PERKINSCOIE

Food Litigation Newsletter

THIS NEWSLETTER AIMS to keep those in the food industry up to speed on developments in food labeling and nutritional content litigation.

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.

RECENT SIGNIFICANT RULINGS

Summary Judgment For Defendants In Juice False Advertising Suit

Major v. Ocean Spray Cranberries, Inc., No. 5:12-cv-03067 (N.D. Cal.): A federal judge has granted defendant's motion for summary judgment and denied as moot the plaintiff's motion for class certification in this putative class action alleging violations of California consumer protection laws and federal false advertising laws based upon claims that defendant's "100% Juice" labels were deceptive since they contained the "No Sugar Added" messaging without the required disclaimer language.

In granting defendant's motion, the Court found plaintiff's claims failed because plaintiff correctly understood that "100% Juice" products are not low calorie foods and therefore, could not produce evidence that she relied on the challenged statements. The Court also found that plaintiff's testimony indicated that she knew what the term "No Sugar Added" meant, and since her understanding was factually consistent with defendant's juice-making process, the term was neither false nor deceptive. *Order.*

Partial Class Certification Granted in "100% Natural" Cooking Oil Action

In re Conagra Foods, No. 2:11cv05379 (C.D. Cal.): A federal judge granted in part and denied in part plaintiff's amended motion for class certification in this putative class action alleging claims under various states' consumer protection laws, breach of express and implied warranty and unjust enrichment, based on the claim that defendants label their cooking oils at "100% Natural" when in fact they contain GMOs.

Addressing objections to plaintiff's expert testimony, the Court first held that plaintiff's damages expert had remedied shortcomings identified in the Court's previous order denying certification by preparing a preliminary regression model that employed a number of independent variables as potential explanatory variables impacting price. The Court held that any alleged flaws in the model went to the weight, not the admissibility, of the evidence. The Court also granted in part defendant's motion to strike plaintiff's expert's opinions concerning survey data, concluding that her thorough explanation of her methodology and her background in performing similar conjoint analyses were sufficient to satisfy *Daubert* and Rule 702, but that she was not sufficiently familiar with the methodology used to design and administer the survey to

opine that it was "conducted according to accepted principles" and reliable.

Turning to the class certification motion, the Court found that due to the rectification of plaintiffs' damages model, plaintiffs had adequately shown that they suffered injury in fact sufficient to confer standing on them. Regarding ascertainability, the Court noted a split in authority as to whether the inability to identify putative class members in a class of consumers of low priced products makes the class unascertainable, and sided with the Court's finding such classes ascertainable because the subject class was definable by "objective characteristics." The Court reasoned that because all putative class members were exposed to the same representations insofar as every bottle of oil contained the same statements, the fact that some class members may not have read or relied on the statements did not destroy ascertainability.

Addressing Rule 23(b) requirements, the Court held that the injunctive class lacked Article III standing because their declarations stating that they "may consider" purchasing the products in the future was not sufficiently concrete to support constitutional standing.

Analyzing the predominance of class issues over individual issues, the Court noted that the threshold question of whether each claim sought to be certified under each state requires a showing of reliance and/or causation, and if so, whether such elements may be established on a classwide basis. The Court proceeded to answer these questions with respect to each state claim for which class certification was sought by a thorough analysis the state-specific law.

After determining which claims would permit a showing of reliance and/or causation on a classwide basis, the Court moved on to whether the materiality of such reliance could be proved on a classwide basis and concluded that it could. On the matter of damages, the Court concluded that while the plaintiffs' proposed hedonic regression analysis alone did not satisfy *Comcast*, that analysis and another expert's conjoint analysis in combination did meet *Comcast's* requirements for class certification purposes.

Ultimately the Court granted class certification with respect to the following claims: California: (1) violations of the UCL, CLRA, and FAL, and (2) breach of express warranty; Colorado: (1) violation of the CCPA, (2) breach of express warranty, and (3) breach of implied warranty; Florida: (1) violation of the FDUTPA; Illinois: (1) Violation of the ICFA and (2) unjust enrichment; Indiana: (1) unjust enrichment and (2) breach of implied warranty; Nebraska: (1) unjust enrichment and (2) breach of implied warranty; New York: (1) violation of the GBL and (2) breach of express warranty; Ohio: (1) violation of the OCSPA; Oregon: (1) violation of the OUTPA and (2) unjust enrichment; South Dakota: (1) violation of the SDDTPL and (2) unjust enrichment; Texas: (1) violation of the TDTPA. *Order.*

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Final Settlement Approved In White Chocolate False Advertising Suit

Miller v. Ghirardelli Chocolate Co., No. 3:12cv04936 (N.D. Cal.): The Court granted final settlement approval in this putative class action alleging that Ghirardelli's white chocolate products did not contain chocolate or white chocolate, but were instead "artificial" and "imitation." The terms of the approved settlement are as follows:

Defendants will pay $5.25 million into a fund to compensate consumers who purchased the products, with individual consumers eligible to claim $1.50 per purchase of the White Chips and $0.75 per purchase of any other products labeled "All Natural." The residual funds will be donated *cy pres*, in equal amounts, to four charitable organizations. Defendants have also agreed to change their product labeling for three years such that they will not use the phrases "all natural;" "Classic White" except as part of the phrase "Classic White Chips;" and "baking chocolate" or "chocolate indulgence" on the packaging of White Chips. Finally, the settlement approves attorneys' fees in the amount of $1,575,000, litigation costs in the amount of $87,572.15, and an incentive award of $5,000 for each named plaintiff. *Order.*

Final Settlement Approved In White Chocolate False Advertising Suit

Riva v. Pepsico, Inc., No. 14cv0340 (N.D. Cal.): A federal judge has dismissed with prejudice this suit, one of several putative class actions filed against Pepsi alleging that Pepsi One and Diet Pepsi beverages contained 4-methylimidazole ("4-MEI"), a carcinogen found on California Proposition 65's list of known carcinogens, which was not disclosed on the products' labelling.

