SECTION OF

ANTITRUST LAW

Promoting Competition
Protecting Consumers

The Advertising Disputes & Litigation and Consumer Protection Committees'

RECENT LITIGATION DEVELOPMENTS

[Cases from October 19 to November 4, 2016]

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RECENT DECISIONS

Lanham Act and Other Competitor Actions

The U.S. District Court from the Eastern District of Texas grants plaintiff OrthoAccel's motion for preliminary injunction against defendant Propel Orthodontics. Defendant began selling a dental medical device that was similar to the plaintiff's and advertising certain clinical benefits that the plaintiff claimed were false under the Lanham Act. The court first determined that there was a substantial likelihood of success on the merits because the advertising claims by the defendant were literally false. Plaintiff was also able to prove falsity by showing that the ad's referenced studies were not applicable to support the claims and certain claims had no studies conducted to support the representations. The court next concluded that customer confusion was proven because the statements were actually false and the plaintiff showed websites that referenced customers' mislead beliefs that the two competing dental products had the same amount of scientific support. To establish that the plaintiff suffered an injury, the court determined it was sufficient to have the plaintiff's CEO testify regarding the lost market share and decline in sales. The court determined that irreparable injury was proven by evidence supporting a significant lost in market share over a short period of time. It was in the public's interest to grant the preliminary injunction because the defendant would be prevented from marketing medical devices that would be used on patients without having undergone scientific study and scrutiny. (*OrthoAccel Techs., Inc. v. Propel Orthodontics, LLC*, No. 4:16-CV-350, 2016 WL 6248711 (E.D. Tex. Oct. 26, 2016)).

The U.S. District Court for the District of Massachusetts grants in part summary judgment in favor of an American manufacturer of a bowel preparation product, concerning certain claims for false advertising under the Lanham Act and Chapter 93(A) of the Massachusetts Consumer Protection Act ("MCPA"). The court was faced with competing motions for summary judgment by the two competing producers of bowel preparation products, the American producer and a Swiss manufacturer defendant. After discussing the literal falsity and literally true but misleading standards for prevailing on a Lanham Act claim, the court considered several claims challenged by the respective parties. The defendant marketed a substantially similar and potentially identical bowel preparation product throughout the rest of the world under a separate name, but received

approval for sale in the U.S. of the product under a different trade name. Much of the disagreement between the parties was over claims by the two producers as to the efficacy of the defendant's product compared to the plaintiff's, and claims by the plaintiff as to the safety level of use of the defendant's product. The court denied both parties' motions as to the majority of these issues because genuine issues of fact existed as to the truth or falsity of the claims as well as to the question of whether the allegedly false statements were actually distributed to the consuming public. But the court granted the plaintiff's motion as to one claim made by the defendant, because the defendant could not establish standing in the form of a direct harm by the allegedly false or misleading statements made by the plaintiff. As to this claim, known as the challenged "Clean Freak" claim, the actual comparison was of the plaintiff's product and another non-party's product – not the defendant's product. Therefore, the defendant could not establish that it was within the zone of protection intended by the Lanham Act. For the same reasons, the court granted the plaintiff's motion as to the MCPA. (*Ferring Pharms., Inc. v. Braintree Labs., Inc.*, No. 13-12553, 2016 WL 6275156 (D. Mass. Oct. 25, 2016)).

The U.S. District Court for the Southern District of New York grants in part and denies in part the defendant's motion to dismiss the plaintiff's action alleging violations of the Lanham Act and New York's General Business Law. Plaintiff, an online retailer of mattresses, claimed that the defendant made a number of false and misleading statements on its mattress review website, in part because of the defendant's affiliate marketing relationship with a number of the mattress retailers for which it reviews products. Specifically, the plaintiff claimed that the following categories of statements on the defendant's website were untrue or misleading: (1) the defendant's mattress reviews, including the comparisons it makes between the plaintiff's product and other products; (2) certain statements in the defendant's disclosures about its affiliate marketing relationships; and (3) certain statements about the extent to which the defendant is influenced by its market affiliations. The court found that the defendant's mattress reviews were not actionable under the Lanham Act because they are opinions and, therefore, cannot be objectively verified. The court next determined that the defendant's disclosures about its affiliate marketing relationships likewise were not actionable because, even if they were inadequate, they could not be linked to "an affirmative statement of fact that is false or misleading." With respect to the defendant's statements about whether it was influenced by its market affiliations, the court determined that some, but not all, of the statements "contain verifiable facts that are alleged to be false, and [plaintiff] has properly connected those statements of fact to its alleged injuries," and, therefore, found that they were adequately pled and would survive the motion to dismiss. Finally, the court ruled that the plaintiff's claim under New York's General Business Law could proceed because the plaintiff met the burden of plausibility in its pleadings, and the defendant's argument for dismissal based on failure to allege that the defendant's statements "harmed the public at large or that they related to public health or safety" misinterpreted the statute and relevant case law. (*Casper Sleep, Inc. v. Derek Hales & Halesopolis, LLC*, No. 16-cv-03223, 2016 WL 6561386 (S.D.N.Y. Oct. 20, 2016)).

The United States District Court for the District of Massachusetts denies defendant Dyson Inc.'s motion to strike plaintiff SharkNinja Operating LLC's jury demand in a false advertising case. SharkNinja and Dyson are competitors in the household vacuum market. SharkNinja alleged that certain Dyson advertisements comparing Dyson vacuums to other vacuums are false under the Lanham Act and Massachusetts state law. SharkNinja sought an accounting of Dyson's

profits. Dyson argued that the remaining issues were all properly resolved in equity, so that a jury trial is improper, whereas SharkNinja argued that a jury trial is warranted because SharkNinja is seeking the accounting remedy as a proxy for harm it has suffered. The court found that SharkNinja failed to establish a viable proxy rationale supporting a remedy at law because it failed to show that Dyson was its "direct" competitor, as interpreted under case law, for the applicable products, in that Dyson's gain from allegedly false advertising was not sufficiently correlated with SharkNinja's loss. However, the court found SharkNinja's accounting request to be unclear, so the court denied Dyson's motion to strike, ordered a jury trial, and delayed ruling on the constitutional jury issue so that it could decide later whether the jury verdict will be advisory. (*SharkNinja Operating LLC v. Dyson Inc.*, No. 14-cv-13720, 2016 WL 6134101 (D. Mass. Oct. 19, 2016)).

The U.S. District Court for the District of Kansas denies plaintiff Inspired by Design, LLC's motion for preliminary injunction against defendant Sammy's Sew Shop, LLC. Plaintiff, a maker of customized pet beds and pet-related products, alleged that the defendant began selling replicas of the plaintiff's pet beds on its Etsy webpage. Following an unsuccessful cease-and-desist letter, the plaintiff sued and sought a preliminary injunction prohibiting the defendant from, among other things, falsely advertising its pet bed product as "high quality." According to the plaintiff, the beds had poor support and shape and used inferior fabrics. Citing to Tenth Circuit precedent, the court held that general advertising claims of "high-quality customer service" were puffery. Accordingly, the court held that the plaintiff had not shown a likelihood of success in proving that the defendant's statements were actionable as false and misleading statements under the Lanham Act and denied the plaintiff's motion for preliminary injunction as to this claim. (*Inspired by Design, LLC v. Sammy's Sew Shop, LLC*, No. 16-CV-2290, 2016 WL 6093778 (D. Kan. Oct. 18, 2016)).

State Consumer Protection Laws

The U.S. Court of Appeals for the Ninth Circuit reverses the district court's decision to grant summary judgment to defendant CarMax Auto Superstores, LLC in an action brought against a used car retailer for alleged violations of California's Consumer Legal Remedies Act ("CLRA") and Unfair Competition Law ("UCL"). The plaintiff argued that he purchased a car from CarMax's lot which later turned out to be faulty, and that he would have paid less had the vehicle not been "certified." The plaintiff had received two versions of a "Carmax Quality Inspected" certificate, which apparently showed the components that had been inspected but did not have individual results of each component's testing. On appeal, the Ninth Circuit needed to decide whether this report, which failed to indicate the results of the car inspection in a manner that conveys the condition of the individual car components, qualifies as a "completed inspection report" under California law. The court found that it did not and reversed summary judgment as a result. In reaching its conclusion, the court first noted that California law applies, but the state's highest court had not yet ruled on the issue and there were no published opinions from appellate courts interpreting the section. Looking to the intent of the Legislature, the court found that the term "inspection report" had a technical meaning and the word "completed" implied that it required something more than "an unmarked list of components." Moreover, the section existed for the

purpose of consumer protection, and should be construed as such. (*Gonzales v. CarMax Auto Superstores, LLC*, Nos. 14-56842 and 14-56305, 2016 WL 6122776 (9th Cir. Oct. 20, 2016)).

