Rakoff declared that whether a consumer purchased a tin of Capatriti "100% Pure Olive Oil" is an ascertainable issue. Judge Rakoff also rejected defendants' predominance and commonality arguments, finding that any variations between the common law of fraud and negligent misrepresentation in various states was "unlikely to lead to actual variation in adjudication of liability." The next day, a federal bankruptcy judge upheld Judge Rakoff's December 2013 class certification decision without analysis and allowed the nationwide class to proceed against Kangadis Food Inc. in the bankruptcy proceedings. [Order; In re: Kangadis Order.](#)

Whole Foods "All Natural" and "Organic" Labeling Suit to Stay in Federal Court

Stafford v. Whole Foods Market California, Inc.: No. 4:14CV00420 JLH (E.D. Ark.): A federal judge in Arkansas rejected the plaintiff's request to remand her putative class action against Whole Foods back to Arkansas state court. The complaint alleged that Whole Food mislabels certain of its "365 Everyday" soda, ketchup, and chicken broth products as "all natural" or "organic" when they actually contain artificial ingredients, chemical preservatives, and synthetic or excessively processed ingredients. The complaint alleged that each potential plaintiff's damages could be almost \$75,000 and there were "thousands" of potential class members. Taking these allegations as true, the court found that the \$5 million threshold for removing a class action to federal court under the Class Action Fairness Act was easily satisfied. The court rejected plaintiff's argument that her personal damages were closer to \$150 than \$75,000 as "too little, too late" in light of the complaint's specific allegations. [Order.](#)

Courts Gives Initial OK to Vitaminwater Settlement

Volz v. The Coca Cola Company et al., No. 1:10-cv-00879 (S.D. Ohio): A federal court in Ohio granted preliminary approval to a class action settlement regarding the allegedly deceptive labeling of Vitaminwater by The Coca Cola Co. and its subsidiary, Glaceau. In the settlement, Coca Cola and Glaceau agreed to remove certain challenged statements from the label, such as "vitamins + water = all you need" and "made for the center for responsible hydration," and agreed to additional label changes. The mandatory, non-opt-out settlement class will release all claims by subclasses of consumers in Florida, Illinois, Missouri, Ohio, and the Virgin Islands. The court also preliminarily approved \$1.2 million in attorney's fees. [Order.](#)

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Putative ECJ Class Action Dismissed After Settlement

Cowan v. Guayaki Sustainable Rainforest Products, Inc., No. 3:14-cv-01248-SC (N.D. Cal.): Following a settlement in a putative class action, a California federal court granted the parties' motion to dismiss the individual plaintiff's claims with prejudice and the putative class claims without prejudice. The lawsuit claimed the defendant deceptively labeled its yerba mate teas as containing "organic evaporated cane juice" instead of sugar. [Joint Motion to Dismiss and Order.](#)

NEW FILINGS

Clay v. Chobani LLC, No. 3:14-cv-02258 (S.D. Cal.): On behalf of a putative class of California consumers, the plaintiff claims Chobani's yogurt products are deceptively labeled as "0%" without explanation of what that means and as containing "evaporated cane juice" instead of sugar. The complaint, which was removed from San Diego Superior Court to the U.S. District Court for the Southern District of California, asserts claims for violations of various California consumer protection statutes, negligent misrepresentation, and unjust enrichment. [Complaint.](#)