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 In Part for Lack of Specificity

Thomas v. Gerber Prods Co., No. 2:12-cv-00835 (D.N.J.): The court granted in part and denied in part defendant's motion to dismiss in a putative class action alleging claims under New Jersey, California, New York, and Washington's respective consumer protection statues, as well as New Jersey state claims for breach of express and implied warranty and unjust enrichment, based on defendant's labeling and advertising that its products provide immune system benefits and are similar to breast milk. First, the court found that the plaintiffs had sufficiently pleaded Article III standing based on their allegations that they were misled by defendant's labeling stating the health benefits of probiotics, as well as by print, television and in-store advertisements with the same representations. The court added that causation was sufficiently pleaded because plaintiffs had demonstrated a campaign of consistent messaging and that they relied upon that category of misrepresentations. However the court did agree with defendants that plaintiffs had failed to establish standing for injunctive relief because they had not pleaded any threat of future injury. Next the court addressed defendant's contention that plaintiffs had failed to satisfy Rule 9(b)'s specificity requirements. With respect to several of the plaintiffs, the court found they had met their burden by identifying the advertising campaign and the specific immune benefits statements at issue, as well as the date range and locations where they purchased the products. For several other plaintiffs, however, the court dismissed their claims, finding they had not satisfied their burden because they had not specified date ranges or locations where they purchased the products or when they viewed the advertisements at issue. Additionally, the court generally found insufficient and conclusory plaintiffs' allegations regarding defendant's claims that its products were similar to breast milk and dismissed those claims as well, with the exception of the New York Consumer Protection Act claim, which the parties agreed was not subject to Rule

9(b). Finally, the court addressed a choice of law dispute regarding the New Jersey state law claims and found no conflict and thus no need for a choice of law analysis. The court found that plaintiffs had adequately pleaded their breach of express warranty claim, but not the breach of implied warranty claim, because plaintiffs had not alleged that the products were unfit for consumption. Further the court held that plaintiffs had not sufficiently pleaded their unjust enrichment claim because their claims sounded in tort, and New Jersey does not recognize an independent tort cause of action for unjust enrichment. Order.

Court Dismisses Evaporated Cane Juice Claims Where Labels Disclosed Sugar Content

Thomas v. Costco Wholesale Corp., No. 5:12cv2908 (N.D. Cal.): The court granted in part and denied in part defendant's motion to dismiss in a putative class action alleging claims under California's UCL, FAL, and CLRA claiming that several of defendant's products were misbranded and/or misleading with respect to a) nutrient content, b) antioxidant claims, c) "no sugar added" claims, d) health claims, e) "0 grams trans fat" claims, e) evaporated cane juice, f) synthetic chemical content omissions, g) "preservative free" claims, and h) slack-filled packaging. First addressing Article III standing, the court ruled that one of the named plaintiffs, Thomas, lacked standing because she failed to sufficiently allege that the "no trans fat" representations were actually untrue, and thus she could not meet the injury-in-fact or causation requirements. Next addressing Rule 9(b), the court first held that all of plaintiff's UCL claims, including those under the "unlawful" prong, were subject to Rule 9(b). The court then held that plaintiffs had satisfied their burden with respect to their nutrient content, antioxidant content, health, no sugar added, preservative free, and slack-fill claims because these claims may deceive a reasonable consumer. However, the court dismissed the ECJ claims, noting that the products' labelling specifically listed "sugar" as a nutrient and showed how much sugar was in the products. Because plaintiffs suggested in their complaint that they knew that ECJ was sugar and failed to allege what they believed ECJ was if it was not sugar, or what a reasonable person might believe ECJ to be, the allegations were insufficient. Finally, the court found no need to address cefendant's primary jurisdiction argument because it had already dismissed the ECJ claims. Order.

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Court Dismisses In Part for Lack of Injury-In-Fact

Leonhart v. Nature's Path Foods, No. 5:13cv492 (N.D. Cal.): The court granted defendant's motion to dismiss with leave to amend in a putative class action alleging claims under California's UCL, FAL, and CLRA claiming that several of cefendant's products were misbranded with respect to a) ECJ, b) unapproved health or drug claims, c) "low sodium" claims, d) "preservative free" claims, and e) slack-filled packaging. First addressing Article III standing, the court found no standing for lack of injury-in-fact because not only had plaintiff alleged claims regarding statements she never saw and products she did not buy, but she also failed to allege that the products were substantially similar to products she did buy. The court also addressed the preemption argument, finding no preemption because plaintiff's claims were predicated on the Sherman FDCA, which does not impose any requirements additional to the FDCA. Regarding primary jurisdiction, the court similarly found no bar, following the "majority of courts in this district." Next, addressing Rule 9(b), the court again confirmed that the UCL's unlawful prong was subject to Rule 9(b) and to the actual reliance standard, and found that plaintiff had failed to carry her Rule 9(b) burden for any of her claims. Specifically, she failed to identify which products' labels used the term ECJ, failed to allege what she believed ECJ was if not a sugar, failed to specify which health claims she saw on the products she purchased or her reliance on these claims, failed to specify what "preservative free" claims she saw, and failed to allege that she was deceived by the slack-filled packaging. Finally, the court dismissed plaintiff's unjust enrichment claim, holding that it was duplicative of the statutory claims. Order.

