

1 Richman Law Group
2 Jaimie Mak (SBN 236505)
3 jmak@richmanlawgroup.com
4 535 Mission Street
5 San Francisco, CA 94105
6 T: (718) 705-4579
7 F: (718) 228-8522

8 Jay R. Shooster (*admitted pro hac vice*)
9 jshooster@richmanlawgroup.com
10 1 Bridge Street, Suite 83
11 Irvington, NY 10533
12 T: (718) 705-4579
13 F: (718) 228-8522

14 *Attorneys for Plaintiffs*

15
16 **UNITED STATES DISTRICT COURT**
17
18 **NORTHERN DISTRICT OF CALIFORNIA**
19
20 **OAKLAND DIVISION**

<p>21 Sylvia Koh and David Green, on Behalf 22 of Themselves and all Others Similarly 23 Situated,</p> <p>24 Plaintiffs,</p> <p>25 v.</p> <p>26 The Kraft Heinz Company,</p> <p>27 Defendant.</p>	<p>28 Case No. 4:20-Cv-04425-JSW</p> <p>Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss</p> <p>Judge: Hon. Jeffrey S. White</p> <p>Date: December 18, 2020 Time: 9:00 am Place: Courtroom 5 *Oral Argument Requested</p> <p><u>Demand For Jury Trial</u></p>
---	--

Table of Contents

1

2 **INTRODUCTION..... 1**

3

4 **FACTS 2**

5

6 **ARGUMENT..... 3**

7 **I. REASONABLE CONSUMERS PLAUSIBLY EXPECT NATURAL CHEESE TO**

8 **BE PRODUCED WITHOUT THE USE OF ARTIFICIAL GROWTH HORMONES..... 4**

9 **A. This Court Has Already Held That Consumers Plausibly Expect That “Natural”**

10 **Products Are Made Without the Use of Artificial Hormones..... 4**

11 **B. The FDA Has Not Found That the Use of Artificial Hormones Is Consistent With**

