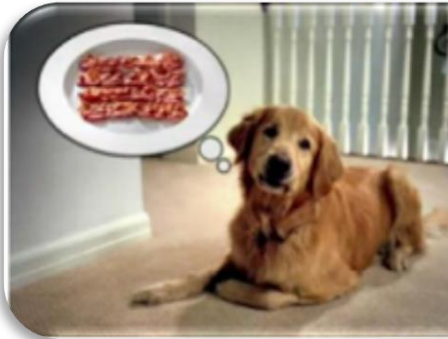


# Are there any limits on the use of food imagery?

Yes. Imagery cannot be false or misleading (e.g, PF2(c): A vignette, graphic or pictorial representation on a pet food or specialty pet food label shall not misrepresent the contents of the package). The *Wysong* court acknowledged other pet food imagery cases in which deception was adequately pled.



# Beggin' Strips Commercial



# *Blue Buffalo v. Nestle Purina PetCare (E.D. Missouri 2015)*

Blue Buffalo alleges that Purina's television commercials and packaging for its *Beggin' Strips* dog treats mislead consumers into thinking "that the product is bacon" or that its main ingredient is bacon, when in fact bacon is listed tenth on the ingredient list...I find that Blue Buffalo has stated a plausible claim for false advertising under the Lanham Act (MTD denied).

# *Kacocha v. Nestle Purina Petcare Co.*

## *SDNY*

“The plaintiff alleged that the defendant “manufacture[d] and deceptively and falsely market[ed] its popular ‘Beggin’ dog treat products as being largely comprised of real bacon, when in reality, bacon [was] just a minor ingredient.”...The plaintiff’s claim focused, in part, on the defendant’s packaging, and the plaintiff provided substantial detail about the particular packaging and the context in which images appeared on that packaging. For instance, the plaintiff claimed that the packaging “prominently” featured images of “giant bacon strips” that were particularly misleading to consumers...The plaintiff also included in his complaint a careful analysis of the entire package, as a whole...The plaintiff then specifically explained how the television advertisements for the Beggin’ Strips product reinforced the allegedly-misleading message that the product contained real bacon...” (MTD Denied)

# Other “Natural Cases”

# *Slawsby v. Champion Petfoods USA, Inc. et al*

The Complaint alleges that certain Champion Pet Food products have levels of heavy metals and BPA which are inconsistent with “natural” and other claims on the packaging, and that a premium is charged for the food. The complaint relies on data published by the Clean Label Project, and part of their rating includes rating for Heavy Metals.

# *Slawsby v. Champion Petfoods USA, Inc. et al*

7. Defendants warrant, promise, represent, label and/or advertise that the Contaminated Pet Foods are free of any heavy metals and/or chemicals like BPA by assuring that the food represents an evolutionary diet that mirrors that of a wolf – free of anything “nature did not intend for your dog to eat.”

8. Defendants assert that: “Virtually All Of The Nutrients In Acana Are Natural And Not Synthetic.” Defendants make a similar claim to the Orijen Pet Foods in maintaining that that the main source of any nutrient in Orijen is natural.

9. Defendants further warrant, promise, represent, advertise and declare that the Contaminated Pet Foods are made with protein sources that are “Deemed fit for human consumption.”



# *Slawsby v. Champion Petfoods USA, Inc. et al*

10. Based on the risks associated with exposure to higher levels of arsenic, both the U.S. Environmental Protection Agency (“EPA”) and U.S. Food and Drug Administration (“FDA”) have set limits concerning the allowable amounts of arsenic at 10 parts per billion (“ppb”) for human consumption in apple juice (regulated by the FDA) and drinking water (regulating by the EPA).

11. The FDA has taken action based on consumer products exceeding this limit, including testing and sending warning letters to the manufacturers.<sup>1</sup>

12. Moreover, the FDA is considering limiting the active level for arsenic in rice cereals for infants to 100 ppb.<sup>2</sup>

# *Slawsby v. Champion Petfoods USA, Inc. et al*

17. Additionally, Defendants knew or should have been aware that a consumer would be feeding the Contaminated Pet Foods multiple times each day to his or her pet, making it the main, if not only, source of food for the pet. This leads to repeated exposure of the heavy metals to the pet.

18. Defendants have wrongfully and misleadingly advertised and sold the Contaminated Pet Foods without any label or warning indicating to consumers that these products contain heavy metals, or that these toxins can over time accumulate in the dog's or cat's body to the point where poisoning, injury, and/or disease can occur.

19. Defendants' omissions are material, false, misleading, and reasonably likely to deceive the public. This is true especially in light of the long-standing campaign by Defendants to market the Contaminated Pet Foods as healthy and safe to induce consumers, such as Plaintiff, to purchase the products. For instance, Defendants market the Contaminated Pet Foods as

68. Additionally, Defendants received notice of the contaminants in their dog and cat food, including the Contaminated Pet Foods, through the Clean Label Project. The Clean Label

Project is a nonprofit 501(c)(3) run by mothers, fathers, pet lovers, consumers and agents of change concerned about the industrial and environmental contaminants in consumer products. The Clean Label Project found higher levels of heavy metals in its dog and cat food products.

