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# Court Gives Vanilla Ice Cream False Advertising Claims a Frosty Reception

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Judge Louis L. Stanton of the Southern District of New York recently granted defendant Wegmans Food Markets'motion to dismiss claims alleging that Wegmans falsely labels its vanilla ice cream. Plaintiffs sued Wegmans for false advertising, negligent misrepresentation, and deceptive acts in violation of federal and state law, alleging that despite labeling its product "vanilla ice cream," the product contains only a negligible amount of vanilla, and to the extent it tastes like vanilla, this flavor comes from non-vanilla sources. Therefore, plaintiffs argued, this product could not "truthfully or lawfully" be labeled "vanilla ice cream." The Court, however, held that because plaintiffs conceded that there is at least a *de minimis* amount of vanilla in the product, no objective misrepresentations had been pled, and dismissed plaintiffs' claims. *Steele v. Wegman's Food Markets*, No. 1:19-cv-09227 (S.D.N.Y. July 14, 2020).

The ice cream packaging at issue displays the word "Vanilla" in large type, on the front of the container. The next largest words on the front of the container are "Ice Cream," followed by labels indicating that the product contains "no Artificial Colors, Flavors or Preservatives," and that the product is "Made with Milk, Cream and Natural Vanilla Flavor." The back of the packaging also displays an ingredient list, which mentions neither vanilla beans nor vanilla bean extract.

Judge Stanton determined that the case came down to two questions: (1) did the label on the ice cream container misrepresent the container's contents, and (2) did the "elaborate" analysis performed by plaintiffs' chemists show there was "fraudulently little" vanilla bean extract in the ice cream? He concluded the answer to both questions was no.

First, Judge Stanton found that the product label, on its face, was not deceptive. Judge Stanton noted that the disclosures made on the label were limited to those described above, and considered the effect of each, in turn. Judge Stanton observed that the large-type “Vanilla” was of immediate use to consumers for the purpose of distinguishing the product from the many other varieties of ice cream, and the “Natural Vanilla Flavor” and “No Artificial” labels would be of interest to consumers who prefer natural ingredients. Those interested in the actual ingredients could read the list, which did not mention vanilla beans or vanilla bean extract. Accordingly, Judge Stanton concluded that the labels were not deceptive, as they truthfully disclosed all the relevant information to consumers without falsely suggesting anything more.

Judge Stanton further found plaintiffs had not provided a basis for their contention that buyers assume “natural vanilla flavor” must refer to vanilla beans and extracts, specifically. Since the vanilla flavoring was, in fact, derived from natural sources, and since the container does not mention vanilla beans or extract, Judge Stanton concluded “it is hard to see where there is deception.”

Judge Stanton also took issue with the chemical analysis proffered to support plaintiff’s allegation that Wegmans’s ice cream contains only *de minimis* amounts of vanilla. Plaintiffs alleged that a mass spectrometry analysis showed that, of the four chemical compounds present in vanilla beans (vanillin, p-hydroxybenzaldehyde, vanillic acid, and p-hydroxybenzoic acid), only vanillin was detectable in the ice cream. Plaintiffs argued this meant there was too little vanilla bean extract in the ice cream for it to be labeled “Vanilla,” and the flavoring must come from non-vanilla bean sources. Judge Stanton disagreed, noting that the other three compounds are found in vanilla beans in “tiny” proportions compared to vanillin, so even if they did not show up on the analysis, this does not necessarily mean there is no vanilla bean extract (or just a *de minimis* amount) in the ice-cream. Rather, it could simply indicate that the test was not sensitive enough to detect these other three markers with smaller profiles.

This decision serves as a reminder that false advertising claims challenging literally true claims are more susceptible to a motion to dismiss, because of the risk that the judge deciding the motion will find no basis for the mental leap the complaint contends consumers reasonably will make.

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