Food Litigation Newsletter
June 13, 2014

ISSUE NO. 34

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 Rulings

Northern District of California Continues Trend of Dismissing or Staying Evaporated Cane Juice Cases on Primary Jurisdiction Grounds

Numerous cases have been filed over the last few years challenging as misleading product labels that list "evaporated cane juice" as an ingredient instead of sugar. On March 5, 2014, the FDA announced that it is actively reviewing its position on use of the phrase "evaporated cane juice." In light of the FDA's announcement, several courts have recently invoked the primary jurisdiction doctrine to dismiss or stay evaporated cane juice cases pending FDA action, including the following:

- *Swearingen v. Yucatan Foods*, No. 3:13-cv-03544 (N.D. Cal.) (dismissing without prejudice putative class action regarding defendant's guacamole products). Order.
- *Swearingen v. Late July Snacks*, No. 3:13-cv-04324 (N.D. Cal.) (staying for five months putative class action regarding defendant's crackers and chips). Order.
- *Swearingen v. Attune Foods*, No. 4:13-cv-04541 (N.D. Cal.) (dismissing without prejudice putative class action regarding defendant's cereal and snack bar products). Order.
- *Avila v. Redwood Hill Farm and Creamery Inc.*, No. 5:13-cv-00335 (N.D. Cal.) (staying putative class action regarding defendant's yogurt products). Order.
- *Gitson v. Clover Stornetta Farms Inc.*, No. 3:13-cv-01517 (N.D. Cal.) (staying for six months putative class action regarding defendant's yogurt products). Order.
- *Smedt v. The Hain Celestial Group, Inc.*, No. 5:12-cv-03029 (N.D. Cal.) (dismissing without prejudice evaporated cane juice claims in putative class action regarding defendant's snack and drink products). Order.

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Court Certifies California Class in Almond Milk Labeling Case, But Not National Class

Werdebaugh v. Blue Diamond Growers, No. 5:12-cv-02724 (N.D. Cal.): Judge Koh of the Northern District of California granted in part and denied in part plaintiff's motion for class certification in a case alleging that Blue Diamond falsely labels its almond milk products as containing "evaporated cane juice" instead of sugar and as being "all natural" when they actually contain synthetic ingredients. The court denied plaintiff's request for a Rule 23(b)(2) class, finding plaintiff lacked standing to seek injunctive relief where he had not shown any intent to purchase the challenged products in the future. The plaintiff did, however, have standing to represent a Rule 23(b)(3) damages class based on deposition testimony that he would not have purchased the products but for the alleged misrepresentation. Turning to ascertainability, the court found that class membership was based on an objective criteria (purchase of Blue Diamond almond milk products during the class period) and the challenged representations appeared on the actual products purchased by class members, making self-identification possible for prospective class members. The court further held that the plaintiff satisfied all the Rule 23(a) elements. Turning to the Rule 23(b)(3) analysis, the court found that the term "all natural" was subject to an objective definition that satisfied predominance. However, the court agreed with Blue Diamond that the predominance element was not satisfied as to a national class because, given each state's interest in applying its own consumer protection laws to its citizens, the court would be forced to apply the laws of all 50 states. As a result, the Court refused to certify a national class but did certify a Rule 23(b)(3) class of California consumers. Finally, applying the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend*, the court rejected two of the three damages models proposed by plaintiff but found the third model was sufficient. Following other recent decisions, the court rejected the "full refund" model as running afoul of restitution principles and rejected the "price premium" model because the expert could not link price differences to the alleged misrepresentations. The court found adequate under *Comcast* the expert's proposed "regression model," which sought to compare sales prices before and after the launch of the alleged misrepresentations. Order.

Class Certified in "All Natural" Labeling Suit Against Dole

Brazil v. Dole Packaged Foods LLC, No. 5:12-cv-01831 (N.D. Cal.): Judge Koh granted in part and denied in part plaintiff's motion for class certification in a case alleging that Dole misrepresents its various fruit and berry products as "all natural" when they contain synthetic ingredients. Largely tracking her class

certification analysis in *Werdebaugh v. Blue Diamond Growers*, Judge Koh certified a California damages class under Rule 23(b)(3) but denied plaintiff's request for a national damages class. Judge Koh also certified a national Rule 23(b)(2) class for injunctive relief, finding that plaintiff's brand loyalty gave him standing to seek injunctive relief. Following the same analysis she did in *Werdebaugh*, Judge Koh rejected the full refund and price premium damages models proposed by plaintiff's expert but concluded that the expert's proposed regression model was sufficient under *Comcast* to allow class certification. Order.

