

# Food Litigation Newsletter

## January 8, 2014

ISSUE NO. 25

### 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

#### Bumble Bee Foods Wins Partial Summary Judgment in Omega-3 False Ad Class Action

In *Ogden v. Bumble Bee Foods, LLC*, No. 12cv1828 (N.D. Cal.), the court heard a putative class action in which plaintiff alleged that a variety of Bumble Bee products contain false or misleading label statements, including that its products are a "good source" or "excellent source" of Omega-3 fatty acids and "rich in" Vitamin A and Iron. The court granted in part and denied in part Bumble Bee's motion for summary judgment, ruling that plaintiff failed to establish a genuine issue of material fact as to her standing to pursue the Vitamin A and iron nutrient content claims, but finding a question of fact as to plaintiff's standing to pursue the Omega-3 claims. [Order](#).

#### Final Settlement Approval Granted in Naked Juice False Ad Suit

A California federal judge hearing *Papas v. Naked Juice Co.*, No. 11cv8276 (C.D. Cal.) granted final approval to the settlement of a nationwide class action against defendant related to labeling products "All Natural," "100% Juice," "100% Fruit," "Not From Concentrate," and "Non-GMO." Under the nationwide settlement, defendant will pay \$9 million to compensate class members up to \$75 per member; \$2.5 million will be paid in attorney fees; and defendant will cover approximately \$600,000 in fees and costs, with any remaining funds to be distributed to the Mayo Clinic (50%), the National Association of IOLTA Programs (25%), and seven legal aid organizations (combined 25%). [Order](#).

# Food Litigation Newsletter

## January 8, 2013

ISSUE NO. 25

### **Silk Soy Milk “Misbranding” Case Dismissed as Preempted and Implausible**

The Northern California federal judge assigned to *Ang v. Whitewater Foods Co.*, No. 13cv1953 (N.D. Cal.) dismissed the case, rejecting plaintiffs’ allegations that a variety of Horizon yogurt products and Silk soy and other nondairy “milks” are misbranded because their labels disclose “evaporated cane juice” (ECJ) as opposed to “sugar” or because the nondairy “milks” do not come from lactating cows and therefore do not satisfy the standard of identity for “milk.” First, the court found the class bound by a previous national settlement in Florida related to the ECJ and yogurt claims, in which plaintiffs tried to intervene but were denied when the court found their interests adequately protected by the Florida litigants. Second, with respect to the nondairy “milks” claims, the court found the standard of identity for milk “pertains to what milk is, rather than what it is not, and makes no mention of non-dairy alternatives such as the Silk Products.” The court agreed that “the names ‘soymilk,’ ‘almond milk,’ and ‘coconut milk’ accurately describe” the products, and found claims based on those statements preempted and implausible. [Order.](#)

### **Preliminary Approval Granted to Settlement of Hydrogenated Oils Case Against Quaker Oats**

The parties to *In re Quaker Oats Labeling Litigation*, No. 10cv0502 (N.D. Cal.), which relates to the inclusion of partially hydrogenated oils (PHOs) in Quaker Oat’s products, sought preliminary approval of a settlement agreement. Under the terms of the agreement, Quaker Oats has agreed to remove PHOs from its products by the end of 2014 and will thereafter label any products containing trace amounts of PHOs as containing “dietarily insignificant amount of trans fat.” The settlement class is a Rule 23(b)(2) class, so most of the relief is injunctive, although Quaker Oats agrees to pay for class notice and attorney fees totaling \$880,000. [Order.](#)

### **Evaporated Cane Juice Complaint Dismissed in Part**

In *Reilly v. Amy’s Kitchen*, No. 13cv21525 (S.D. Fla.), plaintiff alleged a wide variety of defendant’s packaged food products violate Florida consumer protection laws because their labels disclose “evaporated cane juice even though ECJ is actually sugar, not juice.” The court ruled that plaintiff lacked standing to allege statutory violations based on products she did not purchase, but otherwise allowed the case to proceed, holding that the claims were not preempted since the complaint alleged adequately that labeling a product’s

# Food Litigation Newsletter

## January 8, 2013

ISSUE NO.25

ingredients ECJ rather than sugar meet the statutory requirements under Florida's consumer protection statutes and rejected the primary jurisdiction defense. [Order.](#)

### **Court Certifies Class Where Olive Pomace Oil Was Labeled "100% Pure Olive Oil"**

The New York federal judge hearing *Ebin v. Kangadis Foods Inc.*, No. 13cv2311 (S.D.N.Y.) denied a motion to dismiss and granted plaintiffs' motion for class certification in this case, in which plaintiffs allege that defendants' falsely label as "100% pure olive oil" a product derived from olive pits and other byproducts of the olive oil production process through chemical and other manipulation. Oil derived from these byproducts is traditionally known as olive "pomace oil," which the court accepted does not meet FDA, USDA, New York, New Jersey, or the U.N.'s definitions of "olive oil." [Motion to dismiss; Class certification.](#)

