

# The Role of Science in Burgeoning Health Litigation: A New Perspective on Food and Beverage False Advertising Claims

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The Role of Science in Burgeoning Health Litigation: A New Perspective on Food and Beverage False Advertising Claims is not intended as legal advice and should not be interpreted as legal advice. We recommend you contact counsel for legal advice about your labeling, advertising and false advertising needs.

# I. Introduction

The number of lawsuits filed in US courts that charge food and beverage suppliers with false advertising has dramatically increased in recent years. Such claims can take a variety of forms, including allegations of misleading pricing, and nonfunctional slack fill, among others. In recent years, a large preponderance of the false advertising claims relating to foods and beverages allege some economic harm to consumers arising from misleading claims that directly or indirectly relate to health. Some such purportedly misleading advertising and labeling are even accused of contributing to negative health consequences. Most companies confronting these suits have employed standard defenses – focusing on technical deficiencies in the initial pleadings or challenges to class certification that threaten to dramatically reduce the value of pursuing the claims. Although few of these false advertising cases proceed to trial, it has not always been because early motion practice has been successful. Indeed, the failure to win dismissal of such cases involving health claims, coupled with the failure to avoid class certification, often results in settlement.<sup>1</sup> The merits are infrequently adjudicated.

A combination of the potential exposure and the uncertainty of litigating matters dominated by issues of nutritional and medical science often drives the traditional approach. Indeed, the risks of litigating the merits appear to be compounded by the pragmatic consideration that the role of diet in health is widely perceived by the public as too complex to understand.<sup>2</sup> Some scholarly work even suggests that any understanding may be skewed toward the unscientific by the role of new media supplanting more traditional, professional sources of information about diet and health.<sup>3</sup> On the other hand, Dr. David Katz, a leading public health expert, succinctly and routinely asserts, “We know what a healthy diet is. Now can we stop arguing about it?”<sup>4</sup> By this assertion, he does not mean to suggest that we can say what “very specific set of rigid principles” have allowed us to identify which diet is best for health; he means that the principles that guide “a more general dietary pattern” are well known, even as they continue to evolve.<sup>5</sup>

This whitepaper embraces the same general view, and encourages food and beverage companies now facing or vulnerable to false advertising and associated health-related claims to consider defending their products on the scientific merits. Doing so will enable the targeted companies to muster more vigorous defenses in courts of law, and respond more vigorously and meaningfully in the court of public opinion as well. Indeed, food and beverage companies should consider preparing far in advance of lawsuits being served, by regularly, truly and freely engaging with the scientific and medical communities just as prudent manufacturing companies engage with safety engineers.

## II. The Current Landscape

The two primary types of health claims targeting food and beverage companies in the form of false advertising lawsuits are: (1) those attacking products labeled or marketed as “natural” and (2) those attacking claims of a product’s purported health benefits.<sup>6</sup>

Use of the “natural” label has been an invitation for litigation because the Food and Drug Administration (FDA) has repeatedly declined requests to define the term, despite pressure to do so from consumer and industry groups and in the face of the influx of false advertising litigation over use of the term.<sup>7</sup> Most “natural” cases involve food and beverages labeled as “natural” that contain genetically modified organisms (GMOs), and various synthetic or artificial ingredients, or highly processed ingredients such as the various formulations of high fructose corn syrup (HFCS).<sup>8</sup>

Other actions are based on claims that defendants deceptively market their products on false or misleading health claims.<sup>9</sup> For example, some makers of yogurt products have faced actions brought by the Federal Trade Commission (FTC) over claims related to purported benefits to immune systems and “irregularity.”<sup>10</sup> Other companies have received agency warning letters over claims as seemingly innocuous as their products being “healthy and tasty, convenient and wholesome.”<sup>11</sup> Not surprisingly, these FTC and FDA actions and warnings have spurred a number of class action lawsuits against numerous food companies, even when not subject to regulatory attention.<sup>12</sup>

Commercial false advertising lawsuits will continue their explosive trend given the Supreme Court’s recent decisions in *Pom Wonderful LLC v. The Coca-Cola Company* and *Lexmark International Inc. v. Static Control Components, Inc.*<sup>13</sup> The *Pom Wonderful* decision held that the *Federal Food, Drug and Cosmetic Act* does not prevent *Lanham Act* false advertising lawsuits premised upon product labels even if the labels comply with FDA regulations. *Lexmark* clarified that a flexible, expansive class of plaintiffs may assert false advertising claims under the *Lanham Act*. Although the majority of the new wave of food cases assert claims under state consumer protection statutes rather than the *Lanham Act* (because consumers do not have standing to sue under the *Lanham Act*), the significance of these decisions to the entire realm of false advertising practice is uncontroversial.