Court Stays Evaporated Cane Juice Case on Primary Jurisdiction Grounds

Swearingen v. Santa Cruz Natural, Inc., 3:13cv04291 (N.D. Cal.): The court dismissed the complaint without prejudice in a putative class action alleging claims under California's UCL, FAL, CLRA, and a number of common law tort claims, alleging that defendant's use of the term "organic evaporated cane juice" on its labels violates the FDCA. The court dismissed based solely on the primary jurisdiction doctrine, holding that primary jurisdiction applied in light of the FDA's recent, March 5, 2014 notice demonstrating that the FDA is actively considering the meaning of the phrase "evaporated cane juice." Order.

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Court Stays Second Evaporated Cane Juice Case on Primary Jurisdiction Grounds

Figy v. Amy's Kitchen, Inc., No. 3:13cv3816 (N.D. Cal.): The court dismissed the complaint without prejudice in a putative class action alleging claims under California's UCL, FAL, CLRA, and a number of common law tort claims, alleging that defendant's use of the term "organic evaporated cane juice" on its labels is misleading and violates the Sherman FDCA. In a nearly identical order to the recent *Swearingen v. Santa Cruz Natural Inc.* decision, the court dismissed based solely on the primary jurisdiction, holding that the primary jurisdiction doctrine applied in light of the FDA's March 5, 2014 notice demonstrating that the FDA is actively considering the meaning of the phrase "evaporated cane juice." Order.

Voluntary Dismissals

Barnes v. Campbell Soup Co., No. 3:12cv5185 (N.D. Cal.): In a putative class action alleging claims under California's consumer protection statutes, based on defendant's "100% Natural" labelling of products allegedly containing GMOs, the parties stipulated to a dismissal of the entire action with prejudice. Order.

Krzykwa v. Campbell Soup Co., No 0:12cv62058 (S.D. Fla.): In an almost identical putative class action alleging claims under Florida's consumer protection statute, the parties also stipulated to a dismissal of the entire action with prejudice. Order.

Bolerjack v. Pepperidge Farm, Inc., No. 1:12cv2918 (D. Colo.): Plaintiff voluntarily dismissed with prejudice a putative class action alleging a claim under Colorado's Consumer Protection Act, as well as claims for breach of express warranty, and negligent misrepresentation, based on defendant's use of the term "Natural" for products containing GMOs. Order.

Avoy v. Turtle Mountain, Inc., No. 5:13-CV-00236 (N.D. Cal.): In a putative class action alleging claims under California's UCL, FAL, CLRA, and a claim for unjust enrichment based on defendant's use of the terms "Evaporated Cane Juice" and "Dehydrated Cane Juice" in its products, the court dismissed the case with prejudice after plaintiff failed to amend the complaint within the 21-day period allotted in the court's previous order on defendant's motion to dismiss. Order.

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New Filings

Weiss v. The Kroger Co. et al., No. BC541622 (L.A. Cty Super.): Putative class action alleging claims under California's CLRA, FAL, and UCL for false advertising of the sodium content of its sunflower seeds. Complaint.

Marshall v. Monster Beverage Corp., No CGC-14-538447 (S.F. Super.): Putative class action alleging claims under California's CLRA, FAL, and UCL, as well as Unjust Enrichment, claiming that defendant misrepresents its Hansen's, Vidration, Blue Sky, Energy Pro, Diet Red and all Blue Energy products as being "Natural," "100% Natural," or "All Natural" when they actually contain color additives and synthetic ingredients such as citric acid and erythritol, which is a sugar alcohol made from genetically modified corn. Complaint.

Hall v. Diamond Foods Inc., No. CGC-14-538387 (S.F. Super.): Putative class action alleging claims under California's UCL, FAL, CLRA, and Unjust Enrichment claiming that defendant falsely labels and advertises its Kettle and Tias! chips as "natural," "all natural" or "reduced fat" when, in fact, they contain synthetic ingredients such as citric acid, maltodextrin, and color additives. Complaint.