

## After Another Round of Motions, the Court Dismisses Some Claims and Stays Others

*Thomas v. Costco Wholesale Corp.*, No. 5:12cv2908 (N.D. Cal.): Plaintiff alleged that eight of Costco's Kirkland Signature food products are improperly labeled in violation of state and federal law. After the Court dismissed some of Plaintiff's claims in March, Plaintiff filed an amended complaint adding two new claims: violations of the implied warranty of merchantability and negligent misrepresentation. The Court dismissed both new claims and stayed other claims involving Evaporated Cane Juice ("ECJ") under the primary jurisdiction doctrine. Plaintiff's claim for violation of the implied warranty of merchantability was dismissed because Plaintiff failed to allege that Costco's food products lacked a basic degree of fitness or would be unsafe for consumption. The Court noted that mislabeling of a product is not the sort of "fundamental defect" that the implied warranty of merchantability is intended to protect against. The Court dismissed Plaintiff's negligent misrepresentation claim, finding that Plaintiff failed to allege any affirmative misrepresentations made by Costco, and instead only alleged omissions, which is insufficient. The Court granted Costco's request to stay Plaintiff's claims involving ECJ until the FDA issues its final guidance. [Order](#).

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