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California Judge Certifies Class in Bigelow Tea False Advertising Lawsuit

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- As previously covered on this blog, the Federal Trade Commission (FTC) adopted a final rule on July 1, 2021 that requires products labeled with unqualified "Made in the USA" or equivalent claims to be "all or virtually all" made in the United States, meaning that significant processing and final assembly of the product occurs in the US and all or virtually all ingredients or components of the product are made and sourced in the US. The year before FTC's decision, as discussed here, R.C. Bigelow urged the dismissal of a proposed false adverting class action lawsuit over teas labeled as "Manufactured in the USA 100% American Family Owned," asserting that reasonable consumers know that very little tea is grown in the US and that most consumers would read "manufactured in the USA" as encompassing Bigelow's blending, packaging, labeling, and formulating, most of which is done in the US.

- On July 31, 2023, a federal judge ordered the certification of a class of persons who purchased at least one box of Bigelow's green, black or oolong tea, labeled as "Manufactured in the USA 100% American Family Owned," at a retail store in California at any time from October 17, 2017 to present. On the disputed prerequisites for class certification of commonality and typicality, the judge found that while the named plaintiffs, who were longtime Bigelow tea drinkers, may have considered other factors in their purchasing decisions, it is unlikely they are uniquely concerned about taste compared to the rest of the class of tea purchasers and that Bigelow would use the defense of lack of reliance against any plaintiffs. On the issue of adequacy of representation, although they could not remember exactly when the disputed labeling began to appear and they were solicited to participate in a class action lawsuit via a website, the named plaintiffs were found to have clearly reviewed the pleadings, to understand the basis for their claims, and to have participated actively in their case. The judge also admitted the plaintiffs' proffered report from a food labeling specialist on the deceptiveness of the defendant's claim, a survey supporting the plaintiffs' price premium theory for determining damages, and a consumer survey on what is conveyed by the label's wording. In the required predominance inquiry, the judge rejected the defendant's argument that a staggered rollout of the disputed labels destroys commonality, finding this does not create individual questions that predominate over common questions, but he did adjust the

class definition to begin October 2017, when the label was approved, rather than July 13, 2017, as the plaintiff had proposed. Further, the judge ruled that the label's placement, set off to the side in bold type on the back of the box, is more prominent than labels in other cases that were deemed not "sufficiently prominently displayed to warrant an inference of class?wide exposure."

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