69. Defendants spoke with the Clean Label Project by phone regarding its findings and methodology which showed that Orien pet foods have high levels of heavy metals compared to



# Acana Heritage Freshwater Fish Formula Dry Dog Food

## Overall Product Rating



### How We Measure This

At Clean Label Project, we believe that when it comes to industrial and environmental contaminants,...

[Read More](#)

[View All Categories](#)

## Results Summary

### Heavy Metals



#### Heavy Metals (Arsenic, Cadmium, Lead, and Mercury):

Heavy metal pollution and contamination can arise from many sources but often arises from metal purification processes, such as the smelting of copper and the preparation of nuclear fuels. The water run-off from these industries can result in contaminated soils.<sup>1</sup> The same soils that grow many of the ingredients used in pet food

# *Jennifer Reitman et al v. Champion PetFoods USA, Inc. et al 3/1/2018 C.D. Ca. 2:18-cv-01736*

Complaint: "Defendants engaged in deceptive advertising and labeling practice by expressly warranting, claiming, stating, featuring, representing, advertising, or otherwise marketing on Acana and Orijen labels and related websites that the Contaminated Pet Foods are natural, fit for human consumption, fit for canine consumption, and made from "Biologically Appropriate" and "Fresh Regional Ingredients" consisting entirely of fresh meat, poultry, fish, and vegetables when they contain the non-naturally occurring chemical BPA."



# AAFCO

Association of American Feed Control Officials

**I use ingredients from the grocery store; I want to tell customers that my product is human grade. Can I do that on the label?**

Claims on animal foods should not be false or misleading. A claim that something is "human-grade" or "human-quality" implies that the article being referred to is "edible" for people in legally defined terms. The terms "human grade" or "human quality" have no legal definition. When one or more human edible ingredients are mixed with one or more non-human edible ingredients, the edible ingredients become non-human edible. To claim that a product composed of USDA inspected and passed chicken, plus poultry meal, which is not human edible, plus other ingredients is made with human-grade chicken is misleading without additional qualification and disclaimers in the claim because the chicken is no longer edible. Thus, for all practical purposes, the term "human grade" represents the product to be human edible. For a product to be human edible, all ingredients in the product must be human edible and the product must be manufactured, packed and held in accordance with federal regulations in 21 CFR 110, Current Good Manufacturing Practice in Manufacturing, Packing, or Holding Human Food. If these conditions exist, then human-grade claims may be made. If these conditions do not exist, then making an unqualified claim about ingredients being human grade misbrands the product.

**NAD Case #6156 (02/07/2018)**  
**Blue Buffalo Company, Ltd.**  
**Blue Buffalo Brand Pet Food Products**  
**Challenger: Mars Petcare US**





# Express Claims

- “...PEDIGREE® pet parents were very clear about which ingredients they preferred. In fact, in a comparison, 8 out of 10 chose the ingredients in Blue Buffalo.”
- “...9 out of 10 CESAR® feeders preferred the ingredients in Blue Buffalo.”

# Substantiation for Express Claims

In order to support the express claim, Blue Buffalo commissioned a consumer preference study of 400 Pedigree and Cesar users (200 of each). Those who participated were shown 2 sets of unbranded ingredient lists. One was for Pedigree or Cesar and the other for Blue Buffalo. Respondents were told the following: “Below are 2 lists of ingredients – they show the top 5 ingredients in 2 actual dog foods. Both products provide complete and balanced nutrition” and asked the following question: “Which of the following, if either, would you prefer to feed your dog?” and, the answer choices were Brand K, T or no preference/don’t know. So, essentially, Blue Buffalo first screened for the relevant consuming public (users of Pedigree and Cesar users and not just dog food purchasers), blinded the ingredients and had a solid survey question (including a “no preference” option). The results showed that 87% of the Pedigree users and 93% of the Cesar users preferred the Blue Buffalo ingredients. NAD determined that the commercials reasonably conveyed that pet parents preferred the ingredients in Blue Buffalo to those in Cesar and Pedigree.

# No False Denigration

NAD also concluded that these particular commercials did not falsely denigrate Cesar and Pedigree, so with respect to the ingredients preference test, Blue Buffalo was successful (NAD found that Blue Buffalo had crossed the line in prior comparative ads: ““It takes a lot to get me mad, but it really hit me when I realized that his big name dog food had chicken byproduct meal as a first ingredient – not real meat. It felt like they fooled me, so I switched Leo to BLUE Buffalo.””).

# Implied Taste Preference Claim

NAD found that there was an implied claim that dogs prefer the taste of Blue Buffalo over Mars dog food products. This was based on the scene in the Pedigree commercial where the Pedigree dog crosses over to the Blue Buffalo side, puts her paw in the lap of the Blue Buffalo pet parent and ultimately eats the Blue Buffalo product along side the Blue Buffalo owner's dog thereby conveying an implied taste preference claim.

