



“Sugar” and “Natural” Food Label Claims and Litigation – What’s Next?

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Hot Topic: Sugar Class Actions

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The Backdrop

- 71.6% of American adults (age 20 and over) are overweight
- 39.8% of American adults (age 20 and over) are obese
- More than 100 million adults are diabetic or pre-diabetic
- That number will reach 50% soon
- <https://www.cdc.gov/nchs/fastats/obesity-overweight.html>
<https://www.cdc.gov/media/releases/2017/p0718-diabetes-report.html>

The Role of Sugar

- High sugar consumption links with weight gain, type-2 diabetes, and cardiovascular disease
- What's high?
- The American Heart Ass'n recommends a limit of 6 tsp of added sugar per day for adult women and children, and 9 for men
- One typical 12 oz. can of soda has approx. 7 tsp of added sugar and a 20 oz. bottle has approx. 16 tsp



Target: Misleading Health Halos for Food High in Sugar

- Trumpet “healthy,” “nutritious,” or “good for you,” when high in added sugars
- Imply no or low sugar, e.g., “no high fructose corn syrup,” or “no turbinado sugar,” or “light” when only slight reduction
- Fortification of Junk Foods



Jamba Juice



- Sued in 8/2018 for deceptive marketing of smoothies
- According to its 10-K Report, JJ's business strategy is "to position [itself] as a leading global health and wellness, lifestyle brand . . . to meet the needs of today's increasingly *health-conscious . . . consumer.*"
- Claims made from "whole fruits and veggies"
- Are "good for you," "nutritious," and "healthy"

Marketed vs. True Profile

Caribbean Passion

**Whole mango, strawberry,
peach, orange passion fruit**

**Passion Fruit-Mango Juice
Blend, which is made of pear
juice and white grape juice,
and orange sherbet**

**There is no whole passion
fruit, mango or orange**

**Healthy, nutritious, and good for
you**

**95 grams, or approx. 23 tsp of
sugar, in a large (with upsell)**



jambajuice • Follow

jambajuice 🥰🥰🥰 This lil guy's mama gets it: Blending is better! There's only goodness in this cup #iJamba

toniluciano Sooo cute!!!

rashin_saghafi @roza.saghafi

chloe_waitforit @showtimetnb

jamie.allen70509 having his smoothies#Goodstuff

mariana_fonsec 🥰🥰🥰🥰

ohhsandoval 🥰🥰🥰🥰

zar_che @bay_toe84

miyalxve Adorable!!

kristinrandolph @kaitopp



1,949 likes

JULY 15, 2017

Add a comment...



- “Kids deserve the best. We blend it for them. Whole fruits and veggies give them real nutrition.”
- “Drink your greens”
- One on-line ad reposted a news article touting the benefits of blending whole fruits and veggies as opposed to smoothies blending fruit juices



Query This Ad...

- “With summer around the corner, hydrate your kids with....”
- BA has 36 grams of sugar in a 16 oz. bottle
- Or 9 tsp



BODYARMOR

June 17, 2017 · 🌐

With summer around the corner, hydrate your kids with BODYARMOR. Read more about tips for outdoor activities here:

<http://bit.ly/2ra0bPC> #Switch2BODYARMOR



THESTIR.CAFEMOM.COM

6 Reasons Your Kid Should Play Outside, According to Science

In decades past, the simple joys of playing outside were something most kids took for granted. But between increasingly busy extracurricular...



