Food Litigation Newsletter
July 9, 2013

ISSUE NO. 14

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 Developments and Rulings

Court Cites "Catalyst" Theory to Award Attorneys' Fees for Label Changes

Henderson v. The J.M. Smucker Co., No. 10cv4529 (C.D. Cal.): Plaintiff sued, claiming that Uncrustables pre-packaged sandwiches and Crisco shortening made false and misleading claims that the products were healthful despite containing partially-hydrogenated vegetable oils and high fructose corn syrup. Shortly thereafter the named plaintiff filed for bankruptcy and the trustee settled the action for $22,500. However, due to the fact that Smucker changed its labels in ways contemplated by the complaint, plaintiff's attorneys filed a motion seeking more than $3 million in fees and $35,000 in costs, contending that plaintiff was the prevailing party because of the change in labeling. The Court agreed that California law supported plaintiff's contention that she could recover fees if she was the "catalyst" that caused the defendant to make changes to its advertising. After reviewing the evidence submitted by the parties, the court concluded that the lawsuit was a "substantial causal factor" in changes made by the defendant, and held that California's consumer protection statutes allowed for a recovery of attorney's fees. The court explained it could not determine the reasonableness of the fees based on plaintiff's submission and ordered further briefing on that topic. Order.

Class Settlement Preliminarily Approved in Barbara's Bakery "All Natural" GMO Class Action

In *Trammell v. Barbara's Bakery*, No. 12cv2664 (N.D. Cal.), plaintiffs alleged that Barbara's Bakery cereals were falsely labeled "all natural" since they contain

GMO corn and other allegedly "synthetic" ingredients. The Court preliminary approved settlement of the class action prior to class certification. Key terms of the settlement are: (1) a $4 million settlement fund for consumers to submit claims for refunds of up to $100 per customer based on retail purchase price; (2) Barbara's will remove "natural" from the labels of all products with GMOs, or alternatively, use the Non-GMO Project to certify its products as non-GMO if they intend to carry the "natural" label going forward; (3) $1 million in attorneys' fees to be deducted from the $4 million fund; and (4) if any money is left in the $4 million fund after refund claims and fees, a donation of the remaining amount will be made to Consumer Union (the advocacy arm of Consumer Reports) and Action for Healthy Kids. Order.

Class Settlement Reached in "Evaporated Cane Juice" Class Action

Singer v. WWF Operating Co., No. 13cv21323 (S.D. Fla.). The court granted final approval to the settlement of a class of all purchasers nationwide of a wide variety of products sold or manufactured by the defendant, including its Horizon, Silk and International Delight products, which bore labels listing "evaporated cane juice" as an ingredient. The court valued the settlement at $800,000 (which included the value of injunctive relief) and awarded class counsel $250,000 in fees and costs. The motion for final approval explained that the defendant agreed to re-label its products as containing "cane sugar" or "organic cane sugar" and not evaporated cane juice. Class members with proofs of purchase can recover up to $50; without, they may recover up to 25% of the purchase price of 5 covered products. The motion for final approval and Order granting it.

Class Settlement Reached in Naked Juice "All Natural" Lawsuit

Pappas v. Naked Juice Co., No. 11cv8276 (C.D. Cal.): The parties have reached settlement of six coordinated cases alleging that Naked Juice labels falsely claimed the products were "all natural" but contained synthetic ingredients such as ascorbic acid and beta carotene, or included GMO ingredients, or were made from concentrate. Under the terms of the settlement, which is nationwide, Naked will create a $9 million non-revisionary fund from which claimants with proofs of purchase can recover up to $75 or up to $45 without proofs of purchase. Any residual funds would be distributed as follows: 50% to the Mayo

Clinic and 25% to the National Association of IOLTA Programs and 25% to various legal aid organizations. Naked also agreed to redesign its labels, independently test products labeled "non-GMO" to verify the representation, and employ a quality control manager to oversee independent product testing. The settlement fund will also be used to pay attorneys' fees and expenses, not to exceed $3.12 million. Memorandum in support of settlement and stipulation of settlement.

Partial Dismissal of Amended Complaint in Kraft Class Action

Ivie v. Kraft Foods, No. 12cv2554 (N.D. Cal.) (ongoing case): After the court dismissed without prejudice a number of claims by plaintiffs against a wide variety of Kraft products, the plaintiffs amended to add new allegations and state claims against many other Kraft products the named plaintiffs did not purchase but which bear the same or similar labels. The claims and products include Crystal Light beverages' "natural lemon" claims; Planter's nut blends' "wholesome" claims; fat and nutrition content claims of Kraft cheeses; and "essentially similar" claims on various flavors of Trident and Dentyne gums, Back to Nature cookies, and Capri Sun drinks, among others. Regarding the "natural lemon" claims, plaintiffs conceded that Kraft used an approved flavoring component in the product, but argued that two other ingredients—potassium citrate and sodium citrate—were also "flavors" but not flavors authored by the FDA's regulations. The court rejected the argument, finding the claims preempted as seeking to impose inconsistent requirements on top of the FDA's requirements. According to the court, nothing in the FDA's regulations or anywhere in the complaint listed the products as "flavors." The court further held that the "bare, conclusory assertion" that the ingredients were used as flavors "without any basis for such a conclusion in the FDA regulations or otherwise, is insufficient to state a claim." The court allowed the "wholesome" claims to proceed as to the Planter's nut blends, as well as the fat content claims related to Kraft cheese as the complaint alleged that the products' labels were in technical violation of typeface and placement requirements. The court also rejected Kraft's primary jurisdiction defense but dismissed claims based on web statements the plaintiffs did not allege they say and products they did not purchase. Order.

Food Litigation Newsletter
June 29, 2013

ISSUE NO.14

Contacts

David Biderman, Partner
Los Angeles and San Francisco
310.788.3220

Charles Sipos, Partner
Seattle
206.359.3983

Joren Bass, Senior Counsel
San Francisco
415.344.7120

New filings

Shaker v. Nature's Path Foods, No. 13cv1138 (C.D. Cal.): The complaint contains two central allegations, both with respect to Nature's Path "Optimum" breakfast cereal. First, plaintiff alleges that pictures of strawberries in the image label falsely suggest to consumers that the product contains dried strawberries. Second, plaintiff alleges that the title is false and misleading because "Optimum is not optimum." In addition to UCL/FAA and CLRA claims, plaintiff also alleges violation of the Lanham Act. Complaint.

Cuzakis v. Hansen Beverage Co., No. BC513620 (Cal. Super., Los Angeles County): Plaintiff alleges that a variety of Hansen & Monster fruit juices are labeled "no sugar added" in violation of federal and state labeling requirements, which preclude the claim that the product does not contain added sugar, including "added sugars such as jam, jelly, or concentrated fruit juice." According to the plaintiff, because the products are made from reconstituted fruit juice concentrates, the products are labeled in violation of FDA regulations and California's Sherman Act, which incorporates those regulations. Complaint.