SECTION OF

ANTITRUST LAW

Promoting Competition
Protecting Consumers

The Advertising Disputes & Litigation and Consumer Protection Committees'

RECENT LITIGATION DEVELOPMENTS

[Cases from January 11 to 31, 2017]

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RECENT DECISIONS

Lanham Act and Other Competitor Actions

The U.S. District Court for the Western District of Michigan issues an order in response to several post-trial motions made by the parties in an action for alleged violations of the Lanham Act arising out of the defendant's representations about its scent-control hunting clothing. Specifically, the plaintiff alleged that the defendant made false claims about the quality of the defendant's products, which reduced purchases of the plaintiff's products by several big-box retailers. The jury sided with the plaintiff and awarded a total of nearly $4 million in damages. In its order, the court first granted the defendant's motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. For two of the three claims at issue, the court found that, although the defendant admitted the claims were "literally false," the plaintiff failed to establish that the claims were "material to the retailers' purchasing decisions and that there was a causal link between these statements and some harm" because there were numerous attributes other than the claims at issue that could have influenced the retailers' purchasing decisions. With regard to the third claim at issue, the court found that the plaintiff failed to prove the falsity of the claim because it did not demonstrate that the testing upon which the claim was based was unreliable. The court further explained that, although the plaintiff sufficiently demonstrated deception and materiality as to consumers, it failed to satisfy these elements for retailers. Because the court granted the defendant's motion for judgment as a matter of law, it also granted the request for a new trial "in the event that the judgment is later vacated or reversed." The court, then, turned to the plaintiff's post-trial motions. First, the court granted a request for limited permanent injunctive relief on the basis that the defendant admitted that two of its claims were false, and the plaintiff's evidence showed that the third claim "has a tendency to deceive consumers." Finally, the court denied the plaintiff's motion for attorneys' fees because the plaintiff "failed to show that the instant case is exceptional." (*A.L.S. Enters., Inc. v. Robinson Outdoor Prods., LLC*, No. 1:14-CV-500, 2017 WL 393307 (W.D. Mich. Jan. 30, 2017).)

Consumer Class Actions

The U.S. District Court for the Northern District of California grants the defendants' motion to dismiss the plaintiffs' amended complaint with prejudice in a putative class action challenging the

defendants' supply chain. Plaintiffs allege that defendants – retailer Costco and supplier Charoen and CP Foods – sell prawns farmed in Southeast Asia that are fed fish caught via slavery, human trafficking, and other illegal labor practices. Plaintiffs allege that the defendants affirmatively tout their clean supply chain and, separately, fail to disclose these supply chain problems; had the plaintiffs known the true facts of the supply chain, they claim they would not have purchased the prawns. While recognizing that the alleged facts are "tragic," the court ultimately concluded that California law does not require defendants to inform consumers of these facts. The court dismissed claims against Charoen and CP Foods because the plaintiffs – who did not allege that the prawns they purchased at Costco were sourced by these suppliers – lacked standing against those defendants. The court dismissed claims against Costco because Costco itself was not engaged in the wrongful practices and it did not have a duty to disclose the supply chain issues to the plaintiffs. That's because the plaintiffs did not allege that they ever read or relied on Costco's partial representations (*i.e.*, Costco's affirmative statements about its supply chain), plaintiffs do not provide specific allegations about what other relevant advertisements they did rely upon, and plaintiffs' allegations do not fit within the prerequisites of California's circumscribed duty to disclose, *i.e.*, that Costco has superior knowledge, that Costco actively concealed the issues, or that the supply chain problems constitute a safety risk to prawn consumers or a product defect. Plaintiffs' reliance on supply chain disclosure and anti-trafficking laws do not patch up the gaps in the allegations. Finally, the court ruled that the crux of the plaintiffs' claim is a failure to disclose, but California's False Advertising Law does not apply to a pure omissions theory. Because the plaintiffs already had an opportunity to amend and further amendment would be futile, the dismissal was without leave to amend. (*Sud v. Costco Wholesale Corp.*, No. 15-cv-3783, 2017 WL 345994 (N.D. Cal. Jan. 24, 2017)).

The U.S. District Court for the District of Nevada remands to state court the plaintiffs' case against a bottled water manufacturer for alleged violations of Nevada's consumer protection statutes. Specifically, the plaintiffs assert that the defendant makes numerous false scientific and health-related claims on the labels of its bottled water products. The defendant removed the case to federal court on the basis that the plaintiff's claims are preempted by federal law, or alternatively, that the claims raise a substantial question of federal law sufficient to support federal question jurisdiction. In the remand decision, the court rejected both of these arguments. First, the court found that the plaintiffs' state law claims are not preempted by the federal Food, Drug and Cosmetic Act because the federal statute "does not preempt state laws that allow consumers . . . to sue bottled water manufacturers that label their products in violation of federal standards." Second, the court determined that "the plaintiffs' state law claims do not necessarily raise a substantial federal issue because the plaintiffs offer multiple reasons why [the defendant] has violated the Nevada deceptive trade practices act, only some of which are founded on violations of federal law." (*Nunes v. Affinitylifestyles.com*, No. 2:16-cv-02265, 2017 WL 359178 (D. Nev. Jan. 23, 2017)).

The U.S. District Court for the District of Arizona denies the defendant server hosting company GoDaddy.com LLC's motion to dismiss a putative class action suit. Plaintiffs alleged various unfair competition and false advertising claims against GoDaddy after purchasing a "dedicated server" plan, and receiving a virtualized server instead. A dedicated server is a server run on

standalone hardware that is not shared with other users, while a virtualized server is composed of software emulating standalone hardware but, in fact, is competing for resources with other users of the same hardware. GoDaddy did not dispute that its dedicated server product is virtualized, but argued that this information was "clearly and publicly disclose[d]." Plaintiffs argued that they "were misled by [GoDaddy's] omission of material facts, *i.e.* that the 'Dedicated Servers' marketed and sold by [GoDaddy] were, in fact, virtualized." Although GoDaddy's marketing materials contained the acronym "VM", the single mention of those letters without explanation was not enough for the court to conclude that GoDaddy clearly disclosed the fact that the dedicated server product was virtualized. GoDaddy argued that the plaintiffs' claims failed because it did not have a duty to disclose any particular fact to the Plaintiffs. However, the court held that, under either the Arizona Consumer Fraud Act or the Restatement (Second) of Torts § 551(2)(d), GoDaddy had a duty to refrain from an omission of any *material fact* with intent that others rely thereon. For similar reasons, the court held that the plaintiffs stated a claim for fraudulent concealment under Arizona law. With regard to violations of California's Unfair Competition Law, the court concluded that GoDaddy's omission could form the basis for a claim in fraud because GoDaddy was in exclusive possession of the material facts not known to the plaintiffs. Further, the court determined that California's False Advertising Law "has been interpreted broadly to encompass not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public," and, thus, the plaintiffs stated a claim for false advertising by alleging that GoDaddy's omission of the virtualized aspect of the server was misleading to an actual consumer. The court dismissed the plaintiffs' claim for negligent misrepresentation under California law, because such a claim must be based on a positive assertion, not an omission. (*Schellenbach v. GoDaddy.com LLC*, No. CV-16-00746, 2017 WL 192920 (D. Ariz. Jan. 18, 2017)).