More than 65% of all US consumer food and beverage lawsuits are being filed in California, which is considered to have particularly plaintiff-friendly laws and health conscious communities favorably inclined to apply those laws to questionable health claims. A particular concentration of these food cases have been filed in the Northern District of California, which has consequently become known as the “Food Court.”<sup>14</sup> These actions most frequently assert claims under California’s Unfair Competition Law (UCL)<sup>15</sup>, False Advertising Law (FAL)<sup>16</sup> and Consumer Legal Remedies Act (CLRA)<sup>17</sup>.

As noted, most food labeling and marketing claims have survived motions to dismiss, leading to settlements, prolonged discovery or both.

### III. Early Defense Tactics

Food and beverage companies have commonly defended attacks against the promotional or advertising claims through traditional tactics: attacking pleading deficiencies, asserting that the allegations fail to state a plausible claim pursuant to Federal Rules of Civil Procedure 8 and 12(b) (6), or pursuant to Rule 9 if the claims effectively sound in fraud and are not pleaded with the requisite specificity.

Another tactic includes asserting the primary jurisdiction of US Executive Branch agencies, particularly the FDA and FTC, over the claims, arguing that courts should defer decision-making to the agency with primary regulatory authority.<sup>18</sup> Some natural claims—such as those alleging that foods containing GMO ingredients are falsely labeled as “natural”—have been occasionally dismissed on primary jurisdiction grounds.<sup>19</sup> Federal preemption arguments are another means of early attack on food and marketing claims that have had some success.<sup>20</sup> Perhaps because of the “hit or miss” nature of these approaches, or perhaps due to their technical, legalistic tone, one major drawback to this traditional strategy is that it is sometimes perceived as an effort to dodge the merits, leaving the fundamental claim unresolved and fomenting consumer doubts and harm to brand credibility.<sup>21</sup>

## IV. A Proposed New Approach – Embrace the Science as Early as Possible

In defending against claims tied to nutrition and medical science, food and beverage companies should consider addressing the merits at the outset as part of a defense strategy to best serve them both in courts of law and public opinion.

The science associated with health claims is often considered static. Food and beverage companies should resist the temptation to embrace conventional wisdom that portrays their products as healthier than those of the competition, lest they be ready to defend themselves in litigation. The dairy industry is one example. In early 2000, cholesterol and fat were high on the health community's list of public enemies.<sup>22</sup> Those outside the dairy industry seized on concerns about cholesterol and fat to champion their products as healthier alternatives, and drove dairy toward low and no-fat options.<sup>23</sup>

The onset of the South Beach Diet, popularized in 2003, illustrated how the conventional wisdom shifted. Carbohydrate-rich foods, once viewed as healthier alternatives because of their low-fat content, were now to be avoided. Indeed, some seriously questioned whether carbohydrates – as opposed to fats and cholesterol – were the real cause of heart disease, weight gain and obesity.<sup>24</sup> Consistent with this shift in the conventional wisdom, the *Washington Post* recently ran an above the fold, front page article observing that “research published in recent years indicates that . . . [m]illions might have been better off had they stuck with whole milk” instead of low-fat or non-fat milk.<sup>25</sup>

The point here is not to take sides in the decades-long debates about the healthiest dietary proportions of the macronutrients fat, protein and carbohydrate, whether it is appropriate even to lump together each variation of these macronutrients – think saturated trans fats versus polyunsaturated varieties – or to assess the significance of micronutrients, GMOs, artificial sweeteners, or any of the innumerable other aspects of the modern diet. Rather, we seek to underscore the importance of food and beverage companies simply keeping current regarding the evolving state of the science of nutrition as it relates to their products. Companies should be particularly wary of embracing a static understanding of nutrition science and health, for it may lead to continued advertising of a product's attributes as a matter of established scientific fact when the purported “fact” is a matter of a new or perhaps even an ongoing debate in the scientific community.<sup>26</sup>

