

# Food Litigation Newsletter

## November 12, 2013

ISSUE NO. 23

### 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

#### Court Rains on Plaintiff's Vitamin Drink Suit Parade

*Maple v. Costco Wholesale Corp.*, No. 12cv5166 (E.D. Wash.): The court has dismissed without leave to amend the plaintiff's amended complaint in a matter alleging that VitaRain Tropical Mango Vitamin Enhanced Water Beverage ("VitaRain"), bottled by Niagara Bottling and sold by Costco, lacked proper disclosures. The complaint charged that the drink packaging failed to disclose that the beverage contained caffeine; failed to disclose the relative amount of caffeine in the beverage; and falsely claimed that the beverage was a "natural tonic" containing "natural caffeine." The court held that the allegation that the name "VitaRain" falsely conveyed that the drink is "nutritional, healthy and full of vitamins only" was implausible because the name "VitaRain" was itself "nonsensical." Additionally, the court found that the complaint failed to plead that the drink truly was unhealthy, or to specify what statements the plaintiff actually read on the label. [Order](#).

#### Potato Chip Misbranding Claims Half-Baked, Says Court

*Wilson v. Frito Lay*, No. 12cv1586 (N.D. Cal.): The court granted in part a motion to dismiss plaintiff's suit over allegedly misbranded and mislabeled products containing claims such as "No MSG," "All Natural," and "0 Grams Trans Fat." The court found that plaintiffs had failed to allege substantial similarity between the products plaintiffs alleged they had actually purchased and the myriad other non-purchased products. The court therefore dismissed all claims regarding the non-purchased products from the complaint. The court also refused to incorporate reference statements made on the company's website into product labels simply because the labels referred customers to the website, in part because the complaint failed to allege that plaintiffs relied on the website. Notably, the court also found that allegations of product misbranding could not

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satisfy standing requirements where plaintiff did not also allege reliance on the misbranding. Other claims were allowed to proceed. [Order](#).

### **Court: Pasta Claims Need More Sauce**

*Pelayo v. Nestle USA, Inc.*, No. 13cv5213 (C.D. Cal.): The court dismissed a suit alleging that various pasta sold under the Buitoni brand were not “all natural” as the labels claimed, because they contained “synthetic” ingredients, including synthetic xanthan gum, soy lecithin, and synthetic soy lecithin. Rejecting the claims, the court concluded that the plaintiff failed to allege either a plausible objective definition of the term “All Natural” or that her subjective definition of the term “All Natural” is shared by the reasonable consumer. [Order](#).

### **Regulatory Update Regarding Trans Fats**

On November 8, 2013, the FDA published a tentative determination that partially hydrogenated oils (PHO), which are the primary dietary source of industrially-produced trans fatty acids, are not generally recognized as safe (GRAS) for any use in food based on current scientific evidence. If this determination is finalized by the FDA, the result would be that PHO is considered a food additive that may be used in food only with prior FDA approval. The FDA cited scientific evidence that consumption of PHO significantly increases a number of health risks, principally heart disease.

These are the same concerns that led the FDA in 2003 to require food manufacturers to start including the quantity of trans fat on food product labels. The FDA estimates that the consumption of trans fat in the United States has decreased significantly over the past 10 years, with one study showing the level of trans fat in the blood of a certain population group decreased approximately 58 percent from 2000 to 2009. The FDA estimates that elimination of PHO from food could prevent up to 7,000 coronary deaths per year. In addition to scientific evidence, the FDA also cited the facts that other governments, including foreign countries, California and New York City, have taken different steps to restrict the availability of PHO in food products.

The use of PHO in foods has been permitted on the basis of self-determination by the food industry that the products are GRAS, based upon a history of use prior to 1958. The FDA tentatively determined that there is no longer a consensus among experts that consumption of PHO is not harmful, which would preclude continued use under a GRAS determination and, instead, require specific agency approval for use as a food additive. In considering any such

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petition for approval, the burden would be on the applicant to prove, with scientific evidence, that use of the product in food is safe, and to identify any limiting conditions -- such as maximum quantity, conditions of use, and labeling requirements -- that may be appropriate.

The FDA has invited comments, including additional scientific evidence, and has set forth a number of specific issues that it would like parties to address, including:

- Are there data to support other possible approaches to addressing the use of PHO in food, such as by setting limits for trans fat levels in food?
- How long would it take producers to reformulate food products to eliminate PHOs from the food supply?
- What time period for compliance is adequate to allow producers to reformulate products as necessary and to minimize market disruption?
- Are there any special considerations that could be made to reduce the burden on small businesses?

Any person may submit comments within 60 days. The Notice can be found at: <http://federalregister.gov/a/2013-26854>.

### NEW FILINGS

*Suarez v. Anheuser-Busch Cos.* (Fla. Cir. Ct., 11th Jud. Circ.) (Miami-Dade County): Plaintiffs allege that Anheuser-Busch misleads consumers to believe that Kirin beer is manufactured and imported from Japan, when in fact it is made in the U.S. of domestic ingredients – and that plaintiffs paid substantially more for Kirin under the belief that the beer is a Japanese import. **Complaint.**

*Miller v. Living Harvest Foods*, No. 13-cv-23926 (S.D. Fla.): Plaintiff alleges on behalf of a putative Florida-wide class that defendants' representations of its products' ingredients, which include "evaporated cane juice," violate Florida's consumer protection statutes. **Complaint.**

*Nobles v. Coca-Cola Refreshments USA*, 13cv5017 (N.D. Cal.): Plaintiff in *Nobles* alleges that although most containers of Coca-Cola state that they contain no artificial flavoring and/or chemical preservatives, they in fact contain phosphoric acid, "an artificial, man-made chemical that Defendants use for flavoring and as a preservative." **Complaint.**