
# ANTITRUST LAW

## Promoting Competition
## Protecting Consumers

**The Advertising Disputes & Litigation and Consumer Protection Committees'**

# RECENT LITIGATION DEVELOPMENTS
# Quarterly Report

**[Cases from January 1 to March 31, 2014]**

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## RECENT DECISIONS

### Lanham Act and Other Competitor Actions

The U.S. District Court for the District of Utah grants the defendants' motion to dismiss the plaintiffs' Lanham Act claims and remands the plaintiffs' state law claims, including a claim for violation of Utah's Truth in Advertising Act, to state court. Plaintiffs alleged that the defendants misrepresented the quality, character, and expense of treatment options for stroke patients, as well as the nature of their general business practices. In dismissing the Lanham Act claims, the court found that the plaintiffs failed to state plausible claims because many of the defendants' statements were not statements of fact for which the defendants could be held liable under the Lanham Act, the plaintiffs did not adequately allege that the statements were misleading, and/or the plaintiffs did not adequately allege that the statements gave rise to a competitive injury. (*Intermountain Stroke Center, Inc. v. Intermountain Health Care, Inc.*, No. 2:13-cv-00909, 2014 WL 1320281 (D. Utah Mar. 31, 2014)).

The U.S. District Court for the Eastern District of Michigan considers cross-motions for summary judgment in a Lanham Act challenge arising out of advertising claims for medical equipment. Nellcore and CAS Medical Systems Inc. ("CAS") both manufacture cerebral oximeters, which are devices used by surgeons and anesthesiologists to monitor the oxygen level of blood in an area of the brain. Nellcor alleged that CAS falsely advertised that its cerebral oximeter was more accurate than Nellcor's cerebral oximeter. The claim was based on studies that compared readings from competing cerebral oximeters to an estimate of the average field saturation of oxygen in the entire brain ("fSO2"). According to Nellcor, the testing was not reliable because fSO2 provides only a rough estimate of oxygen saturation and does not measure oxygen saturation in the area of the brain that the cerebral oximeter measures. After considering evidence from scientific studies and depositions, the court granted in part and denied in part each party's motion for summary judgment.

(*Nellcor Puritan Bennett LLC v. CAS Med. Sys.*, No. 2:11-cv-15697, 2014 U.S. Dist. LEXIS 41827 (E.D. Mich. Mar. 28, 2014)).

The U.S. district Court for the Eastern District of North Carolina grants the defendant's motion to dismiss the plaintiff's Lanham Act complaint. Plaintiff, Todd Goodman, the owner of a general automotive and repair shop in Raleigh, North Carolina and several other similar businesses in North Carolina brought a suit against a website operator and multiple "Does" alleging violations of state unfair competition and defamation laws as well as the Lanham Act. Plaintiff was the target of a smear campaign on the "localdirtbags" website, which featured articles and associated comments stating that the plaintiff cheats customers, and that he is a criminal and extortionist. The complaint alleged that the articles and many comments were authored by the website operator. The court determined that the plaintiff did not sufficiently state a false advertising claim under the Lanham Act because the website operator was not in commercial competition with the plaintiff, and the articles and comments were not commercial advertising. Accordingly, the court dismissed the entire case, holding that it could not exercise supplemental jurisdiction over the state law claims due to the dismissal of the Lanham Act claim. (*Goodman v. Doe*, No. 4:13-CV-139-F, 2014 U.S. Dist. LEXIS 42130 (E.D.N.C. Mar. 28, 2014)).

The U.S. District Court for the District of Nevada grants the defendant's motion to dismiss the plaintiff's complaint, which asserted claims for violation of the Lanham Act, Nevada's Unfair Competition law, and Macao's Unfair Competition law. Plaintiff, the marketer and seller of gaming technology and services, alleged that the defendant, a competitor, willfully misrepresented the quality of its products and services. In granting the defendant's motion to dismiss on each of the unfair competition claims, the court found that the plaintiff's factual allegations sounded in fraud and the plaintiff failed to satisfy Fed. R. Civ. P. 9's heightened pleading standard. The court granted the plaintiff leave to amend its complaint in order to supplement its claims with "properly detailed, true facts to cure the deficiencies." (*LT Int'l Ltd. v. Shuffle Master, Inc.*, No. 2:12-cv-1216, 2014 WL 1248270 (D. Nev. Mar. 26, 2014)).

The U.S. District Court for the Eastern District of Tennessee denies the plaintiff-maker and seller of manufactured homes' motion for reconsideration of an order dismissing its complaint. In 2008, a class action was brought against the plaintiff by its home buyers who alleged that the insulation of their homes failed to meet minimum requirements. After settling those claims, the plaintiff sued the defendant-seller of the insulation, asserting claims under the Lanham Act, fraud, and breach of warranty. On reconsideration, the court found the complaint was properly dismissed because the misrepresentations at issue (thickness of the insulation) were not the kind of misrepresentations prohibited by the Lanham Act ("nature, characteristics, qualities, or geographic origin"). Also, the plaintiff's Lanham Act and fraud claims were barred by the statute of limitations because the date that the plaintiff knew or should have known of its claims was the date the class action was filed, which fell outside the limitations period. Finally, the court denied reconsideration of the warranty claims finding that the misrepresentation at issue was not covered by the warranty. (*CMH Manufacturing, Inc. v. US Greenfiber, LLC*, No. 3:12-273, 2014 WL 1207542 (E.D. Tenn. Mar. 24, 2014)).

The U.S. District Court for the District of Arizona denies motions for attorneys' fees filed by both ThermoLife International and Gaspari Nutrition. The two companies are rival manufacturers of

dietary supplements for bodybuilders. ThermoLife sued Gaspari in 2011, alleging nine counts of false advertising under the Lanham Act, in addition to claims for unfair competition and tortious interference with business. Gaspari counter-claimed, alleging, among other things, false advertising, false designations of origin, and false descriptions under the Lanham Act. After the court granted both parties' motions for summary judgment, it determined in January 2014 that only one party is entitled to recover costs, and Gaspari was the prevailing party in net and was entitled to costs that were not solely related to its counterclaims. Both parties moved for attorneys' fees, arguing that the case was exceptional. The court noted that this was the sort of case where the line between exceptional and non-exceptional was fuzzy; neither party was successful on its claims, and both parties engaged in misconduct and "overlitigation." The court found that equitable considerations supported denial of both parties' attorneys' fee requests. (*ThermoLife Int'l., LLC v. Gaspari Nutrition, Inc.*, No. 11–CV–01056, 2014 WL 981089 (D. Ariz. Mar. 13, 2014)).

The U.S. Court of Appeals for the Ninth Circuit reverses the district court's order denying preliminary injunctive relief in a lawsuit stemming from the defendant ABD Insurance and Financial Services' use of the "ABD" trademark, and remands the case to the lower court. First, the Ninth Circuit determined that the district court improperly failed to consider plaintiff's Lanham Act false advertisement claim and abused its discretion by treating that claim as part of its trademark infringement claim. The Ninth Circuit stated that trademark infringement and false advertising are different claims, which require the application of separate tests. The appellate court also concluded that the district court misapplied the law in its trademark abandonment analysis and, accordingly, erroneously concluded that the plaintiff abandoned the ABD mark. Finally, the Ninth Circuit noted that the district court weighted evidence of actual confusion too heavily when considering the trademark infringement claim because the importance of evidence of actual confusion is less important at the preliminary injunction stage of the proceedings. (*Wells Fargo & Co. v. ABD Ins. & Financial Services, Inc,* -- F.3d --, 2014 WL 806385 (9th Cir. Mar. 3, 2014)).

The U.S. District Court for the District of Colorado denies the plaintiff's two post-trial motions – one for an award of prejudgment interest and the other to alter or amend the judgment concerning the disgorgement amount. On May 7, 2013, after a bench trial, the court found for plaintiffs on their claim of false advertising under the Lanham Act, but not on their Lanham Act trademark infringement and unfair competition claims. The court enjoined the defendants from further acts of false advertising, and ordered disgorgement of the defendants' 2010 profits plus costs. On the plaintiff's motions, the court found there was no evidence at trial establishing the defendants' 2011 and 2012 profits; the plaintiff disagreed and sought to have the court alter the judgment, based on one of the defendant's trial testimony. But the court found the trial testimony was "too unstable a foundation on which to base a disgorgement award." As for prejudgment interest, the court held that that was not appropriate in a case where the damages were not based on the plaintiff's actual damages. (*Gen. Steel Domestic Sales, LLC v. Chumley*, No. 10-CV-01398, 2014 WL 788040, (D. Colo. Feb. 27, 2014)). In a separate decision, the court also denied the post-trial motions for attorneys' fees filed by both the plaintiffs and defendants. Plaintiffs' motion for attorneys' fees was denied because they had prevailed only on one of their asserted claims of false advertising based on statements on one of the defendants' website, and because the plaintiffs had shown no actual damages as a result of the false statements. Defendants' motion was denied because the plaintiffs' trademark claims had a basis in fact and the plaintiff subjectively believed them to be meritorious; nor was its ultimately withdrawn claim of trademark dilution frivolous. (*Gen. Steel Domestic Sales, LLC v. Chumley*, No. 10-CV-01398, 2014 WL 793090, (D. Colo. Feb. 27, 2014)).

The U.S. District Court for the Southern District of West Virginia grants in part and denies in part the defendants' motion to dismiss the plaintiffs' complaint, which alleged claims for false advertising and false endorsement under the Lanham Act, along with claims for tortious interference, defamation, and invasion of privacy. With regard to the false advertising claims, the plaintiffs contended that the defendants' advertisements, which stated that the defendants had the "lowest prices" in West Virginia, were literally false. In granting the motion to dismiss, the court found that these statements were "broad, vague exaggerations or boasts on which no reasonable consumer would rely." In terms of the false endorsement claims, the plaintiffs alleged that the defendants created a false Facebook profile using the individual plaintiff's name and used that profile to endorse the defendants' products. In denying the motion to dismiss, the court held that "it is plausible that the fictitious Facebook Profile misled [plaintiffs'] clients and potential customers . . . " (*Imagine Medispa, LLC v. Transformations, Inc.*, No. 2:13-26923, 2014 WL 770810 (S.D. W.Va. Feb. 26, 2014)). The same court also denied the plaintiffs' motion for a preliminary injunction to enjoin the defendants from the use of any Internet-based advertising or communications related in any way to their business or the plaintiffs' business, or the individual plaintiff personally. The plaintiffs claimed that they were entitled to the injunctive relief because the evidence established that the defendants created the Facebook profile in question, and the advertisements were false and misleading, and caused irreparable harm. In denying the motion for the preliminary injunction, the court held that the plaintiffs did not clearly establish their likelihood of success on the merits or that they were likely to suffer irreparable harm. (*Imagine Medispa, LLC v. Transformations, Inc.*, No. 2:13-26923, 2014 WL 769624 (S.D. W.Va. Feb. 26, 2014)).

The U.S. District Court for the Eastern District of Virginia, in a case involving a claim of false advertising under the Lanham Act, denies defendant Handi-Foil's motion for partial summary judgment. The court found that solicitations by the defendant's sales representatives to retailers constituted commercial advertisements under the Lanham Act because they were meant to encourage retailers to purchase the defendant's foil product over the plaintiff's competing foil product. (*Reynolds Consumer Prods., Inc. v. Handi-Foil Corp.*, No. 13-cv-214, 2014 WL 794277 (E.D. Va. Feb. 27, 2014)).

The U.S. District Court for the Southern District of Texas grants in part and denies in part defendant Alaskan Energy Resources, Inc.'s motion to dismiss Tercel Oilfield Products USA LLC's complaint, which asserted, among other things, Lanham Act false advertising and Texas unfair competition claims. More specifically, the court denied the motion as to the Lanham Act and unfair competition claims. Tercel alleged that Alaskan Energy took photographs of Tercel's product, misrepresented it as Alaskan Energy's, and represented performance criteria for Alaskan Energy's product that really included performance specifications for Tercel's similar product. The court found this stated a claim under the Lanham Act and the Texas unfair competition statute. (*Tercel Oilfield Prods. USA LLC v. Alaskan Energy Resources, Inc.*, No. H-13-3139, 2014 WL 645380 (S.D. Tex. February 19, 2014)).

The U.S. District Court for the Northern District of California grants summary judgment on the plaintiff's claims against its competitor for false advertising under the Lanham Act, and violations of California's False Advertising Law and Unfair Competition Law. The plaintiff, VeriPic, sold camera software designed for law enforcement agencies that allowed users to measure the length of objects using a "point and click" method; the defendant, Foray, produced and sold a competing product. The plaintiff used an expert market survey of the law enforcement community to show

there was a material dispute of fact as to whether the defendant's advertising was deceptive. The court rejected the plaintiff's survey, because the plaintiff failed to show that the survey examined the proper universe of consumers. The plaintiff's survey included law enforcement officers, but the subjects were not familiar with the products or software used. Additionally, the plaintiff did not show that the subjects were the relevant audience for the false advertising claims because, even if the law enforcement officers used the software, they might not be the decision-makers who purchase the cameras and whose opinions would have been influenced by the allegedly false advertisements. The court also rejected the plaintiff's assertion that the defendant's representation that its software "authenticates" digital evidence, rather than only preserving the "integrity" of the image, was literally false. Relying on the plaintiff's experts and the Scientific Working Group on Imaging Technologies Guidelines, the court found that the term "authentication" is frequently used when referring to "integrity" processes in the digital asset management system industry. (*Kwan Software Eng'g, Inc. v. Foray Techs., LLC*, C 12-03762, 2014 WL 572290 (N.D. Cal. Feb. 11, 2014)).

The U.S. District Court for the District of Utah dismisses the plaintiff's complaint on grounds that the court lacked personal jurisdiction over the defendant. Vitamins Online, which sells vitamins and dietary and nutritional supplements over the Internet, sued rival Dynamic Industries, which sells supplements via third-party websites, primarily Amazon.com. Vitamins Online alleged that Dynamic Industries made false statements in the advertisement and sale of its supplements. The court dismissed the lawsuit for lack of personal jurisdiction, finding that plaintiff had not met its burden of proving that the court had personal jurisdiction over the defendant. The mere listing of products for sale on Amazon.com did not constitute evidence that defendant had directed its conduct at Utah residents. The court distinguished *Del Sol, L.C. v. Caribongo, L.L.C*, 2012 WL 530093 (D. Utah Feb. 17, 2012), which had found personal jurisdiction over a defendant that operated an interactive website, even though the consumer was redirected to another website to purchase the products, because the court found it was not readily apparent to the consumer that he or she was leaving the defendant's website. By contrast, here, there was no evidence that the defendant even operated a website and consumers were well aware they were at Amazon's website. (*Vitamins Online v. Dynamic Indus.*, No. 2:13–CV–665, 2014 WL 545864 (D. Utah Feb. 10, 2014)).

The U.S. District Court for the Eastern District of Michigan grants a permanent injunction in a case involving trademark infringement via Internet advertisements. Plaintiff is a Michigan-based moving company called "E-Z Moving Co., Inc."; the defendant is an Illinois-based moving company called "E-Z Movers, Inc." Plaintiff alleged various trademark infringement claims based on the defendant's use of the term "E-Z Movers." The central issue was whether the defendant's Internet advertising – directed to people in Michigan – infringed upon the plaintiff's trademarks. Defendant advertised its company on multiple moving company search sites and its ads were displayed in search results for Michigan movers. Defendant also published targeted web pages advertising moving services in numerous Michigan towns. Even though the Defendant did not actually offer services in Michigan, the court held that, because it appeared in searches for Michigan movers alongside the plaintiff's company, the ads were deceptive and misleading. The court granted the plaintiff injunctive relief by prohibiting the defendant from advertising that is does intrastate business with Michigan or that it is a Michigan company. (*T.D.C. Int'l. Corp. v. EZ Movers, Inc.*, No. 13-10195, 2014 WL 109488 (E.D. Mich. Jan. 13, 2014)).

The U.S. District Court for The District of Arizona denies the plaintiff's motion for summary judgment in a Lanham Act false advertising action, and grants the defendant's motion for summary judgment on its false advertising counterclaim. At the heart of the plaintiff's claim was an allegedly false advertising campaign by the defendant that several of its dietary supplements were "safe," "natural," "DSHEA-compliant," and "legal." The court noted that no private enforcement is possible under the DSHEA (Dietary Supplement Health and Education Act of 1994). The court also explained that where the FDA has not concluded that particular conduct violates the federal Food, Drug & Cosmetic Act (FDCA) a Lanham Act claim may not be pursued if the claim would require litigating whether certain conduct violates the FDCA. Therefore, thecCourt found that judicial determination of the falsity of statements that certain dietary supplements are "legal," "DSHEA-compliant," and/or "safe" without a determination by the FDA would usurp or undermine FDA authority. Also, because a dietary supplement or ingredient is not determined to be unsafe, not DSHEA-compliant, and/or illegal until the FDA proves and declares the product to be adulterated, the defendant's assertions to that effect were not false at the time they were made. For those reasons, the plaintiff's motions for summary judgment failed. On the defendant's counterclaim, the court found that the plaintiff made false and disparaging statements about the defendant's product, which likely influenced the purchasing decisions of consumers. The motion for summary judgment, therefore, was granted. (*ThermoLife Int'l., LLC v. Gaspari Nutrition, Inc.,* No. CV-11-01056, 2014 WL 99017 (D. Ariz. Jan. 10, 2014)).

The U.S. District Court for the Northern District of California grants the defendant's motion to dismiss – but only in part and with leave to amend – the plaintiff-computer hardware and software manufacturer's complaint, which seeks damages from, and an injunction against, two suppliers for, among other things, fraud relating to the provision of customers with access to updates to the plaintiff's operating system. The plaintiff alleged six claims, including viol;ations of the federal Consumer Fraud and Abuse Act ("CFAA"), false advertising under the Lanham Act, and unfair competition under California's Unfair Competition Law. The court, first, noted that, "while the CFAA is primarily a criminal statute, it also create a private right of action for persons injured by conduct prohibited thereunder." But, because the disputed conduct involved third-party reliance and not the first-party reliance required to recover for an economic injury from fraud under California law, even if Fed. R. Civ. P. 9(b) might apply to other CFAA claims, the court held that it did not apply here. The court, then, found that "Oracle has not sufficiently pleaded its trafficking claim and dismissal is warranted" and dismissed the plaintiff's remaining CFAA claims. However, the court refused to grant dismissal on the other claims, holding that the Lanham Act false advertising claim would survive because the "court does not see a reason to first require [the plaintiff] to litigate its underlying causes-of-action before bringing a Lanham Act false advertising claim. Nor does the court see any reason to apply Rule 9(b) to this claim. While the court respects that other district courts in the Ninth Circut have concluded otherwise, as Defendants acknowledge, the Ninth Circuit itself has never held as such. In sum, dismissal of [the plaintiff's] Lanham Act claim is not warranted." (*Oracle America, Inc. v. TERiX Computer Company, Inc.,* No. 5:13-CV-03385, 2014 WL 31344 (N.D. Cal., Jan. 3, 2014)).

**State Consumer Protection Laws**

The U.S. District Court for the Southern District of Ohio grants the defendants' motion for summary judgment on the plaintiffs' claim that they engaged in false advertising in connection with the sale of

American Mastiff dogs. Plaintiffs alleged that the defendants falsely advertised that their "maskless dogs" were American Mastiffs, despite the fact that a maskless dog does not meet the breed standard. Holding that there was no evidence that consumers were actually mislead and that "the threshold issue [wa]s whether the [defendants] made statements that were literally false," the court found that the plaintiffs failed to present evidence demonstrating that a false statement of fact was made. (*Wagner v. Circle W Mastiffs*, Nos. 2:08-CV-00431, 2:09-CV-00172, 2014 WL 1308713 (S.D. Ohio Mar. 31, 2014)).

The U.S. District Court for the District of Columbia grants the defendant's motion for summary judgment against allegations that they violated two D.C. consumer protection statutes by requesting customers' ZIP codes in conjunction with credit card purchases. The plaintiffs, customers of the defendants' Urban Outfitters and Anthropologie stores, alleged that the stores violated the D.C. Use of Consumer Identification Information Act ("CII Act") and the D.C. Consumer Protection Procedures Act, the latter of which prohibits misrepresentations of material facts and deceptive representations in connection with goods or services. The court dismissed the plaintiffs' claims, finding that a ZIP code did not amount to an "address" under the requirements of the CII Act. The court also dismissed plaintiffs' claims under the D.C. Consumer Protection Procedures Act, which were predicated on their CII Act claim that ZIP codes constituted an "address." In addition, the court held that the plaintiffs did not plead any facts from which it could be inferred that the defendants' asking for a ZIP card constituted "misrepresenting a material fact that has a tendency to mislead," because the plaintiffs failed to allege that the defendants represented that customers needed to provide a ZIP code to complete their transactions. (*Hancock v. Urban Outfitters, Inc.*, No. CV 13-939, 2014 WL 988971 (D.D.C. Mar. 14, 2014)).

The U.S. District Court for the Central District of California, in a putative class action alleging unlawful, unfair, and fraudulent conduct in violation of California's Unfair Competition Law ("UCL"), False Advertising Law, and the Consumer Legal Remedies Act ("CLRA"), grants and denies in part the defendant's motion to dismiss. Plaintiffs alleged that the defendant manufactured a heating and air conditioning unit that broke after three weeks and cost them over $1100 to repair, in direct violation of defendant's express warranties and website advertisements. The court held that the plaintiffs failed to establish fraud under the UCL because the pleadings did not show the plaintiffs actually read the defendant's website. For the same reason, the plaintiffs' false and deceptive advertising claim was dismissed. Plaintiffs' unlawful UCL claim was spared from dismissal because the court found pleading a breach of express warranty sufficient to establish that the defendant could have participated in illegal business conduct. The court upheld the plaintiffs' unfair UCL claim because their harm outweighed the utility of the defendant's conduct. Finally, the court dismissed the plaintiffs' CLRA claim because they failed to follow the statutory requirements of producing an affidavit. (*McVicar v. Goodman Global, Inc.*, No. SACV 13-1223, 2014 WL 794585 (C.D. Cal. Feb. 25, 2014)).

The U.S. District Court for the District of Minnesota grants in part the defendants' motion to dismiss the plaintiffs' amended complaint, which alleged, among other things, violations of the California Unfair Competition Law, Florida Deceptive and Unfair Trade Practices Act, Colorado Consumer Protection Act, and Hawaii Uniform Deceptive Trade Practices Act, arising out of a dispute concerning the purchase of fractional interests in resort condominiums. In granting the defendants' motion to dismiss the consumer protection claims, the court held that "the allegations of consumer fraud fall far short of Rule 9(b)'s particularity requirements." Specifically, the court found that the

plaintiffs failed to identify who made the allegedly fraudulent statements, and failed to identify the particular marketing statements and materials at issue. In addition, the court found that the plaintiffs failed to differentiate between the six different defendants when identifying the allegedly fraudulent statements, holding that "[s]uch group pleading is not sufficient under Rule 9(b)." (*Hoyt v. Marriott Vacations Worldwide, Corp.*, No. 12-3093, 2014 WL 509903 (D. Minn. Feb. 7, 2014)).

The U.S. Court of Appeals for the Ninth Circuit affirms the dismissal of a homebuyer's fraudulent concealment and misrepresentation claims against the defendant-homebuilders. The plaintiff-homebuyer claimed that he had relied upon the defendants' advertising that the home development was "stable," "traditional," and had a "family-based character," and that this description was a misrepresentation. The Ninth Circuit affirmed the lower court's decision to dismiss. With regard to the misrepresentation claim, the court held that representations that the development was "stable," "traditional," and had a "family-based character" were too vague to be actionable and would not deceive the reasonably prudent customer. (*Kelly v. Beazer Homes USA, Inc*., No. 12-55750, 2014 WL 107961 (9th Cir. Jan. 13, 2014)).

**Consumer Class Actions**

The U.S. District Court for the Northern District of California denies defendant Yahoo!'s motion seeking a bond from the plaintiff for its costs of defending the class action, pursuant to California Code of Civil Procedure § 1030. Plaintiff, a small business in Arkansas, alleged that Yahoo!'s "Localworks" advertising program did not work as advertised and filed a class action lawsuit claiming breach of contract, unjust enrichment, fraudulent business acts under the California Unfair Competition Law ("UCL"), and false advertising under both the UCL and the California False Advertising Law. In order to succeed on its motion, Yahoo! was required to demonstrate a reasonable possibility that Yahoo! would obtain judgment in its favor. Yahoo! argued that the plaintiff lacked standing to sue because an individual partner of the plaintiff, not the plaintiff, itself, had signed the contract at issue; the court held that it could not conclude at this stage that the plaintiff lacked standing. Yahoo! also argued that the plaintiff's injury was caused by his own errors in using the Localworks system, not by any flaw in the system. The court agreed that Yahoo! had shown the possibility of success on the merits as to this argument, but no greater a possibility than in any other case with disputed facts. The court also noted that Yahoo! had not demonstrated that there was a risk that it would not ultimately recover costs from defendant if it prevailed. Accordingly, the court denied the motion. (*Wilson & Haubert, PLLC v. Yahoo! Inc.*, No. 13-cv-5879, 2014 WL 1351210 (N.D. Cal. Apr. 4, 2014)).

The U.S. District Court for the Northern District of California dismisses the plaintiffs' class action complaint involving the automatic transmission fluid of "Mini Cooper S" models because the complaint failed to alleged any material misrepresentation or omission. Plaintiffs' complaint hinged on the allegation that the automatic transmission fluid of the Mini Cooper S needing to be replaced after every 30,000 miles instead of the purported industry standard 100,000 miles. Plaintiffs brought claims under the consumer protection statutes of California, New York, and New Jersey among other claims. Plaintiffs' California Unfair Competition Law claim for injunctive relief was dismissed because the vehicles were outside of their warranty periods and each plaintiff already had repaired or sold his or her vehicle. The New York Consumer Protection Act claim failed because the plaintiffs failed to aver reliance on the defendant's technical service bulletin informing authorized dealerships and repair facilities that the transmission fluid only needed to be changed every 100,000 miles. The

New Jersey Consumer Fraud Act claim failed because the warranty period had expired and the plaintiffs failed to allege that the defendant knew the car had a defect, which would cause it to fail before its expected useful life and intentionally concealed that information with the purpose of maximizing profit. (*Callaghan v. BMW of N. Am., LLC*, No. 13-CV-4794, 2014 WL 1340085 (N.D. Cal. Apr. 2, 2014)).

The U.S. District Court for the Northern District of California dismisses without prejudice the plaintiffs' class action involving the term "organic evaporated cane juice" on primary jurisdiction grounds. Plaintiffs brought their action against defendant Santa Cruz Natural Inc. for its use of the term "organic evaporated cane juice" on various beverages. Plaintiffs brought a multitude of claims, including ones under California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumer Legal Remedies Act ("CLRA"). Because the U.S. Food and Drug Administration (FDA) issued a notice in the Federal Register on March 5, 2014 reopening the comment period for the draft guidance on the use of the term, the court held that dismissing the case on primary jurisdiction grounds was proper. Deferring to the FDA for resolution of the issue would enhance decision-making and efficiency by allowing the court to take advantage of administrative expertise, and allow for uniformity in administration on the term. (*Swearingen v. Santa Cruz Natural Inc.*, No. C 13-04291 SI, 2014 WL 1339775 (N.D. Cal. Apr. 2, 2014)).

The U.S. District Court for the Northern District of California grants, in part, and denies, in part, the defendant retailer's motion to dismiss the plaintiffs' second amended complaint. Plaintiffs are two California consumers who purchased a variety of the defendant's food products and claim to have been deceived into buying the products by misleading labeling. Plaintiffs allege that a number of the defendant's labeling statements on many products were unlawful and/or misleading, including (1) nutrient content statements; (2) claims about antioxidant content; (3) "no sugar added" statements; (4) health statements; (5) "0 grams trans fat" or "no trans fat" representations; (6) "evaporated cane juice" ("ECJ") statements; (7) synthetic chemical content omissions; (8) "preservative free" statements and omissions about preservative content; and (9) slackfilled packaging. The court ruled that the plaintiffs must allege injury-in-fact to show that they meet Article III standing requirements, but that one of the plaintiffs failed to allege injury-in-fact because she did not claim that "she received a product that was different from the one as labeled," and those claims were dismissed with prejudice. While the other plaintiff previously had been found to meet both Article III and statutory standing requirements, the court ruled that that plaintiff must allege reliance and that consumers are likely to be deceived to support the California Unfair Competition Law claims, including under the "unlawful" prong. "Plaintiffs cannot circumvent the reliance requirement by simply pointing to a regulation or code provision that was violated by the alleged label misrepresentation, summarily claiming that the product is illegal to sell and therefore negating the need to plead reliance." The court ruled that the claims for antioxidant content, health, no sugar added, preservative free, propellant, and slack-fill were sufficient to survive at the motion to dismiss stage. Claims challenging ECJ as the name of an ingredient were dismissed with leave to amend. The court reserved ruling on primary jurisdiction because the ECJ claims were dismissed on other grounds. (*Thomas v. Costco Wholesale Corp.*, No. 5:12-cv-02908, 2014 WL 1323192 (N.D. Cal., Mar. 31, 2014)).

The U.S. District Court for the District of New Jersey grants, in part, denies, in part, and defers, in part, the defendant-baby food manufacturer's motion to dismiss a third amended consolidated false

advertising complaint, alleging that several of the defendant's probiotics baby food products do not provide the advertised immune system benefits and are not equal to breast milk in nutritional value. The court ruled that the defendant's products do not claim to be near equivalents to breast milk and dismissed those challenges. The court further ruled that the plaintiffs have not demonstrated the potential for future injury and, therefore, do not have a claim for injunctive relief. The court dismissed the California, New Jersey, and Washington plaintiffs' fraud claims because they did not identify when and where they purchased the products at issue. The court also dismissed the claims for breach of implied warranty and unjust enrichment. The court did find, however, that the plaintiffs have alleged enough to support Article III standing to state claims based on the defendant's overall marketing campaign. The court also upheld the claim for violation of the New York Consumer Protection Act. The court deferred ruling on claims under the consumer protection law of several other states. (*In re Gerber Probiotic Sales Practices Litig.*, No. 2:12-cv-00835, 2014 WL 1310038 (D.N.J. Mar. 31, 2014)).

The U.S. District Court for the District of Massachusetts denies summary judgment to defendant Williams Sonoma, in an action alleging that it inadequately informed customers of its ZIP code policies in violation of Massachusetts consumer protection law. The plaintiff alleged that Williams Sonoma did not inform her of its policies of using ZIP codes it collects to send targeted mailings and to share with third parties. The court found that the plaintiff was entitled to additional time for discovery because there was a "plausible basis for believing that additional facts exist" that would defeat the motion for summary judgment. (*Brenner v. Williams-Sonoma, Inc.*, No. CA 13-10931, 2014 WL 1347047 (D. Mass. Mar. 31, 2014)).

The U.S. District Court for the Northern District of California grants, in part, and denies, in part, the defendants' motion to dismiss in an action alleging that several of the defendant's products have been improperly labeled so as to amount to misbranding and deception in violation of California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumers Legal Remedies Act ("CLRA"). The court notably held that numerous courts in the district have rejected the idea that unfair competition claims based on "natural" type labels are expressly preempted by FDA regulations and, thus, "[p]ermitt[ed] a factual determination to go forward with respect to whether the challenged 'natural' labels in this case would deceive a reasonable consumer is not akin to defining FDA policy, but rather is a finding of fact with respect to this particular plaintiff and product, and would not risk undermining the agency's expertise in this area." The court also stated that, for all claims under the UCL that arise from deceptive advertising, the plaintiff must plead reliance sufficient to meet Fed. R. Civ. P. 9(b) and show that "members of the public are likely to be deceived." Moreover, where a court can conclude as a matter of law that alleged misrepresentations are not likely to deceive a reasonable consumer, courts have dismissed claims under the UCL, FAL, and CLRA. In part, because the plaintiff failed to explain what a reasonable person would believe evaporated cane juice to be, dismissal, in part, was appropriate. (*Pratt v. Whole Foods Market California, Inc.*, No. 5:12-CV-05652, 2014 WL 1324288, (N.D. Cal. Mar. 31, 2014)).

The U.S. District Court for the Northern District of California grants the defendant's motion to dismiss in a class action alleging that the defendant improperly labeled several of its products, which amounts to misbranding and deception in violation of California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumers Legal Remedies Act ("CLRA"). The court began its analysis by noting that, to satisfy the injury-in-fact requirement for unfair competition claims, "courts in California require that plaintiffs demonstrate the purchase of products

as a result of deceptive advertising." To plead actual reliance, the "plaintiff must allege that the defendant's misrepresentations were an immediate cause of the injury-causing conduct." While courts are split as to whether actual purchase is required to establish the requisite injury-in-fact, many courts in the district have found that claims regarding unpurchased products similar to the plaintiff's do not survive a motion to dismiss. For that reason, the court dismissed with leave to amend. (*Leonhart v. Nature's Path Foods, Inc., No. 5:13-CV-0492,* 2014 WL 1338161, (N.D. Cal. Mar. 31, 2014)).

The U.S. District Court for the Western District of Kentucky grants defendant General Motors LLC's ("GM") motion to dismiss the plaintiff's putative class action alleging concealment of an antifreeze leakage defect. Plaintiff brought several claims for relief, including claims under the Kentucky Consumer Protection Act and the state's unfair trade practice laws on behalf of a purported nationwide class of individuals and entities that purchased or leased a model year 2011 or newer "Chevrolet Cruze." The court dismissed all counts and explained that the Kentucky Consumer Protection Act claim was time barred, the unfair trade practice claim did not satisfy Fed. R. Civ. P. 9(b)'s specificity requirement, GM's marketing and advertising materials did not create express warranties, and plaintiff failed to provide GM with an opportunity to cure before filing a Magnuson-Moss Warranty Act claim. (*Mitchell v. Gen. Motors LLC*, No. 3:13-CV-498, 2014 WL 1319519 (W.D. Ky. Mar. 31, 2014)).

The U.S. District Court for the Western District of Missouri grants a defendant's motion for judgment on the pleadings, in an action where the plaintiff alleged that the defendant violated the Missouri Merchandising Practice Act by using false advertising and misrepresentations to sell gasoline. The plaintiff claimed that the defendant's practice of pumping higher-grade gasoline through the same pump that it used for lower-grade gasoline constituted false advertising, by supplying low-grade gasoline to consumers who paid for a higher grade. First, the court found that the plaintiff's claims were preempted by the Automotive Fuel Rating and the Petroleum Marketing Practices Act, which regulates certification and posting requirements for the octane labeling on gasoline pumps. Alternatively, even if the claims were not preempted by federal law, the court found that Missouri law provides a safe harbor from liability, because it expressly allows the type of gasoline pump as a permissible device for gasoline dispensing. Thus, the plaintiff could not use the Missouri Merchandising Practice Act for conduct "permitted and highly regulated" under Missouri law. (*Johnson v. MFA Petroleum Co.*, -- F. Supp. 2d --, No. 4:11-CV-00981, 2014 WL 1292453 (W.D. Mo. Mar. 28, 2014)).

The U.S. District Court for the Southern District of New York, in a consumer class action lawsuit challenging natural advertising claims brought under the New York statutory and common law, dismisses the plaintiff's unjust enrichment claim but otherwise denies defendant Johnson & Johnson's motion to dismiss. The plaintiff challenged Johnson & Johnson's Aveeno "Active Naturals" brand, claiming that the name implied the product was made exclusively from natural ingredients when, in fact, the product label revealed numerous synthetic ingredients. The court rejected the defendant's federal preemption argument on the grounds that FDA regulations did not require Johnson & Johnson to use the term "natural" in its brand name. The court also declined to dismiss the case on primary jurisdiction grounds because courts are "eminently well suited" to entertain false advertising cases, and the FDA has not begun promulgating rules concerning the use of "natural" in cosmetic advertising. Moreover, the court rejected the defendant's argument that the

plaintiff failed to adequately plead that its "natural" brand name was misleading because the product's ingredient label dispelled the notion that the product contained only natural ingredients. However, the court dismissed the plaintiff's unjust enrichment claim as improperly duplicative of its other tort claims. (*Goldemberg v. Johnson & Johnson Consumer Cos.*, No. 13-cv-3073, 2014 WL 1285137 (S.D.N.Y. Mar. 27, 2014)).

The U.S. District Court for the Northern District of California denies the defendant's motion to dismiss claims brought under California's False Advertising Law, Unfair Competition Law, and Consumer Legal Remedies Act, arising out of the plaintiff's allegation that General Mill's "Nature Valley" products are not "100% Natural" due to the presence of preservatives and genetically modified organisms. General Mills argued that the plaintiff failed to meet the statutory requirement of demonstrating deception of a "reasonable consumer." The court denied this argument, finding that the product's individual wrappers and box, all labeled as "natural," but containing highly processed ingredients, were sufficient to deceive a reasonable consumer under California's consumer protection laws. Further, the terms "100% Natural" and "All Natural" were not mere puffery because the terms referred to a specific characteristic of the product, and the court held that the defendant could not escape a misrepresentation claim by including a correct list of their products' ingredients on the wrapper. (*Bohac v. Gen. Mills, Inc.*, No. 12-cv-05280, 2014 WL 1266848 (N.D. Cal. Mar. 26, 2014)).

The U.S. District Court for the Northern District of California denies the defendant-food manufacturer's motion to dismiss a class action complaint, alleging that General Mills' ("GM") labels stating "100% Natural" violated the state consumer protection laws because the products contain genetically modified organisms and synthetic ingredients. The court denied GM's motion, finding that the plaintiff satisfied the reasonable consumer test in his allegations because the representations were affirmative, specific, and factual and not puffery. The court found that GM's argument that the ingredient list cleared up any possible misconception unavailing. The court also found that the plaintiff had standing to challenge the representations on products he did not purchase because the 29 other products carried the same "100% Natural" label. The court found GM's argument – that variations between the ingredients and labeling of those products – unpersuasive because GM failed to demonstrate that the differences were sufficient enough that the products were not "substantially similar". (*Rojas v. Gen. Mills, Inc.*, No. 12-cv-05099, 2014 WL 1248017 (N.D. Cal. Mar. 26, 2014)).

The U.S. District Court for the Central District of California, in a putative class action alleging violations of California's False Advertising Law, Unfair Competition Law, and Consumer Legal Remedies Act, grants the defendant's motion for decertification. Plaintiffs purchased a "Pom Wonderful" 100% juice product between 2005 and 2010. POM Wonderful LLC ("Pom") argued that the plaintiffs failed to show commonality and predominance in the issues of damages, and that the plaintiffs' damage models were methodologically invalid. The court rejected the plaintiffs' "Full Refund" model because it ignored the statutory principal of allowing restitution, rather than full damages after subtracting the value received from the product. The court also rejected the plaintiffs' "Price Premium" model, which reduced the price to account for the assumption that without the misrepresentation, Pom's products would cost less. This model depends on a "fraud on the market" theory, which the court found was irrelevant in the calculation of damages. Because the plaintiffs failed to establish why Pom's higher price resulted from their misrepresentations, their alleged

damages were not linked to a class-wide legal theory. Further, the misrepresentations were not on the purchased product and, therefore, class members could not be ascertained. (*In re Pom v. Wonderful LLC*, No. MDL No. 10-02199, 2014 WL 1225184 (C.D. Cal. Mar. 25, 2014)).

The U.S. District Court for the Northern District of California grants in part and denies in part defendant StarKist Co.'s motion to dismiss the plaintiff's class action claims for breach of express and implied warranties, unjust enrichment, negligent misrepresentation, fraud, and violations of California's Consumer Legal Remedies Act ("CLRA"), Unfair Competition Law ("UCL") and False Advertising Law ("FAL"). Plaintiff alleged that the defendant's cans of tuna were under-filled and substantially underweight. The court held that the California state law claims were not expressly preempted by federal Food, Drug, and Cosmetic Act and under-filling claims were not within special competence of the FDA as required for the primary jurisdiction doctrine. The court dismissed the unjust enrichment claim because it was duplicative of claims under the CLRA and UCL, but allowed the complaint to proceed under all other claims. The court explained that the complaint sufficiently had alleged both reliance and deception required for the CLRA, UCL and FAL claims, sufficiently stated claims for breach of express and implied warranty of merchantability, pled fraud with sufficient particularity, and the plaintiff had standing to bring claims based on products he had not purchased. (*Hendricks v. StarKist Co.*, No. 13-cv-729, 2014 WL 1244770 (N.D. Cal. Mar. 25, 2014)).

The U.S. District Court for the Northern District of California grants defendants' Odwalla, Inc. and The Coca-Cola Company's motion to dismiss in part and stayed the action. Plaintiffs alleged violations of California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumers Legal Remedies Act ("CLRA") California's Sherman Food, Drug, and Cosmetic Law ("Sherman Law"), and the federal Food Drug and Cosmetics Act ("FDCA") on behalf of putative classes of purchasers of the defendants' beverage products. Specifically, the plaintiffs allege that the defendants currently market a number of beverages and energy bars that list **"**Evaporated Cane Juice**"** or **"**Organic Evaporated Cane Juice**"** as an ingredient. Plaintiffs allege that all such products are misbranded because the use of the term **"**Evaporated Cane Juice**"** is a violation of federal and California food labeling laws. Applying the doctrine of primary jurisdiction, the court stayed the action. It noted that the plaintiffs' claims turn on the question of whether the products are "misleading" in the sense that they are considered "misbranded" under the federal food labeling laws, not on whether the labels are misleading in a general legal sense. In other words, the determination whether the product labels are misleading is governed entirely by their compliance with the federal regulations in this area. A stay of the action based on the primary jurisdiction doctrine was, therefore, appropriate because of the FDA's recent action with respect to **"**Evaporated Cane Juice**"** clearly indicates that the agency is exercising its authority in the area. Because the FDA has revived its review of the **"**Evaporated Cane Juice**"** issue, the court found that the FDA's position on the lawfulness of the use of that term is not only "not settled," it is also under active consideration by the FDA. Any final pronouncement by the FDA in connection with that process almost certainly would have an effect on the issues in the instant litigation. (*Reese v. Odwalla, Inc.*, No. 13-cv-947, 2014 WL 1244940 (N.D. Cal. Mar. 25, 2014)).

The U.S. District Court for the Central District of California denies the parties' cross-motions to determine whether Welch's label constitutes a "health claim" and dismisses the action without prejudice under the doctrine of primary jurisdiction. Plaintiff filed a first amended complaint

alleging violations of California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumers Legal Remedies Act ("CLRA"), and California common law on behalf of a putative class of purchasers of Welch's "100% Grape Juice" product. Specifically, the plaintiff alleged that the label of Welch's juice product label contains the message, "Helps Support a Healthy Heart" displayed inside or near a heart symbol as well as another claim – "As part of a healthy diet and active lifestyle, Welch's 100% Grape Juice, made with Concord grapes, helps support a healthy heart" (the "Heart Health Label"). Plaintiff contends that the Heart Health Label is a health claim. According to the plaintiff, the defendant cannot make such a claim because the Heart Health Label does not fall under any of the categories established by the FDA. Defendant argued that the Heart Health Label cannot constitute a health claim because it lacks any reference to a disease or health-related condition. Further, it contended that, because the Heart Health Label is a structure/function claim, it cannot simultaneously be a health claim since the two classifications are mutually exclusive. Noting that the parties submitted "compelling arguments" on the health claim issue and the primary jurisdiction issue, the court found that invocation of the primary jurisdiction doctrine was appropriate under the four factor test in *U.S. v. General Dynamics Corp*., 828 F.2d 1356, 1362 (9th Cir. 1987). In finding that the four factors in *General Dynamics* were met, the court determined that dismissal without prejudice, as opposed to staying the case pending referral to the administrative agency, was appropriate and would not unfairly disadvantage the plaintiff given that the statute of limitations under the consumer laws in question provided an "ample opportunity" to bring his claims against defendant again once the FDA furnished its response to the plaintiff's citizen petition. (*Haggag v. Welch Foods, Inc.*, No. 13-cv-00341, 2014 WL 1246299 (C.D. Cal. Mar. 24, 2014)).

The U.S. District Court for the Southern District of Florida denies in part and grants in part the defendant-cooking oil manufacturer's motion to dismiss a class action complaint. The plaintiff alleged that the defendant's "all natural" claim on the label of its cooking oil violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), the state false advertising statute, was a breach of an express warranty, and constituted unjust enrichment because the oils were made from genetically modified plants or genetically modified organisms. The court found the complaint satisfied the pleading standard of Fed. R. Civ. P. 9(b) with respect to the FDUTPA claim. The court also found the plaintiff's claims were not preempted by federal law because the FDA has declined to address the question of whether bioengineered foods may be labeled "all natural". The court further found that whether the plaintiff has standing to bring claims on behalf of products she did not purchase is an issue for class certification. However, the court held that the plaintiff failed to state a claim for breach of express warranty because she failed to state that notice of the breach was given to the seller. (*Randolph v. J.M. Smucker Co.*, No. 13-80581, 2014 WL 1018007 (S.D. Fla. Mar. 14, 2014)).