We also encourage food and beverage companies to resist the temptation to rely on the same, and arguably, insular cadre of industry-captive scientists year after year. The corn refining industry, for instance, received some embarrassing press attention when it was reported that it had spent, in a relatively brief period, an excess of US\$10 million on research under the direction of one scientist while he was also reportedly receiving US\$500,000 per year in separate consulting fees.<sup>27</sup> There may be instances in which industry needs hired guns – but simply the perception of industry-captive scientists being those hired guns may be damaging – both in the courtroom and the broader forum of public opinion. Working cooperatively with independent researchers, clinicians, and public health experts may sometimes inhibit a company's ability to make health claims likely to boost sales. But if long-term brand protection, public trust and, indeed, public responsibility are core business principles, fostering relationships with independent scientists, and even scientists with a contrarian tilt, is, perhaps, a more responsible way to advance a company's business principles while also insulating it from legal attacks from plaintiffs' lawyers or competitors.

Often, plaintiffs' counsel have engaged expert consultants to develop theories supporting their claims, or at least relied on publicly available research to support the theories they intend to pursue. As a result, plaintiffs are more and more frequently directly citing scientific support for their claims in their initial pleadings, even using them as tools to prompt pre-filing settlement discussions. Of course, defense counsel often have the distinct advantage of far greater access to the nutrition and medical science relevant to the claims – their clients. Food and beverage companies should consider exploiting that advantage as a central part of any defense, and potentially when they may even discourage a burgeoning controversy from maturing into a lawsuit.

When presented with a complaint that is ostensibly supported by myriad citations to scientific publications, defendants should embrace the opportunity to address the science—using it to expose flaws in the plaintiffs' claims or at least cabin them. In a positive development for industry, some courts have demonstrated a willingness and capability to assess whether referenced scientific articles actually support the allegations at issue on scientifically based motions to dismiss.

The case of *McCrary v. Elations Co., LLC*, No. 13-0242, 2013 U.S. Dist. LEXIS 173592, at \*22-24 (C.D. Cal. July 12, 2013), provides an example of this strategy. *McCrary* is one of the rare cases in which a defendant was afforded, took, and succeeded in converting on an opportunity to attack the science underlying a complaint in a motion to dismiss. The defendant convinced the court that despite the many citations in purported support of false advertising claims, the plaintiff lacked genuine scientific evidence to advance those claims past the pleading stage.<sup>28</sup> In *McCrary*, the plaintiff alleged defendant's dietary supplement beverage was falsely advertised as promoting "healthier joints" and improving "joint comfort" and "joint flexibility" in light of scientific studies demonstrating that the ingredients in the defendant's product were ineffective in treating osteoarthritis. The court dismissed the complaint without leave to amend in part because the studies cited by the plaintiff did "not plausibly demonstrate the falsity of those claims." *Id.* at \*23. More specifically, the court rejected efforts by the plaintiff "to link . . . scientific studies concerning osteoarthritis with the actual marketing and advertising claims" that were of a far more general nature. *Id.*<sup>29</sup>

As soon as a complaint is served, an engaged consultant, particularly one well versed in the scientific issues presented, can quickly help defense counsel identify weaknesses in the claims from a scientific viewpoint and begin assisting with the crafting of a defense. Moreover, being in contact with relevant experts will put a defendant in an even better position to aggressively defend against these claims, even as early as a motion to dismiss. Equally important, by staying up-to-date on issues, a defendant can also identify the key scientists who may even be on the opposition side of the relevant issue and still be able to retain those researchers as a consulting expert allowing the defense to better anticipate contrary positions while simultaneously depriving its opponent of that expert's services.

As litigation proceeds, consulting experts can help counsel develop claims or defenses based on the scientific issues presented. Engaged as consultants, discussions with these experts are protected from discovery as attorney-work product, an advantage that is absent should counsel wait to strategize regarding the scientific issues presented with testifying experts. Along those lines, relationships with consulting experts can help counsel assess whether that expert would later make a valuable testifying expert. Alternatively, consulting experts can often be an invaluable resource for identifying potential testifying experts with the necessary scientific expertise in the areas at issue.