Like



Comment



Share

Naked Juice

- Settlement of EDNY complaint
- Manufactured by PepsiCo, Naked Juice labels emphasized high profile ingredients over predominant ingredients
- Allegation: Gave the false impression that, for example, kale blazer was as nutritious as pressed kale
- Contained 34 g of sugar (8+ teaspoons)
- Commendable effort by PepsiCo



Target Ads



New Label



Remedy of Transparent Labeling

Reformulation (not part of settlement)

- And now we have: Half Naked

HALF NAKED : 50% LESS SUGAR, 100% JUICE

LIVELY GREENS





Not Just Drinks - Cheerios Protein

- Litigation in NDCal settled in 2018
- Cheerios Protein effectively marketed as all the goodness of Cheerios with the benefit of more protein
- But has only a smidgen more protein and 16x or 17x the added sugar
 - 33% sugar by weight
 - 66% of added sugar cap per day for women per AHA guidelines – not taking into account “overpour” averages

Settlement Cheerios Protein

New label will amend red dot to include only the protein from the cereal itself and not include the protein from milk

Will highlight the greater sugar content by dramatically enlarged the text “sweetened whole grain oat cereal” on FOP

Fortification of Junk Food: Forbidden

- FDA has a jelly bean rule – official policy against fortification of junk food (21 CFR § 104.20)
- Can't claim health benefits or support a relative claim - "more," "fortified," etc. - by fortifying high sugar products with vitamins or nutrients (§101.54(e)(1) & §101.65(d)(2))
- Felled vitaminwater marketing – "keeps you healthy as a horse" - and Coke Plus (*Ackerman v. Coca-Cola*, 2010 WL 2925955 (EDNY July 21, 2010))

GLACÉAU
vitaminwater
nutrient enhanced water beverage

defense

raspberry-apple (c-zinc)

if you've had to use sick days because you've actually been sick then you're seriously missing out my friends. see, the trick is to stay healthy and use sick days to just um, not go in. and the combination of zinc and fortifying vitamins can help out with that keep you healthy as a horse so drink up.

remember, don't overdo it on the coughing and sniffing (big rookie mistake). just stick with the ever elusive "24-hour bug." the symptoms are vague and people will actually encourage you to stay home.

vitamins + water = all you need

one sip, swig or gulp may result in boycott of other beverages.

made from scratch for glacéau
whitestone, ny 11357
877-GLACEAU www.vitaminwater.com
bottle design and label: TM and ©2005

FL OZ • 591 mL

Praxis v. Coca-Cola

Other Forms of Deceptive Marketing



- Still awaiting ruling on MTD on a complaint filed almost 2 years ago
- Claims based on marketing writ large
 - PR appearances by corporate executives
 - Undisclosed corporate funding of scientists who diminished role of sugar drinks in diabetes and obesity
 - Undisclosed funding of bloggers who equated snacking of mini-Coke with a bag of almonds

ABA v. San Francisco Regulatory Litigation

- Passed in June 2015, the San Francisco Ordinance required a 20% health warning on large SSB ads (billboards, walls).
- In 1/19, the 9th Circuit found that the goals of the SSB ordinance could be achieved by warnings of a smaller size and accordingly, that a warning requirement occupying 20% of the billboard was not justified when balanced against the likely burden it would have on protected speech.



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KERRY

Leading to Better

Clean Labeling – Industry Insights

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Kerry Taste & Nutrition
FDLI, Washington, DC
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Delighting and nourishing
consumers across the
globe with products
people enjoy and feel
better about.

Our Vision

To be the leader in taste and nutrition for the global food, beverage and pharmaceutical industries, creating sustainable value for our customers, employees, environment, community and shareholders.

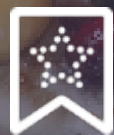
Our Mission

To help delight and nourish consumers across the globe.

Our Values



Commitment



Excellence



Teamwork



Value Creation



Entrepreneurship

We Are Kerry

The Taste And Nutrition Company

Our heritage, knowledge and expertise enable us to deliver better taste, health and well-being globally.



Food & Beverage
Heritage



Insights &
Innovation



Science &
Technology



Applications &
Culinary Excellence



Unmatched Taste &
Nutrition Solutions



Clean Label is Getting a lot of Attention

91%

of U.S. consumers believe food and beverage options with recognizable ingredients are healthier.

*Innova 2017

84% of Americans are seeking more natural, less processed foods.