The U.S. District Court for the Northern District of California denies in part and grants in part the defendant-tea company's motion to dismiss a consumer class action, which alleged that the defendant fraudulently labels and advertises its tea products as "rich in" and a "good source" of healthful antioxidants. Plaintiff alleges that the defendant's labeling does not comply with federal labeling law and its identical California counterpart, the Sherman Law, and the labels are, therefore, false and deceptive under California consumer protection law. Plaintiff purchased four of the defendant's products, but seeks to represent a consumer class relating to 28 products. According to the court, different ingredients among the 28 teas is not determinative, and the plaintiff is not

required in the complaint or on a motion to dismiss to "pars[e] and compare[e] the labels of 28 products." The court ruled that the plaintiff has standing to sue on all 28 tea products because the plaintiff alleges that each is labeled similarly and all the products purportedly are made from the same plant and differ only in flavor. The court also ruled that plaintiff has Article III standing because he has alleged that the product he received is not the product as labeled and advertised. Moreover, the plaintiff has statutory standing because he has alleged that he relied on the alleged false labeling and advertising in his purchasing decisions, and paid money for the tea products. Significantly, the court ruled that the plaintiff must allege reliance – even on an "unlawful" prong claim under California's Unfair Competition Law ("UCL") – because his claims are ultimately grounded in fraud. Because the plaintiff never alleged that he relied on the defendant's website statements, those allegations were dismissed. The court also held that express federal preemption does not apply to the plaintiff's claims because the claims are based on California's Sherman Law, which imposes requirements that are identical to federal labeling law, and the claims, therefore, are not attempting to impose requirements greater than or different from federal labeling law. Moreover, the primary jurisdiction doctrine did not apply because food false advertising issues are well within judicial competence and the FDA has shown no interest in handling these issues. The court dismissed claims challenging statements that the products are "healthful" because the plaintiff failed to allege how they violate the law or are deceptive, but the plaintiff sufficiently alleged that the "antioxidant" labeling statements do violate the law and, therefore, his "unlawful" prong claim survives. The court concluded that the plaintiff failed to sufficiently allege a "fraudulent" prong claim, however, because violation of labeling law is not synonymous with deception, and the plaintiff did not otherwise satisfy the elements of deception. Plaintiff also failed to sufficient allege an "unfair" prong claim because the labels are not alleged to violate an established public policy and the plaintiff failed to allege harm that outweighs the utility of the defendant's conduct. Plaintiff's California Consumer Legal Remedies Act claim was held to be deficient because he failed to provide the pre-litigation notice required under the statute. Finally, the plaintiff's California False Advertising Law claim was dismissed for the same reasons that the UCL "fraudulent" and "unfair" claims were dismissed. (*Victor v. R.C. Bigelow, Inc*., No. 13cv2976, 2014 WL 1028881 (N.D. Cal. March 14, 2014)).

The U.S. District Court for the Northern District of California grants in part and denies in part the defendant's motion to dismiss the plaintiffs' second amended complaint, which alleged misbranding of baked goods that the plaintiffs had purchased, as well as of baked goods that the plaintiffs had not purchased but which they claimed were substantially similar to the purchased products. Defendant argued that the plaintiffs lacked standing to pursue their claims on the unpurchased products because they failed to show that the unpurchased products were sufficiently physically similar to the purchased products. Analyzing a number of previously decided cases within the District, the court held that "[w]hether a claim for a purchased product is coextensive with a claim for an unpurchased product does not necessarily turn on whether a product is physically similar to an unpurchased one. It also depends upon the nature of the claim at issue and the nature of the injury suffered by the consumers who purchased the allegedly mislabeled products." In analyzing the specific products at issue, the court found that the plaintiffs had standing to pursue the following claims for unpurchased products: (1) claims regarding the defendant's use of the phrases "good source" and "excellent source" of whole grains in violation of FDA regulations; (2) claims regarding the defendant's purported violation of the FDA's standard of identity for bread by adding coloring to the product; (3) claims regarding the labeling of products as "whole wheat" when those products allegedly contained

non-whole wheat flour; and (4) claims regarding the use of the American Heart Association's "Heart-Check" mark without a disclosure that the mark was a paid "endorsement." In finding that the plaintiffs had standing to pursue these claims, the court held that the "injury allegedly suffered by plaintiffs is identical to the injury suffered by consumers who purchased the other products," and that "potential differences between the products' labels or compositions would not impact the legal analysis of the claims." The court granted the defendant's motion to dismiss the plaintiff's claim premised on the allegation that the labels' inclusion of the terms "fresh" and "baked daily" could be misleading because, based on the relative location of those words, consumers could read them as "baked fresh daily" which would be false and misleading. In dismissing this claim with prejudice, the could held that consideration of each separate products' label would be required and that a fact-specific analyses of each product would be required because "differences in the products themselves . . . could impact whether a 'reasonable consumer' would be misled." (*Ang v. Bimbo Bakeries USA, Inc.*, No. 13-cv-01196, 2014 WL 1024182 (N.D. Cal. Mar. 13, 2014)).

The U.S. District Court for the Eastern District of Missouri dismisses the plaintiff's class action complaint based on the sale of prescription eye drops in volumes in excess of the amounts needed to complete a course of treatment. Plaintiff brought claims under, among other things, the Missouri Merchandising Practices Act. Defendants Alcon Laboratories Inc. and Alcon Research, Ltd. manufactured and sold the prescription eye drops "Moxeza," "Vigamox," and "Nevanac" for treatment of conditions such as bacterial conjunctivitis and post-surgical inflammation. Plaintiff alleged that the defendant knew that the FDA-approved sample bottles of the medications were sufficient for consumers to complete typical prescriptions and forcing plaintiffs to purchase larger volume bottles violated Missouri law. The court dismissed the plaintiff's Missouri Merchandising Practices Act claim because the plaintiff did not allege that the defendants were precluded from charging the same price for both the sample and larger size bottles. Moreover, the plaintiff cited no authority that a drug manufacturer's choice of volume fill was an unfair practice. (*Carter v. Alcon Labs., Inc.*, No. 4:13CV00977, 2014 WL 989002 (E.D. Mo. Mar. 13, 2014)).

The U.S. District Court For the Northern District of California denies defendant Wallaby Yogurt Co.'s ("Wallaby") motion to dismiss but strikes the plaintiffs' prayer for injunctive relief. Plaintiffs filed a first amended complaint alleging violations of California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumers Legal Remedies Act ("CLRA") on behalf of putative nationwide and California classes of purchasers of 17 different kinds of Wallaby yogurt. Plaintiffs alleged that Wallaby yogurt products are misbranded because they list "evaporated cane juice" sometimes modified by the term "organic" as a listed ingredient, and that Wallaby does so to **"**make its products appear healthier than a product that contains 'added sugar' as an ingredient," allowing it "to increase sales and to charge a premium." Wallaby sought dismissal of the complaint on the grounds that the plaintiffs lacked statutory standing; the plaintiffs did not have standing to challenge products that they did not purchase; they lacked standing to obtain injunctive relief; and the plaintiffs failed to state a claim for relief under the UCL, FAL, and CLRA. The court, however, held that the plaintiffs had statutory standing because they adequately showed reliance by alleging that they were "health conscious" consumers that relied on the allegedly misleading "evaporated cane juice" statement on the product label in purchasing the products, and would not have purchased the products at the premium price paid had they known the truth. The court held it was not implausible for the reasonable consumer to equate "evaporated cane juice" with no added sugar. Wallaby also argued that the plaintiffs could not challenge products that they did not purchase. The

court, citing a split among judges in the Northern District of California on this issue, held that the "substantially similar" product test should apply to the question of the plaintiffs' standing to challenge products that they did not purchase. The court determined that plaintiffs had standing as to products they did not purchase because the alleged misrepresentation is identical across all challenged products and will cause the same harm. Wallaby also argued that the plaintiffs lack standing to seek injunctive relief because they now know what "evaporated cane juice" is and cannot be harmed again in the future. The court, again noting a split among judges in the Northern District, held that injunctive relief required a showing of a likelihood of future harm and, therefore, was not available because the plaintiffs cannot plausibly allege that they would purchase the challenged products in the future if they were properly labeled. Plaintiffs could only pursue claims for damages. Finally, the court determined that the plaintiffs stated a cause of action under the unlawful, unfair, and fraudulent prongs of the UCL. Because the standard for deceptive practices is the same under the FAL and CLRA, the court also determined that the plaintiffs stated a claim under those statutes. (*Morgan v. Wallaby Yogurt Co.*, No. 13-cv-00296, 2014 WL 1017879 (N.D. Cal. March 13, 2014)).

The U.S. District Court for the Northern District of California, in a putative class action alleging breach of contract as well as violations of California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and the Consumer Legal Remedies Act ("CLRA"), grants in part and denies in part the plaintiffs' motion for class certification. Plaintiffs alleged that the defendant, Safeway, who delivers groceries from online orders, changed its price formula in a way that was false and misleading to consumers. The court found the plaintiffs failed to prove their burden of numerosity, commonality, typicality, and adequacy for each of their statutory claims (the UCL, FAL, and CLRA) because the vast majority of customers did not view the alleged misrepresentations in the online "Special Terms Agreement." The court refused to permit certification based on the fact that the customers clicked a box saying they agreed to the Special Terms because the statutes require actual viewing of the misleading statement. But the court did certify a class limited to the plaintiffs' breach of contract claim because the interpretation and scope of the Service Agreement applies to all members of the class, and predominates over individual issues. (*Rodman v. Safeway*, No. 11-cv-03003, 2014 WL 988992 (N.D. Cal. Mar. 10, 2014)).

The U.S. District Court for the Eastern District of New York grants in part and denies in part the defendant's motion to dismiss the plaintiffs' class action complaint. Plaintiffs alleged that defendant HSBC Bank USA improperly re-sequenced debit card transactions in largest-to-smallest order in order to maximize overdraft fee revenue. Plaintiffs brought claims on behalf of nationwide and state-specific subclasses for violations of various state laws, including California's Consumers Legal Remedies Act ("CLRA"), Unfair Competition Law ("UCL"), and False Advertising Law ("FAL"). The court held that the plaintiffs' state law claims were not preempted by the National Bank Act nor regulations promulgated by the Office of the Comptroller of the Currency. The court also denied the defendant's motion to dismiss the FAL and UCL claims, finding that the plaintiffs adequately alleged that reasonable consumers were likely to be deceived by the defendant's overdraft fee practice. However, the court did dismiss, on standing grounds, the claims under laws of the states to which the plaintiffs lacked a connection, and the CLRA claim, as well, because the providing of overdraft services was not a good or service under the Act. (*In re HSBC Bank, USA, N.A., Debit Card Overdraft Fee Litg.*, -- F. Supp. 2d --, 2014 WL 868827 (E.D.N.Y. Mar. 5, 2014)).

The U.S. District Court for the District of Massachusetts grants defendants Forest Laboratories, Inc. and Forest Pharmaceuticals, Inc.s' motion to dismiss the plaintiffs' class action claims alleging violations of California's Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law on the basis that the claims were barred by the California safe harbor provision. Plaintiffs alleged that the defendants misrepresented and concealed material information about the efficacy of "Lexapro" in treating major depressive disorder in pediatric patients. The court concluded that the FDA approval of the defendants' drug label protected them from liability under California state consumer protection law for false or misleading statements or omissions within that label. The court explained that the safe harbor provision, in essence, reflects a judgment by the California Supreme Court that California's unfair competition law should not be employed to second guess legislative judgments. (*In re Celexa and Lexapro Mktg. and Sales Practices Litig.*, No. 13-11343, 2014 WL 866571 (D. Mass. Mar. 5, 2014)).

The U.S. District Court of the Southern District of Florida denies the plaintiff's motion for class certification in a nationwide class action against the defendant-marketer and manufacturer of a dietary supplement that advertised that its product would "burn fat" and help achieve rapid fat loss. The court found that the plaintiff satisfied Fed. R. civ. P. 23(a); however, it found that the proposed class action did not satisfy Rule 23(b)(3) because the class was unmanageable. First, the plaintiff failed to present any practical method of verifying membership in the class – there was no central record of purchasers and customers were unlikely to retain proof of purchase. Second, the claims of the nationwide class action implicated the laws of multiple states, which required different proof of each claim depending on the location of the class member. Because of this, the trial would be unwieldy and these individual issues would overshadow common factual questions. (*Karhu v. Vital Pharms., Inc.*, No. 13-60768, 2014 WL 815253 (S.D. Fla. Mar. 3, 2014)).

The U.S. District Court for the Southern District of New York certifies a class in a suit alleging that the defendant misrepresented the nature of its olive oil in violation of New York General Business Law § 349 and the New Jersey Consumer Fraud Act. More specifically, the plaintiffs alleged that the defendant sold a product that was advertised as "100% olive oil" but was really a mixture of olive oil and pomace. (*Ebin v. Kangadis Food Inc.*, No. 13-CV-2311, 2014 WL 737960 (S.D.N.Y. Feb. 25, 2014)).

The U.S. District Court for the Northern District of California grants the defendant-Greek yogurt manufacturer's motion to dismiss a third amended consumer class action complaint with prejudice. Plaintiff brought claims for false advertising under California consumer protections laws, alleging that the defendant deceptively labeled its products by listing evaporated cane juice ("ECJ") as the name of a cane-based sweetener. Plaintiff alleged that the "common or usual name" of ECJ is dried cane syrup. Plaintiff also alleged that defendant deceptively represented that its products were made with "only natural ingredients," which plaintiff claimed was false because the challenged ingredients were added for color, including fruit and vegetable juice. In analyzing the claims, the court confirmed prior rulings that unlawful-prong claims under California's Unfair Competition Law must include allegations that plaintiff relied on the challenged labeling statement, not simply that the labeling statement violates labeling law. After evaluating how the plaintiff's claims changed over the course of the case, the court ruled that it was not plausible that plaintiff could realize that "dried cane syrup" was a form of a cane-based sweetener, but that "evaporated cane juice" was not. The court found it relevant that the plaintiff never alleged what she thought evaporated cane juice was if

not a cane-based sweetener, and concluded that, because the plaintiff did not plausibly allege how she relied on the ECJ or "natural" labeling statements, she did not have standing to pursue the claims. Moreover, the plaintiff's allegations that she thought ECJ was somehow healthy because it included the word "juice" were undermined by plaintiff's other allegations that juice is often present in products as an added sugar. Regarding challenges to the "natural" labeling statements, the court previously found that the plaintiff's original allegation – that the vegetable and fruit juice were added for color – was not plausible because the labeling (which plaintiff alleged she read) explicitly disclosed that the juice (which was not alleged to be not natural) was added for color. Plaintiff's amended allegations stated that the added juices were not natural because they were more than minimally processed, but the court ruled that the allegations were too conclusory. Moreover, because the plaintiff had several opportunities to allege exactly why the added colors were not natural, and to provide factual allegations in support, the failure to do so in the third amended complaint was fatal. (*Kane v. Chobani, Inc*., -- F.Supp.2d --, No. 12-CV-02425-LHK, 2014 WL 657300 (N.D. Cal. Feb. 20, 2014)).

The U.S. Court of Appeals for the Ninth Circuit reverses the granting of the defendant's motion to dismiss the class action complaint, which alleged that the defendant-food company violated California law by misrepresenting the sodium content of sunflower seeds by focusing exclusively on kernels. The plaintiff alleged that, by reporting on its package labeling only the salt from the kernel of a sunflower seed and not the shell, the defendant violated California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law. The Ninth Circuit began its decision by noting, "Some days we are called upon to consider such profound issues as eleventh-hour death penalty appeals, catastrophic threats to the environment, intense and existential questions of civil and human rights, and the most complicated, controversial problems in civil, criminal and administrative law. Today we consider the coating on sunflower seeds." The Ninth Circuit reversed the district court's dismissal order primarily on the ground that a determination of whether a business practice is deceptive will usually be a question of fact not appropriate for decision on a motion to dismiss. *(Lilly v. ConAgra Foods, Inc*., No. 12-55921, 2014 WL 644706 (9th Cir. Feb. 20, 2014)).

The U.S. District Court for the Northern District of Texas granted a motion to dismiss a putative class action filed against a major U.S. hotel chain and online travel agents for alleged violations of antitrust law and unfair and deceptive advertising claims. The plaintiffs alleged that the defendants conspired to uniformly adopt resale price maintenance agreements containing "most favored nation" clauses in an effort to eliminate price competition among hotel room booking websites. Additionally, the plaintiffs claimed that publication of "best price" or "lowest price" guarantees on the websites were deceptive, because the online travel agencies knew that the "best" price was the same fixed rate offered across all hotel booking websites. The court found that the statements, although literally true (consumers received the best price available online), were deceptive because a reasonable consumer of ordinary intelligence could "plausibly find that the advertisement falsely implies that the lowest or best price offered is being set through Defendants' competitive discounting efforts, rather than contractual assurances." Despite this, the court granted the defendants' motion to dismiss under the theory that plaintiffs did not allege proximate causation: even without the defendant's advertisements that the rates were the best available online, the plaintiffs still would be in the position of paying the defendant's prices, given that room prices were the same across the entire online bookings market. (In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig., No. 3:12-CV-3515-B, 2014 WL 626555 (N.D. Tex. Feb. 18, 2014)).

The U.S. Judicial Panel on Multidistrict Litigation consolidates the putative class actions before it in the District of New Jersey. The cases before the panel involved allegedly false and misleading advertising claims regarding AZEK decking products, specifically about the company's claims of maintenance and durability. Plaintiffs in the Southern District of Illinois opposed centralization on the basis that their case also involved AZEK railing. Despite the existence of a different product, the panel coordinated the actions because of common factual questions involving the advertising claims about the maintenance and durability of the decking products. The District of New Jersey was selected because the first filed action had been proceeding there for over a year and it was closer to the defendant's headquarters in Scranton, Pennsylvania. (*In re AZEK Bldg. Prods., Inc. Mktg. and Sales Practices Litig.*, -- F. Supp. 2d --, 2014 WL 690628 (J.P.M.L. Feb. 18, 2014)).

The U.S. District Court for the Northern District of California grants the defendant's motion to dismiss the plaintiff's complaint where the plaintiff failed to allege her claims with the heightened particularity required by Fed. R. Civ. P. 9(b). Plaintiff sued the defendant, Turtle Mountain, a natural foods company, on behalf of a putative class, alleging that defendant's dairy product labeling listed "organic evaporated cane juice" or "organic dehydrated cane juice" as ingredients instead of their common names – "sugar" or its equivalent, ″dried cane syrup." In addition to alleging various regulatory and statutory violations, the plaintiff claimed that the defendant's labeling misled consumers into paying premium prices for inferior products in violation of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. The fatal error for the plaintiff was that all labels included in the complaint listed "sugar" or "sugars" as an included nutrient and contained the terms "sugar," "syrup," or "dextrose" in their ingredient lists. Thus, the plaintiff's own evidence literally negated her claim that she was misled into thinking the products did not contain sugar. Moreover, relying on its recent decision in *Kane v. Chobani,* which had very similar facts, the court noted that the plaintiff's interchangeable reference to "sugar" and its equivalent ″dried cane syrup" in the complaint betrayed her assertion that she did not know the truth about evaporated cane juice; the conflation of those terms suggested that the plaintiff understood that ″dried cane syrup″ was essentially "sugar." Moreover, there were no facts in the complaint to explain what she may have perceived as the difference between the terms "dried cane syrup" and "evaporated cane juice," or what she believed "evaporated cane juice" to be, if not sugar. (*Avoy v. Turtle Mt., LLC*, 2014 U.S. Dist. LEXIS 19241 (N.D. Cal. Feb. 14, 2014)).

The U.S. District Court for the Northern District of California denies the plaintiff's motion for class certification in a putative class action based on an allegedly misleading "all natural" representation on nutrition bars labels. The court found that the class representative had Article III standing to bring the claim because she alleged that she would not have purchased the nutrition bars but for the purported misrepresentation. However, the court found that the proposed class was not ascertainable. The defendant sold its products to retailers, not consumers; therefore, it had no records identifying the potential class. The court followed the reasoning of the Third Circuit Court of Appeals in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), which held that a class is not ascertainable if there is insufficient evidence to show that retailer records could be used to identify class members, and found that the plaintiff failed to present any method for determining class membership, let alone an administratively feasible method. (*Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907, 2014 WL 580696 (N.D. Cal. Feb. 13, 2014)).

The U.S. District Court for the District of Colorado denies the defendant's motion to dismiss a class action suit for violations of the Colorado Consumer Protection Act based on claims that the plaintiffs' 2013 Ford Escape SE averaged less mileage than advertised. Plaintiffs alleged that the defendant should have disclosed the represented mileage was only an EPA estimate and would vary. In its motion to dismiss, the defendant argued that the Energy Policy and Conservation Act and Federal Trade Commission regulations preempted the suit. The court rejected this argument, finding that Congress did not intend to regulate the entire field of vehicle fuel economy and that the regulations were limited to representations in the dealer's information book and stickers. Defendant further argued the suit should be dismissed because the advertisements complied with federal regulations. The court refused to dismiss because the EPA estimates, albeit correct, were presented as a guarantee. Finally, the court refused to abstain under the primary jurisdiction doctrine because the case was limited to the defendant's failure to disclose information to consumers, rather than the accuracy of the EPA estimates. (*Gilles v. Ford Motor Co.*, No. 13-CV-00357, 2014 WL 544990 (D. Colo. Feb. 12, 2014)).

The U.S. District Court for the Northern District of California, in a class action lawsuit brought under the California Organic Products Act ("COPA") and various California consumer protection statutes, denies the defendant-cosmetic manufacturer's motion for summary judgment. The court found that a previously closed investigation by the California Department of Health into the defendant's "organic" advertising claims under COPA was merely an informal inquiry, applying undefined processes and based on *ex parte* submissions. The court held that such an informal agency action was not sufficient to preclude a subsequent class action lawsuit for injunctive relief and damages under COPA or the various other California consumer protections statutes. (*Brown v. Hain Celestial Group, Inc.*, No. 11-cv-3082, 2014 WL 556732 (N.D. Cal. Feb. 10, 2014)).

The U.S. District Court for the Central District of California, in a class action lawsuit involving tainted dog food asserting claims under the consumer protection laws of California and Texas, denies an individual plaintiff's motion for nationwide class certification on the basis that she failed to satisfy the predominance element of Fed. R. Civ. P. 23. The court concluded that the defendants had established that the consumer protection laws of the fifty states materially differed with respect to the circumstances of the case, and that the named plaintiff, herself, would be subject to different laws than class members in other states. For this same reason, the court also determined that the proposed class did not present a superior method of adjudicating the matter. (*Holt v. Globalinx Pet LLC*, No. 13-cv-41, 2014 WL 347016 (C.D. Cal. Jan. 30, 2014)).

The U.S. District Court for the Central District of California grants the defendant's motion to decertify the class and dismisses the action with prejudice. Plaintiff filed a class action complaint against defendant NaturalCare, alleging that NaturalCare misrepresented its homeopathic "RingStop" product in violation of California's Consumers Legal Remedies Act, False Advertising Law, and Unfair Competition Law. After commencing the action, and three months prior to filing her amended complaint, the plaintiff filed a Voluntary Petition for Chapter 7 bankruptcy. Plaintiff failed to advise her attorneys of the bankruptcy, list the instant action in her bankruptcy petition, and advise the court of the bankruptcy in her class certification motion. Seven months after the plaintiff filed for bankruptcy, the court granted the plaintiff's motion for class certification. Upon learning of the bankruptcy petition, NaturalCare moved to decertify the class on the grounds that the sole class representative lacked standing when she filed the operative complaint and motion for class

certification. The court stated that, while the plaintiff had constitutional standing because she suffered "injury in fact," she lacked "prudential standing" on the date that she filed for bankruptcy because the bankruptcy estate, not the plaintiff, was entitled to assert her claim against NaturalCare. Accordingly, the court vacated plaintiff's motion to substitute class representative as moot because the plaintiff lost her prudential standing prior to the operative complaint and the class certification order. Therefore, the class certification order was ineffective and the putative class members never acquired a legal status separate from the plaintiff. The court dismissed the first amended complaint with prejudice because the plaintiff's lack of standing could not be cured by amendment. (*Neal v. NaturalCare, Inc.*, No. CV 12-0531, 2014 WL 346639 (C.D. Cal. Jan 30, 2014)).

