

## Courts Increasingly Rely on FDA Notice to Stay or Dismiss ECJ Claims

*Swearingen v. Amazon Preservation Partners, Inc.*, No. 13-cv-4402 (N.D. Cal.): In a putative class action alleging claims under California's UCL and CLRA, and breach of implied warranty, based on the allegedly misleading use of the phrase "organic evaporated cane juice" rather than "sugar" in products' ingredients lists, the court granted defendants' motion to stay the ECJ claims and to dismiss the implied warranty claim. First, the court dismissed the breach of implied warranty of merchantability claim without leave to amend, noting that plaintiffs had pleaded only that the goods were misbranded or misrepresented, not that they were unfit for consumption. Second, the court stayed the remaining ECJ claims under the primary jurisdiction doctrine, citing the March 5, 2014 FDA Notice and the numerous recent similar decisions in the Northern District of California. [Order.](#)

*Saubers v. Kashi Co.*, No 3:13-cv-00899 (S.D. Cal.): In a putative class action alleging claims under California's Sherman FDC Law, UCL, FAL, and CLRA, New Jersey's Truth-in-Consumer Contract, Warranty, and Notice Act, and Consumer Fraud Act, and common law unjust enrichment and restitution claims, based on allegations that 75 of defendant's products are misbranded or misleading to the extent they list ECJ as an ingredient rather than sugar, the court granted defendant's motion to dismiss without prejudice under the primary jurisdiction doctrine. As have many other courts, the court cited the FDA's March 5, 2014 Notice indicating that the agency intends to revise its guidance on ECJ, and pointing out that plaintiffs' "claims rely heavily, if not entirely, on the premise that the FDA has concluded that 'evaporated cane juice' is not the common or usual name for any sweetener." The court also cited the numerous similar decisions in the Northern District as support for the dismissal. [Order.](#)

*Gitson v Trader Joe's Co.*, No. 3:13cv1333 (N.D. Cal.): In a putative class action alleging claims under California's UCL, FAL, and CLRA based on claims that defendant's products are misleading and misbranded to the extent they label some products as containing evaporated cane juice, among other claims, the court denied certification for interlocutory appeal, refused to strike plaintiffs' nationwide class allegations, and granted a stay of the ECJ claims based on primary jurisdiction. The court also denied without prejudice defendant's motion to dismiss, and invited defendant to refile once the stay was lifted. First, the court found that plaintiffs' nationwide class allegations should not be stricken at this stage, citing the Ninth Circuit's Mazza decision. The court explained that although Mazza held that plaintiffs could not bring nationwide claims under California's consumer protection statutes, this did not foreclose certifying a California-only class or a consumer class action proceeding under the laws of multiple states. The court also refused to certify for interlocutory appeal its previous decision that plaintiffs had standing to pursue an action based on products they did not purchase. Finally, the court granted a stay of plaintiffs' ECJ claims under the primary jurisdiction doctrine, following numerous other decisions in the district, based on the FDA's March 2014 notice. The court also stayed all other claims in the interim to preserve judicial and party resources. [Order.](#)

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