Consumer Class Actions

The U.S. District Court for the Northern District of Ohio grants in part and denies in part the defendant's motion to dismiss the plaintiff's class action complaint. Plaintiff alleges that the defendant's advertisement practices are unfair and deceptive, and intentionally designed to mislead consumers by including bogus reference prices in its website advertising in violation of Ohio's Consumer Sales Practices Act ("CSPA"). In addition, the plaintiff also sets forth claims for breach of contract, fraud, and unjust enrichment. The court explained that the CSPA and accompanying administrative provisions prohibit deceptive price comparisons by suppliers, and that there is no express language in the CSPA limiting the prohibition on false and deceptive pricing practices to "brick-and-mortar" retailers. Thus, the plaintiff stated a valid CSPA claim. The court also dismissed the fraud claim because the plaintiff had not alleged any actual damages and the failure to allege "an injury above and beyond the reliance on the misrepresentation itself is fatal." Finally, the court dismisses the CSPA class action claim because plaintiff has not alleged any actual damages and, in the absence of actual damages, a consumer cannot maintain a class action under the Act. (*Gerboc v. ContextLogic, Inc.*, No. 1:16 CV 928, 2016 WL 6563684 (N.D. Ohio Nov. 4, 2016)).

The U.S. District Court for the Northern District of California grants in part and denies in part a Mexican chain restaurant's motion to dismiss putative class action claims for violation of California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law, Florida's Deceptive and Unfair Trade Practices Act, Maryland's Consumer Protection Act, and New York's General Business Law Sections 349 and 350, and claims for unjust enrichment, misrepresentation, declaratory relief, and prospective injunctive relief. The District Court denied the motion as to the statutory claims, finding that the plaintiff's allegations were sufficient under the "reasonable consumer test." Specifically, the court found that the allegations that the defendant's claims of "Non-GMO" and "GMO free" were sufficiently plausible because they were supported by allegations of definitions used by the Non-GMO Project and the federal government, as well as market research and surveys. The court refused to take judicial notice of the defendant's website because it was inappropriate in the context of a motion to dismiss and also because, even if considered, the website was insufficient to outweigh any misrepresentations on the label at the point of sale. The court also denied the motion to dismiss the claim for unjust enrichment as an unrecognized cause of action, because it found the claim to be one of quasi contract claim seeking restitution recognized by the Ninth Circuit. The motion to dismiss the misrepresentation claim was denied for the same reasons that the motion to dismiss the statutory claims was denied. The Court did grant the motion for prospective injunctive relief because a prerequisite for prospective injunctive relief is the demonstration of a "a real and immediate threat of repeated injury in the future", and the court found it "entirely implausible" that the plaintiffs would be misled in the future by the restaurant's alleged misrepresentations. (*Schneider v. Chipotle Mexican Grill, Inc.*, No. 16-cv-02200, 2016 WL 6563348 (N.D. Cal. Nov. 4, 2016)).

The U.S. District Court for the Northern District of California largely grants the plaintiffs' motion to compel discovery in action against The Coca-Cola Company (and related entities) challenging the Coke labeling statement "No artificial flavors. No preservatives added. Since

