

FILED

UNITED STATES COURT OF APPEALS

JUL 17 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

NATALIA BRUTON, individually and on  
behalf of all others similarly situated,

Plaintiff-Appellant,

v.

GERBER PRODUCTS COMPANY,

Defendant-Appellee.

No. 15-15174

D.C. No. 5:12-cv-02412-LHK  
Northern District of California,  
San Jose

ORDER

Before: O'SCANNLAIN, GOULD, and M. SMITH, Circuit Judges.

Defendant-Appellee Gerber Products Company's Petition for Rehearing is **GRANTED, in part.** The memorandum disposition previously filed on April 19, 2017, and the partial dissent filed with it, are hereby withdrawn, and a new memorandum disposition shall be filed simultaneously.

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MEMORANDUM\*

Appeal from the United States District Court  
for the Northern District of California  
Lucy H. Koh, District Judge, Presiding

Argued December 13, 2016, Submitted April 19, 2017  
San Francisco, California

Before: O'SCANNLAIN, GOULD, and M. SMITH, Circuit Judges.

Plaintiff-Appellant Natalia Bruton filed a putative class action against baby food manufacturer Gerber Products Company (Gerber). Bruton alleged that labels on certain Gerber baby food products included claims about nutrient and sugar content that were impermissible under Food and Drug Administration (FDA)

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

headlong into an inconsistent case that was decided after the district court's ruling. In *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), our court—using different terminology for what the district court called “ascertainability”—held that there was no separate “administrative feasibility” requirement for class certification. *Id.* at 1123. We reverse the district court's denial of class certification and remand for further consideration of whether class certification is appropriate.

3. The district court properly held that there was no genuine dispute of material fact on Bruton's claims that the labels were deceptive in violation of California's Unfair Competition Law (UCL), *see* Cal. Bus. and Prof. Code § 17200, False Advertising Law (FAL), *see id.* § 17500, and Consumer Legal Remedies Act (CLRA), *see* Cal. Civ. Code § 1770.

Bruton's theory of deception does not rely on proving that any of Gerber's labels were false. Rather, Bruton contends that the combination of (a) the presence of the claims on Gerber's products (in violation of FDA regulations), and (b) the lack of claims on competitors' products (in compliance with FDA regulations), made Gerber's labeling likely to mislead the public into believing that Gerber's products were of a higher quality than its competitors' products.

Bruton's theory of deception may be viable. The California courts have held that even technically correct labels can be misleading. See *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 510 (2003) ("The advertisement, although literally true, was nevertheless deceptive and misleading in its implications." (quoting *People v. Wahl*, 39 Cal. App. 2d Supp. 771, 773 (Cal. App. Dep't Super. Ct. 1940) (literally true advertisement was misleading because price of offered product was 50% off regular price of more expensive product, not regular price of the offered product)); see also *Leoni v. State Bar*, 39 Cal. 3d 609, 627 (1985) (holding that attorney advertising, though not false, was misleading because "[a] necessary fact ha[d] been omitted."). Here, it may be literally true that Gerber's products are "As Healthy As Fresh," but due to alleged external facts—that Gerber does not comply with the FDA regulations that otherwise prevent its competitors from making the same claim—Bruton's theory is that Gerber's labels by comparison mislead in their implications.

Nevertheless, even assuming the validity of Bruton's theory, the record does not include sufficient evidence to create a genuine dispute of material fact for trial as to consumer deception under her theory. Bruton points to the following evidence to support consumer deception: (1) Gerber's and its competitors' labels;

(2) Bruton's own testimony about being misled by Gerber's labels; and (3) two warning letters from the FDA.

The labels in the record include both Gerber's labels and some of its competitors' labels. However, the competitor labels do not, as Bruton's theory of deception would require, avoid illegal label claims. Rather, they make many of the same illegal claims as Gerber's labels. A reasonable jury comparing the labels side by side could not rationally conclude that Gerber's labels were likely to deceive members of the public into thinking that Gerber's products were of a higher quality than its competitors' products that made the same type of claims. Bruton's testimony about being misled while shopping is vague, "uncorroborated and self-serving," and does not tend to show that Gerber's labels were misleading or deceptive. *F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1159 (9th Cir. 2010), as amended (June 15, 2010) (internal quotation marks omitted). And the FDA warning letters, in addition to being informal and non-binding, do not indicate that Gerber's competitors' labels are in compliance with FDA requirements. The letters therefore do not support Bruton's theory that Gerber's labels are deceptive because its competitors' labels follow the law. We hold that the record does not contain sufficient evidence to create a genuine dispute of material fact for trial as to the outcome under the reasonable consumer test. We affirm the district court's grant

of summary judgment to Gerber on Bruton's claims that the labels were deceptive in violation of the UCL, FAL, and CLRA.

4. The district court erred in granting summary judgment to Gerber on Bruton's claims that the labels were unlawful under the UCL. The UCL's unlawful prong "borrows" predicate legal violations and treats them as independently actionable under the UCL. *Wang v. Massey Chevrolet*, 97 Cal. App. 4th 856, 871 (2002). The best reading of California precedent is that the reasonable consumer test is a requirement under the UCL's unlawful prong only when it is an element of the predicate violation. *Compare, e.g., Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1354, 1360 (2003) (holding that UCL claims were subject to the reasonable consumer test where the predicate violations were of the FAL and CLRA, both of which require meeting the reasonable consumer test); *with Los Angeles Mem'l Coliseum Comm'n v. Insomniac, Inc.*, 233 Cal. App. 4th 803, 835 (2015) (holding that a UCL claim was properly stated—without mention of the reasonable consumer test—where the predicate violation was of federal tax law). The predicate violation here is of California's Sherman Law, *see* Cal. Health & Safety Code §§ 110760, 110765, which itself incorporates standards set by FDA regulations, *see id.* §§ 110100, 110670. These FDA regulations include no requirement that the public be likely to

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experience deception. *See* 21 C.F.R. §§ 101.13(b)(3), 101.60(c)(2)(v). We reverse the district court's grant of summary judgment to Gerber on Bruton's claims that the labels were unlawful in violation of the UCL.

**AFFIRMED in part, REVERSED in part, and REMANDED**

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

#### Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

##### (1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

##### B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

#### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

#### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

#### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

#### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**United States Court of Appeals for the Ninth Circuit**

**BILL OF COSTS**

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>

**Note:** If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
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\* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

\*\* *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

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*Continue to next page*

**Form 10. Bill of Costs - Continued**

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

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*(To Be Completed by the Clerk)*

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk