



Cool to Be KIND: Second Circuit Rejects “Expert” Survey Evidence, Ends Long-Running “All Natural” Class Action

by Jennifer Adams

False advertising challenges to “all natural” and similar “natural” claims has been one of the most prolific litigation trends for consumer product companies. Currently there is no legal or regulatory definition of “natural,” and cases have either settled before reaching this core issue or are disposed of on other grounds. The years-long battle surrounding KIND Bar’s “All Natural” claim was poised to be the first case to reach this question. Instead, it ended abruptly in summary judgment for KIND when the district court excluded expert testimony on consumers’ perception of “natural,” a ruling which prevented the plaintiffs from defining that term. The U.S. Court of Appeals for the Second Circuit recently affirmed this decision,¹ thereby weakening “natural” false advertising challenges and potentially attenuating the rate of future cases to similar undefined, ambiguous terms.

Winding History

The *In re KIND LLC*² litigation did not start as only an “All Natural” lawsuit. The litigation followed a March 2015 Food and Drug Administration (“FDA”) Warning Letter citing KIND for improperly featuring on its label “healthy” and several other nutrient-content claims.³ Numerous copycat false advertising cases were filed, leading to consolidation as a multi-district litigation in the Southern District of New York. The court stayed the case for a few years after FDA’s November 2015 announcement that it was considering a rulemaking to define “natural” for food products.⁴ Ironically, during the stay the plaintiffs voluntarily dismissed the bulk of the allegedly false claims after, in a highly unusual move, FDA publicly withdrew its objections to KIND’s labeling.⁵ The stay was lifted in August 2018 and the case proceeded only with challenges to the “All Natural” and “Non-GMO” claims. Ultimately the court certified three damages classes (consumers in New York, California, and Florida), and during discovery the plaintiffs dropped the challenges to the “Non-GMO” claims. Once discovery closed, KIND moved for summary judgment on the “All Natural” claim, to exclude plaintiffs’ expert witnesses, and to decertify.

¹ *Bustamante v. KIND, LLC*, 100 F.4th 419 (2nd Cir. 2024).

² *In re KIND LLC “Healthy and All Natural” Litigation*, Southern District of New York, MDL No. 2645.

³ FDA Warning Letter to KIND, LLC, March 17, 2015.

⁴ FDA, “Use of the Term “Natural” in the Labeling of Human Food Products; Request for Information and Comments,” 80 Fed. Reg. 69905 (Nov. 12, 2015).

⁵ Letter from FDA to KIND, LLC, April 20, 2016.

Plaintiffs' case came down to whether the claim "All Natural" on a few KIND bar lines was deceptive. The "deceptive act" in consumer false advertising challenges is governed by the "reasonable consumer" standard. While the standard varies slightly by jurisdiction, the crux is that a statement must tend to mislead consumers acting reasonably under the circumstances. Of course, to be misled there must be a consensus as to what reasonable consumers interpreted the claim to mean. Thus, fundamental to meeting this burden is that the plaintiff must first show how a reasonable consumer understands "All Natural." To that end, the plaintiffs primarily relied on two key pieces of evidence: an expert opinion based on a consumer survey, and an expert opinion by a chemist.

Summary Judgment For KIND

KIND's motion for summary judgment emphasized that the plaintiffs had failed to demonstrate a reasonable consumer's understanding of "All Natural" and therefore were unable to show, as a matter of law, that a reasonable consumer was deceived by the term. Central to this argument was KIND's motion to exclude the two expert opinions. After examining previous definitions put forth by the plaintiffs at various stages of the litigation, the district court determined the plaintiffs had not plead a reasonable consumer's understanding of "All Natural" sufficient for use at the summary judgment stage and then turned to their expert evidence to see if it helped meet the burden.

The district court first examined the expert testimony based on a consumer survey commissioned by plaintiffs, which purported to show that 86.4% of consumers selected the option that "All Natural" products would not contain artificial or synthetic ingredients (nearly the same definition plead by plaintiffs). But after thoroughly dissecting the methodology, the district court found the survey to be biased, misleading, and so deficient that it was not admissible. Among the numerous fatal faults were key questions structured with leading answers, lack of definitions of critical terms such as "artificial," "synthetic," and "chemical," and a general lack of objectivity. Perhaps most telling was the expert's own testimony, which indicated the survey was designed to essentially only test the plaintiffs' theory of liability and that the language used was intended to mimic that in the operative complaint. While plaintiffs argued KIND's methodology challenges go towards the weight of the evidence, and not the admissibility, the district court disagreed and held a survey is inadmissible when it is so misleading that it cannot assist the trier of fact.

