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Litigators of the Week: King & Spalding Gets 2nd Circuit to Uphold 'All Natural' Win For Kind Bar Maker

By Ross Todd
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Our Litigators of the week are **Keri Borders** and **Dale Giali** of **King & Spalding** who have represented KIND LLC in a nearly decade-long class action saga involving food labels. The Second Circuit last week upheld their summary judgment win over the use of the words "All Natural" on certain products. The opinion lays out a viable path to summary judgment for defendants facing similar consumer deception claims. The panel found that the trial court didn't err when it excluded plaintiffs' expert testimony attempting to establish that reasonable consumers wouldn't expect artificial or synthetic ingredients in the products at question.

Lit Daily: What was at stake here for your client?

Dale Giali: As for litigation remedies, plaintiffs—via 13 consumer class actions blanketing the country—were seeking a percentage of the purchase price on every sale of 39 of KIND's most popular snack bar and granola products going back 13 years, and an injunction against KIND making certain representations on its product labels. But far more important to KIND was plaintiffs' questioning KIND's adherence to two of the core principles under which KIND operates, transparency and providing snack products with high-quality ingredients you can see and pronounce.

Courtesy photoS

Keri Borders, left, and Dale Giali, right, of King & Spalding.

How did this matter come to you and the firm?

Giali: We had successfully represented KIND in several other consumer class actions that were filed at the beginning of the tidal wave of class actions against the food and beverage industry for alleged false advertising. Given the prior and ongoing successful relationship, it was a natural progression that we'd again partner with KIND on these cases.

Who is on your team and how have you divided the work on this matter, both at the trial court and on appeal?

Keri Borders: Our core team is Dale, senior associate **Rebecca Johns** and me. We have worked closely together for a decade, focusing our practice on defending consumer class actions in the food, beverage and supplement false advertising space. We are equally and fully invested in all of our cases. We share in strategy, argument development and briefing—a true team effort. Dale argued the pleading attacks, stay motions and class certification motion and (as is usually the case in our class action litigation) took the plaintiffs' depositions. Also as is usual, I took and defended the expert depositions and was the architect of our *Daubert* and summary judgment motions. I also argued before the Second Circuit to defend our summary judgment and *Daubert* victories. Rebecca focused on discovery and, in the way only she can, kept the trains running on time. We were assisted by our long-time and extraordinary paralegal **David Coplen**, and, of course, with a great supporting group of attorneys.

How did the claims your client was facing when this case finally made it to summary judgment differ from what was originally filed nine years ago?

Borders: The case started as 13 separate consumer class actions filed as direct follow-ons to an FDA Warning Letter challenging a statement that used to appear on the back of KIND's product label. The "about KIND" statement said, among other things, "healthy and tasty," and FDA's position was that the snacks didn't qualify as healthy under the healthy labeling regulations. All of the class actions mirrored FDA's challenge to healthy. On a parallel track to the litigation, KIND engaged with FDA on the Warning Letter, ultimately resulting in FDA permitting KIND to continue to use the "healthy and tasty" phrase. Plaintiffs, no longer with the support of an FDA challenge, refocused their theory of deception to an "All Natural/ Non GMO" label statement. After discovery was closed and plaintiffs were confronted with an indisputable factual record that KIND sourced its ingredients as Non GMO, plaintiffs dropped that claim, too, and by the time of summary judgment plaintiffs were proceeding solely against the "All Natural" label statement. As initially filed, the class actions purported to cover consumers nationwide, but by the time of the class certification motion, the classes were limited to California, Florida and New York consumers, i.e., the home states of the named class representatives.

What were the strategic steps that you took at the expert phase that helped win the summary judgment ruling you were arguing to uphold here at the Second Circuit?

Borders: Three stand out. First, we made the strategic decision not to offer our own affirmative expert opinion. We did not want to set up a battle of the experts, which could appear like a triable issue of fact. We used our experts in a rebuttal role. Second, we developed the record with a *Celotex*-style summary judgment motion in mind, which would focus on plaintiffs' inability to meet their preponderance burden on a select few of the elements of their claims. We focused on the deception element. Third, because plaintiffs' ability to meet their preponderance burden on deception was heavily dependent on their experts, we had laser-beam focus on the expert reports and expert depositions. We successfully demonstrated that plaintiffs' experts did not have a reliable or relevant opinion on the reasonable consumer's understanding of the term "All Natural" as used on KIND products or whether that term was material to the purchasing decision of KIND products, or whether KIND's products were incompatible with an appropriate definition of "All Natural."

Now that you have this decision in-hand, is there anything about the oral argument at the Second Circuit that sticks out to you?

Borders: How engaged the panel was with the issues. The panel was very active and asked

thought-provoking questions. In particular, the panel really dug into the expert reports and depositions and asked pretty detailed and pointed questions about their testimony.

What's important in the Second Circuit decision for companies such as KIND facing these sorts of consumer deception claims?

Giali: The decision provides much-needed guidance regarding the evidence required of plaintiff at summary judgment to show that a reasonable consumer would be deceived. Consumer deception class actions often turn on the objective reasonable consumer standard as applied to the specific context of the case but there is not a significant body of law instructing parties on what type of evidence is sufficient to meet that burden. In this decision, the Second Circuit confirmed that many sources of purported evidence relied on by plaintiffs are insufficient, including:

- What the named plaintiff thinks,
- What a party's expert's personal understanding is,
- What a government agency thinks,
- How the dictionary may define various terms (e.g., "natural"), or even
- What the defendant thinks

Rather, a plaintiff needs to come forward with admissible evidence of a coherent and consistent meaning that is held by a significant portion of the consuming public acting reasonably under the circumstances, i.e., the reasonable consumer. While a survey is not required, that is usually how it's done. But, if so, the survey itself needs to apply sound and accepted methodology and be performed correctly.

What can other litigators take from your experience with this case?

Giali: The Second Circuit's decision confirms a conventional framework for fighting on the merits in consumer deception class action litigation—using *Daubert* motions and a motion for summary judgment based on an evidentiary record—to bring a consumer deception case to a successful conclusion for a defendant when moving to dismiss and opposing class certification were not successful offramps.

The decision also confirms that the objective "reasonable consumer" standard is where most of the oxygen in consumer deception class actions goes.

I guess it's also worth noting that in any case that lasts nine years and goes through summary judgment, there will be plenty of lost battles along the way. The complaint in this case ultimately survived pleading attacks and plaintiffs successfully had two stays lifted (stays based on the primary jurisdiction of FDA (defining natural) and USDA (regulating GMOs)). A defendant can lose plenty of battles and win the war in the end. Constantly reassess the strength of your case. If the fundamentals remain solid—strong arguments supported by admissible evidence and/or where the opposing side does not have evidence to meet its preponderance burden—trust your instincts and the system.

What will you remember most about this matter?

Giali: It's tough to pick one—between transfers/coordination/MDL of the 13 class actions, multiple motions to dismiss and stay, parallel proceedings with FDA resulting in it withdrawing its Warning Letter and reconsidering its healthy regulation altogether, plaintiffs' depositions, expert discovery, our first virtual hearings/proceedings during the pandemic, decertification, summary judgment, *Daubert* orders, precedential Second Circuit decision—but the most memorable, and the one that made it all possible, is KIND's full commitment and partnership from the very beginning to see the case through to conclusion.