The U.S. District Court for the District of Kansas, in a subpoena enforcement suit arising out of a California false advertising class action, orders that a subpoena seeking the medical records of an individual plaintiff be quashed provided that the individual plaintiff stipulates in writing that she will not put her physical condition at issue or call any of her health care providers as witnesses at trial. The court determined that, where the individual plaintiff had challenged the advertised health benefits of Pom Wonderful, her personal health had nothing to do with whether Pom's advertising misled the class of plaintiffs. (*In re Pom Wonderful, LLC, Marketing & Sales Practice Litig.*, No. 13-mc-217, 2014 WL 333576 (D. Kan. Jan. 29, 2014)).

The U.S. District Court for the Southern District of New York dismisses a lawsuit filed by 34 former students at Yeshiva University High School for Boys against the school and its administrators, which included claims for false advertising under New York law. The former students, ranging in age from their late thirties to their early sixties, alleged that they had been sexually abused by employees of the school and/or a friend of one of the employees. The complaint alleged that the school and administrators were well aware of multiple acts of abuse by these individuals against other boys prior to the plaintiffs being victimized, but the school took no action; and, in response to complaints made by the plaintiffs while they were students, the school expressed disbelief, discouraged the students from pursuing the matter, and took no action against the abusers. In addition to claims for fraud, negligence, and violation of Title IX of the Education Amendments Act of 1972, the plaintiffs brought a claim for false advertising under Section 350 of New York's General Business Law because defendants marketed the school as a safe learning environment staffed by faculty members and administrators of high moral character, while knowing those representations were false. The court granted the defendants' motion to dismiss because the limitations period had expired decades earlier, and the claims did not fall under any exception to the statute of limitations (including the federal discovery rule, the state-law discovery rule, or the doctrine of equitable estoppel). The plaintiffs argued that their causes of action did not accrue until the publication of a 2012 interview with the university's former president, which brought the scope of the abuse and the school's knowledge of it to the plaintiffs' attention. The court disagreed, holding that the plaintiffs were aware of the abuse and the identity of their abusers at the time the alleged abuse occurred; the failure to warn of the risk of sexual abuse was not the kind of affirmative misrepresentation that can trigger equitable estoppel; and the state-law discovery rule (applicable only to fraud claims) did not apply because the fraud claim was incidental to the other claims. (*Twersky v. Yeshiva University*, -- F. Supp. 2d --, No. 13-CV-4679, 2014 WL 314728 (S.D.N.Y. Jan. 29, 2014)).

The U.S. District Court for the Northern District of California largely dismisses, without prejudice, the plaintiff's class action complaint, which alleged that the defendant-food manufacturer falsely

advertises its sauce and juice products as having "no sugar added." Following a particularly detailed comparison of the highly technical "no sugar added" labeling regulation with the plaintiff's allegations, the court rejected the plaintiff's argument that the inclusion of juice concentrate is prohibited in "no sugar added" products, rejected the plaintiff's allegations regarding "no added sugar" on products not labeled as not low or reduced calorie, and rejected the plaintiff's claims as to the product substitution exception on the "no sugar added" claim on sauce products. The court, however, did find that plaintiff sufficiently alleged that juice product substitutes did not contain added sugar, and, therefore, the allegations regarding the product substitution exception on the "no sugar added" claim on juice products were sufficient to allege a violation of the food labeling law. The court, then, ruled that under the "unlawful" prong of California's Unfair Competition Law ("UCL"), violation of the technical labeling law and the plaintiff's alleged reliance on the labeling statement were sufficient to state a claim without allegations that a reasonable consumer would be deceived. The court, however, dismissed the plaintiff's claims under California's False Advertising Law and Consumers Legal Remedies Act, as well as the claims under the "fraudulent" prong of the UCL, finding that plaintiff failed to explain how reasonable consumers would be misled by the labeling, even assuming a violation of labeling law. In other words, violation of labeling law is not synonymous with deception and false advertising. The court rejected the defendant's argument that the case should be dismissed based on the primary jurisdiction of FDA. The court also dismissed plaintiff's claim for negligent misrepresentation, finding that the deficiencies in the FAL, CLRA, and fraudulent prong of the UCL claims carried over to this claim. Finally, the court dismissed plaintiff's claims for injunctive relief because there are no allegations that the plaintiff intends to purchase the product in the future. (*Rahman v. Mott's LLP*, No. 13-cv-3482, 2014 WL 325241 (N.D. Cal. Jan. 29, 2014)).

The U.S. District Court for the Eastern District of Missouri grants the defendant-dog food manufacturer's motion to dismiss the plaintiff's putative class action complaint. The court held that the plaintiff failed to satisfy either Fed. R. Civ. P. 8's plausibility standard or Rule 9's specificity standard. Plaintiff alleged that he purchased the defendant's dog food and fed it to his dog. Shortly thereafter, the dog began to suffer various symptoms, including lethargy, bloody urine, and other issues. The plaintiff took the dog to the veterinarian, who advised plaintiff to purchase a medicated dog food instead of the food currently provided to the dog. The dog's condition improved shortly after receiving the medicated food. However, the plaintiff never pled that the veterinarian attributed the dog's issues to the defendant's food product as opposed to the myriad of other potential causes. Further, the plaintiff never pled with specificity how the alleged representations that the food was healthy and beneficial to dogs were deceptive or misleading, or how the plaintiff was exposed to the representations. Therefore, the court granted the motion to dismiss, with leave to amend the complaint. (*Miller v. Nestle Purina Petcare Co.*, No. 4:13-CV-283, 2014 WL 307271 (E.D. Mo. Jan. 28, 2014)).

The U.S. District Court for the Southern District of California denies the Iovate defendants' motion to dismiss, denies the retailer defendants motion to dismiss, and orders the plaintiffs to file a more definite statement as to the retailer defendants. The Iovate defendants moved to dismiss certain claims in the plaintiffs' second consolidated amended class action complaint ("SAC"). In the SAC, purchasers of the "Hydroxycut" dietary supplement products brought claims on behalf of a nationwide class of consumers under multiple state consumer protection statutes, among other things. Relying on Justice Stevens' concurring opinion in *Shady Grove Orthopedic Ass'n v. Allstate*

*Ins. Co.*, 559 U.S. 393 (2010), the Iovate defendants argued that the plaintiffs' claims under the consumer protection laws of Georgia, Louisiana, Montana, South Carolina, and Tennessee do not allow class actions and must be dismissed. Specifically, the Iovate defendants argued that under *Shady Grove*, the state provisions prohibiting class actions are found within the state consumer protection acts and, therefore, are so intertwined with state rights or remedies that application of Fed. R. Civ. P. 23 would violate the Rules Enabling Act. Because the Ninth Circuit has not yet voiced opinion on how to apply the *Shady Grove* decision, the court looked to pre-*Shady Grove* Ninth Circuit cases for guidance. While recognizing that the issue of whether state statutory provisions that prohibit class actions are "procedural" or "substantive" is a difficult question with no clear answer, the court concluded that application of Rule 23 to the plaintiffs' claims does not run afoul of the Rules Enabling Act, and the plaintiffs' claims are not subject to dismissal based on the state statute prohibiting class actions. The court denied the Iovate defendants' motion without prejudice. The retailer defendants moved to dismiss the plaintiffs' consumer protection claims on the ground that the plaintiffs failed to plead fraud with the particularly required by Rule 9(b). The court agreed that, as to the retailer defendants, the plaintiffs' SAC failed to meet the pleading requirements of Rule 9(b), and the plaintiffs' failure to specify the advertisements to which they were exposed prior to purchase was fatal to their consumer protection claims because they must allege that each retailer defendant made, adopted, or controlled representations that the plaintiffs heard or saw prior to purchasing the products. Plaintiffs argued that the retailer defendants are liable for whatever representations were made by the Iovate defendants because they were "aiders and abettors" of the deceptive advertising scheme. However, the court found that the plaintiffs' SAC failed to plead facts supporting an inference that the retailer defendants knew that the representations made by Iovate regarding the safety and efficacy of the Hydroxycut products were false. In the interest of moving the case along, however, the court ordered the plaintiffs to file a more definite statement instead of dismissing the claims against the retailer defendants. (*In re Hydroxycut Mktg. & Sales Practices Litig.*, MDL No. 09-md-2087, 2014 WL 295302 (S.D. Cal. Jan. 27, 2014)).

The U.S. District Court for the Central District of California dismisses fraudulent business practices and false advertising claims against video game publisher Take-Two Interactive. Plaintiffs, two purchasers of the publisher's "Grand Theft Auto V" video game, generally alleged that Take-Two Interactive misrepresented the game by advertising an online component subsequently not accessible until 13 days after the game's release. Plaintiffs argued that, but for the online component, they would not have purchased the game on release day. Plaintiffs claimed fraudulent, unlawful, and unfair business practices under California's Unfair Competition Law, and false advertising under the state False Advertising Law. The court – using similar analyses for both claims – dismissed the claims because the plaintiffs could prove neither likely misrepresentation nor actual misrepresentation. The court reasoned that the game packaging's online component section (1) did not specify "immediate" availability, and (2) disclaimed that the feature may not be available for all players. Moreover, because the packaging disclaimed that the component could be suspended or removed, the plaintiffs could not prove any substantial injury. (*McMahon v. Take-Two Interactive Software, Inc.*, No.13-02032, 2014 WL 324008 (C.D. Cal., Jan. 29, 2014)).

The U.S. District Court for the Northern District of California, in a putative class action alleging violations of California's Unfair Competition Law ("UCL") and Consumer Legal Remedies Act ("CLRA"), grants in part and denies in part the defendant's motion to dismiss. Plaintiffs alleged that the labeling for defendant's product "I Can't Believe It's Not Butter!" spray, which was labeled as

"0 Fat" and "0 Calorie," was false and misleading because the listed serving size was smaller than that customarily used by consumers. The court dismissed all serving size claims, finding the allegations to be preempted by the Federal Food, Drug and Cosmetic Act because federal regulations exclusively govern appropriate serving sizes for spray fats and oils. Plaintiffs also argued that the defendant failed to disclose that the spray contained trace amount of fats, arguing that it should have placed an asterisk next to the ingredient "soybean oil" with language disclosing that the ingredient is a fat. The latter claim aligned with current federal regulations and, therefore, was preempted. The court, however, held that the plaintiffs' pleadings under the UCL and CLRA were sufficient under Fed. R. Civ. P. 9(b) because the plaintiffs stated that they read the back label prior to purchasing the product. However, the court dismissed all other non-California state consumer protection law claims because the plaintiffs alleged only that they purchased the product in California, and, thus, lacked standing under other states' law. (*Pardini v. Unilever United States, Inc.*, No. 13-1675, 2014 WL 265663 (N.D. Cal. Jan. 22, 2014)).

The U.S. District Court for the Western District of Kentucky denies the plaintiff's motion for class certification against an automobile manufacturer. The plaintiff brought a putative class action against Ford alleging a violation of the Kentucky Consumer Protection Act ("KCPA") arising out of Ford's use of 2003 engines in its 2004 model trucks. The court denied class certification, finding that Fed. R. Civ. P. 23(b)(3) was not met because individual questions predominated. Specifically, the KCPA requires that the "good" be purchased primarily for personal, family, or household purposes and, even though the class was defined as "all persons who purchased the vehicles primarily for personal, family or household purposes," there still would need to be individualized inquiries of each class member into the "primary" reason for their purchases. (*Corder v. Ford Motor Co.*, No. 3:05-CV-00016-CRS, 2014 WL 199792 (W.D. Ky. Jan. 17, 2014)).

The U.S. District Court for the Northern District of California grants, in part, the defendant-baby food manufacturer's motion to dismiss a second amended nationwide consumer class action complaint, alleging false advertising under California consumer protection laws. Plaintiff purchased many of the defendant's food products, alleging that that all were intended for children under two years of age and that the labels violated federal and state labeling law. Plaintiff claimed she was entitled to various remedies because the products were unlawful to sell and, separately, because the labels were deceptive. In addition to bringing claims relating to products she purchased, the plaintiff also asserted similar challenges to allegedly substantially-similar products that she had not purchased. Plaintiff claimed that the defendant made "nutrient content claims" (or "NCCs") on the products' labels (*e.g.*, "excellent source of" various vitamins and minerals), even though according to federal and state labeling law, NCCs are not permitted on products specifically intended for children under two years of age. Plaintiff also alleged that defendant labeled the product with the NCC of having "no added sugar," but the labels did not – as required by federal and state labeling law – also include a statement referring the consumer to the high levels of calories in the products. Defendant challenged the complaint on several, separate grounds. The court ruled that the plaintiff did have standing to challenge non-purchased products that are substantially similar to those she did purchase, but that the complaint failed to allege how twelve categories of non-purchased products were substantially similar to the ones purchased. Accordingly, the court dismissed claims relating to these non-purchased products, and did so with prejudice because the plaintiff failed to cure the defect despite prior warning from the court. The court also dismissed claims based on statements on the defendant's website that plaintiff did not allege she viewed. Again, the dismissal was with

prejudice because plaintiff had had an opportunity to amend the complaint. The court further dismissed with prejudice the plaintiff's theory that the defendant had a "duty to disclose" the alleged illegality of its labels. Rejecting the plaintiff's theory of liability based strictly on mere alleged violation of labeling law, the court ruled "that actual reliance and injury are required to establish statutory standing under" the "unlawful prong" of California's Unfair Competition Law "whenever the underlying alleged misconduct is deceptive or fraudulent." The court ruled that the "essence" of the plaintiff's claims were that the labeling was deceptive and, therefore, the plaintiff must allege reliance and injury as a result of the alleged deceptive labels. However, the court determined that the plaintiff met her burden of alleging reliance and injury and did so with the requisite particularity required by Fed. R. Civ. P. 9(b). Defendant's argument that the plaintiff's allegations were not plausible – and therefore plaintiff lacked standing to bring the claims – raised disputes of fact "not appropriately resolved on a motion to dismiss." The court similarly rejected the defendant's parallel argument that the plaintiff failed to state a claim because the "reasonable consumer" would not be deceived. The court also rejected the defendant's argument that the "Healthy" labeling statements were puffery, concluding that the "Healthy" claims were sufficiently plausible, and whether a reasonable consumer could base claims on such statements required the development of a factual record. Defendant's argument that its labels actually complied with federal and state labeling laws was rejected because the plaintiff's contrary allegations – including citations to the U.S. Food and Drug Administration's own interpretation – were sufficient to proceed past the pleading stage, and the defendant's interpretation of labeling law was not "so plainly correct" as to allow the court to disregard the allegations of the FDA's own interpretation. "All [defendant] has established at this stage is that there is a dispute between the parties as to how to read the FDA's regulations." Finally, the court ruled that it was premature to dismiss the nationwide class allegations based on a *Mazza* argument, *i.e.*, that plaintiff may not apply California consumer protection laws to out-of-state purchases made by out-of-state consumers. (*Bruton v. Gerber Products Company*, No. 5:12-cv-02412, 2014 WL 172111 (N.D. Cal. Jan. 15, 2014)).

The U.S. District Court for the District of New Jersey grants defendant Vitamin Shoppe, Inc.'s motion to dismiss the plaintiff's class action complaint under Fed. R. Civ. P. 12(b)(6). Plaintiff filed the complaint alleging, among other things, violation of the New Jersey Consumer Fraud Act ("NJCFA") stemming from claims that the defendant's "True Athlete Training Formula" supplement could not deliver the promised results. Specifically the plaintiff alleged that the product's ingredients were ineffective and/or the instructed dosage was insufficient to achieve the results. In support of the allegations, the plaintiff recited various scientific studies about the efficacy of the active ingredients. In dismissing the complaint, the court stated that, while the plaintiff's scientific studies showed the ingredients were effective at a higher dosage, it did not stand that the lack of studies demonstrating efficacy a lower dosage meant the ingredients were ineffective. Such a leap of logic was not only a conclusory allegation, but a lack of prior substantiation was not, standing alone, actionable under the NJCFA. (*Hodges v. Vitamin Shoppe, Inc.*, No. 13-3381, 2014 WL 200270 (D.N.J. Jan. 15, 2014)).

The U.S. District Court for the Southern District of California, in a putative class action involving claims of false advertising under the California consumer protection statutes, denies the defendant-dietary supplement manufacturer's motion to dismiss and grants, in part, the defendant's motion to strike class allegations. The court rejected the defendant's argument that plaintiffs' complaint was based on a lack of substantiation theory, which all parties agreed was not cognizable under

California law. The court observed that the complaint cited "multiple specific scientific studies" allegedly contradicting the defendant's claim, which was sufficient to avoid dismissal on lack of substantiation grounds. The court also refused to dismiss the plaintiff's claims on the ground that plaintiff did not allege actually ingesting the supplement. The court ruled that plaintiff properly alleged economic injury by simply claiming that he would not have purchased the product absent the misrepresentation. With respect to the defendant's motion to strike class allegations, the court struck certain allegations referring to nationwide product purchases based on the agreement of the parties. (*Hesano v. Iovate Health Sciences, Inc.*, No. 13-cv-1960, 2014 WL 197719 (S.D. Cal. Jan. 15, 2014)).

The U.S. District Court for the Central District of California grants the plaintiff's motion for class certification and motion to file a fourth amended complaint. Plaintiff moved to certify a class of California residents who purchased the defendant's "Elations" brand glucosamine dietary supplement juice product, which bore labels and/or packaging containing the statements "clinically-proven formula" and/or "clinically proven combination" of ingredients Plaintiff alleges that Elations is not "clinically-proven" to have any impact on joints and, thus, the defendant's advertising claims are false and deceptive under the California Unfair Competition Law ("UCL"), Consumer Legal Remedies Act ("CLRA"), and False Advertising Law ("FAL"). The court rejected the defendant's arguments against class certification, namely, that the proposed class is not ascertainable; the plaintiff was not typical because of his medical history; and that the plaintiff cannot establish predominance under Fed. R. Civ. P. 23(b)(3) because: (1) certain unnamed class members may lack standing; (2) there are individualized issues of reliance as to the "clinically proven" claims; (3) a classwide presumption of materiality was not appropriate because some consumers were satisfied with the product; and (4) individual damages issues would overwhelm common questions of law and fact. The court's decision with respect to ascertainablity is notable. The court refused the defendant's argument to apply the reasoning of the Third Circuit's decision in *Carrera v. Bayer*, 727 F.3d 300 (3d Cir. 2013), which held that a defendant has a due process right to defend against claims of class membership, which must be established through proof of purchase evidence or a defendant's own purchase records. The court noted that *Carrera* was not the law of the Ninth Circuit, and the decision has the potential to "eviscerate[] low purchase price consumer class actions in the Third Circuit." The court stated that in the Ninth Circuit, however, "it is enough that the class definition describes 'a set of common characteristics sufficient to allow' a prospective plaintiff to 'identify himself or herself as having a right to recover based on the description.'" It is also of note that the court rejected the defendant's "satisfied purchaser" argument that members of the proposed class were uninjured and happy with Elations. The court stated that, in cases involving an economic loss under the California consumer protection statutes, "an examination of whether each putative class members was satisfied with Elations is irrelevant to the class certification analysis" as the focus at class certification is the "actions of the defendants, not on the subjective state of mind of the class members." Accordingly, the court did not consider the declarations from purchasers filed by the defendant because they were irrelevant (and granted the plaintiff's motion to strike the declarations because they were not disclosed in the defendant's Rule 26 disclosures, and the defendant did not provide proper notice of these witnesses prior to their use in opposition). Finally, the court noted that other cases in the Central District of California involving the advertising of glucosamine joint supplements have come to differing conclusions regarding the viability of certification. In addition to certifying the class, the court granted the plaintiff's motion to file a fourth amended complaint ("4AC"), but denied the parties' request to file the amended complaint under seal. The parties

sought to seal portions of the complaint relating to the defendant's clinical studies, which the defendant had marked as "Confidential--Attorneys Eyes Only" pursuant to the parties' stipulated protective order. In declining the parties' request, the court found that the 4AC did not reveal any sensitive information with respect to the clinical studies and noted that the parties improperly relied on the 'good cause standard" in their request, rather than the "compelling reasons" standard that is required to seal all or part of a complaint. (*McCrary v. Elations Co., LLC,* No. 13-00242-JGB (C.D. Cal. Jan. 13, 2014)).

The U.S. District Court for the District of Massachusetts rules on the plaintiffs' motions to certify three consumer classes in a case involving a defendant-pharmaceutical company that allegedly misrepresented and concealed material information about antidepressants' efficacy in treating major depressive disorder in pediatric patients. Plaintiffs, who bought the antidepressants for use by their minor children, alleged that the defendant deprived consumers of the ability to make an informed decision about whether to purchase "Celexa" or "Lexapro" for their children by withholding information about the negative efficacy studies and by engaging in an aggressive marketing campaign designed to mislead consumers and physicians about the drugs' efficacy. The court certified the class under Missouri law, finding that the plaintiffs met the requirements for class certification under Fed. R. Civ. P. 23, but denied certification under Illinois and New York law, finding that plaintiffs would not satisfy the predominance requirement under the elements of those states' unfair and deceptive acts statutes. The court held that the plaintiffs' "informed choice" theory is viable under Missouri's Merchandising Practices Act, which requires a showing that plaintiffs suffered ascertainable loss of money or property, and that their loss resulted from the defendant's conduct, but does not require a showing of reliance on the defendant's alleged misrepresentations in deciding to purchase the drugs. (*In re Celexa & Lexapro Mktg. & Sales Practices Litig*., MDL 09-02067-NMG, 2014 WL 108197 (D. Mass. Jan. 10, 2014)).

The U.S. District Court for the Northern District of California denies the plaintiff's motion for class certification in an action alleging that the defendant-ice cream manufacturer falsely labels and markets its products as "All Natural." Specifically, the plaintiff alleged that the alkali agent in the alkalized cocoa contained in the challenged products is a synthetic alkali, which is inconsistent with an "All Natural" representation. The court denied the class certification motion "for two primary reasons – plaintiff has not established that the class is ascertainable, and she has not established that common issues predominate over individual issues." In finding that class members were not ascertainable, the court agreed with the defendant that the plaintiff provided no evidence as to which class members bought ice cream with alkalized cocoa made with a synthetic alkali. This omission was material because cocoa can be alkalized via several different alkalis and some of them are "natural." And the defendant, being a wholesale manufacturer, did not maintain records identifying consumers of its products, let alone whether they purchased a product that used a synthetic alkali. In finding that common issues did not predominate, the court, relying heavily on the defendant's expert consumer survey evidence, ruled that whether consumers are likely to be deceived by the "All Natural" statement is not a common legal or factual question susceptible to class-wide determination, and that plaintiff has not established that common issues predominated such that there is a class-wide method of granting relief. Finally, the court found that the plaintiff's claims are not typical, "in part because she has not identified an ascertainable class." (*Astiana v. Ben & Jerry's Homemade, Inc*., No. C10-4387, 2014 WL 60097 (N.D. Cal. Jan. 7, 2014)).

The U.S. Court of Appeals for the Ninth Circuit affirms in part, reverses in part, and remands the dismissal of the plaintiffs' first amended consolidated class action complaint involving the ability of consumers to utilize other operating systems on the Sony "PlayStation 3" gaming console. The crux of the plaintiffs' complaint was that statements and promotional materials of the defendants, Sony Computer Entertainment America Inc. and Sony Computer Entertainment America LLC, indicated that the PlayStation 3 would have both the ability to utilize other operating software and the ability to access the PlayStation Network for the duration of the ten-year lifespan of the console. However, the plaintiffs later were presented with a software update that only would permit them to keep one of the two functions. Plaintiffs brought various causes of action, including claims under California's Consumer Legal Remedies Act ("CLRA"), False Advertising Law ("FAL"), and Unfair Competition Law ("UCL"). The court reversed the district court's dismissal on the CLRA, FAL, and UCL claims. The district court's ruling on the CLRA claim was reversed because the Ninth Circuit found that the plaintiffs adequately alleged that the representations at the time of sale were likely to deceive the public, that the plaintiffs alleged they relied on Sony's website and the PlayStation 3 packaging, and that the plaintiffs suffered damages because they paid more for the PlayStation 3 than they otherwise would have paid. The district court's ruling on the FAL and UCL claims were reversed for similar reasons. (*In re Sony PS3 "Other OS" Litig.*, -- Fed. Appx. --, 2014 WL 31217 (9th Cir. Jan. 6, 2014)).

The U.S. District Court for the Northern District of California denies the plaintiff's motion for summary judgment in a class action brought on behalf of a purported class of tea purchasers, alleging that the defendant "misbranded green, black, and white teas" under California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumer Legal Remedies Act ("CLRA"). At the heart of the plaintiff's claim was an allegedly misleading label describing the defendant's tea as a "Natural Source of Antioxidants." The court held that, under the UCL and FAL, "[u]nfair competition means and includes any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." The court also held that the claim arising under the UCL's unfair and unlawful prongs similarly requires reliance when the underlying misconduct involves misrepresentation or deception. Despite the plaintiff's contention, the court found that reliance based upon a presumption of materiality could not be proved. It, however, did find that the use of the word "source" is a nutrient content claim. But, because the defendant's labels "only makes, at most, a generalized health claim," the court found that such a general claim is not a violation of FDA regulations. The court ultimately concluded that the defendant had not made an actionable health claim. (*Lanovaz v. Twinings N. Am., Inc.*, No. C-12-02646, 2014 WL 46822, (N.D. Cal. Jan. 6, 2014)).

The U.S. District Court for the District of Hawaii denies the plaintiffs' motion for class certification in an action against Philip Morris USA ("PMUSA") for unfair and deceptive trade practices. Plaintiffs sought to certify a proposed class composed of "[a]ll persons who purchased Defendant's Marlboro Lights cigarettes in Hawaii for personal consumption from the first date Defendant placed Marlboro Lights cigarettes into the stream of commerce." The plaintiffs alleged that "through advertisements and marketing representations featured on Marlboro Lights products, including, *inter alia*, the term 'Lights,' [PMUSA] intended to and did misrepresent that smokers of Marlboro Lights would receive less nicotine and tar, and a less harmful product, than smokers of regular cigarettes of the same brand." While the court concluded that the requirements of numerosity, commonality, typicality, and adequacy under Fed. R. Civ. P. 23(a) had been met, certification was denied because

the predominance requirement of Rule 23(b)(3) was not met. In finding that the predominance requirement was not satisfied, the court concluded that "common questions do not predominate over the individual inquiries into whether each class member was in fact injured by PMUSA's alleged misrepresentation," and held that "the question of which class members were actually injured (and which were not) is not apt for resolution class-wide." (*Cabbat v. Philip Morris USA, Inc.*, No. 10-00162, 2014 WL 32172 (D. Hawaii Jan. 6, 2014)).

The U.S. District Court for the Northern District of California grants in part and denies in part the defendant's motion for summary judgment on the basis of standing under California's Consumer Legal Remedies Act ("CLRA"), Unfair Competition Law ("UCL"), and False Advertising Law ("FAL"). Plaintiff sued Bumble Bee Foods under the CLRA, UCL, and FAL, alleging that she relied on the defendant's nutrient content, health, and drug claims when purchasing its tuna products. Defendant sought to dismiss all of the claims for lack of standing, alleging that plaintiff could not demonstrate reliance and resulting injury as required under the CLRA, UCL, and FAL. First, the plaintiff alleged that the defendant's representations that its tuna products are an "excellent Source of Omega-3" and "rich in Natural Omega-3" are unlawful because they are non-compliant with Food and Drug Administration ("FDA") regulations, which require that products contain a threshold amount of the nutrient claimed, and that nutrient content claims for products that contain more than a threshold amount of fat and cholesterol per serving be accompanied by a disclosure: "See nutrition information for __ content." Defendant asserted that its statements were lawful pursuant to a special petition for the claims to the FDA. But the defendant was relying on another manufacturer's petition for a different type of Omega-3. Consequently, the court agreed with the plaintiff, finding standing for her Omega-3 content claims because she saw the misrepresentations, relied on them "in substantial part" in her purchasing decision, and consequently paid more than she otherwise would have paid. Defendant also argued that a disclosure would have been pointless because the plaintiff admitted to not examining the nutrition panels on the back of packaging. The court rejected this argument because the inference was that she would have had there been a disclosure prompting her to do so. Second, the plaintiff alleged that the defendant made claims on its website that these products are "rich" in Vitamin A and Iron even though the products did not contain the threshold amount of the nutrient claimed. But because the plaintiff admitted to not looking at the back nutrition panels or the website before buying the products, the court found that she had no standing to raise these claims. The court also found that the plaintiff had no standing to challenge various unlawful "drug" and "health" claims that the defendant allegedly made on its website and elsewhere for the same reason – the plaintiff did not look at the website prior to purchasing the products and/or failed to explain how the claims were unlawful. Interestingly, the plaintiff used violations of the Food, Drug, and Cosmetic Act ("FDCA") as the basis of her UCL "unlawful" prong, which borrows violations of other laws, treating them as unlawful practices under UCL. Even though the FDCA does not provide a private right of action, the court allowed the plaintiff to proceed, noting that to forestall an action under the UCL, the underlying statute must contain "an absolute bar to relief." (*Ogden v. Bumble Bee Foods, LLC*, 2014 WL 27527 (N.D. Cal. Jan. 2, 2014)).

**Federal Trade Commission (FTC) Litigation**

The U.S. District Court for the District of New Jersey denies Defendant Wyndham Worldwide Corporation's motion to dismiss a complaint brought by the FTC asserting an unfairness theory against the hotel operator based upon a security breach, which exposed 619,000 customers'

confidential information. The FTC alleged that Wyndham required its regional franchisees to configure their computer systems to Wyndham specifications and those specifications were insufficient to provide reasonable and appropriate protection of customers' personal information. As a result, on three separate occasions, hackers gained unauthorized access to customers' personal information, including credit card information. The FTC also charged that, after discovering the first two breaches, the defendants failed to take remedial action promptly. The FTC claimed that consumers had suffered $10.6 million in fraud losses. The defendants argued that the unfairness doctrine was an improper theory as to data security breaches. The court denied the defendants' motion in its entirety. First, it held that the various federal statutes relating to security of electronically stored customer information did not preclude the FTC's authority to challenge such a breach as an unfair practice. The court concluded that the FTC's application of its broad unfairness authority over data security would not contradict congressional policies. Nor was there any requirement that a federal agency affirm its authority to act within its broad statutory authority before asserting that authority. The court also rejected the argument that the FTC was obligated first to promulgate a trade regulation rule or at least guidance in this area before it could proceed with enforcement actions. The FTC relied upon prior consent decrees in the area and its business guidance brochure. The court further rejected a more generalized argument advanced by the defendants that the FTC had an obligation to first state with ascertainable certainty what conduct is required to meet the FTC compliance standards to protect consumer's electronically stored information. The court reiterated its view that the agency had the right to proceed by *ad hoc* litigation or regulation, and that the FTC had provided the defendants with fair notice on the standard required for data security, including adherence to industry standards, which were referenced in the defendants' own privacy policy statements. The court concluded that the FTC had alleged sufficient facts, including the $10.6 million in fraud losses, to establish the elements of an unfairness claim in the context of a motion to dismiss. (*FTC v. Wyndham Worldwide Corp.*, No. 13-1887, 2014 WL 1349019 (D.N.J. Apr. 7, 2014)).

The U.S. Court of Appeals for the Eleventh Circuit affirms an order granting the FTC's motion for a preliminary injunction and ordering an asset freeze in a case brought by the FTC against an organization and its principals that were purporting to sell the functional equivalent of health insurance. The organizational defendant, IAB, purported to be a non-profit organization advancing the interest of small business owners and the self-employed. The FTC alleged violations of section 5 of the FTC Act and the Telemarketing Act, specifically charging that the purchasers were not receiving health insurance as represented, but were getting modest discounts from providers after submitting claim forms. The Eleventh Circuit, first, held that the government needed only to prove substantial probability of success and that the injunction would be in the public interest. However, the key issue was the individual defendants' contention that the asset freeze was improper. The Eleventh Circuit rejected these arguments emphasizing that the gross revenue of the challenged conduct was $70 million, while only $2.3 million in assets were frozen. The Eleventh Circuit emphasized that one defendant had earned $6 million during that time period. Further, the court rejected the idea that the government had to determine the value of the services provided, reasoning the misconduct tainted the entire transaction. (*FTC v. IAB Mktg. Assocs., LP*, No. 12-16265, 2014 WL 1245263 (11th Cir. Mar. 27, 2014)).

The U.S. District Court for the Middle District of Florida approves and adopts a magistrate's recommendation to award the receiver and its counsel fees and costs in a case brought by the FTC

against Green Savers, LLC. The original suit alleged violations of Section 5(a) of the FTC Act, and the FTC's Trade Regulation Rule regarding telemarketing sales. The court entered an *ex parte* temporary restraining order and asset freeze, and the case eventually was resolved by a stipulated preliminary injunction; final judgments were entered. The receiver concluded that the defendant "could not operate legally and profitably." A total of $172,126.43 was recovered by the receiver, and the court awarded $65,730.10 to the receiver and its counsel to resolve various claims against the receivership assets, to investigate the matter, and to secure assets for the receivership estate. The court found that the receiver and its counsel had handled the matter efficiently and awarded the amount sought because of the lack of objection and the reasonableness of the time spent on the matter. (*FTC v. Green Savers, LLC*, No. 6:12-cv-1588, 2014 WL 978311 (M.D. Fla. Mar. 12, 2014)).

The U.S. court of Appeals for the Fourth Circuit affirms a district court order, which awarded civil redress Section 13(b) of the FTC Act. The Fourth Circuit also affirmed the district court's ruling that individuals may be liable for consumer redress based on their direct participation in violations of the FTC Act. Alternatively, an individual may be liable for redress if he or she has the right to control those who participated in the deceptive conduct, had knowledge of the deceptive conduct or a reckless disregard or indifference to the truth, or intentionally avoided the truth. The defendants were accused of operating a deceptive internet "scareware" scheme based on false warnings to consumers that its software had detected a variety of dangerous files, including illegal pornography, on consumers' computers. In fact, no such scans were ever performed. One defendant challenged the availability of consumer redress under 15 U.S.C. § 53(b), which only explicitly provides for injunctive relief, and argued that Section 53(b) does not refer to "other orders" which was the basis for the original Supreme Court precedent interpreting the 1942 Emergency Price Control Act. The Fourth Circuit rejected the "magic language" argument and reasoned that the structure, history, and purpose of the FTC Act weighed against the defendants' interpretation. Further, the Fourth Circuit noted that the Second, Seventh, Eighth, Ninth, and Eleventh Circuits already had rejected the same argument proffered by the defendants. The court found that the broad language of 15 U.S.C. § 52(a) covering all corporations, persons, or partnerships provided a statutory basis to award redress against individual defendants. The Fourth Circuit adopted the test applied by the First, Ninth, and Tenth Circuits that either actual participation in the deceptive act, or the power of control together with either actual knowledge, reckless disregard for truth, or intentional avoidance of the truth, was sufficient to impose redress liability. The court rejected one of the defendant's advertising expert's opinion that the ads were not deceptive because the trial court properly determined that they were deceptive. The court also admitted various emails under the co-conspiracy exception to the hearsay rule under Fed. R. Evid. 801(d)(2)(e). The court found that the necessary scientier for deception could be based on knowledge of consumer complaints. (*FTC v. Ross*, No. 12-2340, 2014 WL 703739 (4th Cir. Feb. 25, 2014)).

The U.S. District Court for the Northern District of California grants the Federal Trade Commission's ("FTC") motion for summary judgment on liability, redress, and injunctive relief, and denies the defendants' cross-motions. The FTC alleged that the defendants' promotion of "medical food products" intended to treat diabetes was deceptive and unsubstantiated, and brought claims under Section 5(a) and 12 of the FTC Act. The defendants' products included the "Diabetic Pack" and the "Insulin Resistance Pack," which were the same products containing vitamins, minerals, and botanical extracts added to a glucose support formula, or a calcium magnesium formula.

Defendants' claims included "new diabetes break-through," reduces the effect of diabetes, "money back guarantee," a clinically proven solution with a 90% success rate and "no side effects guaranteed," and various testimonials. The court rejected the *Daubert* challenge to the FTC expert who offered an opinion that the defendants' claims were false and unsubstantiated. The court granted the FTC's *Daubert* motion as to the defendants' expert because he did not address the claims that were before the court, and had used an unreliable methodology. Additionally, the court rejected the defendants' expert's opinion that the defendants did not knowingly mislead consumers, because the products had value. The court reasoned that the methodology of the defense expert was unreliable. The court also rejected the defendants' argument that the FTC must consider the FDA regulations in determining whether the statements are false, finding that the FDA regulations were irrelevant to the defendants' claim. Defendants' First Amendment claims also were rejected because the right of free speech does not extend to false, deceptive, or misleading commercial advertising. On the merits, the court concluded that the defendants made the false and misleading claims, including assertions that these products can be substituted for prescription drugs. The court rejected the defendants' substantiation claims – "scientific studies prove . . . [a] 31.99% drop in blood sugar." Under the "net impression" test, the court had little trouble in concluding that reasonable consumers likely were to be misled, and "disclaimers" did not effect that net impression that the product was a scientific "break through" to replace drugs such as insulin. Other claims rejected by the court included: 31.9% drop in blood glucose levels, reversal of insulin resistance, and prevention of diabetes. The court applied a requirement of high level of substantiation for both the establishment and non-establishment claims requiring clinical studies because the risk or benefit of the type of representations were so high – abandoning the use of approved prescription drugs to treat diabetes. The studies performed by the defendants were not proper clinical studies and did not test the actual product – simply some of its ingredients. The court found both the corporate defendant and the individual defendants were jointly liable reasoning that individual defendants participated in the false advertisement and had the ability to control the advertising. The court found that the individual defendants ran the company and had disregarded the truth, at least recklessly. Both individual defendants knew they had no scientific training and that no scientific testing was performed by qualified scientists. The court ordered restitution based on net revenue minus refunds. The court rejected the defendants' argument that repeat purchases should be excluded absent evidence that those purchasers did not rely on advertising as to the subsequent purchases. The court also imposed a broad injunction against the defendants from making deceptive or unsubstantiated claims for a twenty-year period. Compliance reports are required during that time period concerning the businesses the individual defendants own or control, as well as any business they may work for in the future. The court rejected the defendants' motion to restrict the order to ten years and limited it to marketing activity. (*FTC v. Wellness Support Network, Inc.*, No. 10-cv-04879, 2014 WL 644749 (N.D. Cal. Feb. 19, 2014)).

The U.S. District Court for the Northern District of Illinois denies the defendants' motion to dismiss the complaint alleging violations of the FTC Act and Telemarketing Sale Rule ("TSR"). The FTC alleged that the defendants' scheme, which purportedly involved deceptively marketing and selling a medical discount plan primarily to the elderly and infirm throughout the United States, was a violation of the FTC Act and TSR because the defendants either directly or indirectly misrepresented or led consumers to believe that they were affiliated with the U.S. Government, such as Medicare and Social Security. The individual defendants argued that the FTC did not meet Fed. R. Civ. P. 9(b)'s pleading standards and did not pinpoint which acts and practices were violated by which of

the ten separate and distinct individuals and companies. The court disagreed and denied the motion to dismiss, finding that Rule 9(b) did not apply to the FTC Act and TSR because neither fraud nor mistake are elements of the claim. The court also found that the allegations against the individual defendants were sufficient. (*FTC v. AFD Advisors, LLC,* No. 13 CV 6420, 2014 WL 274097 (N.D. Ill. Jan. 24, 2014)).

The U.S. District Court for the District of New Jersey grants the FTC's motion for contempt against Lane Labs, USA and other corporate and individual defendants based on a violation of a prior FTC consent order concerning the advertising of dietary supplements. The defendants were accused of violating the FTC consent order by making claims about the health benefits of certain supplements without competent scientific support to substantiate those claims. Initially, the trial court had denied the FTC's motion for contempt, but the Third Circuit reversed as to certain claims, and upon reconsideration, the trial court found violations based on: (1) claims that "Advacal" is three-to-four times more absorbent than calcium supplements, (2) a spinal density changes graph, and (3) bone density increase claims. The primary issue the court considered on the contempt motion was "damages." The FTC sought $15 million in gross sales in the relevant period. The court considered a "premium" theory based upon a heightened price for the product as an alternative that would be less likely to be punitive and cause a potential bankruptcy. The court explained that a compensatory sanction must not exceed the actual loss suffered by the party that was wronged. The court also considered the willfulness of the conduct in determining the sanction. The court considered the testimony of the FTC's own expert that the product was a good form of calcium, which would be expected to reduce substantially the risk of bone fractures because the consumers received an effective product. The FTC damage theory was unnecessarily punitive and a price premium theory should be used to measure compensatory damages. These were calculated by direct sales, retail sales, and calculated sales, based upon offending ads, and the $20.56 price premium amount for total to compensatory damages of $803.72, to be distributed to consumers at the cost of the defendants. (*FTC v. Lane Labs-USA, Inc.*, No.: 2:00-cv-3174, 2014 WL 268642 (D.N.J. Jan. 23, 2014)).

The U.S. District Court in the Southern District of New York denied motions to dismiss filed by certain defendants associated with co-defendant, The Tax Club, Inc., in an action brought by the FTC under Section 5(a) of the FTC Act, the Telemarketing Rule, and New York and Florida statutes. The Tax Club, Inc. is a business that sells products and services to persons seeking to start a new business. The services that the defendant companies sold included tax advice, business planning services, and "credit development assistance." The defendants' enterprise solicited customers by use of the telephone and offered their "essential" services with the assurance that the value of these services ultimately would pay for themselves. The enterprise established numerous merchant accounts to redistribute the funds received by consumers trying to start their new business. The FTC charged that the representations made to purchasers were misleading because callers were misrepresenting who they worked for, and customers were not able to recoup the charges from cost savings. In addition, the customers were not given access business or tax advice. Further, calls were made to "upsell" customers without informing the customers that the purpose of the call was to make additional sales. The court held that the complaint properly alleged each cause of action asserted against every defendant. The "group pleading" objection was rejected under the "common enterprise" exception where each defendant is liable for the acts of the other defendants. The court found that the complaint alleged that each defendant operated from the same office space, shared common control, and used the same processes. The court also found that the complaint alleged

sufficient facts to establish a basis for personal liability against individual defendants on the grounds that they personally participated in the challenged acts and/or had the authority to control those who did and had some knowledge of the acts and practices. The court also rejected the argument that Fed. R. Civ. P. 9(b) applies to a government enforcement proceeding, in part because the argument was reduced to a footnote. *FTC v. The Tax Club, Inc.*, 13 Civ.210, 2014 WL 199514 (S.D.N.Y. Jan. 17, 2014).

**National Advertising Division (NAD) Decisions**

The NAD has determined that Body Armor Nutrition LLC can support certain claims for its "BODYARMOR SuperDrink" in a standalone context, but has recommended the company modify or discontinue the use of such claims in other contexts. The claims at issue were challenged by Stokely-Van Camp, Inc., the maker of "Gatorade" sports drinks. The challenger took issue with the claims that BODYARMOR SuperDrink "provide[s] an unparalleled combination of superior nutrition and superior hydration," and that it contains, "2½ Times the Electrolytes [of the] Leading Sports Drink." NAD found that the claim "SUPERIOR NUTRITION + HYDRATION," in a monadic context, conveys a substantiated message as to the quality of the advertiser's product. However, on product packaging, the claim appeared in proximity to a different comparative claim referencing "the leading sports drink." NAD recommended that the advertiser either discontinue using the "SUPERIOR NUTRITION + HYDRATION" language in that context, or modify the claim to avoid conveying any unsupported comparative message that its product provides superior nutrition and hydration as compared to "the leading sports drink." Further, NAD found that the claim "ELECTROLYTES: 2½X THE LEADING SPORTS DRINK," standing alone, conveyed a literally true statement of fact. NAD, however, noted that when presented in close proximity to the claim "SUPERIOR NUTRITION + HYDRATION," it could imply that the superior hydration was due to the inclusion of two and one-half times the electrolytes of the leading sports drink, which was not supported. Accordingly, NAD recommended that the advertising be modified to avoid such a message. (*Body Armor Nutrition LLC (BODYARMOR SuperDrink)*, NAD Report No. 5703 (Apr. 1, 2014)).

The NAD has determined that B'Iota Botanicals can support certain advertising claims for the company's "Advanced Shampoo & Serum for Thinning and Damaged Hair." However, NAD has recommended the advertiser discontinue or modify other claims and testimonials to better explain to consumers that the products help reduce specific causes of hair thinning. Lifes2Good, Inc., maker of the hair-growth product, "Viviscal," challenged a number of establishment claims that the advertiser's products "reduce hair fall due to damage and help hair to grow faster, thicker and fuller," provide a "proven solution that brings new hope to those who have weak, damaged and thinning hair," and "with continued use [provides] stronger, thicker, fuller and faster growing hair!" Here, the advertiser's products are not a cure to for hair loss and do not regrow hair. Instead, they are an herbal shampoo and serum that claim to reduce the amount of thinning. As support for its claims, the advertiser relied on the results of a single, independent study, which NAD concluded was reliable and well-conducted. The study illustrated the typical product performance for consumers experiencing thinning hair due to changes in hair follicle growth. NAD determined that the advertiser provided a reasonable basis for the claim that its products are "herbal-based," "dermatologist tested," and proven to help address particular issues with hair that is thinning due to changes in hair follicle growth physiology. However, NAD was concerned about certain claims that

B'Iota products help hair grow "thicker" and "fuller" without clearly indicating that those terms relate to hair density, not the thickness of individual hair shafts. Accordingly, NAD recommended that the advertiser modify such claims to make this differentiation more clear. (*B'Iota Botanicals (Advanced Shampoo & Serum for Thinning and Damaged Hair)*, NAD Report No. 5702 (Mar. 31, 2014)).

The NAD has recommended that Ontel Products Corporation discontinue the use of challenged before-and-after images in advertising for the company's "Pink Armor" nail gel product. NAD also determined that other challenged claims were permissible puffery. Coty Inc., a competing manufacturer of nail products, challenged product demonstrations and performance claims made by Ontel in a variety of media. The challenger argued that the "before-and-after" photographs in the advertising misrepresented the rate at which nails grow, how a consumer's nails look after using the product, and implied that the product healed diseased nails and cuticles. The advertiser argued that its product packaging clearly and conspicuously stated that the photographs were dramatizations and argued that they amounted to puffery. NAD noted in its decision that "before" and "after" photographs must be supported, accurate, and representative of the level of product efficacy that a reasonable consumer can expect to achieve. Here, the "before" photographs depicted short and visibly damaged or diseased fingernails, while the "after" photographs depicted perfectly manicured, shiny, noticeably longer and pink fingernails after four weeks of use. The advertiser submitted no product testing in support of its "before" and "after" photographs. NAD recommended that, given the lack of reliable supporting evidence in the record, the "before" and "after" photographs be discontinued. NAD determined that other challenged claims, including, "Rock Hard Finish" and "[W]ith just one coat, once a week, [i]t's like getting a professional nail treatment at home!" constituted permissible advertiser puffing. However, NAD recommended that the advertiser discontinue other unsupported product performance claims, such as "Your nails won't peel, chip or crack no matter what the attack." (*Ontel Products Corporation (Pink Armor Nail Gel)*, NAD Report No. 5701 (Mar. 27, 2014)).

The NAD has recommended that Cortec Corporation, the maker of vapor corrosion inhibiting ("VCI") products, discontinue claims made in business-to-business email advertising, which were challenged by Northern Technologies' International Corporation, the maker of "Zerust" films, a competing VCI product line. The challenged claims were made in email communications from Cortec employees to sales representatives and distributors, and included claims that Zerust films failed all standard product testing, were "counterfeit product," "do[] not contain any VCI compound," and "use[] old VCI technology that is failing due to outdated chemistry and a lack of quality control." At the outset, the advertiser contended that NAD has no jurisdiction over the claims at issues, which were directed to distributors who sell the parties' products to end users. It argued that the email recipients are contractually bound to sell its products, and are not consumers of that product. NAD found, however, that the challenged claims fell squarely within the definition of "national advertising" delineated by NAD Policies and Procedures § 1.1(A), and that the purpose of the emails was "commercial" in nature, and formulated "with the purpose of inducing a sale." NAD further noted that the advertiser's statements included very strong claims regarding the lack of efficacy of its competitor's product. Following its review of the evidence in the record, NAD recommended that the advertiser discontinue the claims at issue because the challenged statements were not supported by the tests that the advertiser cited. (*Cortec Corporation (Zerust Vapor Corrosion Inhibiting Products)*, NAD Report No. 5700 (Mar. 19, 2014)).

The NAD has recommended that Blue Buffalo Company, Ltd. modify certain advertising claims for its "BLUE Brand Pet Food" products to avoid disparaging competing pet food makers. The company has said it will appeal some of NAD's findings to the National Advertising Review Board. The advertising at issue depicts a pet owner who appears shocked to learn that "big name pet foods" contain chicken by-product meal, and includes phrases such as "Pet parents are learning the truth about the ingredients in some of the leading dog food brands. Don't be fooled by the big name dog food brands." The claims were challenged by Hill's Pet Nutrition, Inc., a competing manufacturer of pet food products. It argued that the challenged advertising conveys the falsely disparaging message that "big name" pet food manufacturers actively try to conceal the fact that they include chicken by-product meal, instead of meat, as the first ingredient. The advertiser contended that its market research shows that many pet owners prefer meat as the first ingredient of their pet food and do not want their pet's food to contain any chicken or poultry by-product meals. NAD previously has held that, while companies can and should inform consumers about the composition of their pet food, they may not falsely disparage competing products by communicating unsupported messages that these products are less healthy, less safe, or nutritionally inferior. NAD also noted the advertiser did not provide any evidence that "big name" pet food manufacturers are actively concealing the truth about the ingredients in their products. Additionally, it noted that, while meat is certainly a high-quality, nutritious ingredient, the advertiser did not provide any evidence that meat by-product meal is not nutritious. Accordingly, NAD recommended that the advertiser modify the challenged advertisements to avoid any express or implied references to competing manufacturers "fooling" or otherwise misleading consumers because their products include meat or chicken by-product meals. (*Blue Buffalo Company, LTD. (BLUE Brand Pet Food Products)*, NAD Report No. 5696 (Mar. 11, 2014)).

The NAD has recommended that Sergeant's Pet Care Products, Inc. discontinue certain claims for the company's "Fiproguard Max" and "Pronyl OTC Max" flea and tick products. The claims, challenged by Bayer Healthcare, LLC, maker of "K9 Advantix II" (flea and tick control for dogs) and "Advantage II" (flea control for cats and dogs), include that Fiproguard Max [and Pronyl] "start killing fleas and ticks in five minutes," that with those products, "99% of fleas dead in just four hours – 100% within 24 hours!" and that Sergeant's products "prevent more fleas from biting your pets than . . . K9 Advantix II." According to Bayer, the three studies offered in support of the advertiser's claims were flawed and the advertiser cherry picked favorable data from certain studies in support of its claims. The advertiser asserted that it had a reasonable basis, substantiated by methodical and comprehensive testing for its claims. The advertiser also stated that certain claims at issue were approved by the Environmental Protection Agency ("EPA"). Following its review of the evidence in the record, NAD determined that the studies did not support the claims that the advertiser's products "start killing fleas and ticks in five minutes," kill "99% of fleas dead in just four hours – 100% within 24 hours!" and "prevent more fleas from biting your pets than . . . K9 Advantix II." NAD concluded that the advertiser provided a reasonable basis for other challenged claims. (*Sergeant's Pet Care Products, Inc. (Sentry Fiproguard Max and Pronyl OTC Max)*, NAD Report No. 5695 (Mar. 10, 2014)).

The NAD has recommended that Sun Products, Inc., discontinue or modify certain comparative claims for the company's "all with Stainlifters" laundry detergent. Further, NAD determined that the advertiser's voluntary discontinuance of a "Grass Stain Demonstration" YouTube video was

necessary and appropriate. The claims at issue were challenged by Church & Dwight Co. Inc., the maker of "Arm & Hammer Plus OxiClean" laundry detergent. The broadcast advertising at issue features a visual comparison of the advertiser's product against an unidentified orange bottle that closely resembles an Arm & Hammer liquid detergent bottle. A voiceover states, "For more cleaning power than just washing with the leading value detergent and booster combined." A super states, "Comparison based on pretreating and washing with all Stainlifters vs. just washing with the leading value detergent and leading booster combined." It is well-settled that products being compared in advertising must be treated equally and that comparative demonstrations must fairly and accurately reflect the results that consumers typically see and experience when they use and compare the two products. In this case, the NAD found that, in one of the two tests performed by Sun, the products were not treated equally in accordance with product directions. The supporting evidence for the advertiser's comparative performance claim was premised upon pre-treating and washing a grass-stained garment in "all with Stainlifters," but ignored the product-use directions for pre-treating grass stains with the challenger's product. The NAD recommended that the challenged comparative claim be discontinued or modified to show an equal comparison the two products and more clearly and conspicuously disclose the object of comparison. The NAD also found that the advertiser could support a stand-alone performance claim that "all with Stainlifters" outperforms a previous formulation of all detergent. (*Sun Products, Inc. (all with Stainlifters*), NAD Report No. 5691 (Feb. 25, 2014)).

The NAD has recommended that The Hershey Company modify advertising for the company's "Brookside Chocolate-Covered Candies" to assure that consumers understand that the products are "fruit-flavored," rather than pieces of fruit. The advertising claims at issue, made on product packaging and in television advertising, were challenged by Mars Incorporated, a competing maker of chocolate products. NAD considered whether the commercial and the language, images, and layout of the product packaging implied that Brookside chocolate-covered products are chocolate covered fruit. At the outset, the advertiser requested that the NAD administratively close its inquiry into packaging claims because the packaging had been revised. NAD noted that the original packaging was still available in retail outlets at the outset of the challenge, and, thus, it retained jurisdiction. NAD acknowledged in its decision that, generally, consumers who are told that a product is "flavored" with a particular fruit do not take away the message that the product necessarily contains a piece of that fruit. NAD determined that the language used on the packaging accurately described the advertiser's product – a fruit-flavored candy covered in chocolate – and did not inherently convey a message that the product contained actual fruit. However, the NAD did find that the layout and font sizes used in the product name could be read in a way that conveyed the message that the product contained a real piece of fruit. Accordingly, NAD recommended that the advertiser further modify its packaging to present the product name in a manner that makes it clear that all of the identified fruits are in fact "flavors." The broadcast advertising at issue depicted a team of chefs, chopping chocolate and preparing berries and pomegranates in an outdoor kitchen. A voiceover described the products as "[r]ich dark chocolate meets sweet soft centers flavored with exotic fruit juices . . . " The NAD noted in its decision that the visual cues presented in the advertisement were particularly striking, and served to draw viewers' attention away from the voiceover and conveyed an inaccurate message that the products contain actual fruit. NAD recommended that the advertiser modify its television commercial in a way that would avoid conveying the unsupported message that the products contain real fruit. (*The Hershey Company (Brookside Chocolate-Covered Candies)*, NAD Report No. 5688 (Feb. 24, 2014)).

The NAD has determined that T-Mobile USA, Inc., can support certain advertising claims for the company's "Jump" program. However, the NAD recommended that the company modify its JUMP website to disclose more clearly the deductibles that may apply if one's phone is lost, damaged, or stolen. Sprint Corporation challenged the claims, contending that television and website advertising for "JUMP" implied that consumers could receive certain promoted phone upgrades with no additional fees even if a phone is damaged, lost, or stolen. NAD noted that the challenged television and radio commercials were designed to introduce consumers to the JUMP program, but did not state or imply any message regarding the cost or terms and conditions of JUMP. Each of the challenged television ads, NAD noted, included a sketch that depicted a phone breaking in a comical scenario with a voiceover stating: "Two years is too long to wait. Introducing JUMP! from T-Mobile. The freedom to upgrade when you want, not when you're told." NAD concluded that the advertiser was under no obligation to inform consumers about the program's deductibles in either the introductory radio or television advertisements. However, NAD reached a different conclusion regarding the program's website. NAD was concerned that the site's "$10 a month" claim appeared together with a claim regarding protection for damaged, lost, or stolen phones, which has an additional cost. It determined that a reasonable consumer could take away the message that he or she could be "protected" for "$10 a month," even if his or her phone was lost or damaged. Given the significant deductibles that could apply in the case of a lost or damaged phone, NAD recommended that the website should clearly and conspicuously disclose the existence and amount of the deductibles that may apply. (*T-MOBILE USA, INC. (T-Mobile's JUMP upgrade program)*, NAD Report No. 5687 (Feb. 20, 2014)).

The NAD has determined that the Kimberly-Clark Corporation can support certain print and Internet advertising claims for the company's "Sleek" super-absorbency tampon, but has recommended that the advertiser make modifications to assure that disclosures are readily noticeable and understandable to consumers. The Procter & Gamble Company, the maker of "Tampax Tampons," challenged the following claims: "Unbeatable Protection.* Sleek vs. Tampax Pearl" (*super absorbency vs. Tampax Peal, among those with a preference.) and "Preferred by girls over Tampax Pearl*" (*super absorbency.) Key to its decision in this case was the NAD's examination of the consumer-use testing provided by the advertiser. The challenger criticized the advertiser's at-home test as materially flawed and, as rebuttal, offered the results from its own consumer use testing, which utilized a different protocol. NAD noted that the advertiser's study had a number of flaws. Of most concern was whether the test sufficiently ensured that test participants followed the protocol and recalled their opinions when later answering a questionnaire. However, the NAD noted, the evaluation of advertising claims substantiation is based on a determination of whether an advertiser has provided a reasonable basis for its claims. NAD found that, despite the study's flaws, it had adequate protocols in place to prevent bias and capture the participant's overall preferences, as well as which product, if either, better protected them. Following its review of the evidence in the record, the NAD determined that the advertiser provided a reasonable basis for the claims at issue. However, the NAD noted that in some iterations of its claim, the necessary disclosure – "super absorbency vs. Tampax Pearl, among those with a preference" – was not presented in a manner that was clear and conspicuous. NAD recommended that the advertiser modify its advertising to ensure that disclosures are readily noticeable and understandable by consumers. (*Kimberly-Clark Corporation (U by Kotex Sleek Tampons)*, NAD Report No. 5682 (Feb. 4, 2014)).

The NAD has recommended that Murad, Inc. modify advertising for the company's "Murad Rapid Age Spot and Pigment Lightening Serum" product to avoid conveying the unsupported message that it provides a protective barrier against environmental harm to the skin. As part of its routine monitoring program, the NAD requested substantiation for the claim, "Environmental Shield." The advertiser argued that the "Environmental Shield" claim is a trademarked phrase that has appeared on its product packaging since 1997 and refers to an entire line of products that are designed to be used together, which include a sunscreen and a moisturizer that act as a "shield" against environmental harms such as sunburn and skin desiccation. NAD noted in its decision, however, that the challenged advertisement does not refer to the "Environmental Shield" line of products or explain that the use of the Rapid Age Spot and Pigment Lightening Serum is merely Part Two of a three-step "Environmental Shield" Day Regimen. Accordingly, NAD recommended that the advertiser modify its advertising to make clear that "Environmental Shield" is a whole line of products and that the Rapid Age Spot and Pigment Lightening Serum is only one part of a multi-step regimen, in order to avoid conveying the unsupported message that the Rapid Age Spot and Pigment Lightening Serum product itself provides a protective barrier against environmental harm to the skin. (*Murad, Inc. (Murad Rapid Age Spot and Pigment Lightening Serum)*, NAD Report No. 5678 (Jan. 30, 2014)).

The NAD has recommended that Chase Bank USA, NA, modify certain claims made for the company's "Chase Freedom Rewards Credit Card" in broadcast and Internet advertising. Capital One Bank (USA), NA challenged Chase's "5% cash back" claim and argued that its advertising implied that the benefit was available on all purchases without restriction. Capital One argued that Chase materially misrepresented the scope and value of its five percent cash-back rewards feature, and contended that the advertising left consumers with the impression that the benefit was without material restriction. The five percent cash-back benefit, however, is limited to certain rotating categories, requires special activation, and has a $1,500 spending cap. Chase responded that its "Freedom Card" advertising clearly communicates the terms and material limitations of the benefit. Capital One provided a consumer-perception study of the television commercial at issue, which it argued, demonstrates that consumers failed to notice and understand the benefit's limitations. Chase criticized several aspects of the consumer-perception survey, including the failure to include a control commercial and confusing survey questions. Although the NAD shared some of Chase's concerns about the study, the NAD's independent review of the commercial led it to conclude that consumers reasonably could be confused regarding the material terms and limitations of Chase's cash rewards card. NAD recommended that the advertiser discontinue or modify its television advertisements to clearly and conspicuously disclose the program's material terms and avoid simultaneous distracting audio and visuals when doing so. Regarding Internet advertising, the NAD further recommended that, when Chase uses a hyperlink to disclosures in space-constrained advertisements, such as banners, the hyperlink indicate the nature of the disclosures to which it is linking. (*Chase Bank, USA, N.A. (Chase Freedom Rewards Credit Card)*, NAD Report No. 5679 (Jan. 30, 2014)).

The NAD has referred advertising claims made by Brain Research Labs, for its dietary supplement "Procera AVH" to the FTC following the company's failure to abide by the terms of an NAD decision. In a 2009 decision, the NAD recommended that the advertiser discontinue a wide range of claims and testimonials for Procera AVH, including the unqualified claim that Procera AVH was "clinically shown to restore the memory and brain power you had 10-15 years ago" and claims that

the product is "fast-acting." The NAD also determined that a key ingredient in the product, vinpocetine, had not been demonstrated to provide increased oxygen delivery, uptake, and utilization by the brain. The NAD contacted the advertiser when it learned that the company, again, was making claims similar to those it agreed to discontinue in 2009. The advertiser, in response, agreed to discontinue all the challenged claims except for the claim that Procera AVH has "vinpocetine, a substance that helps deliver increased oxygen and glucose to your brain." The advertiser asserted that a more recent study supports the claim. However, an advertiser in an NAD proceeding may not, absent extraordinary circumstances, submit new evidence after the fact as support for claims that were the subject of an earlier proceeding. Accordingly, the NAD has referred the matter to the FTC for further review. *(Brain Research Labs (Procera AVH*), NAD Report No. 5073 (Jan. 14, 2014)).

The NAD has recommended that BP Lubricants USA, Inc., the maker of "Castrol EDGE" motor oil, discontinue comparative advertising claims between its product and the challenger, ExxonMobil Corporation's "Mobil 1" motor oil. The advertiser has stated that it will appeal the decision to the NARB. The advertising at issue depicted two cars on dynamometers running at 75 miles per hour on a 7% grade and fully loaded at 1,600 pounds. On Day 5 of the test, the engine using Mobil 1 motor oil is shown to have failed, shooting smoke and sparks into the air, while the Castrol EDGE engine continued to run. The NAD reviewed the advertisement and related superiority claims. It noted in its decision that there was no dispute that the advertising accurately depicted the test conditions and that consumers vehicles would never be subjected to those conditions in the real world. The NAD determined that torture tests can be used to support product claims, but only if they represent conditions which have real world relevance, even when clearly depicting the conditions. The NAD also noted several weaknesses in the test protocol, including the small sample size, failure to randomize the order of the oils tested, and failure to properly account for potentially confounding factors. Accordingly, the NAD determined that the testing was not sufficiently reliable to support the strong comparative claims and denigrating demonstration at issue. The NAD recommended that the advertiser discontinue any comparative superiority claims based upon its torture testing. (*BP Lubricants USA, Inc. (Castrol EDGE*), NAD Report No. 5674 (Jan. 14, 2014)).

The Procter and Gamble Company said that it has permanently discontinued advertising claims and product demonstrations for its "Swiffer WetJet" that were challenged before the NAD by The Libman Company, a competing manufacturer of household cleaning products. The challenged claims included various versions of the claim, "Swiffer WetJet Starter Kit. Cleans better than a mop and bucket," as well as side-by-side demonstrations of a mop and the advertiser's product. In response to the NAD's inquiry, the advertiser asserted that, while it believes its claims are fully supported by its testing, the challenged advertising has run its course and all of the challenged claims and product demonstrations have been or are in the process of being permanently discontinued. NAD, in its decision, said it appreciated the advertiser's agreement to permanently discontinue the challenged claims and product demonstrations, an action NAD deemed necessary and proper under the circumstances. NAD stated that, "[g]iven the strong competitive nature of some of the claims and visuals, NAD recommended the advertiser take immediate steps to do so." (*The Procter & Gamble (Swiffer Products)*, NAD Report No. 5670 (Jan. 8, 2014)).

The NAD has referred advertising claims made by Chicken of the Sea, Inc. for its "Chicken of the Sea" tuna products to the FTC and California regulatory agencies after the company declined to participate in proceedings before the NAD. The claims at issue were challenged by the Animal

Legal Defense Fund ("ALDF") and related to the company's environmental responsibility policies. The challenger argued that the advertiser's claims mislead consumers about Chicken of the Sea's dolphin-safe policy by going beyond bare usage of the term "dolphin-safe," authorized by the Dolphin Protection Consumer Information Act, and, instead, employed language that leads reasonable consumers to believe that absolutely no dolphins are harmed during the production of the company's tuna. In response to the NAD's inquiry, the advertiser said that it respectfully declined to provide a substantive response to the challenge because, in 2012, the FTC had decided not to pursue a review following a similar petition by ALDF. Notwithstanding its decision not to participate in the proceeding, the advertiser asserted that all of the claims challenged by the ALDF are truthful and accurate. (*Chicken of the Sea, Inc. (Chicken of the Sea Tuna Products*), NAD Report No. 5667 (Jan. 6, 2014)).

As part of its routine monitoring program, the NAD requested substantiation for certain quantified performance claims made by Energizer Holdings, Inc. for its "Energizer MAX" AA alkaline batteries. The claims at issue included, "Energizer MAX seals in power for up to 10 years* . . . * Shelf life." NAD also considered whether the advertising claims implied that Energizer batteries will provide power for up to 10 years of use. The advertiser argued that the challenged express claims convey the same truthful and accurate message: that unopened and unused Energizer MAX alkaline batteries – represented by depictions of the iconic Energizer bunny sealed inside a battery – retain their power up to 10 years after manufacture. It explained that it has developed a technology called "PowerSeal," which helps seal batteries and prevent leakage, extending the shelf-life of its product. The advertiser maintained that the terms "seals" and its disclaimer reinforced that message. Following its review of the evidence in the record, NAD determined that the advertiser provided a reasonable basis for the challenged claims. However, NAD recommended that the "shelf life" disclosure appear in closer proximity to the claim at issue to better communicate that the claim refers to unused batteries. NAD further recommended that the advertiser include a "shelf-life" disclosure in its television commercial's voiceover. (*Energizer Holdings, Inc. (Energizer MAX AA Alkaline Batteries)*, NAD Report No. 5668 (Jan. 3, 2014)).

## RECENT FILINGS

### Lanham Act and Other Competitor Actions

Themis Bar Review, LLC filed a complaint against rival bar examination online preparation course provider, Kaplan, Inc., requesting declaratory relief for alleged violations of the Lanham Act. Themis challenges Kaplan's website claims, such as "Kaplan Beats BARBRI – again*!" alleging that the asterisk does not direct to a disclosure on all pages, but on some is accompanied by a disclosure describing a survey comparison to Themis, not BARBRI – *i.e.*, "*Based on exit survey of 1,973 July 2011 bar examinees and 1,250 July 2013 bar examinees who took bar review. Surveys conducted at 24 randomly selected locations in states where Kaplan offers full service bar review. Each respondent rated his/her primary bar review course. 2013 survey conducted by MMR Strategy Group that its students have 'Higher Pass Rates…based on Themis first-time takers who completed 75% or more of their course assignments and on state bar exam first-time takers.'" Themis alleges that this advertising is misleading. (*Themis, LLC v. Kaplan, Inc.*, No. 3:14-cv-00208 (S.D. Cal. complaint filed on Jan. 30, 2014)).

Church & Dwight Co., Inc., the manufacturer of the "First Response" brand of over-the-counter pregnancy tests, filed a complaint against SPD Swiss Precision Diagnostics, GmBH, manufacturer of the "Clearblue Advanced Digital Pregnancy Test with Weeks Estimator," alleging false advertising under the Lanham Act and violations of Section 349 of the New York General Business Law. Plaintiff alleges that the defendant falsely advertises that its product is capable of estimating how many weeks a woman has been pregnant. Plaintiff claims that the defendant does not have substantiation to support this claim, that defendant has expressly acknowledged that the product should not be used for that purpose, and that the FDA specifically directed that the product not be marketed for that use. (*Church & Dwight Co., Inc. v. SPD Swiss Precision Diagnostics, GmBH*, No. 1:14-cv-00585 (S.D.N.Y. complaint filed on Jan. 29, 2014)).

**State Consumer Protection Law Litigation**

Handwritten *pro se* complaint filed against the National Football League ("NFL") and Commissioner Roger Goodell in the U.S. District Court for the Western District of Pennsylvania alleging, among other things, fraud and negligence. Plaintiff alleges that the defendants, acting through the NFL's game officials and instant replay employees, negligently and fraudulently failed to identify and penalize an illegal formation by the San Diego Chargers during an unsuccessful field goal attempt by the Kansas City Chiefs at the end of their last regular-season football game. Plaintiff further alleges that defendants fraudulently and negligently prohibited the Chiefs from challenging the formation based on an NFL rule prohibiting such challenges during the last two minutes of the game and that the defendants' employees failed to exercise their responsibility to review the play. Plaintiff additionally maintains that defendants denied the Chiefs a touchdown in overtime by invoking an improper and unconstitutional new rule that penalizes a team when a player's helmet is removed before the player is down. Plaintiff alleges that, as a result of the defendants' fraudulent and negligent actions, the Pittsburgh Steelers were eliminated from a wild-card berth in the playoffs. Plaintiff, on behalf of himself and Pittsburgh Steelers players, coaches, and fans, asks the court to order:

> A temporary injunction of 1 week – 10 days of all NFL (football) playoffs to allow: i. A rekick by (Chiefs) Brian Succup [*sic*] thus making the field goal 37 yards instead of 41 yards, and or coin toss and or ii. Pittsburgh Steelers v. San Diego Chargers match-up on nuetral [*sic*] site to determine 6th seed[;] Commissioner Roger Goodell, Defendant[,] allowing this protest due to the fact that [Chiefs coach Andy] Reid could not challenge an obvious error on instant replay, and declare Chiefs winners and allow Steelers as six seed[;] iv. and or money damages of excess of $25,000.00 plus court [and] all legal costs.

(According to published reports, the plaintiff is currently serving an 11- to 22-year sentence in Pennsylvania state prison for stabbing his estranged wife's ex-husband to death in 1995 and for stabbing his ex-wife until she told him "I love you." Since his conviction, plaintiff reportedly has spent his time filing frequent lawsuits, normally seeking habeas corpus relief or asserting civil rights violations rather than judicial intervention in sporting events.) (*Spuck v. Nat'l Football League, et al.*, No. 2:14-cv-00005 (W.D. Pa. complaint filed on Jan. 2, 2014)).

**Consumer Class Actions**

Putative Ohio-only class action filed against Hobby Lobby Stores, Inc. in the U.S. District Court for the Northern District of Ohio, alleging violations of the Ohio Consumer Sales Practices Act. Plaintiff claims that Hobby Lobby advertises that its products are "always" offered at a discount (*e.g.*, "Always 30% off the marked price"), resulting in consumers purchasing products at their regular price, rather than at a reduced price. Thus, the plaintiff alleges, the defendant's advertising misrepresents that consumers are receiving a benefit by purchasing the product at the "sale" price. (*Ice, et al. v. Hobby Lobby Stores, Inc.*, No. 1:14-cv-00744 (N.D. Ohio complaint filed on Apr. 4, 2014)).

Putative class action filed against Vonage America Inc. removed from state court to the U.S. District Court for the Eastern District of Wisconsin. The complaint, initially filed in the Brown County Circuit Court, alleges that Vonage published the plaintiffs' home address and telephone number after plaintiff requested that they remain private, and failed to remove the information upon request. The complaint alleges violations under Wisconsin's right to privacy, unfair trade practices, and telecommunications privacy laws, negligence and negligence per se, negligent infliction of emotional distress, fraud, breach of contract, and intentional infliction of emotional distress. (*Miller, et al. v. Vonage America, Inc.*, No. 1:14-CV-00379 (E.D. Wisc. complaint filed on April 3, 2014)).

Putative class action filed in the California Superior Court (San Francisco County) against Diamond Foods, Inc. alleging violations of California's Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law based on the defendant's marketing of its "Kettle" brand chips and "Tias!" tortilla chips as "Natural" and "All Natural," when, allegedly, such products actually contained synthetic ingredients such as citric acid and color additives. Plaintiffs additionally alleged that the defendant deceptively labeled its "reduced fat" chips by comparing the products to inappropriate reference foods and falsely stating the reduction in fat content. (*Hall, et al. v. Diamond Foods, Inc.*, No. CGC-14-538387 (Cal. Super. Ct. complaint filed on Apr. 2, 2014)).

Putative California-only class action filed against Banana Republic, LLC in California Superior Court (Los Angeles County), alleging violations of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. Plaintiff claims that Banana Republic's advertisements misrepresent that its sales are applicable to all merchandise when, in reality, many products, including the higher-end, more expensive products, are excluded from the sale. While the plaintiff acknowledges that some in-store signs contain disclosures, he alleges that those disclosures are inadequate. (*Veera, et al. v. Banana Republic, LLC*, No. BC541146 (Cal. Super. Ct. complaint filed on Apr. 1, 2014)).

Putative nationwide class action filed in the U.S. District Court for the Northern District of California against De Wafelbakkers, LLC, alleging violations of California's False Advertising Law, Consumer Legal Remedies Act, and Unfair Competition Law based on "All Natural" claims made for its pancake products. Plaintiffs alleged that such claims were false and misleading because the products contained non-natural highly processed ingredients, such as Calcium Acid Pyrophosphate. (*Ham, et al. v De Wafelbakkers, LLC*, No. 14-CV-1462 (N.D. Cal. complaint filed on Mar. 28, 2014)).

Putative class action complaint alleging breach of express warranty, fraud by uniform written misrepresentation and omission, and violation of Florida's Deceptive and Unfair Trade Practices Act filed against Vitamin Shoppe, Inc., a retailer of nutritional products and sports supplements, in the U.S. District Court for the Middle District of Florida. Plaintiff alleges that Vitamin Shoppe, Inc. knowingly under-dosed the ingredient Aminogen, which allegedly helps to speed up metabolism, in its dietary supplements "BodyTech," "Whey Tech Pro 24," "BodyTech 100% Casein," and "Body Tech Primal Pro" dietary supplements (collectively, the "Products"), and made false claims regarding the effect of lactase, another ingredient in the Products, which allegedly assists with digestion. (*Hermida, et al. v. Vitamin Shoppe, Inc.*, No. 2:14-CV-00172 (M.D. Fla. complaint filed Mar. 27, 2014)).

Putative class action filed in the U.S. District Court for the Northern District of California against Nest Inc., alleging that Nest used false and misleading advertising on its website, in print, at the point of sale, and on product packaging. Plaintiffs allege that contrary to Nest's claims, the "Nest" thermostat does not result in energy and cost savings and instead increases energy costs. For example, the face plate on the thermostat purportedly heats up causing the thermostat to run longer than necessary. The complaint alleges, among other things, violations of California's Legal Remedies Act and False Advertising Law. (*Darisse, et al. v. Nest Labs, Inc.*, 3:14-CV-01363 (N.D. Cal. complaint filed on Mar. 25, 2014)).

The U.S. District Court for the Southern District of Florida transfers to the U.S. District Court for the Northern District of California a class action, which alleges that the defendants advertise "Straight Talk" wireless plans as offering "unlimited" data plans, without disclosing that the defendants "throttle" (reduce the speed of), or terminate altogether, subscribers' access to data based on undisclosed limits and the needs of the wireless carriers. Plaintiffs further allege that the defendants fail to restore data access or regular data speeds unless and until the current prepaid plans expire and consumers purchase new Straight Talk wireless plans. Plaintiffs assert claims for, among other things, violation of Florida's Deceptive and Unfair Trade Practices Act, and California's Unfair Competition Law and Consumer Legal Remedies Act. (*Browning, et al. v. Tracfone Wireless, Inc*., No. 3:14-CV-01347 (N.D. Cal. case transferred on Mar. 24, 2014)).

Putative class action filed against The Proctor & Gamble Company in the U.S. District Court for the Northern District of Illinois. Plaintiff and class members allege that the defendant makes numerous false, deceptive, and misleading claims regarding its "Aussie" brand "Miraculously Smooth 12 Hour Anti-Humidity Spray," which the defendant represents will "stop humidity and frizz in consumers' hair." Plaintiff claims that the Miraculously Smooth 12 Hour Anti-Humidity Spray does not provide the promised benefits. As a result, the defendants' claims, according to plaintiff, constitute deceptive advertising practices in violation of Illinois's Consumer Fraud Act. (*Piekos, et al. v. Proctor & Gamble Co.*, No. 1:14-cv-02014 (N.D. Ill., complaint filed on Mar. 21, 2014)).

Putative Ohio-only class action filed against Coach, Inc. alleging violations of the Ohio Consumer Sales Practices Act, removed from the Ohio Court of Common Pleas (Lake County) to the U.S. District Court for the Northern District of Ohio. Plaintiff claims that Coach advertises continuous discounts for products offered at its factory stores, resulting in those products being offered for purchase at the same price and never actually discounted. Additionally, plaintiff alleges that Coach misrepresents that the advertised discounts are available for a limited time only. (*Pattie, et al. v. Coach, Inc.*, No. 1:14-cv-00628 (N.D. Ohio complaint removed on Mar. 21, 2014)).

Putative class action filed against Nutronics Labs, Inc. in the U.S. District Court for the Southern District of California. The complaint alleges that the defendant made false and misleading statements in the advertising for its "IGF-1 Plus" products, a line of deer antler velvet supplements that the defendant claims provides a variety of health benefits, including promoting a powerful immune system, promoting sexual performance and function, reducing the appearance of wrinkles, supporting healthy weight-loss regimens, etc. The plaintiff and class members claim that the defendant does not have any competent and reliable scientific evidence that substantiates its representations about the health benefits of consuming the IGF-1 Plus products. Therefore, according to the plaintiffs, the advertising claims made by the defendant in relation to the IGF-1 Plus product line are false and misleading in violation of California's Unfair Competition Law and Consumers Legal Remedies Act. Plaintiffs also allege that the defendant's advertising practices constitute a breach of express warranty. (*Burghardt, et al. v. Nutronics Labs, Inc.*, No. 3:14-cv-00606 (S.D. Cal., complaint filed on Mar. 17, 2014)).

Putative California-only class action filed against H.J. Heinz Company in the U.S. District Court for the Central District of California, alleging violations of California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law. Plaintiff claims that Heinz falsely advertises its "Distilled White Vinegar" products as "all natural," when, in fact, the products are made with genetically modified crops. (*Banafsheha, et al. v. H.J. Heinz Co.*, No. 2:14-cv-02023 (C.D. Cal. complaint filed on Mar. 17, 2014)).

Putative class action filed in the California Superior Court (Los Angeles County) against Truong Giang Corporation alleging violations of California's Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law based on the defendant's marketing of its herbal dietary supplement product, "Ballerina Tea Dieter's Drink Extra Strength." According to the complaint, the defendant's claim that the product is a "100% guaranteed herbal drink to help you lose weight without dieting" is false and misleading because the product exclusively contained Cassia Angustifolia, or Senna Leaves, which is an herbal stimulant laxative that can actually thwart weight loss. (*Perry, et al. v. Truong Giang Corp.*, No. BC-539568 (Cal. Super. Ct. complaint filed on Mar. 17, 2014)).

Putative class action filed against the Kroger Co. removed California Superior Court to the U.S. District Court for the Central District of California. The complaint alleges that Kroger misled consumers in violation of California's consumer protection laws by advertising that its chickens were raised in a humane environment and were cage-free, when, in fact, all chicken purportedly is raised cage-free and Kroger's chickens were raised in the same environment as all other chicken. (*Ortega, et al. v. the Kroger Co.,* 2:14-cv-01959 (Notice of Removal filed March 14, 2014))

Putative class action filed against Kimberly-Clark in California Superior Court (San Francisco County), alleging violations of California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law, and common law fraud and misrepresentation. According to the plaintiff, Kimberly-Clark markets consumer product goods, particularly paper products, including toilet paper, tissues, paper towels, feminine hygiene products, diapers, and baby wipes. Kimberly-Clark allegedly charges a premium for "flushable" wipes as compared to both toilet paper and wipes that are not marketed as "flushable," even though, purportedly, "flushable" wipes are not suitable for disposal by flushing down a toilet. According to the plaintiff, the "flushable" wipes routinely damage or clog pipes, septic systems, and sewage pumps; do not disperse, disintegrate, or

biodegrade like toilet paper; and are not regarded by municipal sewage systems as appropriate to flush down a toilet. Plaintiff further asserts that Kimberly-Clark mislead consumers into believing that the products are suitable for disposal by flushing down a toilet, and caused consumers to pay a premium price for the products that they would not otherwise pay; Kimberly-Clark's action also allegedly causes significant harm to municipal wastewater treatment systems. Plaintiff seeks restitution and damages for purchasers of the wipes, and injunction requiring Kimberly-Clark to remove the word "flushable" from its packaging and marketing, and to affirmatively inform purchasers that the wipes are not suitable for flushing. (*Davidson, et al. v. Kimberly-Clark Corp*., No. CGC-14-537962 (Cal. Super. Ct. complaint filed on Mar. 13, 2014)).

Putative class action filed against Kamerycah, Inc., a Torrance, CA-based manufacturer of "Umi no Shizuku Fuciodan" products in powder, capsule, and drink form (collectively, "Fuciodan Products") in California Superior Court (Los Angeles County), alleging breach of express warranty, deceit, and violation of California's False Advertising Law, Unfair Competition Law, and Consumers Legal Remedies Act. Plaintiff alleges that Kamerycah, Inc. falsely represents that: (1) modern science affirmed an anti-cancer substance called Fucoidan; (2) Fucoidan causes certain types of rapidly growing cancer cells to self-destruct, promoting apoptosis; and (3) Fucoidan Products prevent the cancer from spreading in the human body. Plaintiff also challenges the use consumer testimonials in "communities' newspapers, phone directories, commercial radio broadcastings, and in the 'Free Booklet,'" which consumers claim that they had used Fucoidan Products and "experienced miraculous results thereby." In contrast to representations regarding the effectiveness of Fucoidan Products, the Fucoidan Products allegedly are not effective in causing rapidly growing cancer cells to self-destruct and in preventing cancer from spreading in the human body. (*Lee, et al. v. Kamerycah, Inc*., No. BC538866 (Cal. Super. Ct. complaint filed on Mar. 10, 2014)).

Putative class action seeking certification of nationwide and Florida-only classes filed against Tom's of Maine, Inc. in the U.S. District Court for the Southern District of Florida, alleging violations of the Florida Deceptive and Unfair Trade Practices Act. Plaintiff claims that Tom's of Maine falsely advertises its toothpaste as "natural" and "all natural" when, in reality, the product contains heavily chemically processed ingredients, including xylitol and sodium lauryl sulfate. (*Gay, et al. v. Tom's of Maine, Inc.*, No. 0:14-cv-60604 (S.D. Fla. complaint filed on Mar. 7, 2014)).

Putative nationwide class action filed against Amazon Services LLC in the U.S. District Court for the Western District of Washington, alleging, in addition to breach of contract, violations of the Washington Consumer Protection Act. Plaintiff, an Amazon "Prime" member, claims that Amazon encourages third-party vendors who use Amazon to ship items to mark up the prices of these items to cover shipping charges, thereby concealing shipping charges in the price of the product. Therefore, plaintiff alleges, Amazon's representations that its Prime Members receive two-day free shipping are deceptive. (*Burke, et al. v. Amazon Servs. LLC*, No. 2:14-cv-00335 (W.D. Wash. complaint filed on Mar. 7, 2014)).

Putative class action filed against Wal-Mart Stores, Inc. in California Superior Court (Los angeles County), alleging that the defendant made false and misleading statements on the packaging of and in advertising for its "Equate Sensitive Skin Body Wash by" labeling the product as "unscented" and marketing it to sensitive skin users, even though the product purportedly contains "fragrance" and a detectable scent. Plaintiff and class members argue that these practices are false and misleading, in violation of California's Unfair Competition Law, False Advertising Law, and Consumer Legal

Remedies Act. (*Gomez, et al. v. Wal-Mart Stores, Inc.*, No. BC538639 (Cal. Super. Ct. complaint filed on Mar. 6, 2014)).

Putative class action filed in the U.S. District Court for the Northern District of California against HSNi, LLC (dba Home Shopping Network), Martha Stewart Living OmniMedia, Inc., Emeril's Homebase, LLC, and Emerils.com, LLC, alleging violations of California's False Advertising Law, Consumer Legal Remedies Act and Unfair Competition Law based on product claims made for "Emeril" brand knives and knife products. According to the complaint, the defendants allegedly falsely represent that certain knives and knife sets are manufactured in Solingen, Germany, an area famous for producing high quality cutlery, when they are actually manufactured in China. Plaintiffs further allege that the defendants' references to Solingen, Germany intentionally mislead consumers into believing that the knife products are high quality when, in fact, the knives rust and chip easily and are not high quality. (*Moshiri, et al. v. HSNi LLC, et al.*, No. 14-CV-1034 (N.D. Cal. complaint filed on Mar. 5, 2014)).

Putative Florida-only class action filed against Nature's Bounty, Inc. in the U.S. District Court for the Southern District of Florida alleging, among other things, negligent misrepresentation, unjust enrichment, and violation of the Florida Deceptive and Unfair Trade Practices Act. Plaintiff asserts that Nature's Bounty makes false and misleading health claims that its "Flush Free Niacin" supplement is effective in improving and promoting heart health when, in fact, the product allegedly has no impact on any condition that improves or impacts heart health. (*Mazzeo, et al. v. Nature's Bounty, Inc.*, No. 0:14-cv-60580 (S.D. Fla. complaint filed on Mar. 5, 2014)).

Class action filed in California Superior Court (Los Angeles County) against Barney Premium Foods, LLC arising out of advertising its nut butter products as healthy products containing "evaporated cane juice," despite the Food and Drug Administration's pronouncement that that term is false and misleading. Plaintiffs also claim that the defendant fails to disclose that the products contain sugar. Plaintiffs allege violations of California's Sherman Law (which incorporates federal and California food labeling laws), Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act, as well as common law negligent misrepresentation, and breach of quasi-contract. (*Shaouli, et al. v. Barney's Premium Foods, LLC*, No. BC538558 (Cal. Super. Ct. complaint filed Mar. 5, 2014)).

Putative class action filed against Simply Nourish Pet Food Company, LLC. in the U.S. District Court for the Northern District of Illinois. Plaintiff and class members allege that the defendant makes numerous false, deceptive, and misleading claims regarding its "Simply Nourish's Hip & Joint" product, which purports to offer "joint support" and which purports to "[s]upport[ ] and help[ ] maintain hip and joint function and flexibility." Plaintiff alleges that these claims lack support because no scientific evidence connects joint health and support to a glucosamine supplement product such as the product at issue. These claims, according to the plaintiff, constitute deceptive advertising practices in violation of Illinois's Consumer Fraud Act. (*Gubala, et al. v. Simply Nourish Pet Food Co.*, No. 1:14-cv-01443 (N.D. Ill. complaint filed on Mar. 3, 2014)).

Putative Florida-only class action filed against Chattem, Inc. in the U.S. District Court for the Middle District of Florida, alleging violations of Florida's Deceptive and Unfair Trade Practices Act. Plaintiff claims that Chattem falsely advertises that its "ACT Restoring Anticavity Fluoride Mouthwash" rebuilds tooth enamel, as the active ingredient fluoride only strengthens, but does not

rebuild, enamel. (*Foster v. Chattem, Inc.*, No. 6:14-v-00346 (M.D. Fla. complaint filed on Mar. 3, 2014)).

Pautative class action alleging, among other things, violation of Florida's Deceptive and Unfair Trade Practices Act, negligent misrepresentation, and violation of Magnuson-Moss Warranty Act filed against Hain Celestial Group in the U.S. District Court for the Southern District of Florida. Plaintiff alleges that the defendant "unlawfully, negligently, fraudulently, unfairly, misleadingly, and/or deceptively" represented that its: (1) "DeBoles Gluten Free Corn Spaghetti Style Pasta" (2) "DeBoles Wheat Free Corn Spaghetti Style Pasta"; and (3) "DeBoles Wheat Free Corn Elbow Style Pasta" are "All Natural," when they, in fact, are not because they contain unnatural, synthetic, and/or artificial ingredients, including, but not limited to yellow corn flour and/or yellow corn meal. (*Bohlke, et al. v. Hain Celestial Group, Inc*., No. 9:14-CV-80300 (S.D. Fla. complaint filed Feb. 28, 2014)).

Putative class action filed in U.S. District Court for the Central District of Northern California against BlueBonnet Nutrition Corporation, alleging false advertising in connection with the defendant's representation that its "Betaine Hydrochloride" product contains beet molasses when, in fact, the product is synthetically produced. Plaintiffs claim violations of California's consumer protection statutes, as well as negligent and intentional misrepresentation. (*Kochlani, et al. v. BlueBonnet Nutrition Corp.*, No. 2:14-CV-01539 (C.D. Cal. complaint filed Feb. 28, 2014)).
Putative class action filed in the U.S. District Court for the Northern District of California against General Mills, Inc. alleging violations of California's False Advertising Law, Consumer Legal Remedies Act, and Unfair Competition Law arising out of labeling and marketing claims for "Kix Crispy Corn Puffs Cereal" products. According to the complaint, the defendants falsely represent that products are "made with All Natural Corn" and "made with All Natural Corn & Honey," when, in reality, such products are not "natural" because they are made from corn derived from genetically modified organisms (GMOs). (*Kellogg, et al. v. General Mills, Inc.*, No. 14-CV-939 (N.D. Cal. complaint filed on Feb. 28, 2014)).

Complaint Putative class action filed against GoGo LLC, a provider of in-flight Internet connectivity and wireless in-cabin digital entertainment services, in the U.S. District Court for the Eastern District of California, alleging, among other things, violations of New York General Business Law § 349 and the consumer protection acts of various states. Plaintiff claims that in September 2012 he purchased a one-month pass for in-flight Internet service from GoGo for $34.95 and that GoGo continued to bill his credit card every month for an additional three months without his authorization and even though he did not use the service. Plaintiff further alleges that the representations on GoGo's registration website were deceptive because they omitted references to the recurring nature of the charges, and, therefore, the plaintiff and putative class members did not receive notice of the recurring charges when they registered for GoGo's in-flight Internet service. (*Berkson, et al. v. GoGo LLC*, No. 1:14-CV-01199 (E.D.N.Y. complaint filed on Feb. 25, 2014)).

