Food Litigation Newsletter
March 7, 2014

ISSUE NO. 28

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

Class Certification Denied in Ben & Jerry's "All Natural" Ice Cream Case

Astiana v. Ben & Jerry's Homemade, No. 10-cv4387 (N.D. Cal.): The court denied plaintiff's motion for class certification, finding that plaintiff had failed to establish ascertainability or commonality under Rule 23(a) and predominance under Rule 23(b). The *Astiana* case involves ice cream labeled "all natural," which plaintiff alleged contain "synthetic" alkalized chocolate. In denying class certification, the court explained that plaintiff offered no way to determine which products contained "synthetic" as opposed to natural alkali, and further offered no way to show that other class members shared her concern over "synthetic" alkali. The court therefore found that plaintiff had not established her claims were typical, in large part because she had not identified an ascertainable class. The court further held that the plaintiff had failed to satisfy the predominance requirement of Rule 23(b)(3), explaining plaintiff had failed to establish a classwide manner of awarding damages based on her price-inflation theory, which would have required evidence that consumers paid more for products containing "natural" alkalized cocoa. Order.

FDA Responds to Court Referrals Regarding "Natural" and Bioengineering

Three federal judges previously stayed "natural" cases involving bioengineered ingredients and referred those cases to the FDA for further guidance on the issue. In a response letter to the judges in those cases, the FDA wrote that private litigation was not the right forum to decide these questions. Given the competing consumer and industry interests at stake, the FDA stated that "it would be prudent and consistent with [the] FDA's commitment to the principles of openness and transparency to engage the public on this issue." The FDA also noted that it had consulted with the USDA, and the agencies determined that to

define the term, they would need to consider other factors related to "natural" including scientific evidence, food production and processing technology, among others. The FDA further noted that it expected a citizen petition to be filed shortly addressing the same issue, which would provide for a more open administrative process. Letter.

Court Dismisses "Sugar Free" Gum Lawsuit

Gustavson v. Wrigley Sales Co., No. 12cv1861 (N.D. Cal.): The court granted a motion to dismiss claims that various Eclipse gums and Lifesaver candies are misbranded as "sugar free." The court found that the claims were expressly preempted under federal law and dismissed with prejudice. The court reasoned that defendant had complied with the relevant federal regulations, rendering the complaint an attempt to impose requirements "in addition to" the FDA's regulations and therefore expressly preempted. Order.

Court Dismisses "Natural" Claims in Yogurt Lawsuit

Gitson v. Clover Stornetta Farms, 13cv1517 (N.D. Cal.): Plaintiffs alleged that defendant's yogurt products are misbranded because they list "evaporated cane juice" instead of "sugar" on their labels. Plaintiffs further allege that use of the term "natural" on the labels is misleading. The court dismissed the "natural" claims on standing grounds because the named plaintiffs did not allege they relied upon that claim. The court allowed the complaint to proceed as to the "evaporated cane juice" claims, however, reasoning the plaintiffs had pled reliance sufficiently for that claim. The court also allowed the case to move forward with "substantially similar" products where the only variation was the flavor of yogurt. Order.

Court Dismisses "No Sugar Added" Claims to Proceed

Bruton v. Gerber Products, No. 12cv2412 (N.D. Cal.): The court largely denied Gerber's motion to dismiss a complaint that asserts Gerber makes unlawful nutritional content claims on food for children under age 2, and that its products claim to have "no added sugar" without making disclosures required by FDA regulations. The court denied Gerber's motion to dismiss claims related to "substantially similar" products that the named plaintiff did not purchase, holding that the plaintiff adequately alleged injury sufficient to establish standing, and sought through the class device to represent others who suffered a "substantially similar" injury. However, this was plaintiff's second chance to amend to allege adequately how the "substantially similar" products were like

the purchased product, so for certain of the products that were subject to a previous motion to dismiss, the court granted the motion to dismiss claims related to "substantially similar" products with prejudice. The court also granted with prejudice the motion to dismiss claims from Gerber's website, which the plaintiff did not claim to have seen. Finally, the court denied the motion to dismiss national class allegations, ruling that it was a question for the class certification process. Order.

Preliminary Settlement Approval Granted in Quaker Oats Lawsuit

In re Quaker Oats Labeling Litig., 10cv0502 (N.D. Cal.): The court granted preliminary settlement approval of a Rule 23(b)(2) injunctive relief class in this case, which involves allegations that the inclusion of partially hydrogenated oils ("PHOs") in Quaker products violated state and federal labeling laws because of "wholesome" claims on some of the products' labels. Products at issue include various flavors of Quaker Oats' Go Bars, Instant Quaker Oatmeal, and Quaker Chewy Bars. Quaker denied any wrongdoing but agreed to remove PHOs from its products by the end of 2015 and will thereafter label any products containing trace amounts of PHOs as containing "dietarily insignificant amount of trans fat." Order.

