

Ravioli Trees and Tortellini Bushes: What Should Courts Expect from the Reasonable Consumer When it Comes to “Natural” Claims?

I. INTRODUCTION AND BACKGROUND

In recent years, there has been a steady flow of consumer class action cases alleging that advertisers are deceptively labeling their food and personal care products as “natural.” Cases have targeted a variety of products, including ice cream, juice, tortilla chips, yogurt, smoothie kits, breakfast cereal, pasta sauce, vegetable oil, shampoos and conditioners, deodorant, toothpaste, face wash, body wash, and sunscreen, to name just a few. Plaintiffs in these cases typically allege that the companies violated state consumer protection and false advertising laws by marketing foods as “natural” when the products include ingredients alleged to be synthetic or genetically modified.

Some “natural” cases have ended at the class certification stage or on motions to dismiss due to factual matters that were specific to the case at hand (e.g., plaintiff’s failure to show injury).¹ Many cases, however, have not been resolved preliminarily, and many have led to multi-million dollar settlements. For instance, Con Agra, last year, agreed to establish a settlement fund worth \$3.2 million in a class action over “natural” claims for Alexia frozen potato products,² and Barbara’s Bakery, Inc., agreed to establish a settlement fund of \$4 million in a case involving snack foods and cereals.³ On the personal care side, Neutrogena Corp. agreed to establish a \$1.3 million fund following a settlement over its Neutrogena Naturals line of facial cleansers, body washes, and moisturizers.⁴

One recent case suggests that more “natural” cases could be — and should be — resolved in defendants’ favor at the pleadings stage. In *Pelayo v. Nestlé USA, Inc.*, the court rejected a class action over “All Natural” claims for refrigerated pasta products. The court, in effect, found that because consumers have no common or objective understanding of what the claim “natural” means on a processed food, a legal claim of false advertising is not possible.

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POLICY RECOMMENDATION:

Courts should follow the holding in *Pelayo v. Nestlé USA, Inc.* and reject legal claims of false advertising where consumers have no common or objective understanding of what the claim “natural” means when used to promote processed foods or personal care products.

II. ISSUES IN DISPUTE – PELAYO V. NESTLÉ USA, INC.

The plaintiff, Maritza Pelayo, alleged that Nestlé violated California consumer protection laws (specifically, the Unfair Competition Law and the Consumer Legal Remedies Act) by labeling thirteen of its Buitoni refrigerated pasta products as “All Natural.”⁵ Products at issue included, for instance, Buitoni Four Cheese Ravioli, Buitoni Spinach Cheese Tortellini, and Buitoni Mixed Cheese Tortellini. Pelayo contended that the “All Natural” claims deceived consumers given that the thirteen products contained ingredients, such as xanthan gum and soy lecithin, which the plaintiff alleged were “unnatural, artificial, or synthetic.”⁶ The plaintiff sought to represent a class of similarly situated plaintiffs against Nestlé. Nestlé filed a motion to dismiss. The court, in considering the motion to dismiss, was obligated to assess whether the case either lacked “a cognizable legal theory” or lacked “sufficient facts alleged under a cognizable legal theory.”⁷

The *Pelayo* court observed that “[t]he question of whether a business practice is deceptive in most cases presents a question of fact not amenable to resolution on a motion to dismiss.”⁸ The court, nevertheless, found that “in certain instances, [courts] can properly make this determination and resolve such claims based on its review of the product packaging.”⁹ It further stated that “where a Court can conclude as a matter of law that members of the public are not likely to be deceived by the product packaging, dismissal is appropriate.”¹⁰ In California (as in most of the country), an advertising or labeling claim will be considered false or deceptive if it is likely to mislead purchasers who are acting reasonably under the circumstances. In other words, if a “reasonable person” would be misled, the claim is considered deceptive. The plaintiff’s complaint advanced several possible legal theories under which the claim “All Natural” might mislead reasonable consumers. The court rejected each.