Anheuser-Busch Wins Dismissal of Watered-Down Beer Cases

In Re: Anheuser-Busch Beer Labeling Marketing & Sales Practices Litig., No. 1:13-md-02448 (N.D. Ohio): A federal judge in Ohio dismissed multi-district litigation accusing Anheuser-Busch of deliberately watering down its beers. Alleging that Anheuser-Busch deliberately overstated the alcohol content of its beers, the putative class actions asserted claims under the Magnuson-Moss Warranty Act and the Missouri Merchandising Practices Act, as well as consumer protection, unjust enrichment, and fraudulent misrepresentation claims under various states' laws. In granting the motion to dismiss, the court noted that the Federal Alcohol Administration Act allows "a tolerance" of 0.3 percent, either above or below the percentage of alcohol stated on the label, and the eight states in which the consolidated cases were filed either explicitly or implicitly support the federal law. Because there was no allegation that the alleged mislabeling ever exceeded the allowed 0.3% tolerance, the court dismissed the putative class actions. Because the federal act does not distinguish between intentional and unintentional variances from the stated percentages, plaintiff's claim that Anheuser-Busch acted intentionally was irrelevant. Order.

Court Dismisses Claims Regarding Products Plaintiff Did Not Buy

Smedt v. The Hain Celestial Group, Inc., No. 5:12-cv-03029 (N.D. Cal.): On behalf of a putative nationwide class action, the plaintiff claimed defendant's use of the phrases "evaporated cane juice," "no trans fat," and "all natural" on the labels of three products she bought and 11 she did not violated California consumer protection and false advertising laws. As noted above, the court dismissed her evaporated cane juice claims under the primary jurisdiction doctrine pending FDA action. The court also granted defendant's partial motion to dismiss as to products the plaintiff did not buy. Because the complaint did not allege facts showing that the unpurchased products were "substantially similar" to the purchased products, the court held that plaintiff failed to establish standing or

satisfy Rule 9(b) as to the unpurchased products. The court dismissed without prejudice all claims regarding the unpurchased products. Order.

Smuckers Denied Dismissal of "All Natural" Labeling Suit Over Crisco Oil

Ault v. J.M. Smucker Co., No. 03-cv-03409 (S.D.N.Y.): A federal court in New York rejected Smucker's motion to dismiss a putative class action that claims falsely marketing its Crisco cooking oils as "all natural" when the products are highly processed and made using genetically modified organisms ("GMOs"). Defendant first argued that plaintiff's state law claims are preempted by the FDA's informal policies and guidance regarding bioengineered foods or, alternatively, that the court should defer to the FDA on the issue under the primary jurisdiction doctrine. The court rejected both arguments in light of the FDA's January 2014 decision not to accept a referral from another court regarding whether foods containing GMOs can be labeled natural. Finally, the court found that plaintiff had standing as to some products, and reasoned that whether plaintiff could represent a class regarding other products should be considered at the class certification stage. Order.

Most Claims in Whole Foods "All Natural" Labeling Suit Survive Dismissal

Garrison v. Whole Foods Market Group, Inc., No. 3:13-cv-05222 (N.D. Cal.): Most of plaintiffs' California statutory and common law claims survived Whole Foods' motion to dismiss a proposed class action alleging it falsely labels baked goods that contain synthetic ingredients as "all natural." Rejecting defendant's preemption argument, the court held that the federal Food, Drug, and Cosmetic Act does not preempt state law "all natural" labeling claims. The court also rejected defendant's primary jurisdiction argument, noting that the FDA had declined to adopt a formal definition of the word "natural" in the context of food labeling. The court also concluded that the complaint's allegations satisfied Rule 9(b) and were sufficient to put Whole Foods on notice about the circumstances of plaintiff's false labeling and advertising claims. The court next found that plaintiffs had standing to sue regarding products they did not buy where the labels at issue were nearly identical to the purchased products and the unpurchased products did not implicate a "significantly different set of concerns" than the purchased products. The court did dismiss plaintiffs' unjust enrichment claim, finding it was duplicative of their other claims, and plaintiffs' claims for injunctive relief, finding no risk for future injury that could be remedied with an injunction where plaintiffs expressed no interest in future purchases. Order.

