

## 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](http://perkinscoie.com/foodlitnews) for more information.

### RECENT SIGNIFICANT RULINGS

#### Court Dismisses in Part "Natural" Claims

*Barron v. Snyder's-Lance, Inc.*, No. 0:13-cv-62496 (S.D. Fla.): In a putative class action complaint alleging numerous claims under various states' consumer protection statutes, based on the allegation that Defendant's products were misrepresented as "natural" when they contain GMOs and other artificial and synthetic ingredients, the Court granted in part and denied in part Defendant's motion to dismiss.

Previously in the litigation, nine of the thirteen party Plaintiffs filed notices of voluntary dismissal without prejudice. In light of that, the Court dismissed without prejudice the claims brought under the laws of those states for lack of standing. Similarly, there were two claims brought under the laws of North Carolina that the court dismissed because no named Plaintiff resides in or purchased Defendant's products there. Finally, the Court dismissed without prejudice a claim for breach of express warranty under Missouri law, finding that proper notice of the breach was not given.

The Court found that Plaintiffs lacked standing to pursue injunctive relief as they had not established a real and immediate threat of future injury because they had not alleged that they intended to purchase the allegedly mislabeled products again. The Court also found that Plaintiffs lacked standing to assert claims regarding products they did not purchase, though noted the split in authority on the topic outside of the Eleventh Circuit.

As a result of the ruling, the Plaintiffs are limited to state claims for which there is a named Plaintiff in that state and for claims against products that a named Plaintiff actually purchased. [Order.](#)

#### Court Enters Partial Dismissal of "Handmade" Claims

*Hofmann v. Fifth Generations Inc.*, No. 3:14-cv-02569 (C.D. Cal.): In this putative class action alleging violations of California's UCL, FAL, and CLRA, as well as negligent misrepresentation based on claims that Defendant falsely calls its product "Tito's Handmade Vodka" when the process is actually highly mechanized, the Court granted in part and denied in part Defendant's motion to dismiss and granted Plaintiff's request for leave to amend.

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The Court granted Defendant's motion to dismiss with respect to all statutory claims. In doing so, the Court noted that Article III standing requires both that Plaintiff show he was deceived by the product's label into spending money and also that he would not have purchased it but for the alleged deception. In this case, Plaintiff stated only in his cause of action for misrepresentation that he would not have purchased the product but for the alleged deception; he did not do so in the paragraphs that support his statutory claims, thus the Court found Plaintiff did not allege sufficient injury-in-fact for the statutory claims. However, the Court granted Plaintiff's request for leave to amend.

The Court went on to address several other arguments by Defendant that attempted to challenge the remaining misrepresentation claim or enable the Court to dismiss the complaint without leave to amend. The Court shot each of them down with relative ease, spending some time on Defendant's safe harbor argument, but ultimately finding that it wasn't clear that the Alcohol and Tobacco Tax and Trade Bureau's approval of Defendant's label was sufficient to invoke the safe harbor.

[Order.](#)

### **Court Dismisses Injunctive Relief Claim Allows Others to Proceed**

*Seidman v. Snack Factory LLC*, No. 14cv62547 (S.D. Fla.): In this putative class action alleging violations of Florida's DUTPA, the Magnuson-Moss Warranty Act, negligent misrepresentation, breach of express warranty and unjust enrichment, claiming Defendant falsely labels its Pretzel Crisps as "all natural" when they contain synthetic or artificial ingredients such as maltodextrin, soybean oil, dextrose and caramel color, the Court granted in part and denied in part Defendant's motion to dismiss. The Court found that Plaintiff is not entitled to injunctive relief because he does not allege he will ever purchase the products at issue again, dismissing the claim with prejudice. The Court allowed the remaining claims to proceed. [Order.](#)

### **Court Strikes Complaint As "Shotgun Pleading"**

*Hulse v. Wal-Mart Stores, Inc.*, No. 15cv0233 (M.D. Fla.): In this putative class action alleging violations of Florida's DUTPA, negligent misrepresentation, and unjust enrichment based on claims that defendant's cranberry-pomegranate juice is misleadingly and unfairly labeled and marketed as "Cranberry Pomegranate," when the juice is actually a flavored juice from concentrate, the Court struck the complaint sua sponte.

In striking the complaint the Court found the complaint to be an instance of "shotgun pleading." In addition, the Court found that Plaintiff did not identify Defendant's citizenship, nor did she come close to pleading the required amount in controversy. Lastly the Court denied without prejudice Plaintiff's motion for class certification.

[Order.](#)

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### Court Grants Summary Judgment on Antioxidant Claims

*Khasin v. The Hershey Co.*, No. 5:12cv01862 (N.D. Cal.): In this putative class action alleging claims under California's UCL, FAL, CLRA, and unjust enrichment claiming Defendant made misrepresentations about its products spanning antioxidant claims, nutrient content claims without the proper disclosures, health claims, sugar free claims, unlawful serving sizes, improperly listing polyglycerol polyricinoleic acid, and failing to disclose vanillin, the Court granted summary judgment in favor of Defendant.

