GMOS, GENETICALLY MODIFIED ORGANISMS OR GENUINELY MIXED OPINIONS? A REASONABLE CONSUMER'S UNDERSTANDING OF THE TERMS "GMO" AND "NON-GMO," AND THE STRUGGLE TO SET A STANDARD*

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I. INTRODUCTION

In recent years, there has been an extraordinary increase in consumer fraud class actions over deceptive food labels. Courts, legislators, and consumers alike have wrestled with defining the terms that are on food labels, and whether or not consumers have been deceived by companies that put such labels on their products. The most recent iteration of the food labeling debate is the conflict over the term "non-GMO," or "non-GE," which stands for non-genetically modified organisms, ingredients and/or non-genetically engineered processing.[1] As of 2016, there was no official federal definition for genetically modified organisms (GMO) ingredients.[2] As such, a spate of recent class actions against Chipotle Mexican Grill, Inc. (Chipotle), the first restaurant to market a "non-GMO" menu, has challenged judges to define "non-GMO," and specifically, to understand how a reasonable consumer understands the term.[3]

In today's health conscious society, consumers expect the food that they purchase to be of the healthiest standards.[4] In 2013, over twenty-two

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[1] Kristen Polovoy, *Defending 'Non-GMO' Consumer Fraud Class Actions*, LAW360 (May 09, 2016, 1:13 PM), https://www.law360.com/articles/793654/defending-non-gmo-consumer-fraud-class-actions.

[2] *Id.*

[3] *See id.*

[4] *See* Nancy Gagliardi, *Consumers Want Healthy Foods—And Will Pay More For Them*, FORBES (Feb. 18, 2015, 11:30 PM), http://www.forbes.com/sites/nancygagliardi/2015/02/18/consumers-want-healthy-foods-and-will-pay-more-for-them/#42dd526d144f ("Nielsen's 2015 Global Health & Wellness Survey that polled over 30,000 individuals online suggests consumer mindset about healthy foods has shifted and they are ready to pay more for products that claim to boost health and weight loss."). For instance, "88% of those polled

percent of food products and thirty-four percent of beverage products introduced in the United States were labeled "all natural."[5] In light of consumers' health expectations[6], not surprisingly, between 2012 and 2014, "natural" labeled products increased in sales by twenty-four percent.[7] In 2013 alone, consumers spent over $40 billion on food that was labeled "natural."[8] Nevertheless, as more food products began bearing "natural" labels, more consumers began believing that companies were misleading them.[9] Because the Food and Drug Administration (FDA) has not officially defined "natural," many skeptical consumers turned to the courts for resolution of this ambiguity.[10]

While consumers have focused their efforts on combatting companies that falsely labeled such foods, there has been a rise in consumer demand for foods labeled "non-GMO."[11] A GMO is any animal, plant, or other organism that has had its genetic makeup modified through gene splicing or transgenic technology.[12] This scientific process creates combinations of genes that cannot be created through nature.[13] For example, some combinations could include plant, animal, bacterial, or viral genes.[14] Though recent studies have suggested that GMOs do not pose a threat,[15] and despite the fact that most

are willing to pay more for healthier foods," including foods that are GMO-free. *Id.*

5 Mike Esterl, *The Natural Evolution of Food Labels*, WALL ST. J., Nov. 6, 2013, at B1.

6 Gagliardi, *supra* note 4.

7 Leah Messinger, *Food Trade Group Will Create a "Natural" Label in Absence of US Government Regulation,* THE GUARDIAN (Oct. 23, 2015), http://www.theguardian.com/sustainable-business/2015/oct/23/food-natural-label-government-onha-fda.

8 Esterl, *supra* note 5.

9 *See* Nicole E. Negowetti, *Food Labeling Litigation: Exposing Gaps in the FDA's Resources and Regulatory Authority*, GOVERNANCE STUD. BROOKINGS (Brookings Inst., D.C.) (June 2014), at 7–9, https://www.brookings.edu/wp-content/uploads/2016/06/Negowetti_Food-Labeling-Litigation.pdf.

10 *Id.* at 6.

11 *See GMO Foods: What You Need to Know*, CONSUMER REPORTS (Feb. 26, 2015, 3:20 PM), http://www.consumerreports.org/cro/magazine/2015/02/gmo-foods-what-you-need-to-know/index.htm ("In 2013, sales of non-GMO products that were either certified organic (by law, organic products can't be made with GMO ingredients) or that carried the 'Non-GMO Project Verified' seal increased by 80 percent . . . .").

12 *GMO Facts*, NON GMO PROJECT, http://www.nongmoproject.org/gmo-facts/ (last visited Sept. 15, 2016).

13 *Id.*

14 *Id.*

15 Kate Hall, *Yes, GMOs Are Safe (Another Major Study Confirms)*, FORBES (May 20, 2016, 6:20 PM), http://www.forbes.com/sites/gmoanswers/2016/05/20/gmos-are-safe/#38b1eb9e119d; Elizabeth Weise, *Academies of Science Finds GMOs Not Harmful to Human Health*, USA TODAY (last updated May 17, 2016, 5:32 PM) http://www.usatoday.com/story/tech/2016/05/17/gmos-safe-academies-of-science-report-genetically-modified-food/84458872/ (reporting that "there was no correlation between genetically modified food and obesity or Type II diabetes").

scientists believe that GMOs are harmless, a minority of scientists disagree.[16] Likewise, while a large portion of the scientific community believes that GMOs are harmless, most United States consumers do not share the same perception.[17]

Moreover, the food industry has attempted to appeal to the modern consumer by labeling food products as "non-GMO," "GMO-free," or "non-GE," recognizing that consumers are concerned about the potential harms of GMOs and that consumers perceive "non-GMO" foods as healthier.[18] One chain restaurant has even created a purported "GMO-free" menu.[19] In April 2015, Chipotle became the first national restaurant chain to switch to GMO-free ingredients, responding to a national trend that has people requesting healthier food options.[20] Nevertheless, just like the debate over the definition of "natural", which has been extensively litigated in the courts, the federal government, until recently, has not weighed in on what the term "non-GMO" means. Consequently, consumers have brought a number of lawsuits against Chipotle to invite the courts to resolve whether Chipotle has misled the consumers by labeling its menu "GMO-free."[21]

Not only has "non-GMO" and "GMO" labeling been an issue in the courts, it has also been an issue in Congress. On July 29, 2016, President Barack Obama signed Public Law No. 114-216,[22] "which creates a national labeling requirement for food products" that are "made from genetically

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[16] *Hundreds of Scientists Warn: No Consensus on Safety of Genetically Modified Crops*, MINTPRESS NEWS (June 10, 2015), http://www.mintpressnews.com/hundreds-of-scientists-warn-no-consensus-on-safety-of-genetically-modified-crops/206427/.

[17] Mike Hughlett & Jim Spencer, *Consumer Angst at Forefront of GMO Labeling Debate*, STARTRIBUNE (July 25, 2015, 9:29 AM), http://www.startribune.com/consumer-angst-at-forefront-of-gmo-labeling-debate/318482521/. The public and researchers are vastly divided on the effects of GMOS. In 2015, researchers found that eighty-eight percent of U.S. scientists that constitute the American Association for the Advancement of Science believed GMOs were "generally safe," whereas only thirty-seven percent of United States consumers believed GMOs to be safe. *Id.*

[18] *Id.* Consumer demand for "non-GMO" labeling has increased over recent years as "only 1.6 percent of new food and drink products made 'non-GMO' labeling claims" in 2010, but that number increased to 2.8 percent by 2012 and to 10.2 percent by 2014. *Id. See also* Polovoy, *supra* note 2; *New Survey Finds that 87% of Consumers Think Non-GMO Is Healthier*, THE ORGANIC & NON-GMO REPORT (Aug. 29, 2015), http://non-gmoreport.com/articles/new-survey-finds-that-87-of-consumers-think-non-gmo-is-healthier/.

[19] Morgan Chilson, *Which Restaurant Chains are Non-GMO?*, NEWSMAX HEALTH (June 9, 2015, 12:34 PM), http://www.newsmax.com/Health/Health-Wire/restaurant-chains-non-GMO-food/2015/06/09/id/649564/.

[20] *Id.*

[21] Polovoy, *supra* note 1.

[22] National Bioengineered Food Disclosure Standard, Pub. L. No. 114-216, 130 Stat. 834 (2016).

modified organisms."[23] Under the law, the United States Department of Agriculture (USDA) has two years to finalize its regulatory decisions.[24] Though the law does not require labeling for food derived from an animal solely because the animal has consumed GMO feed,[25] following the passage of the law, the USDA has already begun exercising its regulatory power by issuing guidance regarding negative claims such as "non-GMO" labeling.[26] The USDA's guidance suggests that meat purchased at a grocery store cannot claim it is GMO-free unless the livestock was fed a non-GMO diet.[27] Though restaurants are explicitly excluded from the application of the law,[28] since the federal government, via the regulatory guidance of the USDA, is now weighing in on what constitutes "non-GMOs,"[29] courts may have to consider the federal government's stance on the food-labeling debate when ruling on future consumer fraud class actions against restaurants that purport to have GMO-free menus.

