FOOD FOR THOUGHT

A REVIEW OF 2016 LITIGATION
FROM CARLTON FIELDS

CARLTON FIELDS

SIGNIFICANT DECISIONS AFFECTING THE FOOD INDUSTRY

INSIDE: 'NATURAL' LABELING CLASS SUIT REINSTATED AGAINST HAIN CELESTIAL
• COURT ADDRESSES CLAIMS IN CLASS ACTION AGAINST ENERGY DRINK MANUFACTURER
• CLASS ACTION DISMISSED AGAINST LIP BALM MANUFACTURER ACCUSED OF DECEIVING CUSTOMERS
• GMO AND PESTICIDE BANS REJECTED IN THREE HAWAII COUNTIES

FOOD FOR THOUGHT 2017

FOOD FOR THOUGHT is a review of significant court decisions affecting the food, beverage, dietary supplements and personal care products industry. Although many cases in this edition focus on class certification, others relate to motions to dismiss or are otherwise notable. Carlton Fields provides this review on a complimentary basis to clients and friends.

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In re: Simply Orange Juice Marketing and Sales Practices Litigation, No. 4:12-md-2361 (W.D. Mo., Feb. 8, 2016)

BY ANGELA T. PUENTES-LEON

The *In re: Simply Orange Juice Marketing and Sales Practices Litigation* consolidated cases are based on allegations that defendants the Coca-Cola Company, Simply Orange Juice Company (a division of Coca-Cola) and Minute Maid Company (a division of Coca-Cola) made false and misleading claims relating to their Simply Orange, Minute Maid Pure Squeezed and Minute Maid Premium orange juices. Specifically, plaintiffs alleged that the terms "100% Pure Squeezed," "Not from Concentrate," "Simply Orange," "Pure," "Natural," and "Honestly Simple," (for the Simply Orange products), "100% Pure Squeezed," "Pure Squeezed" and "Never from Concentrate" (for the Minute Maid Pure Squeezed products); and "100% Pure Squeezed," "100% Orange Juice," and "natural orange goodness" (for the Minute Maid Premium products) are misleading because the juice products at issue are made using a high-engineered artificial flavoring. Plaintiffs' lawsuit, brought on behalf of individual consumers residing in Alabama, California, Florida, Illinois, Missouri, New Jersey, and New York, alleges violation of the consumer protection statutes of multiple states, in addition to various common law claims.

The court denied the parties' cross-motions for summary judgment and held that questions of fact "remain as to whether orange essence oil should be considered orange oil or orange essence under the relevant FDA regulations." Furthermore, the court also held "questions remain as to whether the processing of the oil and/or flavor components in all defendants' orange juice products makes those components into something other than ordinary orange oil or essence which must be disclosed on the products' labels." As a result, the court denied both parties' motions for summary judgment.

The court originally heard arguments on the parties' motions for summary judgment in April 2015. At the time, the court entered an order directing the parties to undertake expedited discovery relating to the "modified orange oil add-back" used in the juice products at issue, including its composition and manufacturing by defendants and its third-party suppliers. After discovery was complete on those issues, the parties supplemented their summary judgment motions and the court heard oral arguments. Thereafter, the court issued its ruling denying the motions for summary judgment.

Ninth Circuit Holds California's Nonfunctional Slack Fill Regulations for Meat and Poultry Are Preempted by Federal Law

Del Real, LLC v. Harris, 636 Fed. Appx. 956 (9th Cir. Feb. 12, 2016)

BY SYLVIA H. WALBOLT

California enacted statutory prohibitions against nonfunctional slack fill, which is the empty space between a product and its packaging that serves no specified purpose. The California Attorney General appealed a permanent injunction banning enforcement of that prohibition against a producer of heat-and-serve meat and poultry products.

The Ninth Circuit affirmed the detailed decision of the district court in *Del Real, LLC v. Harris*, 966 F. Supp. 2d 1047 (E.D. Cal. 2013). In a brief, not-for publication decision, the Ninth Circuit held that, "as applied to meat and poultry products, California's nonfunctional slack fill provisions are expressly preempted by the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) because they are 'in addition to, or different than' 21 U.S.C. §§ 467e, 678, the federal statutes' general prohibitions against containers 'filled as to be misleading'…."

The court rejected California's argument that it prohibited only a subset of conduct already prohibited by the FMIA or PPIA. First, Congress intended to create uniform national labeling standards, which "counsels against allowing the states to develop variant standards." Second, Congress allowed meat and poultry packaging to be subject to "a lesser level of regulation" than other products.

The court's decision emphasized in conclusion that "[n]othing in this disposition should be read to prevent California from exercising its concurrent authority under both the FMIA and PPIA to address misleading packaging of meat and poultry products."

Ninth Circuit Reinstates 'Natural' Labeling Class Suit Against Hain Celestial

Baler v. The Hain Celestial Group, Inc., 640 Fed. Appx. 694 (9th Cir. Feb. 22, 2016)

BY AMY LANE HURWITZ

The Ninth Circuit held that a consumer's definition of "natural" as alleged in the complaint is sufficient for the court's determination of the sufficiency of the pleading with respect to a motion to dismiss. In *Balser*, putative class action plaintiffs filed suit against the Hain Celestial Group, Inc., accusing Hain of deceptive advertising due to the use of the word "natural" on its products. After the lower court granted Hain's motion to dismiss, the Ninth Circuit reversed and remanded with the following notable findings.

First, the panel held that the plaintiffs' definition of "natural" as "free of synthetic ingredients" was sufficient to allege a reasonable consumer's understanding of what that word meant, and thus adequate under California law.

The Ninth Circuit also found that the plaintiffs sufficiently pled allegations of reliance on the misleading advertising by asserting that they would not have paid the premium price for the products had the products not been advertised as natural.

Citing *Williams v. Gerber Prods. Co.*, 552 F.3d 934 (9th Cir. 2008), the panel reversed the dismissal of the complaint on the additional finding that "an ingredient list does not correct, as a matter of law, misrepresentations on the product's label." Thus, whether the ingredient list impacted the putative class is a fact issue to be evaluated by a jury.

Finally, the Ninth Circuit remanded the matter for a thorough consideration of whether discovery limited to class certification issues was warranted. The panel noted the recent trend of authority supporting "the need to establish a sufficient factual record at the class certification stage," and found the applicable scheduling order "quite unrealistic."

California Court Prevents Second Bite at the ~~Apple~~ Yogurt

Torrent v. Yakult U.S.A., Inc., No.8:15-cv-00124-CJC-JCG (C.D. Cal., Mar. 7, 2016)

BY JOSHUA E. ROBERTS

A California court once again held that plaintiff Nicolas Torrent does not have standing to force yogurt manufacturer, Yakult USA, Inc., to change its labeling/advertisements. Torrent brought a putative class action on behalf of California purchasers of Yakult, a yogurt drink. Plaintiff alleged that Yakult's marketing claims about digestive health benefits associated with its yogurt drink were false and likely to deceive reasonable consumers. Torrent filed a motion for class certification under Rule 23(b)(1)(A) and (b)(2). On January 7, 2016, the district court denied plaintiff's motion, determining that he lacked standing to pursue the injunctive relief sought. The district court held that plaintiff lacked standing to bring such a class action because he would not suffer any future harm. *See Torrent v. Yakult U.S.A., Inc.*, No. 8:15-cv-00124-CJC-JCG, 2016 WL 4844106 (C.D. Cal., Jan. 5, 2016). Ten days later, in an attempt to suffer future harm, plaintiff purchased another Yakult yogurt drink and again moved for class certification. The district court again denied plaintiff's motion.

Injunctive Relief Standing

To have standing to pursue injunctive relief in federal court, a plaintiff must demonstrate that there is "a sufficient likelihood that [he] will be wronged in a similar way" in the future. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). In January, the court determined that Torrent did not meet this standard because he indicated that he never planned to buy Yakult again. Plaintiff said as much in his operative complaint and answers to interrogatories, stating: "Had I known that Yakult was falsely, deceptively, and misleadingly advertised, I would not have purchased Yakult." Because Torrent would not purchase Yakult again in the future, he would not suffer any future harm. As such, Torrent lacked standing to pursue injunctive relief.

Second Bite at the Yogurt

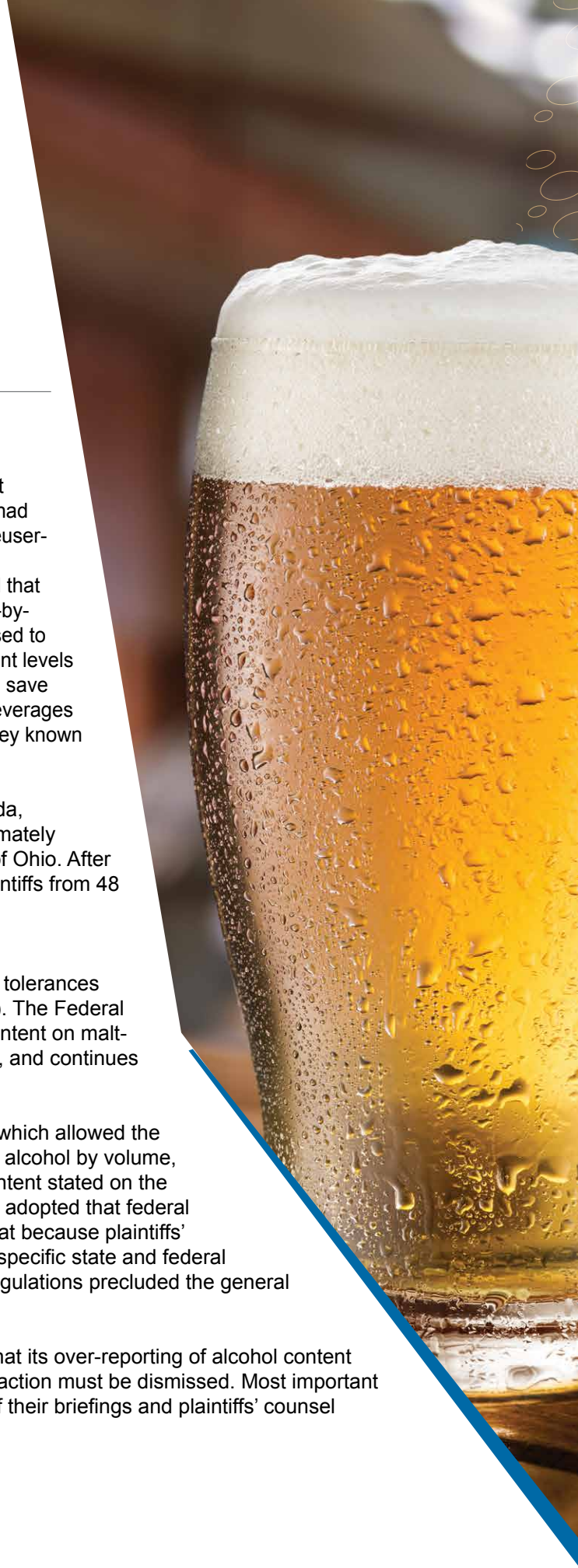
Understanding that he could not proceed with his lawsuit because he had no intention of ever buying Yakult again, Torrent sought to rectify his problem — by buying Yakult, again. Ten days after the court denied plaintiff's motion to certify for lack of standing, Torrent purchased a Yakult beverage, filed a renewed motion for class certification, and stapled a copy of his receipt to the motion. The court was not impressed.