Like many other plaintiffs who have filed “natural” cases, Pelayo first pointed to a dictionary definition of the term. According to the plaintiff, *Webster’s Dictionary* states that “natural” means “produced or existing in nature” and “not artificial or manufactured.”¹¹ The court found that even the plaintiff acknowledged in her brief opposing Nestlé’s motion to dismiss that the *Webster’s* definition “clearly does not apply to the Buitoni Pastas because they are a product manufactured in mass.”¹² The court further quoted statements by the plaintiff that “the reasonable consumer is aware that Buitoni [p]astas are not ‘springing fully-formed from Ravioli trees and Tortellini bushes.’”¹³ The court found that the plaintiff defeated her own arguments in favor of applying the dictionary definition. It held that the dictionary definition failed to provide a theory of how reasonable consumers might be deceived by the claim “natural” on mass-produced pastas.¹⁴

The plaintiff next pointed to the definition of “synthetic” under the National Organic Program (“NOP”) as a theory of deception. She contended that certain ingredients in the thirteen products met the NOP definition. The NOP is housed within the U.S. Department of Agriculture¹⁵ and is “responsible for developing national standards for organically-produced agricultural products.”¹⁶ The court held that the NOP “synthetic” definition was not applicable to the pastas given the obvious point that the products were labeled as “natural,” rather than “organic.” The court further observed that, given certain exceptions in the NOP standards, the ingredients at issue would, in fact, be allowed in “organic” products, despite falling within the NOP’s “synthetic” definition. The court stated that it is

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“implausible that a reasonable consumer would believe ingredients allowed in a product labeled ‘organic’ . . . would not be allowed in a product labeled ‘all natural.’”¹⁷

Finally, the plaintiff, Pelayo, argued that the claim, “All Natural,” was misleading under a Food and Drug Administration (“FDA”) food labeling rule and an FDA policy on “natural” claims on foods. The FDA rule governs the “labeling of spices, flavorings, colorings, and chemical preservatives” sold as foods or used in foods.¹⁸ Because the rule includes provisions on declaring “natural” and “artificial” flavorings, it defines these terms.¹⁹ The court easily found that the FDA rule was inapplicable given that the pasta ingredients alleged to be synthetic were not flavorings. The court, likewise, held that the FDA policy failed to help the plaintiff. The FDA policy provides that a food can be labeled “natural” if “nothing artificial or synthetic (including all color additives regardless of source) is included in, or has been added to, the product that would not normally be expected to be there.” The court held that the FDA policy is merely an “informal policy” and “does not establish a legal requirement.”²⁰ The court, moreover, observed that FDA and the Federal Trade Commission (“FTC”) had at points considered undertaking rulemaking to define “natural,” but that both agencies “[u]ltimately . . . declined to adopt a definition.”²¹ The court quoted the following passage from a 2010 public announcement in which the FTC declined to define “natural”: “[N]atural may be used in numerous contexts and may convey different meanings depending on that context. Thus, the Commission does not have a basis to provide general guidance on the use of the term.”²² The court held that “[g]iven the FTC’s finding that the term ‘natural’ can be used in numerous contexts, it is implausible that a ‘significant portion of the general consuming public or of the targeted consumers’ would be deceived or misled by the use of the term ‘All Natural’ on the Buitoni [p]astas.”²³

The court granted Nestlé’s motion to dismiss without allowing the plaintiff leave to amend her complaint. The court stated as follows: “Generally, the Ninth Circuit has a liberal policy favoring amendments . . . However, a court does not need to grant leave to amend where the Court determines that permitting a plaintiff to amend would be an exercise in futility.”²⁴

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III. RESEARCH & RESPONSE – OTHER COURTS SHOULD FOLLOW PELAYO

Given that the *Pelayo* court, prior to factual findings, cut off all opportunity for the plaintiff to proceed, the case, at first glance, may seem to be a bold decision destined to be an outlier among the “natural” cases. Several points, however, suggest that other courts hearing “natural” cases should follow *Pelayo*.