1886." Plaintiffs allege that the ingredient phosphoric acid is both an artificial flavor and a chemical preservative. By previous order, class certification discovery was to proceed before merits discovery. The motion to compel related to discovery propounded during the class certification phase. Because it was submitted prior to the stipulated and ordered cut-off, the court rejected the defendants' argument that the motion to compel was late. The court agreed with the plaintiffs that communications between defendants and the FDA concerning the lawfulness of Coke's labels and classification of phosphoric acid were discoverable in the class certification discovery phase, so long as the discovery requests were tailored to the laws and regulations at issue in the lawsuit. Defendants argued that the discovery was impermissible because it related to the merits. But the court ruled that discovery can be relevant to both merits and class certification and that "this evidence may be useful common proof to determine what consumers were likely to understand." The court also agreed with the plaintiffs that discovery of how the defendants perceived the challenged label statements and how they intended and understood consumers to perceive those representations – both during and before the class period – was relevant and discoverable, subject to appropriate tailoring and narrowing so as to be proportional to the needs of the case and limited to only what is in defendants' possession, custody, or control (plaintiffs did not establish any basis at this stage to require defendants to seek any information from franchise bottlers). The court agreed with the defendants that market share data is not relevant to class certification issues and is not justified by the proportionality rule, further noting that it did not see how market share data would be particularly relevant in later discovery phases either, *i.e.*, it does not appear particularly useful to assess damages. The court, however, did find that the effects of the challenged label statements on the defendants' sales, revenues, profits, and prices was discoverable as relevant to the class certification damages inquiry. (*In re Coca-Cola Prods. Mktg. and Sales Practices Litig.*, No. 14-md-2555, 2016 WL 6245899 (N.D. Cal. Oct. 26, 2016)).

The U.S. District Court for the Southern District of New York grants the defendant-candy manufacturers' motion to dismiss a class action complaint. Plaintiff alleged the "Sour Patch Kids" candy he purchased at a movie theater was deceptively packaged because the box could have held more candy than it in fact did. Of note, the box indicated there was 28 pieces of candy inside, which there was. Plaintiff alleged that 44% of the box was empty space. Plaintiff brought a nationwide class action complaint alleging violation of New York's consumer protection statute, and violation of all fifty states' common law regarding negligent misrepresentation, fraud and unjust enrichment. The court dismissed the New York consumer protection claim finding the plaintiff failed to allege injury because there was no allegation he paid more for the candy than he otherwise would have or that the defendants, as opposed to the movie theater, set the price or reaped the benefit from the alleged deceptive act. The court dismissed the negligent misrepresentation claims finding no special relationship imposing a duty on defendants. The court dismissed the fraud claims finding the complaint did not plead the fraud with particularity. Finally, the court dismissed the unjust enrichment claims because they were reliant on the other causes of action, which were dismissed. Because the court dismissed the complaint, it denied the motion to strike the class allegations as moot. (*Izquierdo v. Mondelez Int'l, Inc.*, No. 16-cv-04697, 2016 WL 6459832 (S.D.N.Y. Oct. 26, 2016)).

The U.S. District Court for the Northern District of California denies the defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Plaintiff filed a putative consumer class action against defendant Vigo Importing Co. asserting federal jurisdiction

under the Class Action Fairness Act of 2005 ("CAFA") for violations of California's consumer protection statutes, and alleging that the defendant sold, labeled, and marketed certain products as containing octopus (the "Octopus Products"), when in reality the products actually contained jumbo squid. Defendant moved to dismiss the complaint, challenging the court's jurisdiction under CAFA on the grounds that the amount in controversy was less than $5 million. Defendant submitted confidential financial information regarding nationwide sales for the Octopus Products identified in the complaint for the past four years. Defendant argued that, because its sales did not exceed a certain amount, the relief sought by the plaintiff could not possibly meet the minimum $5 million amount in controversy requirement. The court rejected the defendant's arguments and evidence, stating that the evidence of the defendant's sales figures is insufficient to prove that there are no circumstances under which the plaintiff's suit involves the requisite $5 million amount in controversy. Thus, based on the evidence presented, the court could not conclude to a legal certainty that the plaintiff's claim is for less than the jurisdictional amount. (*Fonseca v. Vigo Importing Co.*, No. 5:16-cv-02055, 2016 WL 6249006, 2016 U.S. Dist. LEXIS 148457 (N.D. Cal. Oct. 26, 2016)).