The U.S. District Court for the Southern District of New York grants in part and denies in part defendant Hain Celestial Group, Inc.'s motion to dismiss a putative class action alleging that Hain and its subsidiary Jason Natural Products, Inc. misleadingly marketed certain consumer products as lacking sodium lauryl sulfate ("SLS") – an allegedly irritating chemical compound – when they should have known that the products, in fact, did contain SLS. After the Wall Street Journal published a study concluding that some consumer products, including a baby shampoo marketed by the defendants, contained SLS, Jason Natural's website represented that some of its products might contain SLS as a constituent part of another chemical compound. Plaintiff brought claims under New York's consumer protection statutes, alleging that Hain manufactures and sells personal care products under the brand name "Jason Natural." The court found that this allegation was barely enough to allow some claims against Hain to stand at this stage, as the court noted the unclear relationship between the corporate entities and the alleged conduct. The court dismissed the plaintiff's negligent misrepresentation claim under the economic loss doctrine. Additionally, the court found that the plaintiff lacked standing required for injunctive relief because she failed to demonstrate a likelihood of future harm. As for the remaining claims, the court denied the defendants' motion to dismiss on the grounds that the plaintiff plausibly alleged material misrepresentations about SLS content. (*Gordon v. Hain Celestial Group, Inc.*, No. 16-cv-6526, 2017 WL 213815 (S.D.N.Y. Jan. 18, 2017)).

The U.S. District Court for the Southern District of California grants in part and denies in part defendants Alere, Inc., Alere Home Monitoring Inc., and Alere San Diego, Inc.'s motion to strike the plaintiffs' complaint. Plaintiffs' class action complaint alleged that the defendants unlawfully, deceptively, and misleadingly engaged in advertising, marketing, and sales of various products, including an "INRatio PT/INR" product and an "INRatio2" product. These products are electronic testing devices designed to assist patients who have been prescribed blood thinners. A recall notice had been sent out regarding the INRatio2 test strips because of a disparity in test results between those systems versus independent laboratory testing. The recall notice instructed customers to stop using INRatio2 and switch to an alternative, including the INRatio PT/INR test strips. A study had been performed comparing two different drugs to determine which was more effective in preventing strokes and embolisms, during which it was discovered that the test results done with INRatio products differed from those performed in an independent laboratory. Defendant moved to strike allegations concerning this trial study from the complaint, arguing that they were immaterial because the plaintiffs did not argue that they were prescribed the second drug, and because the testing products were the INRatio PT/INR product. The court stated that "[b]y directing users to substitute the INRatio PT/INR test strips for the defective INRatio2 PT/INR test strips, Defendants falsely and misleadingly represented to healthcare professional and consumers that the INRatio PT/INR test strips worked properly, when in fact they caused false and erroneous results," and thus, the study could have bearing on the subject matter of the litigation. The court did, however, strike as prejudicial an allegation that implied that the plaintiffs' alleged harm beyond themselves to include also the users of the second drug that was subject to the study. (*Andren v. Alere, Inc.*, No. 16-cv-1255, 2017 WL 168605 (S.D. Cal. Jan. 17, 2017)).

Consumer Financial Protection Bureau (CFPB) Litigation Decisions

The U.S. Court of Appeals for the Ninth Circuit affirms the district court's denial of a petition filed by appellants Great Plains Lending, LLC, Mobiloans, LLC, and Plain Green, LLC to set aside investigative demands issued by the Consumer Financial Protection Bureau ("CFPB"). Appellants are for-profit Native American tribal lending entities. The CFPB issued investigative demands against these entities to determine whether they were engaging in unlawful small-dollar lending in violation of consumer financial laws. The CFPB brought action in the U.S. District Court for the Central District of California, seeking to enforce the investigative demands it had served on the entities. The district court denied the appellants' petition to set aside these demands, and the Ninth Circuit affirmed, finding the district court properly held that the CFPB did not lack jurisdiction to issue investigation demands to tribal corporate entities under the Consumer Financial Protection Act. The Ninth Circuit held that the Consumer Financial Protection Act is a generally applicable law and that Congress did not expressly exclude Native American tribes from the CFPB's enforcement authority. **(***CFPB v. Great Plains Lending, LLC*, No. 14-55900, 2017 WL 242560 (9th Cir. Jan. 20, 2017)).

RECENT FILINGS

Consumer Class Actions

Putative California-wide class action filed against Stein Mart, Inc. in the U.S. District Court for the Central District of California, alleging causes of action for violations of California's Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act. Plaintiff asserts that the defendant misleadingly and falsely uses an artificially inflated price as a "compare at" price for its products to deceive consumers into believing they are receiving the product at a discounted price. According to the plaintiff, the defendant violates FTC rules by listing a "compare at" price that is not the price charged for similar merchandise in the area. (*Morales v. Stein Mart, Inc.*, No. 5:17-cv-00159 (C.D. Cal. complaint filed Jan. 28, 2017)).

Putative nationwide class action filed in California Superior Court (Los Angeles County) against Blue Diamond Growers alleging violations of California's False Advertising Law, Unfair Competition Law, and Consumer Legal Remedies Act. According to the complaint, the defendant misleads consumers into believing that its "Almond Breeze Almond Milk" beverage is a dairy milk alternative that is nutritionally equivalent, and even superior, to dairy milk when the product actually lacks many essential nutrients and vitamins of dairy milk. Plaintiff alleges that defendant "capitalized on reasonable consumers' understanding of the well-known health benefits and essential nutrients that dairy milk provides" by calling the product "milk," notwithstanding that the product allegedly lacks many of those benefits and nutrients. Plaintiff further alleges that the product should be labeled "imitation milk" under FDA regulations because the product utilizes the common or usual name of a food without adequately disclosing the distinct nature and characteristics of the product. (*Painter v. Blue Diamond Growers*, No. BC-647816 (Cal. Super. Ct. complaint filed Jan. 28, 2017)).

Putative nationwide-class action filed against ConAgra Brands, Inc. in the U.S. District Court for the Northern District of California, alleging, among other things, violations of California's Unfair Competition Law, Consumers Legal Remedies Act, and False Advertising Law. Plaintiffs assert that the defendant unfairly included partially hydrogenated oil ("PHO") in its margarine and vegetable oil spread products despite the fact that PHOs have adverse health effects on consumers. Plaintiffs further allege that defendant misleadingly advertises its products as healthy and having "no trans fat" or "0g trans fat." According to the plaintiffs, because the products contained PHOs, these statements are false. (*McFaddin, et al. v. ConAgra Brands, Inc.*, No. 3:17-cv-00387 (N.D. Cal. complaint filed Jan. 25, 2017)).

Putative nationwide class action filed in the U.S. District Court for the Southern District of Florida against Bed Bath & Beyond related to its sale of linens advertised as "100% Egyptian Cotton." Plaintiffs allege that the bedding, made by manufacturer Welspun, were actually made from inferior and less expensive cottons. Plaintiffs allege violations of, among other things, the U.S. Textile Fiber Products Identification Act, the Magnuson-Moss Warranty Act, and the New Jersey Consumer Fraud Act. (*Blair v. Bed Bath & Beyond Inc.*, No. 0:17-CV-60178 (S.D. Fla. complaint filed Jan. 24, 2017)).

Putative California class action filed in the U.S. District Court for the Central District of California against the Sioux Honey Association Cooperative regarding advertising for "Sue Bee" honey products. Plaintiff alleges that Sue Bee products are labeled and advertised as "pure," "100% pure," and/or "natural," but that the products contain synthetic chemical glyphosate. Plaintiff alleges violations of California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law. (*Tran v. Sioux Honey Ass'n*, No. 8:17-CV-110 (C.D. Cal. complaint filed Jan. 23, 2017)).

Putative nationwide class action filed in the U.S. District Court for the Central District of California against Tradewinds Beverage Co., Sweet Leaf Tea Co., and Nestle Waters North America, Inc. alleging violations of California's False Advertising Law, Unfair Competition Law, and Consumer Legal Remedies Act. According to the complaint, the defendants deceptively represented that certain "Tradewinds"-branded iced tea products were "natural" and "all natural" notwithstanding the use of caramel color and beta carotene as coloring in the products. Plaintiff alleges that the use of caramel color and beta carotene as color renders the products not "natural" under FDA policy for "natural" claims and, thus, the claims are false and misleading under California law. (*Rhinesmith v. Tradewinds Beverage Co., et al.*, No. 17-cv-00408 (C.D. Cal. complaint filed Jan. 18, 2017)).