This Comment examines the recent class actions filed against Chipotle and how judges are wrestling with defining a reasonable consumer's understanding of "non-GMO" and will offer a standard that courts should use to assess these claims. Part II will present the history and background of food labeling cases that led to the debate over the definition of the term

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[23] James Lee, *U.S. Senate Passes GMO Labeling Bill*, VERISK 3E EHS EXPRESSIONS BLOG (July 14, 2016), http://3ecompany.com/resource-center/blog/us-senate-passes-gmo-labeling-bill-updated-29-july-2016. Andrew Amelinckx, *What You Need To Know About the New GMO Labeling Law*, MODERN FARMER (Aug. 8, 2016), http://modernfarmer.com/2016/08/gmo-labeling-law/ ("The most ubiquitous genetically-modified agricultural crops—corn, soy, canola, and sugar beets—would require labeling in their unrefined state. But as the FDA points out, many highly-refined products that come from genetically-modified sources, such as oil made from soy or canola, will not have to be labeled because they don't fit the law's definition of 'bioengineering' and don't necessarily contain genetic material."). Andrea Stander, the executive director for Rural Vermont, a grassroots organization that supports small farmers said "[m]y understanding is that many, many common types of food ingredients such as oils and sugars will be exempted from labeling under this law; things like corn syrup and soybean oil which are pretty ubiquitous in processed food." *Id.* Though the FDA's understanding of the law is consistent with Stander's statements, as directed by the law, the USDA Secretary of Agriculture will ultimately decide what food products will require labeling. *Id.*

[24] Lee, *supra* note 23 (noting some of these regulatory decisions will include what the "symbol on the food package indicating GMO ingredients should look like; the threshold amount of GMO contents a product must contain to trigger such labeling; and enforcement provisions.")

[25] National Bioengineered Food Disclosure Standard, Pub. L. No. 114-216, 130 Stat. 834 (2016).

[26] *First Attack on Companies Labeling Their Food as GMO-Free*, ANH USA (Sept. 6, 2016), http://www.anh-usa.org/first-attack-on-companies-labeling-their-food-as-gmo-free/ [hereinafter ANH USA].

[27] *Id.*

[28] Amelinckx, *supra* note 23.

[29] ANH USA, *supra* note 26.

"natural" in the consumer fraud context, including a discussion of the government's authority to regulate food labeling and a discussion of the obesity epidemic. Part III will discuss the mechanisms for bringing a deceptive food labeling claim and the lawsuits that have been brought over the term "natural" in light of the FDA's failure to provide a definition. Part IV will introduce the debate over the definition of "non-GMO." It will further discuss the jurisdictional split on this issue that has come out of a wave of class actions against Chipotle. One view, which emerges out of cases such as *Gallagher v. Chipotle Mexican Grill Inc.*,[30] supports a more narrow definition that suggests a reasonable consumer would think that in order for food to qualify as "non-GMO", the feed given to animals from which such food is manufactured does not necessarily need to also be "non-GMO." The other view, which comes out of cases such as *Reilly v. Chipotle Mexican Grill Inc.*,[31] posits a broader view that suggests the opposite opinion. Part V will propose a standard courts should use to assess these claims, namely what a reasonable consumer likely thinks the terms "non-GMO" and "GMO" actually mean.

More specifically, this Comment takes the position that though many state and federal laws support a narrow definition of the terms "non-GMO" and "GMO," such laws are influenced by the lobbying efforts of the industries seeking to benefit from a narrow understanding of the terms. On the contrary, this Comment argues for a standard that supports a consumer's broad understanding of the terms as consumer education efforts, market research, and even recent regulatory guidance issued by the USDA suggest that consumers hold such a broad understanding. Finally, Part VI concludes with a discussion of the future implications if such a standard is used.

II. BACKGROUND AND HISTORY OF FOOD LABELING LITIGATION

A. *The Federal Government's Regulatory Authority Over Nutrient Content and Health Claims on Food Labels*

Three agencies are primarily responsible for federal regulation of nutrition information: the FDA, the Federal Trade Commission (FTC), and the USDA.[32] The FTC regulates food advertising, whereas the FDA and USDA have shared authority to regulate food labels.[33] The USDA, through

[30] Gallagher v. Chipotle Mexican Grill, Inc., No. 15-cv-03952, 2016 WL 454083 (N.D. Cal. Feb. 5, 2016).

[31] Complaint ¶¶ 12, 16, Reilly v. Chipotle Mexican Grill Inc., No. 1:15-cv-23425, (S.D. Fla. Sep. 10, 2015).

[32] *Regulation of Advertising and Labeling: Conditions of Private Information Supply*, USDA ECON. RESEARCH SERV., https://www.ers.usda.gov/webdocs/publications/41905/51665_ah715c.pdf?v=42079 [hereinafter *USDA ERS*].

[33] *Id.*

its Food Safety and Inspection Service (FSIS), regulates the labeling of meat and poultry, whereas the FDA regulates other food labels, including fruits, vegetables, dairy, baked products, and seafood.[34]

Moreover, Congress promulgated the Federal Food, Drug, and Cosmetic Act (FDCA) in 1938, which grants the FDA the authority to create food definitions and food quality standards.[35] In 1990, Congress subsequently enacted the Nutrition and Labeling Education Act (NLEA), which amended the FDCA for almost all food products over which the FDA has jurisdiction.[36] The NLEA regulates food packaging health claims, standardizes nutrient content claims, and requires manufacturers to include more detailed information on product labels.[37] Under the NLEA, the FDA issued regulations regarding permissible nutrient content, nutrient claims, and health claims on food labels.[38] After the NLEA was passed, FSIS issued parallel regulations for nutrient content, nutrient claims, and health claims on labels for food subject to USDA jurisdiction.[39]

B. *The Obesity Epidemic and the Dawn of the Food Labeling Lawsuits*

The federal government's authority to regulate the food industry has become of particular concern as obesity has become a significant public health issue in the United States.[40] Obesity rates have increased steadily among Americans over the past two to three decades.[41] Though there are other factors at play, processed food is a contributing factor to the American obesity "epidemic."[42] While concern over obesity rates among Americans

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[34] Negowetti, *supra* note 9, at 2; USDA ERS, *supra* note 32, at 11.

[35] Negowetti, *supra* note 9, at 3.

[36] *Id.*

[37] *Id.*

[38] *Id.* A health claim describes the relationship of any substance to a disease or health-related condition through the use of statements, symbols, or vignettes. *Id.* at 4. A nutrient content claim describes the level of a nutrient in the food, directly or implicitly, using terms such as, "low," "high," "free," "reduced," or "light." *Id.* at 5.

[39] USDA ERS, *supra* note 32.

[40] Negowetti, *supra* note 9, at 5; *See* Nicole L. Novak & Kelly D. Brownell, *Role of Policy and Government in the Obesity Epidemic*, 126 CIRCULATION 2345, 2345–52 (2012). The federal government has implemented a range of policies and programs to combat the obesity epidemic, including clinical guidelines, nutrition labeling on packaged foods, social marketing and educational efforts, and calorie labeling on restaurant menus. *Id*.

[41] Youfa Wang et al., *Will All Americans Become Overweight or Obese? Estimating the Progression and Cost of the US Obesity Epidemic*, 16 OBESITY 2323, 2326–29 (2008) ("By 2030, health-care costs attributable to obesity and overweight could range from $860 to $956 billion, which would account for 15.8–17.6% of total health-care costs, or for 1 in every 6 dollars spent on health care.").

[42] *The Obesity Epidemic*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/cdctv/diseaseandconditions/lifestyle/obesity-epidemic.html (last visited

has increased, so has the demand for local, fresh, and healthy food.[43] Reports by the government and news outlets over the past few years demonstrate the consumer demand for healthy, natural, and organic food.[44] For example, organic food sales have increased from approximately $11 billion in 2004 to an estimated $27 billion in 2012.[45] In 2013, fifty-one percent of Americans searched for all-natural products when shopping at grocery stores.[46] More recently, in 2015, the total organic product sales hit a new record of $43.3 billion, which is an eleven percent increase from the prior year's record level.[47]

Accordingly, processed food manufacturers have introduced to the market hundreds of processed foods claiming to be "natural," "wholesome," "simple," or "pure."[48] Food labeled "natural" has arguably appealed to many consumers as reports indicate there was a twenty-four percent increase in "natural" sales from 2012 to 2014.[49] Additionally, in 2013 alone, consumers spent more than $40 billion on food labeled "natural."[50] Yet, in light of consumer demand for healthy foods, an increase in the amount of health, nutrition, and other claims, and limited oversight by the FDA, consumer advocacy groups have turned to the courts to combat deceptive food labeling practices.[51] At least 100 lawsuits have been brought between 2012 and 2013 challenging deceptive food labeling against a number of brands, including Unilever PLC's Ben & Jerry's, Kellogg Co.'s Kashi, and Beam Inc.'s Skinnygirl alcohol drinks.[52]

III. LET THE DECEPTIVE FOOD-LABELING LAWSUITS BEGIN

A. *Mechanisms for Bringing a Claim and the Reasonable Consumer Standard*

Like any other lawsuit in the consumer fraud context, there needs to be a mechanism through which a claimant can bring a claim. Neither the FDCA

Sept. 10, 2016) (other contributing factors include societal, economic, cultural conditions).

