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Judge Dunks Plaintiffs' Claims and Dismisses Oreo False Advertising Lawsuit

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Judge Edward R. Korman of the U.S. District Court for the Eastern District of New York recently granted Mondelēz Global's motion to dismiss a putative class action challenging the advertising for its signature Oreo cookies. *Harris v. Mondelēz Global*, No. 19-cv-2249-ERK (E.D.N.Y. July 28, 2020).

Plaintiffs alleged the Oreo manufacturer's front label statement "Always Made With Real Cocoa" is misleading because the cocoa used to make Oreos is refined through an alkalizing process. Although Plaintiffs conceded Oreos are in fact made with cocoa, they claimed "the addition of alkali diminishes the quality and taste of the cocoa" and that a reasonable consumer would expect "'real cocoa' to indicate a higher quality cocoa than if the ingredient been identified just as 'cocoa' (minus the 'real')." Plaintiffs asserted claims under various state deceptive or misleading business practices statutes and for unjust enrichment.

Cutting to the core of Plaintiffs' claim, Judge Korman found Plaintiffs' failure to dispute that Oreos contain cocoa to be "fatal to their case." Plaintiffs relied on *Mantikas v. Kellogg* to argue that technical accuracy does not dispel a plaintiff's claim that conduct is plausibly deceptive. In *Mantikas*, the Second Circuit found the phrase "Made with Whole Grain" in Cheez-Its advertisements falsely implied the products contained more whole grain than white flour. Judge Korman distinguished *Mantikas* because Plaintiffs did not allege that the Oreo label misrepresents the quantity or proportion of cocoa, or that the amount of cocoa is *de minimis* relative to the amount of alkali.

Judge Korman explained “a representation that a food is ‘made with’ a ‘real’ ingredient does not necessarily mislead from the truth that the advertised ingredient may have been combined with another.” Drawing on examples from other cases concerning mashed potatoes advertised as “made with real butter” (while containing additional fats) and graham crackers packaged as “made with real honey” (while also containing other sweeteners), the Court explained that the Oreo label did not foreclose the use of other ingredients. A reasonable consumer viewing the words “made with real cocoa” on the Oreo label would not expect the cocoa to be present in any particular form or not mixed with other ingredients, particularly in the absence of any modifiers like “only” or “exclusively” before the phrase “real cocoa.”

Based on this analysis, the Court held Plaintiffs failed to plausibly allege that a reasonable consumer would be misled by a made with “real cocoa” representation when the product did in fact contain cocoa, and dismissed Plaintiffs’ claims. The Court denied Plaintiffs’ leave to amend because their complaint’s “substantive problem could not be cured through better pleadings.”

This case once again demonstrates that claims based only on consumer assumptions unsupported by the text of the advertising are ripe for a motion to dismiss. That’s just how the cookie crumbles. Continue to watch this space for further developments.

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