The District Court for the Central District of California reasoned that courts are generally "reluctant to allow parties to have a second bite at the apple by relitigating issues that have already been decided." *See Anderson Living Trust v. WPX Energy Prod., LLC*, 308 F.R.D. 410, 438 (D.N.M. 2015)(internal quotations omitted). Allowing Torrent to seek injunctive relief based on his (very) recently expressed intention to continue purchasing Yakult in the future would allow him to fundamentally alter his theory of the case and relitigate issues that were already ruled on. Rule 23 does not require such a result and the local rules expressly prohibit it. As such, the court denied plaintiff's motion for class certification… again.

Sixth Circuit Affirms Dismissal of Class Action Complaints Against Anheuser-Busch for Intentionally Overstating Alcohol Content of its Malt Beverages

In Re: Anheuser-Busch Beer Labeling Marketing and Sales Practices, 644 Fed. Appx. 515 (6th Cir. 2016)

BY AMY E. FURNESS



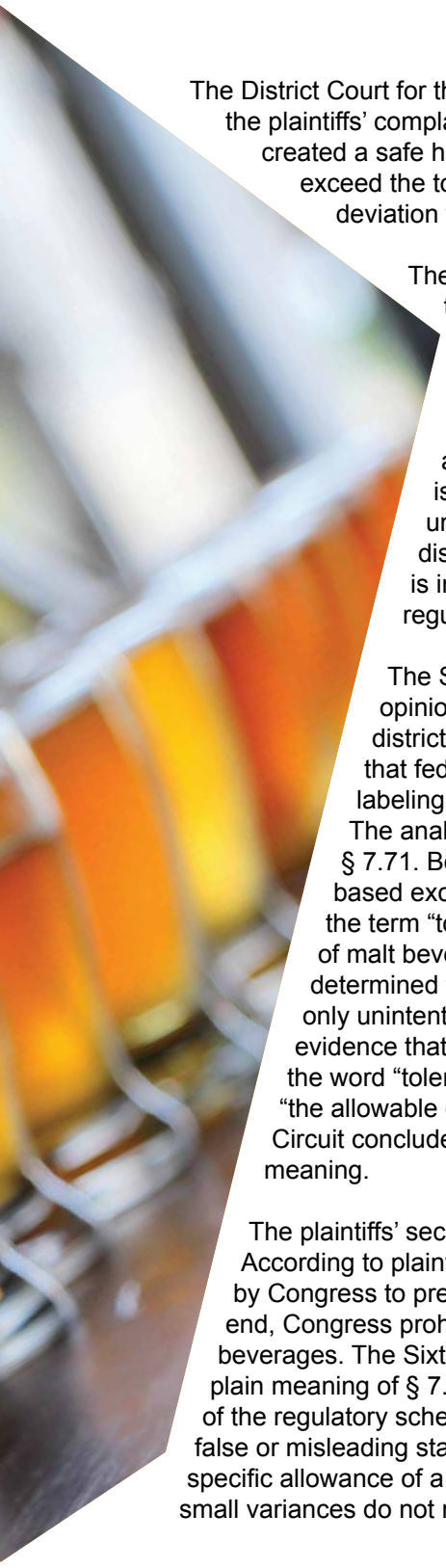
Consumers in seven states brought individual class action lawsuits alleging Anheuser-Busch intentionally overstated the alcohol content of many of its malt beverages on those beverages' labels. Plaintiffs had consumed one or more of the malt beverages and alleged that Anheuser-Busch employed process-control technology enabling it to precisely measure the alcohol content of its malt beverages. Plaintiffs claimed that the technology was not used to produce beverages with the alcohol-by-volume content as listed on the label. Rather, the technology was used to deceive consumers by adding extra water to dilute the alcohol content levels below that found on the labels and thus, allowed Anheuser-Busch to save money on production costs. Plaintiffs claimed they purchased the beverages in reliance on the labels and would not have purchased them had they known the alcohol content was much lower than stated.

Litigation commenced in seven states: California, Colorado, Florida, New Jersey, Ohio, Pennsylvania, and Texas. The cases were ultimately consolidated in one multidistrict litigation in the Northern District of Ohio. After consolidation, plaintiffs sought to certify an additional class of plaintiffs from 48 states.

In response, Anheuser-Busch moved to dismiss, arguing that any misstatement of alcohol content, even if intentional, fell within the tolerances permitted by the applicable federal regulation, 27 C.F.R. § 7.71(c). The Federal Alcohol Administration initially prohibited statements of alcohol content on malt-beverage labels. However, 27 C.F.R. § 7.71 was enacted in 1992, and continues to govern how alcohol content must appear on labels.

Anheuser-Busch's argument centered on that federal regulation, which allowed the alcohol content of malt beverages containing 0.5 percent or more alcohol by volume, a "tolerance of 0.3 percent" (either above or below the alcohol content stated on the beverages' labels). Each of the state laws in question in this case adopted that federal tolerance by incorporating § 7.71. So, Anheuser-Busch argued that because plaintiffs' general consumer protection and warranty claims conflicted with specific state and federal beverage labeling regulations, the compliance with the specific regulations precluded the general claims.

Anheuser-Busch's primary argument was that if the court found that its over-reporting of alcohol content (even if intentional) was permitted under 27 C.F.R. § 7.71(c), the action must be dismissed. Most important was the fact that plaintiffs had not "disputed this premise in any of their briefings and plaintiffs' counsel explicitly conceded this point at oral argument."



The District Court for the Northern District of Ohio dismissed the plaintiffs' complaint. It found the language of § 7.71(c) created a safe harbor for any brewer who did not exceed the tolerance and it did not matter if the deviation was intentional.

The plaintiffs appealed and argued that the most reasonable construction of § 7.71 would allow unintentional variances but that "intentional dishonesty about the alcohol level remained prohibited." The plaintiffs also argued that the word "tolerance" is a technical term permitting only unintentional variations and that the district court's interpretation of § 7.71 is inconsistent with the purpose of the regulatory framework.

The Sixth Circuit, in an unpublished opinion, affirmed the judgment of the district court. The appellate court concluded that federal alcohol regulations allow some labeling variation, even if done intentionally. The analysis began with the text of 27 C.F.R. § 7.71. Because in certain provisions intent-based exceptions were included when using the term "tolerance," but not in the context of malt beverage labeling, the appellate court determined that the term as used did not apply to only unintentional variances. In light of the lack of evidence that any legislature or regulator intended the word "tolerance" to mean anything other than "the allowable deviation from standard," the Sixth Circuit concluded the word as used bears its ordinary meaning.

The plaintiffs' second argument was also rejected. According to plaintiffs, the relevant section was designed by Congress to prevent consumer deception. To that end, Congress prohibited misleading labels on alcoholic beverages. The Sixth Circuit disagreed and found that the plain meaning of § 7.71 would not conflict with the purpose of the regulatory scheme. The general prohibition against false or misleading statements could be reconciled with the specific allowance of a 0.3 percent tolerance because such small variances do not mislead consumers.

Finally, the Sixth Circuit determined that the plain language of § 7.71 would suggest the relevant tolerance applied regardless of Anheuser-Busch's intent. Therefore, the appellate court determined that the district court properly held Anheuser-Busch did not violate § 7.71. In doing so, it was forced to address the issue of plaintiffs' forfeiture of an argument. As noted above, Anheuser-Busch asserted, and plaintiffs never contested, that if the district court were to find the alleged over-reporting of alcohol content was permitted, then the action must be dismissed. Specifically, the court noted, "What is missing from the plaintiffs' briefing was the argument that they make on appeal, namely, even if Anheuser-Busch complied with § 7.71, the plaintiffs' state-law and MMWA [Magnuson-Moss Warranty Act] claims would survive." It was determined that because plaintiffs failed to clearly raise an argument in the district court, that argument was forfeited. "The upshot of this is that the plaintiffs could have drawn on state appellate authority to argue Anheuser-Busch's compliance with § 7.71 does not preclude particular state-law or consumer-protection or warranty claims…Nothing prevented the plaintiffs from raising in the district court the very argument that they seek to make for the first time on appeal."

The Sixth Circuit concluded Anheuser-Busch was not prohibited from targeting the lower end of the tolerance set forth in 27 C.F. R § 7.71. It also noted that because plaintiffs forfeited the argument that their claims would survive such an interpretation, the judgment of the district court was affirmed.

Putative Class Action Against Yogurt Maker Revived by the Ninth Circuit with Directions to Stay the Proceedings in Light of Ongoing FDA Proceedings

Kane, et al v. Chobani, LLC, 645 Fed. Appx. 593 (9th Cir. 2016)

BY ANGELA T. PUENTES-LEON

The Ninth Circuit revived a putative class action that alleged defendant Chobani deceptively and unlawfully labeled and sold its Greek yogurt products. Plaintiffs Katie Kane, Arianna Rosales, and Darla Booth, allege that defendant's use of "natural" violated FDA regulations. Specifically, they alleged that the products labeled "all natural" contained artificial ingredients, flavorings, coloring and chemical preservatives, and that defendant deceptively and unlawfully used the term "evaporated cane juice" to describe the products' added sugar without disclosing that the term is synonymous with the term "sugar." Thus, they contend that defendant misled customers into thinking the product contained less sugar than it allegedly did.

The district court granted defendant's motion to dismiss the third amended complaint. Citing the primary jurisdiction doctrine, the Ninth Circuit reversed and remanded for entry of an order staying the proceedings until such time as the U.S. Food and Drug Administration (FDA) completes its proceedings regarding the use of the terms "natural" and "evaporated cane juice" in food labeling. The Ninth Circuit, citing *Astiana v. Hain Celestial Grp.*, 523 F. 3d 1110 (9th Cir. 2008), stated that the scope and permissible usage of the terms "natural" and "evaporated cane juice" in food products should be addressed by the regulatory agency with authority over the relevant industry rather than by the judicial branch.

The court supported its invocation of primary jurisdiction because the FDA both said it would address the terms, and had ongoing proceedings about them. Specifically, the court cited the FDA's November 2015 request for comments regarding the use of the term "natural" in food product labeling and the FDA's July 2015 letter indicating that it expects to issue final guidance on the term "evaporated cane juice" by the end of 2016. As a result, the court did not feel staying the proceedings would needlessly delay the action. However, in a footnote, the court noted that the duration of the stay remains within the discretion of the district court. The court further instructed that the district court's exercise of its discretion should be informed by any events that rendered the FDA's resolution of the terms "natural" and "evaporated cane juice" "illusory."

Manufacturer Obtains Partial Summary Judgment in Lawsuit Alleging it Violated Consumer Protection Statutes by Labeling and Selling its House-Brand Baked Goods as "All Natural"

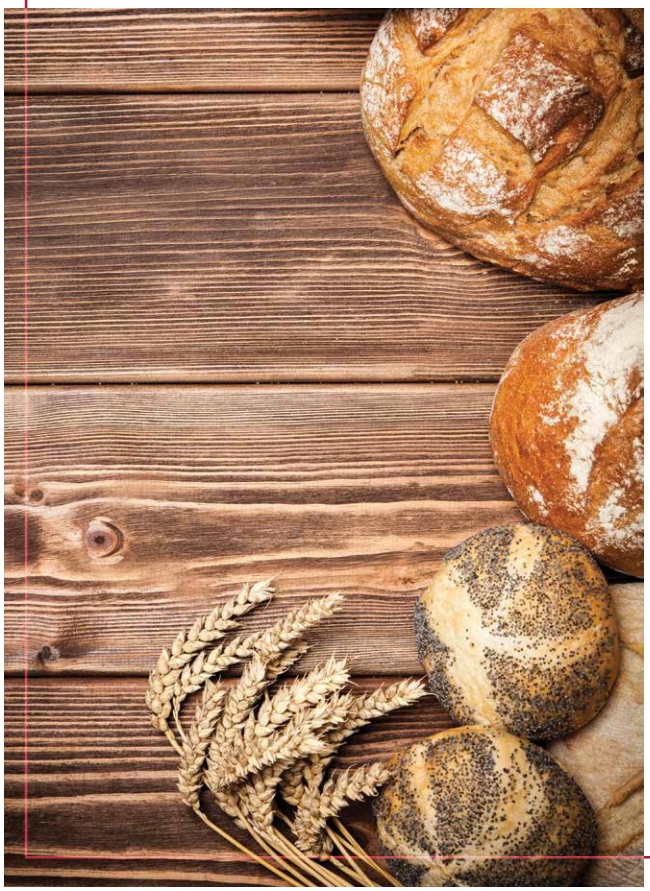
Garrison v. Whole Foods Market, Inc., No. 3:13-cv-5222 (N.D. Cal., Mar. 29, 2019) and Garrison v. Whole Foods Mkt. Cal., Inc., No. 3:14-cv-0334 (N.D. Cal., Mar. 29, 2019)

BY ANGELA T. PUENTES-LEON

Plaintiffs' putative class action alleged that defendant Whole Foods Market, Inc. violated California consumer protection statutes when it labeled and sold its house-brand baked goods as "all natural." Specifically, plaintiffs alleged that sodium acid pyrophosphate and maltodextrin, both ingredients in defendants' baked goods, are "synthetic." The court granted defendants' motion for summary judgment as to plaintiffs' claims for violations of California's Consumer Legal Remedies Act (CLRA) and the common law claim for breach of contract. The court denied defendants' motion for summary judgment with respect to the claims for violation of California's Unfair Competition Law, the False Advertising Law, and the common law claims of fraud, negligent misrepresentation, and breach of express warranty.

The district court held that plaintiffs could not proceed with their CLRA claims because they failed to provide the required pre-suit notice to defendant. Plaintiff provided pre-suit warning to the wrong entity and, despite being aware of a problem with the notice, failed to provide notice to the correct entity. The court further held that plaintiffs could not proceed with their breach of contract claims because they were not in privity with the defendant.

However, the court denied defendants' motion for summary judgment on the remaining claims. The court expressed that it was "unlikely that a jury would find the Garrisons credible" on the contention that they were deceived by the "all natural" label on the challenged products. The court also articulated additional concern with plaintiffs' inability to identify the dates on which they bought the challenged products and their failure to provide receipts for the purchase of said products. Nonetheless, the court held that plaintiffs' testimony that they recalled purchasing the products was sufficient to create an issue of fact for the jury. And, although the plaintiffs "apparently had a mistaken belief that organic foods (like "all natural" foods) contain no synthetic ingredients," the court did not believe that this rendered unreasonable their belief that products labeled as "all natural" would not contain synthetic ingredients. Thus, a genuine issue of fact remained for the jury regarding whether the plaintiff was deceived by the labels of the challenged products.



Finally, defendants' contended that even if plaintiffs were deceived by the labels they did not suffer any "actual injury" as defined in California's consumer protection statutes. The court held that there was sufficient evidence from which a jury could conclude that the plaintiffs suffered an actual injury, particularly because the "'actual injury' threshold is not high." The court stated it was premature to address at summary judgment the remaining issues regarding price premiums because discovery was still open and evidence about price premiums would most likely come from experts.

For Want of a Damages Model, Certification Was Lost

Khasin v. R. C. Bigelow, Inc., No. 12-CV-02204-WHO, 2016 WL 1213767 (N.D. Cal., Mar. 29, 2016)

BY DAVID L. LUCK AND D. MATTHEW ALLEN

Khasin v. R. C. Bigelow, Inc., No. 12-CV-02204-WHO, 2016 WL 1213767 (N.D. Cal. Mar. 29, 2016), provides a recent example of a class-certification denial premised on the "damages model" rule expressed in *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1433 (2013). As the Northern District of California expressed it: "To satisfy Rule 23(b)(3)'s predominance requirement, a plaintiff must demonstrate that 'damages are capable of measurement on a classwide basis….' At class certification, plaintiff must present a likely method for determining class damages, though it is not necessary to show that his method will work with certainty at this time."

The putative class at issue sought to hold R.C. Bigelow, a purveyor of tea products, responsible for the purported mislabeling of the health benefits of a wide range of its green tea offerings. In support of class certification, the representative plaintiff provided three damages models: (1) a restitution calculation; (2) statutory damages; and (3) nominal damages. The court held that all were meritless.

First, regarding restitution, the plaintiff took the position – against applicable precedent – that the value of all of these green tea products was zero due to alleged "false advertising." The court responded that this argument was "too implausible to accept" because these products could be purchased on any number of grounds, and the plaintiff was required to "present a damages model that can likely determine the **price premium attributable only to Bigelow's use of the allegedly misleading**" labeling (emphasis supplied). The plaintiff's restitution model failed to do so despite prior warnings.

Second, while statutory damages were available under California law in appropriate circumstances regarding such mislabeling claims, the plaintiff "failed to provide a viable theory for calculating damages under the [California Consumers Legal Remedies Act] that would be tied to his theory of liability."

Third, the plaintiff "also [sought] nominal damages, but [failed to cite] … a single case demonstrating that nominal damages are available under his causes of action."

On these grounds regarding the lack of a viable damages model – and additional non-damages grounds – the court denied class certification.

UPDATE: In August 2016, the district court granted defendant's motion for summary judgment, disposing of the putative class action asserting violations of the California Unfair Competition Law (UCL), Consumers Legal Remedies Act (CLRA), and False Advertising Law (FAL), and raising a claim for unjust enrichment.

Ninth Circuit Court of Appeals Holds FDCA Does Not Preclude or Preempt Lanham Act Claims by Supplement Manufacturer Against Competitor

ThermoLife Intern., LLC v. Gaspari Nutrition, Inc., 648 Fed.Appx. 609 (9th Cir. 2016)

BY AMY LANE HURWITZ

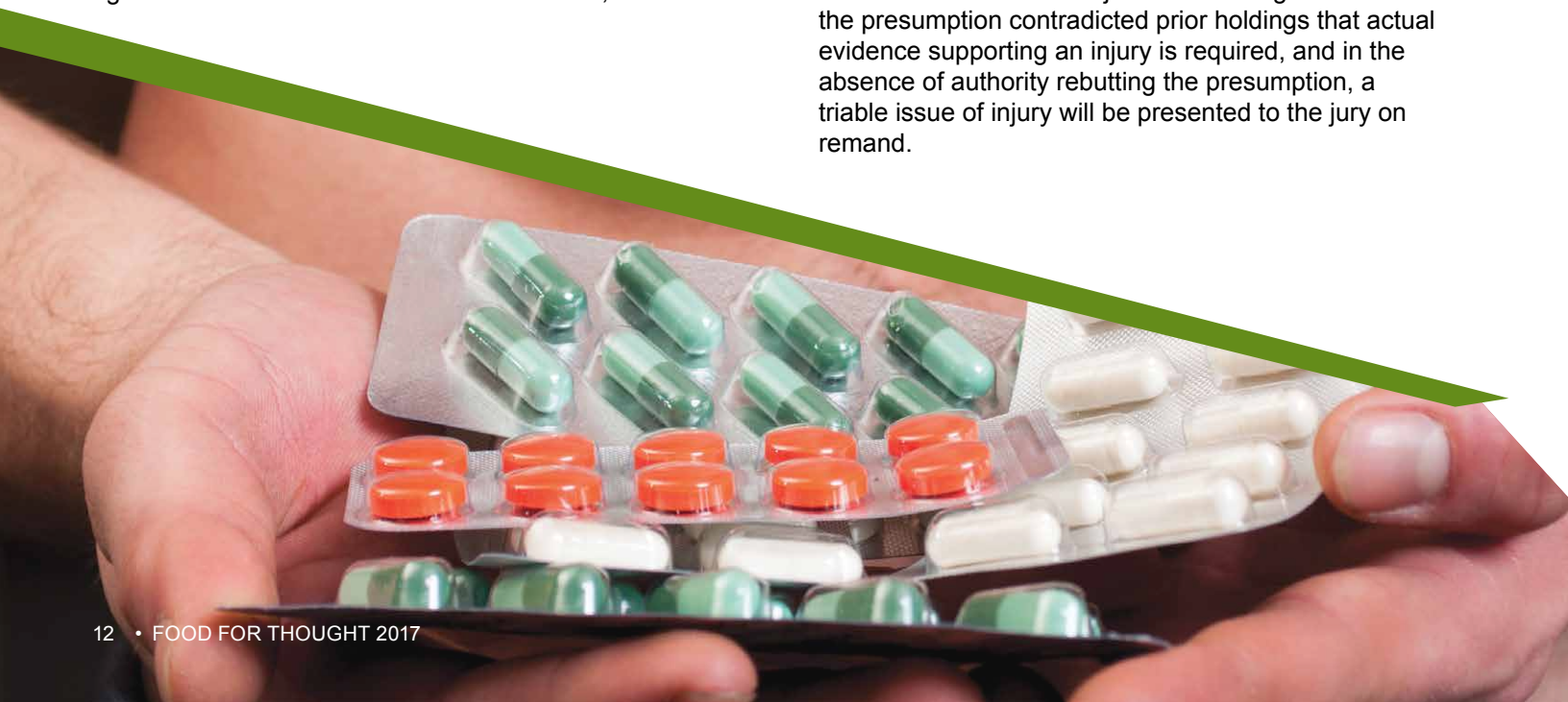
In *ThermoLife Intern., LLC v. Gaspari Nutrition, Inc.*, supplement maker ThermoLife International, LLC ("ThermoLife") asserted a variety of claims against Gaspari Nutrition, Inc. (GNI) related to Gaspari's alleged false advertising of testosterone products. ThermoLife claimed that GNI falsely advertised its testosterone boosters as "safe," "natural," and "legal," and compliant with the Food, Drug and Cosmetic Act (FDCA). ThermoLife sued GNI for six counts of false advertising under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), and for unfair competition under Arizona law.

