02.09.2015 | ISSUE NO. 47

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 DEVELOPMENTS AND RULINGS

Another Greek Yogurt Case Against Whole Foods is Transferred

Jackson v. Whole Foods Market Inc., No. 2:14-cv-06705 (C.D. Cal.): The Court transferred this case to the Western District of Texas, following the transfer of at least seven other similar cases, where Plaintiffs allege that Whole Foods misrepresents its 365 Everyday Value Plain Greek Yogurt as having 2 grams of sugar per serving when it contains at least 11 grams of sugar per serving.

Safeway's Frozen Waffles Case Dismissed

Richards v. Safeway, No. 13-cv-4317 (N.D. Cal.): Plaintiff's individual claims were voluntarily dismissed with prejudice, and the putative class claims dismissed without prejudice, in this putative class action alleging that Safeway's frozen waffles were wrongly labeled "100% Natural" when they contain SAPP. *Order.*

Individual Claims Voluntarily Dismissed in Case About Splenda

Bronson v. Johnson & Johnson Inc., No. 3:12-cv-04184 (N.D. Cal.): Plaintiffs stipulated to dismissal with prejudice of their individual claims in this putative class action alleging that Defendant misrepresented the health benefits—such as added antioxidants, vitamins, and fiber—of its Splenda Essentials sweetener products.

Individual Claims Dismissed in Case About Minute Maid Fruit Juice

Browne v. The Coca-Cola Co., No. 3:14-cv-02687 (S.D. Cal.): Plaintiff dismissed, without prejudice, his individual claims in this putative class action alleging that Defendant falsely promoted and sold its Minute Maid Pomegranate Blueberry 100% Fruit Juice Blend as a product that provides brain support benefits.

Nationwide Putative Class Action Over "All Natural" Brown Rice Crisps Lives On

Bohlke v. Shearer's Foods, LLC, No. 9:14cv80727 (S.D. Fla.): In a putative class action alleging that Defendant misrepresents its Brown Rice Crisps products as being "All Natural" and containing "No Artificial Ingredients," when in fact they contain unnatural, synthetic, or artificial ingredients such as Masa Corn Flour, Canola Oil, and Maltodextrin, the Court granted in part and denied in part Defendant's motion to dismiss the amended complaint and denied Defendant's motion to strike the nationwide class-

action allegations.

In its motion to dismiss, Defendant argued that the Court should defer to the FDA regarding the meaning of the term "natural" under the primary jurisdiction doctrine. The Court followed other courts in rejecting Defendant's argument on the grounds that the FDA does not regulate "natural" claims. The Court, however, agreed with Defendant's argument that Plaintiff had no standing as to products that she did not actually purchase, and therefore dismissed claims related to flavors of brown rice crisps that Plaintiff did not purchase. The Court declined to dismiss claims based on different product labels, finding that issue more suitable for determination at the summary judgment.

The Court also rejected Defendant's arguments that Plaintiff failed to state a claim. Defendant argued that Plaintiff's claim under Florida's Deceptive and Unfair Trade Practices Act ("DUTPA") the claim was barred by Florida's Food Safety Act ("FFSA"), that there was no plausible theory of actual damages, and that a reasonable consumer could not be deceived by the labels. The Court held that the FFSA does not preclude DUTPA claims, and found that Plaintiff had sufficiently alleged both a per se DUTPA violation and that Defendant's practices were "unfair and deceptive." The court also rejected Defendant's attack on Plaintiff's damages theories, holding that both the "price premium" theory of damages and the " valueless due to misbranding" theory were plausible enough to survive dismissal. Finally, the Court held that whether specific conduct constitutes an "unfair" or "deceptive" trade practice is a question of fact to be determined at a later stage. The Court also found that Plaintiff adequately pleaded reliance on defendant's misrepresentations and therefore stated a claim for negligent misrepresentation. The Court also rejected Defendant's argument that Plaintiff failed to adequately allege breach of express warranty, violations of the Magnusson-Moss Warranty Act, or unjust enrichment. The court held that Plaintiff sufficiently alleged that Defendant's products were not as represented and that defendant's false representations directly caused injury to plaintiff, who would otherwise not have purchased the products.

In its motion to strike the nationwide class, Defendant argued that there could be no Rule 23 nationwide class because all claims were state claims and Florida's choice-of-law rules would require the Court to apply the laws of 51 jurisdictions. The Court held that since Plaintiff could ultimately choose to seek certification of a more limited and narrow nationwide class, Defendant's arguments were premature. The Court also noted that Rule 23's requirements do not apply to Rule 12(f) motions to strike, and are therefore such arguments are more properly addressed at the class certification stage. *Order.*

NEW FILINGS

Tsan v. Seventh Generation Inc., No. 3:15-cv-00205 (N.D. Cal.): Putative class action alleging that Defendant deceptively markets its cleaning supplies and paper

Food Litigation Newsletter

CONTACTS

DAVID BIDERMAN
Partner
Los Angeles and San Francisco
+1.310.788.3220

CHARLES SIPOS
Partner
Seattle
+1.206.359.3983

JACQUELINE YOUNG
Associate
San Francisco
+1. 415.344.7056

products as "all natural" when in fact they contain chemicals and synthetic ingredients. *Complaint.*

Mladenov v. Whole Foods Inc., No. 15cv0382 (D.N.J.): Putative class action alleging that Whole Foods falsely marketed and advertised the bread and bakery products sold in its stores as "made in store" or "baked in store" when in fact the bread and bakery products were frozen, delivered to stores, and re-baked or partially baked. *Complaint.*