*Mintel 2017



"We draw a line when it comes to hydrogenated fats and artificial colors, flavors, preservatives and sweeteners." – Whole Foods

53%

of consumers say the exclusion of undesirable ingredients is more important than the inclusion of beneficial ingredients.

*Nielsen Clean Label 2017

Additive and artificial free products have grown 8% in the last year.

*Nielsen Q1 2017

59% equate food with fewer ingredients as being "more healthful."

*Mintel 2017

39%

of U.S. consumers say they would switch from the brands they currently buy to others that provide clearer, more accurate product information.

*Label Insights 2017

One in 10 new products launched last year in the United States had an "organic" claim.

*Mintel 2017



"100% of our food is 100% clean. That means no artificial preservatives, sweeteners, flavors and no colors from artificial sources." – Panera

Kerry's Proprietary Research | Clean Label

702
Consumers
Surveyed

Kerry surveyed **702 American consumers** in May 2017 to determine their preferences and opinions when it comes to Clean Label food and beverages.

Ingredient-
Conscious
Consumers

A blend of prompted quantitative and projective/ qualitative techniques were used to explore the topic of Clean Label.

Actionable
unacceptable
ingredients list

The respondents were primary grocery shoppers who were **'ingredient-conscious'**; i.e. paid attention to the product label and considered ingredients while grocery shopping.

Demographic
Breakouts

The research considered specific demographic breaks: gender, age, lifestage & income.

Our objectives were to estimate the consumer definition of Clean Label.

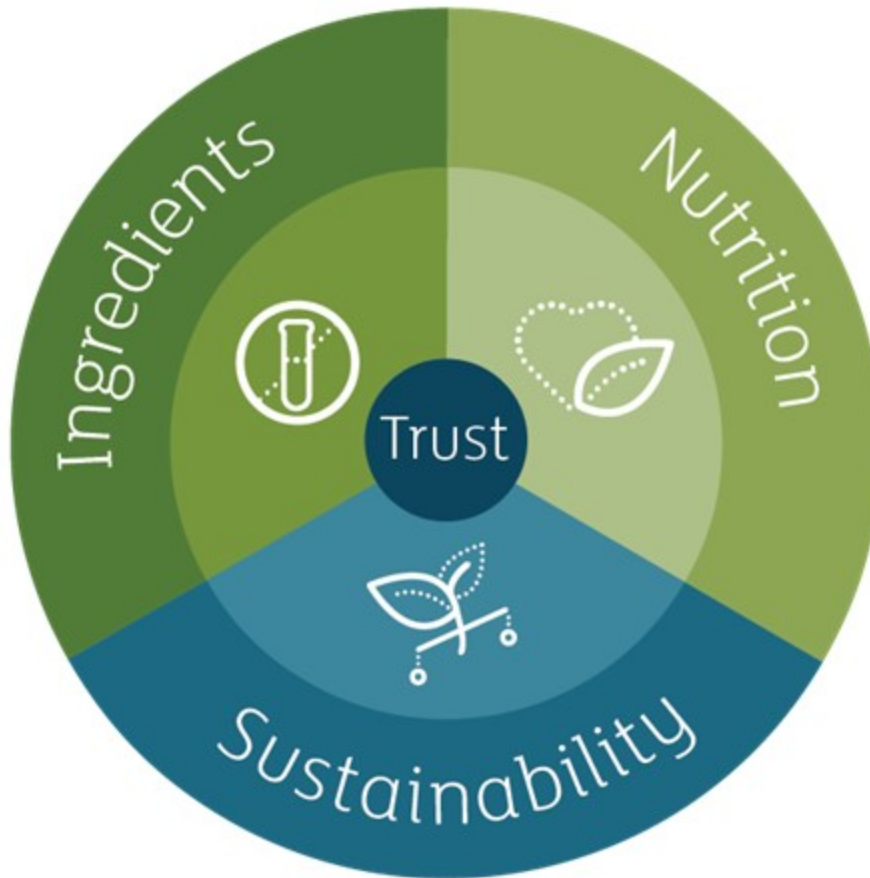
The research explored the following areas:

1. Understanding and associations with Clean Label
2. Barriers and triggers to Clean Label acceptance
3. Ingredient acceptance and rejection, within specific categories (unexplored by the industry, Kerry has proprietary findings and insights)

Source: Kerry Clean Label Study 2017

Clean Label Definition

Kerry research delivers clarity about what consumers want from food.



