

# **Lack of Standing Dooms Organizational Plaintiffs' False Advertising Claims; Such a Challenge Can Be Brought at Any Time**

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Challenges based on lack of standing can be brought at any time and, in *Friends of the Earth v. Sanderson Farms, Inc.*, 2019 U.S. Dist. LEXIS 127964 (N.D. Cal. July 31, 2019), the court dismissed a putative class action for lack of standing pursuant to Rule 12(h)(3) after Plaintiffs supplemented discovery responses and depositions were taken. Although it had earlier denied motions to dismiss brought pursuant to Rule 12(b)(6), the district court concluded that Plaintiffs failed to produce evidence in discovery to establish their injury in fact and, accordingly, lacked standing under Article III.

Friends of the Earth ("FoE") and Center for Food Safety ("CFS") brought suit alleging that Sanderson's "100% Natural" advertising for its chicken products was false and misleading and alleged claims under California's Unfair Competition Law and its False Advertising Law.

Following the close of non-expert discovery, Sanderson brought a motion to dismiss, asserting that Plaintiffs' discovery responses and deposition testimony showed that Plaintiffs could not establish organizational standing. By using the 12(b)(1) (lack of subject matter jurisdiction) mechanism, Sanderson could introduce evidence of lack of standing without converting the motion to one for summary judgment and force Plaintiffs to move past the allegations in the complaint.

A plaintiff facing such a challenge must demonstrate that the injury-in-fact is concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling. Organizations must demonstrate both (1) frustration of its organizational mission and (2) diversion of its resources to combat the particular conduct in question.

In opposing the motion, Plaintiffs pointed to their publications regarding Sanderson's products and expert costs incurred in publicizing their allegations as evidence of injury.

In granting the motion, the court noted that the advertising and publications identified by Plaintiffs were not specific to Sanderson. Further, and "most damaging to Plaintiffs' cause" was their testimony admitting that no resources were diverted because of the advertising and conceding that

that they would have undertaken the same advocacy even if Sanderson had never aired the challenged advertisements. The district court reasoned that even if Plaintiffs suffered an ongoing injury after litigation commenced, they still had to establish an injury prior to the filing of the lawsuit – standing must be present at the time suit is brought.

The district court dismissed the claims without prejudice (required when dismissal is based on lack of standing), and without leave to amend, recognizing that amendment would be futile, would prejudice Sanderson and produce an undue delay in already prolonged litigation.

This case highlights the importance of developing case themes and strategy, and revisiting and executing on them throughout the discovery process. Sanderson apparently proactively sought and obtained evidence related to Plaintiffs' standing. And, by bringing its motion under 12(b)(1), Sanderson preserved its right to later bring a motion for summary judgment.

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