Blogs
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Food & Consumer Packaged Goods Litigation

Rulings, Orders, Settlements – January 30, 2018

Parties Settle Kombucha False Advertising Action *Retta, et al. v. Millennium Products, Inc.*, No. 2:15-cv-01801 (C.D. Cal.): The Ninth Circuit entered an order granting Objector-Appellant's motion for voluntary dismissal of this putative class action for violations of California's CLRA, UCL, and FAL, as well as New York's Deceptive and Unfair Trade Practices Act. Plaintiffs alleged that Defendant's kombucha beverages are falsely and misleadingly labeled, representing the products as containing antioxidants when in fact the beverages "do not have even a single nutrient that the FDA recognizes and approves of for labeling statements using the term 'antioxidant.'" In August 2017, the district court entered an order granting final approval of class action settlement, from which Objector-Appellant appealed to the Ninth Circuit. Objector-Appellant subsequently moved for voluntary dismissal, pursuant to settlement. The terms of the settlement are as follows: (1) Defendant is permanently enjoined from ordering printing labels containing the term "antioxidant"; (2) Defendant must add a warning label stating that the products contain naturally occurring alcohol and should not be consumed by individuals seeking to avoid alcohol; (3) Defendant must add "a warning label stating that "Contents are under pressure. Failure to refrigerate may increase pressure, causing product to leak or gush"; (4) Defendant must conduct regular sampling to ensure compliance with federal and state labeling rules and to ensure the accuracy of the sugar content on the label; and (5) Defendant must promise to adopt any new industry-wide methodology for the testing of alcohol content within its product. The Settlement Agreement provides for a maximum financial commitment of an amount up to $8.25 million, for the payment of Plaintiffs' incentive awards of $2,000 each, class member claims, administrative costs, attorneys' fees and expenses. **Court Dismisses Buffalo Wild Wings Menu Suit** *Borenkoff v. Buffalo Wild Wings, Inc.*, No. 1:16-cv-08532 (S.D.N.Y.): The Court entered an order granting Defendant's motion to dismiss this putative class action asserting violations of New York's Deceptive and Unfair Trade Practices Act, and raising a claim for unjust enrichment. Plaintiff alleged that Defendant unlawfully deceived vegetarian consumers by frying various non-meat menu items (e.g. French fries and cheese curds) in beef tallow, despite not listing beef tallow as an ingredient. Though the Court expressed doubts about the adequacy of the injuries alleged in Plaintiff's complaint, it nevertheless found that Plaintiff had standing. The Court found, however, that Plaintiff had not sufficiently stated a claim under New York's GBL because she failed to allege that Defendant's products were harmful or defective in any way. In so finding, the Court pointed out that although Plaintiff claimed to have paid a premium for the beef tallow in which the products were fried, she failed to alleged "how the use of beef tallow affects the objective economic value of the food items she received." **Court Grants Motion to Dismiss Canned Beans Slack Fill Action** *Beckman, et al. v. Arizona Canning Company, LLC*, No. 3:16-cv-02792 (S.D. Cal.): The Court issued an order granting Defendant's Motion to Dismiss this putative copycat class action asserting violations of California's UCL, CLRA and FAL. Plaintiffs alleged that Defendant sold Sun Vista whole canned bean products to consumers, representing that the cans are primarily filled with beans, when in fact they contain only a small amount of beans that are fully submerged in a large amount of water. The Court tentatively ruled that Plaintiffs pleadings do not meet the heightened particularity requirements of Rule 9(b) finding that Plaintiffs did not plead with particularity why the picture of the ready-to-serve bowl of beans mislead them to believe the unprepared product would appear the same for any of the various can sizes offered by Defendant. The Court then ruled that Plaintiffs failed to state a claim for violation of the UCL because Plaintiffs do not allege the label falsely includes or omits an ingredient or misstates the contents—Plaintiffs failed to allege non-compliance with FDA regulations. As for Plaintiffs' FAL claim, the Court did not find it appropriate to make a determination on whether the reasonable consumer standard has been met at this stage in the pleadings. Before the Court reaches the reasonable consumer test, Plaintiffs must plead with particularity pursuant to Rule 9(b). Finally, the Court found that Plaintiffs never

gave the pre-filing notice required by § 1782(a) and therefore dismissed Plaintiffs' CLRA claim. **Court Grants in Part Motion to Dismiss Beer False Advertising Suit** *Peacock v. The 21st Amendment Brewery Cafe, LLC,* No. 17-cv-01918 (N.D. Cal.): The Court issued an order granting in part and denying in part Defendant's motion to dismiss this putative class action for false advertising pursuant to California's CLRA and UCL. Plaintiff claims that he purchased beer relying on the representations made by Defendant indicating the beer was made in California, when in fact, it was not exclusively brewed in California. The Court found that Plaintiff "plausibly alleges that the Bay Area map with an 'x' marking the brewery is likely to deceive a reasonable consumer." However, the Court granted Defendant's motion to dismiss Plaintiff's UCL claim for failure to satisfy the pleading standards for common law fraud with leave to amend to the extent that it (1) is predicated on the CLRA claim, and (2) relies upon California Sherman Law section 110100. The Court reasoned that Plaintiff's allegations did not meet the heightened standard because Plaintiff's Complaint fails to identify the specific FDA regulations violated by Defendant and "does not explain how the FDA has the authority to regulate beer in the first place." The Court determined that Defendant's labeling and packaging claims were not within the safe harbor exception to California's consumer protection law, which protects representations "allowed or permitted under both state and federal law," as the Alcohol and Tobacco Trade Bureau "*may* disapprove the listing of a principal place of business if its use would create a false or misleading impression as to the geographic origin of the beer." The Court also granted Defendant's motion to dismiss Plaintiff's CLRA claim due to failure to provide sufficient notice under California Civil Code section 1782(a).

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