12 **Consumer Perception of Natural Claims. 8**

13

14 **II. KRAFT HAS ALREADY FOUGHT AND LOST ON THE ARGUMENT THAT**

15 **THE FDA’S REVIEW OF THE TERM “NATURAL” REQUIRES THAT THE COURT**

16 **STAY OR DISMISS UCL, FAL, OR CLRA CLAIMS. 9**

17 **III. PLAINTIFF KOH HAS STANDING TO REPRESENT A CLASS SEEKING**

18 **INJUNCTIVE RELIEF. 11**

19 **IV. THE COURT SHOULD NOT DISMISS PLAINTIFFS’ NATIONWIDE CLASS**

20 **ALLEGATIONS FOR LACK OF STANDING. 13**

21 **CONCLUSION 15**

22

23

24

25

26

27

28

Table of Authorities

Cases

1
2
3 *Animal Legal Def. Fund v. Hormel Foods Corp.*, No. 2016 CA 004744 B, 2017 D.C. Super.
4 LEXIS 9 (D.C. Super. Ct. Sept. 20, 2017). 7
5 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)..... 3
6 *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753 (9th Cir. 2015)..... 10
7 *Balser v. Hain Celestial Grp., Inc.*, 640 Fed. Appx. 694 (9th Cir. 2016)..... 6
8 *Balser v. Hain Celestial Grp., Inc.*, No. CV 13-05604-R, 2013 U.S. Dist. LEXIS 180220 (C.D.
9 Cal. Dec. 18, 2013)..... 6
10 *Branca v. Bai Brands, LLC*, No. 3:18-cv-00757, 2019 U.S. Dist. LEXIS 37105 (S.D. Cal. Mar. 7,
11 2019)..... 13
12 *Brazil v. Dole Packaged Foods, LLC*, 660 Fed. Appx. 531 (9th Cir. 2016)..... 4
13 *Catholic Health Care West v. US Foodserv. (In re US FoodServ. Pricing Litig.)*, 729 F.3d 108
14 (2d Cir. 2013) 15
15 *Cordes v. Boulder Brands USA, Inc.*, No. CV 18-6534, 2018 U.S. Dist. LEXIS 217534 (C.D.
16 Cal. Oct. 17, 2018)..... 12, 13
17 *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956 (9th Cir. 2018)..... 11, 12
18 *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059 (9th Cir. 2007)..... 9
19 *Feller v. Transamerica Life Ins. Co.*, No. 2:16-cv-01378, 2017 U.S. Dist. LEXIS 206822 (C.D.
20 Cal. Dec. 11, 2017)..... 15
21 *Fraleay v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011) (Koh, J.)..... 3
22 *Friedman v. AARP, Inc.*, 855 F.3d 1047 (9th Cir. 2017) 4
23 *Friends of the Earth v. Sanderson Farms, Inc.*, No. 17-cv-03592-RS, 2018 U.S. Dist. LEXIS
24 220547 (N.D. Cal. Dec. 3, 2018)..... 6, 7
25 *Garcia v. Harley-Davidson Motor Co.*, No. 19-cv-02054-JCS, 2019 U.S. Dist. LEXIS 199608
26 (N.D. Cal. Nov. 15, 2019) 13
27 *Gregorio v. Clorox Co.*, No. 17-cv-03824-PJH, 2018 U.S. Dist. LEXIS 19542 (N.D. Cal. Feb. 6,
28 2018)..... 10
Henderson v. Gruma Corp., No. CV 10-04173, 2011 U.S. Dist. LEXIS 41077 (C.D. Cal. Apr.
11, 2011)..... 11
In re Coca-Cola Prods. Mktg. & Sales Practices Litig., No. 14-md-02555-JSW, 2020 U.S. Dist.
LEXIS 26261 (N.D. Cal. Feb. 14, 2020)..... 13
In re Frito-Lay N. Am., Inc. All. Nat. Litig., No 12-MD-2413, 2013 U.S. Dist. LEXIS 123824
(E.D.N.Y. Aug 29, 2013)..... 14
In re McCormick & Co., 217 F. Supp. 3d 124 (D.D.C. 2016)..... 14
Jones v. Conagra Foods, Inc., 912 F. Supp. 2d 889 (N.D. Cal. 2012) (Breyer, J.)..... 10
Jones, et al. v. Monsanto Co., No. 19-0102, 2019 U.S. Dist. LEXIS 232815 (W.D. Mo. June 13,
2019)..... 14
Kane v. Chobani, LLC, 645 F. App'x 593 (9th Cir. 2016) 10
Klein v. Cook, No. 5:14-CV-03634-EJD, 2015 U.S. Dist. LEXIS 67943 (N.D. Cal. May 22,
2015)..... 9, 10
Koh v. S.C. Johnson & Son, Inc., No. C-09-00927, 2010 U.S. Dist. LEXIS 654 (N.D. Cal. Jan. 6,
2010) (Whyte, J.)..... 13
Lavie v. Procter & Gamble Co., 129 Cal. Rptr. 2d 486 (Cal. Ct. App. 2003)..... 4

