

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

**IN RE: SIMPLY ORANGE ORANGE
JUICE MARKETING AND SALES
PRACTICES LITIGATION**

ALL ACTIONS

MDL No. 2361

Master Case No. 4:12-MD-02361-FJG

ORDER

Pending before the Court is Plaintiffs' Status Report and Request for Additional Discovery (Doc. No. 97). Within this report, plaintiffs request additional discovery from Defendant The Coca-Cola Company ("Coca-Cola"), as well as two non-parties. Plaintiffs seek additional discovery from Coca-Cola as to the add-backs used to achieve a signature taste, as well as information concerning the marketing and advertising claims made by defendant to demonstrate the link between its promotion of the subject products and how it flavors its products. Plaintiffs seek from third-party vendors Firmenich and Givaudan discovery into the flavors added to the Products, which plaintiffs anticipate will reveal that the flavors are not ordinary "orange oil" or "orange essence," but rather will show that defendant purchases highly specified and market tested flavors to create its signature "fresh taste."

The Court's previous discovery order directed defendants to produce "document discovery sufficient to show whether Defendants' products contain synthetic flavors or orange pulp, oil, or essence at levels significantly in excess of those found in raw processed orange juice or otherwise permitted by FDA regulations and whether

Defendants add to their not-from-concentrate orange juice products any water-soluble constituents of orange essence.” Doc. No. 48, p. 9. In a subsequent Discovery Order (Doc. No. 52), the Court indicated that those categories of documents include the following: (a) all testing conducted by Coca-Cola on the Products during the Class Period, concerning their levels of orange pulp, oil, and essence; (b) all USDA testing reports of the Products during the Class Period; (c) all communications with government regulatory entities during the Class Period regarding the levels of orange pulp, oil, and essence within the Products; and (d) all specifications and certifications for the Products, including documents reflecting the composition of any “add backs” to the Products during the Class Period. Doc. No. 52, p. 2.¹

Defendants note that in the first part of the status report, plaintiffs seemingly agree that the case is ripe for summary judgment, because plaintiffs contend that the evidence produced by defendants shows that defendants violate FDA regulations by adding orange oil to their orange juice during the offseason for purposes of restoring the flavor of fresh juice. Defendants argue that this position is premised on a misinterpretation of the applicable FDA regulations (which defendants say expressly authorize manufacturers to add orange oil, but do not require orange oil to be disclosed

¹ The relevant FDA provisions regarding orange juice labeling are as follows:

Thus, FDA advises that only if pulp, oil, or essence are added at levels significantly in excess of those found in the raw juice from which the juice is derived, or if they are obtained from an extraneous source, i.e., from sources other than the fruit from which the juice is obtained (e.g., produced synthetically or purchased through a flavor supplier for artificially adding flavor or texture to the juice), would they be ingredients subject to the ingredient labeling requirements for standardized foods, as set forth in part 130.

Food Labeling; Declaration of Ingredients, 58 FR 2850-01.

on product labels so long as the oil is not synthetic or added at levels beyond what is found in raw juice). The Court agrees with defendants that, to the extent the parties are arguing about how to interpret the FDA regulations, that issue is ripe for summary disposition and no further discovery is necessary.

Towards the end of the status report, however, defendants note plaintiffs argue they need further discovery because defendant has only provided “conclusory statements” about the composition of its add-backs, and has not provided documents concerning the “processing steps” used by defendant’s third-party suppliers. Defendant, however, argues that the so-called “conclusory statements” are instead Coca-Cola’s proprietary juice formulas, product specifications, ingredient certifications, and mixing instructions, and these documents are the best evidence of the composition of defendants’ products and are the types of documents that plaintiffs’ experts concede are routinely used and relied upon in the industry. Defendants specifically state that they produced nearly 20,000 pages of responsive documents, including (1) the formulas for Simply Orange orange juice, Minute Maid Pure Squeezed orange juice, and Minute Maid Premium orange juice (the Products); (2) all specifications and certifications for the Products, including documents reflecting the composition of the “add backs” used in connection with the Products; (3) purchase standards and product specifications for all ingredients in the Products; (4) records of USDA and FDA plant inspections; (5) all testing performed on the Products, including (a) official USDA testing and grading of the Products, (b) testing “score sheets” for all ingredients purchased by Coca-Cola for use in the Products, (c) “Finish Product Analysis” sheets, which contain the results of Coca-Cola’s routine testing of the Products; (d) in-depth chemical analyses of the Products