# Substantiation for Implied Claim

Blue Buffalo was prepared for this potential implied claim and had done a palatability study. The study tested the products in question or as follows:

- Blue Buffalo commissioned Summit Ridge Farms to conduct the June 2017 palatability study. The study consisted of 50 dogs. After five days of testing, the dogs consumed over three times more Blue Life Protection Formula Chicken and Brown Rice Recipe than Pedigree Adult Roasted Chicken, Rice & Vegetable Flavor, and 76 percent (38 out of 50 dogs) chose Blue Life Protection Formula Chicken and Brown Rice Recipe with at least a 2-to-1 consumption ratio. Blue Life Protection Formula Chicken and Brown Rice Recipe was also chosen first on 221 occasions versus only 29 occasions when a dog chose Pedigree Adult Roasted Chicken, Rice & Vegetable Flavor first.

# Challenges By Mars

Non-verbal ques, e.g., the reactions of the pet parents and the dogs: “Mars argued that unlike the Blue Buffalo pet parents, the Cesar and Pedigree pet parents appear to be in disbelief implying that the ingredients in Cesar and Pedigree are undesirable or not beneficial to their pets.” This allegedly implied that Mars’ products were less healthy or safe or were nutritionally inferior and thus, preferred on that basis. (NAD had found some of these elements in previously challenged Blue Buffalo commercials). There were some slight modifications that Blue Buffalo did have to make to the advertisement. “Both foods provide complete and balanced nutrition.”

# Challenged By Mars

5 Ingredients: Mars also challenged that showing only the first five ingredients (vs. the entire list) did not support a preference claim. Blue Buffalo countered that they had estimated the top 5 ingredients in the featured Pedigree and Cesar products constituted 90%-95% of each product by weight. Further, the top 5 ingredients in the Blue Buffalo products represented approximately 80% and 90% by weight.

- NAD agreed with Blue Buffalo: “It is undisputed that the first five ingredients comprise the vast majority of total ingredients by weight of Pedigree, Cesar and Blue Buffalo products”. However, NAD recommended that the commercials be modified to indicate that the preference is based on a comparison of the top five ingredients in the products to make the basis of comparison clearer.

# Challenge by Mars

Mars also alleged that the preference of a dog food should take into account cost (apparently, the Blue Buffalo product is approx. twice as much). Again, NAD was unpersuaded: “The challenged claims are based solely on a comparison of the ingredients in the Blue Buffalo and Cesar and Pedigree products. Mars is free to promote the price differential between the Blue Buffalo products and Cesar and Pedigree products in its own advertising.”



# Challenge by Mars

Mars also asserted that the implied taste preference claim conveyed a “brand-wide” taste superiority claim when the study only compares two products shown in the commercial. Here, the NAD agreed: “[D]espite two specific products being shown in the Pedigree commercial, general brand references are made throughout the commercial by the pet parents and the announcer during the commercial. Moreover, the products are not displayed in a manner which would allow consumers to discern the specific variant being compared. For all the foregoing reasons, NAD recommended that the Pedigree commercials be modified to identify the specific variants tested (Pedigree Adult Roasted Chicken, Rice & Vegetable Flavor and Blue Life Protection Formula Chicken and Brown Rice Recipe) in order to avoid conveying the message that dogs prefer the taste of Blue Buffalo over Pedigree on a brand-wide basis.



# Pet Food Litigation Trends

*Presented by:*

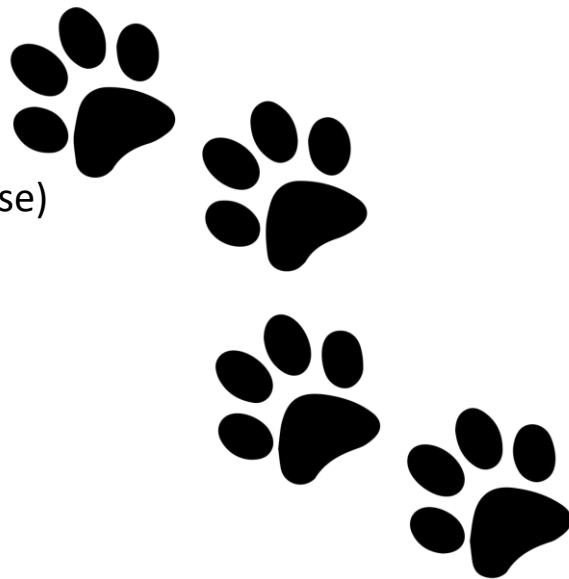
***Adam Ekonomon, Vice President & Deputy General Counsel, J.M. Smucker Company***

***Emily Leongini, Associate, Arent Fox LLP***

***Jeannie Perron, Partner, Covington & Burling LLP***

# Agenda

- Food Imagery on Packaging
  - *Wysong Corp. v. APN, Inc. et al.*
- [Beggin' Strips- Adam's slides]
- “Natural” claims
  - *Grimm v. APN, Inc. et al* (Rachel Ray “Nutrish” case)
  - [Champion cases- Adam's slides]
- “Made in the USA” claims
  - *Fitzpatrick v. Tyson Foods, Inc.*
  - *Fitzpatrick v. Big Heart Brands*
  - *Sensenig v. Merrick Pet Care*
  - *Sabo v. WellPet LLC*
- [Moore case, Eukanuba FTC case, NAD cases- Jeannie's slides]



# Food Imagery on Packaging: Wysong Case

- *Wysong Corp. v. APN, Inc. et al.* filed 5/23/16 (Case 2:16-cv-11821-MFL-PTM)
- Lanham Act cases against 6 competitors alleging deceptive marketing practices
- Wysong alleged images on Defendants' pet food packaging do not represent the actual ingredients