43 Negowetti, *supra* note 9, at 6.

44 *See, e.g.*, USDA, AGRIC. RESOURCES & ENV'T INDICATORS, 2012 EDITION 37–38, (Craig Osteen et al. eds., 2012), https://www.ers.usda.gov/webdocs/publications/44690/30351_eib98.pdf?v=41432; Mike Esterl, *supra* note 5; Press Release, Organic Trade Assoc., U.S. Organic Sales Post New Record of $43.3 Billion in 2015, (May 19, 2016), https://www.ota.com/news/press-releases/19031.

45 Osteen, *supra* note 44.

46 Esterl, *supra* note 5.

47 Press Release, *supra* note 44.

48 Negowetti, *supra* note 9, at 6.

49 Messinger, *supra* note 7.

50 Esterl, *supra* note 5.

51 Negowetti, *supra* note 9.

52 Esterl, *supra* note 5.

nor the FTC Act provides for a private right of action.[53] In other words, plaintiffs cannot bring a lawsuit claiming a food company's products fail to comply with certain FDCA statutes or regulations, or are misbranded.[54] States with laws that mirror the federal requirement, such as California, have nevertheless allowed for private causes of action.[55] Many food labeling lawsuits are filed in California where claimants can allege violations under the Unfair Competition Law (UCL) predicated on violations of the False Advertising Law (FAL), or violations under the Consumer Legal Remedies Act (CLRA); the UCL, FAL, and CLRA are California consumer protection statutes that prohibit deceptive practices and misleading advertising.[56]

In addition to California courts, New York and Florida courts apply the "reasonable consumer" standard to decide these claims.[57] The reasonable consumer test focuses on whether "members of the public are likely to be deceived."[58] The pertinent question under this standard is whether "a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled."[59] A reasonable consumer is "the ordinary consumer acting reasonably under the circumstances and is not versed in the art of inspecting and judging a product, in the process of its preparation or manufacture."[60]

Certain courts have determined that whether a plaintiff meets the reasonable consumer standard is a question of fact that cannot be resolved at the summary judgment stage.[61] Some courts, however, have ruled that a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6),[62] asserting that a plaintiff's allegations have failed to meet the reasonable consumer

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53 Negowetti, *supra* note 9, at 10.

54 *See* Murphy v. Cuomo, 913 F. Supp. 671, 679 (N.D.N.Y 1996).

55 Negowetti, *supra* note 9, at 11.

56 *Id.* at 10.

57 David J. Lender et al., *Navigating Deceptive Advertising Consumer Class Actions*, THOMSON REUTERS (2014), http://www.weil.com/~/media/files/pdfs/Navigating_Deceptive_Advertising_Consumer_Class_Actions.pdf.

58 Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008) (quoting Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995)); Lender et al., *supra* note 57. *See* Fink v. Time Warner Cable, 714 F.3d 739, 741–42 (2d Cir. 2013); Elias v. Hewlett-Packard Co., 950 F. Supp. 2d 1123, 1131–32 (N.D. Cal. 2013); In re Horizon Organic Milk Plus DHA Omega-3 Mktg. & Sales Practice Litig., 955 F. Supp. 2d 1311, 1331–32 (S.D. Fla. 2013).

59 Lavie v. Procter & Gamble Co., 129 Cal. Rptr. 2d 486, 508 (Cal. Ct. App. 2003).

60 Colgan v. Leatherman Tool Grp., Inc., 38 Cal. Rptr. 3d 36, 48 (Cal. Ct. App. 2006).

61 McKell v. Wash. Mut., Inc., 49 Cal. Rptr. 3d 227, 240 (Cal. Ct. App. 2006) (citing Gregory v. Albertson's, Inc., 128 Cal. Rptr. 2d 389, 397 (Cal. Ct. App. 2002)). "Whether a practice is deceptive or fraudulent" is generally a question of fact which requires "consideration and weighing of evidence from both sides before it can be resolved."). *Id*. *See also Williams*, 552 F.3d at 938–39.

62 FED. R. CIV. P. 12(b)(6).

standard, may also successfully end these class actions prior to discovery.[63] For example, in *Manchouck v. Mondelēz International, Inc., d/b/a Nabisco*,[64] the consumer asserted that Nabisco's "made with real fruit" label on Nabisco's strawberry and raspberry "Newton" cookies was deceptive because the cookies contained processed fruit purée instead of real fruit. Nabisco moved to dismiss the plaintiff's complaint.[65] Nabisco argued that: (1) the complaint failed to plausibly allege why a reasonable consumer would be deceived by the label "made with real fruit" because the plaintiff did not dispute the cookies contained real fruit in puréed form, (2) the definition of "real fruit" does not exclude puréed fruit, (3) the packaging displayed a depiction of the cookies' puréed fruit filling, and (4) consumers are on notice of the puréed fruit as they are listed in the ingredients.[66] The district court agreed with Nabisco because it found the plaintiff failed to allege why strawberries and raspberries in their puréed form are not "real fruit."[67] Thus, the plaintiff did not meet the reasonable consumer standard, and the court dismissed the complaint.[68]

B. *Preemption and Doctrine of Primary Jurisdiction in "Natural" Cases*

The FDA has extensively defined other common labels, including "low fat" and "light," but has not formally defined "natural."[69] Instead, in 1991 the FDA adopted an "informal policy" for the term "natural," which states that "natural" simply means "nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there."[70] Yet, the FDA's policy does

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[63] Lender et al., *supra* note 57; *see also* Freeman v. Time, Inc., 68 F.3d 285, 289–90 (9th Cir. 1995) (upholding the dismissal of a plaintiff's claim against a mailer that led the plaintiff to believe that the plaintiff won a million-dollar sweepstakes).

[64] Manchouck v. Mondelēz Int'l, Inc., No. C 13-02148 WHA, 2013 WL 5400285, at *1–3 (N.D. Cal. Sep. 26, 2013); Lender et al., *supra* note 57.

[65] Lender et al., *supra* note 57 (citing Manchouck v. Mondelēz Int'l, Inc., No. C 13-02148, 2013 WL 5400285, at *1–3 (N.D. Cal. Sept. 26, 2013)).

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *See, e.g.*, Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993) (to be codified at 21 C.F.R. pts. 5, 101) (explaining FDA's intention not to officially define "natural"); April L. Farris, *The "Natural" Aversion: The FDA's Reluctance To Define a Leading Food-Industry Marketing Claim, and the Pressing Need for a Workable Rule*, 65 FOOD & DRUG L.J. 403, 403–04 (2010) (explaining the FDA's lack of official definition for "natural"); Nicole E. Negowetti, *A National "Natural" Standard for Food Labeling*, 65 ME. L. REV. 581, 582–83 (2013) (explaining the lack of definition for "natural").

[70] Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of

not establish a legal standard as it only has the legal force of an advisory opinion.[71] The FDA explained that "[b]ecause of resource limitations and other agency priorities, [the FDA] is not undertaking rulemaking to establish a definition for 'natural' at this time."[72]

With no official federal agency definition, judges have been challenged to define what constitutes a "natural" ingredient in a myriad of lawsuits.[73] First, courts have ruled these issues justiciable as "the FDA, pursuant to the FDCA and NLEA, [does] not preempt claims brought under state consumer protection laws that utilized labels emphasizing that the food contained 'all natural' ingredients."[74] Specifically, the NLEA provides "that no state may directly or indirectly establish" any food labeling requirement not identical to the requirement of 21 U.S.C.A. § 343(q), which sets out when food intended for human consumption and offered for sale is misbranded.[75] The NLEA, however, does not preclude all nutrition labeling regulated by states, but instead has the purpose of preventing state and local governments from adopting inconsistent nutrition labeling requirements.[76] In *Barnes v. Campbell Soup Co.* the court found that "because the FDA deferred taking regulatory action by providing a mere general and unrestrictive policy on the term 'natural,' the FDA provided no actual federal requirements regarding the term 'natural' for the Court to endow with preemptive effect."[77] As such, the court stated that it would not intrude on the FDA's authority and preempt the plaintiff's claims until the FDA issued a clear requirement, position, or rule regarding use of the term "natural."[78]

Given that the FDA and USDA share regulatory authority over food product labeling,[79] whether a court should itself define "natural" ingredients in deceptive labeling cases depends on whether the primary jurisdiction doctrine applies. The primary jurisdiction doctrine applies "whenever enforcement of [a] claim requires the resolution of issues which, under a

Terms, 56 Fed. Reg. 60421, 60,466 (Nov. 27, 1991).

71 Negowetti, *supra* note 9, at 11.

72 Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. at 2407.

73 Negowetti, *supra* note 9, at 12.

74 Barnes v. Campbell Soup Co., No. C 12-05185, 2013 U.S. Dist. LEXIS 118225, at *23 (N.D. Cal. July 25, 2013). *See also* Lockwood v. Conagra Foods, Inc., 597 F. Supp. 2d 1028, 1034 (N.D. Cal. 2009); Hitt v. Arizona Beverage Co., No. 08-cv-809 WQH (POR), 2009 WL 449190, at *1 (S.D. Cal. Nov. 24, 2009); Astiana v. Ben & Jerry's Homeade, Inc., No. C 10-4387, 2011 WL 2111796, at *8 (N.D. Cal. May 26, 2011).

75 *Barnes*, 2013 U.S. Dist. LEXIS 118225, at *22; 21 U.S.C.A § 343 (West 2010).

76 *Barnes*, 2013 U.S. Dist. LEXIS 118225, at *22.

77 *Id.* at *25.

78 *Id.*

79 USDA ERS., *supra* note 32.

regulatory scheme, have been placed within the special competence of an administrative body."[80] Essentially, the doctrine provides courts with the benefit of hearing the views of administrative agencies on issues within the scope of the agencies' competence in appropriate circumstances.[81] Although "'[n]o fixed formula exists for applying the doctrine of primary jurisdiction,'"[82] courts have traditionally held that this doctrine applies in cases where a need to resolve an issue, that has been placed by Congress "within the jurisdiction of an administrative body having regulatory authority," exists and is "pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority," which "requires expertise or uniformity in administration."[83] A court will refer the issue to the proper agency for an administrative ruling if it determines the agency has primary jurisdiction.[84]

Some courts have decided to stay cases until the FDA promulgates formal regulations that define "natural;"[85] however, other courts have decided to consider the issue.[86] In one case, the court found that whether "GMO-free" falls within the reasonable consumer's understanding of "natural" is an issue that falls within the scope of a judge's conventional experience.[87] In another case that centered on whether products labeled "all natural" can contain genetically modified ingredients, the court decided it did not need to wait for official FDA guidance, but instead, had primary jurisdiction over the case.[88] For these reasons, many courts have decided to hear these claims.

C. *A Reasonable Consumer's Understanding of "Natural" Ingredients*

Plaintiffs who bring deceptive labeling claims against a food processor for "natural" labeling allege that they were deceived by the food processor's

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[80] United States v. W. Pac. R.R., 352 U.S. 59, 63–64 (1956).

[81] Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371, 376 (Pa. 1980).

[82] Davel Commc'ns, Inc. v. Quest Corp., 460 F.3d 1075, 1086 (9th Cir. 2006) (quoting *W. Pac.*, 352 U.S. at 64).

[83] Clark v. Time Warner Cable, 523 F.3d 1110, 1115 (9th Cir. 2008) (citing Syntek Semiconductor Co. v. Microchip Tech. Inc., 307 F.3d 775, 781 (9th Cir. 2002)).

[84] *W. Pac.*, 352 U.S. at 64.

[85] *See, e.g.*, Cox v. Gruma Corp., No. 12-CV-6502, 2013 U.S. Dist. LEXIS 97207 (N.D. Cal. July 11, 2013); Van Atta v. Gen. Mills, Inc., No. 12-cv-02815, 2013 U.S. Dist. LEXIS 118137 (D. Colo. July 18, 2013).

[86] Colleen Gray, *A Natural Food Fight: The Battle Between the "Natural" Label and GMOs,* 50 FOOD WASH. U. J.L. & POL'Y 123, 133 (2016).

[87] In re Frito-Lay N. Am., Inc., No. 12-MD-2413 (RRM) (RLM), 2013 WL 4647512, at *8 (E.D.N.Y. Aug. 29, 2013).

[88] Ault v. J.M. Smucker Co., No. 13 Civ. 3409 (PAC), 2014 WL 1998235, at *4–5 (S.D.N.Y. May 15, 2014).

"natural" claim on products that are not truly natural.[89] Therefore, to satisfy the "reasonable consumer" standard, plaintiffs need to demonstrate that the food producer's use of the term "natural" was not consistent with a reasonable consumer's definition of the term.[90] Lawsuits centered on products labeled as "natural" generally target four categories of products: (1) products containing artificial preservatives, (2) products processed with chemicals or containing other unnatural ingredients, (3) products containing high fructose corn syrup, and (4) products containing GMOs.[91] Given that the government has not officially defined "natural," that the term is ambiguous and ubiquitous, and that there are varying types of products that feature the term, ascertaining a reasonable person's understanding of the term is no easy task.[92]

The varying definitions that plaintiffs have offered highlight the difficulty in defining the term. For example, in one lawsuit the plaintiffs asserted that "natural" should exclusively apply to "products that contain no artificial or synthetic ingredients and consist entirely of ingredients that are only minimally processed."[93] In another lawsuit, a plaintiff argued GMO ingredients and artificial or synthetic substances are "by definition, *not* natural, and reasonable consumers reasonably do not expect food labeled as 'natural' . . . to include artificial or synthetic substances."[94] In yet another lawsuit, a plaintiff alleged that Nestle's Buitoni Pasta's "All Natural" label is "false, misleading, and reasonably likely to deceive the public" as the products contain unnatural ingredients, such as "synthetic xanthan gum and soy lecithin."[95] The plaintiff offered multiple definitions of natural, including "produced or existing in nature" and "not artificial or manufactured."[96]

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[89] *See* Pelayo v. Nestle USA, Inc., 989 F. Supp. 2d 973 (C.D. Cal. 2013); Class Action Complaint, Koehler v. Pepperidge Farm, Inc., No. 13-cv-02644, 2013 U.S. Dist. LEXIS 128440 (N.D. Cal. Sept. 9, 2013); Second Amended Class Action Complaint, Janney v. Mills, 944 F. Supp. 2d 806 (N.D. Cal. 2013).

[90] Nicole E. Negowetti, *Defining Natural Foods: The Search For a* Natural *Law*, 26 REGENT U. L. REV. 329, 344 (2014).

[91] Negowetti, *supra* note 9, at 13.

[92] Negowetti, *supra* note 90, at 344.

[93] Second Amended Class Action Complaint at 2, Janney v. Mills, 944 F. Supp. 2d 806 (N.D. Cal. 2013).

[94] Class Action Complaint at 8, Koehler v. Pepperidge Farm, Inc., No. 13-cv-02644, 2013 WL 4806895 (N.D. Cal. Sept. 9, 2013).

[95] Pelayo v. Nestle USA, Inc., 989 F. Supp. 2d 973, 975–76 (C.D. Cal. 2013).

[96] *Id.* at 978.

IV. THE DEBATE MOVES FROM "NATURAL" TO "NON-GMO"

A. *Primary Jurisdiction in Recent Chipotle Class-Actions Involving the Definition of the Term "Non-GMO"*

Recently, consumers have considered "non-GMO" branding to be an important purchasing factor. A 2014 consumer survey found that eighty percent of consumers look for non-GMO products, with fifty-six percent saying non-GMO was crucial to brand purchasing.[97] In fact, a recent survey found that the majority of shoppers perceive GMO foods to be less healthy and less safe than non-GMO foods with eighty-seven percent believing that non-GMO foods are either moderately or significantly healthier than GMO foods.[98] This push for non-GMO and healthier food options led Chipotle to become the first national restaurant chain to offer a GMO-free menu.[99] Steve Ells, founder and co-chief executive of Chipotle, told the *New York Times* that Chipotle's decision to offer a GMO-free menu "is another step toward the visions we have of changing the way people think about and eat fast food," and "[j]ust because food is served fast doesn't mean it has to be made with cheap raw ingredients, highly processed with preservatives and fillers and stabilizers and artificial colors and flavors."[100]

On its website, the company states, "Chipotle is on a never-ending journey to source the highest quality ingredients we can find. Over the years, as we have learned more about GMOs, we've decided that using them in our food doesn't align with that vision."[101] In addition, the company contends that "Chipotle was the first national restaurant company to disclose the GMO ingredients in our food, and now we are the first to cook only with non-GMO ingredients."[102] Chipotle posted a disclaimer on its website, which states "[t]he meat and dairy products we buy come from animals that are not genetically modified."[103] The company also stated: "But it is important to note that most animal feed in the United States is genetically modified, which means that the meat and dairy served at Chipotle are likely to come from animals given at least some GMO feed" and that "[m]any of the beverages sold in our restaurants contain genetically modified ingredients, including

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97 *Non-GMO Trumps Organic in 2014 Market LOHAS MamboTrack Survey*, PRNEWSWIRE (Mar. 5, 2014, 2:56 PM), http://www.prnewswire.com/news-releases/non-gmo-trumps-organic-in-2014-market-lohas-mambotrack-survey-248604731.html.

98 THE ORGANIC & NON-GMO REPORT, *supra* note 18.

99 Chilson, *supra* note 19.

100 Stephanie Strom, *Chipotle to Stop Using Genetically Altered Ingredients*, N.Y. TIMES, Apr. 27, 2015, at B2.

101 Chipotle Mexican Grill, *Food With Integrity G-M-Over It*, https://chipotle.com/gmo (last visited Sept. 14, 2017).

102 *Id.*

103 *Id.*

those containing high fructose corn syrup, which is almost always made from GMO corn."[104] As of this writing, Chipotle is the only national chain-restaurant that markets non-GMO food products.[105]

Nevertheless, Chipotle's move to marketing a "non-GMO" menu has led to a series of class action lawsuits. Just like the consumer fraud class action lawsuits over "natural" labeling, consumers are additionally focusing on "non-GMO" and "non-GE" labeling.[106] As with the term "natural," the federal government had not issued a federal definition of GMO ingredients before consumers brought these lawsuits.[107]

Just as courts have decided to not preempt plaintiffs' claims in cases where consumers brought deceptive food labeling claims for companies that claimed to have "natural" ingredients,[108] so should the courts not preempt plaintiffs' claims in these cases. Likewise, whether courts should decide to define "non-GMO" ingredients depends on whether courts have primary jurisdiction. Though the USDA has begun to exercise its regulatory power under Public Law No. 114-216 to regulate the labeling of GMO and non-GMO ingredients,[109] because the law creates an explicit exemption for food labeled by restaurants,[110] the regulations promulgated by the USDA are not applicable in these types of cases. Therefore, though courts may consider the guidance the USDA issues pursuant to its regulatory power under Public Law No. 114-216, courts should still hear the issue and exercise jurisdiction over the Chipotle line of cases—cases involving deceptive food labeling in the restaurant context for "non-GMO" labeling.

B. *Jurisdictional Split Over a Reasonable Consumer's Understanding of "Non-GMO" Labeling in Recent Chipotle Class-Actions*

The recent Chipotle lawsuits demonstrate the difficulty in defining a reasonable consumer's understanding of "non-GMO" and the jurisdictional split that such endeavor has caused. On August 28, 2015, a plaintiff filed a complaint on behalf of a nationwide class against Chipotle in a case called

104 *Id.*

105 Chilson, *supra* note 19.

106 Polovoy, *supra* note 1.

107 *Id.*

108 *See* Lockwood v. Conagra Foods, Inc., 597 F. Supp. 2d 1028, 1034 (N.D. Cal. 2009); Hitt v. Arizona Beverage, No. 08-cv-809, 2009 WL 449190, at *4 (S.D. Cal. Feb. 4, 2009); Barnes v. Campbell Soup Co., No. C 12-05185, 2013 U.S. Dist. LEXIS 118225, at *25 (N.D. Cal. July 25, 2013); Astiana v. Ben & Jerry's Homemade, Inc., No. C 10-4387, 2011 WL 2111796, at *8 (N.D. Cal. May 26, 2011).

109 ANH USA, *supra* note 26.

110 Amelinckx, *supra* note 23.

Gallagher v. Chipotle Mexican Grill Inc.[111] The complaint alleged that from April 2015 until August 2015, the plaintiff purchased Chipotle food and beverage products marketed, advertised, and sold by Chipotle.[112] When she purchased such food and beverage products, the plaintiff "relied on the representation that [d]efendant's Food Products did not contain any GMO ingredients, having seen or heard advertisements, and in-store signage, that [the defendant] used 'only non-GMO ingredients.'"[113]

The plaintiff claimed that Chipotle represented that it prepared its food using non-GMO ingredients only[114] and that all of Chipotle's food is non-GMO.[115] The plaintiff contended however, that "Chipotle's menu [had] never been at any time free of GMOs. Among other things, Chipotle serves meat products that come from animals which feed on GMOs, including corn and soy."[116] The plaintiff claimed that "[w]hile Chipotle knows that its menu contains ingredients with GMOs, it takes no meaningful steps to clarify consumer misconceptions in its advertisements and on its billboards, both in stores and in print, which instead say 'all' of the ingredients used in its Food Products are 'non-GMO.'"[117]

The plaintiff defined "GMO" as "any organism whose genetic material has been altered using . . . genetic engineering techniques."[118] The plaintiff also alleged that GMO content is a material fact that a reasonable person would have considered when purchasing a food or beverage product.[119] The plaintiff further noted that the USDA defines "organic" as "products that come from animals not fed with genetically modified crops" and that "organic" is not synonymous with non-GMO.[120] Accordingly, the plaintiff claimed that Chipotle had a duty to disclose but failed to disclose the material fact that consumers are not consuming exclusively non-GMO ingredients.[121] Had the plaintiff known of this concealed fact, or that Chipotle's claims regarding its GMO-free menu were false and misleading, the plaintiff contends she would not have purchased the food and beverage products from

111 No. 15-cv-03952, 2016 WL 454083 (N.D. Cal. Feb. 5, 2016).

112 Complaint ¶ 1, Gallagher v. Chipotle Mexican Grill, Inc., No. 15-cv-03952, 2016 WL 454083 (N.D. Cal. Feb. 5, 2016).

113 *Id.* ¶ 7.

114 *Id.* ¶ 30.

115 *Id.* ¶ 27.

116 *Id.* ¶ 5.

117 *Id.*

118 Complaint ¶ 14, Gallagher v. Chipotle Mexican Grill, Inc., No. 15-cv-03952, 2016 WL 454083 (N.D. Cal. Feb. 5, 2016).

119 *Id.* ¶ 41.

120 *Id.* ¶ 38.

121 *Id.* ¶¶ 40–42.

Chipotle.[122]

Chipotle spokesman Chris Arnold called the lawsuit "meritless" and posited that Chipotle has "always been clear that [its] soft drinks contained GMO ingredients, and that the animals from which [its] meat comes consume GMO feed . . . but that does not mean that [its] meat is GMO, any more than people would be genetically modified if they eat GMO foods."[123] In its analysis, the court noted that the "[p]laintiff contends that the reasonable consumer would interpret 'non-GMO ingredients' to mean meat and dairy ingredients produced from animals that never consumed any genetically modified substances."[124] The court questioned whether the complaint reasonably supported this interpretation.[125] The court found that since the plaintiff conceded that a reasonable consumer could not be deceived by Chipotle's website disclosures and since the plaintiff did not explain why the reasonable consumer would interpret "non-GMO" to mean the same thing as "organic," the court granted Chipotle's motion to dismiss.[126]

With the court's permission, on March 11, 2016, the plaintiff amended her pleadings by adding six plaintiffs and adding claims for violations of California's, Maryland's, Florida's and New York's consumer protection statutes; she alleged that consumers ascribe a "broad meaning" to non-GMO and GMO terms due to educational efforts by non-GMO consumer information organizations, as well as government authorities, including The Non-GMO Project, FDA, FSIS, and USDA.[127] Moreover, the plaintiff alleged that according to market research, consumers have a "broader" understanding of the terms GMO and non-GMO.[128] Essentially, the plaintiff claimed that such a broad definition means that foods and drinks are GMO-free if they are not sourced from any GMOs and if they do not contain animal products from animals that consume feed containing GMOs.[129]

Less than a month later, on September 10, 2015, a different consumer filed a similar class action in the Southern District of Florida, alleging that Chipotle's advertising for non-GMO ingredients is false and misleading as its meat and dairy products come from animals fed with a diet containing

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122 *Id.* ¶ 7.

123 James R. Ravitz and Georgia C. Ravitz, *Chipotle Served with Class Action Lawsuit Over 'GMO-Free' Marketing*, LEXOLOGY (Sept. 10, 2015), http://www.lexology.com/library/detail.aspx?g=1c33301e-0200-44ab-aa4a-119e0f60b564.

124 Gallagher v. Chipotle Mexican Grill, Inc., No. 15-cv-03952, 2016 WL 454083, at *4 (N.D. Cal. Feb. 5, 2016).

125 *Id.*

126 *Id.*; Polovoy, *supra* note 1.

127 Polovoy, *supra* note 1.

128 *Id.*

129 *Id.*

GMO ingredients.[130] The plaintiff in this case alleged violations of Florida's Deceptive and Unfair Trade Practices Act.[131] Relying on the *Gallagher* dismissal order, Chipotle argued that the case should be dismissed as the plaintiff's interpretation of non-GMO was a "nonsensical subjective definition of 'non-GMO' that would not plausibly be espoused by a reasonable consumer."[132] Chipotle argued that a reasonable consumer would not believe that meat and dairy ingredients sourced from animals that have consumed GMO feed contain GMOs.[133] Chipotle therefore concluded that the plaintiff was unable to demonstrate that it violated the Florida Deceptive and Unfair Trade Practices Act.[134]

Despite the striking similarities between the claims in *Gallagher* and *Reilly*, the court in *Reilly* made an opposite ruling on Chipotle's motion to dismiss than the court in *Gallagher*.[135] The *Reilly* court compared Chipotle's evidence, that some legal and scientific definitions of GMO exclude items included in the plaintiff's definition, with the plaintiff's evidence, that some consumers and legislators hold the same definition as the plaintiff.[136] The court disagreed with Chipotle's criticism of the plaintiff's non-GMO interpretation and held that "more evidence is needed to establish both a definition of the term and whether a reasonable consumer would share [the plaintiff's] interpretation of the term."[137] The *Reilly* court found that the plaintiff had proffered sufficient evidence to show that some consumers and legislators believe that feed given to animals, from which such food is manufactured, must also be non-GMO in order for the animal-based food to qualify as non-GMO.[138]

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130 Complaint ¶¶ 12, 16, Reilly v. Chipotle Mexican Grill Inc., No. 1:15-cv-23425, (S.D. Fla. Sep. 10, 2015).

