

# Food Litigation Newsletter

## July 22, 2013

ISSUE NO. 15

### 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 current on developments in food labeling and nutritional content litigation.

### Recent Significant Developments and Rulings

#### Court Grants Preliminary Approval of Settlement in ConAgra's "All Natural" Potato Class Action

*In re Alexia Foods Litigation*, No. 11cv6119 (N.D. Cal.): The court granted preliminary approval of a \$3.2 million settlement agreement between ConAgra Foods, Inc. and a class of consumers who claim that potato products were falsely labeled "natural" because they contain an artificial chemical that prevents discoloration. The agreement provides a \$2.5 million settlement fund with another \$700,000 in vouchers. Class members can receive up to \$35 for products purchased or up to \$75 in food vouchers, or a combination of the two. ConAgra also agreed to pay up to \$800,000 in attorneys' fees. [Stipulation of Settlement.](#)

#### "All Natural" Case Involving GMOs Stayed to Allow for FDA Determination

*Cox v. Gruma Corp.*, No. 12cv6502 (N.D. Cal.): Plaintiffs alleged that because Gruma Corp.'s food products contain corn grown from bioengineered seeds, Gruma's "All Natural" labels are false and misleading. The court granted Gruma's motion to stay the case for six months on primary jurisdiction grounds in order to allow the FDA to determine whether food products with ingredients grown from bioengineered seeds can be labeled "All Natural." [Order.](#)

#### "I Can't Believe It's Not Butter" Suit Dismissed

*Pardini v. Unilever U.S.*, No. 13cv1675 (N.D. Cal.): The court granted a motion to dismiss claims that "I Can't Believe It's Not Butter" violated California's consumer

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protection statutes because its label stated “0 fat” and “0 calories” when the product has 771 calories and 82 grams of fat per bottle. The court rejected the plaintiff’s core allegation that Unilever was using improperly small serving sizes so it could round down the fat and calorie content. Instead, the court ruled, the FDA allows any product containing less than 0.5 grams of fat to be marketed as fat free. [Order.](#)

### **Monster Energy Drink Suit Dismissed**

*Fisher v. Monster Beverages Corp.*, No.12cv2188 (C.D. Cal.): The court granted a motion to dismiss claims that Monster energy drinks targeted adolescents with false statements about the safety of its energy drinks. First, the court found that two of the named plaintiffs lacked standing because they alleged only that the beverage “could have” harmed their health, not that they actually did. The court also characterized the claim as “attenuated and insufficient to establish an actual injury” because the named plaintiffs had not alleged either physical or economic injury. Finally, the court found that the named plaintiffs had failed to allege fraud with particularity. While the court refused to extend the Ninth Circuit’s ruling in *POM Wonderful* to prohibit state law claims, it did dismiss other state law claims. The court also dismissed the plaintiffs’ Magnuson Moss Warranty Act claims. [Order.](#)

### **Court Grants Partial Dismissal in “All Natural” Suit Against Chobani**

*Kane v. Chobani, Inc.*, No. 12cv2425 (N.D. Cal.): The court partially dismissed claims directed at Chobani Greek yogurt. The court dismissed claims related to Chobani’s use of evaporated cane juice on product labels to the extent the claims related to products the plaintiffs did not purchase. The court also dismissed claims under California law related to “no sugar added” and “all natural” labeling. All dismissals were with leave to amend. The court was not persuaded by the plaintiffs’ assertion that the Greek yogurt violated the Standard of Identity for Yogurt, but stated that “[i]f the FDA retracts its previous notice that it intends to amend the Standard of Identity for Yogurt, Plaintiffs may seek leave to amend.” The court also dismissed the plaintiffs’ warranty and unjust enrichment claims. [Order.](#)

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### Stipulated Dismissal in Appeal Over Labeling of Honey

*Ross v. Sioux Bee Honey*, No. 13-15293 (9th Cir.): The parties stipulated to the dismissal of an appeal from a ruling that honey could not be labeled “honey” since it was processed to remove pollen. [Order](#).

### Court Requests Guidance from FDA in Case Involving Soy Yogurt and Evaporated Cane Juice

*Hood v. Wholesoy & Co.*, No. 12-cv-5550 (N.D. Cal.): Plaintiffs alleged that the labels on Wholesoy’s soy yogurt are misleading because 1) the product labels disclose “evaporated cane juice” instead of “sugar” and 2) it does not meet the Standard of Identity for Yogurt because they are derived from soy milk rather than cow’s milk. The court granted Wholesoy’s motion to dismiss the case without prejudice on primary jurisdiction grounds to allow the FDA to determine the appropriate rules with respect to soy yogurt and evaporated can juice. Currently, there is no certainty about the FDA’s position on either claim. While warning letters have been issued to some companies whose product labels claim “evaporated cane juice,” the FDA has also stated that its position on evaporated cane juice is “nonbinding” and is merely “guidance.” Similarly, while the Standard of Identity for Yogurt includes dairy milk and the FDA has sent warning letters to makers of other soy milk-based products, the court recognized that the marketplace reality is that many soy-based products refer to dairy products with FDA standards of identity. According to the court, “the need for the FDA to administer a comprehensive approach is compelling.” [Order](#).

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### New filings

*Howerton v. Cargill, Inc.*, No. 13cv336 (D. Hawaii): The plaintiff alleges that Cargill deceptively markets Truvia as a “natural” sweetener made primarily from the stevia plant, but its main ingredient is synthetically made by adding “ethanol, methanol, or rubbing alcohol” to purify the product. The plaintiff claims to have paid a price-premium in reliance on the “natural” representations, and seeks a national class under Hawaii law. [Complaint.](#)

*Pelayo v. Nestle USA*, No. 13cv5213 (C.D. Cal.): The plaintiff alleges that the defendants’ Buitoni pasta products are marketed as “all natural” in violation of California law because they contain xanthan gum and soy lecithin, which are “synthetic” ingredients. [Complaint.](#)

*Perez v. Costco*, No. 13cv1687 (S.D. Cal.): The plaintiff alleges that Costco’s Business Centers (not its warehouses, which sell to consumers) sell products to other food retailers that contain more than the 0.5 grams of trans fat allowed by California law. [Complaint.](#)