

# Food for Thought: Putative Class Action Against Yogurt Maker Revived by the Ninth Circuit with Directions to Stay the Proceedings in Light of Ongoing FDA Proceedings

March 24, 2016

*Kane, et al v. Chobani, LLC, 645 Fed. Appx. 593 (9th Cir. 2016)*

The Ninth Circuit revived a putative class action that alleged defendant Chobani deceptively and unlawfully labeled and sold its Greek yogurt products. Plaintiffs Katie Kane, Arianna Rosales, and Darla Booth, allege that defendant's use of "natural" violated FDA regulations. Specifically, they alleged that the products labeled "all natural" contained artificial ingredients, flavorings, coloring and chemical preservatives, and that defendant deceptively and unlawfully used the term "evaporated cane juice" to describe the products' added sugar without disclosing that the term is synonymous with the term "sugar." Thus, they contend that defendant misled customers into thinking the product contained less sugar than it allegedly did. The district court granted defendant's motion to dismiss the third amended complaint. Citing the primary jurisdiction doctrine, the Ninth Circuit reversed and remanded for entry of an order staying the proceedings until such time as the U.S. Food and Drug Administration (FDA) completes its proceedings regarding the use of the terms "natural" and "evaporated cane juice" in food labeling. The Ninth Circuit, citing *Astiana v. Hain Celestial Grp.*, 523 F.3d 1110 (9th Cir. 2008), stated that the scope and permissible usage of the terms "natural" and "evaporated cane juice" in food products should be addressed by the regulatory agency with authority over the relevant industry rather than by the judicial branch. The court supported its invocation of primary jurisdiction because the FDA both said it would address the terms, and had ongoing proceedings about them. Specifically, the court cited the FDA's November 2015 request for comments regarding the use of the term "natural" in food product labeling and the FDA's July 2015

letter indicating that it expects to issue final guidance on the term "evaporated cane juice" by the end of 2016. As a result, the court did not feel staying the proceedings would needlessly delay the action. However, in a footnote, the court noted that the duration of the stay remains within the discretion of the district court. The court further instructed that the district court's exercise of its discretion should be informed by any events that rendered the FDA's resolution of the terms "natural" and "evaporated cane juice" "illusory."

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