# Wysong: Defendants

- APN
- Big Heart Brands
- Hill's Pet Nutrition
- Mars Petcare US
- Nestle Purina Petcare
- Wal-Mart Stores



# Wysong: The Claim

- Defendants engaged in false/misleading advertising in violation of the Lanham Act by:
  - Placing on their pet food packaging images of “premium meats, poultry, fish and vegetables”
  - However, the images “do not fairly represent the actual ingredients of the packages”



# Wysong: Theories of False/Misleading Advertising

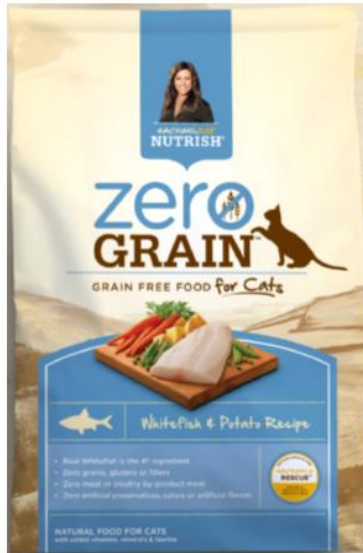
- The “Premium Grade” Theory
  - packaging depicts images of premium ingredients (e.g., lamb chops, salmon fillets, steak) when food is actually made of lower cost parts



Chicken, Ground Whole Grain Sorghum, Ground Whole Grain Barley, Chicken Meal, Lamb, Fish Meal (source of fish oil), Brewers Rice, Dried Beet Pulp, Chicken Flavor, Dried Egg Product, Potassium Chloride, Salt, Carrots, Tomatoes, Chicken Fat (preserved with mixed Tocopherols, a source of Vitamin E), Choline Chloride, Spinach, Peas, DL-Methionine, Minerals (Ferrous Sulfate, Zinc Oxide, Manganese Sulfate, Copper Sulfate, Manganese Oxide, Potassium Iodide), Monosodium Phosphate, Vitamins (Ascorbic Acid, Vitamin A Acetate, Calcium Pantothenate, Biotin, Thiamine Mononitrate (source of vitamin B1), Vitamin B12 Supplement, Niacin, Riboflavin Supplement (source of vitamin B2), Inositol, Pyridoxine Hydrochloride (source of vitamin B6), Vitamin D3 Supplement, Folic Acid), Dried Apple Pomace, Calcium Carbonate, Vitamin E Supplement, Rosemary Extract.

# Wysong: Theories of False/Misleading Advertising (cont'd)

- The “Primary Species” Theory
  - Packaging depicts premium cuts from a particular animal when food is actually made of lower cost parts from a completely different species



## Ingredients

Whitefish, Salmon Meal, Menhaden Fish Meal, Turkey Meal, Dried Peas, Tapioca, Poultry Fat (Preserved with Mixed Tocopherols), Whole Dried Potatoes, Dried Egg Product, Pea Protein, Turkey, Natural Fish Flavor, Salt, Dried Plain Beet Pulp, Whole Flaxseed, Dried Carrots, Choline Chloride, Potassium Chloride, Dried Cranberry, Taurine, Vitamin E Supplement, Zinc Sulfate, Ferrous Sulfate, Niacin, L-Ascorbyl-2-Polyphosphate (Source of Vitamin C), Manganese Sulfate, Copper Sulfate, Vitamin A Supplement, Thiamine Mononitrate, D-Calcium Pantothenate, Sodium Selenite, Riboflavin Supplement, Pyridoxine Hydrochloride (Source of Vitamin B6), Biotin, Menadione Sodium Bisulfite Complex (Source of Vitamin K activity), Vitamin B12 Supplement, Folic Acid, Vitamin D3 Supplement, Cobalt Sulfate, Potassium Iodide.



# Wysong: Theories of False/Misleading Advertising (cont'd)

- The “By-Product” Theory

- Packaging depicts images of premium ingredients when food is actually made of by-product (the cheapest parts of the animal, e.g. intestines, bone)



Tuna, Pea Protein, Chicken, Cracked Pearled Barley, Chicken Fat, Rice, Egg Product, Yellow Peas, Chicken Meal, Potato Starch, Hydrolyzed Chicken Liver, Potatoes, Chicken Liver Flavor, Calcium Sulfate, Lactic Acid, DL-Methionine, Fish Oil, Choline Chloride, Iodized Salt, Green Peas, L-Lysine, Carrots, Taurine, Potassium Chloride, Cranberries, vitamins (Vitamin E Supplement, L-Ascorbyl-2-Polyphosphate (source of vitamin C), Niacin Supplement, Thiamine Mononitrate, Vitamin A Supplement, Calcium Pantothenate, Riboflavin Supplement, Biotin, Vitamin B12 Supplement, Pyridoxine Hydrochloride, Folic Acid, Vitamin D3 Supplement), Apples, Broccoli, Zucchini, minerals (Ferrous Sulfate, Zinc Oxide, Copper Sulfate, Manganous Oxide), Mixed Tocopherols for freshness, Natural Flavors, Rosemary Extract, Beta-Carotene

# Wysong's Pleading Burden

- In order to state a claim that an image is misleading in violation of the Lanham Act, a plaintiff must plausibly allege that the image actually deceives or has a tendency to deceive a substantial portion of the intended audience.
- The alleged deceptiveness of an image is analyzed under the “reasonable consumer” standard.
- When determining whether a reasonable consumer would have been misled by a particular advertisement, *context is crucial*.

# Wysong: Motions to Dismiss

- Whether an advertisement is deceptive is generally a question of fact, which requires consideration and weighing of evidence from both sides
  - As such, usually cannot be resolved through a motion to dismiss
- HOWEVER, courts will dismiss false advertising and similar claims for failure to state a claim when, construing the factual allegations in the light most favorable to the plaintiff, the challenged advertisements would NOT *plausibly deceive a reasonable consumer*. **This is very rare.**

# Wysong: Court's Analysis

1. Whether Wysong *plausibly alleged* that the images are literally false under any one of the three asserted theories.
2. Whether Wysong *plausibly alleged* that the images, even if not literally false, are misleading under any one of the three asserted theories.

# Wysong: Court's Order Granting Motions to Dismiss

- Issued 7/20/17
- **The Court held that Wysong failed to plausibly allege that the images are literally false and/or misleading under any of the three theories.**

# Wysong's *Literal Falsity* Claim

- Wysong's *literal falsity* claim failed under all three theories because:
  - An image of a premium ingredient on a package of pet food, standing alone, does not unambiguously, necessarily, and unavoidably convey that the food in the package
    - contains the exact cut or grade of the ingredient pictured,
    - that the meat is primary ingredient, or
    - that the food contains a greater percentage of the pictured meat than by-product.
  - A reasonable consumer could view such an image as merely identifying the type of ingredients or the flavor.

# Wysong's *Misleading* Claim

- Wysong's *misleading* claim failed under all three theories because:
  - Wysong failed to explain how any particular image of a premium ingredient on any particular package is misleading in the *context of the package as a whole*.
    - The images, standing alone, could potentially communicate several different messages.
  - Wysong merely attached pictures of packaging and made a generalized allegation. Court held that Wysong should have included allegations showing how each image, given its context and character, could plausibly be understood to convey the meaning Wysong attributed to it.

# “Natural” Claims Cases



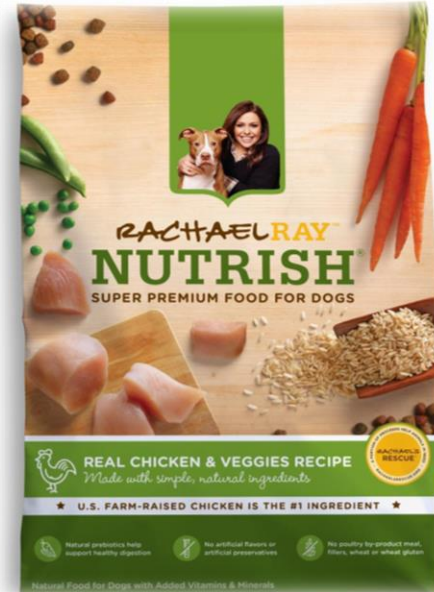


# Natural Claims: Rachael Ray “Nutrish” Case

- *Christina Grimm v. APN, Inc. and Ainsworth Pet Nutrition, LLC* filed 2/28/17 (Case 8:17-cv-00356-JVS-JCG)
- Consumer class action alleging Rachael Ray Nutrish dog foods were deceptively marketed as “natural” and containing “no artificial ingredients” in violation of the California Consumer Legal Remedies Act (CLRA), California False Advertising Law (FAL), and California Unfair Competition Law (UCL) and breaches of express and implied warranties.

# Nutrish Case: The Claim

- Product claims
  - “Natural Food for Dogs with Added Vitamins & Minerals”
  - “Made with simple, natural ingredients”
  - “No artificial flavors or artificial preservatives”
- Four lines of products contained L-Ascorbyl-2- Polyphosphate, Menadione Sodium Bisulfite Complex, Thiamine Mononitrate, "natural flavors," and caramel color.



# Nutrish Case: AAFCO “Natural” Standard

- Defendant’s use of the term natural complies with the definition of “natural” under guidelines established by Association of American Feed Control Officials (AAFCO)
- CA Department of Public Health (CDPH) endorsed AAFCO guidelines and defers to AAFCO



# Nutrish Case: Status

- Court took judicial notice of CDPH document that stated:  
“Any pet food label that complies with AAFCO guidelines for pet food ingredients and labeling will be considered in compliance with California law.”
- Case stayed for CDPH determination on whether to initiate rulemaking
- CDPH Hearing held March 2018

# [Placeholder for other “Natural” Claims Cases]

# “Made in the USA” Claims



# Made in the USA Litigation



Many cases relating to a variety of goods



The pet food industry has been targeted specifically



Brought as class action suits

- Most in California, some in other courts
- Recite > \$5,000,000 in damages

# Made in the USA Claims: FTC Standard

## FTC Standard

- The product must be “all or virtually all” made in the U.S.
- “All or virtually all” means that all significant parts and processing that go into the product must be of U.S. origin. That is, the product should contain no — or negligible — foreign content.
- The product’s final assembly or processing must take place in the U.S.

## Qualified claims

- “Made in the USA of U.S. and imported ingredients.”



# Made in the USA Claims: California Standard



Senate Bill  
633, took  
effect on Jan.  
1, 2016

Merchandise  
may be  
labeled as  
“Made in the  
USA” if:

- Part produced outside U.S. constitutes no more than 5% of the “final wholesale value of the product”; or
- A manufacturer can show that a specific part/ingredient could not be obtained within the U.S. and that part does not constitute more than 10% of the final wholesale value.
- Previously, Cal. Bus. & Prof. Code § 17533.7 prohibited “Made in the USA” claims if *any* portion of the product was made outside the U.S.

# Made in the USA Claims: Tyson case

- *Fitzpatrick v. Tyson Foods* filed 1/11/16 (Case 2:16-cv-00058-JAM-EFB)
- Nudges grain-free treats
  - “Made in USA” + American flag
  - Tapioca starch from cassava root – not grown in U.S.
  - Vitamin, mineral and amino acid packs contain non-US ingredients
- Order to dismiss granted by E.D. Cal. on 10/5/16
  - Rationale: Safe harbor doctrine bars Plaintiff’s claims
- Dismissal upheld by 9th Circuit 3/13/18



# Made in the USA Claims: Big Heart Pet Brands case

- *Fitzpatrick v. Big Heart Pet Brands* filed 1/11/16  
(Case 2:16-cv-00063-JAM-AC)
- Milo's Kitchen
  - “Made in the USA”
  - Tapioca starch from cassava root – not grown in U.S.
  - Vitamin, mineral and amino acid packs contain non-US ingredients
- Order to dismiss granted by E.D. Cal. on 11/28/16
- Dismissal upheld by 9th Circuit 3/13/18



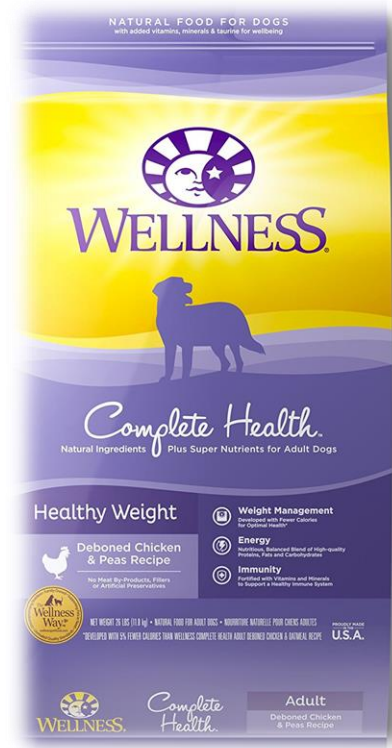
# Made in the USA Claims: Sensenig case

- *Sensenig v. Merrick Pet Care & Nestle Purina Pet Care Co.* filed 2/1/16 (Case 3:16-cv-50022)
- Ultramix and Organix brand products
  - “Made with Love IN THE USA”
  - Tapioca starch from cassava root and Vitamin C not sourced in the U.S.
- Voluntarily dismissed without prejudice 6/17/16



# Made in the USA Claims: WellPet case

- *Sabo v. WellPet LLC* filed 8/31/16 (Case 1:16-cv-08550)
- Wellness Brand
  - “Made in USA”
  - Vitamins and minerals, such as vitamin C, sourced in foreign countries
- Motion to dismiss granted 4/21/17, Court found Plaintiff did not plead actual damages
  - Plaintiff did not claim that he paid more (or that WellPet charged more) for the products based on the representation that they were “Made in USA”.
  - Plaintiff did not allege that he would not have purchased if he had known vitamins were foreign-sourced.



[Placeholder for other Cases]

# Thank you



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Jeannie Perron [jperron@cov.com](mailto:jperron@cov.com)



# FTC Mars Petcare Consent Decree

152-3229

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman  
Maureen K. Ohlhausen  
Terrell McSweeney

In the Matter of  
MARS PETCARE US, Inc., a corporation

DECISION AND ORDER  
DOCKET NO. C-

## DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violation of the Federal Trade Commission Act.





# FTC Mars Petcare Consent Decree

**Utah at age 17.  
Living 30% longer  
than his typical lifespan.**

He's enjoying an exceptionally long life,  
with many more adventures ahead.

**Eukanuba**

**Iowa at age 17.  
Living 30% longer  
than her typical lifespan.**


She's enjoying an exceptionally long life,  
with plenty of chase left to give.

**Eukanuba**

**Eukanuba** Dedicated to Healthier, Longer Lives  
Learn about the long life study at [Eukanuba.com](http://Eukanuba.com)

**Eukanuba** Dedicated to Healthier, Longer Lives  
Learn about the long life study at [Eukanuba.com](http://Eukanuba.com)

# FTC Mars Petcare Consent Decree




› Dogs in the study were able to live beyond their typical lifespan

10 Years ago, we launched a long life study. What we observed was astonishing. With Eukanuba® and proper care, some dogs in the study were able to live exceptionally long lives.