## V. Conclusion

By embracing the objective science of nutrition from an early stand point (i.e., before litigation commences), food and beverage companies will not only protect their brand equity, but also help insulate themselves from litigation and regulatory intervention down the road. While this approach may require more upfront research costs and/or greater lead time to the grocery store shelf, by following objective science, food and beverage companies will be acting more responsibly, which may enhance their reputation with consumers, as well as limiting their legal liability and their exposure to regulatory intervention. In short, food and beverage companies doing business in the US should appreciate the important role of science-based research and scientific experts in today's burgeoning food and beverage litigation landscape before US courts.

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## Endnotes

- 1 Several high-profile defendants have chosen to settle false advertising class actions for millions of dollars. Notable settlements include: *Howerton v. Cargill, Inc.*, No. 13-00336 LEK-BMK, 2014 U.S. Dist. LEXIS 165967 (D. Hawai'i Nov. 26, 2014) (US\$6.1 million settlement of four class action lawsuits alleging that Cargill misled shoppers by marketing its Truvia products as "natural," when the products are actually largely synthetic and chemically-produced); *Astiana v. Kashi Co.*, No. 11-CV-1967-H (BGS), 2014 U.S. Dist. LEXIS 127624 (S.D. Cal. Sept. 2, 2014) (US\$5 million settlement of class action lawsuit accusing Kashi of falsely advertising Kashi products as "all natural" or with "nothing artificial" when they, in fact, contained ingredients or were manufactured by processes a reasonable consumer would consider unnatural and synthetic); *Larsen v. Trader Joe's Co.*, No. 11-cv-05188-WHO, 2014 U.S. Dist. LEXIS 9558 (N.D. Cal. Jul. 11, 2014) (approving US\$3.375 million class action settlement of purported falsely and misleadingly labeled "All Natural" or "100% Natural" products that allegedly contained synthetic ingredients); *Gemelas v. The Dannon Co., Inc.*, No. 1:08-cv-00236 (N.D. Ohio Sept. 18, 2009) (No. 38) (stipulated US\$35 million settlement of class action lawsuit accusing Dannon of falsely marketing and advertising the purported health benefits of its yogurt products).
- 2 See, e.g., Jim Windolf, "[Why Everything is Bad for You](#)," *NY Times*, Sep. 22, 2015, at D6.
- 3 See generally, e.g., Deborah Lupton, *Health promotion in the digital era: a critical commentary*, *Health Promot. Int.*, vol. 30 (1): pp. 174-183 (2015); Jina H. Yoo and Junghyun Kim, *Obesity in the New Media: A Content Analysis of Obesity Videos on YouTube*, *Health Comm'n*, vol. 27 (1): pp. 86-97 (2012); Susan T. Borra and Ann Bouchoux, *Effects of Science and the Media on Consumer Perceptions about Dietary Sugars*, *J. Nutr.* vol. 139: pp. 1214S–1218S (2009).
- 4 See David Katz on [We Know What a Healthy Diet Is](#).
- 5 D.L. Katz and S. Meller, "Can We Say What Diet Is Best for Health?," *Annu. Rev. Public Health*, vol. 35: pp.83-103, pp. 93-94 (2014).
- 6 See e.g., The Food and Drug Law Institute's Food and Drug Policy Forum, A Series of Reflections on "Food Fight: An Examination of Recent Trends in Food Litigation and Where We Go From Here" (April 3, 2015); Edgeworth Economics, [Trends in Food Labeling Class Action Litigation](#) (2013).
