Food Law

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Over the past few years, food litigation in California has been surging, and 2016 was no different. The filing of food law cases continues unabated. Most cases involve allegations of consumer deception. Some claims in this area seem to have run their course, such as challenges to food products containing partially hydrogenated oils, while others appear to be burgeoning, such as slack-fill claims. Although no major food case has gone to trial, food law continues to develop into a distinct area as dispositive motions are resolved and reported by the courts. As the cases discussed in this article demonstrate, a successful food law practice requires not only substantive expertise, but also experience in class action litigation and familiarity with the food industry itself.

Northern District of California Dismisses Complaint Challenging "Non-GMO" Claim

Gallagher v. Chipotle Mexican Grill, Inc. (N.D.Cal., Feb. 5, 2016, No. 15-cv-03952) 2016 WL 454083

Plaintiff, Colleen Gallagher ("Gallagher"), brought suit on behalf of a nationwide class against Chipotle's Mexican Grill ("Chipotle") regarding Chipotle's advertising and in-store signs stating that its food is prepared using "only non-GMO ingredients."

The district court dismissed the action without prejudice for lack of statutory standing under California's False Advertising Law (FAL), Unfair Competition Law (UCL), and Consumer Legal Remedies Act (CLRA). The court determined that Gallagher adequately pled reliance by identifying "the specific representation made by Defendant that induced her to purchase its products (i.e., that Defendant uses 'only non-GMO ingredients')."[1] But the court held that she failed to adequately plead resulting economic injury, because the complaint did not specify which Chipotle products she had purchased, or plausibly plead that all Chipotle products contain GMOs. "Thus," the court concluded, "it is not clear that Plaintiff purchased any products that, by her definition, are 'made with ingredients containing GMOs.'"[2] Gallagher's failure to identify the specific products purchased also defeated her standing as a class representative because there were "no allegations in the complaint that could plausibly suggest that all of Defendant's food and beverage products—i.e., both the allegedly GMO products and the concededly non-GMO products—are 'substantially similar' for purposes of class representative standing."[3]

The court dismissed the complaint with leave to amend, but offered "guidance" regarding other potential bases for dismissal should Gallagher file an amended complaint. The court observed that under the complaint as pled, Gallagher lacked standing to seek injunctive relief because she failed to allege facts showing a "real and immediate threat" of future injury.[4] Plaintiff alleged that she would not have purchased the products had she known about the alleged misrepresentations, and she did not allege that she intends to purchase the products in the future.

The court further suggested that the complaint warranted dismissal because its allegations could support the conclusion that, as a matter of law, no reasonable consumer would likely be deceived by Chipotle's advertising. First, the court found that Gallagher had not alleged that any of the ingredients used by Chipotle fell within the complaint's definition of "GMO." The complaint defined GMO as "any organism whose genetic material has been altered using . . . genetic engineering techniques."[5] However, Gallagher alleged that Chipotle sold meat and dairy products that had been fed genetically modified substances, and did not allege that the meat and dairy products themselves had been genetically modified. The court rejected as implausible Gallagher's contention that the reasonable consumer "would interpret 'non-GMO ingredients' to mean meat and dairy ingredients" from animals that had merely consumed GMO ingredients.[6]

Second, the court found it implausible that a reasonable consumer would be misled by Chipotle's

1. *Gallagher v. Chipotle Mexican Grill, Inc.* (N.D.Cal., Feb. 5, 2016, No. 15-cv-03952) 2016 WL 454083, *2.
2. *Ibid.*
3. *Ibid.*
4. *Id.* at p. *3, citation omitted.
5. *Id.* at p. *3.
6. *Id.* at p. *4.

"non-GMO" statements because, as Gallagher pled, Chipotle defined its usage of the term on its website by disclosing "that it sells soft drinks that contain GMOs and that it uses meat and dairy products derived from animals that consumed genetically modified food."[7]

Finally, the court observed that Gallagher recognized in her complaint "that an entirely different term—'organic'—is used to describe meat and dairy products sourced from animals that did not consume genetically modified feed," but Gallagher did not allege that Chipotle represented its ingredients as "organic" or explain why a reasonable consumer would interpret "non-GMO" to mean the same thing as organic.[8]

Ninth Circuit Holds that Website Disclosures Do Not Override Misrepresentations on Label

***Balser v. The Hain Celestial Grp., Inc*. (9th Cir., Feb. 22, 2016, No. 14-55074) 640 Fed.Appx.694**

Plaintiffs, Alessandra Balser and Ruth Kresha, filed a putative class action against The Hain Celestial Group Inc. ("Hain"), for its use of the terms "natural" and "100% vegetarian" on 30 products in its Alba Botanicals line. Central District of California Judge Manuel Real dismissed the complaint with prejudice, finding that plaintiffs did not satisfy Federal Rule of Civil Procedure 9(b)'s pleading requirements with respect to deception, reliance, or injury. The Ninth Circuit reversed.

In granting the motion to dismiss, Judge Real first found that the plaintiffs' proposed definition of "natural" to mean "existing in or produced by nature; not artificial" was "implausible" as applied to the Alba Botanicals line because "shampoos and lotions do not exist in nature, there are no shampoo trees, cosmetics are manufactured."[9] The district court similarly rejected the plaintiffs' contention that "100% vegetarian" means "from vegetable matter" rather than "the more common understanding" used by defendants: "without animal products."[10] The court further found that the defendant "actively defines what its use of natural means so that no reasonable consumer could be deceived" by stating on its website that "100% natural…means we don't use parabens, sulfates or phthalates."[11] Finding that amendment would be futile, Judge Real dismissed the complaint with prejudice.

The Ninth Circuit reversed in a short unpublished decision. The court first determined that the pleadings were sufficiently particular to satisfy rule 9(b). Plaintiffs' allegations regarding the terms "natural" and "100% vegetarian" were "sufficient [to] plausibly allege a reasonable consumer's understanding of the term 'natural' as used on Hain's packaging."[12] Assuming without deciding that rule 9(b) requires specific allegations of reliance, the court held that plaintiffs had plausibly alleged reliance by claiming that they (a) viewed the "natural" claim on Hain's products, and (b) would not have paid a premium for the products but for that claim. The court also found sufficient allegations of harm. "Allegations that one paid more than one otherwise would have because of a misrepresentation sufficiently allege economic injury."[13]

Second, the court rejected the district court's determination that no reasonable consumer could be misled by the statements that the products were "natural" and "100% vegetarian," holding that the statements "could be taken as a claim that no synthetic chemicals were in the products."[14] The court rejected the district court's determination that statements on Hain's website rendered it implausible that a reasonable consumer could be misled. In so holding, the court applied and extended its holding in *Williams v. Gerber Prods. Co.* (9th Cir. 2008) 552 F.3d 934, 939-40 that disclosures in an ingredient list do not correct, as a matter of law, misrepresentations on a product's label. Applying *Williams* here, the court held product information disclosed "on a website also cannot override as a matter of law any misimpressions created by the label."[15]

Finally, the court reversed the decision of the district court that effectively denied plaintiffs' motion for precertification discovery. "[I]n light of recent case law regarding the need to establish a sufficient factual record at the class certification stage," the district

7. *Ibid.*
8. *Ibid.*
9. *Balser v. The Hain Celestial Grp., Inc*. (C.D. Cal., Dec. 18, 2013, No. CV 13–05604) 2013 WL 6673617, *1.
10. *Ibid.*
11. *Ibid.*
12. *Balser v. The Hain Celestial Grp., Inc.* (9th Cir., Feb. 22, 2016, No. 14-55074) 640 Fed.Appx.694, 695-96.
13. *Id.* at p. 696, citation omitted.
14. *Ibid.*
15. *Ibid.*

court's failure to consider the request for precertification discovery before considering the certification motion was an abuse of discretion.[16]

Southern District of California Dismisses with Prejudice Putative PHO Class Action as Preempted and for Lack of Standing

Hawkins v. The Kroger Co. **(S.D.Cal., Mar. 17, 2016, No. 15-cv-2320) ECF No. 19**

Plaintiff, Shavonda Hawkins ("Hawkins"), filed a putative class action against The Kroger Company ("Kroger") on behalf of purchasers of Kroger Bread Crumbs that allegedly contain partially hydrogenated oils ("PHOs"). Hawkins alleged that Kroger violated nine California state laws, including California's Unfair Competition Law, claiming that Kroger adds PHOs to its breadcrumbs and PHOs are linked to cardiovascular disease, diabetes, cancer, Alzheimer's disease and accelerated memory damage and cognitive decline, and that Kroger misleadingly and unlawfully advertises Kroger Bread Crumbs as containing "0g Trans Fat" on the front of the label when the products do contain trans fat.

The district court held that Hawkins' claims failed "for two different reasons." First, citing *Carrea v. Dreyer's Grand Ice Cream, Inc.* (9th Cir. 2012) 475 Fed.Appx. 113, the court found that Hawkins' "0g Trans Fat" claims were preempted. Noting that Hawkins did not dispute that Kroger Bread Crumbs contain less than .5g trans fat, the court found that the "0g Trans Fat" statement on the label complied with federal law mandating that "'[i]f the serving contains less than 0.5 gram[s], the content, when declared, shall be expressed as zero,' 21 C.F.R. §101.9(c)(2)(ii)."[17] Hawkins' state-law claim was therefore preempted. In so holding, the court rejected Hawkins' invitation to follow the Ninth Circuit's decision in *Reid v. Johnson & Johnson* (9th Cir. 2015) 780 F.3d 952, rather than *Carrea*, because *Reid* "involved the statement 'no trans fat' and not a specially defined regulatory term like in *Carrea.*"[18]

Second, the court held Hawkins lacked standing because she failed to plead that she actually relied on the allegedly misleading statements and that the misrepresentation caused her injury. The court found that Hawkins failed to plead reliance on the "0g Trans Fat" label because, although she pled that she had purchased the product for 15 years, the complaint did "not identify when, if ever, Plaintiff first read the label," and Hawkins pled that she only learned that the product contained trans fats shortly before she filed suit.[19] Comparing the case to *Cullen v. Netflix* (N.D.Cal., Jan. 10, 2013, No. 5:11-cv-01199) 2013 WL 140103, the district court concluded that Hawkins "simply cannot establish that she relied upon the unread statements in 2000 to support the August 2015 purchase and/or discovery of the statement ('0g Trans Fat')."[20] With respect to injury, Hawkins alleged that she was harmed because consuming trans fat in any quantity "inflames and damages vital organs and increases the risk of heart disease, diabetes, cancer, and death," and that she lost money because similar products without the misleading label would have cost less.[21] The court noted that the complaint and the briefing contained "numerous references to articles concerning the negative effects of trans fat," but rejected Hawkins' contentions as pleading only "generalized and hypothetical risks of harm . . . insufficient to establish a cognizable injury sufficient to satisfy statutory standing requirements."[22] The court entered the dismissal with prejudice.[23]

Central District of California Denies Renewed Motion for Class Certification, Finding Evidence of Post-Denial Purchase Insufficient to Revisit Standing

Torrent v. Yakult U.S.A., Inc. **(C.D.Cal., Mar. 7, 2016, No. 8:15-cv-00124) 2016 WL 6039188**

Nicolas Torrent ("Torrent") filed suit against Yakult U.S.A., Inc. ("Yakult") on behalf of a putative class of California purchasers of Yakult, a yogurt drink. Torrent alleged that Yakult's marketing and advertising claims concerning digestive health were false and misleading. The district court denied Torrent's first motion for class certification, finding that Torrent lacked standing to pursue injunctive relief because he failed to plead that he planned to buy Yakult

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16. *Ibid.*, citing *Wal-Mart Stores, Inc. v. Dukes* (2011) ___ U.S. ___ [131 S.Ct. 2541, 2551].
17. *Hawkins v. The Kroger Co.* (S.D.Cal., Mar. 17, 2016, No. 15-cv-2320) ECF No. 19, p. 5.
18. *Id.* at p. 1, fn. 5.
19. *Id.* at p. 6.
20. *Id.* at p. 7.
21. *Ibid.*
22. *Ibid.*, citing *Simpson v. Cal. Pizza Kitchen, Inc.* (S.D. Cal. 2013) 989 F.Supp.2d 1015.
23. Hawkins' appeal of the dismissal is pending before the Ninth Circuit. (*Hawkins v. The Kroger Co.* (9th Cir., No. 16-55532).)

in the future and had pled and stated in discovery responses that he would not have purchased Yakult had he known that the product was deceptively advertised.

Shortly thereafter Torrent filed a renewed motion for class certification. The renewed motion attached a receipt showing that Torrent had purchased Yakult ten days after the district court's order declining to certify the class, and it attached a sworn declaration stating, "I intend to buy Yakult in California in the future." The district court construed the motion as a motion for reconsideration under Central District of California Local Rule 7-18, and denied it. "Allowing Torrent to seek injunctive relief based on his recently-expressed intention to purchase Yakult in the future would permit him to fundamentally alter his theory of the case and would allow him to relitigate issues that this Court has already ruled on. Rule 23 does not require such a result and Local Rule 7-18 prohibits it."[24]

Ninth Circuit Stays Case Raising "ECJ" and "Natural" Claims Under Doctrine of Primary Jurisdiction

***Kane v. Chobani* (9th Cir., Mar. 24 2016, No. 14-15670) 645 Fed.Appx. 593**

In *Kane*, buyers of fruit-flavored Greek yogurt filed a putative class action against Chobani, Inc. ("Chobani"), alleging that Chobani's use of the terms "evaporated cane juice" ("ECJ") and "natural" on its labels violated California's Unfair Competition Law (UCL), False Advertising Law (FAL), Consumer Legal Remedies Act (CLRA), and the Sherman Food, Drug, and Cosmetic Act. Northern District of California Judge Lucy H. Koh granted Chobani's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The Ninth Circuit vacated the decision and remanded for entry of an order staying the case under the doctrine of primary jurisdiction.

In granting the motion to dismiss, Judge Koh held that plaintiffs must plead reliance in order to establish standing under the UCL, FAL, and CLRA, including claims under the "unlawful" prong of the UCL.[25] The court found that plaintiffs failed to adequately plead reliance for either their ECJ or "all natural" claims. With respect to ECJ, Judge Koh found it implausible that plaintiffs did not know that ECJ was a sweetener because the complaint referred to ECJ and sugar interchangeably and did not adequately allege what plaintiffs thought ECJ was if not a form of sugar. As for the term "all natural," plaintiffs alleged that the term was deceptive because Chobani's products were colored using fruit or vegetable juice concentrate. The court held that plaintiffs failed to provide sufficient allegations describing why they believed the challenged ingredients were not natural, as required to demonstrate they relied on the representation and were deceived.

The Ninth Circuit did not address the district court's bases for dismissal. Rather, in an unpublished memorandum decision, the court vacated the district court's order and remanded the case with the direction that it be stayed pursuant to the doctrine of primary jurisdiction. The court cited its own prior decision in *Astiana v. Hain Celestial Grp., Inc.* for the proposition that "[t]he delineation of the scope and permissible usage of the terms 'natural' and 'evaporated cane juice' in connection with food products 'implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch.'"[26] The court observed that the primary jurisdiction doctrine should not be invoked when the relevant agency "is aware of but has expressed no interest in the subject matter of the litigation."[27] However, in this case, the relevant agency has expressed such an interest. The court noted that in November 2015 the FDA issued a request for comments regarding "use of the term 'natural' in connection with food product labeling,"[28] and in July 2015, the FDA represented that it would issue final guidance on the term "evaporated cane juice" by the end of 2016.[29] Given the ongoing FDA proceedings regarding the two terms, the court concluded that the stay would promote efficiency.

24. *Torrent v. Yakult U.S.A., Inc.* (C.D.Cal., Mar. 7, 2016, No. 8:15-cv-00124) 2016 WL 6039188, *2.
25. *Kane v. Chobani* (N.D.Cal. 2014) 973 F.Supp.2d 1120, 1129, citing *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 326.
26. *Kane v. Chobani* (9th Cir., Mar. 24 2016, No. 14-15670) 645 Fed. Appx. 593, 594, quoting *Astiana v. Hain Celestial Grp., Inc.* (9th Cir. 2015) 783 F.3d 753, 760.
27. *Ibid.* (quoting *Astiana*, at p. 761).
28. *Ibid.*
29. The FDA issued the expected ECJ guidelines in May 2016, a copy of which is available for download on the FDA's website: http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm181491.htm.

Northern District of California Denies Class Certification for Lack of Viable Damages Model

Khasin v. R.C. Bigelow, Inc. **(N.D.Cal. Mar. 29, 2016, 4:12-cv-02204) 2016 WL 1213767**

Plaintiff, Alex Khasin ("Khasin"), filed a putative class action against R.C. Bigelow, Inc. ("Bigelow") seeking injunctive relief and damages based on Bigelow's claims that its products contain "healthy antioxidants." Northern District of California Judge William Orrick declined to certify the class under Federal Rules of Civil Procedure 23(b)(3) or 23(b)(2).

With respect to rule 23(b)(3), the court found that Khasin's damages model failed to satisfy *Comcast v. Behrend* (2013) ___ U.S. ___ [133 S.Ct. 1426]. Khasin had proffered three models for calculating class-wide damages: (1) a restitution calculation; (2) statutory damages; and (3) a nominal alternative. The court rejected the restitution model because Khasin—reasoning that Bigelow's green tea products were "legally worthless"—attributed to the products a value of $0 and therefore calculated the restitution owed as a full refund of the product price. The court rejected the $0 valuation as "too implausible to accept" because it assumed that "consumers gain no benefit in the form of enjoyment, nutrition, caffeine intake or hydration from consuming the teas."[30] The court held that Khasin "must present a damages model that can likely determine the price premium attributable only to Bigelow's use of the allegedly misleading claim."[31]

The court also rejected Khasin's alternate model based on statutory damages under California's Consumer Legal Remedies Act (CLRA). Although, the court reasoned, the CLRA provides for a minimum total damages award of $1000 in a class action, damages under the CLRA are not "automatic." "A plaintiff must still prove 'actual damages' in order to be entitled to a $1000 minimum award."[32] Khasin's claim for statutory damages under the CLRA did not satisfy rule 23(b)(3), the court held, because Khasin failed "to provide a viable theory for calculating damages under the CLRA that would be tied to his theory of liability."[33]

Khasin's nominal damages alternative also failed because, the court found, Khasin had not established that nominal damages were available under any cause of action in the complaint. Khasin, citing *Avina v. Spurlock* (1972) 28 Cal.App.3d 1086, argued that nominal damages are available where there is a "technical invasion of a plaintiff's right" or "real, actual injury and damage suffered."[34] The court rejected the argument, holding that *Avina* concerns California Code of Civil Procedure section 3360, which applies only where there has been a breach of duty. Because Khasin did not identify a breach of any duty owed, nominal damages were not available.

With respect to Khasin's bid to certify an injunctive class under rule 23(b)(2), the court declined to certify the class for two reasons. First, the court found Khasin had not plausibly alleged that he intended to buy the products in the future. The court rejected as "unconvincing" a statement contained in Khasin's declaration that he would consider buying Bigelow tea again if the antioxidant claims were removed from the packages and the product was in compliance with California law.[35] This "unsupported assertion" did not satisfy the standing requirements for seeking injunctive relief.[36] Second, the court found that even if Khasin had adequately pled that he intended to buy the products in the future, he would lack standing to pursue injunctive relief because there was no danger he would be misled in the future. "Plaintiffs like Khasin, who were previously misled by deceptive food labels and now claim to be better informed lack standing for injunctive relief because there is no danger that they will be misled in the future."[37]

Northern District of California Holds that Plaintiff Who Looked at Label but Didn't See Disclosure Satisfies Adequacy and Typicality

Kumar v. Salov North America Corp. **(N.D.Cal., July 15, 2016, No. 4:14-cv-2411) 2016 WL 3844334**

Plaintiff, Rohini Kumar ("Kunar"), sued Salov North America Corporation ("Salov") on behalf of a proposed class of olive oil purchasers. Kumsar alleged

30. *Khasin v. R.C. Bigelow, Inc.* (N.D.Cal. Mar. 29, 2016, 4:12-cv-02204) 2016 WL 1213767, *3.
31. *Ibid.*
32. *Id.* at p. *4.
33. *Ibid.*
34. *Ibid.*
35. *Id.* at pp. *4-5.
36. *Id.* at p. *5, citing *City of Los Angeles v. Lyons* (1983) 461 U.S. 95, 102.
37. *Ibid.*

that the claim "Imported from Italy" on the front of the package was false and misleading because the oil was actually produced in other countries and then shipped to Italy and mixed with a small amount of Italian olive oil before being bottled and sold to consumers. Northern District of California Judge Yvonne Gonzalez Rogers granted Kumar's motion for class certification.

With respect to rule 23(a), Judge Rogers rejected Salov's challenges to adequacy, typicality, commonality, and ascertainability. Salov argued that Kumar was not an adequate class representative or typical of the class because she testified in her deposition that she read the back of the bottle to check the "best by" date, which is located adjacent to a disclaimer that the olive oils come from Italy, Spain, Greece, and Tunisia. Salov argued that Kumar must have seen the disclaimer and could not have been misled by the "Imported from Italy" claim on the front of the bottle. The district court rejected the argument based on Kumar's testimony that, although she looked at the back of the bottle, she did not see the information about the origin of the olives. The court also rejected arguments that Kumar was not adequate to represent the class because she had a friendship with one of the class counsel and had a felony conviction for driving under the influence.

Addressing rule 23(a)(2)'s requirement that the party seeking certification show that "there are questions of law or fact common to the class," the court identified "[t]he central question" as "whether Salov's labels were likely to deceive a reasonable consumer," and held that the answer to that question was based on common facts, "that is, identical statements on the labels of the products at issue."[38] The court further found that common legal and factual questions were presented by Kumar's contentions that the "Imported from Italy" statement violates the Tariff Act of 1930 and its implementing regulations (establishing a predicate for liability under the "unlawful" prong of California's Unfair Competition Law).

With respect to whether the class was ascertainable, the court noted that (as true at the time) the Ninth Circuit had "not yet reached the question of whether there is an ascertainability requirement implied in, or in addition to, rule 23,"[39] but found that membership in the class must be determined by reference to "objective, administratively feasible criteria."[40] Salov argued that ascertainability had not been established because Kumar had provided no analysis of the class members' purchases—"what they paid [for the olive oil], where they purchased it, and how many times."[41] With two modifications, the court found the class definition "precise and objective" and its membership "readily determinable."[42] As to the difficulty of providing receipts or other proof of purchase by individual class members, the court found that, in this case, evidence of purchase by affidavit on a claim form would be sufficient to identify class members. "Unlike other food labeling cases that have foundered on this requirement . . .[t]he claim involves identical statements on all products for the relevant time period, with no 'memory test' for flavor, size, or time period necessary to determine whether the product purchased had the challenged statement on the label."[43]

Judge Rogers also found that the proposed class satisfied rule 23(b)(3). Salov argued that individualized questions predominated with respect to the materiality of the "Imported from Italy" statement, class members' exposure to and understanding of the statement, and class members' individual entitlement to relief. Regarding materiality, the court observed that the determination whether a representation is material is based on the reasonable consumer standard, not class members' subjective views, and that misrepresentations of origin have been held to be material misrepresentations without the necessity of proof of materiality to each individual consumer.[44]

With respect to class members' exposure to the statement, the court found unpersuasive Salov's evidence that "neck collars" placed on the bottles may have obscured the label. The court also rejected as "go[ing] to the merits," rather than predominance, Salov's contention that the font size and color made it unlikely that class members saw the representation.[45]

38. *Ibid.*
39. *Id.* at p. *5. On January 3, 2017, the Ninth Circuit held that ascertainability is not a prerequisite to class certification under rule 23. (*Briseno v. ConAgra Foods, Inc.* (9th Cir. 2017) 844 F.3d 1121, 1123.)
40. *Id.* at p. *6.
41. *Ibid.*
42. *Id.* at p. *7.
43. *Ibid.*
44. *Id.* at pp. *7-8, citing *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 333.
45. *Id.* at p. *9.

The court likewise rejected Salov's contention that class members' understanding of the "Imported from Italy" representation presented individualized issues. In so holding the court distinguished the district court decision in *Jones v. Con Agra Foods, Inc*. (N.D.Cal., June 13, 2014, No. C 12-01633) 2014 WL 2702726, because the representation at issue there—the term "natural"—"is not the subject of any regulation and is inherently ambiguous."[46] Further, use of the statement in *Jones* varied by product size, flavor variety, and time period.

Finally, the court held that, for purposes of class certification, Kumar's multiple regression model satisfied the requirement of *Comcast* that "'a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable" to the alleged misconduct and "be consistent with [the plaintiff's] liability case[.]'"[47]

Ninth Circuit Affirms Motion to Decertify and Dismissal of "Illegal Product" Claims but Reverses Order Granting Motion for Summary Judgment

***Brazil v. Dole Packaged Foods, LLC* (9th Cir., Sept. 30, 2016, No. 14-17480) 660 Fed.Appx. 531**

In *Brazil v. Dole Packaged Foods*, plaintiff ("Brazil") filed a putative class action against Dole, ("Dole") alleging that Dole deceptively described its fruit products as "All Natural Fruit" in violation of California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumer Legal Remedies Act ("CLRA"). On September 30, 2016, the Ninth Circuit issued an unpublished decision affirming in part and reversing in part district court Judge Lucy H. Koh's decisions on motions to dismiss, for summary judgment, and on class certification.

With respect to Dole's motion to dismiss, the Ninth Circuit affirmed the dismissal of Brazil's claims for the sale of "illegal products." Brazil had argued that representations on Dole's website about its fruit made its sales illegal under California Health and Safety Code sections 110760 and 110770. The Ninth Circuit affirmed dismissal of Brazil's UCL claims based on the website representations because "Brazil did not see the allegedly offending statements before he purchased the fruit," and therefore could not have relied on the statements in making his decision to purchase.[48] Reviewing for abuse of discretion, the Ninth Circuit also affirmed the district court's decision not to stay the case the pursuant to the doctrine of primary jurisdiction.

The Ninth Circuit reversed the district court's order granting Dole's motion for summary judgment. Judge Koh had held that Brazil's evidence was insufficient to create a genuine issue of material fact with respect to whether Dole's "All Natural Fruit" representation was likely to mislead a reasonable consumer. The Ninth Circuit reversed, finding that Brazil's evidence—including the label itself, Brazil's testimony that he was deceived, Dole's consumer surveys prepared for litigation, the FDA's non-binding policy regarding the term "natural," and recent FDA warning letters sent to other food sellers regarding the term "natural"—could allow a trier of fact to conclude that Dole's description of its products is misleading to a reasonable consumer.[49]

Finally, the Ninth Circuit affirmed the district court's decision granting Dole's motion to decertify the class. In her initial certification decision, Judge Koh had accepted Brazil's proposed "regression model" as providing a means to establish class-wide damages through common proof, noting that Dole could challenge the model's adequacy after discovery.[50] Dole moved to decertify after the close of expert discovery, and Judge Koh granted the motion, finding that Brazil's model did not measure the damages attributable to Dole's misconduct as required by *Comcast*.[51] The Ninth Circuit agreed. The court held that "[t]he district court correctly limited damages to the difference between the prices customers paid and the value of the fruit they bought—in other words, the 'price premium' attributable to Dole's 'All Natural Fruit' labels."[52] Finding that "Brazil did not explain how this premium could be calculated with

46. *Ibid*.

47. *Id*. at p. *10, citing *Comcast Corp. v. Behrend, supra*, (2013) 133 S.Ct. at p. 1433.

48. *Brazil v. Dole Packaged Foods*, LLC (9th Cir., Sept. 30, 2016, No. 14-17480) 660 Fed.Appx. 531, 534 citing *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 326 for the proposition that "a plaintiff who alleges claims based on unlawful misrepresentations under the UCL must show she relied on those misrepresentations."

49. *Id*. at pp. 533-34.

50. See *Brazil v. Dole Packaged Foods, LLC* (N.D.Cal., Nov. 6, 2014, No. 12-cv-01831) 2014 WL 5794863, *2-3.

51. *Id*. at pp. *12-14, citing *Comcast Corp. v. Behrend, supra*, (2013) 133 S.Ct. at p. 1433.

52. *Brazil v. Dole, supra*, (9th Cir., Sept. 30, 2016) 660 Fed.Appx. at p. 534.

proof common to the class," the Ninth Circuit held that "the district court did not abuse its discretion by granting Dole's motion to decertify."[53]

Central District of California Denies Motion to Stay "Natural" Claims Because Compliance with FDA Not Relevant to Likelihood of Deception

***Morales v. Kraft Foods Group, Inc.*, (C.D.Cal., Dec. 6, 2016, No. 2:14-CV-04387) ECF No. 273**

Plaintiffs filed a class action against Kraft Foods Group, Inc. ("Kraft") alleging that they were misled by the use of the term 'natural cheese' on a Kraft product.[54] On December 18, 2015, after the FDA announced that it was commencing regulatory review of use of the term "natural" on food product labels, Kraft, invoking the doctrine of primary jurisdiction, filed a motion to stay the case pending release of the FDA's guidelines.[55] The district court denied the motion without prejudice to renewal based on new developments. Kraft renewed its motion on October 27, 2016, after close of the FDA's comment period. Central District of California Judge John A. Kronstadt denied the renewed motion.

Kraft raised three reasons why a stay was warranted, all three of which the district court rejected. First, Kraft argued that in *Kane v. Chobani* (9th Cir. 2016) 645 Fed.Appx. 593, 594, the Ninth Circuit "directed" district courts to stay "natural" claims until completion of the FDA proceedings.[56] Judge Kronstadt found *Kane* distinguishable because the question presented there was whether the representation violated FDA regulations, whereas the question presented by plaintiffs' claims was whether the "natural cheese" label is deceptive to the reasonable consumer. Second, Kraft claimed that, based on the comments submitted, the FDA's anticipated definition of "natural cheese" will directly bear on the case. The court rejected the second argument for the same reason it rejected the first: plaintiffs' claims require a showing that the term "natural cheese" is materially deceptive, and "[c]ompliance with FDA regulations does not 'automatically shield' Kraft from [that] claim under the relevant statutes."[57] The court also dismissed as "unconvincing" Kraft's third argument that the procedural posture of the case had changed significantly since the previous request for stay was denied.

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53. *Id*. at p. 535.
54. The case was initially filed in Los Angeles Superior Court and removed to the Central District on June 6, 2014.
55. *Morales v. Kraft Foods Group, Inc*. (C.D.Cal., Dec. 18, 2015, No. 2:14-CV-04387) ECF No. 97. For a discussion of the primary jurisdiction doctrine, see the summary, *supra, of Kane v. Chobani* (9th Cir., Mar. 24 2016) 645 Fed.Appx. 593.
56. *Morales v. Kraft Foods Group, Inc*. (C.D.Cal., Dec. 6, 2016, No. 2:14-CV-04387) ECF No. 273, at p. 5.
57. *Id*. at p. 6, quoting *Williams v. Gerber Prod. Co*. (9th Cir. 2008) 552 F.3d 934, 940.