

## 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 FILINGS

#### Courts Lift Stays After FDA Stalls in Giving Guidance on ECJ

*Perera v. Pac. Foods of Or., Inc.*, No. 3:14-cv-2074 (N.D. Cal.): In this putative class action alleging violations of California's consumer protection statutes claiming that Defendant falsely labels its Hemp Non-Dairy beverage and other products as "all natural" when they contain artificial ingredients and evaporated cane juice ("ECJ") rather than sugar, the Court issued an order lifting its stay of the action pending FDA consideration of labeling issues due to the FDA's continued delay in providing final guidance. [Order](#).

*Swearingen et al v. Pac. Foods of Or., Inc.*, No. 3:13-cv-4157 (N.D. Cal.): In this putative class action alleging violations of California's consumer protection statutes claiming that Defendant's almond and soy-based beverages are "misbranded" because the labels list ECJ as an ingredient rather than sugar, the Court issued an order lifting its stay of the action pending FDA consideration of labeling issues due to the FDA's continued delay in providing final guidance. [Order](#).

*Figy v. Lifeway Foods*, No. 3:13-cv-4828 (N.D. Cal.): In this putative class action alleging violations of California's consumer protection statutes claiming that Defendant misbranded its products by referring to added sugar in its products as "evaporated cane juice," the Court lifted the stay that it entered in Spring 2014, pending the FDA's issuance of guidance on the use of the term "evaporated cane juice" due to the FDA's continued delay in providing final guidance. [Order](#).

#### Court Points to Lack of Standing to Deny Class Certification in Yakult Class Action

*Torrent v. Yakult U.S.A., Inc.*, No. 8:15-cv-00124 (C.D. Cal.): The Court denied Plaintiff's motion for class certification in this putative class action alleging that Defendant falsely represents that its probiotic beverages are beneficial to digestive and immune system health, despite contradictory scientific evidence. The Court found that the sole named Plaintiff lacked Article III standing to pursue injunctive relief because he had not alleged or proffered evidence that he intended to purchase the products ever

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again. As such, his claims did not meet the requirements of Rule 23(b)(1)(A) or 23(b)(2), which both required a class representative who could pursue injunctive and declaratory relief. [Order](#).

### Final Settlement Proposed in Subway Foot Long Actions

*In re: Subway Footlong Sandwich Mark'g & Sales Practices Litig.*, No. 2:13-md-2439 (E.D. Wis.): Subway moved unopposed for final approval of a proposed settlement in multiple pending consolidated putative class actions alleging that its sub sandwiches are shorter than 12 inches as represented by their "foot long" label. The terms of the proposed settlement are as follows: (1) Defendants will make certain franchise practice changes to ensure that bread sold to customers is either 6 or 12 inches long; (2) Defendants will pay no more than \$525,000 in attorney fees, expenses, costs and incentive awards. [Order](#).

### Settlement Proposed in Beverage Class Action

*Marshall et al v. Monster Beverage Corp.*, No. 2:14-cv-6311 (C.D. Cal.): In this putative class action alleging that Defendant misrepresents its Hansen's, Vidration, Blue Sky, Energy Pro, Diet Red, and Blue Energy products as being "Natural," "100% Natural," or "All Natural" when they actually contain color additives and synthetic ingredients such as citric acid and erythritol, Plaintiffs moved unopposed for preliminary approval of a proposed class settlement.

The terms of the proposed settlement are as follows: (1) Defendant agrees to revise certain Hansen's product labels; (2) Defendant agrees to provide each eligible class member that files a claim with either (i) a cash payment of \$0.50 per eligible purchase for up to 20 purchases or (ii) a \$1.00 off merchandise certificate per eligible purchase for up to 20 purchases; (3) Defendant agrees not to oppose an award of attorneys' fees for up to \$282,000; (4) Defendant agrees to pay each class representative an incentive award of up to \$1,000; and (5) Defendant agrees to bear all costs associated with settlement implementation, including the cost of hiring a settlement administrator. [Order](#).

### NEW FILINGS

*Magier v. Trader Joes Co. et al*, No. 1:16-cv-43 (S.D.N.Y.): Putative class action alleging that Defendant's five-ounce canned tuna products weigh substantially less than labeled and are under-filled. [Complaint](#).

*Envtl. Research Ctr., Inc. v. Chosen Foods Inc., et al*, No. RG16-798895 (Cal. Sup. Ct. – Alameda Cnty.): Proposition 65 action alleging that Defendants do not warn that their nutritional health products contain lead. [Complaint](#).

*Perea v. Tate's Bake Shop, Inc.*, No. 16-36077196 (Fla. Cir. Ct. – Miami-Dade Cnty.): Action alleging that Defendant markets its cookie products as "All Natural"

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when they contain soy lecithin, which Plaintiff alleges is made with unnatural ingredients and contains pesticides. [Complaint.](#)

*Alaei v. H.J. Heinz Co., L.P. et al*, No. 3:15-cv-2961 (S.D. Cal.): Putative class action alleging that Defendant's products are labeled as manufactured in the U.S.A. when they in fact include foreign ingredients. [Complaint.](#)

*Alaei v. Rockstar, Inc. et al*, No. 3:15-cv-2959 (S.D. Cal.): Putative class action alleging that Defendants mislabel their products as made in the U.S.A. when they in fact include foreign ingredients. [Complaint.](#)

*Consumer Advocacy Grp. v. The Kroger Co. et al*, No. RG15798432 (Cal. Sup. Ct. – Alameda Cnty.): Proposition 65 action alleging that Defendants' seaweed products contain lead. [Complaint.](#)

*Bobo v. Woodbolt Distribution, LLC*, No. 3:16-cv-32 (S.D. Cal.): Putative class action alleging that Defendant misleadingly advertises that certain ingredients in its nutritional supplement products—leucine nitrate, creatine nitrate, and arginine nitrate—provide substantial benefits, when in fact, industry research indicates the ingredients provide no health benefits, and Defendant has not provided the FDA with evidence that these ingredients are actually safe. [Complaint.](#)