A. Other Courts Have Reached Similar Conclusions on the Ambiguous Nature of “Natural”

Similar to *Pelayo*, other courts have recognized a lack of common understanding of the term “natural,” although *Pelayo* is the first to dismiss a “natural” case entirely based on lack of a uniform definition. In *Thurston v. Bear Naked, Inc.*, plaintiffs claimed that Bear Naked, Inc., falsely advertised eleven of its juices as “100% Natural” or “100% Pure and Natural.”²⁵ The plaintiffs contended that the products were not “natural” given the presence of ingredients alleged to be synthetic. The court

held that, on this theory, the plaintiff failed to show “commonality,” which is a requirement for class action cases. The court stated:

At this time, Plaintiffs fail to sufficiently show that “natural” has any kind of uniform definition among class members, that a sufficient portion of class members would have relied to their detriment on the representation, or that Defendant’s representation of natural in light of the presence of the challenged ingredients would be considered to be a material falsehood by class members.”²⁶

The court further noted that the “Defendant provide[d] evidence demonstrating that food processors, consumers, and the Food and Drug Administration all fail to define ‘natural’ in a definite manner.”²⁷ The court allowed class certification only as to allegations based on a single type of ingredient, hexane-processed soy ingredients. According to the court, an Environmental Protection Agency rule specifically identifies hexane as a “synthetic organic chemical manufacturing industry chemical.”²⁸ Further, the court observed that hexane processing “violates the definition of natural proffered on the website of Kashi Company, Bear Naked’s parent and the defendant in an identical, related lawsuit.”²⁹

The same judge hearing the Bear Naked case reached a similar decision in a case over “All Natural” and various other claims for Kashi products. In *Astiana v. Kashi*, the court rejected class certification on “All Natural,” except as to hexane-processed soy ingredients.³⁰

Cases like *Thurston* and *Astiana* support the findings in *Pelayo* that a plausible or widely agreed-upon definition or understanding of the claim “natural” is lacking when the term is used to promote manufactured, mass-produced products.

B. The *Pelayo* Decision to Dismiss Is Grounded in Precedent

Despite its seemingly bold holding, *Pelayo* is grounded in precedent. The court cited the following prior cases that also allowed dismissal at the pleadings stage in false advertising cases:

- *Videtto v. Kellogg USA*, 2009 WL 1439086 (E.D. Cal., May 21, 2009) (dismissing without leave to amend a complaint alleging that packaging for Froot Loops misleads consumers to believe that the cereal contains “real, nutritious fruit”);
- *McKinnis v. Kellogg USA*, 2007 WL 4766060 (C.D. Cal., May 21, 2007) (same);
- *Werbel v. Pepsico, Inc.*, 2010 WL 2673860 (N.D. Cal. July 2, 2010) (dismissing without leave to amend a complaint alleging that packaging for Cap’n Crunch’s Crunch Berries misleads consumers to believe that the cereal contains real fruit berries);

- *Sugawara v. Pepsico, Inc.*, 2009 WL 1439115 (E.D. Cal. May 21, 2009) (same); and
- *Rooney v. Cumberland Packing Corp.*, 2012 WL 1512106 (S.D. Cal. Apr. 16, 2012) (dismissing without leave to amend a complaint alleging that the product name, “Sugar in the Raw,” misleads consumers to believe that the sugar is entirely unprocessed or unrefined).³¹

Additional supportive precedent includes the following.

- *Ang v. Whitewave Foods Co.*, Case No. 13-cv-1953 (N.D. Cal. Dec. 10, 2013) (dismissing without leave to amend a complaint alleging that “milk” in product names, like Soymilk and Almond Milk, misleads consumers to believe that the products are from dairy cows).
- *Shaker v. Nature’s Path Foods, Inc.*, Case No. CV-13-1138-GW (Dec. 16, 2013) (dismissing without leave to amend a complaint alleging that packaging depicting a bowl of Optimum Cinnamon Blueberry Cereal garnished with dried strawberries misleads consumers to believe that the cereal contains dried strawberries).

In each of the cases listed above, the courts found – like the *Pelayo* court – that the allegations of deception were implausible. Because of this, the courts refused to move forward to fact-finding.³²

Another line of cases provides further, analogous examples where courts routinely terminate advertising cases on a motion to dismiss. Those cases are puffery cases.³³ *Rooney*, one of the “implausibility” cases noted above and cited by *Pelayo*, includes the following explanation of puffery:

“Generalized, vague, and unspecified assertions constitute ‘mere puffery’ upon which a reasonable consumer could not rely, and hence are not actionable” under the UCL, FAL, or CLRA. *Anunziato v. eMachines, Inc.*, 402 F.Supp.2d 1133, 1139 (C.D.Cal.2005); see *Williams*, 523 F.3d at 939 n. 3; *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv.*, 911 F.2d 242, 245 (9th Cir.1990). Puffery involves “outrageous generalized statements, not making specific claims, that are so exaggerated as to preclude reliance by consumers.” *Cook*, 911 F.2d at 246 (quotations omitted).³⁴

Although the court in *Rooney* did not decide the case on the basis of puffery or further discuss puffery at all, the inclusion of this passage seems deliberate and relevant. As noted above, the plaintiffs in *Rooney* contended that the product name, “Sugar in the Raw,” deceived consumers by implying that the product contained entirely unprocessed or unrefined sugar. The court rejected the plaintiff’s argument, finding that the packaging “repetitively and clearly” indicated that the product was “pure natural cane turbinado sugar,” which is a form of brown sugar that is subject to a level of processing.³⁵ The court further observed that “[n]owhere on the box d[id] the words ‘unprocessed’

or 'unrefined' appear."³⁶ The phrase, "in the raw," as it was used on the packaging, thus, appears to have been similar to puffery in that it was vague or subjective, conveying no specific claims.

Like the phrase, "in the raw," "natural" claims used in the advertising and labeling of manufactured, mass-produced products are analogous to puffery. "Natural" claims on such products very likely fail to convey any specific or absolute message.

Courts considering cases on "natural" claims will *not* be out on a limb in following *Pelayo* and dismissing at the pleadings stage. Cases on implausible deception allegations, as well as puffery cases, support conserving judicial resources and dismissing at the pleadings stage.

C. *Pelayo* Is "Naturally" Limited Given the Unique Regulatory History of the Term "Natural"

Courts have expressed hesitation in dismissing advertising cases based on a legal determination of the ads at the pleading stage. Even in California, where *Pelayo* was decided, the courts have stated that "it is a 'rare situation' where granting a motion to dismiss claim under [California's Unfair Competition Law] is appropriate."³⁷ *Pelayo*, however, is unlikely to open the flood gates for other types of advertising cases to be terminated in a similar manner on a motion to dismiss given that "natural" claims are a discrete type of claim with a unique and protracted regulatory history. The regulatory background on "natural" is even more extensive than the *Pelayo* court acknowledges, and further supports courts in holding, like the *Pelayo* court did, that "natural" is ambiguous and subjective, when used on mass produced goods, such that it cannot mislead reasonable consumers. Although discussed only briefly by the *Pelayo* court, both the FDA and FTC, on several occasions, have acknowledged the ambiguity of the term and declined to provide a standard definition.

The FTC has declined to define "natural" for the purposes of advertising on two occasions. First, in 1983, the FTC declined to issue a rule on the use of "natural" in claims for foods.³⁸ The FTC described as follows its original proposed rule and its decision to not issue a final rule on the term:

The proposed rule [would have] define[d] "natural" foods as those with no artificial ingredients and only minimal processing. Quite aside from the significant difficulties that would be posed in enforcing this rule, a fundamental problem exists by virtue of the fact that the context in which "natural" is used determines its meaning. It is unlikely that consumers expect the same thing from a natural apple as they do from natural ice cream. The proposed rule assumes, without any evidence, that "natural" means the same thing in every context. We should concentrate our resources on more serious consumer protection problems than addressing whether a claim that "milk is a natural [food]" is deceptive.³⁹

In revising its “Green Guides” last year, the FTC again declined to provide a standard for “natural” claims.⁴⁰ The FTC simply stated at that time that it “lacks sufficient evidence on which to base general guidance” for “natural” claims.⁴¹

In the early 1990s, as FDA implemented regulations under the Nutrition Labeling and Education Act, it considered establishing, by rule, a standard definition for “natural” claims for foods.⁴² In seeking public comment on whether to undertake a rulemaking, the FDA acknowledged that defining the term could be a difficult endeavor. Specifically, FDA noted a lack of “scientific agreement about the meaning of the term” and “numerous inconsistencies” and “unanswered questions” in existing definitions “established by other government agencies, other countries, state governments, and industry.”⁴³ FDA also referenced the FTC’s rulemaking effort in the 1980s. FDA noted that “after considerable input from various groups, including scientists, consumers, industry, and regulatory professionals, the [FTC] was unable to establish a definition for ‘natural.’”⁴⁴ Two years later, after receiving public comments, FDA announced that it would not establish a definition, but would continue to follow its informal policy.⁴⁵ The FDA has issued a handful of warning letters over the years based on its policy, but has never sought to take enforcement action based on the policy.⁴⁶