Meet Iowa at Age 17, our relentless fetcher

Meet Utah at Age 17, our tireless explorer



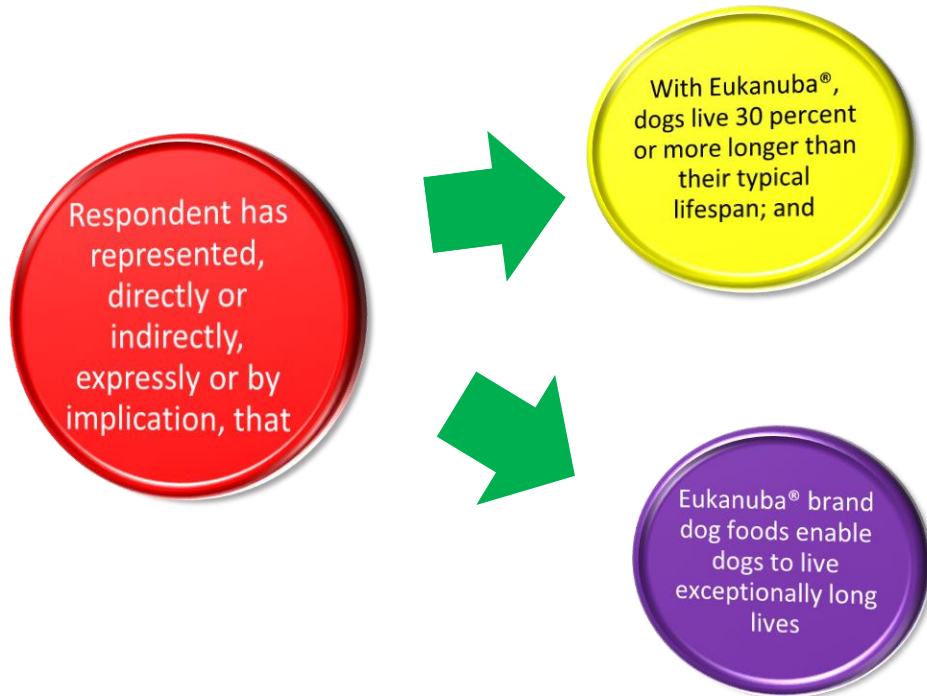
› Living 30% longer than her typical lifespan

IOWA AT AGE 17

\*typical Labrador lifespan: 12 years

This is the life we want for all dogs, to live long and be full of vitality.

# FTC Mars Petcare Consent Decree



# FTC Mars Petcare Consent Decree

## **Count II False Establishment Claims**

9. In connection with the advertising, promotion, offering for sale or sale of Eukanuba brand dog food, Respondent has represented, directly or indirectly, expressly or by implication, that

- A. Scientific tests prove that, with Eukanuba, dogs live 30 percent or more longer than their typical lifespan; and
- B. Scientific tests prove that Eukanuba brand dog foods enable dogs to live exceptionally long lives.

10. In fact,

- A. Scientific tests do not prove that, with Eukanuba, dogs live 30 percent longer than their typical lifespan; and
- B. Scientific tests do not prove that Eukanuba brand dog foods enable dogs to live exceptionally long lives.

Among other things, the evidence relied on by Respondent for its representations concerning the Eukanuba brand dog food consisted primarily of results from a single study, the results of which showed no significant difference in the median age at death of the dogs in the study relative to the typical age at death of dogs of the same breed. Therefore, the representations set forth in Paragraph 8 were, and are, false or misleading.

## **Violations of Sections 5 and 12**

11. The acts and practices of Respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce

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# Moore v. Mars Petcare, *et al.*

Purported  
class  
representative  
plaintiffs sued

- Mars Petcare
- Royal Canin
- Nestle Purina
- Hill's
- PetSmart
- Medical Management d/b/a Banfield Pet Hospital
- Bluepearl Vet

# Moore v. Mars Petcare, *et al.*

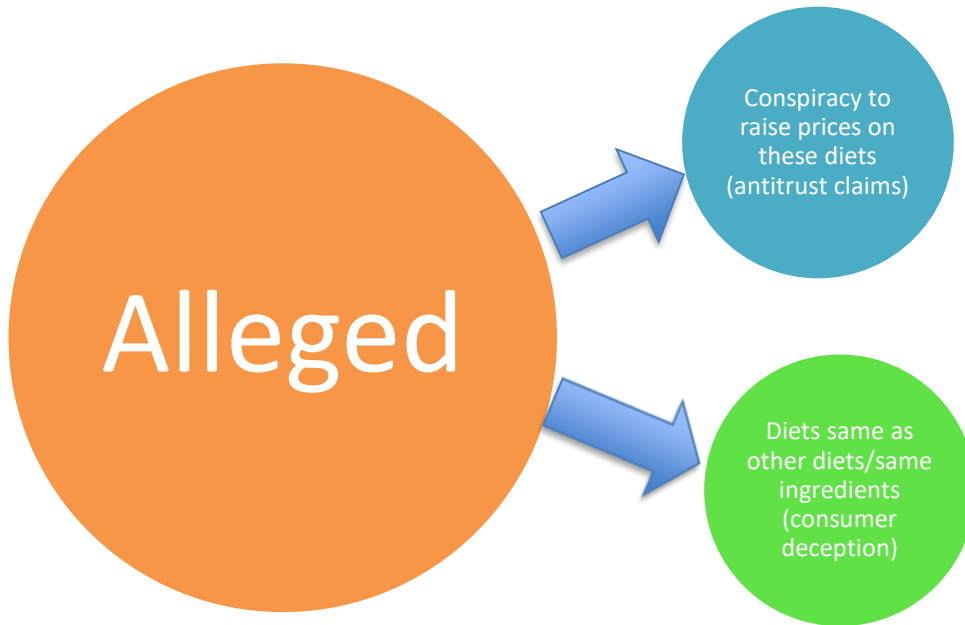
Focused on diets  
used on the  
direction of a  
veterinarian



