

Justin Timberlake Waves Bai Bai Bai to Partially Dismissed “No Artificial Flavors” Beverage Mislabeling Suit

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Last month, a judge in the Southern District of California partially dismissed a putative class action against beverage company Bai Brands, LLC (“Bai”) and related defendants. [*Branca v. Bai Brands, LLC, No. 18-00757 \(S.D. Cal. 2019\)*](#). Plaintiff Kevin Branca filed this lawsuit against Bai, its parent company Dr. Pepper Snapple Group, Inc. (“DPSG”), the CEOs of both these companies, and Bai investor Justin Timberlake, alleging that they violated California and federal statutes and state consumer protection laws by labeling Bai drinks as containing “NO artificial flavors” and as being “naturally flavored” when they allegedly contain an artificial form of malic acid, and by failing to identify this form of malic acid by its scientific name in the product ingredients list. In granting in part defendants’ motion to dismiss, the court held that it lacked jurisdiction over the individual defendants, including Timberlake, and that defendants were not required to list beverage ingredients by their scientific names. However, the court declined to dismiss plaintiff’s claims that it was false and misleading to label the beverages as containing “NO artificial flavors” and as being “naturally flavored,” leaving defendants Bai and DPSG to defend those claims.

The product labels of the Bai beverages in dispute indicate that they contain malic acid. According to plaintiff, malic acid can take one of two forms: (1) l-malic acid, which occurs naturally and is found in certain fruits and vegetables, and (2) d-l-malic acid, which is chemically manufactured. Plaintiff alleged that Bai’s products contain the latter, and that defendants were therefore required to identify the ingredient on the product label by its scientific name “d-l-malic acid,” rather than simply by its common name “malic acid.” The court, however, disagreed, finding that FDA regulations “specifically instruct that ingredients should be listed by their common or usual name,” and plaintiff’s contention that defendants were required to do something different is preempted.

The court also dismissed Timberlake and the other individual defendants from the lawsuit on the grounds that they are not California state residents, and their roles as corporate officers or agents of the corporate defendants did not confer specific personal jurisdiction over them. In addition, plaintiff's consumer protection claims were dismissed to the extent they were barred by the 3-year statute of limitations for CLRA and FAL claims, or the 4-year statute of limitations for UCL and breach of warranty claims. Branca purported to assert claims on behalf of a class of individuals who purchased products as far back as 2012, but did not file his lawsuit until April 2018. In defense of these claims, Branca argued that he and other putative class members had to rely on the manufacturer's labeling and therefore could not have discovered defendants' allegedly deceptive practices earlier than April 2018. The court rejected these arguments, instead agreeing with defendants that the CLRA and FAL claims were barred to the extent they arose prior to April 2015, and the UCL and breach of warranty claims were barred to the extent they arose prior to April 2014.

But defendants were not able to drink up a total victory. In declining to dismiss plaintiff's claims that the Bai beverages should have been labeled as "artificially flavored," and that it was deceptive to label them as containing "NO artificial flavors" and as "naturally flavored," the court found the complaint sufficiently pled that the products contained the manufactured form of malic acid. Defendants argued that, regardless, malic acid is not used as a "flavor" but rather as an acidulant (an ingredient that makes food more acidic and serves as a pH control agent), and therefore under federal regulations could not be described on the product label as an "artificial flavor." The court acknowledged that FDA regulations distinguish between a "flavor" (which imparts a distinctive flavor of its own) and a "flavor enhancer" (which has no distinctive flavor of its own, but intensifies flavors from other ingredients), but found that plaintiff sufficiently pled in this case that malic acid was a "flavoring ingredient," and that whether it was in fact an "artificial flavor" was a factual determination that the court could not make on a motion to dismiss. Bai and DPSG are therefore still left to defend this claim.

Watch this space as we continue to cover how courts are grappling with what constitutes an "artificial flavor."

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