Judge Edward Chen agreed with Pepsi that plaintiffs lacked standing to sue, and that their causation and injury allegations were not sufficiently backed by scientific facts. Referring to plaintiffs' cited scientific studies, which were based on lab mice and rats, the judge found that the levels of 4-MEI consumed by the plaintiffs was not anywhere near the exposure of mice and rats in the studies, and that plaintiffs were required to show that the chemical was significantly likely to cause serious damage in order to obtain medical monitoring. The studies at issue were not persuasive in that regard and plaintiffs had admitted that they were not aware of other studies supporting their claims. Further, because plaintiffs had not established that their alleged risk of cancer was credible and substantial, the Court also held that they did not have standing to pursue their claims as the Ninth Circuit requires a credible threat of harm in order to constitute actual injury for standing purposes. Because plaintiffs could not say how they might modify their claims to address these problems, the Court dismissed with prejudice. *Order.*

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NEW FILINGS

Harlam v. Blue Diamond Growers, No. 1:15-cv-877 (E.D.N.Y.): Putative class action alleging defendant deceptively labels its Almond Breeze Almond Milk as "All Natural," when in fact it contains synthetic and artificial ingredients and preservatives.

Snyder v. Knudson & Sons Inc., No. 3:15cv00189 (M.D. Fla.): On behalf of a putative statewide class, plaintiff asserts claims under Florida Deceptive and Unfair Trade Practices Act, as well as negligent misrepresentation and unjust enrichment, alleging that defendant marketed a mixed juice to make consumers think it contains mostly pomegranate and blueberry when it is actually made primarily from apple juice and water. *Complaint.*

Guttman v. Nissin Foods Company, Inc., No. 4:15-cv-00567 (N.D. Cal.): Plaintiff asserts on behalf of a putative nationwide class claims under California's Unfair Competition Law, as well as nuisance and breach of implied warranty based on claims that defendant sells instant noodles containing partially hydrogenated oil, which is a toxic carcinogen that has many safe substitutes. *Complaint.*

Hulse v. Wal-Mart Stores, Inc., No. 15cv0233 (M.D. Fla.): On behalf of a putative statewide class, plaintiff alleges violations of Florida Deceptive and Unfair Trade Practices Act, negligent misrepresentation, and unjust enrichment based on claims that defendant's cranberry-pomegranate juice is misleadingly and unfairly labeled and marketed as "Cranberry Pomegranate," with pictures of cranberries and pomegranates on the product's front label, when the juice is actually a flavored juice from concentrate, consisting primarily of water and white grape, apple, and plum juice concentrates. *Complaint.*

Murphy v. Stonewall Kitchen LLC, No. 1522-CC00481 (St. Louis City Cir. Ct.): On behalf of a putative statewide class, plaintiff alleges violations of Missouri's Merchandising Practices Act and unjust enrichment based on claims that defendant's Vanilla Cupcake Mix is mislabeled as "all natural" when it contains synthetic ingredients such as sodium acid pyrophosphate ("SAPP"). *Complaint.*

George v. Urban Accents Inc., No. 1522-CC00479 (St. Louis City Cir. Ct.): Plaintiff asserts on behalf of a putative statewide class claims under Missouri's Merchandising Practices Act and unjust enrichment based on claims that defendant's Ginger Carrot Cake Flapjack Mix is mislabeled as "all natural" when it contains synthetic ingredients such as sodium acid pyrophosphate ("SAPP"). *Complaint.*

Thornton v. YZ Enterprises, Inc., No. 1522-CC00482 (St. Louis City Cir. Ct.): On behalf of a putative statewide class, plaintiff alleges violations of Missouri's

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Merchandising Practices Act and unjust enrichment based on claims that defendant's Almondina Toastees product is mislabeled as "all natural" when it contains synthetic ingredients such as sodium acid pyrophosphate ("SAPP"). *Complaint.*

Tsang v. Walgreen Co., No. 1:15-cv-1153 (E.D.N.Y.): On behalf of a putative nationwide class, plaintiff alleges violations of consumer protection laws of New York, California, Illinois, Florida, Michigan, New Jersey, and Pennsylvania, as well as negligent misrepresentation, breach of express warranties, and unjust enrichment based on claims that defendants marketed their "Good & Delish" food products as containing "Natural" or "All Natural" ingredients and "No Preservatives," when in fact the products contained chemically processed ingredients and preservatives. *Complaint.*

McCartney v. Artisan Confections Company, No. CGC-15-544497 (S.F. Sup. Ct.): Action under California's Proposition 65 based on claims that defendants failed to adequately warn consumers that their cacao powder product contains cadmium, a chemical known to the state to cause cancer, birth defects, and other reproductive harm. *Complaint.*

Cady v. Double Diamond Distillery, LLC, No. 2015-CH-3632 (Cook Co. Cir. Ct.): On behalf of a putative nationwide class, plaintiff alleges violations of Illinois FCA, Colorado CPA, and unjust enrichment based on allegations that defendant labels its Breckenridge Bourbon as being handcrafted in Colorado using snowmelt from the mountains, but it is in fact mass-produced at distilleries outside of Colorado. *Complaint.*

03.10.2015 | ISSUE NO. 49

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