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.

Decisions

Court Dismisses ECJ Claims While Upholding "Natural" Claims

Pratt v. Whole Foods et al., No. 5:12cv5652 (N.D. Cal.): The court granted in part and denied in part a motion to dismiss a putative class action alleging misbranding and the misleading use of the terms "evaporated cane juice" (ECJ) and "natural" on a number of products. Denying dismissal based on preemption, the court rejected defendants' argument that plaintiff's claims were impliedly preempted because private litigants cannot enforce FDA requirements under the FDCA, holding that plaintiff could bring his claims under California's Sherman Law, which parallels the federal FDCA and NLEA. The court also held that plaintiff's ECJ claims did not seek to impose requirements different than requirements under the FDCA, and therefore were not preempted. Further, the court rejected defendants' argument that plaintiff's "natural" claims were preempted, relying on previous decisions from the Northern District of California. As to defendants' primary jurisdiction argument, the court again followed Northern District of California precedent in ruling that neither the ECJ claims nor the "natural" claims required dismissal under the primary jurisdiction doctrine.

Next addressing defendant's Rule 9(b) arguments, the court rejected plaintiff's claim that he did not need to plead reliance as to the misbranding claims, but did not specify whether the pleadings did so sufficiently. The court then upheld plaintiff's "natural" claims, but dismissed the ECJ claims without prejudice under the reasoning of previous cases in the district: the accused labels stated that the products contained sugar and the amount of sugar in the products; plaintiff indicated that he knew that ECJ was sugar; and the complaint failed to allege whether plaintiff believed that ECJ was something other than sugar or what a reasonable person might have believed ECJ to be other than sugar. Finally, the court also dismissed the unjust enrichment claim, holding that plaintiff's other

claims provided duplicative relief, but upheld plaintiff's request for injunctive relief because defendants had not demonstrated that the products at issue had been discontinued. Order.

Court Denies Class Certification for Failure to Meet Predominance Test

Caldera v. The J.M. Smucker Co., No. 2:12cv4936 (C.D. Cal.): The court denied plaintiff's motion for class certification in a case alleging claims under California consumer protection statutes based on defendant's labeling of Crisco products as containing "50% Less Saturated Fat Than Butter" and of Uncrustables products as "Whole Grain 16g or more." With respect to the proposed damages class, the court held that the proposed class failed the predominance test under *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011), because plaintiff failed to offer any method of determining damages on a class-wide basis. The court found that plaintiff's offered method—a full refund of purchase price—was not appropriate because some class members received some benefit from the products. The court also declined to certify a proposed class for injunctive relief, based on plaintiff's failure to articulate why certification under Rule 23(b)(2) was warranted. Order.

Court Dismisses Claims Based on Trans Fat and Cholesterol Claims Based on Lack of Standing

Bishop v. 7-Eleven Inc., No. 5:12-cv-02621 (N.D. Cal.): The court dismissed, with prejudice, a putative class action alleging claims under California's UCL, FAL, and CLRA, based on representations that defendant's Cheddar and Sour Cream Chips and other products contained "0g trans fat" and "no cholesterol." Plaintiff's allegations centered on defendant's alleged failure to comply with FDA regulations regarding disclosures of fat content in foods making "0g trans fat" or "no cholesterol" claims. The court found that, even if the disclosures were required, plaintiff had not alleged any actual misrepresentation, and therefore had no standing to plead his claims. Order.

Court Certifies Injunctive Relief Class But Denies Certification of Damages Class

Lanovaz v. Twinings North America, Inc., No. 12cv2646 (N.D. Cal.): In an action alleging claims under California's UCL, FAL, and CLRA, based on representations on defendant's tea products that they are a "Natural Source of Antioxidants," the court granted in part and denied in part plaintiff's motion for class certification. The court ruled that Rule 23(a)'s requirements had been met, finding that ascertainability had been established, despite the lack of records or

receipts to identify purchasers, because the class definition was specific enough to allow plaintiff to identify herself as having a right to recover. The court further held that the commonality and typicality requirements were satisfied because each product in the proposed class definition contained the same "natural source of antioxidants" labeling. The court rejected defendant's argument that the materiality of the allegedly misleading statement needed to be determined on an individualized basis, finding that plaintiff need only establish that the reasonable consumer would attach importance to the phrase, which could be determined on a class-wide basis.

The court then went on to certify an injunctive relief class under Rule 23(b) because the labels carried the relevant claims, but denied certification of the monetary damages class. The court found that plaintiff had not presented a sufficient damages model, rejecting the "full refund" model as inappropriate in the restitution context, and finding that plaintiff's expert had not provided a sufficient measure of damages under a "price premium" model because he had no way of linking a difference in price to the antioxidant label. Order.

Voluntary Dismissals

Ebin v. Kangadis Family Mgmt LLC, No. 1:14-cv-01324 (S.D.N.Y.): The court dismissed a putative class action alleging that defendants misrepresented their olive oil products as containing "100% Pure Olive Oil," when in fact they contained olive-pomace oil, in favor of the related case, *Ebin v. Kangadis Food Inc.,* 1:13-cv-02311 (S.D.N.Y.). Order.

New Filings

Joseph v. Trader Joe's Co., No. BC543455 (L.A. Sup.): Individual action alleging claims under the California UCL and FAL, claiming that defendant's produce and meat was mislabeled as to country of origin. Complaint.

Stetz v. H.J. Heinz Co., No. 3:14cv1871 (N.D. Cal.): Putative class action alleging claims for breach of express warranty and under California's CLRA, UCL, and FAL, based on allegations that Heinz's distilled white vinegar products are misrepresented as "all natural" when in fact they contain GMOs. Complaint.

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Garrett v. Bumble Bee Foods, No. 1-14-cv-264322 (Santa Clara Super.): Putative class action alleging claims under California's UCL, FAL, and CLRA, along with breach of implied warranty, negligent misrepresentation, negligence, unjust enrichment, recovery in assumpsit, and declaratory relief claims. Plaintiff alleges that defendant's products are misbranded and misleading to the extent that they are advertised and/or labeled as "Excellent Source Omega 3" and bear an American Heart Association seal without disclosing that this is a paid endorsement. Complaint.