

# A Natural Food Fight: The Battle Between the “Natural” Label and GMOs

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## I. INTRODUCTION

Sales of foods labeled “natural” and “all natural”<sup>1</sup> have increased in recent years.<sup>2</sup> In fact, 22.1 percent of food products and 34 percent of beverage products launched in the United States in the first six months of 2013 bore the label “natural.”<sup>3</sup> Foods labeled “natural” ranked second in sales only to “low fat” foods in 2013<sup>4</sup> and outsold those labeled “organic” by 400 percent in 2008.<sup>5</sup> Consumers generally equate foods labeled “natural” as healthier and more nutritious than products without the label.<sup>6</sup> This assumption, although

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1. In this Note, I use the term “natural” to refer to food packaging labels containing the terms “natural” or “all natural.” Additionally, I use the phrase “‘natural’ foods” and “‘natural’ products” to denote products labeled “all natural” or “natural.” As explained later, “natural” products do not necessarily contain only natural, unprocessed ingredients.

2. Leah Messinger, *Food Trade Group Will Create a ‘Natural’ Label in Absence of US Government Regulation*, THE GUARDIAN (Oct. 23, 2015, 10:50 AM), <http://www.theguardian.com/sustainable-business/2015/oct/23/food-natural-label-government-onha-fda>. Sales of natural foods have increased 24 percent from 2012 to 2014. *Id.* In fact, “natural” foods outsold organic foods by 400 percent in 2008. Melanie Warner, *Why “Natural” Is One of the Most Meaningless Words in Food Packaging*, CBS NEWS (May 5, 2010, 01:32 PM), <http://www.cbsnews.com/news/why-natural-is-one-of-the-most-meaningless-words-in-foo-packaging>.

3. Mike Esterl, *The Natural Evolution of Food Labels*, WALL ST. J., Nov. 6, 2013 at B1. These numbers, however, are down in recent years due to increased litigation about what “natural” really means in relation to packaged foods and whether the reasonable consumer would be misled by such a term, controversies discussed in this Note. *Id.* This disconnect between consumers and manufacturers on what “natural” means has spawned over two hundred lawsuits challenging the word’s use on food packaging. Mary MacVean, *Food Buyers Lean Toward ‘Natural,’ a Claim That’s Hard to Define*, L.A. TIMES (Aug. 15, 2014), <http://www.latimes.com/health/la-he-natural-20140816-story.html>.

4. Esterl, *supra* note 3, at B1.

5. Warner, *supra* note 2.

6. *Id.*

held by many, is often incorrect.<sup>7</sup> But because the FDA has yet to determine what standards food products must meet to be considered “natural,”<sup>8</sup> food manufacturers currently decide for themselves what constitutes “natural,” continuing to mislead consumers.<sup>9</sup>

Along with the increasing number of “natural” products in stores, the number of genetically modified organisms (GMOs)<sup>10</sup> in the United States is also rising.<sup>11</sup> Genetically modified organisms are organisms in which the DNA has been altered by inserting a gene containing a desirable trait into the genetic structure.<sup>12</sup> While 90 percent of global crops are *not* genetically modified,<sup>13</sup> over 90 percent of soy, cotton, corn, canola, and sugar beets grown in the United States *are* genetically modified.<sup>14</sup> Because many processed

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7. *Id.*

8. *Id.* “The problem here is that, unlike organic, which hews to a clear set of standards, the FDA has never actually created any regulations for what natural actually means.” *Id.* Even the FDA has changed positions on what can constitute a “natural” product. *Id.* “In April of 2008, [the FDA] told a trade magazine that it did not consider high fructose corn syrup to be natural, only to reverse its thinking three months later after [high fructose corn syrup] maker Archer Daniels Midland . . . protested.” *Id.*

9. *Id.*

10. A genetically modified organism is an organism in which the genetic material has been changed by insertion of a gene containing a desired trait. Paul Diehl, *What Are GMOs and How Are They Made?*, ABOUT.COM (Aug. 31, 2012), <http://biotech.about.com/od/introtobiotechnology/a/What-Are-Gmos-And-How-Are-They-Made.htm>. GMOs are produced for a variety of reasons, discussed later. In this Note, I use the terms “genetically modified organism”, or “GMO”, and “genetically modified crop” to refer to a plant that has undergone genetic modification. I use the term “genetically modified ingredient” to refer to ingredients in manufactured food products produced from the plants that have been genetically modified and the term “genetically modified product” to refer to manufactured food products containing genetically modified ingredients.

11. *Genetically Modified Plants: Global Cultivation on 174 Million Hectares*, GMO COMPASS (Apr. 9, 2014), [http://www.gmo-compass.org/eng/agri\\_biotechnology/gmo\\_planting/257\\_global\\_gm\\_planting\\_2013.html](http://www.gmo-compass.org/eng/agri_biotechnology/gmo_planting/257_global_gm_planting_2013.html).

12. Jolie Lee, *What You Need to Know About GMOs*, USA TODAY (Jan. 3, 2014, 3:05 PM), <http://www.usatoday.com/story/news/nation-now/2014/01/03/gmo-genetically-modified-organism-facts-cheerios/4302121/>.

13. *Id.*

14. Marc Lallanilla, *GMOs: Facts About Genetically Modified Food*, LIVESCIENCE (Nov. 1, 2013, 05:54 PM), <http://www.livescience.com/40895-gmo-facts.html>. The United States, Canada, Brazil, and Argentina alone grow 90 percent of the world’s genetically modified crops. David H. Freedman, *Are Engineered Foods Evil?*, 309 SCI. AM. 80, 82 (2013). Most of the crops grown in the United States are genetically modified. Elizabeth Weise, *Genetically Engineered Foods Q&A*, USA TODAY (Oct. 28, 2012, 7:29 AM), <http://www.usatoday.com/story/news/nation/2012/10/28/gmo-questions/1658225/>. In fact, 95 percent of sugar beets, 94 percent of soybeans, 90 percent of cotton, 90 percent of papaya, and 88 percent of feed corn are

food products sold in the United States contain sugar, high fructose corn syrup, or vegetable oil, they likely contain genetically modified ingredients.<sup>15</sup> An estimated 40 to 75 percent of food products sold in the average American grocery store contain genetically modified ingredients.<sup>16</sup>

Modifying the genetics of any organism is a recent development in science, and the health effects are still generally unknown.<sup>17</sup> One major concern surrounding genetically modified crops is inserting genes from an allergy-inducing plant (*e.g.*, a peanut) into another, and then selling that genetically modified (GM) plant to a consumer without a GMO label.<sup>18</sup> Such processes carry the risk of an allergic reaction, but the consumer would not be aware of the danger until after consuming the product due to the absence of mandatory GMO labeling in the United States.<sup>19</sup> Despite these concerns, the scientific community cannot agree on whether GMOs actually pose a threat. Just as one study comes along to alert consumers about the ill effects of consuming GM products, the study is discredited<sup>20</sup> or another

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genetically modified, according to a 2011 study. *Id.* Genetically modified versions of zucchini, yellow squash, and sweet corn are also grown in the United States. *Id.*

15. Weise, *supra* note 14. This is because 42 percent of the sugar Americans consume is derived from sugar beets, high fructose corn syrup is derived from corn, and vegetable oil is commonly a product of soybeans. *Id.* Notably, however, by the time these ingredients have been processed, they are “chemically and biologically identical” to ingredients that have not been genetically modified. *Id.*

16. *Id.*

17. Roxanne Palmer, *GMO Health Risks: What the Scientific Evidence Says*, INT’L BUS. TIMES (Mar. 30, 2013, 03:42 PM), <http://www.ibtimes.com/gmo-health-risks-what-scientific-evidence-says-1161099>.

18. *Id.*

19. *Id.* In fact, in a 1996 study, researchers found that an individual allergic to Brazil nuts could be induced into an allergic reaction by consuming a certain variety of GM soybeans that contained inserted genes from a Brazil nut. *Id.* Another potential risk is a GM plant transferring artificially inserted genes to the consumer. For example, if a digested plant passes an antibiotic-resistant gene to bacteria in the stomach, a new antibiotic-resistant form of the bacteria could potentially form. This new form of antibiotic-resistant bacteria can lead to infections and illnesses that cannot be adequately stopped with antibiotics alone. *Id.* Nonetheless, in several studies, the horizontal gene transfer rate (the rate at which genes are transferred from one species to another) was found to be negligible, suggesting that the actual risk posed by GM plants forming antibiotic-resistant bacteria is minimal. *Id.*; *see generally* Paul Keese, *Risk from GMOs Due to Horizontal Gene Transfer*, 7 ENVTL. BIOSAFETY RES. 123 (2008).

20. Palmer, *supra* note 17. Some of the most inflammatory research findings against GMO consumption have proven to be scientifically questionable. *Id.* One study showing that GMO consumption caused organ damage has been criticized as having erroneous calculations.

study reassures consumers that GMO consumption is benign.<sup>21</sup>

Although GMO supporters and anti-GMO advocates consistently debate the side effects of GMOs, the potential benefits of GMOs cannot be disputed. Genetically modifying crops can lead to more viable crops in a single field, increase pest resistance, and allow farming in more extreme conditions.<sup>22</sup> Such benefits are especially important because, with an ever-increasing world population, the world's food supply will need to increase by 70 percent by 2050.<sup>23</sup>

With all the questions surrounding GMOs, 92 percent of American consumers are in favor of compulsory labeling for genetically modified products.<sup>24</sup> Despite such overwhelming support, no federal law exists requiring mandatory labeling of GMOs.<sup>25</sup>

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Similarly, scientists have universally condemned another study showing an increased risk of cancer following prolonged GM corn consumption for having poor research methods. *Id.*

21. Jon Entine, *The Debate About GMO Safety Is Over, Thanks to a New Trillion-Meal Study*, FORBES (Sept. 17, 2014, 04:53 PM), <http://www.forbes.com/sites/jonentine/2014/09/17/the-debate-about-gmo-safety-is-over-thanks-to-a-new-trillion-meal-study/>. One such study focused on observational data collected from farmers who transitioned from non-GMO feed to feed that was mostly genetically modified. The researchers found that "GM feed is safe and nutritionally equivalent to non-GMO feed. There was no indication of any unusual trends in the health of animals since . . . GMO crops were first harvested." *Id.* Indeed, none of the 130 research projects funded by the European Commission found any risks associated with consumption of GM products. Freedman, *supra* note 14, at 84.

22. Theresa Phillips, *Genetically Modified Organisms (GMOs): Transgenic Crops and Recombinant DNA Technology*, 1 NATURE EDUC. 213 (2008), available at <http://www.nature.com/scitable/topicpage/genetically-modified-organisms-gmos-transgenic-crops-and-732>; Freedman, *supra* note 14, at 82. Genetically modifying crops so that they can grow in more extreme conditions is accomplished by modifying naturally-occurring crops to be able to withstand less fertile land and both high and low temperatures. Freedman, *supra* note 14, at 82.

23. Freedman, *supra* note 14, at 82.

24. Andrea Rock, *Where GMOs Hide in Your Food*, CONSUMER REP. (Oct. 2014), <http://consumerreports.org/cro/2014/10/where-gmos-hide-in-your-food/index.htm>.

25. *Id.* Because of this, many consumers have taken it upon themselves to actively attempt to avoid GMOs at the grocery store even without GMO labeling by choosing USDA Organic-labeled foods or non-GMO verified foods, eating mainly fresh produce, except for high risk produce like corn, Hawaiian papaya, edamame, zucchini, and yellow summer squash, and avoiding common additives in processed foods derived from genetically modified ingredients. *Quick Start Guide: How to Shop If You're Avoiding GMOs*, WHOLE FOODS MARKET, <http://www.wholefoodsmarket.com/how-shop-if-youre-avoiding-gmos> (last accessed Mar. 14, 2016). In order to be labeled as non-GMO through such organizations as the Non-GMO Project, food manufacturers must show that each ingredient in the product came from. Amy Mayer, *How Your Food Gets the Non-GMO Label*, NPR (Jan. 20, 2015, 2:41 PM ET), <http://www.npr.org/sections/thesalt/2015/01/20/378361539/how-your-food-gets-the-non-gmo-label>. If there is a chance that the ingredient was genetically modified, the product has to

Several states have taken the issue into their own hands, with Connecticut, Maine, and Vermont passing laws that require such labeling.<sup>26</sup> The only current labeling of GMOs that occurs on food packaging in the United States, outside of the three states that have passed mandatory labeling laws, is completely voluntary.<sup>27</sup> This reality is in stark contrast to the rest of the world, with over sixty countries worldwide requiring GMO labeling on food products.<sup>28</sup> For example, the European Union requires that manufacturers label food products derived from crop material where more than 0.9 percent has been genetically modified,<sup>29</sup> as well as the labeling of non-prepackaged GM foods.<sup>30</sup>

One largely contested and yet judicially, legislatively, and administratively unresolved issue in the United States is whether products that contain genetically modified ingredients can be labeled “natural.”<sup>31</sup> This issue begs the legal question: what products can bear the “natural” label without misleading a reasonable consumer?

This Note begins by looking at the FDA’s definition of “natural” and food labeling laws. It moves on to discuss the history of general false advertising and mislabeling cases. Then, this Note progresses

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undergo DNA testing. *Id.* The product must contain less than one percent GMOs in order to be verified as non-GMO via the Non-GMO Project. *Id.*

26. *State Labeling Initiatives*, CENTER FOR FOOD SAFETY, <http://www.centerforfoodsafety.org/issues/976/ge-food-labeling/state-labeling-initiatives#> (last visited Oct. 28 2015). As of October 2015, twenty other states have pending legislation to require GMO labeling. *Id.*

27. Rock, *supra* note 24.

28. Dana Tims, *GMO Labeling in Oregon: Measure 92 Turns State into ‘Battleground for Food Culture’*, THE OREGONIAN (Oct. 16, 2014, 08:00 AM), [http://www.oregonlive.com/politics/index.ssf/2014/10/post\\_158.html](http://www.oregonlive.com/politics/index.ssf/2014/10/post_158.html).

29. Peter Mitchell, *Europe Angers US with Strict GM Labeling*, 21 NATURE BIOTECHNOLOGY 6 (2003). This EU law includes labeling “end-products such as sugars and oils *even when GM ingredients cannot be detected* in them because they are physically and chemically identical to products derived from non-GM crops.” *Id.* (emphasis added). Additionally, the 0.9 percent threshold changes to 0.5 percent of genetically modified content if an imported good contains a GM ingredient not yet tested and approved in Europe but believed to be safe. *Id.*

30. Commission Regulation 1829/2003, art. 13 § 1(e), 2003 O.J. (L 268) 1, 11 (EC).

31. *In re Frito-Lay N. Am., Inc.*, No. 12-MD-2413, 2013 WL 4647512, at \*7 (E.D.N.Y. Aug. 29, 2013) (“The FDA has not promulgated any formal rule or policy explaining when a food may be labeled ‘natural.’”). The court in *In re Frito-Lay* did not decide the ultimate issue of whether a reasonable consumer would be misled into believing the product did not contain GMOs, finding that this was a question for the jury. *Id.* at \*16.

into the yet unresolved false advertising cases on whether “natural” foods can contain GMOs. Finally, this Note concludes that the trajectory of such cases shows that no reasonable consumer should be misled into believing that a “natural” product does not contain genetically modified ingredients. Ultimately, I argue that, due to the prevalence of genetically modified ingredients and “natural” labels on food products, a reasonable consumer<sup>32</sup> should know that “natural” products may contain GMOs.

## II. HISTORY

In 1938, Congress passed the Federal Food, Drug, and Cosmetics Act (FFDCA)<sup>33</sup> to yield control of the safety of food, drugs, and cosmetics to the United States Food and Drug Administration (FDA).<sup>34</sup> Of particular importance here, the FDA controls the branding of food, adulterated food products, and which products can be included in packaged foods for sale in the United States.<sup>35</sup> As explained below, most false advertising cases deal with the misbranding of food items because, under 21 U.S.C. § 343, “if [a food’s] labeling is false or misleading in any particular,” then that product is deemed mislabeled and misbranded.<sup>36</sup>

Pursuant to the authority granted by the FFDCA, the FDA typically issues regulations regarding standards for certain foods.<sup>37</sup>

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32. *See infra* note 43.

33. Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended in 21 U.S.C. §§ 301-399 (2012)).

34. The legislation came in response to the deaths of over one hundred people that consumed an otherwise innocuous toxic elixir. *Legislation*, FDA, <http://www.fda.gov/RegulatoryInformation/Legislation/default.htm> (last accessed Oct. 18, 2014). Today, the FDA “ensures the safety of all food except for meat, poultry and some egg products; ensures the safety and effectiveness of all drugs, biological products, . . . medical devices, and animal drugs and feed; and makes sure that cosmetics and medical and consumer products that emit radiation do no harm.” *Id.*

35. *See* 21 U.S.C. § 343 (2012) (defining misbranded food), 21 U.S.C. § 342 (2012) (defining adulterated food), and 21 U.S.C. § 348 (2012) (describing what food additives may be included in food products).

36. 21 U.S.C. § 343(a).

37. 21 U.S.C. § 341 (2012) (“Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a

For example, the FDA regulates nutrition content claims on food packaging, such as “low sodium” or “reduced fat,” via the Nutrition Labeling and Education Act of 1990 (NLEA). The FDA also regulates structure/function claims and related dietary supplement claims, such as “calcium builds strong bones” or “fiber maintains bowel regularity,” and health claims describing a relationship between the food and a reduced risk of disease or other health-related issues.<sup>38</sup> Therefore, while misbranding of food is generally prohibited under the FFDCA, through promulgating the NLEA, the FDA has set forth specific guidelines on specific claims and defines exactly what constitutes misbranding in certain circumstances.<sup>39</sup>

The FDA’s regulations regarding the term “natural,” however, are not as clear. The FDA has yet to define the word “natural” on food packaging;<sup>40</sup> nonetheless, it has found that “use of the term ‘natural’ on a food label [is] truthful and non-misleading when ‘nothing artificial or synthetic . . . has been included in, or has been added to, a food that *would not normally be expected to be in the food.*’”<sup>41</sup> Applying these guidelines, the FDA has issued warning letters to Alexia Foods for including chemical preservatives in a food it labeled

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reasonable definition and standard of identity, a reasonable standard of quality, or reasonable standards of fill of container.”).

38. *Label Claims for Conventional Foods and Dietary Supplements*, FDA, <http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm111447.htm> (last accessed Oct. 17, 2014). See also 104 Stat. 2353 (1990). Notably, the United States Department of Agriculture (USDA) also controls some food claims, such as “organic,” pursuant to 7 U.S.C. § 6501 (2012). Genetically modified ingredients are specifically prohibited from inclusion in any “organic” food product. See Miles McEvoy, *Organic 101: Can GMOs be Used in Organic Products?*, USDA (May 17, 2013), <http://blogs.usda.gov/2013/05/17/organic-101-can-gmos-be-used-in-organic-products/>; and 7 C.F.R. § 205.105 (2015).

39. James M. Beck, *Food Fight: FDA Preemption and Food Labeling Claims*, LAW360 (Jan. 27, 2011, 2:14 PM), <http://www.law360.com/articles/221444/food-fight-fda-preemption-and-food-labeling-claims>. “The NLEA was passed ‘to clarify and to strengthen [FDA’s] authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about the nutrients in the food.’” Nat’l Council for Improved Health v. Shalala, 122 F.3d 878, 880 (10th Cir. 1997) (alteration in original).

40. *What is the Meaning of ‘Natural’ on the Label of Food?*, FDA (June 8, 2015), <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214868.htm>.

41. Warning Letter from Michael Roosevelt, Acting Dir., Office of Compliance, Ctr. For Food Safety and Applied Nutrition, FDA, to Alex Dzieduszycki, CEO/President, Alexia Foods, Inc. (Nov. 16, 2011) (emphasis added). The FDA has said elsewhere that it “has not objected to the use of the term [‘natural’] if the food does not contain added color, artificial flavors, or synthetic substances.” *What is the Meaning of ‘Natural’ on the Label of Food?*, FDA, <http://www.fda.gov/aboutfda/transparency/basics/ucm214868.htm> (last accessed Oct. 17, 2014).

“All Natural,” and to Bagels Forever for claiming its food that contained blueberries infused with potassium sorbate was “all natural” and contained “no preservatives”.<sup>42</sup> The FDA has never issued such a letter to a “natural” food that contained genetically modified ingredients.<sup>43</sup>

Pursuant to the FFDCFA, if the FDA has not established guidelines on a certain product claim, then the product manufacturer must be able to show that a reasonable consumer would not be misled by the claim.<sup>44</sup> This test was particularly important in *Videtto v. Kellogg USA*, in which the plaintiff claimed he was misled to believe that Froot Loops cereal actually contained real fruit due to: (1) the inclusion of the word “froot” in the cereal name, (2) pictures of cereal made to resemble fruit on the cereal box, and (3) pictures of actual fruit on the cereal box.<sup>45</sup> Despite these claims, the cereal contained no real fruit.<sup>46</sup> The plaintiff claimed that Kellogg had engaged in false advertising practices because he had been misled to believe that real

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42. Warning Letter from Gerald Berg, Dir., Minneapolis Dist., FDA, to Barry Berman, President/Owner, Bagels Forever, Inc. (July 22, 2011). *See also* Warning Letter from Roberta Wagner, Dir., Office of Compliance, Ctr. For Food and Safety and Applied Nutrition, FDA, to John Stanger, Technical Manager, Waterwheel Premium Foods Pty Ltd. (July 26, 2013) (finding that a “natural” product was misbranded because it included artificial rye flavor).

43. Response Letter from Leslie Cux, Dep’t of Health and Human Services, to Judge Yvonne Gonzalez Rogers, Judge Jeffrey S. White, and Judge Kevin McNulty (Jan. 6, 2014) (“[W]e respectfully decline to make a determination at this time regarding whether and under what circumstances food products containing ingredients produced using genetically engineered ingredients may or may not be labeled ‘natural.’”). The FDA has recognized that there is “a ‘general lack of consumer understanding and scientific agreement about the meaning of the term [natural]’” and “‘natural’ claims are confusing and misleading to consumers and frequently breach the public’s legitimate expectations about their meaning.” *In re Frito-Lay N. Am., Inc.*, No. 12-MD-2413, 2013 WL 4647512, at \*13 (E.D.N.Y. Aug. 29, 2013) (citing 56 Fed. Reg. 60,466 (Nov. 27, 1991)).

44. 21 U.S.C. § 343 (2012) (“false or misleading” claims are misbranded); *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (adopting the reasonable consumer test for false advertising claims). *See also* *Lavie v. Proctor & Gamble Co.*, 105 Cal. App. 4th 496, 507 (2003) (“[A] representation does not become ‘false and deceptive’ merely because it will be *unreasonably* misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.”) (emphasis added) (quoting *In re Kirchner*, 63 F.T.C. 1282 (1962)).

45. *Videtto v. Kellogg USA*, No. 2:08-CV-01324-MCE-DAD, 2009 WL 1439086, at \*1 (E.D. Cal May 21, 2009).

46. *Id.*

fruit was contained in the cereal, one of the main reasons he had purchased the cereal at all.<sup>47</sup>

The plaintiff rested his theory of recovery on false advertising. According to the court, false advertising includes not only objectively false claims but also “advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.”<sup>48</sup> Although generally a question of fact, the *Videtto* court decided the issue of false advertising as a matter of law and held that no reasonable consumer could be misled into believing that Froot Loops cereal actually contained real fruit.<sup>49</sup>

Ultimately, the court dismissed the entire case because, as a matter of law, the plaintiff did not state a claim upon which relief could be granted.<sup>50</sup>

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47. *Id.*

48. *Id.* at \*2 (quoting *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008)).

49. *Videtto*, 2009 WL 1439086 at \*3. The court reasoned that the self-described multi-grain cereal is actually depicted in ring shapes on the packaging that do not resemble any fruit. *Id.* Also, it noted that although the packaging uses the word “froot,” “the fanciful use of a nonsensical word cannot reasonably be interpreted to imply that the Product contains or is made from actual fruit.” *Id.* Finally, it reasoned that the packaging does not claim that the food is particularly nutritious. *Id.* The plaintiff’s same arguments had previously been presented to a different California district court by the same attorneys on behalf of a different plaintiff. See *McKinniss v. Kellogg USA*, No. CV 07-2611 ABC, 2007 WL 4766060 (C.D. Cal. Sept. 19, 2007). That court reached the same conclusion as the *Videtto* court. *Videtto*, 2009 WL 1439086, at \*3. *Cf. Werbel ex rel. v. Pepsico, Inc.*, No. C09-04456, 2010 WL 2673860, at \*3 (N.D. Cal. July 2, 2010) (finding that no reasonable consumer would mistake “cereal balls with a rough, textured surface in hues of deep purple, teal, chartreuse green and bright red” for cereal containing natural fruit), and *Dvora v. Gen. Mills, Inc.*, No. CV-1074-GW, 2011 WL 1897349, at \*7 (C.D. Cal. May 16, 2011) (finding that no reasonable consumer would be misled into believing that the cereal contained real fruit when “[t]here are no pictures of any fruits on the packaging, and there is no statement that the cereal was made with actual fruit . . .”). The plaintiff in *Videtto* also claimed causes of action for Kellogg’s intentional misrepresentation of the product and breach of implied warranty. *Videtto*, 2009 WL 1439086, at \*3-4. The court perfunctorily dismissed these claims as having no foundation. *Id.* In regards to the intentional misrepresentation claim, the plaintiff failed to allege that the packaging contained false statements or that his conclusion that the cereal contained real fruit based on the packaging was justifiable. *Id.* at \*3. In regards to the breach of implied warranty claim, the court found that an “implied warranty ‘does not impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.’” *Id.* at \*4 (quoting *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1296 (Cal. Ct. App. 1995)). The court found no breach, reasoning that “because the Product packaging was not misleading or deceptive, Plaintiff received exactly what was described on the box.” *Videtto*, 2009 WL 1439086, at 4.

50. *Videtto*, 2009 WL 1439086, at \*4. The court noted that general procedure is to allow a plaintiff a reasonable period of time to file an amended complaint. But the court did not permit

The court in *Lam v. General Mills*, however, reached a different conclusion. In *Lam*, the court found that a reasonable consumer might be misled to believe that Fruit Roll-Ups and Fruit by the Foot contained real fruit based on the statement “made with real fruit” on the product packaging.<sup>51</sup> The plaintiff argued that the depictions on the product packaging would cause the reasonable consumer to “make certain assumptions about the type and quantity of fruit” in the product.<sup>52</sup> General Mills defended the claim by asserting that the claim was objectively true, even if the product only contained minimal actual fruit.<sup>53</sup> The court agreed with the plaintiff and found that “[a]fter seeing [certain] prominent aspects of [the] packaging, a reasonable consumer might be surprised to learn that a substantial portion of each serving of the Fruit Snacks consists of partially hydrogenated oil and sugars.”<sup>54</sup>

The *Lam* court also addressed other claims on the product packaging. Unlike the “made with real fruit” claim, the court found that the claims “naturally flavored” and “fruit flavored” were allowed under the NLEA.<sup>55</sup> Furthermore, the court rejected the plaintiff’s argument that the use of “gluten free” on the product packaging was misleading because the product was not healthful.<sup>56</sup> The court rejected this argument because the product was objectively free of

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the plaintiff to file an amended complaint here because the court claimed that it was “simply impossible for Plaintiff to file an amended complaint stating a claim based upon these facts. The survival of the instant claim would require this Court to ignore all concepts of personal responsibility and common sense. The Court has no intention of allowing that to happen.” *Id.*

51. 859 F. Supp. 2d 1097, 1104 (N.D. Cal. 2012). The court used the same reasonable consumer test described in *Videtto*. *Id.* at 1104.

52. *Id.* at 1104. While the only actual fruit contained in the product was pears from concentrate, the court found that the reasonable consumer would be misled by the large word “strawberry” on the packaging and erroneously conclude that the product actually contained strawberries. *Id.*

53. *Id.*

54. *Id.* Although the court did not reach this conclusion as a matter of law, the case did survive the defendant’s motion to dismiss. *Id.* at 1105.

55. *Id.* at 1101–03. In this case, the state law—whether the statements would mislead a reasonable consumer—is of no concern because it is preempted by federal law. *Id.* at 1103. “[U]nder 21 C.F.R. § 101.22(i), a product may be labeled as ‘fruit flavored’ or ‘naturally flavored,’ even if it does not contain fruit or natural ingredients. So long as that product ‘contains natural flavor’ which is ‘derived from’ the ‘characterizing food ingredient,’ it will not run afoul of the regulation.” *Id.* at 1102–03.

56. *Id.* at 1100.

gluten.<sup>57</sup> The court also dismissed causes of action for breach of implied and express warranties.<sup>58</sup>

The court in *In re Frito-Lay* finally had the opportunity to assess whether “natural” foods can contain genetically modified ingredients.<sup>59</sup> The plaintiffs in this litigation brought a class action suit against Frito-Lay for allegedly deceptively labeling products “all natural” when they, in fact, contained genetically modified ingredients.<sup>60</sup> The plaintiffs asserted reliance on the “all natural” label as their main reason for purchasing the product.<sup>61</sup> Frito-Lay contended that no reasonable consumer would understand “all natural” to mean GMO-free.<sup>62</sup> Frito-Lay argued that this was especially true when other claims, like “organic,” represented how food products are grown and produced and therefore would indicate whether products contain GMOs.<sup>63</sup>

Although other courts have decided to stay similar cases for a period of time until the FDA promulgates regulations defining the use of “natural” on food packaging, the court here asserted primary jurisdiction, finding that the issue of the reasonable consumer is “within the conventional experience of judges.”<sup>64</sup> The court also held that the issue of the reasonable consumer was also not preempted by

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57. *Id.* at 1103–04 (“The statement is objectively true and communicates nothing more than an absence of gluten in the product . . . A reasonable consumer is unlikely to interpret the statement ‘gluten free’ to mean that the Fruit Snacks contain no partially hydrogenated oils, low amounts of sugar or corn-syrup, or that the Fruit Snacks are otherwise healthful.”).