In its *de novo* review, and citing the Supreme Court's decision in *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014), the *Gaspari* court found ThermoLife's false labeling claims were not precluded by FDCA. "[W]hereas the FDCA protects public health by relying on the FDA's expertise, Lanham Act claims like ThermoLife's protect commercial interests by relying on the market expertise of competitors." *Gaspari*, 648 Fed. Appx. 609 (2016).

Evaluating the lower court's summary judgment against ThermoLife on its Lanham Act claims, the Ninth Circuit found triable issues indeed existed regarding the falsity, materiality, and injury on each of ThermoLife's six claims. Three of the counts dealt with GNI's advertisements that its products were "legal" and compliant with the Dietary Supplement Health and Education Act (DSHEA). While such statements generally reflect an interpretation of a regulation and are not actionable, an exception exists for situations where the speaker's beliefs contradict the statements. Here, because the record contained emails suggesting GNI knew its products were not compliant with DSHEA, falsity was a triable issue.

Another falsity issue the Ninth Circuit found triable dealt with GNI's advertising statements regarding its product's safety. Such non-interpretive statements are not of opinion, but of fact. Because a jury could find the contrary based on available expert testimony, the court found this allegation of falsity triable as well. The last statement, which the Ninth Circuit also found yielded a triable issue of falsity, concerned GNI's statements that its product was "natural," and made from ingredients "naturally occurring and [ ] found in natural foodstuffs." While not interpretive opinion statements or statements of clear fact, these statements were "capable of being reasonably interpreted as a statement of objective fact," and therefore actionable.

The Ninth Circuit also found triable issues existed as to materiality, based on survey evidence suggesting that these claims influenced consumers' purchasing decisions. Injury, too, was determined a triable issue based on a presumption of commercial injury where the parties are direct competitors and the misrepresentations have a "tendency to mislead consumers." The court rejected GNI's argument that the presumption contradicted prior holdings that actual evidence supporting an injury is required, and in the absence of authority rebutting the presumption, a triable issue of injury will be presented to the jury on remand.



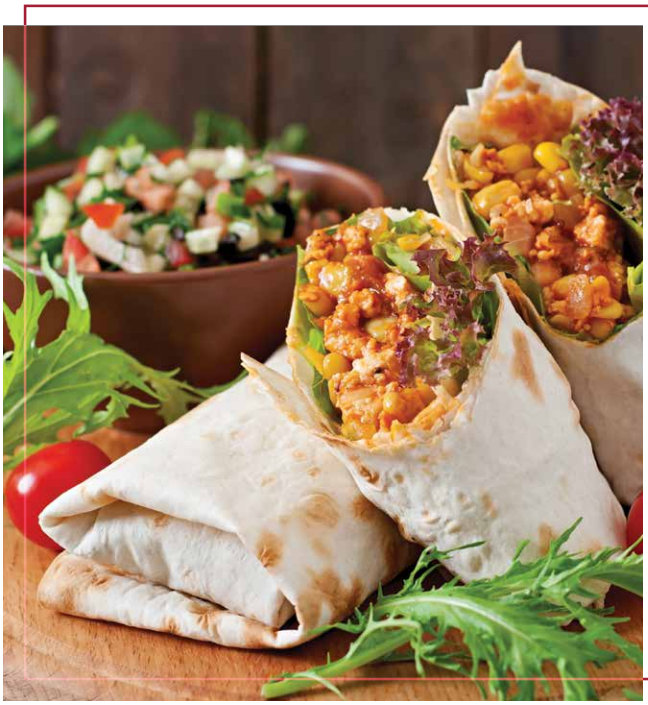
The Ninth Circuit also upheld ThermoLife's unfair competition claim, finding that the particular Arizona statute under which ThermoLife asserted its misbranding claims did not conflict with the FDCA.

Motion to Dismiss Denied in False "GMO" Advertising Suit Against Chipotle

Reilly v. Chipotle Mexican Grill, Inc., 15-CIV-23425-COOKE/TORRES (U.S.D.C., S.D. Fla., April 20, 2016)

BY ADRIAN K. FELIX

A Florida federal judge declined to dismiss a proposed class action against Chipotle Mexican Grill, Inc. accusing the company of deceptively advertising that its foods contain non-GMO ingredients. The plaintiff alleged, in short, that Chipotle sources its meat and dairy products from animals raised on GMO-rich feed, hence the company's food products are not GMO-free as advertised.



Chipotle argued in its motion to dismiss that the plaintiff failed to establish standing because she never identified which product(s) she purchased and never alleged a threat of future harm. Chipotle further argued that no reasonable consumer would assume that an advertisement claiming "no GMO ingredients" means that the animals sourced for the food only consume non-GMO feed.

The district judge found that, unlike in *Gallagher v. Chipotle Mexican Grill, Inc.*, No. 15-cv-03592-HSG (N.D. Cal. Feb. 5, 2016), the plaintiff in this case sufficiently alleged that she paid premium prices for Chipotle food, meat and dairy products, which she believed were GMO-free but which contained GMOs; therefore, the plaintiff satisfied Article III's standing requirements, showed that her claim was facially plausible (at this stage in the proceedings) based on her definition of "non-GMO ingredients," and alleged sufficient grounds to state a claim for unjust enrichment against Chipotle. The judge agreed, however, that the plaintiff failed to demonstrate that Chipotle's continued GMO-free advertising would cause her irreparable harm, because there were no allegations in her complaint that she planned to continue purchasing Chipotle's products; therefore, the judge dismissed her count seeking injunctive relief but granted her leave to amend.

UPDATE: On November 17, 2016, the district court granted defendant's motion for summary judgment and denied plaintiff's motion for class certification. Plaintiff's complaint was dismissed with prejudice. The order states that the district court's holding is based on the reasons cited by the court during the November 16, 2016 hearing.

Whole Foods Wins Dismissal of PETA's Lawsuit Over Company's Claims About How Meat is Raised

PETA v. Whole Foods Mkt. Cal., Inc., No. 15-4301, 2016 U.S. Dist. LEXIS 55601, (N.D. Cal., April 26, 2016)

BY ANGELA T. PUENTES-LEON

Plaintiffs in this putative class action alleged that defendants Whole Foods Market Services, Inc., Whole Foods Market California, Inc., and Mrs. Gooch's Natural Food Markets, Inc., fraudulently marketed meat sold in their stores. People for the Ethical Treatment of Animals, Inc. (PETA), an international animal protection organization, and Lori Grass, a California citizen, together sought to represent a class of consumers who purchased Whole Foods' meat products during

a four-year period. Specifically, plaintiffs claimed that defendants fraudulently enticed consumers to pay a premium price on its meat products by advertising them as a "more humanely treated, higher quality animal product" in violation of California's Unfair Competition Law (UCL), Consumers Legal Remedies Act (CLRA), and False Advertising Law (FAL).

Plaintiffs alleged that the meat section of each of the defendant's retail stores advertises and promotes information about a "Global Animal Partnership 5-Step Rating System." Global Animal Partnership (GAP) is a non-profit organization that rates animal welfare using numerical ratings approved by the federal Food and Safety Inspection Service (FSIS). According to the plaintiffs, GAP received its initial funding from defendants, currently receives a majority of its funding from defendants, and has a board that includes current and former executives from defendant companies. Plaintiffs argued that the GAP rating is a "sham" that is not enforced, that the advertising does not adequately disclose that the treatment standards under the GAP rating "are no better or marginally better than is the common industry practice."

The court previously dismissed plaintiffs' second amended complaint because it did not contain sufficient information to allege fraud with specificity as required by Federal Rule of Civil Procedure 9(b) and because plaintiffs failed to distinguish between in-store advertisements subject to California's consumer protection law and on-package labels that are federally approved and can only be challenged under federal law. Defendants' motion to dismiss challenged plaintiffs' third amended complaint in its entirety.

The court held that plaintiffs' third amended complaint did satisfy the heightened pleading standards of Rule 9(b) because plaintiffs adequately distinguished defendants' signage (including in-store signs, placards, and napkins) from federally approved labels on the meat packages. Similarly, the court did not reach the preemption question because plaintiffs' third amended complaint focused on advertising separate from the GAP rating labels approved by the FSIS.

However, the court held that plaintiffs' third amended complaint failed to allege actionable affirmative misrepresentations by defendants on the signage and napkins. Defendants argued, and plaintiffs conceded, that many of the statements were not factually untrue (e.g., "No Cages" or "Healthy Animals"). Instead, plaintiffs argued that defendants used signs and napkins to describe the GAP rating system and create the impression that defendants' standards ensured superior treatment of animals, resulting in superior meat quality. But the court sided with defendants and held that statements such as "Great-Tasting Meat From Healthy Animals" and "Raised Right Tastes Right," are not actionable statements of fact because there are no quantifiable, objective standards. Essentially, the court found those statements to be "taste representations that are not quantifiable" and, therefore, "non-actionable puffery."

Similarly, the court rejected plaintiffs' contentions that defendants' statements were actionable omissions. Plaintiffs claimed that defendants had a "duty to disclose that the audit process is a sham and that key standards merely meet minimum industry practice." The court held that retailers do not owe a duty to disclose product information unless it relates to consumer safety. Because plaintiffs did not allege a consumer safety issue, their claim of actionable omission failed.

Sixth Circuit Affirms Dismissal of Putative Class Action Claims Against Kraft Foods Global, Inc. and Starbucks

Montgomery v. Kraft Foods Global, Inc., 822 F.3d 304 (6th Cir. 2016)

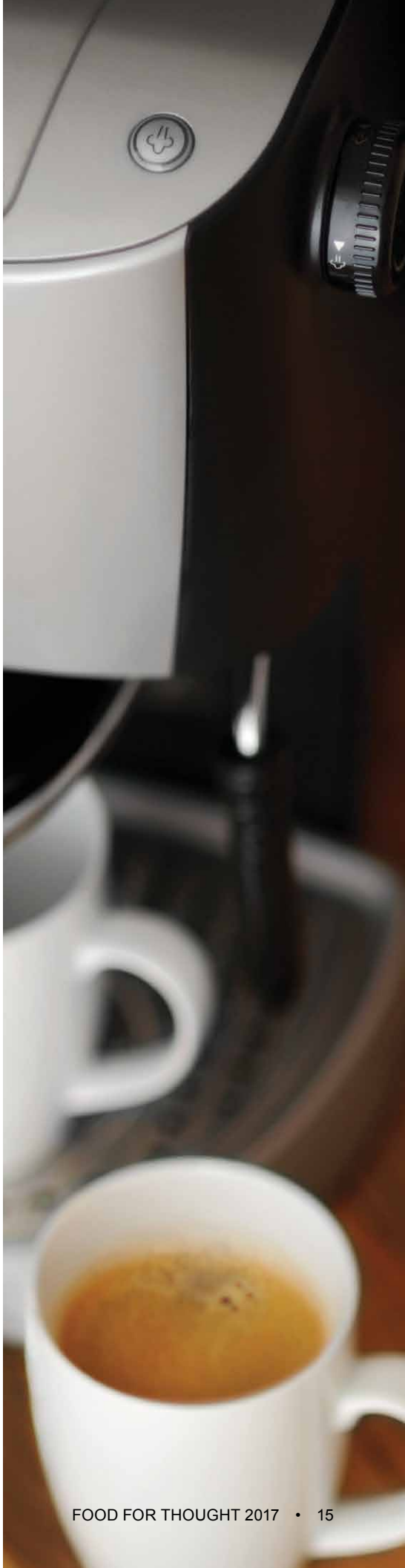
BY JORGE A. PEREZ-SANTIAGO

This putative class action arose because plaintiff Pamella Montgomery purchased a Tassimo, a single-cup coffee brewer manufactured by Kraft Foods, expecting it to brew Starbucks coffee because it bore a sticker reading: "Featuring Starbucks® Coffee." Because Starbucks later announced its plan to terminate its distribution agreement with Kraft and thus her expectations were not met, she sued Kraft Foods and Starbucks on behalf of a class for violations of the Michigan Consumer Protection Act (MCPA), breach of express and implied warranties, and breach of contract.