The court next examined the chemist's expert opinion, which it found similarly irrelevant and of no assistance to the trier of fact. This report purported to assess the "naturalness" of ingredients in KIND's products and concluded the "All Natural" claim was false as ingredients were not "natural." But the district court found the report only assessed the "naturalness" according to the expert's own standard, and not that of reasonable consumers. In particular, the report created its own "framework of naturalness" and even acknowledged that no universal definition of "natural" exists. Moreover, the report only assessed the ingredients generally and did not always factor in specific processing methodologies or sourcing of KIND's ingredients.

After finding both expert reports inadmissible, the court granted summary judgment to KIND as the plaintiffs failed to provide any evidence for an essential element of the claim, and the class was decertified.⁶

⁶ *In re KIND LLC "Healthy & All Nat." Litig.*, 627 F. Supp 3d 269 (S.D.N.Y. 2022).

Plaintiffs' Appeal Is Unsuccessful

Appellate courts review decisions to admit or exclude expert testimony under the highly deferential abuse of discretion standard. Although never explicitly discussed in the district court's opinion, the Second Circuit cited Rule 702 of the Federal Rules of Evidence ("FRE") and the factors set forth in *Daubert v. Merrell Dow Pharmaceuticals*, emphasizing that the district court is "charged with 'the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" FRE 401 (Test for Relevant Evidence) and 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons) are also referenced, noting that even if evidence satisfies FRE 702 and *Daubert* it must still be relevant and be more probative than prejudicial.

The Second Circuit held the district court did not abuse its discretion after examining the trial judge's analysis and finding nothing manifestly erroneous. The decision reaffirms the district courts' vital gatekeeping role, and succinctly weaves together the interplay of several rules of evidence. The opinion sets forth a rubric of evidentiary considerations for district courts, including that they must not only consider expert evidence under FRE 702, but also its relevance under FRE 401 and 403. The Second Circuit particularly emphasized that judges exercise more control over experts than over lay witnesses under FRE 403 because of the inherent risks that expert opinions can mislead due to difficulty evaluating them. The Second Circuit concluded the district court correctly applied the FRE and was well within its directive to consider the reports' possible prejudicial nature. The court also explicitly noted that the plaintiffs failed to appreciate the significance of Rules 401 and 403 as to the admissibility of expert reports.

Takeaways

While on its face *Bustamante v. KIND, LLC* appears to be a fact-specific ruling, it could have a significant impact on false advertising litigation and beyond. In the consumer class-action context, *Bustamante's* most notable takeaway is the affirmation that judges have an important and active role in gatekeeping consumer-perception evidence. One may believe it's a matter of common sense that juries can and should evaluate questions of public opinion as questions of fact. But that does not mean consumer-perception evidence is admissible as a matter of course. As *KIND* demonstrates, it is easy to construct biased surveys and assessments both intentionally and unintentionally. But lay factfinders are not always equipped with tools to uncover these biases and weigh the evidence accordingly. Thus, stringent judicial scrutiny is imperative for ensuring consumer-perception evidence is probative before being considered by the finder of fact.

Acutely, this decision could lead to a further decline in "natural" litigation. Challenges to allegedly deceptive "natural" claims have been steadily decreasing for the last few years, and this case underscores the difficulty plaintiffs face with taking these challenges over the finish line.

But more broadly, it also provides a framework for defendants in other false advertising cases that challenge ambiguous terms. Challenges to unregulated terms are vexing because companies make the claims in good faith and based on sound research, but plaintiffs' attorneys still find ways to challenge a claim's truthfulness and accuracy. While such challenges may make it through the early stages of the lawsuit, it's clear that actually proving alleged understandings and takeaways is exceedingly complex and difficult. This is a helpful arrow in the quiver for responsible advertisers for when they get caught in the crosshairs of consumer class actions.