

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DOCKETING STATEMENT ON APPEAL FROM DISTRICT COURT

FILED MAY 13 2008 US Court of Appeals 4th Circuit

Caption of Case Fourth Circuit Docket No. (if known) 08-1461

Sanderson Farms, et al. (Plaintiffs-Appellees)

Type of Action

- Civil (checked)
Criminal/Prisoner
Cross Appeal

v.

Tyson Foods, Inc. (Defendant-Appellant)

District of Maryland Judge Richard D. Bennett

District Court Docket Number RDB 08CV210

Statute or other authority establishing jurisdiction in the:

District Court 28 U.S.C. § 1331

Court of Appeals 28 U.S.C. § 1292(a)(1)

A. Timeliness of Appeal

- 1. Date of entry of judgment or order appealed from 4/22/08
2. Date this notice of appeal filed 4/28/08
If cross appeal, date first notice of appeal filed
3. Filing date of any post-judgment motion filed by any party which tolls time under FRAP 4(a)(4) or 4(b)
4. Date of entry of order deciding above post-judgment motion
5. Filing date of any motion to extend time under FRAP 4(a)(5), 4(a)(6) or 4(b)
Time extended to

B. Finality of Order or Judgment

- 1. Is the order or judgment appealed from a final decision on the merits? [] Yes [X] No
2. If no,
a.) Did the district court order entry of judgment as to fewer than all claims or all parties pursuant to FRCP 54(b)? [] Yes [X] No
b.) Is the order appealed from a collateral or interlocutory order reviewable under any exception to the finality rule? [X] Yes [] No.
If yes, explain below or on a separate page.

The order appealed from granted Plaintiffs' Motion for Preliminary Injunction. This order is reviewable under 28 U.S.C. § 1292(a)(1).

(Criminal only)

3. Has the defendant been convicted? Yes No
4. Has a sentence been imposed? Yes No Term []
5. Is the defendant incarcerated? Yes No

- C. Has this case previously been appealed? Yes No
If yes, give the case name, docket number and disposition of each prior appeal below or on a separate page.

- D. Based on your present knowledge:
Will this appeal involve a question of first impression? Yes No

If yes, please explain below or on a separate page.

See attached page.

- E. Are any related cases or cases raising related issues pending in this Court, any district court of this circuit, or the Supreme Court? Yes No
If yes, cite the case and the manner in which it is related on a separate page. If abeyance, consolidation, or in seriatim argument is warranted, counsel must file a separate motion seeking such relief.

If a related case is pending in this Court, has it been accepted for mediation by the Office of the Circuit Mediator? Yes No

- F. State the nature of the suit, the relief sought, and the outcome below. Attach additional page if necessary.

See attached page.

- G. Issues to be raised on appeal. Attach additional page if necessary.

See attached page.

M. If this case arises out of a bankruptcy proceeding, attach a copy of the caption of the case in the bankruptcy court showing the parties' status as debtor, creditor, trustee, plaintiff, defendant, etc.

N. List name(s) and address(es) of appellant(s) who filed this notice of appeal and appellant's counsel. Attach additional page if necessary.

Appellant(s) name Tyson Foods, Inc.

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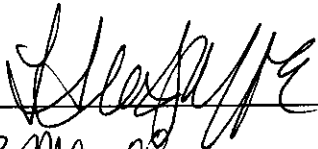
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Will you be handling the appeal? (In criminal cases counsel below will handle the appeal unless relieved by this court.)

Yes No

FRAP 12(b) provides that each attorney who files a notice of appeal must file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney. Any counsel, other than the attorney filing this form, who filed a notice of appeal must provide the requisite statement to be attached to this form.

Signature 

Date 12 May 08

ATTACH: Any additional pages containing extended answers to questions on this form
 Any transcript order with attachments
 Certificate of service for this docketing statement

D. Based on your present knowledge, will this appeal involve a question of first impression?

Yes. This appeal involves a question of first impression regarding whether the United States Department of Agriculture's determination that a label claim for poultry products is not false or misleading pursuant to the Poultry Products Inspection Act, 21 U.S.C. § 451 et seq., precludes a challenge to advertising and labeling (including point-of-sale) materials that substantively comport with the approved language. The appeal also involves the question whether, and under what circumstances, irreparable harm should be presumed in a Lanham Act case involving a claim of false advertising. *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 273-74 (4th Cir. 2002) (noting that the Fourth Circuit "has never spoken directly to the applicability of such a presumption of harm in Lanham Act cases").

F. State the nature of the suit, the relief sought, and the outcome below.

Plaintiffs challenged Tyson Foods' description of its chicken products using the USDA-approved claims "Raised Without Antibiotics" or "Raised Without Antibiotics that impact antibiotic resistance in humans" (collectively, the "RWA claims") under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Plaintiffs sought preliminary injunctive relief against the use of these USDA-approved claims in all of Tyson's advertising and promotional materials. The United States District Court for the District of Maryland granted Plaintiffs' Motion for Preliminary Injunction, ordering Tyson to cease its use of the USDA-approved RWA claims in all materials other than labels affixed directly to chicken product packages, including use on point-of-purchase materials that are directly adjacent to the product packages bearing labels containing the government-approved RWA claim. Tyson now appeals from the district court's order granting plaintiffs' Motion for Preliminary Injunction.

G. Issues to be raised on appeal.

The issues to be raised on appeal challenging the issuance of the preliminary injunction include: (1) whether the district court erred in ruling that a claim found to be "truthful and not misleading" by the federal agency that pre-approves poultry label claims and has jurisdiction over labeling of poultry products can provide the basis for liability as a "false or misleading" statement within the meaning of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), when the approved claim appears anywhere other than on the label affixed to a package of chicken; (2) whether the district court erred in disregarding relevant case law that uniformly holds that advertising that "substantively comports" with the labeling statements approved by the relevant government agency is not subject to Lanham Act challenge; (3) whether the district court erred in applying a presumption of irreparable harm to the plaintiffs based upon its ruling that plaintiffs had established a likelihood of success on the merits; (4) whether the district court erred in ruling that plaintiffs were likely to suffer irreparable harm absent the issuance of the injunction, when plaintiffs' only potential harm was quantifiable and not causally linked to Tyson's use of the RWA claims; (5) whether the district court erred in holding that, although Tyson will suffer irreparable harm from the issuance of a preliminary injunction, the plaintiffs' irreparable harm outweighed the likelihood of irreparable harm to Tyson; (6) whether the district court erred in holding that plaintiffs were likely to succeed on the merits of their Lanham Act claim; (7) whether the district court erred in holding that the preliminary injunction was in the

public interest, (8) whether the district court erred in relying upon the results of an inherently flawed and unreliable consumer survey, and (9) whether the preliminary injunction should be vacated as moot, in part, because it is directed at conduct that already had ceased at the relevant time period.

K. Transcript Order

Please note that while the transcripts of the Preliminary Injunction hearing, held before the Honorable Richard D. Bennett on April 7-10, 2008, have not yet been filed with the District Court, Tyson has paid for and received the official hearing transcripts from the proceedings below. Therefore, Tyson was instructed that it was unnecessary to file a Transcript Order form with the district court. In lieu of the requested transcript order, Tyson has attached to this Docketing Statement the invoice receipt it received from the court reporter for the district court indicating the transcripts were received and paid for in full. Further, Tyson is informed that the transcripts for the proceedings below will be filed with the district court imminently.