FDA is the expert federal agency tasked with regulating the labeling of foods and most personal care products, and the FTC is the expert federal agency tasked with regulating the advertising of most consumer products. If these two agencies have not succeeded in establishing an enforceable definition of “natural,” a court that follows *Pelayo* and declines to allow enforcement of what will inevitably be a patchwork of varied definitions by consumers and plaintiff’s lawyers appears more than reasonable and justified.

A court will easily be able to limit a decision to dismiss a “natural” case based on the unique regulatory history. There simply is no other term with the same unique history.

IV. CONCLUSION

As of the publication of this article, one court hearing a “natural” case has followed *Pelayo*. In *Balser v. Hain Celestial Group, Inc.*, plaintiffs Alessandra Balser and Ruth Kresha challenged “natural” claims used in the marketing of over 30 Alba Botanica personal care products. The court held as follows:

[I]t is undisputed that “natural” is a vague and ambiguous term. Plaintiffs aver that “natural” means: “existing in or produced by nature; not artificial.” This definition is implausible as applied to the products at issue: shampoos and lotions do not exist in nature, there are no shampoo trees, cosmetics are manufactured. Thus Plaintiffs cannot plausibly allege they were deceived to believe shampoo was “existing or produced by nature.” *Pelayo v. Nestlé USA, Inc.*, 2013 WL 5764644 (C.D. Cal. 2013).⁴⁷

Other courts should follow *Pelayo*, as well. The precedent is available to support future decisions similar to *Pelayo*, and such decisions would help conserve judicial resources where the claim, “natural,” eludes any objective or specific definition when used to describe manufactured and mass produced products. It is simply implausible that “natural” means what it usually means when it is used to describe a mass-produced, manufactured product, and as both the FDA and FTC have acknowledged, it is not clear what the claim might mean to consumers when used for such products. A claim that does not convey any objective, specific meaning cannot form the basis of a false advertising challenge.

ENDNOTES

1. See, e.g., Order, *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH (N.D. Cal. Jan. 7, 2014) (denying class certification where plaintiff failed to show how consumers who purchased products containing cocoa alkalized with a natural ingredient could be distinguished from consumers who purchased products containing cocoa alkalized with an ingredient alleged to be synthetic); Order, *Ries v. Arizona Beverages USA, LLC*, No. 3:10-cv-01139-RS (N.D. Cal. Mar. 28, 2013) (granting summary judgment and decertifying case, finding that that “plaintiffs’ counsel has been dilatory and has failed to prosecute this action adequately”); Order, *Rapcinsky v. Skinnygirl Cocktails LLC*, No. 11-cv-06546 (S.D. N.Y. Jan. 9, 2013) (denying class certification where plaintiff’s purchases were not made in New York and plaintiff did not rely on “natural” claims in making purchases); Order, *Weiner et al. v. Snapplle Beverage Corp.*, No. 1:07-cv-08742 (S.D. N.Y. Jan. 21, 2011) (granting motion to dismiss where plaintiff failed to show that consumers suffered an economic injury by paying a premium for Snapplle beverages).
2. See Order, *In re: Alexia Foods, Inc. Litigation*, No. 4:11-cv-06119-PJH (N.D. Cal. July 10, 2013) (providing preliminary approval to parties’ settlement). ConAgra agreed to provide a \$2.5 million cash fund and up to \$700,000 in vouchers. ConAgra also agreed to remove disodium pyrophosphate from products.
3. See Order, *Trammell v. Barbara's Bakery Inc.*, No. 3:12-cv-02664-CRB (N.D. Cal. Nov. 8, 2013) (granting final approval of parties’ settlement). Barbara’s Bakery agreed to exclude “synthetic ingredients,” as defined in the order, from products marketed as “natural” and certify any products marketed as free of genetically modified organisms with the Non-GMO Project or a similar organization).
4. See Order, *Stephenson v. Neutrogena Corp.*, No. 4:12-cv-00426-PJH (N.D. Cal. Aug. 22, 2013). Neutrogena Corp. agreed to disclose the “percentage of each product that is naturally derived” and revise certain claims about petrochemicals. Other cases that were allowed to proceed over the past year include those involving Frito-Lay snack products, Campbell soups, and Nature Valley granola bars. Courts rejected “primary jurisdiction” and pre-emption arguments and largely allowed plaintiffs to proceed with claims and/or amend allegations. See *In re Frito-Lay North America, Inc. All Natural Litigation*, 2013 WL 4647512 (E.D. N.Y. Aug. 29, 2013); Order, *Rojas v. General Mills, Inc.*, No. 12-5099 (N.D. Cal. Oct. 9, 2013) (involving Nature Valley granola bars); Order, *Bohac v. General Mills, Inc.*, No. 12-5280 (N.D. Cal. Oct. 10, 2013) (same); Order, *Janney v. General Mills, Inc.*, No. 12-3919 (N.D. Cal. Oct. 10, 2013) (same); Order, *Krzykwa et al. v. Campbell Soup Co.*, No. 12-cv-62058 (S.D. Fla. May 24, 2013).
5. *Pelayo v. Nestlé USA, Inc.*, No. CV 13-5213-JFW (AJWx), at *2 (C.D. Cal. Oct. 25, 2013).
6. *Id.* The plaintiff originally challenged three additional products that contained meat or poultry. However, she withdrew allegations as to those products given that the U.S. Department of Agriculture had approved the products’ labels.

