

# Food for Thought: Astiana v. Ben & Jerry's Homemade, Inc.

February 23, 2015

*Astiana v. Ben & Jerry's Homemade, Inc.*, No. 10-4387, 2014 WL 60097 (N.D. Cal. Jan. 7, 2014)

Plaintiff, Skye Astiana, filed a proposed class action on behalf of individuals who purchased ice cream products produced by Ben & Jerry's Homemade, Inc., including ice cream, frozen yogurt, and popsicles, which contained alkalized cocoa and were labeled "all natural." Plaintiff alleged that the company was using cocoa that had been alkalized with a "synthetic" agent and, as a result, the defendant misled and deceived consumers by labeling and advertising the products as "all natural." Plaintiff alleged that class members would not have purchased the subject Ben & Jerry's ice cream products had they known they contained alkalized cocoa processed with potassium carbonate, a man-made ingredient (the alleged "unnatural" ingredient). Defendant contended that cocoa can be alkalized using one of several alkalis, some of which are "natural" and some of which are "synthetic." Furthermore, defendant asserted that there was no way to identify which class members purchased which type of ice cream products because, as a wholesale manufacturer, defendant does not maintain records identifying the ultimate customers or their purchases. Thus, according to defendant, it would be impossible to determine which class members bought an ice cream product containing alkalized cocoa processed with a "synthetic" agent instead of an ice cream product containing alkalized cocoa processed with a "natural" agent. As it relates to ascertainability, the court held it was impossible to determine which consumers' ice cream products contained synthetic alkalized cocoa. The district court agreed that plaintiff provided no evidence as to which ice cream product contained the allegedly "synthetic ingredient" or that a means exists for identifying the alkali in every class member's ice cream purchases. In part because she had not identified an ascertainable class, the court ruled that plaintiff had not established that her claims were typical of those of the class. Although the purchasers of defendant's ice cream products were exposed to the same package labeling, that alone was insufficient to establish that plaintiff's claims of having been deceived and misled are typical of the claims of the class. The court also found that plaintiff failed to meet the predominance requirement because she did not offer sufficient damages testimony regarding the amount or manner of damages. Specifically, plaintiff did not offer expert testimony demonstrating that the market price of defendant's products with the "all natural" designation was higher than the market price of defendant's products without the "all natural" designation. "Thus, by definition, there is no evidence showing how much higher the price of one was than the other."

Similarly, the court noted that plaintiff failed to present expert testimony showing "a gap between the market price of Ben & Jerry's 'all natural' ice cream and the price it purportedly should have sold it for had it not been labeled 'all natural'— or any evidence demonstrating that consumers would be willing to pay a premium for 'all natural' ice cream that was made with cocoa alkalized with a 'natural' alkali, and did in fact pay such a premium." Given the court's findings that plaintiff had not identified an ascertainable class, and that common issues did not predominate, the court also found that a class action is not a superior method of adjudication of the controversy. *Read more significant court decisions affecting the food industry in [Food for Thought: 2014 Litigation Annual Review](#).*

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