131 *Id.*; Polovoy, *supra* note 1.

132 Polovoy, *supra* note 1.

133 Alex Wolf, *Chipotle Looks To Duck GMO-Ingredient Class Action*, LAW360 (June 20, 2016, 1:52 PM), http://www.law360.com/articles/808642/chipotle-looks-to-duck-gmo-ingredient-class-action.

134 *Id.*

135 Polovoy, *supra* note 1.

136 *Id.*

137 *Id.*

138 *Id.* On November 16, 2016 the *Reilly* case was dismissed as the plaintiff was denied class certification. Joyce Hanson, *Chipotle Urges 11th Circ. To Toss Customer's GMO Suit*, LAW360 (June 23, 2017, 2:34 PM), https://www.law360.com/articles/937730?scroll=1. On January 31, 2017, the plaintiff filed an appeal, asking the Eleventh Circuit to review the case, claiming that the Florida federal judge failed to properly evaluate the consumer deception issue. *Id.* In response, Chipotle asserted the plaintiff erroneously claimed that Chipotle lied about using GMO ingredients and asserted Chipotle had been transparent about its sourcing of ingredients. *Id.*

One day before the *Gallagher* plaintiff filed her amended complaint, another consumer filed a complaint against Chipotle in the Southern District of California.[139] The plaintiff alleged deception regarding GMO corn, GMO soy, and GMO feed given to animals from which Chipotle sourced its meat products, sour cream, and cheese.[140] The plaintiff defined GMO as "any organism whose genetic material has been altered using genetic engineering techniques whereby genes that express a desired trait can be physically moved or added to a new organism to enhance the trait in that organism."[141] Once again, Chipotle moved to dismiss, asserting that the plaintiff's GMO definition is "nonsensical."[142]

Four days later, on April 22, 2016, Chipotle was sued once again—this time, in the Northern District of California.[143] The *Schneider* complaint alleged violations of California's, New York's, Maryland's, and Florida's consumer protection statutes.[144] In addition, the plaintiffs alleged that consumers reasonably understood that non-GMO claims would mean that Chipotle's menu is 100 percent free of GMOs and that Chipotle does not serve food that comes from animals raised on a diet containing GMO ingredients.[145] Unlike the original complaint in *Gallagher*, the complaint filed by the *Schneider* plaintiffs pled more details, including scientific studies, consumer educational efforts, and market research polls to bolster the notion that a reasonable consumer holds a broad understanding of the terms "non-GMO" and "GMO."[146] The plaintiffs asserted that "consumers have [a broad] understanding [of GMO] because of educational efforts by 'non-GMO' consumer information sources and certification agencies as well as government authorities" and "[m]arket research [shows] that consumers understand and expect that advertisements and labeling of 'non-GMO,' 'GMO[-]free,' or related claims have similar meanings and would not apply to foods sourced from animals fed with a GMO or genetically engineered diet."[147]

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139 Polovoy, *supra* note 1; Complaint, Pappas v. Chipotle Mexican Grill Inc., No. 3:16-cv-00612 (S.D. Cal Mar. 10, 2016).

140 Polovoy, *supra* note 1; Complaint ¶¶ 5–6, *Pappas*, No. 3:16-cv-00612.

141 Polovoy, *supra* note 1; *See also* Complaint ¶ 14, *Pappas*, No. 3:16-cv-00612.

142 Chipotle's Memorandum In Support of Motion to Dismiss at 10, Pappas v. Chipotle Mexican Grill Inc., No. 3:16-cv-00612 (S.D. Cal Mar. 10, 2016).

143 Polovoy, *supra* note 1; Schneider v. Chipotle Mexican Grill, Inc., No. 16-cv-02200-HSG, 2016 U.S. Dist. LEXIS 153579 (N.D. Cal. Nov. 4, 2016).

144 Polovoy, *supra* note 1.

145 Complaint ¶ 2, Schneider v. Chipotle Mexican Grill, Inc., No. 16-cv-02200-HSG, 2016 U.S. Dist. LEXIS 153579 (N.D. Cal. Nov. 4, 2016).

146 *Id.* ¶¶ 19, 24–26.

147 *Id.*

V. THE SEARCH FOR A STANDARD: A REASONABLE CONSUMER'S UNDERSTANDING OF THE TERMS "GMO" AND "NON-GMO"

A. *Consumer Educational Efforts*

The *Schneider* complaint identified several consumer educational initiatives that have attempted to educate consumers about GMOs.[148] For instance, the Non-GMO Project seeks to inform consumers and to build a non-GMO food supply in the marketplace.[149] To do so, the organization developed a standard wherein a company's product can earn a "Butterfly," a symbol that alerts the consumer that the product meets the organization's GMO-free standard.[150] The Non-GMO Project describes its standard as "a consensus-based document crafted with the insight from dozens of industry experts, reflecting a dynamic range of perspectives."[151] The standard defines a "non-GMO" product as "a plant, animal, or other organism or derivative of such an organism whose genetic structure has not been altered by gene splicing," and has not been subject to "[genetically modified] processes or inputs."[152] This definition suggests that food sourced from animals that consume animal feed containing GMOs cannot be classified as "non-GMO."

Furthermore, FSIS of the USDA, responsible for regulating the labeling of meat, poultry, and egg products, recently approved the Non-GMO Project verified label claim for both meat and liquid egg products.[153] The label's purpose is to inform consumers that "the animal was not raised on a diet that consists of genetically engineered ingredients, like corn, soy, and alfalfa."[154]

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148 *Id.* ¶¶ 20–25.

149 *Defining Non-GMO,* NON-GMO PROJECT, http://www.nongmoproject.org/blog/defining-non-gmo/ (last visited Sept. 27, 2016, 8:00 PM).

150 *Id.* ("The nearly 35,000 Non-GMO Project Verified products in the marketplace currently represent an annual $13.5 billion in sales. According to Whole Foods Market, products with the Butterfly are the fastest dollar growth trend in their stores this year at an impressive 16%.").

151 *About*, NON-GMO PROJECT, http://www.nongmoproject.org/about/ (last visited Sept. 27, 2017).

152 NON-GMO PROJECT, NON-GMO PROJECT STANDARD 24 (2016), http://www.nongmoproject.org/wp-content/uploads/2016/08/Non-GMO-Project-Standard.pdf.

153 Claire Mitchell, *USDA Approves Non-GMO Label Claim for Meat and Egg Products*, STOEL RIVES LLP (July 11, 2013), http://www.foodliabilitylaw.com/2013/07/articles/legislation-and-regulation/food-labeling/usda-approves-non-gmo-label-claim-for-meat-and-egg-products/.

154 *Id.*

In addition to the USDA's position, in November of 2015, the FDA issued nonbinding guidelines to express its current GMO understanding.[155] The guidelines apply to "GMO-free," "GE-free," "does not contain GMOs," "non-GMO," and similar claims.[156] The "FDA recommends that manufacturers not use food labeling claims that indicate that a food is 'free' of ingredients derived through the use of biotechnology" because the term "'free' conveys zero or total absence unless a regulatory definition has been put in place in a specific situation."[157] "Instead, [the] FDA recommends that manufacturers consider the use of other types of statements to indicate that a plant-derived food has not been produced using bioengineering."[158]

B. *Consumer Opinion Market Research*

Market research efforts suggest that consumers broadly understand the terms "non-GMO" and "GMO." The *Schneider* complaint references a poll of Ohio voters conducted in December 2015, which asked the following question: "If you saw a dairy product in the supermarket that was labeled 'non-GMO', would you expect that the dairy product was made using milk from cows who had not been fed any genetically modified 'GMO' feed, or not?"[159] The poll revealed that seventy-six percent of consumers would "[e]xpect that a dairy product labeled as 'non-GMO' was made using milk from cows that had not been fed any genetically modified feed."[160] Eleven percent of consumers would "not expect that a dairy product labeled 'non-GMO' was made using milk from cows that had not been fed any genetically modified feed."[161] Twelve percent of consumers were not sure.[162] The results of this poll seem to suggest that a majority of Ohio consumers hold a broad understanding of the terms "GMO" and "non-GMO" and would believe that meat sourced from an animal fed a diet containing GMOs is not "GMO-free," even if such meat is not otherwise genetically modified.

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155 *Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Derived from Genetically Engineered Plants*, U.S. FDA, http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/ucm059098.htm#references (last updated July 1, 2016).

156 *Id.*

157 *Id.*

158 *Id.*

159 Complaint ¶ 24, Schneider v. Chipotle Mexican Grill, Inc., No. 16-cv-02200, 2016 U.S. Dist. LEXIS 153579 (N.D. Cal. Nov. 4, 2016) (citing *Ohio Survey Results*, PUB. POLICY POLLING, https://www.scribd.com/fullscreen/296829933?access_key=key-CZjpQ4qu9Q6VZ6AYOQvf&allow_share=false&escape=false&show_recommendations=false&view_mode=scroll (last visited Sept. 27, 2017)).

160 *Id.*

161 *Id.*

162 *Id.*

C. *State GMO Labeling Laws*

Contrary to educational efforts by organizations, governmental agencies, and consumer opinion market research, state labeling laws support the opposite position. In June of 2013, Connecticut became the first state to pass a GMO labeling law.[163] The law targets two of the contended issues in food labeling: the definition of the term "natural" and whether or not labels should be applied to food products containing GMOs.[164] The law defines natural food as food "(A) that has not been treated with preservatives, antibiotics, synthetic additives, artificial flavoring or artificial coloring; and (B) that has not been processed in a manner that makes such food significantly less nutritive; and (C) . . . that has not been genetically engineered . . . ."[165] As to GMO labeling, the law requires "(A) . . . food intended for human consumption, and (B) seed or seed stock that is intended to produce food for human consumption, that is entirely or partially genetically-engineered . . . [to] be labeled . . . 'Produced with Genetic Engineering.'"[166] Despite this requirement, the law carves out exemptions.[167] Notably, the beef, pork, poultry and egg industries successfully lobbied for a specific exemption, namely that labels are not required for products containing GMOs if such GMOs were the result of livestock consuming genetically modified feed.[168]

Maine swiftly followed Connecticut's lead. Maine's legislature passed a GMO labeling law by a 141-to-4 vote in the state's House of Representatives on June 11, 2013, and by a unanimous vote the next day in the state's Senate.[169] Maine's law is similar to Connecticut's law, requiring food or seed stock that is genetically engineered to be conspicuously labeled "produced with Genetic Engineering."[170] The Maine bill, however, does not define the term "natural."[171] The text in Maine's bill was substantially similar to the provisions set out in the Connecticut law.[172] The law, Maine's

163 Julie Muller, *Naturally Misleading: FDA's Unwillingness To Define "Natural" and the Quest for GMO Transparency Through State Mandatory Labeling Initiatives*, 48 SUFFOLK U.L. REV. 511, 526 (2015).

164 *Id.* at 526–27.

165 *Id.* at 526.

166 *Id.*

167 Ana Radélat, *Senate Moves to Quash CT's GMO Food Labeling Law*, CT MIRROR (July 6, 2016), http://ctmirror.org/2016/07/06/senate-poised-to-quash-connecticuts-gmo-food-labeling-law/. The law exempts a number of ingredients made from genetically modified sources, including oil made from genetically engineered soy. This includes most sugars, starches, and purified proteins. *Id.*

168 *Id.*

169 Muller, *supra* note 163, at 527.

170 *Id.*

171 *Id.* at 527–28.

172 *Id.*

Act to "Protect Maine Food Consumers' Right to Know about Genetically Engineered Food and Seed Stock," exempts food served in restaurants and like Connecticut's law, creates an exception for food derived from an animal that was not itself genetically engineered but was fed genetically engineered feed.[173]

On May 8, 2014, Vermont was the first state to pass a mandatory labeling law for foods produced using GMOs.[174] Essentially, the law mandates that a product must be labeled if the product is sold in Vermont and is made with GMOs.[175] Further, products manufactured with GMOs may not be labeled as "natural."[176] The law delineates a few exceptions, including exceptions for restaurants, and for foods and beverages exposed to GMO seeds unknowingly.[177] Significantly, like Connecticut and Maine, the law excludes "[f]ood consisting entirely of or derived entirely from an animal which has not itself been produced with genetic engineering, regardless of whether the animal has been fed or injected with any food, drug, or other substance produced with genetic engineering."[178] Therefore, it seems some state legislatures, through labeling laws, do not hold a broad understanding of the terms "GMO" or "non-GMO," but instead adopt a narrower understanding of the terms as the labeling laws in Vermont, Connecticut, and Maine all expressly exclude GMO labeling for food products sourced from animals that consumed feed containing GMOs.

D. *New Federal Labeling Law: Public Law No. 114-216*

Similarly, the recent passage of a federal labeling law sheds light on Congress's understanding of the terms "GMO" and "non-GMO." Public Law No. 114-216 creates a national labeling requirement for food products that are made from genetically modified organisms.[179] The law invalidates the strict mandatory GMO labeling requirement in Vermont and preempts

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173 Erin Close, *Maine Becomes Second State to Require GMO Labeling*, LEXOLOGY (Jan. 23, 2014), http://www.lexology.com/library/detail.aspx?g=27fcde08-6b5f-419b-a1e8-d088669fb924.

174 VT. STAT. ANN. tit. 9, § 3043 (2017); Charlotte Davis, *A Right to Know About GMOs: What American Meat Institute v. USDA Means for Vermont's Food Labeling Law*, 16 N.C. J.L. & TECH. ON. 32, 33 (2014).

175 Davis, *supra* note 174, at 47.

176 *Id.* at 47–48.

177 *Id.* at 48. Vermont's mandatory labeling law provides an exemption when "food has not been knowingly or intentionally produced with genetic engineering and has been segregated from and has not been knowingly or intentionally commingled with food that may have been produced with genetic engineering at any time." VT. STAT. ANN. tit. 9, § 3044(2) (2017).

178 § 3044(1).

179 National Bioengineered Food Disclosure Standard, Pub. L. No. 114-216, 130 Stat. 834 (2016). *See* Lee, *supra* note 23.

other state law GMO labeling laws, including the laws passed in Connecticut and Maine.[180] The new legislation is a compromise between a voluntary labeling law—which was proposed by Congress in the past—and more explicit on-package disclosure requirements supported by consumer interest groups.[181] Rulemaking is expected to be contentious, as various stakeholders with differing interests will attempt to influence the USDA's regulatory decision-making on, but not limited to: what the actual labels appearing on the food products should look like; the correct amount of GMO contents that need to be contained in a product to trigger labeling; and provisions for enforcement.[182] Like state labeling laws, the federal law excludes from labeling food served in restaurants or similar retail food establishments.[183] Also consistent with state labeling laws, this federal law excludes from labeling "food derived from an animal to be considered a bioengineered food solely because the animal consumed feed produced from, containing, or consisting of a bioengineered substance."[184] Therefore, similar to the state legislators in Connecticut, Maine, and Vermont, Congress has opted to not require labeling for foods that come from animals fed with GMO laden animal feed solely because the animals ate such feed. This suggests that Congress does not share a broad understanding of the terms "non-GMO" and "GMO," but instead supports a narrower understanding of the terms.

According to the FDA, the law's "bioengineering" definition is ambiguous and narrow and will likely result in many genetically engineered sources not being subject to the law, such as oil made from genetically engineered soy.[185] Likewise, starches and purified proteins are not subject to the law.[186] The FDA further noted that it may prove difficult for any food containing GMOs to qualify for labeling and as such, most foods containing GMOs may not be subject to mandatory labeling under the law.[187] One week before the bill was passed, Connecticut Democratic Senator Richard Blumenthal said, "[a] court interpreting the issues that will be raised in litigation—and there's no question that there will be litigation—will look first and probably only to the language of the statute."[188] Accordingly,

180 *See* Lee, *supra* note 23.

181 *Id.*

182 *Id.*

183 National Bioengineered Food Disclosure Standard, Pub. L. No. 114-216, 130 Stat. 834 (2016).

184 *Id.*

185 Megan Westgate, *Flawed GMO Labeling Bill Signed into Federal Law*, NON-GMO PROJECT (Aug. 24, 2016), http://www.nongmoproject.org/blog/flawed-gmo-labeling-bill-signed-into-federal-law/.

186 *Id.*

187 *Id.*

188 Stephanie Strom, *G.M.O. Labeling Bill Gains House Approval*, N.Y. TIMES, July 14, 2016, at B2.

though the USDA disagrees, many believe that the labeling standard will ultimately be litigated in court.[189]

Following the labeling bill's passage, FSIS swiftly began exercising its regulatory power regarding GMO-free labeling.[190] As the new labeling law provides that "a food may not be considered to be 'not bioengineered' or 'non-GMO', or any other similar claim describing the absence of bioengineering in the food solely because the food is not required to bear a disclosure that the food is bioengineered under this subtitle," the USDA can use its regulatory power to consider "negative claims" or in other words, consider non-GMO labeling claims in addition to GMO labeling claims.[191] In its official guidance, FSIS stated that "[e]ffective immediately, FSIS will begin approving negative claims for meat, poultry and egg products that do not contain bioengineered ingredients or that are derived from livestock that do not consume bioengineered feed and that contain the terms 'genetically modified organism' or 'GMO.'"[192] To evaluate these claims, FSIS states that it will make use of the definition of "bioengineering" in Pub. L. No. 114-216, which is defined as "a food that contains genetic material that has been modified through in vitro recombinant deoxyribonucleic acid (DNA) techniques and for which the modification could not otherwise be obtained through conventional breeding or found in nature."[193] Essentially, a strict reading of the USDA's guidance suggests that meat purchased at a grocery store cannot claim it is GMO-free unless the livestock was fed a non-GMO diet.[194] Though it seems Congress supports narrow definitions of the terms "non-GMO" and "GMO," as the law Congress passed explicitly excludes food sourced from animals with diets containing GMOs, the USDA, consistent with its support for the Non-GMO Project labeling,[195] is using its new regulatory power under the federal labeling law to take the opposite position. In order to qualify for a "non-GMO" claim, the food sourced from animals must be fed a GMO-free diet.

189 *Id.*

190 ANH USA, *supra* note 26.

191 National Bioengineered Food Disclosure Standard, Pub. L. No. 114-216, § 294(c), 130 Stat. 834 (2016); *Statements That Bioengineered or Genetically Modified (GM) Ingredients or Animal Feed Were Not Used in Meat, Poultry, or Egg Products*, USDA, http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/claims-guidance/procedures-nongenetically-engineered-statement (last visited Nov. 1, 2016 9:00 PM).

192 USDA, *supra* note 191.

193 *Id.*

194 ANH USA, *supra* note 26.

195 *See* Mitchell, *supra* note 153.

E. *Adopting a Consumer's Broad Understanding as the Standard*

In the Chipotle class actions, under the reasonable consumer standard,[196] the question is: whether a reasonable consumer could be misled by the purported GMO-free menu when in fact, the meat and other food products used in Chipotle's restaurants is sourced from animals that consumed animal feed containing GMOs. Given the evidence above, courts should find that a reasonable consumer holds a broad understanding of the terms "GMO" and "non-GMO" insofar as an ordinary consumer would expect that if a menu purports to be "GMO-free," then even the feed given to the animals that the meat is sourced from, would also be GMO-free.

Generally, as society has become more health conscious, consumers have become increasingly concerned over the risks associated with GMOs and have held negative views regarding the healthiness of GMOs.[197] Under this backdrop, organizations have engaged in efforts to educate consumers about GMOs. For instance, the Non-GMO Project has set a standard by which food products must abide by in order to qualify as "non-GMO."[198] Foods sourced from animals with diets containing GMOs would not qualify under the Non-GMO Project's standard.[199] The USDA has supported this labeling for meat and liquid egg products to inform consumers that "the animal was not raised on a diet that consists of genetically engineered ingredients, like corn, soy and alfalfa."[200] Likewise, the FDA has warned against companies making "non-GMO" claims, presumably because of the risk of traces of GMOs appearing in a product when consumers expect that "non-GMO" means that there are zero GMO ingredients.[201] Market research of Ohio consumers also supports this position.[202] For example, one poll found that most consumers would think that milk labeled "non-GMO" was

196 *See* discussion *supra* Part III.

197 *See* Hughlett, *supra* note 17. The public and researchers are vastly divided on the effects of GMOs. In 2015, researchers found that eighty-eight percent of United States scientists that constitute the American Association for the Advancement of Science believed GMOs were "generally safe," whereas only thirty-seven percent of United States consumers believed GMOs to be safe. *Id.*; THE ORGANIC & NON-GMO REPORT, *supra* note 18 ("The majority of shoppers who are aware of GMOs perceive them as less healthy and less safe than non-GMO foods with 87% saying that non-GMO foods are somewhat or a lot healthier than GMO foods. Shoppers seem to believe that GMOs play a more negative role when it comes to health and safety rather than environmental impact or other concerns such as taste. The majority of global shoppers do not believe that genetic modification of crops is necessary to ensure that we can grow enough food globally. The survey also found that 48% of global shoppers are extremely or very concerned about GMOs and 87% believe [genetically modified] foods should be labeled as such.").

198 NON-GMO PROJECT, *supra* note 152.

199 *Id.*

200 Mitchell, *supra* note 153.

201 U.S. FDA, *supra* note 155.

202 Complaint ¶ 24, *Schneider*, *supra* note 159.

not sourced from cows that were fed with a diet containing GMOs.[203]

Despite sources that support the proposition that a reasonable consumer understands the term "non-GMO" to be narrow, most state and federal legislation suggest support for the opposite position. The GMO labeling laws in Connecticut, Maine, Vermont, and even the new federal law that preempts these state laws, provide labeling exemptions to food products that were sourced from animals that consumed diets containing GMOs.[204] Nevertheless, these exemptions likely exist as a result of lobbying efforts by the meat and poultry industries, whose companies are directly affected by labeling laws.[205] Moreover, the USDA has already issued guidance for "non-GMO" labeling claims pursuant to its regulatory power under the new federal labeling law; the guidance indicates that in order for food to qualify as "non-GMO," the animals that such food is sourced from cannot have a diet containing GMOs.[206] As such, labeling law exemptions likely do not accurately reflect consumers' actual views regarding GMOs, but rather reflect the successful lobbying efforts of affected industries. Instead, the guidance issued by the USDA regarding negative claims more accurately reflects consumer expectations of the food that they purchase because the guidance issued by the USDA is more consistent with consumer educational efforts and consumer market research.

Therefore, although some labeling laws do not require GMO labeling for foods sourced from animals fed diets containing GMOs, given consumers' demand for healthier food and wariness regarding GMOs, consumer educational efforts and consumer market research, it is likely that a reasonable consumer broadly understands "non-GMO." In other words, a reasonable consumer would expect that when a restaurant advertises a GMO-free menu, everything in the process is GMO-free, including the feed given to the animals that the meat is sourced from. Lastly, if the USDA's new guidance suggests a governmental agency understanding of "GMO" and "non-GMO" and more importantly, consumer understanding of the terms, then though the new federal labeling law explicitly exempts restaurants from GMO labeling, restaurants like Chipotle should beware of making "non-GMO" claims. Consistent with the USDA's new guidance, a reasonable consumer would likely believe that in order to qualify as "non-GMO," the

203 *Id.*

204 National Bioengineered Food Disclosure Standard, Pub. L. No. 114-216, 130 Stat. 834 (2016); VT. STAT. ANN. tit. 9, § 3044(1) (2017); Close, *supra* note 173; Radélat, *supra* note 167.

205 Radélat, *supra* note 167; *See* L.J. Devon, *New 'GMO-Labeling Law' Violates State Sovereignty, Trampling Food Transparency Laws in Vermont and Other Regions*, NATURAL NEWS (July 6, 2016), http://www.naturalnews.com/054578_GMOs_labeling_Roberts-Stabenow_legislation.html.

206 ANH USA, *supra* note 26.

food must be derived from animals that did not consume feed containing GMO ingredients. Nevertheless, if courts adopt a consumer's broad understanding as the standard, litigation will likely continue to ensue, and may result in fewer restaurants and companies labeling their menus or products as "GMO-free" for fear of costly litigation as many food products at least contain some traces of GMOs.

VI. CONCLUSION

In light of America's obesity epidemic, consumer demand for healthier foods has reached an all-time high.[207] Though the FDA and USDA have regulatory power over food labeling, gaps in their guidance have led to questions over the meanings of terms that appear on labels. One of the most notable label debates is the one over the definition of "natural;" however, with more consumer concern over GMOs, and Chipotle's "GMO-free" menu, the dispute over the term "non-GMO" has become the latest version of this food labeling debate.[208] This dispute has led to a jurisdictional split over whether a reasonable consumer would understand the term "non-GMO" in a broad or narrow way. The broad understanding of the term "non-GMO" means there are no GMO ingredients in a food product, including the feed given to the animals that the food product is sourced from. The narrow understanding of the term means there are no GMO ingredients in a food product, even though the animal feed that the food product is sourced from does contain GMOs. Despite labeling laws that support the narrow understanding, consumer educational efforts, consumer market research, and even guidance issued by both the FDA and USDA support a broad understanding. Accordingly, courts should apply the broad understanding to decide class actions similar to those against Chipotle.

If courts adopt this standard, many labeling cases are likely to survive motions to dismiss and summary judgment motions.[209] Assuming that the plaintiffs can factually support a claim, their cases would not likely be dismissed on the grounds that they could not have been deceived by a restaurant that advertised its menu or food products as "GMO-free" if the court finds a reasonable consumer would hold such belief.[210] Therefore, restaurants should heed the FDA's advice and pay close attention to what food products they label as "GMO-free" or "non-GMO."[211] Because the new labeling law carves out an exemption from mandatory labeling for

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207 Negowetti, *supra* note 9, at 6. *See also* THE ORGANIC & NON-GMO REPORT, *supra* note 18.

208 Negowetti, *supra* note 9, at 6–7.

209 *See* Lender et al., *supra* note 57.

210 *See id.*

211 *See* U.S. FDA, *supra* note 155.

restaurants,[212] consumers may still challenge deceptive food labeling in courts as many courts will still likely hear such cases. Unfortunately, this could cause a chilling effect in which companies and restaurants alike will not pursue creating GMO-free menus or products due to the fear of expensive litigation. Therefore, though restaurants may create GMO-free menus to appeal to health-conscious consumers, restaurants that do so, do so at their own risk, because though there are genuinely mixed opinions regarding the meaning of the terms "GMO" and "non-GMO," a consumer's belief that he or she has been deceived may be perfectly reasonable.

[212] Close, *supra* note 173; Davis, *supra* note 174, at 48; Lee, *supra* note 23.