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No “White” Lie: Plaintiffs Fail to Show Reasonable Consumer Would Expect “White Morsels” to Contain White Chocolate

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After the recent dismissal of nearly identical claims, the same consumer plaintiffs have once again been thwarted in their attempt to challenge labeling and advertising that supposedly misleads consumers into believing the product contains white chocolate. *Prescott v. Nestle USA, Inc.*, No. 19-CV-07471-BLF (N.D. Cal. June 4, 2020).

Here, the plaintiffs alleged that Nestle’s use of the words “white” and “premier” to describe its Toll House’s Premier White Morsels would deceive a reasonable consumer into thinking that the product actually contains white chocolate, when it does not. Plaintiffs asserted claims under three California laws: the UCL, FAL, and CLRA.

In dismissing Plaintiffs’ claims, Judge Beth L. Freeman cited the “highly persuasive” decision in *Cheslow v. Ghirardelli Chocolate*, No. 19-CV-07467-PJH (N.D. Cal. Apr. 8, 2020) , dismissing “nearly identical claims” asserted by the same plaintiffs against Ghirardelli regarding its Premium Baking Chips Classic White Chips.

As we noted in our blog post covering the *Cheslow* decision, challenges to literally true advertising in class action cases are particularly vulnerable to a motion to dismiss. In cases where the ingredient list resolves any potential misinterpretation of a literally true claim, consumer plaintiffs face an uphill battle. Judge Freeman’s decision in *Prescott* reinforces this idea.

In addressing the use of the word “white” on the product labeling, the Court echoed the *Cheslow* court’s analysis of modifying adjectives on food labels. Judge Freeman discussed *Cheslow*’s reliance on *Becerra v. Dr. Pepper/Seven Up*, 945 F.3d 1225 (9th Cir. 2019), which found that in light of the commonly understood definition of the word “diet” when used as an adjective, the word “diet” in “Diet Dr. Pepper” spoke to the product’s lack of calories, and did not promise weight loss or management. Applying this reasoning, the court held that “[n]o reasonable consumer could believe that a package of baking chips contains white chocolate simply because the product includes the word ‘white’ in its name or label.”

Judge Freeman also found little merit in plaintiffs’ argument that the use of “premier” was misleading. Relying on the *Cheslow* court’s finding that the use of “premium” in the context of “Premium Baking Chips” and “premium ingredients” constituted puffery, the court similarly reasoned that “premier” in the context of “Toll House’s Premier White Morsels” was “mere puffery that cannot form the basis of a claim under the reasonable consumer standard.”

In a creative attempt to bolster their allegations, plaintiffs included in their First Amended Complaint a number of consumer comments taken from topclassactions.com, which supposedly reflected that other consumers likewise thought the product contained white chocolate. However, the court found that such “subjective opinions…posted in the context of asking to join this lawsuit are irrelevant” to “the [applicable] reasonable consumer standard as discussed in *Becerra* and *Cheslow*.”

This case is the first we have seen where plaintiffs have tried to rely on consumer postings on a class action recruitment website to support their allegation that reasonable consumers will be deceived by the challenged advertising. However, given Judge Freeman’s persuasive reasoning as to why such postings are irrelevant, we doubt this will become a trend. Judge Freeman’s order indicated that leave to amend was appropriate, as the decision was “the first guidance offered by the Court.” Watch this space for further developments.

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