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PERSPECTIVE

California's unremitting food fight takes on the farm

By Amy Lally and Jen Ratner

The legal battle over the definition of "all natural" foods is turning its attention from the courtroom to the farmland. On June 10, Judge Andrew J. Guilford, in the Central District of California, denied the defendant's motion to dismiss in *In re Hain Celestial Seasonings Products Consumer Litigation*, and allowed the case to proceed based on a definition of "all natural" that looks at the pest control methods used on the crops from which the "all natural" products' ingredients were harvested.

Over the last year, class actions challenging "all natural" claims on food products have grown in number and scope. "All natural" has been variously defined by plaintiffs across the state as meaning "no artificial colors," "no artificial flavors," "no preservatives," "no synthetic ingredients," "not processed," and "no genetically modified ingredient."

In the recent *Surzyn v. Diamond Foods* decision in the Northern District, Judge Sandra Brown Armstrong noted that ultimate success for the plaintiffs in these "all natural" class actions may depend on consumer perception evidence proving how consumers of the specific products at issue understand the term "natural" in the context of those products. That "proof" (or lack thereof) may ultimately end the food fight, but bringing it to light involves an investment of time and resources.

Whether "all natural" class actions will continue to grow in scope and number is more directly affected by how those claims fare on motions to dismiss. The court's decision not to dismiss the *Hain* complaint could open the door to an entirely new and potentially problematic definition of "all natural" — namely, "not organic."

The plaintiffs in *Hain* allege that 10 of defendant's Celestial Seasonings teas were prominently labeled and advertised as "all natural" when they contain pesticides, herbicides and insecticides. The plaintiffs do not allege to have suffered any harm but assert that had they known the "truth," they would not have purchased the products.

Hain Celestial moved to dismiss, challenging the sufficiency of the allegations and plaintiffs' standing and, alternatively, asserting that the Food and Drug Administration has primary jurisdiction. The court denied the motion in its entirety. First, the court rejected defendant's argument that plaintiffs failed to sufficiently allege that the teas actually contain unnatural pesticides, finding the allegations sufficient at the pleading stage. Next, with respect to whether plaintiffs failed to adequately allege that a reasonable consumer would likely be deceived, the court rejected defendant's argument that plaintiffs had not appropriately defined what "all natural" means (holding that the complaint asserts that "a food product is not '100% Natural' in the minds of consumers if the product contains unnatural chemicals").

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Hain Celestial also argued that "[i]f this Court accepted Plaintiffs' logic, most fruits, vegetables, and even water could not be described as 'natural' because they contain the exact same trace residue as those allegedly found in Hain Celestial teas." Moreover, the defendant asserted that the plaintiffs' argument that an "all natural" product cannot contain trace amounts of contaminants would run afoul of the FDA's separate regulations governing organic products. Hain Celestial argued that "[a] reasonable consumer — particularly one with concerns about herbicides — would understand that the only way to have complete assurance that there is no prohibited herbicide residue is to purchase certified organic food products."

The court disagreed: The "Defendant argues that unless a product is labeled 'organic,' reasonable consumers would understand that the product may contain traces of pesticides. It may be that the evidence will support that theory. But, based on the allegations, it strikes the Court as plausible that the evidence will favor Plaintiffs." It further noted that the "Defendant has not shown that it is implausible that reasonable consumers would perceive '100% Natural' products as pesticide-free."

The court also rejected the defendant's arguments that (1) its labeling was mere puffery (holding that, if consumers understand "all natural" to mean that the product contains no trace chemicals, then the phrase is capable of being proven false), (2) the plaintiffs lacked standing, and (3), the appropriate forum to resolve this issue was the FDA, which the court viewed as having demonstrated a "lack of interest in providing further guidance on the use of the word 'natural' in food labeling."

Although the court made its decision under the plaintiff-friendly and relatively lenient standard applicable to a motion to dismiss, its implicit sanction of the plaintiffs' argument and its failure to address the impact of the different regulatory scheme governing organic products present issues regarding the applicability of this decision to other food products and future litigation.

The court had the opportunity to address the legal viability of the plaintiffs' definition of "all natural" and whether a reasonable consumer was likely to be deceived, but chose not to. Notably, the defendant itself has its own line of certified organic teas, a fact which the court also ignored. Rather, the court took the position that it would be a matter of proof with respect to what a reasonable consumer would understand the phrase "all natural" to mean. By implicitly sanctioning the plaintiffs' definition of "all natural" — which, as argued by defendant could have far-reaching ramifications for all nonorganic products and ignores that the FDA makes a regulatory distinction as to organic products — the court provided significant leverage to the Hain plaintiffs (and to plaintiffs generally).

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Ironically, in *Pelayo v. Nestle*, Judge John Walter, also of the Central District, dismissed a class action challenging "all natural" claims on pasta because the plaintiffs admitted that a reasonable customer is aware that defendant's pastas are not "springing fully-formed" from trees and bushes. Yet, under the Hain court's definition of "all natural," even produce picked from the vine is not "all natural" if the crops were treated with pesticides.

Companies fighting "all natural" food litigation in California may be best served by seizing upon Armstrong's suggestion to focus on actual consumer perception. The answer to that question may ultimately be the turning moment in the food fight.


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