1	<i>Lee v. Conagra Brands, Inc.</i> , 958 F.3d 70 (1st Cir. 2020)	8
2	<i>Machlan v. Proctor & Gamble Co.</i> , 77 F. Supp. 3d 954 (N.D. Cal. 2015)	11
3	<i>McGill v. Citibank, N.A.</i> , 2 Cal. 5th 945 (Cal. 2017).....	12
4	<i>Morales, et al. v. Kraft Foods Grp., Inc., et al.</i> 2:14-cv-04387-JAK-PJW (C.D. Cal. Dec. 2, 2016).....	9
5	<i>NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.</i> , 693 F.3d 145 (2d Cir. 2012)...	14
6	<i>Organic Consumers Ass’n v. Sanderson Farms, Inc.</i> , 284 F. Supp. 3d 1005 (N.D. Cal. 2018) (Seeborg, J.).....	7
7	<i>Pappas v. Chipotle Mexican Grill, Inc.</i> , No. 16-cv-612, 2016 U.S. Dist. LEXIS 202524 (S.D. Cal. Aug. 31, 2016)	6
8	<i>Pelayo v. Nestle USA, Inc.</i> , 989 F. Supp. 2d 973 (C.D. Cal. 2013).....	6
9	<i>Penrose v. Buffalo Trace Distillery, Inc.</i> , No. 4:17CV294, 2018 U.S. Dist. LEXIS 18340 (E.D. Mo. Feb. 5, 2018)	14
10	<i>Rahman v. Motts LLP</i> , No. 13-cv-03482-SI, 2018 U.S. Dist. LEXIS 164620 (N.D. Cal. Sep. 25, 2018) (Illston, J.)	12, 13
11	<i>Reid v. Johnson & Johnson</i> , 780 F.3d 952 (9th Cir. 2015).....	4
12	<i>Ries v. AriZona Bevs. USA LLC</i> , 287 F.R.D. 523 (N.D. Cal. 2012) (Seeborg, J.)	11
13	<i>Rubenstein v. Neiman Marcus Grp. LLC</i> , 687 Fed. Appx. 564 (9th Cir. 2017).....	4
14	<i>Safe Air for Everyone v. Meyer</i> , 373 F.3d 1035 (9th Cir. 2004).....	3
15	<i>Santos v. Carmax Bus. Servs., LLC</i> , No. 17-cv-02447-RS, 2018 U.S. Dist. LEXIS 231077 (N.D. Cal. May 8, 2018).....	13
16	<i>Savage v. Glendale Union High Sch. Dist. No. 205</i> , 343 F.3d 1036 (9th Cir. 2003)	3
17	<i>School Dist. v. Lake Asbestos (In re Sch. Asbestos Litig.)</i> , 789 F.2d 996 (3d Cir. 1986).....	15
18	<i>Shank v. Presidio Brands, Inc.</i> , No. 17-cv-00232-DMR, 2018 U.S. Dist. LEXIS 10894 (N.D. Cal. Jan. 23, 2018).....	10
19	<i>Siracusano v. Matrixx Initiatives, Inc.</i> , 585 F.3d 1167 (9th Cir. 2009).....	3
20	<i>Summers v. Earth Island Inst.</i> , 555 U.S. 488 (2009)	11
21	<i>Susan Tran v. Sioux Honey Association, Coop.</i> , No. 8:17-cv-00110-JLS-SS (C.D. Cal. Feb. 24, 2020).....	12
22	<i>Tsan v. Seventh Generation, Inc.</i> , No. 15-cv-00205-JST, 2015 U.S. Dist. LEXIS 149042 (N.D. Cal. Nov. 3, 2015)	6
23	<i>United States v. Redwood City</i> , 640 F.2d 963 (9th Cir. 1981).....	3
24	<i>Westways World Travel v. AMR Corp.</i> , 182 F. Supp. 2d 952 (C.D. Cal. 2001).....	3
25	<i>White v. Lee</i> , 227 F.3d 1214 (9th Cir. 2000).....	3
26	<i>Williams v. Gerber Prods. Co.</i> , 552 F.3d 934 (9th Cir. 2008).....	2, 3, 4
27	<u>Statutes</u>	
28	Cal. Bus. & Prof. Code § 1750	4
	Cal. Bus. & Prof. Code § 17500	4, 11
	Cal. Civ. Code § 17200.....	4, 11

INTRODUCTION

1
2 The substance of Kraft's motion more closely resembles a motion for summary judgment
3 than it does a motion to dismiss. Kraft asks this Court to step into the mind of a consumer and
4 rule *as a matter of law* that *no* reasonable consumer could plausibly expect "natural" cheese to
5 be made without the use of artificial growth hormones. Notably, Kraft asks this of the Court
6 despite its *own admissions* that (1) rbST is an "artificial" hormone, (2) a majority of Kraft's
7 consumers want cheese made without the use of artificial hormones, and (3) the bulk of Kraft's
8 "natural" cheese products (as opposed to other Kraft cheese products) are *now* produced without
9 artificial hormones because that is what its consumers desire.
10

11
12 Kraft's position is indefensible. It is fundamentally a factual question whether consumers
13 expect "natural" dairy products to be made with the use of "artificial" hormones. Courts have
14 made it clear that cases based on the reasonable consumer standard should only be dismissed in
15 "rare" situations in which the plaintiff's allegations about consumer expectations are wholly
16 implausible. This is not that "rare" case. Here, there is a wealth of consumer research that supports
17 Plaintiffs' factual allegations, including consumer surveys that have been endorsed by Kraft itself.
18 But more importantly, this court has *already held*—based on this *same survey evidence*—that it
19 is plausible that reasonable consumers believe animal food products marketed as "natural" are
20 produced without the use of "drugs at any point."
21

22
23 Kraft's procedural arguments have also already been rejected in numerous other cases in
24 the Ninth Circuit, including some in which Kraft itself was the defendant. Kraft's previously
25 unsuccessful arguments must be rejected once again and its Motion should be denied.
26
27
28

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.