Food Litigation Newsletter
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About

Perkins Coie's Food Litigation Group defends packaged food companies in cases throughout the country.

Please visit our website at perkinscoie.com/foodlitnews/ for more information.

This newsletter aims to keep those in the food industry up to speed on developments in food labeling and nutritional content litigation.

Recent Significant Developments and Rulings

100% Natural Tea Case Survives Dismissal

Von Slomski v. The Hain Celestial Group, Inc., No. 8:13cv01757 (C.D. Cal.): The court denied defendant's motion to dismiss a putative class action alleging claims under California's UCL, FAL, and CLRA, as well as breach of express warranty, based on defendant's representation that its teas are "100% Natural" when in fact they allegedly contain chemical insecticides, fungicides, and herbicides. The court concluded that plaintiff had adequately alleged that a reasonable consumer may be misled by the product's "100% Natural" representation. The court further reasoned that the defendant's puffery defense raised fact issues that could not be resolved at the pleading stage. The court likewise found plaintiffs had standing, including to bring claims as to teas they had not purchased. Finally, the court concluded that primary jurisdiction did not merit dismissal of plaintiff's claims. Order.

Claims in Chocolate Case Survive Dismissal

Gustavson v. Mars, Inc., No. 5:13cv4537 (N.D. Cal.): In a putative class action alleging claims under California's UCL, FAL, and CLRA, the plaintiff alleged that defendant's labels for its chocolate products 1) make misleading nutrient content claims regarding flavanols, 2) make misleading calorie claims, and 3) fail to identify certain ingredients contained in the product on its labelling. The court denied defendant's motion to dismiss.

Following similar rulings, the court held that "source of" and similar statements about antioxidants were not preempted. The court similarly concluded that the plaintiff's calorie claims did not seek requirements different than those imposed by the FDCA. Finally, the court held that the "front of the pack" calorie claims were not subject to dismissal because, while the FDA had recently issued some statements addressing these claims, the agency's regulatory process was not sufficiently "concrete or advanced" as to warrant dismissal. Order.

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Court Denies Class Certification in "All Natural" Case

Jones v. Conagra Foods, Inc., No. 3:12-cv-1633 (N.D. Cal.): In a putative class action raising claims under California's UCL, FAL, CLRA, and unjust enrichment, plaintiff alleged that 1) defendant's Hunt's tomato products are misrepresented as "100% Natural" or "Free of artificial ingredients & preservatives" when in fact they contain citric acid and/or calcium chloride; 2) defendant's Pam products are misrepresented as "100% Natural" when in fact they contain petroleum gas, propane, propane 2-methyl, and butane; and 3) defendant's Swiss Miss products are misbranded as "Natural Source of Antioxidants" or "Natural Antioxidants are found in Cocoa" when in fact the products fail to meet minimum nutritional requirements. The court denied plaintiff's motion for class certification, explaining that plaintiff's putative class failed to satisfy Rule 23 in several ways.

First addressing standing, the court found that one named plaintiff's deposition testimony adequately showed reliance on the alleged misrepresentations to support standing, but that another named plaintiff lacked standing because she admitted that she did not believe that the statements were untrue or misleading and did not believe she or family would enjoy any particular health benefits from the products.

With respect to Rule 23(b)(3), the court addressed predominance at length. As to Hunts, the court concluded that individual issues predominated because the labels that class members were exposed to varied by can, size, variety, and time period. So too, the court found that customers' understanding of the word "natural" would vary among individuals. In addition, the court found plaintiffs' materiality expert's declaration that consumers would find the "all natural" labelling material unpersuasive and concluded instead that there were many reasons why a customer might purchase the product. The court applied the same reasoning and found that individual questions predominated in the remaining product classes.

Finally, the court rejected plaintiff's expert's approach to damages under Comcast, specifically rejecting both the full retail price approach and the expert's regression analysis. Order.

