

# Food for Thought: N.D. of California Finds Plaintiffs in Del Monte Case Didn't Meet All Rule 23 Requirements

August 01, 2015

*Kosta v. Del Monte Corp.* 308 F.R.D. 217 (N.D. Cal. July 30, 2015)



In *Kosta*, the court denied plaintiffs' motion for class certification. Plaintiffs filed the putative class action alleging that the labels on certain Del Monte Food, Inc. canned tomato products and SunFresh and FruitNaturals fruit products (and Del Monte's advertising of those products) violated the Food, Drug, and Cosmetics Act (FDCA), as adopted by California in Sherman Law, Cal. Health & Safety Code section 109875, et seq. (Sherman Law). Plaintiffs alleged that Del Monte had intentionally misbranded its products in violation of federal and California law. Specifically, plaintiffs alleged that Del Monte's canned tomato products included labels with 1) a statement and symbol indicating that the products "contain antioxidants," despite failing to meet the minimal FDA nutrient requirement for that statement; 2) a statement that the product was a "natural source" of lycopene, a nutrient for which the FDA had not established a daily value; and 3) a statement that the products contained "no artificial flavors or preservative," although they contain ingredients such as calcium chlorida, citric acid, high fructose

corn syrup, and carmine. Plaintiffs also alleged that the labels on Del Monte's SunFresh and FruitNaturals fruit products were misleading because the packaging was similar to packaging for fresh products, the product was placed in the refrigerated cases, and the labels stated that the products "must be refrigerated" and are "fresh." Del Monte conceded that the plaintiffs met the numerosity requirement of Rule 23. Similarly, Del Monte did not contest adequacy of the class representative or class counsel. Del Monte did contest the remaining Rule 23 requirements. The court held that plaintiffs did not satisfy Rule 23's typicality requirements. Specifically, regarding Del Monte's tomato products, the court found that the class representatives met the typicality requirements as to the antioxidant claims, but not as to the statement of "no artificial flavors or preservatives" because there was no evidence that both class representatives had a claim as to that statement. Regarding Del Monte's fruit products, the court held that the class representatives met the typicality requirements for the claims relating to the FruitNaturals products, but not as to the SunFresh product line. Additionally, the court held that plaintiffs did not satisfy the ascertainability requirements of Rule 23. Plaintiffs contended that all Del Monte products bear the same unlawful statements and, therefore, the class is ascertainable because it is all persons who purchased one of the products. But the court found significant evidence to refute those allegations. Del Monte pointed to various discrepancies in the labeling and packaging of the products at issue, showing that the products that are the subject of the lawsuit did not all have the same labels and the same allegedly unlawful statements. And because plaintiffs' proposed class definition covered purchases of any products within the Del Monte canned tomato, SunFresh fruit, and FruitNaturals fruit product lines throughout the entire class period and allegations of alleged false labeling and packaging, the court found that the variability in the claims impacted ascertainability. The court also found that plaintiffs failed to show "there are questions of law or fact common to the class" as required by Rule 23. Again, because of the great variations, at least half the challenged products would not evidence the violations alleged. Thus, the purchase of one of the products alone would not equate to membership in a class of persons to whom Del Monte was liable. Finally, the court held that the plaintiffs failed to offer evidence that the materiality of the allegedly unlawful, deceptive or misleading statement could be shown on a classwide basis. The court found that the plaintiffs had offered no valid means by which classwide proof could be made that a "reasonable consumer" would find the challenged statement deceptive and material to their purchasing decision. In all, the court denied plaintiffs' motion for class certification for failure to meet all the requirements of Rule 23. Although plaintiff met some of Rule 23's threshold requirements for class certification (i.e. numerosity, adequacy of representation, and some degree of typicality), the plaintiffs had not met the remaining requirements (common questions of law or fact, ascertainability, and typicality). *Read more significant court decisions affecting the food industry in [Food for Thought: 2015 Litigation Annual Review](#).*

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