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Fighting to Win: A General Counsel's Perspective on Retaining Outside Counsel

By Joseph Di Salvo

The Northern District of California is dubbed the "Food Court" for the hundreds of false-advertising, food-labeling class actions filed there in recent years, now averaging one per week. These lawsuits are brought on behalf of consumers who allege that buyers of various food and beverage products are harmed because they consume products with labels promoting specific attributes or claims such as "better for you" or "all natural."

Although false advertising can never be condoned, many labeling cases often boil down to frivolous claims by plaintiff lawyers challenging products that actually conform to all applicable FDA rules. These are products that present absolutely no health or safety risk to consumers, and are properly labeled and marketed in accordance with existing governing standards and regulations. In most cases, the real — and barely veiled — thrust of these class action filings is to secure a quick windfall settlement for plaintiff's counsel. The cost and expense required for a company to validate and substantiate even the most basic, straightforward, and obviously accurate label or marketing claims through civil litigation is nothing short of outrageous.

Moreover, due to the business distraction caused by these cases, the required expenditure of limited and valuable company resources, and the brand risks created by negative consumer perception or public opinion generally derived from such false advertising allegations, these tactics often work. Consumer trust in a brand's promise or a product's positioning is the most valuable asset that any successful company holds. Risking damage at the hands of a litigation process often ill-equipped and poorly designed to substantively determine the validity and accuracy of specific product marketing claims is simply not a chance that many business owners are willing or able to take. Companies have paid tens (if not hundreds) of millions of dollars in recent years to settle what would otherwise be deemed unmeritorious suits.

Resolving Litigation

As the managing member of a legal practice that serves as general counsel for small and middle-market consumer product companies in a wide variety of industries, it is my responsibility to oversee and successfully resolve litigation in the most expedient, cost-effective and reputation-preserving manner possible. Defendants in other, similarly situated actions often opt to quickly settle and pay significant sums to avoid the conflict altogether — and this is what plaintiffs have come to expect. But my clients do not.

As I explain below, because of our reluctance to settle, we have mainly avoided large, "name-brand" law firms whose advice tends to be risk-averse and follow a well-worn script: Engage in extensive motion practice, conduct discovery, oppose class certification, and settle. This largely amounts to a war of attrition, in which each side seeks to outspend, outlast, and outmaneuver one another until both have experienced enough financial pain and litigation fatigue that a settlement represents an acceptable (and preferred) outcome compared with the thought of ongoing proceedings, seemingly endless expenses, and continued uncertainty. A Pyrrhic victory, at best, but nonetheless a definitive ending and the opportunity to put the matter to rest and move forward.

We focus instead on finding the most experienced, aggressive defense litigators with a track record in the space. More often than not, these attorneys are operating in a boutique environment, where creativity, "outside the box" thinking, and qualitative results are part of the culture.

Go Aggressive

The filing or threat of a large lawsuit is a busy day for any general counsel, and particularly so in the food arena. One immediately begins to consider and plan for the impact of the litigation on company management, finances and cash flow, and on the brand itself. After notifying the team, my first goal is to identify the right defense attorney with whom to begin collectively drawing up a defense plan to turn the tables on plaintiffs' counsel.

Companies often work with "one-stop shop" partners — large law firms that seek to represent clients in a variety of corporate, transactional, regulatory, and litigation matters. While we do work with large firms on some matters, when it comes to complex litigation our preference

over the last several years has been to turn to smaller law firms with demonstrated success in taking the fight to the other side. Our goal, therefore, has been to find defense lawyers with big case experience and a proven track record in similar matters — but who are willing to vigorously exploit weaknesses in the plaintiff's case. It's also key that they give time and attention to the matter, *i.e.* , without farming work out to a legion of associates.

One firm we have been working with in an increasing number of cases is a California/New York litigation and trial boutique, BraunHagey & Borden. That firm, led by co-founder Noah Hagey, has had a run of success in complex class litigation, including defeating dozens of consumer product class actions.

In fact, our relationship with BraunHagey is a good model for other firms that might be interested to work with our companies. The firm has a strong track record and background in high-stakes litigation, and has gained attention for never having a class certified against any of its public or private food clients. They also have the pedigree we look for, partners who went to top schools and who worked at top firms earlier in their career. We do not want lawyers who overly specialize in one area. It helps, for example, that BraunHagey was founded by commercial trial attorneys who had worked at large firms on headline cases in both New York and San Francisco.

The boutique nature of our outside counsel relationships often prove important, also. We like lawyers who can connect with our executive teams. Many of our companies have an entrepreneurial spirit. That same quality in our legal counsel can create a strong bond between lawyer and client.

