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Judge Looks "Kind"ly Upon Certifying Class in Snack Bar Advertising Suit

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In a recent opinion out of the Southern District of New York, Judge William H. Pauley III certified three classes of plaintiffs in New York, California, and Florida who allege that KIND LLC, the manufacturer of KIND Bars, deceptively marketed several products as "all natural" and "non-GMO," even though they purportedly contain synthetic and genetically modified ingredients. *In re KIND LLC "Healthy and All Natural" Litig.*, No. 15-md-02645 (S.D.N.Y. Mar. 24, 2021).

The court began its analysis by examining each of the four Rule 23(a) requirements—numerosity, commonality, typicality, and adequacy—and determining that each weighed in favor of class certification. Most notably, the court found that common questions predominated despite the absence of any uniform definition of the term "natural" because, in its view, all the definitions plaintiffs advanced were consistent with one another. Plaintiffs offered definitions of "natural" from the dictionary, FDA policy, the USDA, and Congress. In considering these various definitions, Judge Pauley recognized that "these formulations of the definition 'natural' differ," but dismissed these concerns because he believed none "exclude[d] another."

This decision is somewhat surprising, given the deep reservoir of class certification decisions finding that, where plaintiffs fail to establish a controlling definition for a key term or phrase in the challenged advertisement, individual issues predominate and class certification should be denied. A number of courts have reached this conclusion in the "natural" labeling sphere:

- In *Astiana v. Kashi Co.*, the court refused to certify a class bringing "all natural" claims, in part because the plaintiffs were unable to show that "all natural" had a shared meaning amongst the proposed class. 2013 U.S. Dist. LEXIS 108445, *40 (S.D. Cal. 2013)
- In *Thurston v. Bear Naked, Inc.*, a federal judge in the Southern District of California found commonality and predominance lacking because the plaintiffs "fail[ed] to

sufficiently show that 'natural' has any kind of uniform definition among class members." 2013 U.S. Dist. LEXIS 151490, *25 (S.D. Cal. 2013).

- In *Randolph v. J.M. Smucker Co.*, the court denied class certification where plaintiff had "not demonstrated that an objectively reasonable consumer would agree with her interpretation of 'all natural,'" while also noting that this failure "unequivocally exposes the fact that there is a lack of consensus" surrounding what constitutes a "natural" product. 2014 U.S. Dist. LEXIS 176731, *14 (S.D. Fla. 2014).

Courts regularly adopt this reasoning in other contexts also. *See* *Pierce-Nunes v. Toshiba Am. Info. Sys.*, 2016 U.S. Dist. LEXIS 149847 (C.D. Cal. 2016) (holding that the predominance requirement was not satisfied where plaintiffs could not establish a common meaning for the term "LED TV"); *In re 5-Hour Energy Mktg. & Sales Practices Litig.*, 2017 U.S. Dist. LEXIS 220969 (C.D. Cal. 2017) (same based on "energy"); *In re Tropicana Orange Juice Mktg. & Sales Practices Litig.*, 2019 U.S. Dist. LEXIS 102566 (D.N.J. 2019) (same based on "pasteurized").

The FDA also has not adopted, and has actually declined to adopt, a formal definition of the term "natural," citing the "many facets of this issue" the agency would have to carefully consider if it were to undertake the task of defining the term. *See* 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993). In doing so, the FDA noted "the ambiguity surrounding use of this term." It is difficult to square this ambiguity with the *KIND* court's certification decision.

Watch this space as we monitor whether this decision is part of a shifting tide in "natural" certification decisions, or merely an outlier amidst continuing struggles to reach consensus on what "natural" even means.

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