58. *Id.* at 1105–06.

59. No. 12-MD-2413, 2013 WL 4647512, at \*1 (E.D.N.Y. Aug. 29, 2013).

60. *Id.* These products included Tostitos, SunChips, and Frito Bean Dips. *Id.* The plaintiffs alleged that being “unnatural” is the hallmark of genetically modified ingredients. *Id.*

61. *Id.* The plaintiffs claimed that, had they known that the products contained genetically modified ingredients, they would not have purchased them. *Id.*

62. *Id.* at \*4.

63. *Id.* at \*13. Implicit in Frito-Lay’s analysis was that “organic” and “all natural” cannot be synonymous and must be differentiated.

64. *Id.* at \*8-9 (quoting Report & Recommendations, *Van Atta v. Gen. Mills*, No. 12-CV-2815 (D. Colo. July 18, 2013)). The court also reasoned that the FDA “would need far more than six months to define the term ‘natural,’ . . . and would likely open that deliberation to public notice and comment. In an analogous situation, the FDA took nine years to define the requirements a manufacturer must meet before it can label a food ‘gluten-free.’” 2013 WL 4647512 at \*9 (citing Brady Dennis, *Nine Years After Congress’s Request, FDA Defines ‘Gluten-Free’*, WASH. POST (Aug. 2, 2013), [http://www.washingtonpost.com/national/health-science/9-years-after-congress-request-fda-defines-gluten-free/2013/08/01/cfeb2c08-faef-11e2-a369-d1954abcb7e3\\_story.html](http://www.washingtonpost.com/national/health-science/9-years-after-congress-request-fda-defines-gluten-free/2013/08/01/cfeb2c08-faef-11e2-a369-d1954abcb7e3_story.html)).

non-binding and informal FDA guidance on the definition of “natural.”<sup>65</sup> The court considered the informal FDA guidelines, the Federal Trade Commission’s comments, and state law on the matter. The court also considered a USDA-endorsed Food Marketing Institute publication, which stated, “the term ‘natural’ does apply broadly to foods that are minimally processed and free of synthetic preservatives; artificial sweeteners, colors, flavors, and other artificial additives.”<sup>66</sup>

The court ultimately concluded that whether a reasonable consumer would be misled cannot be determined as a matter of law, but is instead a question of fact that the jury must decide.<sup>67</sup> In analyzing whether a reasonable consumer would be misled, the court considered each claim within the context of the entire packaging.<sup>68</sup> It found that it was important, but not dispositive, that the claims “No MSG-No Preservatives-No Artificial Flavors” surrounded the “all natural” label and that the packaging signaled nothing about whether the product contained GMOs.<sup>69</sup> The court distinguished previous cases that decided the issue as a matter of law; it found important that, in those cases, one could easily go to the ingredients list to see if fruit was listed (*e.g.*, *Videtto*) but one could not look to the ingredient

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65. *In re Frito-Lay*, 2013 WL 4647512, at \*10. The court cited several similar cases rejecting the argument that the FDA’s informal guidance on “natural” on food packaging preempted state courts. *Id. See, e.g.*, *Astiana v. Ben & Jerry’s Homemade, Inc.*, No. 10-CV-4387, 2011 WL 2111796, at \*8 (N.D. Cal. May 26, 2011). The court reached this conclusion because the administrative agencies do not mean for non-binding guidance to have a preemptive effect. *In re Frito-Lay*, 2013 WL 4647512, at \*10.

66. *In re Frito-Lay*, 2013 WL 4647512, at \*14 (internal quotations omitted).

67. *Id.* at \*15. The court used the same reasonable consumer standard as discussed above, in *Videtto*. *Id.* at \*16.

68. *Id.*

69. *Id.* The court compared the argument that the claim be considered within the context of the entire packaging to the argument in *Ackerman v. Coca-Cola Co.* where the court determined that “the information contained on vitaminwater’s ingredients label—listing ingredients other than vitamins and water and indicating the sugar content of the beverage—though relevant, does not as a matter of law extinguish the possibility that reasonable consumers could be misled by vitaminwater’s labeling and marketing . . . .” *Id.* (quoting *Ackerman v. Coca-Cola Co.*, 2010 WL 2925955, at \*16 (E.D.N.Y. July 21, 2010)). The “added context” of the words surrounding the “all natural” label in *In re Frito-Lay* likewise did not meet “the heavy burden of ‘extinguish[ing] the possibility’ that a reasonable consumer could be misled into believing the products were GMO-free.” *In re Frito-Lay*, 2013 WL 4647512, at \*16 (internal quotations omitted).

list on Frito-Lay products to determine if those ingredients were genetically modified.<sup>70</sup>

The *In re Frito-Lay* court further found that even though a reasonable consumer might take the term “organic” to mean GMO-free, this did not preclude that same consumer from believing that “natural” foods are likewise GMO-free.<sup>71</sup> Indeed, the court noted that none of the federal agencies’ views on what constitutes “natural” explicitly state that “natural” products *can* contain GMOs.<sup>72</sup> Therefore, the court could not reach a conclusion as a matter of law on whether a reasonable consumer would be misled by the “all natural” label into believing that those products did not contain GMOs.<sup>73</sup>

The court in *Ault v. J.M. Smucker Co.* decided the same issue as in *In re Frito-Lay*—whether products marketed as “all natural” can contain GM ingredients.<sup>74</sup> In *Ault*, the plaintiff claimed that he was misled by Crisco Oil products that were marketed as “all natural” but in fact contained GM soybeans, rapeseeds, and corn; this argument

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70. *In re Frito-Lay*, 2013 WL 4647512, at \*16. The court distinguished *Videtto and Sugawara v. Pepsico*, No. 2:08-CV-1335-MCE-JFM, 2009 WL 1439115 (E.D. Cal. May 21, 2009) which decided the issue as a matter of law. *In re Frito-Lay*, 2013 WL 4647512, at \*16 (“*Sugawara and Videtto* border on fantasy, yielding dismissal as a matter of law. No reasonable consumer could view the Cap’n Crunch with Crunchberries and Froot Loops boxes and conclude that these products contain fruit, and then check the ingredients list to confirm this belief. In marked contrast, a reasonable consumer viewing the Tostitos, SunChips, and Bean Dip ‘All Natural’ labels could reach a variety of conclusions about their potential for containing genetically modified ingredients.”). While the previous cases clearly did not list any fruit as ingredients, the ingredients lists on the Frito-Lay products did not specify whether any ingredients were genetically modified. *Id.*

71. *Id.* at \*15.

72. *Id.* Likewise, the court could not conclude “that a reasonable consumer, or any consumer, is aware of and understands the various federal agencies’ views on the term ‘natural,’” as discussed above. *Id.*

73. *Id.* However, the court dismissed the plaintiff’s cause of action based on the Magnuson-Moss Warranty Act. *Id.* at \*17. “The [Magnuson-Moss Warranty Act (MMWA)] grants relief to a consumer ‘who is damaged by the failure of a . . . warrantor . . . to comply with any obligation . . . under a written warranty.’” *Id.* (quoting *Wilbur v. Toyota Motor Sales, USA, Inc.*, 86 F.3d 23, 26 (2d Cir. 1996)). The court held that the “all natural” label does not “warrant a product free from defect,” and therefore, the MMWA does not apply. *In re Frito-Lay*, 2013 WL 4647512, at \*17 (citing *Wilson v. Frito-Lay N. Am., Inc.*, No. 12-1586 SC, 2013 WL 1320468, at \*15 (N.D. Cal. Apr. 1, 2013)). *In re Frito-Lay*, 2013 WL 4647512, at \*27-28. The court also dismissed the plaintiff’s express warranty cause of action because improper notice was given, not on the basis that the label was not a warranty. *Id.* at \*27-29.

74. No. 13 Civ. 3409(PAC), 2014 WL 1998235, at \*1 (S.D.N.Y. May 15, 2014).

centered around the claim that genetically modified products do not occur in nature.<sup>75</sup> The plaintiff also claimed that these products are not natural because they are heavily processed, turning them into manmade products.<sup>76</sup>

The defendant first argued that the plaintiff's claims were preempted by FDA policies.<sup>77</sup> The court rejected the defendant's argument. It found that no specific FDA regulations about whether natural foods can contain genetically modified ingredients existed.<sup>78</sup> The court stated that because the FDA has no policy and has declined to adopt a policy regarding the specific issue at hand—whether “natural” foods can contain genetically modified ingredients—the issue was not preempted.<sup>79</sup> It also stated that other informal FDA guidance on the meaning of the term “natural” was not controlling or dispositive.<sup>80</sup> As in *In re Frito-Lay*, the court then determined that it had primary jurisdiction over the matter and did not need to wait for formal FDA guidance.<sup>81</sup> The court ultimately concluded that both issues presented in the case (whether a reasonable consumer would be misled to believe that the “all natural” label meant the product was not heavily processed and that it did not contain GMOs) were questions of fact that could not be decided on a motion to dismiss.<sup>82</sup>

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75. *Id.*

76. *Id.* Crisco products undergo five chemical processes. The plaintiff claimed that these processes deprived the ingredients “of the chemical properties of the plants from which they originated and therefore render[ed] the final products chemically-derived and non-natural.” *Id.* at \*2.

77. *Id.* The court first ruled out field preemption because Congress never “intended the FDA to occupy the entire field of food labeling.” *Id.*

78. *Id.* at \*3.

79. *Id.*

80. *Id.* The court determined that where the FDA has not had the resources to address a particular issue or a “potentially deceptive practice, state claims are one of the few means of safeguarding consumers and therefore should not be preempted by the FDA’s inaction.” *Id.*

81. *Id.* at \*4-5. The court found that because the FDA, until that point, had declined to consider the issue at hand, turning to the FDA now “would be unavailing.” *Id.* at \*4. “While the Court would welcome the FDA’s guidance on the definition of ‘natural,’ [t]his case is far less about science than it is about whether a label is misleading.” *Id.* at \*5 (quoting *In re Frito-Lay*, 2013 WL 4647512, at \*8). The court also hesitated to speculate on whether, if the FDA were to proffer a definition, it would contain anything about whether “natural” foods could contain GMOs. *Ault*, 2014 WL 1998235, at \*5.

82. *Ault*, 2014 WL 1998235, at \*5-6. The court noted that the methods used to process other oils allowed them to retain their naturally-occurring chemical properties. *Id.* at \*5. While it is unclear whether the Crisco ingredients were devoid of these naturally-occurring properties,

The court determined that the plaintiff's claim of breach of express warranty likewise could not be determined on a motion to dismiss because it was a factual question.<sup>83</sup> The court found that the standard for the express warranty claim was whether a reasonable consumer would understand the "all natural" label as "a factual claim upon which he or she could rely."<sup>84</sup> The plaintiff's claim that the "all natural" label misleads reasonable consumers and the defendant breached an express warranty ultimately survived the defendant's motion to dismiss.<sup>85</sup>

Although case law has progressed quite rapidly from the pre-GMO era to modern times where many crops farmed in the United States are GMOs, the line of reasoning presented in the cases remains intact. If a reasonable consumer would be misled by the claim on the packaging,<sup>86</sup> then the plaintiff has a colorable claim for false advertising that is a question of fact and should not be determined on a motion to dismiss.<sup>87</sup> The only question remaining, then, is whether

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the court determined that this is indeed a factual question meant for the jury. *Id.* In regards to the product's inclusion of genetically modified ingredients, the defendant argued that "a reasonable consumer would not be misled by Crisco Oil's 'All Natural' label 'in light of FDA's policy on bioengineered ingredients and the federal government's regulations governing organic foods.'" *Id.* at \*6 (emphasis added) (internal quotations omitted). The court found this argument unavailing, however, because the only question was whether the "all natural" label would mislead a reasonable consumer; though FDA policies might be pertinent to the issue, they are not dispositive. *Id.* The Court stated: "[u]ltimately, the question is one of reasonability, which cannot be resolved on Defendant's motion to dismiss." *Id.*

83. *Id.*

84. *Id.* (quoting *Hubbard v. Gen. Motors Corp.*, No. 95 Civ. 4362, 1996 WL 274018, at \*6 (S.D.N.Y. May 22, 1996)). The court defined an express warranty as "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." *Ault*, 2014 WL 1998235, at \*6 (quoting N.Y. U.C.C. Law § 2-313(1)(a) (McKinney 2012)) (alteration in original). The court also determined that the plaintiff could bring this claim even though she did not directly purchase the product from Defendant. *Ault*, 2014 WL 1998235, at \*7.

85. *Ault*, 2014 WL 1998235, at \*7.

86. But recall, this standard is only applicable to those claims that are not preempted by the FDA and have no corresponding regulations. *See, e.g., Lam v. Gen. Mills*, 859 F. Supp. 2d 1097, 1101-3 (N.D. Cal. 2012).

87. *See, e.g., In re Frito-Lay N. Am., Inc.*, No. 12-MD-2413, 2013 WL 4647512, at \*15 (E.D.N.Y. Aug. 29, 2013). Of course, this would not be the case if the false advertising claim were so egregious that the court could determine as a matter of law that the reasonable consumer would have been misled, or alternatively, where the product packaging was clear so that no reasonable consumer would be misled. *Id.*

a particular “all natural” claim would mislead the reasonable consumer if the product contains genetically modified ingredients.

### III. ANALYSIS

What remains clear is that this facet of the law centers on whether a reasonable consumer would be misled and who that reasonable consumer is. It does not necessarily matter whether a claim is technically true, only whether that statement would have the likelihood to deceive the reasonable consumer.<sup>88</sup> This aspect was particularly important in *Lam* because, although it was technically true that the fruit products did contain real fruit (the pear concentrate), the court still found that the “made with real fruit” claim could mislead a reasonable consumer to believe that a particular quantity or type of fruit was present.<sup>89</sup> So, the critical question is whether the “natural” label on a food product would likely deceive consumers to believe that the product did not contain genetically modified ingredients.

In order to undertake this GMO-centric analysis, it is vital to understand how commonplace both the “natural” label and GMOs have become. As previously discussed, over 22 percent of food products and 34 percent of beverage products *introduced* in the United States in the first half of 2013 bore the “all natural” label,<sup>90</sup> at the same time, 40 to 75 percent of food products marketed in the United States contain genetically modified ingredients.<sup>91</sup> Some percentage of “natural” products must contain genetically modified ingredients. In fact, in a 2014 study, all food products bearing the “natural” label contained significant amounts of genetically modified

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88. *Videtto v. Kellogg USA*, No. 2:08-CV-01324-MCE-DAD, 2009 WL 1439086, at \*2 (E.D. Cal. May 21, 2009) (“[T]hese laws prohibit not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.”). In sum, the standard centers on whether the product claims would mislead a reasonable consumer, whether or not the claims are technically true.

89. *Lam*, 859 F. Supp. 2d at 1104. For instance, a reasonable consumer might be misled into believing that the strawberry-flavored fruit snacks contained actual strawberries and not pears from concentrate. *Id.*

90. Esterl, *supra* note 4. This number does not include “natural” food products that were already on the shelves at that time. *Id.*

91. Weise, *supra* note 14.

ingredients.<sup>92</sup> Because of this, no reasonable consumer could believe that genetically modified ingredients are not contained in *any* product labeled “natural.”

*Videtto* appears to the layperson to be a clear-cut and obvious case, and so it is. As the court determined, no reasonable consumer using common sense would believe that Froot Loops contain real fruit.<sup>93</sup> The plaintiff’s arguments that (1) inclusion of the word “froot” in the product title, (2) pictures of brightly colored cereal resembling fruit on the product packaging, and (3) pictures of actual fruit on the product packaging, must necessarily fail.<sup>94</sup> First, as was clear to the court, the word “froot” is not equivalent to the word “fruit,” and most, if not all, reasonable consumers would recognize this difference.<sup>95</sup>

Moreover, the product packaging clearly portrayed the physical appearance of the actual cereal, as bright multi-colored rings, alongside drawings of actual fruit.<sup>96</sup> As the court found, this depiction should signal to the reasonable consumer that no fruit was present in the cereal, as no naturally occurring fruit resembled the cereal.

Finally, although the drawings of actual fruit on the packaging could have been superficially misleading, the court found that looking at the packaging as a whole dispelled this belief rather quickly.<sup>97</sup> Along with the above factors, the court found that the phrases “sweetened multi-grain cereal” and “natural fruit flavors,” and the fact that the ingredient list only contained fruit flavors and no real fruit, outweighed the depiction of fruit on the box.<sup>98</sup> Under its analysis, the court found that no reasonable consumer would be misled to believe that Froot Loops contained real fruit.

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92. Andrea Rock, *Where GMOs Hide in Your Food*, CONSUMER REP. (Oct. 2014), <http://www.consumerreports.org/cro/2014/10/where-gmos-hide-in-your-food/index.htm>.

93. 2009 WL 1439086, at \*4.

94. *Id.* at \*1.

95. *Id.* at \*3.

96. *Id.*

97. *Id.* In *In re Frito-Lay*, the court explicitly warned that the packaging as a whole should be considered in determining whether a reasonable consumer would be misled. *In re Frito-Lay N. Am., Inc.*, No. 12-MD-2413, 2013 WL 4647512, at \*16 (E.D.N.Y. Aug. 29, 2013). Although that concept is not explicitly stated in *Videtto*, it is implicit in the court’s analysis.

98. 2009 WL 1439086, at \*1, \*3.

Conversely, *Lam* presents a less straightforward case. In the court's final disposition, it held that it could not grant the defendant's motion to dismiss for failure to state claim upon which relief can be granted.<sup>99</sup> The court refused to grant the motion because, even though the claim "made with real fruit" on the packaging was objectively true, a reasonable consumer could still be misled.<sup>100</sup>

At first glance, it seems that, if a claim were objectively true, it could not mislead the reasonable consumer. However, when looked at closely, the indication "made with real fruit" could entirely mislead the reasonable consumer. This claim would seem to signal to the consumer that he or she was actually consuming a sizeable quantity of strawberries while consuming the strawberry-flavored fruit snacks. Of course, this assumption would be false; the consumer would only be ingesting a relatively small amount of pear concentrate.<sup>101</sup>

Also found on the food product's packaging was an ingredients list, providing the *Lam* court with a more complex issue than previous cases. The ingredients clearly listed "pears from concentrate" first.<sup>102</sup> This would address the issues above, by unambiguously signaling to the consumer that the fruit included was actually only pear concentrate. Then, the question would become whether a reasonable consumer could be expected to read the ingredients list on a product, especially when the outward claims on the product packaging seemed to clarify what the product contained without having to consult the ingredients list.<sup>103</sup> So although the packaging as a whole is important, as established by *Videtto*, *Lam* demonstrates that some areas of the packaging are more important

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99. *Lam v. Gen. Mills*, 859 F. Supp. 2d 1097, 1105 (N.D. Cal. 2012).

100. *Id.* at 1104. Recall that, although pear concentrate was included in *every* flavor of the fruit snacks, the court found that the reasonable consumer might still be misled by the type or quantity of fruit contained therein. *Id.* Notably, however, the court did not address the other product package claims, "fruit flavored" and "naturally flavored," because they were preempted by the NLEA, rendering any analysis by the court moot. *Id.* at 1103.

101. *Id.* at 1104.

102. *Id.* at 1100.

103. *Id.* at 1104 ("[T]he Court cannot conclude that a reasonable consumer should be expected to look beyond 'made with real fruit' in order to discover the truth in the small print."). The court also noted that an ingredient list cannot be invoked to protect against the message that a reasonable consumer would understand from product claims. *Id.*

than others in determining whether a reasonable consumer would be misled.<sup>104</sup>

*In re Frito-Lay* seems to be an even less straightforward case than either of its predecessors. This is because while “made with real fruit” signals that the product contains some fruit—although as seen in *Lam*, the type and quantity of that fruit is a point of debate—“natural” claims lie in murkier territory because the FDA has yet to promulgate any rules defining the term.<sup>105</sup> Even more vague is the fact that the consumer would not be able to tell from the ingredients list whether GMOs were actually contained in the product, unlike the ingredients list in *Lam*.<sup>106</sup>

The court in *In re Frito-Lay* took several federal, state, and community interest groups’ views on the definition of “all natural” into explicit consideration. Accordingly, these views should play an important part in determining whether the reasonable consumer would be misled. The court, however, questioned whether this material should be accounted for in the reasonable consumer standard, asking whether a reasonable consumer would even be aware of these points of view or proposed standards.<sup>107</sup>

Certainly, if the FDA defined specific claims in the NLEA, it would not matter whether the reasonable consumer was aware of those labeling laws or not.<sup>108</sup> This reality is the main argument for having the FDA promulgate *any* regulation regarding not just “natural” label, but also whether those “natural” products can contain

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104. If the court had not considered the “made with real fruit” claim within the context of the packaging as a whole, this lawsuit would have had a clear winner, General Mills. If all parts of the packaging were equally important, General Mills’ defense that the ingredients list clearly indicated the quantity and quality of the fruit contained in the product would seem to trump any of the plaintiff’s arguments.

105. See JAMES F. NEALE & ANGELA SPIVEY, *FOOD SAFETY LAW* § 16.04 (2015). The term “natural” likewise is not as self-explanatory as “made with real fruit.” Where a reasonable consumer would understand “made with real fruit” to signal a product containing real fruit, “natural” does not automatically invoke a general definition.

106. *In re Frito-Lay N. Am., Inc.*, No. 12-MD-2413, 2013 WL 4647512, at \*16 (E.D.N.Y. Aug. 29, 2013).

107. *Id.* at \*15.

108. See, e.g., *Lam v. Gen. Mills*, 859 F. Supp. 2d 1097, 1103 (N.D. Cal. 2012) (finding that the plaintiff had no claim even though she was subjectively misled by the terms “fruit flavored” and “naturally flavored” and not inquiring any further into what the reasonable consumer would have believed, because those terms were already regulated and therefore preempted by the FDA under the NLEA).