Certification Denied on Ascertainability Grounds in ZonePerfect "Natural" Class Action

Sethavanish v. ZonePerfect Nutrition Co., 12cv2907 (N.D. Cal.): The court denied class certification in a putative class action based on defendant's alleged misuse of the phrase "All-Natural Nutrition Bars" on its products, where the products contain allegedly "synthetic" ingredients. Plaintiff alleged that she purchased the bars for her husband and that she would have purchased other, less expensive bars, had she been aware of the alleged synthetic ingredients. The court ruled that plaintiff had failed to establish that the proposed class was ascertainable because defendant sells predominantly to retailers, not directly to consumers, and there were no records to identify which consumers purchased the accused bars. The court expressly adopted the reasoning of the Third Circuit's *Carrera v. Bayer Corp.* decision on ascertainability, where class certification was denied on the same grounds. Order.

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Court Dismisses Chobani "Natural" Lawsuit With Prejudice

Kane v. Chobani, No. 5:12cv2425 (N.D. Cal.): The court dismissed the third amended complaint in this putative class action with prejudice. Plaintiffs alleged claims under California consumer protection laws and the Sherman Food, Drug, and Cosmetic Law, claiming that various of defendant's products, including Chobani Greek Yogurt and Chobani Greek Yogurt Champions were misbranded as "all natural" when they were not, and that the term "evaporated cane juice" on the products' labeling was misleading. The court dismissed all claims on a number of grounds, including lack of standing and failure to allege facts showing that a "reasonable consumer" was likely to be deceived. First, the court reiterated that actual reliance and economic injury are necessary elements under California's UCL and CLRA and that plaintiffs had failed to allege either. Regarding the ECJ claims, the court rejected as implausible plaintiffs' allegations that they did not know that ECJ was a form of sugar, given that the pleadings revealed that plaintiffs were aware that "dried cane syrup" was a form of sugar. The court went on to reject plaintiffs' allegation that they believed ECJ was somehow "healthier" than sugar for similar reasons. Regarding the "all natural" claims, the court found unpersuasive allegations that the products contained turmeric, among other things, for coloring and were thus misleadingly labeled as "all natural," because the labels specifically advised that "fruit or vegetable juice" was used for color. Further, the court noted that plaintiffs had failed to allege any facts detailing why they believed these ingredients to be synthetic or processed. Because of multiple prior complaints, the court dismissed the action with prejudice. Order.

Ninth Circuit Court of Appeals Reverses Preemption Dismissal

Lilly v. Conagra Foods Inc., No. 12-55921 (9th Cir.): Plaintiff appealed dismissal of her putative class action complaint on federal preemption grounds. Plaintiff had alleged claims under California's consumer protection and unfair competition laws, contending that the labeling of defendant's sunflower seed products misleadingly provided a lower sodium content than the product contained. The panel held that the entire sodium content must be included, under the federal Nutrition Labeling and Education Act ("NLEA"), and that because plaintiff's state-law claims would impose no greater burden than under federal law, her state law claims were not preempted. District Judge Vinson dissented, arguing that plaintiff's attempt to enforce different labeling was expressly preempted by the NLEA and that the labeling was in compliance with federal law. Order.

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PopChips "Natural" Class Action Preliminarily Approved for Settlement

PopChips recently obtained preliminary approval for settlement agreeing to create a fund of $2.4M to allow class members who purchased PopChips products to receive up to $20 per person in refunds. Plaintiffs alleged that PopChips' use of the terms "all natural" "healthy" and "healthier" were misleading because the products were, according to plaintiffs, "highly processed, contain numerous artificial and synthetic ingredients, including ingredients containing GMOs and excessive amounts of fat." PopChips had denied any wrongdoing. In addition to the settlement fund, PopChips agreed to change their claims to instead use "naturally delicious" and "natural flavors," and to modify certain non-GMO claims. The settlement will be reviewed for final approval at a hearing on March 13. Order.

Certification Granted in "100% Pure" Olive Oils Class Action

Ebin v. Kangadis Food Inc., No. 1:13-cv-2311 (S.D.N.Y.): Plaintiffs alleged warranty claims, fraud and misrepresentation claims, as well as claims under New Jersey's Consumer Fraud Act and New York's GBL section 349 based on defendant's alleged practice of selling olive oil labelled "100% Pure Olive Oil," which in fact contained "olive-pomace oil," "olive-residue oil," or "pomace." The court certified a nationwide class under Rule 23(b)(3) consisting of "all persons in the United States who purchased Capatriti 100% Pure Olive Oil packed before March 1, 2013," as well as New York and New Jersey subclasses. The court found typicality and common questions regarding whether olive-pomace oil was the same as olive oil or viewed the same way by consumers, and whether the packaging negligently misrepresented the products as "100% Pure Olive Oil." It also found common questions on the state-based claims to certify the state subclasses, reasoning that each consumer was essentially alleging the same legal theories, arising out of the same course of conduct. Similarly, as to predominance the court found that defendant had made uniform misrepresentations to all class members, and such "standardized misrepresentations established by generalized proof [are] appropriate for class certification." Simultaneous with its grant of summary judgment, the court denied a cross-motion for summary judgment by defendants arguing that the plaintiff had failed to offer sufficient proof of damages. Class certification. Summary judgment.

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NEW FILINGS

Shaouli v. The Hain Celestial Group, Inc., No. BC532667 (Cal. Super., Los Angeles County): Plaintiff claims she purchased various Hain Celestial "energy shot" beverages, and paid a premium for them, because she believed they were lower in sugar and healthier than other beverages. Plaintiff alleges the products are misbranded under California's consumer protection statutes, because they disclose "evaporated cane juice" as an ingredient instead of "sugar." Complaint.

Surzyn v. Diamond Foods, Inc., No. 14cv0136 (N.D. Cal.): Plaintiff alleges that Tia's-brand tortilla chips are labeled "all natural" but contain synthetic and/or artificial ingredients, including maltodextrin and dextrose. Complaint.

Belli v . Nestle USA, Inc., No. 14cv0286 (N.D. Cal): Plaintiffs allege the labeling of defendant's "Fruit Bars" products is misleading as to the claim "all natural" because of beet juice coloring used in the products. Complaint.

Belli v . Nestle USA, Inc., No. 14cv0283 (N.D. Cal): Plaintiffs allege defendant's Eskimo Pies products are misbranded because of a "no sugar added" claim on the products' labels. Complaint.

Coffey v. Nestle USA, No. 14cv0288 (N.D. Cal.): Plaintiffs allege defendant's "Juicy Juice" products are misbranded because of a "no sugar added" claim. Complaint.

Koplian v. Ralphs Grocery Co., No. BC533846 (Cal. Super., Los Angeles Cnty.): Plaintiff alleges that Ralph's decaffeinated coffee products are misbranded because the products are labeled "without caffeine" but actually contain caffeine, as disclosed elsewhere on the label. Complaint.

Garrison v. Whole Foods Market California, Inc., No. 14cv0334 (N.D. Cal.): Plaintiffs allege that Whole Foods baked goods, including muffins, cookies, and cake products, are labeled "all natural" but actually include "synthetic" ingredients including sodium acid pyrophosphate and maltodextrin. Complaint.

Riva v. Pepsico, Inc., No. 14cv0340 (S.D. Cal.): Plaintiffs allege that Pepsi One and Diet Pepsi beverages purchased by plaintiff contained 4-methylimidazole ("4-Mel"), and was not disclosed on the products' labeling. Complaint.

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Langley v. Pepsico, Inc., No. 14cv713 (N.D. Cal.): Plaintiffs allege that Pepsi One and Diet Pepsi beverages purchased by plaintiff contained 4-Mel, and was not disclosed on the products' labeling. Complaint.

Batalla v. The Hain Celestial Group, Inc., No. 9:14cv80246 (S.D. Fla.): Plaintiff alleges that defendant markets its Pita Bites products as "'all natural,' when they are not, because they include synthetic, and/or artificial ingredients, including, but not limited to, corn maltodextrin and/or hydrolyzed soy and corn protein. Complaint.

Bruce v. Kind LLC, No. 2:14cv1424 (C.D. Cal.): Plaintiff alleges that Defendant's Kind Plus snack bars are labeled as "all natural" even though they contain ascorbic acid, an allegedly artificial ingredient. Complaint.

Bohlke v. The Hain Celestial Group, No. 9:14cv80300 (S.D. Fla.): Plaintiff alleges that defendant markets its pasta as "all natural," but contends they contain allegedly unnatural, synthetic, and/or artificial ingredients, including, but not limited to, yellow corn flour and/or yellow corn meal. Complaint.