7. *Id.* at *3 (citing *Summit Technology, Inc. v. High-Line Medical Instruments Co., Inc.*, 922 F. Supp. 299, 304 (C.D. Cal. 1996); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988); and *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007)).
8. *Id.* at *4.
9. *Id.*
10. *Id.* The court took judicial notice of the Buitoni packaging at issue.
11. *Id.* at *4-5.
12. *Id.* at *5 (internal citation omitted).
13. *Id.*
14. The court noted, as well, that “[t]he reasonable consumer is also aware that ingredients in Buitoni [p]astas, such as sugar, wheat, and skim milk, do not come directly from plants, trees, or livestock.” *Id.* at *5 n.4.
15. NOP, About Us (last modified Nov. 4, 2013), available at <http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateA&navID=WhoWeAreNOPNationalOrganicProgramHome&topNav=&leftNav=NationalOrganicProgram&page=NOPAboutUs&resultType=&acct=nopgeninfo>
16. *Id.*
17. *Pelayo*, No. CV 13-5213-JFW (AJWx), at *5. This finding may be helpful for future defendants to the extent that a “natural” case involves ingredients that are allowed in “organic” products under the NOP program.
18. *See id.* (discussing 21 C.F.R. § 101.22).
19. *See id.*
20. *Pelayo*, No. CV 13-5213-JFW (AJWx), at *5.
21. *Id.* at *6.
22. *Id.* (quoting 75 Fed. Reg. 63552, 63586 (Oct. 15, 2010)). In 2010, the FTC considered defining “natural” in the course of revising its *Green Guides*, which govern environmental marketing claims.
23. *Id.* In addition to finding that *Pelayo* failed to allege any plausible, or widely agreed-upon definition or understanding of the claim “All Natural,” the court found that the claim “is not deceptive in context” given the ingredient list provided on the Buitoni products. The court reasoned that “to the extent there is any ambiguity regarding the definition of ‘All Natural’ with respect to each of the Buitoni [p]astas, it is clarified by the detailed information contained in the ingredient list.” *Id.*

24. *Id.* at 3-4.
25. No. 3:11-CV-0189-H (BGS), at *2 (S.D. Cal. July 30, 2013).
26. *Id.* at *14.
27. *Id.* at *13.
28. *Id.* at *15 (quoting 40 C.F.R. Part 63).
29. *Id.*
30. No. 3:11-CV-01967-H (BGS), at *14-15 (S.D. Cal. July 30, 2013). The court also allowed class certification on a “Nothing Artificial” claim, finding *inter alia*, that “[u]nlike ‘All Natural,’ the representation “has a clearly ascertainable meaning; namely, that the product contains no artificial or synthetic ingredients.” *Id.*
31. *Pelayo*, No. CV 13-5213-JFW (AJWx), at *4.
32. Prior to *Pelayo*, a court hearing a “natural” case was not persuaded by implausibility arguments. *See In re Frito-Lay North America, Inc. All Natural Litigation*, 2013 WL 4647512, *15, n.2 *supra*. That court, however, does not appear to have closely considered the regulatory history of “natural” or a wide range of implausibility cases. It held that the claims at issue in the Froot Loops and Crunch Berries cases “border on fantasy, yielding dismissal as a matter of law.” *Id.* at 16.
33. *See e.g., Cook v. Northern California Collection Serv. Inc.*, 911 F.2d 242, 245 (9th Cir. 1990) (“District courts often resolve whether a statement is puffery when considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)”); *Fisher v. Monster Beverage Corp., et al.*, No. 5:12-cv-02188-VAP-OP (C.D. Cal. Nov. 12, 2013) (granting motion to dismiss with regard to certain allegations in proposed class action against the maker of Monster beverages after finding that claims, “Hydrates Like a Sports Drink” and “Rehydrate,” are non-actionable puffery).
34. 2012 WL 1512106, at *3.
35. *Id.* at *4.
36. *Id.*
37. *Rooney*, 2012 WL 1512106, at *3 (quoting *Williams v. Gerber Products Co.*, 552 F.3d 934, 939 (9th Cir. 2008)); *see also Sugawara*, 2009 WL 1439115, at *3.
38. Termination of Proposed Regulation: Rule on Food Advertising, 48 Fed. Reg. 23270 (May 24, 1983).
39. *Id.* at 23270.
40. Guides for the Use of Environmental Marketing Claims: Adoption of Revised Guides, 77 Fed. Reg. 62122, 62124 (Oct. 11, 2012), *available at* <http://www.ftc.gov/os/fedreg/2012/10/greenguidesfrn.pdf>.

41. *Id.*
42. 56 Fed. Reg. 60421, 60421-22 (Nov. 27, 1991).
43. *Id.* at 60466.
44. *Id.* at 60467.
45. 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993).
46. See, e.g., Warning Letter to Ninth St. Management, Inc. (August 13, 2009) (challenging “All Natural Ingredients” claim for cheese ravioli and lobster ravioli); Warning Letter to Fresh Made, Inc. (Oct. 16, 2007) (challenging “All Natural” claim for Happy Kids Strawberry Farmer’s Cheese and Happy Kids Peach Farmer’s Cheese products); Warning Letter to Hirzel Canning Co. (Aug. 29, 2001) (challenging “All natural” claim for chopped tomatoes).
47. *Balser v. Hain Celestial Group, Inc.*, Case No. CV 13-05604-R, at *2 (Dec. 18, 2013). The court also rejected allegations that “100% vegetarian” claims were deceptive. The Plaintiffs contended “that 100% vegetarian means only from vegetable matter.” *Id.* The court held that the “more common understanding is without animal products, which is how Defendants use the term and Defendants’ labels further clarify the meaning of the phrase.” *Id.*

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ABOUT FDLI

The Food and Drug Law Institute, founded in 1949, is a non-profit organization that provides a marketplace for discussing food and drug law issues through conferences, publications and member interaction. FDLI's scope includes food, drugs, animal drugs, biologics, cosmetics, diagnostics, dietary supplements, medical devices and tobacco. As a not-for-profit 501(c)(3) organization, FDLI does not engage in advocacy activities.

FDLI's Mission is to provide education, training, and publications on food and drug law; act as a liaison to promote networking as a means to develop professional relationships and idea generation; and ensure an open, balanced marketplace of ideas to inform innovative public policy, law, and regulation.

In addition to the Forum, FDLI publishes the quarterly, peer-reviewed Food and Drug Law Journal presenting in-depth scholarly analysis of food and drug law developments; Update magazine, which provides members with concise analytical articles on cutting-edge food and drug issues; the FDLI Monograph Series, an annual six-publication set of practical guides on contemporary food and drug law topics, and numerous comprehensive new books each year.