The district court dismissed several of the MCPA claims and all of the claims unrelated to the MCPA claims, and denied class certification on the remaining MCPA claims. The district court also entered judgment in plaintiff's favor when she accepted the defendants' offer of judgment under Federal Rule of Civil Procedure 68, and granted only $6,767 in fees and costs, although she had requested over $180,000 in fees and costs. Plaintiff appealed the dismissal of her claims for breach of express and implied warranties, the denial of class certification on her consumer-protection claims, and the attorneys' fees the district court awarded as part of the Rule 68 settlement.

The Sixth Circuit dismissed the class-certification appeal as moot, affirmed the district court's dismissal of the warranty claims, and affirmed the attorneys' fees award. With respect to the class-certification appeal, the Sixth Circuit held that because plaintiff accepted defendants' Rule 68 offer of judgment, which included costs and attorneys' fees, she lost any putative benefit from class certification and thus rendered her appeal from the denial of class certification moot. In short, because she voluntarily relinquished her claims and received her attorneys' fees and costs and "[c]ertification of the class would not have the potential to leave Montgomery 'in a better position with respect to attorneys' fees and costs than would the [Rule 68 offer she accepted],'" the appeal from the denial of class certification was moot. The court similarly rejected plaintiff's argument that the Rule 68 settlement only related to the costs and fees she incurred in pursuit of her individual claims because the court noted that she did not owe her lawyer any unawarded, class-related attorneys' fees.

Turning to the district court's dismissal of the warranty claims under Rule 12(b)(6), plaintiff alleged that the defendants made and breached several express warranties that: (1) Tassimo afforded customers the "present and continued availability" of compatible Starbucks T–Discs, (2) the Tassimo was "designed for use" with the Starbucks T–Discs, and (3)



Starbucks T–Discs were "designed for use" with the Tassimo. Kraft Foods moved to dismiss the express warranty claim because plaintiff failed to plead that she was in privity of contract with the defendants, and plaintiff countered by claiming that she met the privity requirement due to her status as a third-party beneficiary of the Kraft–Starbucks distribution agreement.

The court, noting that it was obligated to follow a Michigan Court of Appeals decision because the Michigan Supreme Court had yet to rule on the privity issue regarding express-warranty claims, held that privity is required because an express warranty is a specific contract term. Thus, to properly plead a claim of breach of an express warranty, a Michigan plaintiff must plead that she was in privity with the defendants, and plaintiff could not because she purchased the Tassimo from a grocery store and she abandoned the third-party beneficiary argument on appeal.

With respect to plaintiff's claim of breach of implied warranty of merchantability, the court observed that Michigan had abandoned the contractual privity requirement. However, plaintiff's claims were still deficient because plaintiff did not allege that the Tassimo was "unfit for its ordinary purpose." The court clarified that "merchantable" is not synonymous with perfect, which means that a good need only be of average quality in the industry to qualify as merchantable. Moreover, the plaintiff did not plausibly allege that the goods failed to conform to the promises of fact on its label because plaintiff's own allegations suggested that the Tassimo lived up to these promises of fact at the time it was purchased and that only after the system was purchased did it become "increasingly difficult … to find and purchase Starbucks [T-Discs]." Plaintiff argued on appeal that by those allegations she meant that she was unable to brew Starbucks at the time of her purchase. The court rejected this argument because plaintiff did not seek to amend the complaint below and did not expressly make this argument in response to the motion to dismiss. It also rejected plaintiff's argument that the label, which stated that it "[f]eatur[ed] Starbucks® coffee," warranted the "continued availability" of Starbucks T-Discs.

Finally, the court affirmed the award of attorneys' fees because plaintiff's argument on appeal that the award of fees and costs was a "non-award" was no more than a "gripe, unaccompanied by legal reasoning in support of judicial relief." Thus, the issue was forfeited on appeal.

Ninth Circuit Revives Proposed Class Action Against Convenience Store Regarding Nutritional Content of Private Brand Potato Chips

Bishop v. 7-Eleven, Inc., 651 Fed. Appx. 657 (9th Cir. 2016)

BY ANGELA T. PUENTES-LEON

Plaintiff Scott Bishop filed a proposed class action against defendant 7-Eleven based on allegations that the convenience store chain's private-label potato chips are deceptive. According to plaintiff, the front of the potato chips package states "0g trans fat" and "no cholesterol," despite the fact that the product actually contains some small amounts of trans fat and cholesterol. Thus, he claimed he would not have purchased the product if defendant had included the disclosure "See nutritional information for fat content" on the package, as required by the U.S. Food and Drug Administration (FDA).

The district court dismissed plaintiff's second amended complaint. The Ninth Circuit reversed the district court's decision and held that the district court erred in its finding that plaintiff failed to allege facts sufficient to establish standing under California's False Advertising Law (FAL), California's Consumers Legal Remedies Act (CLRA), and California's Unfair Competition Law

(UCL). The Ninth Circuit held that plaintiff had sufficiently alleged actual reliance. The Ninth Circuit held that even if the statements made are "not technically false," they are actionable pursuant to California's consumer protection statutes if they "have a tendency to mislead consumers because the statements fail to disclose or direct the consumer's attention to other relevant information."

Ninth Circuit Addresses Standing, State Claims, Preemption, and Primary Jurisdiction in Consumer Class Action Against Energy Drink Manufacturer

Fisher, et al. v. Monster Beverage Corporation, et al., 656 Fed Appx. 819 (9th Cir. 2016)

BY GREGORY BOULOS

In *Fisher, et al. v. Monster Beverage Corp., et al.*, plaintiffs Alec Fisher ("Fisher"), Matthew Townsend ("Townsend"), and Ted Cross ("Cross"), brought a putative class action against energy drink manufacturer Monster Beverage Corp. ("Monster"). The plaintiffs claimed that Monster engaged in unfair and deceptive business and trade practices by representing that a line of its drinks could rehydrate like a sports drink, and by omitting the potential health risks associated with the frequent consumption of caffeinated drinks, in violation of California's Unfair Competition Law (UCL), California's False Advertising Law (FAL), and California's Consumers Legal Remedies Act (CLRA). The U.S. District Court for the Central District of California dismissed Fisher's complaint and he appealed.

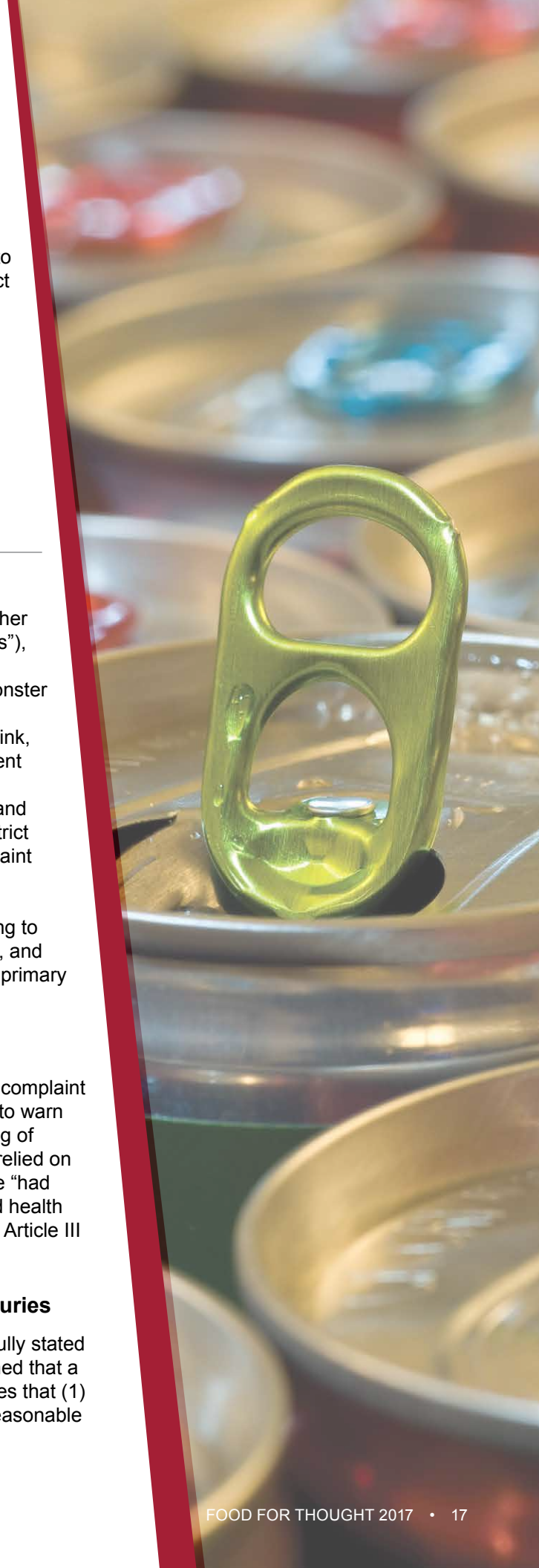
The Ninth Circuit addressed whether plaintiffs had Article III standing to bring their claims, whether they stated a claim under the UCL, FAL, and CLRA, whether plaintiffs' claims were preempted, and whether the primary jurisdiction doctrine applied to their claims.

Plaintiff Fisher Lacked Article III Standing

Monster only challenged Fisher's standing to bring his claims. The complaint alleged that certain specific misrepresentations, including a failure to warn consumers of the caffeine content, was on the labels and packaging of Monster's drinks ("on-label claims"). Fisher failed to allege that he relied on any specific misrepresentations by Monster. Instead, he claimed he "had no reason to believe" that Monster's drinks were "not safe or posed health risks." The court held that this allegation was insufficient to support Article III standing.

Plaintiffs Townsend and Cross Sufficiently Pled Their Injuries

Next, the court considered whether Townsend and Cross successfully stated a claim for relief under the CLRA, FAL, and UCL. The court explained that a complaint is sufficient with regard to all three statutes when it alleges that (1) a representation was made; (2) it was false or likely to mislead a reasonable



consumer; (3) the plaintiff saw and relied on the representations for their truth in purchasing the item; and (4) the plaintiff would not have bought the item otherwise.

Townsend alleged that he relied on Monster's statements on one of its drinks that recommends consumers limit daily consumption to three cans. He also alleged that he read and relied on Monster's affirmative representation that each of the Monster drinks he purchased quenches thirst and hydrates like a sports drink. After five years of consuming up to three Monster drinks per day, Townsend experienced heart palpitations and his blood pressure was measured at 225 over 139. Similarly, Cross alleged that he purchased a Monster drink with the statement, "It's the ideal combo of the right ingredients in the right proportion to deliver the big bad buzz that only Monster can" ("Ideal Combo Statement"). Cross alleged that he relied on the Ideal Combo Statement's representation to mean that Monster drinks were safe for consumption and would not have purchased the drinks but for that representation.

The court explained that the statements that Townsend and Cross relied on were not strictly false, but it is plausible that they were misleading, which is all California law requires. As such, the court held that both plaintiffs sufficiently pled their injury.

Some Claims Were Preempted, Others Were Not

Although the court determined that Townsend and Cross sufficiently pled their injury, it found their claims related to the caffeine content of Monster's drinks were preempted. However, the court found their other on-label claims were not pre-empted. Specifically, the court considered whether plaintiffs' claims were preempted by the federal Food, Drug, and Cosmetic Act (FDCA).

The FDCA expressly preempts state laws that establish any requirement for nutrition labeling of food that are not identical to the requirements of certain statutory provisions, including 21 U.S.C. § 343(q). Federal law also provides, however, that this provision shall not be construed to apply to any requirement respecting a statement in the labeling of food that provides for a warning concerning safety of the food or a component of the food. Title 21 U.S.C. § 343(q) governs nutrition-information labels, including dietary supplements, and provides only that if caffeine is added to a food, it must be included in the ingredient list. Nothing at the federal level required Monster to include on the label the amount of caffeine in its drinks. However, the court determined that if plaintiffs were to succeed on their caffeine-related on-label claim, the only remedy would be to require Monster to identify the amount of caffeine in its drinks on the packaging. As such, the court held that the caffeine-related claim was preempted.

As to plaintiffs' other on-label claims, such as those related to the Ideal Combo Statement, the court found those claims were not preempted. The plaintiffs did not seek further disclosure with respect to nutritional-labeling requirements, but instead sought to remove false or misleading statements or omissions, or to add the sort of safety warnings expressly excluded from preemption.

Primary Jurisdiction Did Not Apply to the Surviving Claims

Finally, the court held that plaintiffs' surviving claims were not within the sole purview of the FDA because the plaintiffs were not seeking to impose any labeling requirements inconsistent with federal law. Rather, they alleged violations of consumer-protection laws related to deceptive marketing and advertising. As such, the court held that the primary jurisdiction doctrine did not apply.

Olive Oil Manufacturer's "Imported from Italy" Representation On Product Label Results in Certification of Consumer Fraud Class Action

Kumar v. Salov N. Am. Corp., No. 4:14-cv-02411-YGR, 2016 WL 3844334 (N.D. Cal., July 15, 2016)

BY M. DEREK HARRIS

The Northern District of California certified a class of "All purchasers in California of liquid Filippo Berio brand olive oil of any grade … between May 23, 2010 and August 31, 2015." Plaintiff brought this class action contending that purchasers of defendant's olive oil products were deceived as to the origin of defendant's olive oil by misleading labels on the bottles stating the products were "Imported from Italy," but the oil is not produced in Italy. Rather, according to plaintiff, defendant's olive oil is "produced in Tunisia, Greece, and Spain, then shipped to Italy, mixed with a small amount of Italian olive oil, bottled, and sold to consumers."

Plaintiff alleged the defendant's statement, "Imported from Italy," violates California's Unfair Competition Law, California's Consumers Legal Remedies Act, and the California False Advertising Law. Plaintiff, relying on a diminution in value damages theory, seeks to recover the price premium paid for the olive oil.

The defendant, Salov North America Corp., defended against class certification arguing the proposed class should not be certified because plaintiff Rohini Kumar has not: (1) met the threshold Rule 23(a) requirements pertaining to adequacy or typicality; (2) established that the proposed class was ascertainable; (3) satisfied the

Rule 23(b)(3) requirement that questions of law or fact common to the class predominate over individualized questions; or (4) shown that damages can be determined on a classwide basis. The district court disagreed and certified the class concluding that the Rule 23(a) and Rule 23(b)(3) requirements were satisfied.

Origin Disclaimer Insufficient to Defeat Certification Absent Evidence Plaintiff Saw It

Defendant's primary argument for why the Rule 23(a) adequacy and typicality requirements were not met was that plaintiff, unlike the proposed class, was not misled by the "Imported from Italy" statement on the front of the bottle of olive oil. The defendant argued that, because plaintiff read the back of the bottle to check the "Best By" date, she must have seen the bottle's county of origin disclaimer located adjacent to the "Best By" date, which stated that the olive oils come from Italy, Greece, Spain, and Tunisia. Defendant's argument did not convince the court. As the district court explained, while plaintiff conceded reading the "Best By" date on the back of the bottle, she also testified that she did not see the country of origin disclaimer. Thus, defendant's argument about what plaintiff must have seen was not a persuasive basis for finding the adequacy and typicality requirements had not been met.

Whether a Class is Ascertainable Turns on the Class Definition

With regard to ascertainability, the district court noted that the Ninth Circuit had yet to answer the question of whether there is an ascertainability requirement implied in, or in addition to, Rule 23. Nevertheless, the court found the proposed class of olive oil purchasers to be sufficiently ascertainable because the class definition is precise and objective. Also, the "Imported from Italy" statement appeared on all bottles during the class period.

Notably, in its discussion of the ascertainability issue, the court found the class was ascertainable while acknowledging that it is unlikely that the consumer class would be able to produce receipts or other evidence to verify purchase during the class period. The court dismissed this concern explaining class members can offer "evidence of purchase by affidavit or claim form."

Materiality and Reliance Can Be Established Classwide Without Individual Proof

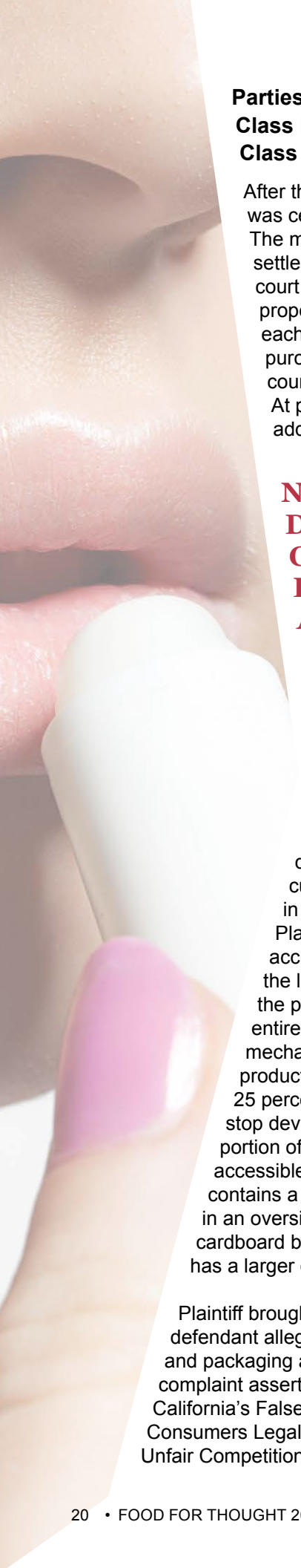
The defendant opposed certification under Rule 23(b)(3) arguing questions of law or fact common to the class would not predominate over individual questions because whether the statement "Imported from Italy" was material and relied upon would require individual evidence. The court disagreed, citing numerous cases for the proposition that materiality and reliance do not "necessarily require individualized evidence for each class member."

"Materiality can be shown by a third party's, or defendant's own, market research showing the importance of such representations to purchasers." Once materiality is established, a presumption or, at a minimum, an inference of reliance arises.

Moreover, the court explained misrepresentations of origin have been held to be material without individual proof of materiality as to each consumer. If there is evidence that a label "misleads a consumer about a product's origins, and the associated value of the product," this is sufficient to establish materiality. Here, the defendant's own market research regarding the importance of Italian origin to olive oil purchasers together with plaintiff's expert's opinion evidence of "a price premium attributable to the representations of Italian origin" established materiality.

Plaintiff's Damages Model Matched Plaintiff's Theory of Liability

After addressing the Rule 23 requirements, the court took a "close look" at plaintiff's damages model and conducted a "rigorous analysis" to determine "whether the model is appropriate to capture damages under plaintiff's theory of liability." The court found that plaintiff's expert's multiple regression damages model that purported to isolate the price premium associated with the "Imported from Italy" statement was sufficient for calculating damages under plaintiff's theory of liability.



Parties' Proposed Settlement Pays Class Members 50 Cents and Class Counsel $1 Million

After the consumer class of olive oil purchasers was certified, the parties went to mediation. The mediation resulted in a preliminary settlement, which the parties asked the district court to initially approve in January 2017. The proposed settlement would pay 50 cents to each class member for each bottle of olive oil purchased. The settlement would pay class counsel nearly $1 million in attorneys' fees. At press time, the district court had not yet addressed the proposed settlement.

Ninth Circuit Affirms Dismissal of Putative Class Action Against Lip Balm Manufacturer Accused of Deceiving Customers as to Product Amount

Ebner v. Fresh, Inc., 838 F.3d 958 (9th Cir. 2016)

BY ANGELA T. PUENTES-LEON

Plaintiff Angela Ebner alleged that defendant Fresh, Inc. deceived its customers as to the quantity of lip balm in its Sugar Lip Treatment product line. Plaintiff alleged that although defendant accurately indicated the new weight of the lip product, the tube design prevented the product from being dispensed in its entirety. Specifically, the tube uses a screw mechanism that allows 75 percent of the product to advance in the tube. The remaining 25 percent cannot advance due to a plastic stop device. Thus, plaintiff contends that only a portion of the stated product quantity is reasonably accessible to the consumer. Furthermore, the tube contains a weighted metallic bottom, is packaged in an oversized dispenser tube, and sold in a large cardboard box, creating the impression that each unit has a larger quantity of lip product than it does.

Plaintiff brought a putative class action against defendant alleging that defendant's label, tube design, and packaging are deceptive and misleading. Plaintiff's complaint asserted causes of action for violations of California's False Advertising Law (FAL), California Consumers Legal Remedies Act (CLRA), California's Unfair Competition Law (UCL), and for unjust enrichment.

The district court granted defendant's motion to dismiss and denied plaintiff leave to amend, finding that California's safe harbor doctrine and federal preemption under the Food, Drug, and Cosmetic Act (FDCA) were each fatal to plaintiff's labeling claims. Furthermore, as to the packaging claims, the district court held that neither the tube dispenser nor the packaging were deceptive or misleading to the reasonable consumer. Finally, the district court held that plaintiff failed to plead a violation of California's Fair Packaging and Labeling Act's (FPLA) prohibition on nonfunctional slack fill. The Ninth Circuit affirmed the district court's decision on March 17, 2016, but later withdrew its opinion, reported at 818 F. 3d 799 (9th Cir. 2016), and replaced it with this Amended Opinion in September 2016.

California's safe harbor doctrine barred plaintiff's claim relating to accurate statement of net weight of product, but did not bar plaintiff's claim alleging omission of a supplemental statement on the product's label

The Ninth Circuit first addressed California's safe harbor doctrine, which precludes plaintiffs from bringing claims based on actions permitted by the legislature. Because defendant complied with federal and state law requiring the net weight of the lip product in the tube be stated on the product's label, its conduct could not be the basis of an unfair competition claim under the UCL, CLRA, and FAL. However, the court held that plaintiff's claim that the net weight label was deceptive due to the lack of a supplemental statement explaining accessibility to the product was not precluded by the safe harbor doctrine. Because this part of plaintiff's claim was based on allegations that defendant omitted information in the label, thus rendering the label deceptive, the claim did not fall within the safe harbor because there is no law expressly permitting the omission of supplemental statements.

Federal Food, Drug, and Cosmetic Act did not preempt plaintiff's claim alleging omission of a supplemental statement on the product's label

However, the Ninth Circuit disagreed with the district court's dismissal of the labeling claim based on preemption. The court held that California's Sherman Law (Sherman Law) and the federal FDCA are virtually identical in that they both prohibit the false or misleading

labeling of cosmetics. Thus plaintiff is seeking to enforce under the Sherman Law the identical duty that defendant has under the FDCA. As a result, plaintiff's claim is not preempted.

Plaintiff's labeling and product packaging claims failed under the "reasonable consumer" test

Although neither preemption nor the safe harbor doctrine barred plaintiff's claims, the Ninth Circuit nonetheless held that plaintiff's labeling claims failed on the merits because "Plaintiff cannot plausibly allege that the omission of supplemental disclosures about product weight rendered Sugar's label 'false or misleading' to the reasonable consumer." Under the "reasonable consumer" test, plaintiff must show that "members of the public are likely to be deceived," a standard higher than the possibility that the label "might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." The consumer standard requires a probability "that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled."

Because it is undisputed that defendant disclosed the correct amount of lip balm included in the product, and the mechanism used in the tube dispenser is commonplace in the marketplace, the reasonable consumer "understands that some product may be left in the tube to anchor" it in place. And although a consumer does not know how much additional product is left in the tube, "the consumer's knowledge that some additional product lies below the tube's opening is sufficient to dispel any deception." The court reasoned that it is up to the consumer to decide if it is worth the additional effort to extract the remaining product from the tube using a different mechanism such a tool or finger.

The Ninth Circuit also affirmed the district court's ruling on the product packaging claim. The court reasoned that just as a reasonable consumer understands that additional product may remain in the dispenser tube, the reasonable consumer understands that some additional weight in the tube may be necessary to keep the product upright. Furthermore, given the product's price point, "elaborate packaging and the weighty feel of the tube is commonplace and even expected by a significant portion" of defendant's consumers. In fact, the court concluded that no reasonable consumer would expect the size of the packaging to be a direct reflection of the quantity of the product included by the manufacturer.

Defendant's product did not contain prohibited slack fill

Finally, the court also affirmed the district court's ruling on plaintiff's claims that the lip product was misleading because it contained nonfunctional slack fill. According to the applicable California statute on which plaintiff based her claims, slack fill is "the difference between the actual capacity of a container and the volume of product contained therein." According to that same statute, "nonfunctional slack fill is the empty space in a package that is filled to substantially less than its capacity for reasons other than" those enumerated in the statute. The Ninth Circuit held that plaintiff had not stated a claim because her challenge was not directed to the amount of "empty space" in each tube, but at the amount of product in each tube that was not easily accessible. Thus, plaintiff's allegation did not meet the definition of actionable slack fill.

NOTE: The amended opinion filed September 27, 2016, is identical to the original opinion, with one exception. In discussing the reasonable consumer standard, the court addressed plaintiff's reliance on Williams v. Gerber Prods. Co., *552 F. 3d 934 (9th Cir. 2008).*

The plaintiffs in Williams*, parents of small children, brought a class action against Gerber alleging deceptive packaging of the products. The product, called "Fruit Juice Snacks" and intended for toddlers, included the images of fruits on the box, stated that it was made with "fruit juice and other natural ingredients," and stated that it was "One of a variety of nutritious Gerber Graduates foods and juices that have been specifically designed to help toddlers grow up strong and healthy." The* Williams *plaintiffs contended that the two most prominent ingredients were sugar and corn syrup, and that the only fruit or juice in the product was white grape juice from concentrate. In* Williams*, the Ninth Circuit concluded that the features on the packaging would lead a reasonable consumer to believe that the product contained the fruits pictured in the package and that all ingredients were natural. The court further held that a reasonable consumer should not be expected to look beyond the misleading representation on the front of the box to discover the ingredient list on the side panel. Thus, if defendant was deceptive, the fine print revealing the truth does not dispel the deception.*

In Ebner*, the court found plaintiff's reliance on* Williams *unpersuasive because there was no deceptive act to dispel. The weight label on the lip balm product complied with applicable law and was consistent with other representations on the package. The Ninth Circuit did not find any words or images "from which any inference could be drawn or on which any reasonable belief could be based about how much of the total lip product can be accessed by using the screw mechanism." Thus, without any such statement or depiction, the court did not think it was plausible that the general consumer or defendant's target consumers could be misled into thinking that the entire amount of lip balm could be extracted from the tube.*

Summary Judgment for Tito's Vodka Makers in Case Alleging Their Product is Not Made in an Old-Fashioned Pot Still

Pye v. Fifth Generation, et al., Case No. 4:14-cv493-RH/CAS (N.D. Fla., Sept. 27, 2016)

BY ANGELA T. PUENTES-LEON

Plaintiffs Shalinus Pye and Raisha Licht filed a lawsuit against defendants Fifth Generation, Inc. and Mockingbird Distillery Corporation alleging they purchased Tito's Handmade Vodka in reliance on defendants' statement on the label that Tito's is "handmade" and made in "an old-fashioned pot still." Plaintiffs sought to represent a class of Florida buyers of Tito's. The first amended complaint which asserted claims based on breach of express warranty, breach of implied warranty, negligence, unjust enrichment, violations of Florida's Deceptive and Unfair Trade Practices Act, and violations of Florida's bait-and-switch advertising statutes.

In September 2015, the district court dismissed all of plaintiffs' claims, except for the breach of express warranty claim. However, the court's order dismissing five of the six claims also limited the express warranty claim. Specifically, the court held that the plaintiffs could not recover based on the statement that Tito's is "handmade," and allowed the case to proceed only as to the statement that Tito's is made in "an old-fashioned pot still."

The district court granted defendants' motion for summary judgment as to the one remaining claim in the case. The court held that the undisputed evidence established that Tito's was indeed made in "an old-fashioned pot still." Plaintiffs argued that the pot still was not truly "old-fashioned" because anything that has been changed cannot truly be "old-fashioned." However, the court declined to give the term such a narrow definition and explained that "the assertion [that anything that has been changed cannot be, 'old-fashioned,'] assigns to the term a meaning far more precise and restricted than the term ordinarily bears."

In addition, pursuant to Florida law, a prerequisite to an express warranty claim is notice to the manufacturer of the breach. The court explained that plaintiffs' express warranty claim survived the motion to dismiss because they alleged they did provide the required notice. However, plaintiffs' response to the summary judgment motion failed to provide evidence supporting the allegation. On the other hand, defendants submitted evidence that they did not receive notice. According to the court, defendants would be entitled to summary judgment on this basis alone.

Throughout, the court cited plaintiffs' failure to provide evidence supporting their allegations. Specifically, the court noted that defendants provided ample evidence in support of their arguments and "rigorously cited the record for every fact on which they rely." By comparison, the court explained plaintiffs' response "cites the record only for the wording on the Tito's label" and "cited no record support for their other factual assertions" because "there is no record support for the assertions." As a result, defendants were entitled to summary judgment.

Ninth Circuit: Food Manufacturers May Be Liable for Misleading Consumers If They Label Foods Containing Synthetic Citric and Ascorbic Acid "Natural"

Brazil v. Dole Packaged Food, LLC., No. 5:12-cv-01831 (9th Cir., Sep. 30, 2016)

BY ALIX COHEN

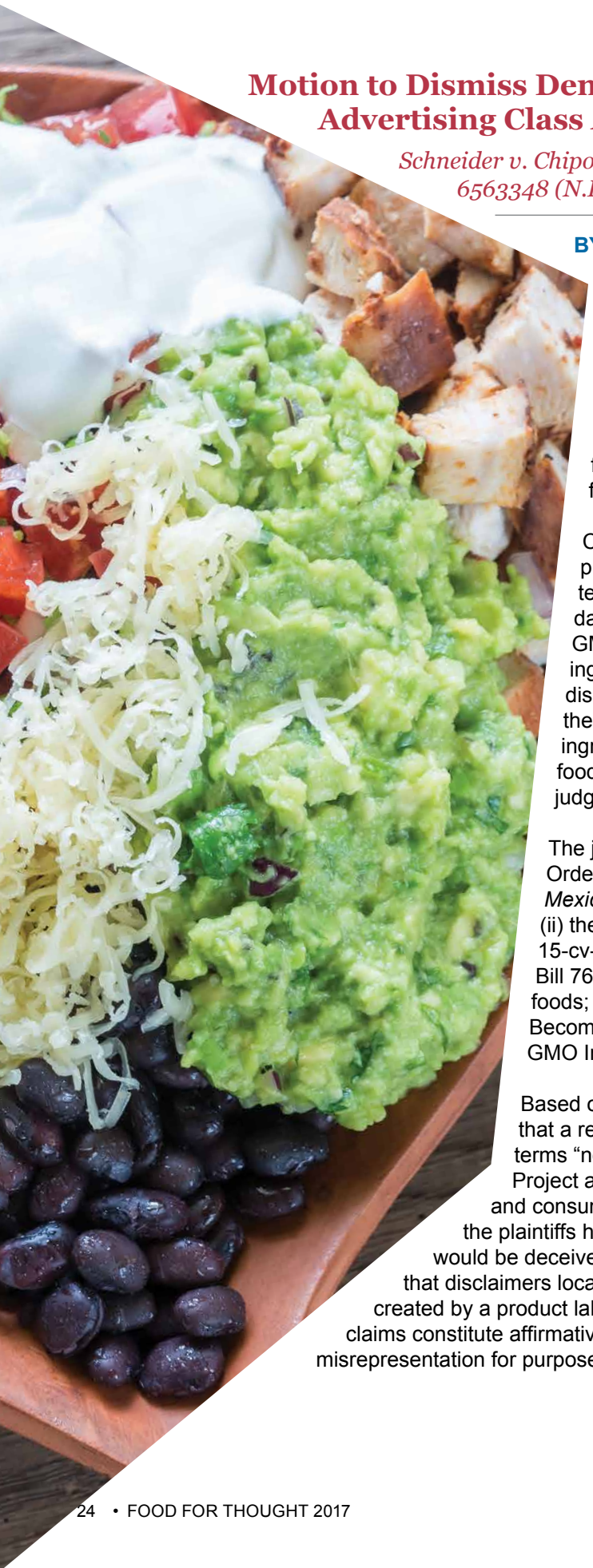
The Ninth Circuit reversed in part a district court decision granting summary judgment to defendant Dole Packaged Foods, LLC ("Dole"), finding that a reasonable fact-finder could conclude that defendant's description of its products as "All Natural Fruit" is misleading to a reasonable consumer.

Plaintiff Chad Brazil, on behalf of a class of consumers, brought suit against Dole under several California statutes, the California Unfair Competition Law, the California False Advertising Law, and the California Consumers Legal Remedies Act, alleging that defendant's labels are deceptive because they describe packaged fruit as "All Natural Fruit," despite the fact that the products contain synthetic citric and ascorbic acid.

To prove the label is misleading, plaintiff said his evidence would include the label itself, his own testimony that he was deceived, defendant's consumer surveys prepared for the litigation, and the federal Food and Drug Administration's (FDA) policy on the use of the word "natural" in food labels. The FDA has defined "natural" to mean "nothing artificial or synthetic…has been included in, or has been added to, a food that would not normally be expected to be in the food." Brazil also cited recent FDA warning letters to food sellers who described their products as "100% Natural" or "All Natural," stating that those descriptions were deceptive because the products used synthetic citric acid and other substances.

The court concluded that taken together, this evidence could allow a jury to find that defendant's description of its products as "All Natural Fruit" is misleading to a reasonable consumer, and the synthetic citric and ascorbic acids in defendant's products were not "natural." Therefore, the court reversed summary judgment on the issue of whether defendant's label was misleading.

Regarding the other claims raised, the court affirmed the dismissal of plaintiff's claim for the sale of "illegal products," because plaintiff did not see the statements that allegedly made the sale illegal before he purchased the fruit and therefore did not rely on them. The court also affirmed that damages are limited to the difference between the prices customers paid and the value of the fruit they bought, explaining that a plaintiff cannot be awarded a full refund unless the product she purchased was worthless, which defendant's fruit was not. In addition, the court upheld the district court's decision decertifying the class, because plaintiff did not show that he could calculate damages on a class-wide basis, although his individual claim stands.



Motion to Dismiss Denied in Renewed False "GMO" Advertising Class Action Against Chipotle

Schneider v. Chipotle Mexican Grill, Inc., No. 16-cv-02200-HSG, 2016 WL 6563348 (N.D. Cal., Nov. 4, 2016)

BY ADRIAN K. FELIX

A federal judge in California declined to dismiss a (renewed) proposed class action case against Chipotle Mexican Grill, Inc., accusing the company of violating consumer protection laws in California, Florida, Maryland, and New York by deceptively advertising that its menu no longer contained GMOs. The plaintiffs alleged, in short, that Chipotle's menu is not GMO-free as advertised, because its meat and dairy products are sourced from animals raised on genetically engineered or GMO-derived feed and its soft drinks contain GMO-derived ingredients.

Chipotle moved to dismiss the complaint on the grounds that the plaintiffs failed to state a claim under the "reasonable consumer" test since the company's website clarifies that its meat and dairy products are likely to come from animals that may receive GMO-feed and its beverages may contain genetically modified ingredients. Chipotle further argued that the complaint should be dismissed because no reasonable consumer would assume that the company's advertisements about moving to only "non-GMO ingredients" extended to anything other than the ingredients of the food prepared or cooked at one of its store locations. The district judge disagreed.

The judge started his analysis by taking judicial notice of: (i) the Order denying Chipotle's Motion to Dismiss in *Reilly v. Chipotle Mexican Grill, Inc.*, No. 15-cv-23245-MGC (S.D. Fla. Apr. 20, 2016); (ii) the pleadings in *Gallagher v. Chipotle Mexican Grill, Inc.*, No. 15-cv-03592-HSG (N.D. Cal. Feb. 5, 2016); (iii) United States Senate Bill 764 establishing a national disclosure standard for bioengineered foods; and, (iv) Chipotle's April 27, 2015 press release titled, "Chipotle Becomes the First National Restaurant Company to Use Only Non-GMO Ingredients."

Based on the foregoing and accepting as true the plaintiffs' allegation(s) that a reasonable consumer would assign the same definition to the terms "non-GMO" and "GMO-free" as that employed by the Non-GMO Project and the federal government (as supported by the market research and consumer survey findings alleged in the complaint), the judge found the plaintiffs had sufficiently alleged at this stage that a reasonable consumer would be deceived by Chipotle's non-GMO claims. The judge further found that disclaimers located on a company's website cannot override misimpressions created by a product label as a matter of law, so Chipotle's non-GMO advertisement claims constitute affirmative representations sufficient to support the plaintiffs' claims of misrepresentation for purposes of defeating the motion to dismiss.

The judge did agree, however, that plaintiffs failed to demonstrate any real and immediate threat of repeated injury, because it was implausible that they would be misled by Chipotle's representations again; therefore, the judge granted dismissal of, without leave to amend, the plaintiffs' count seeking injunctive relief.

The class certification in this case is scheduled to be heard January 4, 2018.

Ninth Circuit Rejects GMO and Pesticide Bans in Three Hawaii Counties Because State and Federal Laws Preempt the Local Regulations

Alika Atay, et al. v. County of Maui, et al., 842 F.3d 688 (9th Cir. 2016); Hawaii Papaya Indus. Assn., et al. v. County of Hawaii, No. 14-17538, 2016 WL 6819700 (9th Cir. 2016); Syngenta Seeds, Inc., et al. v. County of Kauai, et al., 842 F.3d 669 (9th Cir. 2016); and Robert Ito Farm, Inc., et al. v. County of Maui, et al., 842 F.3d 681 (9th Cir. 2016)

BY ANGELA T. PUENTES-LEON

The Ninth Circuit concluded that actions taken by individual counties in the State of Hawaii to regulate pesticides and biotech crops were preempted by state and federal law, in part. In four separate rulings, for separate appeals all relating to the regulations passed in Kauai County, Maui County, and Hawaii County, the appeals court held that federal and state regulatory schemes regulating harmful plants and pesticides preempted the counties from enacting their own rules.

One of the rulings came in *Alika Atay, et al. v. County of Maui, et al,* 842 F.3d 688 (9th Cir. 2016). There, the court affirmed the district court's summary judgment and dismissal in two related actions relating to the Maui ordinance that banned the cultivation and testing of genetically modified crops ("GMO" or "GE"). Specifically, the Ninth Circuit held that the Maui ordinance was expressly preempted by the Plant Protection Act (PPA), 7 U.S.C. § 7756(b), to the extent it bans genetically engineered plants that the U.S. Animal and Plant Health Inspection Service (APHIS) regulates as "plant pests." The court reasoned that although the APHIS regulates plants for reasons other than the concerns that motivated the local law, such a concern was irrelevant for purposes of a finding as to express preemption. In addition, the court held that the ban was not impliedly preempted by the PPA in its application to GMO crops that APHIS deregulated, but was impliedly preempted in this application by Hawaii's "comprehensive statutory scheme" regulating potentially harmful plants.

The panel's reasoning in *Atay* carried over to the decision in *Hawaii Papaya Industry Assn., et al. v. County of Hawaii*, No. 14-17538, 2016 WL 6819700 (9th Cir. 2016), addressing Hawaii County's similar ordinance banning "open air testing of genetically engineered organisms of any kind" and "open air cultivation, propagation, development, or testing of genetically engineered crops or plants." Again, the

appeals court held that the ordinance was expressly preempted because it regulates "movement in interstate commerce," was passed to "control…eradicate…, or prevent the introduction or dissemination of a …plant pest, or noxious weed" and because "APHIS has issued regulations in order to prevent dissemination of the class of plant pests at issue, GE crops."

In *Syngenta Seeds, Inc., et al. v. County of Kauai, et al.*, 842 F.3d 669 (9th Cir. 2016), the court once again referenced its reasoning in the *Atay* case. In this case, the court affirmed the district court's ruling that the Hawaii Pesticides Law impliedly preempted Kauai County's Ordinance 960's pesticide provisions. Ordinance 960 imposed pesticide notification requirements and mandated "pesticide buffer zones." The court held that Ordinance 960's pesticide provisions and the Hawaii Pesticides Law addressed the same subject matter. In addition, the court held that the state had a "comprehensive statutory scheme" regulating pesticides. Finally, the court held that the state legislature had clearly intended for the state's regulation of pesticides to be uniform and exclusive. For those three reasons, the Ninth Circuit held that Ordinance 960's pesticide provisions were impliedly preempted by Hawaii law.

Finally, the court addressed another appeal related to the Maui ordinance. In *Robert Ito Farm, Inc., et al. v. County of Maui, et al.*, 842 F.3d 681 (9th Cir. 2016), the court addressed whether it is necessary to have a prospective intervenor's consent for a magistrate judge to rule on the motion to intervene. In *Robert Ito*, Moms on a Mission Hui, a citizens group, sought to intervene in a suit brought by businesses over the Maui ordinance. The parties to the case previously consented to the magistrate presiding over the case pursuant to the Federal Magistrate Act of 1979, which authorizes magistrates, when designated by the district court and with consent of the parties, to exercise jurisdiction over civil matters in district court and enter final judgment in them.

However, the Second Circuit and Seventh Circuit were in conflict on the matter. The Second Circuit had held that a magistrate judge lacks jurisdiction to decide a motion to intervene without the consent of the prospective intervenor. The Ninth Circuit sided with the Seventh Circuit, holding that prospective intervenors are not parties for purposes of 28 U.S.C. § 636(c)(1) and therefore the consent of prospective intervenors is not necessary for the magistrate to exercise jurisdiction over the action if the actual parties to the suit have given consent.

Food, Beverage, Dietary Supplement, and Personal Care Products Group

Companies operating in the food, beverage, and related consumer products industries face increasing and rapidly evolving challenges. Consumers have become more discerning and health-conscious, leading to rising expectations for the goods they purchase, and questions regarding labeling, marketing, and other promotional claims. Against the backdrop of a hyper-competitive market, manufacturers strive to meet this demand for products that are, for example, natural, GMO-free, or organic, and for those that fulfill functional claims.

At the same time, the Food and Drug Administration regulates and monitors manufacturers' claims in these industries without strictly defining terms such as "natural," or requiring labels to disclose that food is genetically engineered. As a result, inconsistent state consumer protection laws govern in most cases, many of which are viewed as plaintiff-friendly. All these forces combined have led to an explosion in consumer products liability claims, filed as class action lawsuits in light of the generally low economic damages for any individual consumer.

The Carlton Fields food, beverage, dietary supplement, and personal care products group represents domestic and foreign food, beverage, dietary supplement, and personal care product manufacturers in products liability litigation. We focus on defending class action lawsuits, consumer fraud claims, and personal injury and wrongful death actions allegedly stemming from the use of their products. For example, we have represented: a food manufacturer in the defense of a FDUTPA putative class action arising out of the sale and advertisement of probiotic yogurt and claims that challenged the nutritional or health claims of the product; an energy drink manufacturer in class action litigation asserting claims for deceptive and unfair advertising and marketing; and a food manufacturer in a proposed consumer fraud class action regarding the use of the word "natural" in granola bar labeling and advertising.

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