Holding Plaintiffs Accountable for False or Speculative Allegations

Most class litigation in the food products area is built on boilerplate complaints using recycled allegations and often recycled "class representative" plaintiffs. As a result, many of these filings contain unclear, untrue, and/or outright misleading allegations. Sometimes the allegations contain irrelevant material copied from cases about other defendants. This paradoxical irony should not go unnoticed: the majority of cases in which plaintiff's attorneys are targeting consumer goods companies for liability based upon alleged false statements and deceptive claims about products are themselves predicated upon specious, baseless, and hollow allegations asserted by a singular

"representative" plaintiff seeking to pursue damages on behalf of a class.

Accordingly, when retaining a defense firm, we are always interested in hearing how the complaint itself can be used against the plaintiff and its attorneys who brought the action. For example, if a plaintiff has included references to a third party report in its papers, is there anything in the report that undermines the case? Is the plaintiff somehow related to the lead counsel (sister, in-law, etc.)? Has the plaintiff's counsel filed similar claims and lost in other jurisdictions? Is the case a copycat action that was filed as part of a plan to create a bigger controversy and potential MDL (multi-district litigation)? Are any of the allegations potentially false or speculative?

If the answer to any of these questions is "yes," we will want to know how to exploit those weaknesses from an early stage in the litigation. Some firms we talk to are uncomfortable taking this kind of approach, preferring instead to focus on standard motion practice and driving the case forward in a linear fashion. While that approach may work in some cases, it is always expensive, and will rarely generate the kind of leverage necessary to resolve a case effectively at an early stage.

A good example of this is the series of cases filed against one of our companies many years ago. Our client acquired the company from its founder in 2008 with a significant amount of pending class litigation. There was more than $50 million in false advertising lawsuits pending in 11 state and federal courts in California, New Jersey, New York, Pennsylvania, and Florida. Major New York law firms had been representing the client for years, without much traction.

Instead of bringing in yet another big name to defend the company, we hired a smaller boutique — in this case, the BraunHagey team. Their approach was different from other advisers with whom we had spoken. First, they focused on the admitted collusion between counsel in all of the cases. Under a little-used federal law called 28 U.S.C. 1927, it is improper to file duplicative matters to simply harass or annoy a defendant. BraunHagey immediately began to build a 1927 sanctions motion based on the contacts and connections between plaintiffs' counsel in the various matters.

Second, they made quick work of preparing us for class certification, which was only months away in the California matter. Next, they also began to remove all of the state court cases to federal court and have those transferred to the same district in Pennsylvania where the Judge

had already dismissed other similar actions. This required coordination of motions in five different courts — but they were successful. And they were also successful in defeating class certification based, in part, on the company's prior response and remediation of the alleged claims.

Ultimately, the plaintiffs and their attorneys voluntarily dismissed all of these cases without payment of any money to plaintiffs or their counsel — a huge win for the company and its management. The outcome also runs counter to the results of other competitors in similar cases, where food companies have paid multimillion-dollar settlements to resolve comparable class cases.

This species of aggressive litigation is not just limited to food cases. In all of our matters, we are interested in determining how our outside counsel will hold opposing parties accountable, using aggressive motion practice and strategies to place them at risk, even if we are the named defendant.

Hiring Checklist

In the highly litigious space in which we operate, it is important to find strong, uncompromising counsel to protect your company. The following is a short checklist that outlines some of the key considerations we apply in retaining firms for our litigation work:

- Does the firm have a track record for obtaining aggressive, timely results?
- Is the named lead partner going to be personally involved in running the matter and representing us in court?
- How many attorneys/associates are going to be involved in the case (the fewer the better)?
- Is the firm able and willing to understand the specific business and general industry in which the client competes, and does it have the ability to factor that knowledge into the overall strategic objectives to be pursued?
- Will the firm offer flexible billing arrangements or deferrals?

Conclusion

Unless and until we see bold and effective legislative reform to restrict the types of frivolous shakedown class action filings against food companies that have become so prevalent in recent years, innovative companies whose products strike a chord with consumers must

manage increased risk as frequent targets of these cases. But they have options when it comes to self-defense — namely, responding strategically and aggressively to legal attacks on their business.

In my experience, having worked with law firms of every size and scope, the most effective litigation management does not mean engaging an army of lawyers and support staff funded by significant resources, but creating strong partners in smaller defense firms armed with focused commitment, creative thinking, efficient pricing, and the ability to cast strategic stones early on that can derail adversaries and protect clients' brand integrity.

Joseph Di Salvo *is the managing member of The Di Salvo Group PLLC, a legal practice that serves as general counsel for small and middle-market consumer product companies. He began his career at McCarter & English, LLP, where he was a partner and a founding member of the firm's New York City office.*