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Court Dismisses—For Now—"All Natural" Labeling Suit Against Diamond Foods

Surzyn v. Diamond Foods, Inc., No. 4:14-cv-00136 (N.D. Cal.): A California federal judge dismissed without prejudice a proposed class action alleging the Diamond Foods deceptively labels its Kettle Brand TIAS! tortilla chips made with synthetic ingredients as "all natural." Plaintiff brought claims for negligent misrepresentation and for violations of California unfair competition and false advertising statutes. Though the complaint challenged several of defendant's products, the complaint failed to identify which of the challenged products plaintiff had purchased. Because a defendant is entitled to fair notice of the particular product plaintiff purchased, the court concluded that the complaint did not satisfy Rule 9(b). The court also found that plaintiff failed to allege any facts suggesting she was exposed to the advertising she was challenging. The court went on to hold, however, that whether a particular "all natural" label would deceive reasonable consumers could not be resolved at the pleading stage. The court dismissed the complaint without prejudice and granted plaintiff leave to amend to cure the pleading deficiencies. Order.

Court Gives Initial OK to Kashi "All Natural" Settlement

Astiana v. Kashi Co., No. 3:11-cv-01967 (S.D. Cal.): Pending a final fairness hearing, a federal court in California granted preliminary approval to a class settlement of claims that Kashi misled consumers by falsely labeling several of its products that contained synthetic ingredients as "All Natural" or "Nothing Artificial." Under the settlement, Kashi agrees to establish a $5 million settlement fund and to remove the phrases "All Natural" and "Nothing Artificial" from products containing specific ingredients, at least until a regulatory body concludes those ingredients can be labeled "natural." California consumers may seek reimbursements from the settlement fund of $.50 per package for every Kashi product purchased from August 24, 2007, to May 1, 2014. The recovery of class members with proof of purchase is not limited. Class members without proof of purchase can submit claims as well, but their recoveries are limited to $25 per household. Class counsel will receive up to $1.25 million from the settlement fund. Order.

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New Filings

Lesmez v. Einstein Noah Restaurant Group, Inc., No. 0:14-cv-61214 (S.D. Fla.): Plaintiff claims the Einstein Bros Bagels restaurant chain deceptively markets its orange juice as "100% Pure Squeezed Orange Juice" when it is allegedly made from water and concentrate. On behalf of a putative class of Florida consumers, the complaint alleges violations of the Florida Deceptive and Unfair Trade Practices Act and federal Magnuson-Moss Warranty Act, as well as claims for negligent misrepresentation, unjust enrichment, and breaches of express and implied warranties. Complaint.

Phelps v. The Coca-Cola Co., No. BC547592 (Cal. Super., Los Angeles County): On behalf of a putative class of California consumers, plaintiff claims defendant misrepresents its Simply Orange brand juices as "100% Pure Squeezed," "100% Orange Juice," "No Water or Preservatives Added," and "Honestly Simple," when it is allegedly made through highly engineered process using a complex algorithm and artificial flavoring. The complaint accuses defendant of intentional and negligent misrepresentation, fraud, and violations of various California consumer protection statutes. Complaint.

Bohlke v. Shearer's Foods, LLC, No. 9:14-cv-80727 (S.D. Fla.): Plaintiff claims defendant falsely touts it Riceworks Gourmet Brown Rice Crisps as being "All Natural" and containing "No Artificial Ingredient" when it allegedly contains unnatural, synthetic, and/or artificial ingredients such as masa corn flour, canola oil, and maltodextrin. On behalf of a class of Florida consumers, the complaint alleges violations of the Florida Deceptive and Unfair Trade Practices Act and federal Magnuson-Moss Warranty Act, as well as warranty, negligent misrepresentation, and unjust enrichment claims. Complaint.

Koller v. Deoleo USA, Inc., No. 3:14-cv-2400 (N.D. Cal.): Plaintiff claims defendant falsely markets its extra virgin olive oil as "Imported from Italy" when the olives are not grown or pressed in Italy, and where defendant uses inferior bottles that do not preserve the oil as "extra virgin." The complaint alleges various California statutory and common law claims on behalf of a putative national class as to some products and a putative California class as to other products. Complaint.

Kumar v. Salov North America Corp., No. 4:14-cv-02411 (N.D. Cal.): Plaintiff claims defendant falsely markets its extra virgin olive oil as "Imported from Italy" when the olives are not grown or pressed in Italy, and where defendant uses inferior bottles that do not preserve the oil as "extra virgin." The complaint alleges various California statutory and common law claims on behalf of a

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putative national class as to some products and a putative California class as to other products. Complaint.

Kumar v. Safeway, Inc., No. RG14-726707 (Ca. Super., Alameda County): Plaintiff claims defendant falsely markets its extra virgin olive oil as "Imported from Italy" when the olives are not grown or pressed in Italy, and where defendant uses inferior bottles that do not preserve the oil as "extra virgin." The complaint alleges various California statutory and common law claims on behalf of a putative class of California consumers. Complaint.