Food Litigation Newsletter
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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

Court Denies Class Certification in Class Action Suit Against Ben & Jerry's

The judge presiding over *Astiana v. Ben & Jerry's Homemade*, No. 10cv4387 (N.D. Cal.) denied the plaintiff's motion for class certification, finding that plaintiff had failed to establish the requisite ascertainability or commonality under Federal Rule of Civil Procedure 23(a) and predominance under FRCP 23(b). The case deals with consumers who purchased ice cream labeled "all natural" but contained chocolate alkalized with "synthetic" ingredients. The court explained that plaintiff offered no way to determine which products contained "synthetic" alkali as opposed to natural, and further offered no way to show that other class members shared named plaintiff's concern over "synthetic" alkali. The court therefore found that plaintiff had not established that her claims were typical, in large part because she had not identified an ascertainable class. The court further found that named plaintiff had failed to establish a class-wide 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 Declines to Revise Policy on "Natural" Food Labels

On January 6, 2014, the FDA issued a response letter to three federal judges presiding over cases involving whether bioengineered foods can be labeled "natural." The FDA advised in its letter that it had decided not to promulgate a formal definition of "natural" with respect to bioengineered food in the context of ongoing litigation involving that issue. FDA Assistant Commissioner for Policy Leslie Kux wrote that private litigation was not the right forum to decide these questions. Given the competing consumer and industry interests at stake, "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 letter also

noted that the FDA consulted with the USDA, and the agencies determined that to define the term, they would need to consider myriad other factors than just whether GM ingredients could be considered "natural" including consumer preference, scientific belief, food production and processing technology, among others. The FDA's letter left open the possibility of administrative action through other channels. Order.

Court Not Sweet on Plaintiffs' Sugar Free Gum Class Action Complaint

The court granted defendants' motion to dismiss with prejudice in *Gustavson v. Wrigley Sales Co.*, No. 12cv1861 (N.D. Cal.), finding that plaintiff's allegations--that various Eclipse gums and Lifesaver candies are misbranded as "sugar free" are expressly preempted by the Food, Drug, and Cosmetic Act, as amended by the Nutrition Labeling and Education Act of 1990. The parties' briefing addressed whether the products' "sugar free" claims are documented with sufficient specificity under FDA regulations. According to the court, Wrigley complied with the regulations. The complaint, therefore, was considered by the court to be a preempted attempt to impose requirements "in addition to" the FDA's regulations. Order.

Court Denies Summary Judgment in Mislabeled "Antioxidant" Tea Case

The judge hearing defendant's motion for summary judgment in *Lanovaz v. Twining North America*, No. 12cv26465 (N.D. Cal.) declined to dismiss the case. In the action, grounded in the defendants' labels claiming its teas contain beneficial antioxidants, Twinings had moved for summary judgment arguing that Lanovaz did not rely on the allegedly misleading statements in her purchasing decisions, that she cannot establish that Twinings made unlawful nutrient content or health claims, and that she does not have Article III standing for her claims. Plaintiff's testimony indicated that she first purchased the products before the antioxidant labels were created and that she would continue purchasing the teas, but the court ruled that her allegations sufficiently alleged she purchased the product in reliance on the advertising. The court also rejected Twining's standing argument, noting that plaintiff's allegations of paying more than she otherwise would have because of unfair competition was enough to establish standing when plaintiff had not yet had an opportunity to look into Twining's financial and pricing records. Order.

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NEW FILINGS

Shaouli v. The Hain Celestial Group, Inc., No. BC532667 (Cal. Super., Los Angeles County): Plaintiffs allege Hain Celestial's "energy shot" beverages are misbranded under California's consumer protection statutes because they disclose "evaporated cane juice" as an ingredient instead of "sugar" and that health-conscious consumers are misled into believing the beverages are lower in sugar and healthier than other drinks available for purchase. Complaint.

Surzyn v. Diamond Foods, Inc., No. 14cv0136 (N.D. Cal.): Plaintiffs allege that Tia's-brand tortilla chips are labeled "all natural" but contain synthetic and/or artificial ingredients, including maltodextrin and dextrose, in violation of California's consumer protection statutes. Complaint.