Putative class action seeking certification of a nationwide class and a New York-only subclass filed against Telebrands Corporation and Home Depot U.S.A., Inc. in the U.S. District Court for the District of New Jersey, alleging, among other things, violations of New York's deceptive acts and practices statute and New York's false advertising statute. Plaintiff maintains that the defendants have made false and misleading claims as to the durability and construction of Telebrands' "Mini

Max Hose" and "Pocket Hose" brands of expandable garden hoses, and their suitability for use as garden hoses, in nationwide marketing, promotional materials, and advertising for the products. Specifically, the plaintiff asserts that the defendants market and sell these products as rugged and durable expandable garden hoses designed for outdoor use, manufactured with heavy duty fire hose construction to be strong enough for any tough job, and fit for use as maximum length full-size garden hoses. However, according to the plaintiff, the hoses are fundamentally defective, unsuitable for use as garden hoses as advertised, and are prone to leaking and/or bursting when used as instructed, as allegedly evidenced by thousands of complaints posted on Internet review sites and message boards. Plaintiff asserts that defendant Home Depot affirmatively participated in and/or adopted the allegedly false and misleading product claims by incorporating these claims in in-store advertising, reviewing and approving advertising materials for the products, and selling these products to consumers. (*Klemballa, et al. v. Telebrands Corp., et al.*, No. 2:14-cv-01245 (D.N.J. complaint filed on Feb. 25, 2014)).

Putative class action seeking certification of nationwide and Illinois-only classes filed against L'Oreal USA, Inc. in the U.S. District Court for the Northern District of Illinois, alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act. Plaintiff claims that L'Oreal falsely advertises that its "Garnier Sleek & Shine Anti-Humidity Smoothing Milk," made with the silicone dimethicone, will stop humidity and frizz in consumers' hair for 24 hours. According to the plaintiff, silicone is permeable to water vapor and therefore to humidity, rendering the product ineffective. (*Flaherty, et al. v. L'Oreal USA, Inc.*, No. 1:14-cv-01287 (N.D. Ill. complaint filed on Feb. 21, 2014)).

Putative nationwide class action filed against Nonni's Foods, LLC, which alleges violations of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act, removed from California Superior Court (San Francisco) to the U.S. District Court for the Northern District of California. Plaintiffs claim that the defendant misrepresents that its biscotti products are "All Natural," because each product contains between two and four artificial and/or synthetic ingredients, such as glycerin and monocalcium phosphate. (*Larsen, et al. v. Nonni's Foods, LLC*, No. 3:14-cv-00790 (N.D. Cal. complaint removed on Feb. 21, 2014)).

Putative class action filed against Universal Wellness Group, Inc. (a/k/a Better Health Lab, Inc., d/b/a Alkazone). in the U.S. District Court for the Eastern District of New York. The complaint alleges that the defendant made false, deceptive, and misleading statements on the packaging of its "Alkazone" bottled water and on the company's website, including claims regarding the product's pH levels and mineral contents. However, according to the plaintiff, the Alkazone water is "nothing more than bottled tap water dressed up in a fancy, deceitful label." The plaintiff and class members claim that these practices constitute deceptive acts and practices, in violation of N.Y Gen. Bus. Law § 349, false advertising, in violation of N.Y. Gen. Bus. Law § 350, and breach of an express warranty. (*Beard, et al. v. Universal Wellness Group, Inc.*, No. 1:14-cv-01045 (E.D.N.Y. complaint filed on Feb. 18, 2014)).

Putative class action filed in the U.S. District Court for the Southern District of California, alleging violations of California's Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law based on claims that the defendant's "Revolution" helmet significantly reduced the incidence of concussions when such products allegedly did not reduce the incidence of concussions

generally, or at the 31% reduction rate claimed by defendant. (*Galvan, et al. v. Riddell, Inc. et al.*, No. CV-0359 (S.D. Cal. complaint filed on Feb. 14, 2014)).

Putative class action filed against Speedwinds Nutrition, Inc. in California Superior Court (Los Angeles County). Plaintiff and class members allege that the defendant made numerous false, deceptive, and misleading claims regarding its "AntlerX IGF-1 Enhancer Deer Antler Velvet" product, including claims such as "Improves athletic performance and strength;" "Increase muscle mass;" and "Increased lean muscle," among others. These claims, according to plaintiff, constitute deceptive advertising practices in violation of California's False Advertising Act, and unfair or deceptive acts or practices under California's Consumers Legal Remedies Act and Unfair Business Practices Act. (*Gil, et al. v. Speedwinds Nutrition, Inc.*, No. BC536076 (Cal. Sup. Ct. complaint filed on Feb. 11, 2014)).

Putative class action filed in the California Superior Court (Los Angeles County) against Kroger Co., alleging violations of California's Consumer Legal Remedies Act and Unfair Competition Law based on the defendant's marketing of its chicken products as sourced from chickens raised "cage free in a humane environment." According to the complaint, such claims are false and misleading because the chicken products were "treated no differently than other mass-produced chickens on the market" and produced according to the National Chicken Council's Animal Welfare Guidelines and Audit Checklist for Broilers, which allegedly seek to maximize efficiency and profit, rather than ensure humane treatment. (*Ortega, et al. v. Kroger Co.*, No. BC-536034 (Cal. Super. Ct. complaint filed on Feb. 11, 2014)).

Putative nationwide class action filed in the U.S. District Court for the Central District of California, alleging violations of California's Consumer Legal Remedies Act and Unfair Competition Law, and breaches of express and implied warranties based on defendant's representation of its "Nescafe Decaf" instant coffee products as "decaf" when the product allegedly contained caffeine. According to the complaint, the defendant's instant coffee products contained more than a trace amount of caffeine and, thus, were not "decaf" because they contained approximately 2 mg caffeine per fluid once, which is about 1 mg caffeine less than certain caffeinated sodas. (*Estrada, et al. v. Nestle USA, Inc.*, No. CV14-989 (C.D. Cal. complaint filed on Feb. 7, 2014)).

Putative class action filed in California Superior Court (Los Angeles County) against Wellnx Life Sciences, Inc., alleging violations of the California Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law based on the defendant's promotion of its green coffee bean gummies as a "delicious way to lose weight," when such products allegedly do not facilitate weight loss. (*Rosales et al. v. Wellnx Life Scis., Inc. et al.*, No. BC-534808 (Cal. Super. Ct. complaint filed on Jan. 30, 2014)).

Putative class action filed in U.S. District Court for the Central District of California against Natural Organics Laboratories, Inc. a/k/a Nature's Plus, alleging that the defendant falsely promoted its "Betaine Hydrochloride" and "Golden Years Multi-Vitamin Tables" products as containing beet molasses, when, in fact, such products are synthetically produced. Plaintiffs claim violations of California's Unfair Competition Law and False Advertising Law, as well as negligent and intentional misrepresentation. (*Kelly, et al. v. Natural Organics Labs.*, No. 2:14-CV-00704 (C.D. Cal. complaint filed Jan. 29, 2014).

Putative class action filed in the Circuit Court of Cook County, Illinois against Kaspersky Lab, alleging that Kaspersky Lab deceptively marketed its computer software by designing its software security program always to detect and report security threats even where none existed so that consumers were fraudulently induced by the resulting report report into purchasing separate Kaspersky software products to remove them. Plaintiffs claim violations of Illinois's Consumer Fraud and Deception law, and also assert claims for fraudulent inducement and unjust enrichment. (*Machowicz, et al. v. Kaspersky Inc.*, 2014-CH-01525 (Ill. Cir. Ct. complaint filed Jan. 27, 2014)).

Putative California-only class action filed in the U.S. District Court for the Southern District of California against PepsiCo, Inc., alleging violations of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. Plaintiff claims that Pepsi actively conceals material facts concerning the amount and health effects of 4-methylimidazole (4-MEI) – an impurity generated during the manufacture of caramel colors – and omits in advertising that its soft drinks contain dangerous levels of 4-MEI. (*Cortina, et al. v. PepsiCo, Inc.*, No. 3:14-cv-00168 (S.D. Cal. complaint filed on Jan. 23, 2014)). [Putative California-only class action filed in the U.S. District Court for the Northern District of California, alleging violations of California's Unfair Competition Law and Consumer Legal Remedies Act. Plaintiffs claim that PepsiCo concealed the material fact that its soft drinks contain 4-MEI, and failed to comply with its Proposition 65 duty to warn because of the presence of 4-MEI. (*Sciortino, et al. v. PepsiCo, Inc.*, No. 3:14-cv-00478 (N.D. Cal complaint filed on Jan. 31, 2014)).]

Putative class action filed against Goya Foods, Inc. in the U.S. District Court for the Southern District of California. The complaint alleges that the defendant failed to disclose that its Malta Goya soft drinks contain an amount of 4-methylimidazole, a carcinogen, that allegedly is sufficient to expose California consumers to substantial health risks. The plaintiff and class members argue that this omission is fraudulent, unfair, unlawful, deceptive, and misleading, in violation of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. (*Cortina, et al. v. Goya Foods, Inc.*, No. 3:14-cv-00169-L-NLS (S.D. Cal. complaint filed on Jan. 23, 2014)).

Putative class action filed against Whole Foods Market California, Inc. in the U.S. District Court for the Northern District of California. Plaintiff and class members allege that the defendant engaged in unlawful, unfair, deceptive, and fraudulent practices when they advertised certain Whole Foods products as "All Natural," even though they contain the synthetic chemical ingredient Sodium Acide Pyrophosphate, among other synthetic ingredients. This practice, according to the plaintiffs, is a deceptive advertising practice in violation of California's False Advertising Law, and an unfair or deceptive act or practice under California's Consumers Legal Remedies Act and Unfair Competition Law. In conjunction with the allegations relating to the UCL, plaintiffs allege violations of California's Sherman Food, Drug, and Cosmetic Law and various sections of the California Civil Code. Plaintiffs also allege that the defendant's practices constitute common law fraud, negligent misrepresentation, a breach of an express warranty and contract, and unjust enrichment. (*Garrison, et al. v. Whole Foods Market California, Inc.*, No. 3:14-cv-00334-EDL (N.D. Cal. complaint filed on Jan. 22, 2014)).

Putative class action filed in California Superior Court (Los Angeles County) against Ralphs Grocery Company, alleging violations of the California's Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law, based on the defendant's representation that its decaf coffee products were "without caffeine," when such products actually contained caffeine.

(*Kopalian, et al. v. Ralphs Grocery Co. et al.*, No. BC-533946 (Cal. Super. Ct. complaint filed on Jan. 22, 2014)).

Putative class action, seeking certification of a nationwide class and a California-only subclass, filed against Matrixx Initiatives, Inc. and its wholly owned subsidiary, Zicam LLC, in the U.S. District Court for the Eastern District of California, alleging, among other things, violations of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. Plaintiff maintains that the defendants falsely and misleadingly represented on products labels and in nationwide advertising that the "Zicam" line of over-the-counter homeopathic "pre-cold medicine" products prevent, shorten, and reduce the severity of symptoms of the common cold. According to the plaintiff, however, the active ingredients in the Zicam products are so highly diluted that these ingredients are rendered completely inactive and without pharmacological effect, and the products are nothing more than placebos. Plaintiff asserts that clinical trials, scientific studies, and respected medical societies repeatedly have concluded that homeopathic remedies, such as the Zicam products, are ineffective as medical treatments and work no better than placebos, and that clinical evidence cited by the defendants to support their efficacy claims in fact demonstrate that the highly diluted concentrations of zinc in the Zicam products are not effective shortening a cold or reducing the severity of its symptoms. Moreover, the plaintiff notes that the U.S. Food and Drug Administration does not evaluate the safety or efficacy of homeopathic remedies under its New Drug Application approval process. According to the plaintiff, the National Advertising Division found last year that the defendants had made unsupported advertising representations that the Zicam products prevented the occurrence of the common cold, and the NAD recommended that the defendants stop asserting that the products were "clinically proven" to work (although the defendants failed to do so). And two years before that, the plaintiff maintains, Zicam's inventor pled guilty to illegally marketing and distributing an unapproved over-the-counter medication ostensibly intended to treat and prevent bird flu. (*Melgar, et al. v. Matrixx Initiatives, Inc., et al.*, No. 2:14-cv-00160 (E.D. Cal. complaint filed on Jan. 21, 2014)).

Putative nationwide class action filed against 23andMe, Inc. in the U.S. District Court for the Northern District of California, alleging violations of California's False Advertising Law, Consumer Legal Remedies Act, and Unfair Competition Law. Plaintiff claims that defendant lacks substantiation for claims that its "Personal Genome Service" health kit can determine an individual's genetics-related health traits. Additionally, the plaintiff alleges that the defendant is in violation of the federal Food, Drug and Cosmetic Act because it has not received FDA approval to market the health kit, which was the subject of a November 2013 FDA warning letter. (*Stanton, et al. v. 23andMe, Inc.*, No. 4:14-cv-294 (N.D. Cal. complaint filed on Jan. 20, 2014)). [A putative class action seeking certification of nationwide and Illinois-only classes was filed against the same defendant in the U.S. District Court for the Northern District of Illinois, alleging violations of the Illinois Consumer Fraud Act and California Unfair Competition Law. Plaintiff similarly alleges that the defendant lacks substantiation for the claims that the Personal Genome Service health kit can identify over 240 genetic conditions and traits, including the risks of specific diseases. (*Newland v. 23andMe, Inc.*, No. 1:13-cv-280 (N.D. Ill. complaint filed on Jan. 15, 2014)).]

Putative class action filed in U.S. District Court for the Central District of California against Zicam LLC and Matrixx Initiatives Inc. for falsely representing that "Zicam" prevents, shortens, and reduces the severity of symptoms of the common cold. Specifically, the complaint alleges that the

defendants' false and misleading labels and television commercials, and the underlying study on which they rely, violate the federal Magnuson-Moss Warranty Act, and California's Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law. (*Melgar, et al. v. Zicam LLC et al.*, No. 14-00405 (C.D. Cal. complaint filed Jan. 17, 2014)).

Putative nationwide class action filed against Nestlé USA, Inc. in the U.S. District Court for the Northern District of California, alleging violations of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. Plaintiff claims that Nestlé's Dreyer's and Edy's brand "All Natural" fruit bars are misbranded, as they contain artificial ingredients such as citric acid and ascorbic acid, and color additives. Plaintiff also alleges that the "All Natural" statements imply that the products are healthier than similar products that do not make such statements. (*Belli, et al. v. Nestlé USA, Inc.*, No. 5:14-cv-286 (N.D. Cal. complaint filed on Jan. 17, 2014)).

Putative nationwide class action filed against Nestlé USA, Inc. in the U.S. District Court for the Northern District of California, alleging violations of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. Plaintiff claims that Nestlé's "All Natural" and "No Sugar Added" Juicy Juice products are misbranded, as they contain artificial ingredients, ascorbic acid and citric acid, and do not comply with federal regulations governing nutrient content claims. Plaintiff also alleges that these statements imply that the products are healthier than similar products that do not make such statements. (*Coffey, et al. v. Nestlé USA, Inc.*, No. 3:14-cv-288 (N.D. Cal. complaint filed on Jan. 17, 2014)).

Putative California-only and multistate class action filed against GNC Corporation in the U.S. District Court for the Northern District of California, and subsequently transferred to the U.S. District Court for the District of Maryland (where multidistrict proceedings are pending), alleging, among other things, violations of California's Unfair Competition Law and Consumers Legal Remedies Act. Plaintiff alleges that GNC has made false, deceptive, and unsubstantiated claims on product labels and packaging, GNC's website, and online promotional materials for its "TriFlex" line of glucosamine-hydrochloride-and-chondroitin-sulfate-based joint health dietary supplements concerning the purported health benefits of its supplements as a means to help promote mobility and flexibility, improve joint comfort, cushion and lubricate joints, and regenerate cartilage. According to the plaintiff, however, scientific evidence and clinical studies have proven that glucosamine and chondroitin are ineffective in producing these health benefits, and GNC's TriFlex products allegedly do not produce the claimed benefits. In addition, the plaintiff maintains that other ingredients included in GNC's products are likewise ineffective in producing the claimed joint health benefits. Plaintiff further asserts that GNC has directed its health claims at persons suffering from osteoarthritis and its representations implicitly claim that the TriFlex products have a positive effect on common symptoms of arthritis, even though clinical studies purportedly show that glucosamine and chondroitin are ineffective in treating arthritis. As a result, plaintiff maintains that GNC has not only affirmatively misrepresented the joint health benefits of its TriFlex products, but also has engaged in deception by omission or concealment for allegedly failing to disclose facts regarding these clinical studies. (*Brown, et al. v. GNC Corp.*, No. 1:14-CV-00033 (D. Md. complaint transferred from N.D. Cal. on Jan. 17, 2014)). [A similar class action against Nutramax Laboratories, Inc., Wal-Mart Stores, Inc., and Rite-Aid Corporation relating to advertising claims for Nutramax's "Cosamin" line of supplements was transferred from the Southern district of California

to the District of Maryland and consolidated with other pending litigation. *See Dorfman, et al. v. Nutramax Labs., et al.*, No. 1:14-CV-00124 (D. Md. complaint transferred from S.D. Cal. on Jan. 16, 2014)).

Putative class action filed in U.S. District Court for the Central District of California against defendants Sega Amusements Inc., Play It! Amusements Inc., Sega Holdings USA, Inc., Sega Corporation, and Sega Sammy Holdings Inc., alleging violations of the California Consumers Legal Remedies Act for failing to disclose that their amusement arcade machine does not award a prize when consumers win the game, but rather only after a certain amount of money is deposited into the machine. (*Kemp et al. v. Sega Amusements, et al.*, No. CV-14-0281 (C.D. Cal. complaint filed Jan. 13, 2014)).

Putative nationwide class action filed against McAfee, Inc. in the U.S. District Court for the Northern District of California, alleging violations of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act, and Sections 349 and 350 of the New York General Business Law. Plaintiff claims that McAfee automatically renewed consumers' anti-virus software subscriptions at prices higher than it charges non-subscription customers for identical products, in contradiction to the express representations concerning the automatic renewal program. Specifically, plaintiff alleges that McAfee misrepresents in promotional materials and the Consumer Agreement that the customer's subscription will be renewed at the then-current price. (*Williamson, et al. v. McAfee, Inc.*, No. 5:14-cv-158 (N.D. Cal. complaint filed on Jan. 10, 2014)).

Putative class action filed against Skinny Crisps, Inc. in California Superior Court Los Angeles County). Plaintiff and class members allege that the defendant failed to list "sugar" or "dried cane syrup" as ingredients in its products that contain "organic dehydrated cane juice," despite FDA requirements to the contrary. This omission, according to the plaintiffs, constitutes a false and misleading practice in violation of California's Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act. Plaintiffs also allege that defendant's practices constitute both a negligent misrepresentation and a breach of quasi-contract. (*Agazanof, et al. v. Skinny Crisps, Inc.*, No. BC532760 (Cal. Super. Ct. complaint filed on Jan. 9, 2014)).

Putative class action filed against Diamond Foods, Inc. in the U.S. District Court for the Northern District of California. The complaint alleges that the defendant represented that at least five varieties of its "Kettle Brand TIAS Tortilla Chips" were "all natural" in its marketing, even though they contain unnatural, synthetic ingredients, including, but not limited to, maltodextrin and/or dextrose. The plaintiff and class members argue that these practices are fraudulent, unfair, deceptive, and misleading, in violation of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. Plaintiff and class members also argue that these practices constitute a negligent misrepresentation. (*Surzyn, et al. v. Diamond Foods, Inc.*, No. 4:14-cv-136 (N.D. Cal. complaint filed on Jan. 9, 2014)).

Putative nationwide class action filed against the National Football League ("NFL") in the U.S. District Court for the District of New Jersey alleging violation of the New Jersey Consumer Fraud Act. Plaintiff alleges that the NFL manipulates the market price of Super Bowl tickets by stringently restricting the number of tickets offered at face value to the general public (using a lottery system), while issuing the great majority of the tickets to the teams that make up the league, which in turn

offer large numbers of tickets from their respective allotments to ticket resellers pursuant to ticket contracts entered into years in advance, which offer specific numbers of tickets. Specifically, plaintiff maintains that the NFL allocates only 1% of all Super Bowl tickets for sale to the general public via a lottery system, thereby allegedly violating a provision of the New Jersey Consumer Fraud Act that prohibits a person who has access to event tickets prior to their release for sale to the general public from withholding more than 5% of all available seating for that event from sale to the general public. Plaintiff further asserts that the NFL retains 25 percent of the remaining tickets for distribution to corporate patrons, media sponsors, "and other league insiders." And plaintiff alleges that the NFL allocates the remaining tickets in varying percentages to its 32 franchises, which, in turn sell large blocs (under contracts that allegedly reserve "specific quantities of Super Bowl tickets before the tickets are even printed") to ticket resellers that bundle the tickets in with luxury vacation packages and "grossly inflate the price" of the tickets. As a result of the NFL's ticket distribution practices, the plaintiff alleges that prospective purchasers are forced to seek tickets in a secondary market and pay substantially more than face value in order to attend the Super Bowl, "one of the most popular and iconic sporting events of the year." According to the plaintiff, the NFL and its franchises share in the proceeds from this mark-up through their "lucrative contracts" with the ticket resellers, which allegedly require the resellers to purchase large blocs of regular-season tickets to be eligible to purchase Super Bowl tickets. (*Finkelman, et al. v. Nat'l Football League*, No. 3:14-cv-00096 (D.N.J. complaint filed on Jan. 6, 2014)).

Putative class action filed in U.S. District Court for the District of Maryland against GNC Corporation, alleging that GNC falsely and deceptively advertised the health benefits of certain of its dietary supplements. Plaintiff bring claims under the Magnuson Moss Warranty Act, as well as New York's consumer protection, false advertising, and warranty statutes, alleging that GNC falsely claimed it had scientific support for the efficacy of the active ingredient in its "Triflex" supplement and other products designed to treat the symptoms of osteoarthritis. Specifically, GNC's marketing strategy and packaging claimed that its "maximum" and "clinical" strength formulas would promote flexibility, improve joint flexibility, and cushion joints, and also cited studies and scientific research to support its claims. Plaintiffs allege that numerous scientific studies, cited in its complaint, demonstrate that, in fact, those claims are false. (*Howard, et al. v GNC Corp.*, No. 1:14-cv-00002 (D. Md. complaint filed Jan. 4, 2014)).

Putative class action filed against Diamond Foods, Inc. in the U.S. District Court for the Southern District of Florida. The complaint alleges that the defendant represented that at least five varieties of its "Kettle Brand TIAS Tortilla Chips" were "all natural" in marketing, advertising, and packaging, even though they contain unnatural, synthetic ingredients including, but not limited to, maltodextrin and/or dextrose. The plaintiff and class members claim that these practices are fraudulent, unfair, deceptive, and misleading in violation of the Florida Deceptive and Unfair Trade Practices Act, and the Magnusson-Moss Warranty Act. Plaintiff and class members also argue that these practices constitute a negligent misrepresentation and a breach of express and implied warranties. (*Klacko, et al. v. Diamond Foods, Inc.*, No. 9:14-dv-80005 (S.D. Fla. complaint filed on Jan. 3, 2014)).