Court Dismisses in Part Antioxidant and Honey Case

Salazar v. Honest Tea Inc., No. 2:13cv02318 (E.D. Cal.): In a putative class action alleging claims under California's CLRA, UCL, and FAL, as well as breaches of express and implied warranty, negligent misrepresentation, and fraud, plaintiff claimed that defendant misrepresents the amount of antioxidants and amount of honey contained in their tea products. The court granted in part, and denied in part, defendant's motion to dismiss. First, while the court noted that the

FDCA does not preempt nutrient content claims that do not impose greater labelling requirements than does the FDCA itself, it nevertheless dismissed plaintiff's state law claims without prejudice to the extent they were based on alleged misstatements of the antioxidant level of the products. Next, the court rejected defendant's claim that plaintiff had failed to sufficiently plead reliance and injury. The court further found that plaintiff had standing to bring claims as to earlier versions of the product that she did not purchase. Finally, the court considered defendant's argument that the alleged misrepresentations were non-actionable puffery, agreeing and dismissing the claims as to alleged misrepresentations about the amount of honey in defendant's product. However the court rejected the argument as to defendant's advertisements regarding their and/or their products' "honesty," finding these claims raised fact issues that could not be resolved on Rule 12. Order.

Court Stays Evaporated Cane Juice Lawsuit

Swearingen v. Santa Cruz Natural, Inc., No. 13cv4291 (N.D. Cal.): A court has granted in part and denied in part plaintiff's motion to alter or amend the judgment in this putative class action alleging claims under California's UCL, FAL, CLRA, and a number of common law tort claims. Plaintiffs allege that defendant's use of the term "organic evaporated cane juice" on its labels violates the FDCA. Relying on the "apparent lack of prejudice to defendants," and the potential for prejudice to plaintiffs, the court reconsidered its previous decision to dismiss the suit without prejudice under the primary jurisdiction doctrine and decided instead to stay the action pending further guidance from the FDA. Order.

NEW FILINGS

Monka v. Jag Specialty Foods LLC, No. 9:14cv80764 (S.D. Fla.): On behalf of a putative class of Florida consumers, plaintiff claims defendant deceptively markets certain of its breadsticks as "All Natural," when the breadsticks allegedly contain unnatural, synthetic, and/or artificial ingredients including soybean oil and/or corn syrup. The complaint alleges violations of Florida's Deceptive and Unfair Trade Practices Act, as well as claims for negligent misrepresentation, breach of implied warranty of fitness for particular purpose, breach of express warranty, and violation of the Magnusson-Moss Warranty Act. Complaint.

Sturdivant v. Bob's Red Mill Natural Foods Inc., No. 9:14cv80765 (S.D. Fla.): Plaintiff alleges that defendant deceptively represented various of its food products as "All Natural," when the products allegedly contained unnatural, synthetic, artificial, and/or genetically modified ingredients, including whole

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grain corn meal, whole grain corn flour, sodium acid pyrophosphate, corn starch, xanthan gum, soy lecithin, and maltodextrin. On behalf of a putative class of Florida consumers, the complaint alleges violations of Florida's Deceptive and Unfair Trade Practices Act, as well as claims for negligent misrepresentation, breach of express warranty, violation of the Magnusson-Moss Warranty Act, and unjust enrichment. Complaint.

Herndon v. Gruma SAB de CV, No. 3:14-cv-2985 (N.D. Cal.): This putative class action asserts claims under California's UCL and CLRA, as well as Fraud and Negligent Misrepresentation. Plaintiffs allege that defendant misrepresents its Mission Guacamole as guacamole when it is actually a "whipped oil paste," which contains "avocado powder" but no actual avocados. Further, plaintiffs claim that defendant misrepresents its guacamole as being higher quality, healthier, and better tasting than it actually is. Complaint.

Shaouli v. Peanut Butter & Co. Inc., No. BC550157 (L.A. Cty. Superior): The complaint in this putative class action alleges claims under California's UCL, FAL, and CLRA, as well as negligent misrepresentation and breach of quasi-contract. Plaintiffs claim that defendants misbranded and misrepresented their products as containing evaporated cane juice rather than " sugar" or "dried cane syrup." Complaint.