performed by Coca-Cola, and (e) gas chromatography testing of the add-backs used in connection with the Products. Defendants also put forward two 30(b)(6) corporate representatives: Dr. Tim Anglea testified as to not-from-concentrate products, and Mr. Alan Wyland testified as to from-concentrate products. Defendants' expert, Dr. Russell Rouseff, also opined that defendants' products do not contain synthetic ingredients, that defendants do not add orange oil or essence at levels significantly in excess of those found in raw juice, and that defendants do not add aqueous orange essence to its not-from-concentrate orange juice. Upon review of the parties' arguments, the Court believes defendants have complied with the Court's previous discovery orders, and the information produced by defendants should be sufficient for the parties to fully inform the Court on summary judgment motions.

Plaintiffs also argue that they need third-party discovery of defendants' orange oil suppliers. In particular, the flavor houses (Firmenich and Givaudan) provide "Natural Certificates" stating that the add-back is created from a natural source, but plaintiffs argue the certifications do not give information into the means used to produce the add-backs. Plaintiffs argue they need additional discovery concerning the processing methods used to create the add-backs, as it is currently impossible to determine whether the products contain synthetic ingredients or whether the not-from-concentrate products contain added water-soluble essence. Defendants respond that no further discovery is necessary regarding levels of orange oil or essence in the Products, as Coca-Cola's evidence proves that its juice products contain oil and essence at levels well within the normal range found in raw juice. Defendants note that Dr. Rouseff's report concludes that defendants' testing of its orange juice products reveals that

orange oil and essence levels are within the normal range. Additionally, defendants note that they have product specifications for the add-backs stating they must be “derived entirely from the orange” and “[m]anufactured from natural Florida orange oil ingredients.” PI. Ex. 2, at TCCC_00008066. When the add-back is obtained from a third-party, it comes with a certification that the add-back “is an all natural flavor whose flavoring components are derived solely from citrus varieties designated Citrus sinensis (orange).” Tu. Decl. Ex. G. Defendants also note that plaintiffs’ experts acknowledged that the documentation produced by defendants (such as the third-party certifications) is the sort routinely kept and relied upon in the industry. Defendants argue that further discovery on the “processing steps” employed by defendants’ suppliers is a fishing expedition, given that the documents produced by defendants are more than sufficient to resolve the issues identified in the discovery order. The Court agrees with defendants on this issue. Plaintiffs’ mere speculation that synthetic ingredients might be present in components purchased from third-party vendors cannot support further discovery, in the face of defendants’ product specifications and the third-party vendors’ certifications to the contrary.

Accordingly, plaintiffs’ Request for Additional Discovery (Doc. No. 97) is **DENIED**. The Court believes this case is now ripe for briefing on summary judgment. Therefore, the Court sets the following briefing schedule:

- (1) Motions for summary judgment shall be filed on or before **September 12, 2014**;
- (2) Suggestions in opposition shall be filed on or before **October 10, 2014**;
- (3) Reply suggestions shall be filed on or before **October 31, 2014**.

To the extent that the parties believe that motions to strike expert testimony are appropriate, those motions shall be filed on or before **October 10, 2014**; opposition shall be filed on or before **October 31, 2014**; and reply suggestions shall be filed on or before **November 10, 2014**.

The parties should note that the Court's stay on other types of pleadings, motions, or discovery (see Doc. No. 52) remains in place. To the extent that the parties wish to file any other types of motions, discovery, or pleadings not mentioned in this Order, they must first move for permission to file such documents. The parties are cautioned that such a motion will not automatically be granted.

IT IS SO ORDERED.

Date: August 1, 2014
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge