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Judge Dismisses Half-Baked False Advertising Claims Against Ghirardelli

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On April 8, 2020, Judge Phyllis J. Hamilton of the U.S. District Court for the Northern District of California granted Ghirardelli Chocolate's motion to dismiss a putative nationwide class action brought by several consumers who alleged Ghirardelli deceptively marketed its "premium classic white" baking chips as containing white chocolate. *Cheslow v. Ghirardelli Chocolate*, No. 19-CV-07467-PJH, 2020 WL 1701840 (N.D. Cal. Apr. 8, 2020).

The complaint alleged that Ghirardelli's labeling, advertising, and marketing of its "premium classic white" baking chips deceived "reasonable consumers into thinking 'white' represents the type of chocolate in the product, i.e., white chocolate," when in fact the product did not contain chocolate. Plaintiffs asserted violations of California's Unfair Competition Law, False Advertising Law, and the Consumer Legal Remedies Act. Ghirardelli moved to dismiss the complaint on the grounds that it did not contain any allegations that plausibly show that the product advertising made any statements or representations that were false or misleading.

As a preliminary matter, both sides agreed that there was no affirmative statement or representation on the product that was false. Specifically, the product label did not include the words "chocolate" or "cocoa." Therefore, the court explained that Plaintiffs carried the burden of proving that the product had "the capacity, likelihood, or tendency to deceive the consuming public." Applying that standard, the court granted Ghirardelli's motion and dismissed all of Plaintiffs' claims because they did not plausibly allege a reasonable consumer would be deceived by the product's labeling or advertising.

With respect to Plaintiffs' contention that consumers would reasonably understand "white chips" to refer to white chocolate, the court drew on two recent Ninth Circuit opinions and sided with Ghirardelli, which argued the description simply referred to the color of the chips. Beginning with the dictionary definition of the allegedly deceptive term, as suggested by *Becerra v. Dr. Pepper/Seven Up*, 945 F.3d 1225 (9th Cir. 2019) (a case this blog covered), Judge Hamilton found that the adjective "white" in "white chips" does not define the food itself but rather defines the color of the food. Any contrary interpretation of the word by plaintiffs was unreasonable, the court held, and therefore could not form the basis of a false advertising claim under *Ebner v. Fresh*. In *Ebner*, the Ninth Circuit held that a representation regarding a product is not deceptive merely because it may be "unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons that may purchase the product." 838 F.3d 958 (9th Cir. 2016) . Here, "[s]imply because some consumers unreasonably assumed that "white" in the term "white chips" meant white chocolate chips does not make it so." This was especially true because the package disclosed the product ingredients, resolving any potential for misinterpretation as to the contents of the product.

Judge Hamilton also rejected Plaintiffs' argument that the product's label was misleading because it included images of white chocolate chips and baking recipes. Although "deceptive images, especially when combined with deceptive statements, may deceive a reasonable consumer," the court explained that it is "unreasonable to draw a specific qualitative message about the product from an image on the product." Thus, although the package included an image of a cookie with white chips, the court held that it was not reasonable for a consumer to conclude anything "about the quality of those chips" because the packaging "makes no affirmative statement that it is a chocolate cookie."

Finally, Judge Hamilton did not buy Plaintiff's argument that the use of the word "premium" in the phrase "premium baking chips" conveyed to consumers that the product was real white chocolate made with premium ingredients. Rather, it was mere puffery and thus not actionable.

This opinion is a reminder – like other cases we have covered – that challenges to literally true advertising statements are likely to provoke a motion to dismiss and that such motions are often granted. This is particularly the case where an ingredient list resolves any potential misinterpretations that a consumer may derive from the contested claims. Continue to watch this space for further developments.

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