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Advertising

Jeffrey A. Greenbaum

Planning to Promote That Your Products Were Made Using Better Farming Practices? Choose Your Words Carefully

Champion Petfoods markets its Acana brand of pet food with a variety of statements promoting the better ways that its ingredients are sourced. A recent lawsuit in federal court in California alleged, however, that the company's statements—such as that its products are made with "free-run" chicken and that they are "brimming" with "wild-caught fish"—misled consumers about Champion's actual farming and sourcing practices. *Sultanis v. Champgion Petfoods USA*, 2021 WL 3373934 (N.D. Cal. August 3, 2021). While the case is still at its very early stages, a recent decision in the case gives some helpful insights into how to describe better sourcing practices without overstating what's really happening on the farm.

The Plaintiff's Case

The plaintiff alleged that Champion marketed poultry-based pet food products as being "made with fresh **free-run chicken**, turkey, & cage free eggs." In addition, the plaintiff said that the products included chicken icons with the descriptor "free-run chicken" and depicted chickens outdoors on grass. The plaintiff also pointed to statements on Champion's website, such as, "Raised under the highest standards for animal care and food safety by people we know and trust, on family-run American farms, our free-run poultry and cage-free eggs are nourishing, natural, and antibiotic free."

The plaintiff also argued that Champion misled consumers about Acana's fish-based pet food products as well. The plaintiff alleged that the products were marketed as "brimming with . . . wild-caught rainbow trout" and "**brimming with . . . wild-caught fish**." The plaintiff also said that the product packaging depicted a fisherman next to what looks like a fresh body of water with the caption "trusted supplier of fresh wild-caught fish." The plaintiff also cited statements that Champion made on its website, such as "ACANA Freshwater Fish is packed with whole wild-caught rainbow trout" and that its "saltwater fish are sustainable and wild-caught from New England's cold and fertile waters—all whisked to [their] DogStar Kitchen fresh or raw."

So, why did the plaintiff say that these claims are misleading?

The plaintiff argued that Champion's "free-run" chicken claims misled consumers into believing that the chicken is actually made of free range chicken that have access to the outdoors. In fact, according to the plaintiff, the chicken Champion uses comes from "factory-farmed birds raised under standard industrial conditions—confined in crowded barns without outdoor access." Champion did not dispute that the chicken didn't have outdoor access. Rather, Champion argued that the claim "free-run" isn't misleading because chickens are allowed to run inside of the barns where they live.

The issue with Acana's "brimming with . . . wild-caught fish" claim, according to the plaintiff, is that it falsely conveys to consumers that Acana's fish-based products are entirely made from wild-caught fish. The plaintiff alleged (and Champion didn't dispute) that the products are, in fact, made from a mix of wild-caught and factory farmed fish.

What Did the Court Think of the Plaintiff's Allegations?

Applying California law, the court considered whether the plaintiff had sufficiently alleged false advertising claims to survive a motion to dismiss. In order for advertising to be misleading, the plaintiff is required to show that the advertising is likely to deceive a "**reasonable consumer**." Unlike perhaps the reasonable consumer who was the subject of a recent Ninth Circuit decision in *Moore v. Trader Joe's Company*, No. 19-16618 (9th Cir. July 15, 2021), the court said that a reasonable consumer is not a "particularly sophisticated consumer." That doesn't mean that just any interpretation of an advertising claim is reasonable, however. The court explained, "Rather, the phrase indicates that the ad is such that it is *probable* that a *significant portion* of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled."

Regarding the "free-run" claim, the court held that the plaintiff

had sufficiently alleged claims to survive the motion to dismiss. The court wrote, "The term 'free-run,' on its own, could reasonable be read to imply that the chickens used to make the Products can freely run outside, especially because the Products' label also depicts chicken running freely on a spacious, grassy, and outdoor field without any disclaimer that those are not the chickens used to make the products."

The court allowed the plaintiff's claims based on "brimming with wild-caught fish" to continue as well. Champion argued, essentially, that the claim is not misleading because it never said that its products contained only wild-caught fish and that other parts of the packaging explained that the product contained a mix of wild and farmed fish. The court didn't buy Champion's argument, for several reasons. First, "reasonable consumers should not be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box." Second, even if consumers read the disclaimer—such as, "loaded . . . with rainbow trout from Idaho and wild-caught blue catfish and white perch from Grand Rapids, Kentucky"—"it cannot be concluded as a matter of law that the substance of the disclaimer would be sufficient to disabuse the consumer of any misconceptions engendered by the 'brimming with wild-caught fish' representation." And, third, the court said that, "the fact that the Products contain some wild-caught fish does not mean that the statement 'brimming with wild-caught fish' is not misleading." The court explained that, "The statements do not need to use qualifiers like 'all' or "100%' in its representations in order to be misleading." The court concluded, "although it is certainly *more* plausible that [the plaintiff] would have been misled by the statements 'all wild-caught fish' or '100% wild-caught fish,' that does not mean it is entirely implausible that she was misled into thinking that the Products were free from farmed fish by the term 'brimming with wild-caught fish.'"

What Are Some Important Takeaways from This Decision?

While courts do bring a fair degree of skepticism to false advertising cases, that doesn't mean that they're going to be so quick to dismiss them when plaintiffs have made credible arguments that advertising or packaging claims could be subject to (a reasonable) misinterpretation. So, choose your words carefully—or you may end up in a lengthy litigation.

Speaking of choosing your words, when you use potentially ambiguous terminology in your advertising, it leaves you open to these types of false advertising claims. Sometimes, advertisers think that if the claim is ambiguous, consumers won't interpret the claim as communicating specific information. Courts often find, however, that the opposite is true. Since advertisers are generally responsible for all reasonable interpretations of their advertising claims, when the claim is ambiguous, courts may just as easily find that a statement communicates messages that the advertiser did not intend to convey.

Although advertisers often choose their words carefully, you can't assume that consumers will read them as carefully and will notice subtle differences in language. While the advertiser here may have thought that "free run" communicated something specific (*i.e.*, that the chickens aren't in cages), it's not surprising that a consumer alleged that she thought that the term communicated that the chickens were "free range" chickens, and that they were allowed to run free, outside. Your claims are a lot less likely to be misunderstood if you say specifically what you mean, using terminology that is familiar to consumers (such as, "cage free," for example).

Don't ignore the power of the visuals you use. Even when your language is clear, if you've got visuals that communicate something different, it's going to be very difficult to ensure that consumers get the right message. If you show pictures of chickens outdoors, it's going to be very difficult—no matter what you say—to make sure that consumers understand that the chickens are not, in fact, allowed to go outdoors.

I'd bet that, almost every month, I blog about a case where a plaintiff claims that an advertiser was not clear enough about whether a product contains a particular ingredient or *only* has that ingredient. If you're talking about what's in your product—even if you don't claim that the product is "100%" made from that ingredient—it's a good idea to be crystal clear about what you do mean.

This case is also another good example of how difficult it is to use disclaimers, or other copy, to qualify your advertising claims. If you're going to rely on qualifying language, make sure that it's clear and conspicuous and in close proximity to the claim. And, you'll want to make sure that the language clearly modifies the claim. Regulators, courts,

and others often don't buy the argument that consumers are carefully reading the advertising and thoughtfully interpreting the language choices you've made in your disclaimer.

Finally, as consumers become more concerned about healthy eating, and how their shopping practices may adversely impact the environment, marketers are increasingly trying to promote the healthy, environmentally-friendly, and socially beneficial aspects of their products. With the increased use of these types of claims invariably comes increased attention from consumers, competitors, and regulators. So, if you're thinking about touting the "good" aspects of your products, now's a good time to make sure your claims are clear, unambiguous, and fully substantiated.

Jeffrey A. Greenbaum has been Managing Partner of Frankfurt Kurnit Klein + Selz since 2010 and is one of the country's leading advertising lawyers. He is also the Chairman of the Global Advertising Lawyers Alliance.