Ingredients

~40% of Consumer Perception

- Free-from artificial flavors & colors
- No-No lists
- Recipe-like ingredient lists

Nutrition

~40% of Consumer Perception

- Removal of negatives (e.g., sugar)
- Addition of positives (e.g., protein)

Sustainability

~20% of Consumer Perception

- Organic, Non-GMO
- Ethical production & business practices
- Reduction in waste & packaging

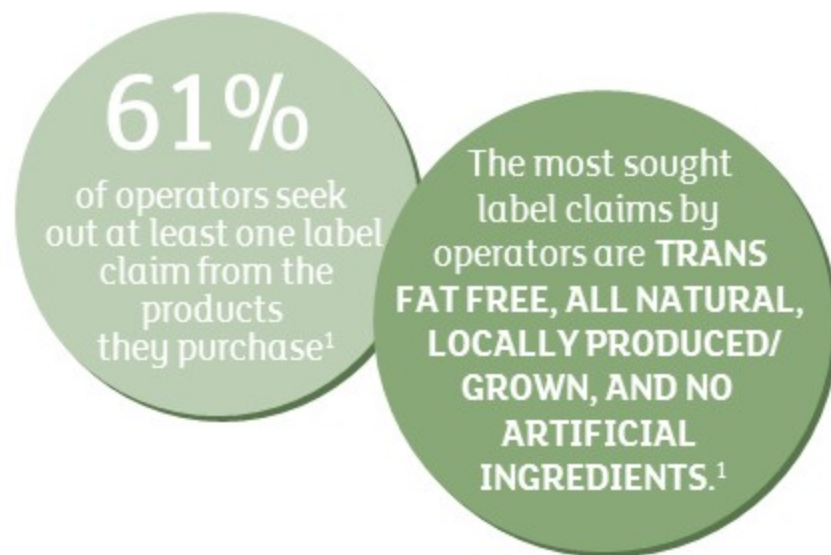
Source: Kerry Clean Label Study 2017

Claims are Strong Signifiers of “Clean Label”

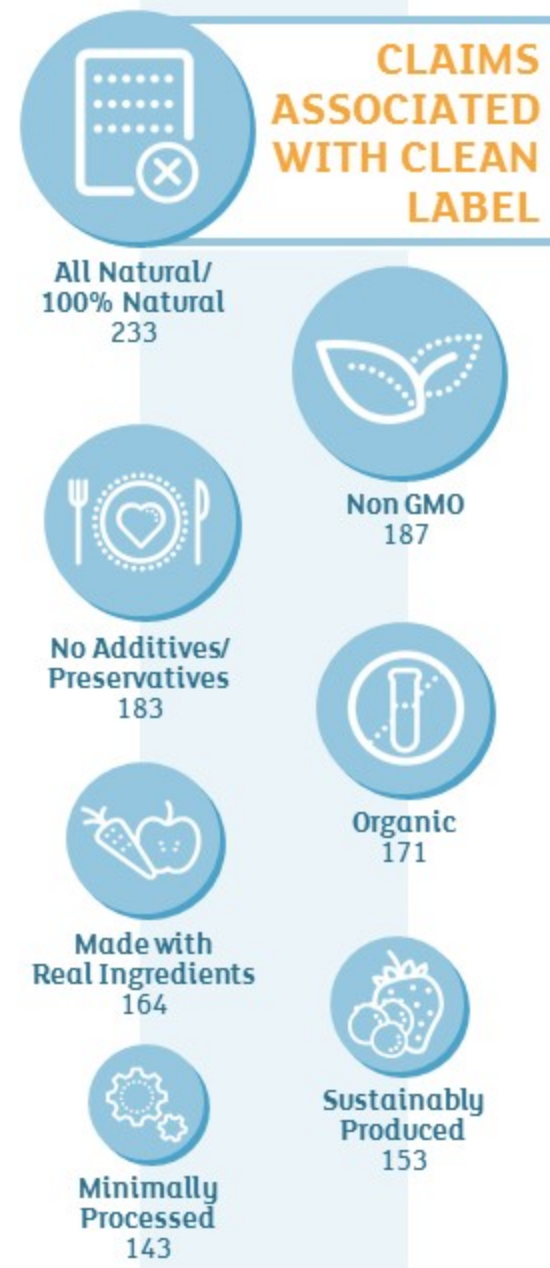
Consumers are inundated daily by information on what they should & shouldn't eat. Claims & certifications play an important role to communicate with consumers.

Clean Label sets the stage for a 'Good Food Future', so consumers can trust their food & beverages.

'All Natural/100% natural' continue to be the strongest indicator, non GMO, no additives/ preservatives, organic, and made with real ingredients also boost a product's Clean position for consumers.



Source: Kerry Clean Label Study 2017; ¹Datassential Pulse 2015



Clean Label is Important in Both Worlds



VS.



Millennials

Boomers and Seniors

84%	willing to pay more for natural foods and drinks	50%
82%	believe Organic/Natural foods are more premium	64%
82%	consider themselves knowledgeable of healthy food	72%
56%	shop at natural grocery stores (Whole Foods, Trader Joe's, etc.)	11%

Source: Kerry Clean Label Study 2017

Clean Label Challenges for Industry

- Highly consumer and customer driven!
 - Consumer and food and beverage manufacturers desire for “friendly,” “non-chemical-named,” and more “natural-sourced” ingredients
 - Quest for transparency and simplicity
 - Halo effect of clean labeling
- Taste, Pricing, Availability
- No U.S. regulatory framework for “clean” labeling - How do we talk about it in a level playing field?
 - Claims & Aligned Definitions?
 - Ingredient Deck?
 - Packaging?



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Thank you!

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“Sugar” and “Natural” Food Label Claims and Litigation – What’s Next?

A Look at “Clean” Label

FDLI Annual Conference | May 3, 2019

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haynesboone

What Is Clean Label? Simplicity? The New Natural? Healthy? Green?

- Not defined by regulation
- Consumer-driven
- Means different things to different consumers:
 - Simple, recognizable, easy to pronounce ingredients
 - Less ingredients
 - Free from specific ingredients (e.g., those on a list of ingredients that are not acceptable)
 - Minimally processed
 - Free of artificial colors, preservatives, sweeteners
 - Free of pesticides, residues, heavy metals, BPA, etc.
 - Organic, gluten free, vegan, non-GMO, farm fresh
 - Lifestyle – choice to eat simpler, less processed foods

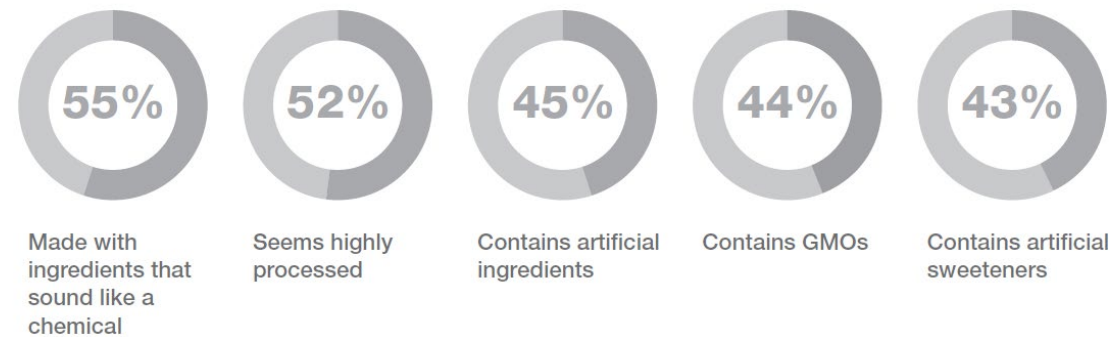


Lack of Consumer Consensus

Defining “clean label”



Attributes *not* associated with “clean label”



Efforts to Achieve Clean Label

- Reformulation – less ingredients, “clean” ingredients
- Relabeling – push to simplify ingredient lists
- Self-defined attributes or lists of banned ingredients
- Substantiation



Why Not Just Say It's Clean?

- *Ransom v. Premier Nutrition Corporation*, 1:18-cv-04617, EDNY
 - Filed 8/16/18
 - Dismissed with prejudice 2/11/19



What Is “Clean” Whey?

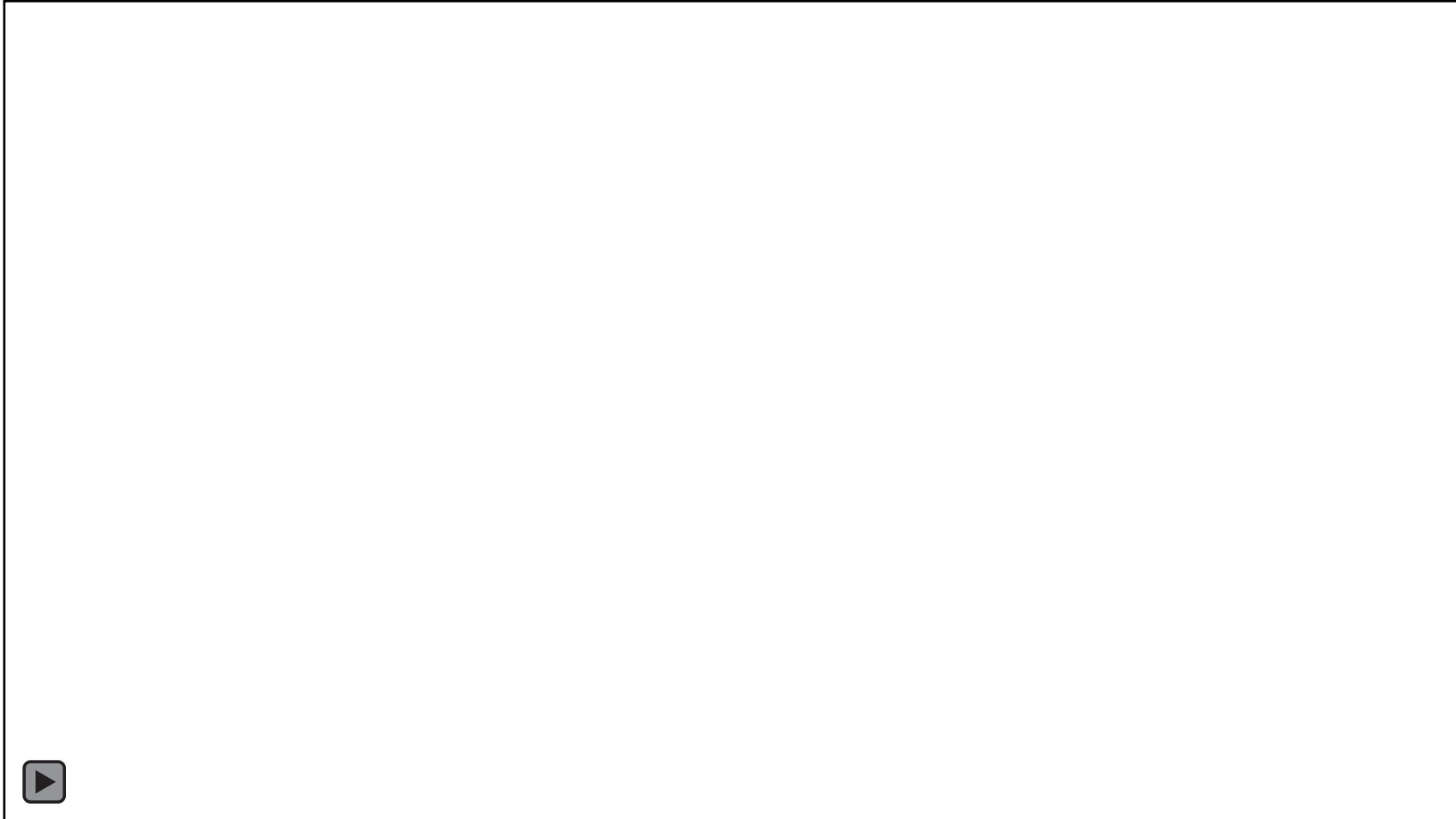
- “Reasonable consumers who purchase one of the Products will expect it to contain only the purest, most concentrated, form of protein....”
- “This is consistent with a standard dictionary definition, which states the ‘meaning of clean usually refers to removing something unwanted: you clean your hands by washing them, then you can clean some grapes,’ and define ‘clean’ as unadulterated or pure.”
- “[C]lean whey protein bar’ gives the impression the protein source is only the most concentrated form of whey – whey protein isolate.... the amount of whey isolate is only slightly above the milk isolate.”

INGREDIENTS: POWERBAR PROTEIN BLEND (WHEY PROTEIN ISOLATE, MILK PROTEIN ISOLATE), INULIN, SOLUBLE CORN FIBER, GLYCERIN, ALMONDS, COCONUT OIL, ERYTHRITOL, COCONUT, WHEY PROTEIN CONCENTRATE, WATER, LESS THAN 2% OF: RICE STARCH, PALM KERNEL OIL, SUNFLOWER LECITHIN, TAPIOCA STARCH, PALM OIL, NATURAL FLAVORS, SALT, NONFAT DRY MILK, WHOLE MILK POWDER, CALCIUM CARBONATE, STEVIOL GLYCOSIDES (STEVIA LEAF EXTRACT).
CONTAINS: ALMONDS, COCONUT, MILK.

Milk Protein Concentrate (MPC)	concentrated milk protein product that contains both casein and whey protein with its protein concentration designated by a number following MPC, i.e., MPC80 has a protein concentration of 80 percent
Milk protein isolate (MPI)	MPC with a protein concentration of 90 percent or more from other forms of MPC
Whey Protein Concentrate (WPC)	Any whey protein with a protein concentration of 25 percent or more, designated as WPC with the protein concentration expressed by a number
Whey Protein Isolate (WPI)	WPC with a protein concentration of 90 percent or more (WPI90 or WPC90).

What If You've Worked Really Hard for a Long Time and It's 100% Clean?

- 2014



Is it “2019” 100% Clean?

- *Tabler v. Panera LLC et al.*, 5:19-cv-01646SVK, N.D. Cal.
 - Filed 3/29/19
- “[T]here is a growing desire among consumers to purchase and consume ‘clean’ foods, which consumers understand to be foods free of artificial ingredients, especially pesticides.”
 - Source = Cargill’s 2017 report on survey of 302 consumers
 - Mentions “pesticides” 1x – “Pesticides, chemicals and artificial sweeteners prompt consistent avoidance of products, with more than half of respondents saying they tend to avoid products with such ingredients....”



“Clean” for 2019?

- “Defendants falsely and deceptively label and market as ‘100% clean’ and/or as ‘clean,’ when in fact the Products contain glyphosate, which is not present in truly ‘clean’ foods.”
- “Panera’s marketing of the Products is false and deceptive because the Products contain residue of the synthetic biocide glyphosate, the presence of which does not comport with consumers’ perceptions of ‘clean’ food.”





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