

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 for more information.

RECENT SIGNIFICANT DEVELOPMENTS AND RULINGS

Extra Virgin Olive Oil Complaint Beats Motion to Dismiss

Koller v. Deoleo USA Inc., No. 3:14cv2400 (N.D. Cal.): A federal judge in California denied a defendant's motion to dismiss a complaint alleging that defendant misleadingly markets its extra virgin olive oil as "imported from Italy" when the olives are not grown or pressed in Italy, and where defendant uses clear, non-ultraviolet bottles for its extra virgin olive oil, which does not preserve the oil as "extra virgin." [Order](#).

Honest Tea Defeats Motion to Dismiss

Salazar v. Honest Tea, Inc., Case No. 13cv2318 (E.D. Cal.): A California federal court denied a motion to dismiss an amended complaint in a putative class action alleging that defendant misrepresents the amount of antioxidants contained in their tea products. Plaintiff's amended complaint alleged that the beverages' labels violate FDA labeling requirements because they characterize flavonoid antioxidants and are thus unauthorized "nutrient content" claims that violate various California state laws. The court held that statements about antioxidants appearing on the tea products may qualify as nutrient content claims must comply with FDA regulations. Moreover, the court held that questions concerning material differences between the labels should be addressed at the class certification stage and not at the Rule 12(b)(6) stage. [Order](#).

Gerber Wins Summary Judgment in Baby Food Suit

Bruton v. Gerber Prods., No. 12-cv-2412 (N.D. Cal.): A California federal judge denied plaintiff's motion for partial summary judgment and granted defendant's motion for summary judgment in a putative class action alleging that Gerber misbrands and misrepresents its baby food products as to certain nutrient content claims. The court premised its decision to award summary judgment to Gerber almost entirely on its finding that there was insufficient evidence that the challenged statements were likely to mislead reasonable consumers. Holding that plaintiff failed to show the existence of a genuine dispute of material fact, the court noted that among the only evidence plaintiff submitted showing that the statements were likely to mislead was deposition testimony in which plaintiff stated that she wasn't sure whether the label statements were true or not. The court likewise found plaintiff's "vague references" to FDA regulations without citation and her expert declarations insufficient to create a triable issue. Accordingly,

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the court granted Gerber's motion on all causes of action to the extent that they are based on nutrient content and sugar-related claims. [Order](#).

Blue Diamond Almond Milk Class Decertified

Werdebaugh v. Blue Diamond Growers, No. 12-cv-02724 (N.D. Cal.): A federal judge in California granted defendant's motion to decertify the class in a putative class action alleging that defendant's package labeling is unlawful, deceptive, and misbranded due to Evaporated Cane Juice and "All Natural" statements on defendant's almond milk products. The court had previously denied a motion to certify the injunctive class, but had accepted plaintiffs' proposed regression model as sufficient under *Comcast*, rejecting as premature defendant's challenges to the robustness of the model. Following that order, plaintiffs filed a second amended complaint, and defendant's motion to decertify followed. In addition to the damages model proposed in their initial class certification motion, plaintiffs submitted a second regression analysis for the court, but did so in an untimely fashion, resulting in the court's decision not to review the second model. Turning to the initial regression, the court ruled it inconsistent with plaintiff's liability theory. Specifically, the court held that the model was incapable of controlling for the effect of defendant's advertising on the price such that it was impossible for the court to determine whether any price premium was due to the challenged claims or was instead the product of successful advertising and promotional expenditures. The court also faulted plaintiffs' expert for what the court perceived as a systematic failure to ensure the accuracy of assumptions used in developing his model (for example, assuming without investigating that competitor products do not use the same claims). [Order](#).

NEW FILINGS

Zakaria v. Gerber Products Co., No. 2:15-cv-00200 (C.D. Cal.): Putative class action alleging defendant falsely labels and markets its Good Start Gentle baby formula, containing hydrolyzed whey protein, as reducing the risk of developing allergies and atopic dermatitis despite a lack of evidence supporting that proposition and an FDA letter rejecting the allergies claim altogether and asserting that the atopic dermatitis claim must be heavily qualified in order to receive FDA endorsement. [Complaint](#).

Cabrera v. Fifth Dimension, Inc. dba Tito's Handmade Vodka, No. 14cv2990 (S.D. Cal): Putative class action alleging defendant falsely labels and advertises its vodka as "Handmade" and "Crafted in an Old Pot Still" when the vodka is actually made using mechanized and automated processes with little human supervision or involvement. [Complaint](#).

Mladenov v. Whole Foods, Inc., Mladenov v. Acme Markets, Inc., Mladenov v. Wegman's Food Market, Inc. (N.J. Sup. Ct.): Nearly identical putative class actions alleging defendants falsely advertise that their breads are "made in store," when in fact the bread was delivered to the stores frozen and then re-baked or partially

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baked at the stores. *Whole Foods; Acme; Wegmans.*

Crane v. Lesserevil LLC, No. 0:14-cv-62854 (S.D. Fla.): Putative fraud class action alleging defendant's "Chia Crisps" are falsely advertised as composed mostly of chia seeds when in reality they are made of black beans. *Complaint.*