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March 12, 2016

Food & Consumer Packaged Goods Litigation

Court Grants Motion to Dismiss in PHO Popcorn Case

McGee v. Diamond Foods, Inc., No. 3:14-cv-2446 (S.D. Cal.): In a putative class action alleging claims under California's UCL, public nuisance, and breach of implied warranty based on the contention that the use of PHOs in popcorn products is inherently unfair, the Court granted Defendant's motion to dismiss without prejudice. With respect to Plaintiffs' Article III standing, the Court held that Plaintiff lacked standing because she had not alleged a current or credible threat of physical injury. The Court also found that the complaint did not sufficiently allege a credible threat of future harm because Plaintiff failed to show how consuming the popcorn products "once every two or three months over three years" would substantially increase her risk of any disease let alone a probability that the harm would be substantial. With respect to economic harm, the Court found Plaintiffs allegations insufficient, holding that the purchase of a product that is "less healthy than expected" is not a sufficient economic injury. The Court further held that Plaintiff received the benefit of her bargain by consuming the popcorn and that Plaintiff's case was distinguishable from the authority she cited because she had not alleged that the labeling on the products deceived her in any way and did not allege that she would have purchased an alternative product but for Defendants' representations. Next, the Court found that Plaintiff had failed to state a claim under the UCL's unfairness prong. First, the Court applied the FTC test to find that Plaintiff's injury was not substantial and could have been avoided because Plaintiff alleges that she had other non-PHO popcorn options to choose from and did not allege that the PHO content was misrepresented or omitted from the labels of the accused products. The Court likewise found that Plaintiff failed to state a claim under the public policy test because she failed to cite any applicable statutory authority that was violated. Finally, the Court held that the public nuisance and breach of implied warranty claims must also be dismissed because Plaintiff failed to allege any special injury to herself different from those allegedly suffered by the rest of the population, and because she had adequate opportunity to inspect the popcorn products to see that they contained PHOs on the multiple occasions she alleges she purchased them. [Order](#).

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