GMOs.<sup>109</sup> If the FDA explicitly addressed this issue in new regulations, *In re Frito-Lay, Ault*, and any other case on whether a reasonable consumer would be misled by GMO-containing, “natural” products would become moot.<sup>110</sup>

Because the FDA has not yet promulgated any regulations concerning the definition of “natural,” several trade groups and states have taken it amongst themselves to define “natural.” In fact, the Natural Products Association certifies both home and personal care items as “natural,” allowing a seal to be used on any qualifying item.<sup>111</sup> However, a growing uncertainty due to lack of FDA guidance on what constitutes “natural” regarding food products has prompted the Organic and Natural Health Association (ONHA) to formulate its own “natural” seal for food products meeting its qualifications.<sup>112</sup> Among other requirements, food products cannot contain genetically modified ingredients in order to qualify for the seal.<sup>113</sup>

Notably, in passing its mandatory GMO labeling law, Connecticut also defined requirements for labeling a food “natural.”<sup>114</sup> As per Connecticut law, “natural” foods cannot contain genetically modified ingredients.<sup>115</sup>

Without such regulations, however, the courts must rely on the reasonable consumer standard. If the reasonable consumer is bound

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109. If the FDA were to define the term “natural” without addressing whether those products could contain GMOs, the courts would still be stuck with the same dilemma.

110. The NLEA explicitly preempts any state law claim that establishes labeling requirements that are not identical to NLEA requirements. 21 U.S.C. § 343-1 (2012).

111. *NPA Natural Standard for Personal Care Products*, NATURAL PRODUCTS ASS’N, <http://www.npainfo.org/NPA/Certification/NaturalSealCertification/PersonalCare/NPA/NaturalSealCertification/NPANaturalStandardforPersonalCareProducts.aspx?hkey=443d55de-e315-42ee-918b-2960452d9fe4> (last accessed Nov. 2, 2015); *NPA Natural Standard for Home Care Products*, NATURAL PRODUCTS ASS’N, <http://www.npainfo.org/NPA/NaturalSealCertification/HomeCare/NPA/NaturalSealCertification/NPANaturalStandardforHomeCareProducts.aspx?hkey=3123594b-3934-4e87-aaec-d4a502f417b6> (last accessed Nov. 2, 2015).

112. Messinger, *supra* note 2. ONHA’s certification process is estimated to begin in early 2016. *Id.*

113. *Id.* Products containing artificial preservatives, colors, flavoring, and sweeteners, products produced using nanotechnology, and synthetically produced vitamins D and E also do not meet certification standards.

114. *Id.*

115. CONN. GEN. STAT. § 21(a)-92(17) (2013). “Natural” foods likewise cannot contain preservatives, antibiotics, synthetic additives, artificial flavoring, or artificial coloring and cannot be processed “in a manner that makes such food significantly less nutritive.” *Id.*

by FDA regulations even if she is not aware of such regulations, can she also be bound by agency opinions that she is unaware of?<sup>116</sup>

Common sense seems to say yes. Of course, it is clear that promulgated regulations bear far more weight than advisory opinions, for one is law where the other is not. And as the court in *Ault* found, FDA advisory opinions are not dispositive as to whether the reasonable consumer would be misled.<sup>117</sup> Nonetheless, even if not dispositive, agency opinions should be given substantial weight because these opinions likely imply a potential regulation on the definition of “natural” that the agencies could promulgate in the future.

Thus, in the absence of official regulations, the courts should hold that no reasonable consumer would be misled into believing that an “all natural” product is GMO-free. This is the only logical conclusion due to the prevalence of GMOs and the “natural” label, as well as other factors, such as the FDA’s advisory opinions on what constitutes a “natural” product. Also, as previously discussed, the use of GMOs confers several advantages, such as allowing farming in more extreme conditions and increasing crop yield. The courts should not discourage such advantages by banning GMOs in “natural” products.

As the FDA could do away with any uncertainty in this area of the law by addressing this issue in its regulations, the FDA should promulgate regulations clarifying that genetically modified ingredients can be included in “natural” foods. By implementing these regulations, no consumer could claim that she was misled into believing that a “natural” food did not contain GMOs.

#### IV. CONCLUSION

Due to the prevalence of GMOs and “natural” labels on food products, courts should find that a reasonable consumer cannot be misled into believing that a “natural” product is GMO-free.

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116. For example, can consumers be bound by informal FDA guidance of the definition of “natural”? Other state and federal opinions can apply here.

117. *Ault v. J.M. Smucker Co.*, No. 13 Civ. 3409(PAC), 2014 WL 1998235, at \*3 (S.D.N.Y. May 15, 2014). However, the court noted that such informal guidance by the FDA “may be relevant to [the] inquiry.” *Id.* at \*6.

Although, as in some false advertising cases, the consumer cannot search the ingredients list of the product to determine whether GMOs are contained within,<sup>118</sup> due to the lack of mandatory GMO labeling in the United States, a reasonable consumer would still be aware of the high prevalence of genetically modified ingredients within the United States.<sup>119</sup> The “natural” claim within the context of the entire packaging should also be important—although perhaps not dispositive—to the reasonable consumer.<sup>120</sup> Although packaging may not explicitly advertise that a “natural” product contains GMOs, it could proffer its own definition of “natural” in some way.<sup>121</sup> Because the packaging did not identify itself as non-GMO, where it similarly self-identified as having no MSG, preservatives, or artificial flavors, the reasonable consumer should not take “all natural” to mean GMO-free.

However, this discussion is only necessary in the absence of FDA regulations on whether “natural” foods can contain GMOs.<sup>122</sup> Indeed, *any* regulation that addressed whether “natural” foods can contain genetically modified ingredients would make this issue in the judiciary moot.

Although the labeling and use of GMOs in food products is increasingly debated throughout the United States and the world,

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118. See *supra* text accompanying note 70.

119. The reasonable consumer would also likely be aware of the lack of compulsory GMO labeling, and so would not be misled by a lack of identification of GMOs on the label. Although mandatory GMO labeling would make it clear to the consumer whether the product contained genetically modified ingredients, without such labeling, the reasonable consumer should still be aware of the potential of a product containing genetically modified ingredients without any indication on the packaging.

120. *In re Frito-Lay N. Am., Inc.*, No. 12-MD-2413, 2013 WL 4647512, at \*16 (E.D.N.Y. Aug. 29, 2013).

121. For example, in *Frito-Lay*, the court considered that the product specified that “all natural” meant that it did not contain MSG, preservatives, or artificial flavors. *Id.* The Court held that these claims were not dispositive on the issue of whether the reasonable consumer would be misled, due in part to the lack of warning that the claims were an exclusive list of what “all natural” meant on the product. But still, the court’s analysis suggests that packaging as a whole, and any similar insignia, should play a large part in determining whether the “natural” label would mislead a reasonable consumer.

122. See *Lam v. Gen. Mills*, 859 F. Supp. 2d 1097, 1101-03 (N.D. Cal. 2012). The *Lam* court only had the opportunity to discuss whether the “made with real fruit” claims would mislead the reasonable consumer, as the claims “naturally flavored” and “fruit flavored” were preempted by FDA regulations.

GMOs are highly prevalent. Specifically in the United States, GMOs are present in the majority of marketed food products, even though the potential health effects of consuming GMOs is still be controversial topic.<sup>123</sup> What cannot be denied is that GMOs have many potential benefits.<sup>124</sup> Because of this, the FDA should implement regulations allowing for the use of the “natural” label on food products containing genetically modified ingredients so that the benefits of GMOs are not impeded. With a regulation in place, courts would not have to deliberate over whether “natural” food products containing genetically modified ingredients would mislead a reasonable consumer. Instead, a clear standard would be in place to which the court could look. Without such regulation, however, courts presented with this issue should hold that no reasonable consumer could be misled into believing that “natural” foods are GMO-free.

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123. See Palmer, *supra* note 17.

124. See Entine, *supra* note 21.