For pets with health  
conditions



# Moore v. Mars Petcare, *et al.*



# Moore v. Mars Petcare, *et al.*

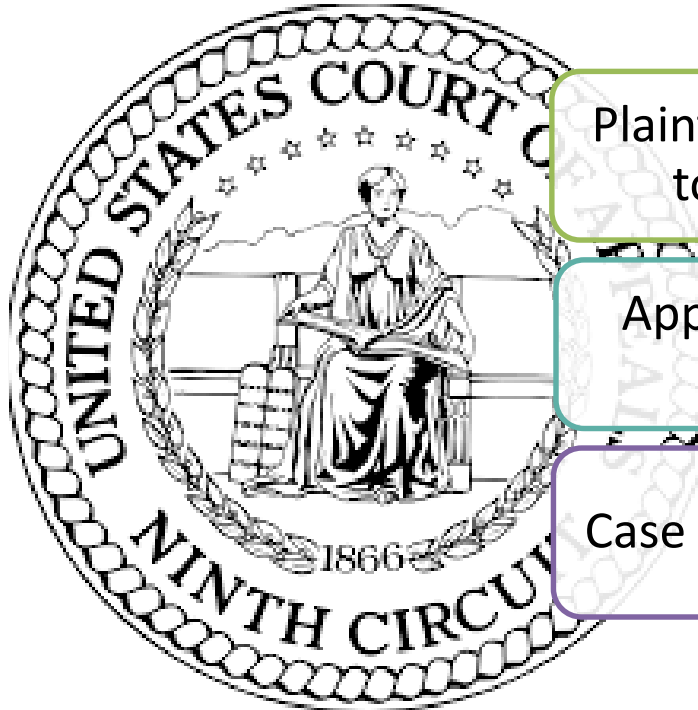
All claims dismissed except

Limited leave to amend in  
3<sup>rd</sup> Amended Complaint

specific factual allegations  
describing how use of  
“prescription” or “Rx”  
affected each plaintiff’s to  
purchase decision



# Moore v. Mars Petcare, *et al.*

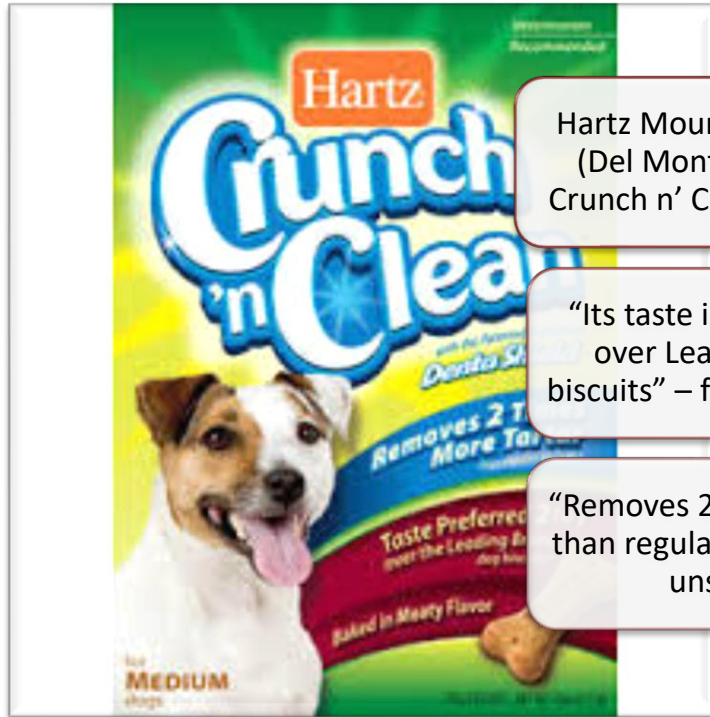


Plaintiffs declined  
to replead

Appealed to 9<sup>th</sup>  
Circuit

Case being briefed

# NAD Cases



Hartz Mountain Corp. 2009  
(Del Monte challenger) -  
Crunch n' Clean Dog Biscuits

"Its taste is preferred 2 to 1  
over Leading Brand dog  
biscuits" – found unsupported

"Removes 2 times more tartar  
than regular biscuits" – found  
unsupported

# NAD Cases



Hill's Pet Nutrition 2010 (Iams challenger) – Advanced Fitness and Optimal Care

“5 x more Antioxidants” and “22 % more Omega 3+6 ” found supported

Recommended disclosure of limitations of benefits provided by supplementing nutrition.