The U.S. District Court for the Central District of California denies defendant Harbor Freight Tools USA Inc.'s motions to dismiss a putative class action suit alleging deceptive pricing and discount labeling. Plaintiffs alleged that Harbor Freight misrepresented actual market retail prices, customary store prices, or prices of comparable merchandise from which "fictitious savings were then calculated and communicated to the consumer," *e.g.*, "Only $89.99, compare at $166.00." Harbor moved to dismiss the case, arguing that the plaintiff lacked Article III and statutory standing for failing to articulate an injury. The court found that Harbor Freight's arguments that the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) – in which the Court found no injury (and thus no standing) where a plaintiff alleged "a bare procedural violation" – to be inapplicable, because, here, the plaintiff alleged a concrete and particularized harm, namely "that class members paid more for [a product] than they otherwise would have paid, or bought it when they otherwise would not have done so." Harbor also moved to dismiss the action for failure to state a claim under Fed. R. Civ. P. 9(b)'s heightened pleading requirement. The court denied the motion, observing that the plaintiff described his own purchases with sufficient particularity by averring that he purchased a product in reliance on the defendant's misleading pricing and by alleging that the strikethrough price did not represent the actual market retail price. Plaintiff also specifically alleged "detailed price and advertising histories by Harbor Freight for a welding unit as well as an impact wrench, which show[ed] prices and advertised discounts over the course of years," along with actual competitor pricing showing market retail prices. Finally, the court declined to grant Harbor Freight's motion to strike the plaintiff's more general allegations of deceptive sales practices, noting that a plaintiff has standing to assert claims for unnamed class members based on products he or she did not purchase so long as the products and alleged misrepresentations are substantially similar to or potentially relevant to his or her claims. (*Shimono v. Harbor Freight Tools USA, Inc.*, No. 16-1052, 2016 WL 6238483 (C.D. Cal. Oct. 24, 2016)).

Federal Trade Commission (FTC) Litigation Decisions

The U.S. District Court for the Middle District of Florida grants the FTC's motion for summary judgment against Nicholas Congleton and others who was engaged in deceptive and unfair advertising of "green-coffee extract" as a weight loss aid. The FTC charged that the claim was unsubstantiated, deceptive, and was supported by paid testimonials that were not disclosed. The court entered a permanent injunction against the defendants and ordered restitution in the amount of $29,131,512 against Congleton and $549,000 against another defendant. The claims included assertions that men and woman who used the product lost 17 pounds in 22 weeks by doing "absolutely nothing," except using the product. A clip in which Dr. Oz describes a clinical study or the product was used to support these "too good to be true" claims. The scope of the advertising campaign was extraordinarily pervasive. Defendants paid Google more than $9.4 million to support their Internet advertising. Gross sales receipts were $33,784,048 with the defendants depositing over $30.2 million in their respective banks accounts. The court analyzed separately the establishment claim – scientific evidence supports the claim from the efficacy claim – that the product actually performs as represented, *i.e.*, leads to weight loss. The FTC established the falsity of the express weight loss claims by rejecting the studies that allegedly showed that the product aided weight loss. Much of the same evidence was rejected as to the establishment claim. The court examined the supporting evidence on establishment, including newsletters and promotional materials were insufficient to establish a reasonable basis for the claims, and Congleton admitted that the express claims did not have a scientific basis. There were several studies introduced to support the claims, but all were found to have serious methodological flaws, or had no relationship to "Pure Green-Coffee." The evidence introduced to prove the establishment claim was unreliable. Regarding the interpretation of the advertisements, the court concluded that a so-called "Vinson Study" and less direct representations, such as men in white coats and phrases like "double blind" and "randomization and placebo-controlled" were used to give consumers the false impression that there was scientific evidence to support the weight loss claim." Additionally, the persons who provided the testimonial were paid and that fact was not disclosed. (*FTC v. NPB Advertising, Inc.*, No. 8:14-cv-1155-T-23, 2016 WL 6493923 (M.D. Fla. Nov. 2, 2016)).