- 7 In a much anticipated letter response issued on January 6, 2014 to various courts seeking the FDA's guidance on the "natural" issue, the FDA officially declined to allocate its resources "to make a determination at this time regarding whether and under what circumstances food products containing ingredients produced using genetically engineered ingredients may be labeled 'natural.'" [Letter from Leslie Kux](#) (PDF), Assistant Commissioner for Policy Food and Drug Administration, to Judges Gonzalez Rogers, White, and McNulty, Jan. 6, 2014 at p. 3.
- 8 See, e.g., *Eggnatz v. The Kellogg Co.*, No. 12-cv-21678 (S.D. Fla.) (Class action in which Kellogg Co. paid approximately US\$4 million to resolve claims that it falsely labeled products containing GMOs as "natural"); *Rojas v. General Mills Inc.*, No. 3:12-cv-05099 (N.D. Cal.); *Bohac v. General Mills Inc.*, No. 3:12-cv-05280 (N.D. Cal.); and *Janney v. General Mills, Inc.*, No. 3:12-cv-03919 (N.D. Cal.); and *Van Atta v. General Mills Inc.*, No. 1:12-cv-02815 (D. Col.) (class actions settled by General Mills resolving claims that General Mills falsely advertised its Nature Valley products as "natural" despite containing HFCS and high maltose corn syrup, maltodextrin, and rice maltodextrin).
- 9 See, e.g., *Cabral v. Supple LLC*, No. 5:12-CV-00085 (C.D. Cal.) (class action asserting claims under California UCL, FAL, and CLRA based on claims that defendant deceptively markets its nutritional beverage as effective at treating joint pain when they are not); *Zakaria v. Gerber Products Co.*, No. 2:15-cv-00200 (C.D. Cal.) (action alleging violations of California's UCL, FAL, and CLRA based on marketing baby food products as helping to prevent infants from developing allergies); and *Torrent v. Yakult U.S.A., Inc.*, No. 8:15-cv-00124 (C.D. Cal.) (putative class action in which plaintiff alleges that defendant violated California's UCL by claiming that its probiotic beverages are beneficial to digestive and immune system health despite purported scientific evidence to the contrary).
- 10 See FTC's Dec. 15, 2010 press release: [Dannon Agrees to Drop Exaggerated Health Claims for Activia Yogurt and DanActive Dairy Drink](#).
- 11 See FDA's March 17, 2015 [warning letter to Kind, LLC](#), the maker of Kind bars, alleging that the bars are misbranded, *inter alia*, as "healthy" because they contain too much saturated fat.
- 12 See, e.g., *In Re: Whole Foods Market Inc. Greek Yogurt Marketing and Sales Practices Litigation*, MDL No. 2588 (W.D. Tex.) (putative class action claiming that Whole Foods misrepresented the sugar content of yogurt); *In re: Kind LLC "All Natural" Litigation*, MDL number 2645 (S.D.N.Y.) (putative class action alleging Kind misrepresented its products as healthy and natural); *Moran v. Good Health Natural Products, Inc.*, No. BC588986 (Cal. Super. Ct.) (putative class action alleging that products were misrepresented as "healthy" and "natural"); *Workman v. Plum Inc., et al.*, No. 3:15-cv-02568-JCS (N.D. Cal.) (putative class action alleging the baby food products were misrepresented as being "healthy" when, in fact, they largely contain sugary apple juice and apple puree).
- 13 *Pom Wonderful LLC v. The Coca-Cola Company*, 134 S. Ct. 2228 (2014); *Lexmark International Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). Notably, unlike the class action lawsuits already discussed, the Lanham Act (15 U.S.C. § 1125(a)) provides a vehicle for a business competitor to file suit for false advertising.