As reported [here](#), previously the Court had dismissed all of Plaintiff's claims except for the UCL claim concerning the statement "natural source of flavanol antioxidants" on certain labels of Defendant's dark chocolate and cocoa product. The Court dismissed this remaining claim for two main reasons. First, the Court found that Plaintiff was unable to meet his burden as to whether a reasonable consumer would be misled by Defendant's statements. The evidence provided went more to how a reasonable consumer could react, not how they actually did react. Second, the Court found that Plaintiff did not meet his burden of showing he suffered economic injury through loss of money or property as a result of Defendant's alleged deceptive labeling. Rather than attempting to show economic injury, Plaintiff claimed his purchases were "legally worthless" because they were inaccurate representations of what he thought he was purchasing. [Order](#).

### NEW FILINGS

*Charles v. The Wine Group, Inc.*, No. BC576061 (Cal. Super. Ct.): Putative class action alleging violations of California's CLRA, as well as unfair business practices, misleading and deceptive advertising, unjust enrichment, breach of implied warranty and negligent misrepresentation based on the claim that Defendants' wines contain inorganic arsenic in that levels that are not reasonably safe to consumers. The Plaintiffs do not claim that the Defendants were under any obligation to keep inorganic arsenic to a certain amount or that they are required by law to warn consumers of the ingredients in the wine. [Complaint](#).

*Marvin v. The Wine Group, Inc.*, No 3:15-cv-00176 (M.D. La.): Putative class action alleging violations of Louisiana's Deceptive and Unfair Trade Practices Act and the Magnuson-Moss Warranty Act, as well as redhibition, negligence, and unjust enrichment based on the claim that Defendants' wines contain inorganic arsenic in that levels that are not reasonably safe to consumers and are above those allowed in drinking water. [Complaint](#).

*Mirzaie v. Whole Foods Market*, No. BC575935 (Cal. Super. Ct.): Putative class action alleging violations of California's business and professional code regarding false and misleading advertisements based on the claim that Defendants advertise that their chickens are gently raised and lovingly slaughtered on farms with standards that exceed conventional factory farms when there is no difference. [Complaint](#).

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*Consumer Advocacy Group v. Yamamoto of Orient, Inc.*, No. CIV1501046 (Cal. Super. Ct.): Complaint alleging violations of Proposition 65 based on claims that Defendants' seaweed contains lead. [Complaint.](#)

*Nixon v. Anheuser-Busch Co.*, No. CGC-15-544985 (Cal. Super. Ct.): Putative class action alleging violations of California's UCL and Section 17533.7 of the Business and Professions Code based on claims that Defendant states its Busch beer is a "Product of the U.S.A.," when the beer is brewed with imported hops. [Complaint.](#)

*Fridlender v. Bella Four Bakery, Inc.*, No. MSC15-00585 (Cal. Super. Ct.): Putative class action alleging violations of California's UCL, FAL and CLRA, as well as breach of express warranty, common law fraud, negligent misrepresentation, breach of contract and unjust enrichment based on claims that Defendant's Nature Bakery Fig Bars are labeled as "100% Natural" when they contain artificial or processed ingredients. [Complaint.](#)

*Environmental Research Center, Inc. v. North American Herb and Spice Co., et al.*, No. RG15764471 (Cal. Super. Ct.): Complaint alleges violations of Proposition 65 based on claims that Defendants' spices contain lead. [Complaint.](#)

*Weisberg v. Aladdin Bakers, Inc.*, No. 15-503704 (Sup. Ct. Kings County): Putative class action alleging several violations of New York's GBL, as well as breach of express and implied warranty and unjust enrichment based on claims that Defendant falsely markets several of its chip products as "ALL NATURAL" because they contain synthetic ingredients. [Complaint.](#)

*McDonough v. Snyder's-Lance, Inc.*, No. 1:15-cv-1751 (E.D.N.Y.): Putative class action alleging violations of North Carolina's UDTPA, New York's GBL, as well as breach of express warranty and intentional misrepresentation based on claims that Defendant markets and labels some of its snack products as "All Natural" when they allegedly contain GMOs. [Complaint.](#)

*McNamee v. The Old Fashioned Kitchen, Inc.*, No. 1522-CC00732 (Mo. Cir. Ct.): Putative class action alleging violations of Missouri's Merchandising Practices Act as well as unjust enrichment based on claims that Defendant's Golden brand Potato Blintzes are labeled as "All Natural" when they contain sodium acid pyrophosphate. [Complaint.](#)

*Lucas v. Sticky Fingers Bakeries*, No. 1522-CC00728 (Mo. Cir. Ct.): Putative class action alleging violations of Missouri's Merchandising Practices Act as well as unjust enrichment based on claims that Defendant's Gluten Free Scones Quick and Easy Mix are labeled as "All Natural" when they contain sodium acid pyrophosphate. [Complaint.](#)