RECENT FILINGS

Consumer Class Actions

Putative California-only class action filed against Samsung Electronics America, Inc. and Samsung Electronics Co., Ltd. in the U.S. District Court for the Northern District of California, alleging causes of action for fraudulent concealment/non-disclosure, unjust enrichment, and violations of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. Plaintiffs assert that Samsung concealed from consumers the extent of the problems with its "Note7" products and that several of its other products are at risk of experiencing similar problems. According to the plaintiffs, the lithium ion battery that malfunctioned in the Note7 is also used in the other challenged products, and consumers have reported to various agencies and Samsung itself similar issues with those products. Plaintiffs assert that, despite this knowledge, Samsung has failed to disclose the risk to consumers. (*Martin, et al. v. Samsung Electronics America, Inc., et al.*, No. 3:16-cv-06391 (N.D. Cal. complaint filed Nov. 2, 2016)).

Putative class action lawsuit filed in the U.S. District Court for the Eastern District of Washington against Lumber Liquidator, Inc. related to advertising for the company's laminate flooring products. Plaintiff alleges that the products are not durable or scratch-resistant as represented, and are not merchantable for general household use because they do not meet the claimed industry standard for products marketed with an "AC3" rating. Plaintiff alleges breach of warranty, fraudulent omission/concealment, and violations of the Magnuson-Moss Warranty Act and the Washington Consumer Protection Act. (*Garrity v. Lumber Liquidators, Inc*, No. 4:16-CV-05146 (E.D. Wash. complaint filed Oct. 31, 2016)).

Putative nationwide class action removed and transferred to the U.S. District Court for the Central District of California from California Superior Court (Los Angeles County) against Iovate Health Sciences U.S.A., Inc., alleging violations of California's False Advertising Law, Consumer Legal Remedies Act, and Unfair Competition Law. According to the complaint, the defendant deceptively marketed certain weight loss products containing green coffee bean extract. Plaintiff alleges that the defendant falsely and deceptively represented the results of certain clinical studies related to weight loss in its marketing for its dietary supplement products and that there is "ample scientific evidence" that disproves the efficacy of green coffee bean extract for weight loss. (*Daboussi, et al. v. Iovate Health Sciences U.S.A., Inc.*, No. 16-cv-8049 (C.D. Cal. complaint removed on Oct. 28, 2016)).

Putative class action removed to the U.S. District Court for the Central District of California against AutoZone related to a "$20 reward" offer. Plaintiffs allege that AutoZone advertised a program whereby customers would receive a reward credit for purchases, and that after accumulating five such credits, they would receive a $20 reward to use at AutoZone. However, according to the plaintiffs, AutoZone unilaterally change its rewards program, and in particular the expiration dates for accrued credits and the expiration date for using any $20 reward issued. Plaintiffs allege fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law. (*Hughes v. Autozone Parts, Inc*., No. 2:16-CV-08009 (C.D. Cal. Complaint filed Oct. 27, 2016)).

Putative nationwide class action filed in the U.S. District Court for the Central District of California against Johnson & Johnson, McNeil-PPC, Inc. and Ranir LLC, alleging violations of California's False Advertising Law, Consumer Legal Remedies Act, and Unfair Competition Law. According to the complaint, defendant deceptively marketed its "Deeply White + peroxide" toothpaste and "Deeply White + peroxide" mouthwash products by claiming that the products effectively deeply whiten teeth, go beyond surface stain removal to provide superior whitening, and contain the same whitening ingredient that dentists use. Plaintiff alleges that the Deeply White products do not effectively deeply whiten teeth and that the peroxide component does not stay on teeth for long enough or come in close proximity enough to reach the layer that would result in "deep" whitening. (*Barber, et al. v. Johnson & Johnson, et al.*, No. 16-cv-01954 (C.D. Cal. complaint filed on Oct. 26, 2016)).

Putative nationwide class action filed against Ace Hardware Corporation in the U.S. District Court for the Central District of California, alleging causes of action for violation of California and Nevada consumer protection statutes. Plaintiff asserts that defendant's advertised "60 day hassle

free" return policy with receipt is false and misleading. According to the plaintiff, when she attempted to return an item within 60 days of purchase with her receipt, she was told she could only return the item to the same location where she had made her purchase in violation of the advertised policy. (*Hummer v. Ace Hardware Corp.*, No. 2:16-cv-07906 (C.D. Cal. complaint filed Oct. 24, 2016)).