- 14 See, Anthony J. Ascombe and Mary Beth Buckley, "[Jury Still Out on the 'Food Court'](#)" *Bloomberg Law* (June 28, 2013) and *Edgeworth Economics*, "[Trends in Food Labeling Class Action Litigation](#)" (2013).
- 15 Cal. Bus. & Prof. Code §§ 17200 *et seq.*
- 16 Cal. Bus. & Prof. Code §§ 17500 *et seq.*
- 17 Cal. Civ. Code §§ 1750 *et seq.*
- 18 Notably, this tactic has seen some success with regard to lawsuits related to claims that labeling sugar as "evaporated cane juice" is misleading. See, e.g., *Swearingen v. Late July Snacks*, No. 3:13-cv-04324 (N.D. Cal.) (issuing a five-month stay); *Avila v. Redwood Hill Farm and Creamery Inc.*, No. 5:13-cv-00335 (N.D. Cal.) (staying putative class action regarding defendant's yogurt products); *Gitson v. Clover Stornetta Farms Inc.*, No. 3:13-cv-01517 (N.D. Cal.) (staying for six months putative class action regarding defendant's yogurt products).
- 19 See *Cox v. Gruma Corp.*, No. 12-06502 (N.D. Cal.), *Barnes v. Campbell Soup Co.*, No. 12-05185 (N.D. Cal.) and *In re General Mills, Inc. Kix Cereal Litigation*, No. 12-00249 (D.N.J.). The *Cox* and *Barnes* courts stayed the cases pending FDA's response to its referrals; the *Kix* court administratively terminated the case until FDA responded to the "natural" referral.
- 20 See, e.g., *Gitson v. Trader Joe's Co.*, No. 3:13-cv-01333 (N.D. Cal.); *Gustavson v. Wrigley Sales Company*, No. 12-cv-1861 LHK (N.D. Cal.); *Lam v. General Mills, Inc.*, 859 F. Supp. 2d 1097, 1101-1104 (N.D. Cal. 2012).
- 21 See a [parody ad put out by an organic trade group](#) in which the fictional "False Advertising Industry" highlights the issue that companies are labeling anything "natural" due to its lack of definition; Peter Whoriskey, "[What is 'natural food?' Even the people who make it aren't sure.](#)" *WASHINGTON POST*, March 6, 2015, (noting that confusion over the meaning of "natural" has been left to the courts and has fomented the current litigious environment); Annie Wu, "[What does a 'Natural' Label Really Mean? Lawsuits Claim False Advertising.](#)" *EPOCH TIMES*, June 22, 2015.
- 22 Gary Taubes, "[What if It's All Been a Big Fat Lie?](#)," *NY TIMES*, July 7, 2002, (Magazine); Bryan Walsh, "Ending the War on Fat," *TIME*, June 23, 2014, at p. 28.
- 23 See e.g., Jill Carroll, "[The Government's Food Pyramid Correlates to Obesity, Critics Say.](#)" *WALL STREET JOURNAL* (Subscription Needed), June 13, 2002, (noting that a criticism of the government's dietary guidelines was that "the government's focus on reducing calories from fat has helped propel sales of low-fat foods that still pack a lot of calories").
- 24 See Nina Teicholz, "[The scientific report guiding the US dietary guidelines: is it scientific?](#)," vol. 351 *BMJ* p. h: 4962 (Sep. 23, 2015); David Ludwig et al., "[Effects of Dietary Composition on Energy Expenditure During Weight-Loss Maintenance.](#)" vol. 307 *J. AM. MED. ASS'N.* p. 2627 (June 27, 2012); Dariush Mozafarian, "[Diverging global trends in heart disease and type 2 diabetes: the role of carbohydrates and saturated fats.](#)" vol. 3 *The LANCET DIABETES & ENDOCRINOLOGY* p. 586 (August 2015); see also, Gary Taubes, "[What Really Makes Us Fat.](#)" *NY TIMES* June 30, 2012; Marni Jameson, "[A reversal on carbs.](#)" *LA TIMES* Dec. 20, 2010.
- 25 Peter Whoriskey, "[For decades, the government steered millions away from whole milk. Was that wrong?](#)" *WASHINGTON POST*, Oct. 6, 2015.
- 26 *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 159-61 (7th Cir. 1977) (explaining that "impossible though it may be to determine whether consuming eggs in fact increases the risk of heart and circulatory disease," because experts had formed this as a hypothesis – disputed by other experts – a trade association's "advertising and public relations campaign" to convey the message that eggs are harmless was properly deemed false advertising).
- 27 Eric Lipton, "[Rival Industries Sweet-Talk the Public.](#)" *NY TIMES*, Feb. 11, 2014, at B1; Tom Hamburger, "[Soft Lobbying war between sugar, corn syrup shows new tactics in Washington influence.](#)" *WASHINGTON POST*, Feb. 12, 2014.
- 28 Notably, the defendant in *McCrary* was able to directly attack the science at such an early stage because the claims alleged were explicitly premised on numerous scientific studies cited in the operative complaint.
- 29 See also *Brown v. GNC Corp. (In re GNC Corp., Triflex Prods. Mktg. & Sales Practices Litig. (No. II))*, 789 F.3d 505, 515 (4th Cir. 2015) (finding that plaintiffs failed to state a plausible claim for relief because the numerous peer-reviewed published studies presented by plaintiffs were "equivocal" and did not demonstrate that defendant's representations regarding the health benefits of their joint health dietary supplements were false); *Kwan v. SanMedica Int'l, LLC*, No. 14-cv-03287-MEJ, 2015 U.S. Dist. LEXIS 22911 (N.D. Cal. Feb. 25, 2015) (granting motion to dismiss claims because plaintiff could not point to affirmative scientific evidence demonstrating the falsity of defendant's marketing claims that its product increased human growth hormone levels).