### **Defendants Obtain Partial Dismissal of Evaporated Cane Juice Complaint**

In *Samet v. Proctor & Gamble Co.*, No. 12cv1891 (N.D. Cal.), plaintiff alleged that various Proctor & Gamble and Kellogg products labels listed ECJ as an ingredient and described the products as "healthy." The court granted in part the motion to dismiss. Plaintiff's claim against "0 grams trans fat" survived because the complaint adequately alleged unlawful conduct in violation of California consumer protection statutes. Further, the court dismissed all claims related to labels making "healthy and wholesome" claims. [Order.](#)

### **Court Rejects Monster Beverage's Attempt to Block San Francisco City Attorney's Separate Lawsuit**

The Los Angeles-area federal judge hearing *Monster Beverage Corp. v. Herrera*, No. 13cv0796 (C.D. Cal.), dismissed Monster's lawsuit seeking an injunction to block San Francisco City Attorney's Dennis Herrera from taking actions to force Monster "to reformulate its products to safe caffeine levels, provide adequate warning labels, and cease promoting overconsumption." The court dismissed the complaint, finding it barred by both the *Younger* abstention doctrine and the Anti-Injunction Act. [Order.](#)

# Food Litigation Newsletter

## January 8, 2013

ISSUE NO. 25

### Cereal Box Image of Strawberries in Milk Does Not Falsely Convey the Cereal Contains Strawberries

In *Shaker v. Nature's Path Food Co.*, No. 13cv1138 (C.D. Cal.), the court found plaintiffs' allegations implausible where they alleged that the defendant's "Optimum Cinnamon Blueberry Cereal" violated state consumer protection laws because the image on cereal boxes include a picture of the cereal in milk with fresh strawberries. Plaintiffs claimed that the strawberries falsely suggested that the cereal also contained dried strawberries, and the term "Optimum" in the product name implies the cereal is good for "growth, reproduction or other vital processes." The court rejected both claims. First, the court found that no reasonable consumer would believe that a picture of fresh strawberries on a box of cereal titled "Cinnamon Blueberry" would reasonably believe that it also contained dried strawberries. "[T]he large, legible labels on the front of the cereal boxes unmistakably indicate that the product contains blueberries and cinnamon – not strawberries." The court also rejected claims based on the term "Optimum," finding that "any reasonable consumer would understand the word is not a specific and objective representative." [Order.](#)

### NEW FILINGS

*Posner v. Hain Celestial Group*, No. 13cv9310 (C.D. Cal.): Plaintiffs allege that defendants falsely market their teas as "100% natural" but contend that third-party testing reveals that defendant's teas contain residue of pesticides, herbicides and other chemicals in excess of U.S. pollution standards. [Complaint.](#)

*Levin v. Hain Celestial Group*, No. 13cv 9314 (C.D. Cal.): Plaintiffs allege that defendants falsely market their teas as "100% natural" but contend that third-party testing reveals that defendants' teas contain residue of pesticides, herbicides and other chemicals in excess of U.S. pollution standards. [Complaint.](#)

*Rhinerson v. Van's International Foods, Inc.*, No. 13cv5923 (C.D. Cal.): Plaintiffs allege that defendant's frozen waffles and other products are falsely labeled "natural" but contain "synthetic" ingredients, focused on the ingredient sodium acid pyrophosphate. [Complaint.](#)

# Food Litigation Newsletter

## January 8, 2013

ISSUE NO. 25

### Contacts

**David Biderman, Partner**

Los Angeles and San Francisco  
310.788.3220

**Charles Sipos, Partner**

Seattle  
206.359.3983

**Joren Bass, Senior Counsel**

San Francisco  
415.344.7120

*Melvin v. Blue Diamond Growers*, No. BC532044 (Cal. Super., Los Angeles County): Plaintiffs allege that Blue Diamond almond milks are labeled “all natural” but contain artificial ingredients, including alkalized cocoa, potassium citrate, and Vitamin A palmitate. [Complaint.](#)

*Klacko v. Diamond Foods, Inc.*, No. 14cv80005 (S.D. Fla.): Plaintiffs allege that TIAS-brand tortilla chips are labeled “all natural” but contain synthetic and/or artificial ingredients, including maltodextrin and dextrose. [Complaint.](#)

*O’Dea v. Conagra Foods, Inc.*, Plaintiff alleges that various of defendant’s Chef Boyardee pastas are labeled “No MSG” or “No MSG Added” but contain ingredients that contain MSG. [Complaint.](#)