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Let it “Bee”: Ninth Circuit Affirms Dismissal of Trader Joe’s Manuka Honey Advertising Suit

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A Ninth Circuit panel recently affirmed dismissal of a putative consumer class action alleging Trader Joe’s misleadingly labeled its store brand honey as “100% New Zealand Manuka Honey,” where plaintiffs’ pollen content testing showed that only about 60% of the honey was derived from Manuka flower nectar. In doing so, the Court reinforced the importance of considering context (including a reasonable consumer’s background knowledge) in evaluating whether advertising would be likely to mislead a reasonable consumer. *Moore v. Trader Joe’s Co.*, No. 19-16618 (9th Cir. July 15, 2021).

Under the FDA’s Honey Guidelines, “Manuka Honey” is the “common or usual name” for honey whose “chief floral source” is the Manuka bush, a plant native to Australia and New Zealand. Plaintiffs conceded that Trader Joe’s labeling is consistent with these guidelines. Even still, plaintiffs maintained that “100% New Zealand Manuka Honey” could nonetheless mislead consumers into thinking that the honey was “100%” from Manuka flower nectar. As noted, plaintiffs commissioned pollen content testing that showed nearly half of the honey was derived from other non-Manuka flower nectar.

The Court of Appeals noted the “100%” in the “100% New Zealand Manuka Honey” label could be read in multiple ways: “100% could be a claim that the product was 100% Manuka honey, that its contents were 100% derived from the Manuka flower, or even that 100% of the honey was from New Zealand.” To determine if this ambiguity would mislead a reasonable consumer, the Ninth Circuit panel relied on precedent from multiple federal appellate courts supporting “the general principle that [courts considering] deceptive advertising claims should take into account all the information available to consumers and the context in which that information is provided and used.” The panel also noted, “information available to a consumer is not limited to the physical label and may involve contextual inferences regarding the product itself and its packaging.”

Here, the Court found three key contextual inferences would dissuade a reasonable consumer from adopting the "unreasonable or fanciful" belief that the product consists solely of honey derived from the Manuka flower: (1) the impossibility of making a honey that is 100% derived from one floral source; (2) the low price of Trader Joe's Manuka Honey; and (3) the presence of the "10+" on the label.

First, the Court explained that because of the well-known "foraging nature of bees" any reasonable consumer would know it is impossible to completely control what flowers a bee visits – making it impossible to produce a honey 100% derived from one floral source.

Second, the Court considered the price of Trader Joe's Manuka Honey relative to the cost of products containing higher concentrations of Manuka-derived honey. Trader Joe's honey costs $13.99 per jar ($1.59 per ounce), while a jar of honey 92% derived from Manuka costs around $266 ($21.55 per ounce). Given this dramatic price difference, the Court found any consumer aware of the market for Manuka honey could not reasonably expect a $13.99 jar of honey to be "100%" derived from Manuka flower nectar. In support of its reasoning, the Ninth Circuit cited the Second Circuit's decision in *Jessani v. Monini* – a lawsuit where Proskauer successfully represented the makers of "white truffle flavored" olive oil. There, the Court found it was "simply not plausible that a significant portion of the general consuming public acting reasonably would conclude that [the defendant's] mass produced, modestly-priced olive oil was made with 'the most expensive food in the world.'"

Third, the Court turned to the "10+" on the product label. Although the Court noted there are "no other details on the jar about what '10+' means, the presence of this rating on the label puts a reasonable consumer on notice that it must represent *something* about the product." In fact, the "10+" refers to the honey's Unique Manuka Factor (UMF) score, which measures a Manuka honey product's concentration of honey derived from Manuka flower nectar. The Court observed that reasonable consumers of Manuka honey would routinely encounter such ratings and would likely have some knowledge about them – and any consumer with even a cursory knowledge of the UMF scale would know Trader Joe's Manuka Honey was decidedly on the lower end of the scale, which ranges from 5+ to 26+.

The Court thus held “a reasonable consumer would be left only with the conclusion that ‘100% New Zealand Manuka Honey’ means that it is 100% honey whose chief floral source is the Manuka plant, which is an accurate statement.”

While some district courts in the Ninth Circuit can be unduly hesitant about dismissing at the pleading stage complaints alleging unreasonable interpretations of advertising, *Moore* is a reminder that “where plaintiffs base deceptive advertising claims on unreasonable or fanciful interpretations of labels or other advertising, dismissal on the pleadings may well be justified.” *Moore* is also a reminder that in advertising law, context is king—or perhaps queen, in the case of the honey bee.

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