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Added Allegations of Consumer Survey Results Fail to Sweeten the Deal: Court Dismisses "White Chips" False Advertising Suit With Prejudice

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We previously blogged about the dismissal without prejudice of a putative consumer class action alleging that the well-known confectioner Ghirardelli misled consumers into believing its "Premium Baking Chips Classic White Chips" contained white chocolate. Last month, Judge Phyllis J. Hamilton of the Northern District of California once again dismissed plaintiffs' claims against Ghirardelli – this time, with prejudice — holding that the amended complaint failed to cure the original complaint's critical defects. *Cheslow v. Ghiradelli Chocolate Company*, No. 19-cv-07467 (N.D. Cal. July 17, 2020).

Plaintiffs' amended complaint asserted the same causes of action as the original complaint — violations of the California Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act. In dismissing the first complaint, the Court stated it was not persuaded that the use of the word "white", in and of itself, would suggest to a reasonable consumer that the product contained white chocolate. On this go-around, plaintiffs hoped to sway the Court by proffering a consumer survey of 1,278 people that allegedly showed otherwise.

In Plaintiffs' proffered survey, participants were shown the front label of Ghirardelli's product and were asked questions such as: "Based on your review of this package, do you think that this product contains white chocolate?" Plaintiff's alleged that he survey results showed that 92 percent of participants believed Ghirardelli's Classic White Chips contained white chocolate while 8 percent thought it did not. A majority of those surveyed also indicated this product's lack of white chocolate would leave them "much less satisfied" or "somewhat less satisfied" and that they would be less likely to purchase the product again.

Despite the survey, Judge Hamilton nonetheless reaffirmed her previous finding that the adjective “white” in the term “white chips” on its face does not reasonably communicate that the product contains white chocolate. In particular, the Court relied on *Becerra v. Dr. Pepper/Seven Up*, 945 F.3d 1225 (9th Cir. 2019) (which we blogged about here) in holding that plaintiffs’ survey did not rescue the complaint. Importantly, the survey did not show respondents the back of the product package, which disclosed the ingredients list (and did not list white chocolate as an ingredient). The Court had previously found that the ingredients list resolved any potential for consumers to be misled.; by omitting the back panel, “the survey deprived respondents of relevant information,” and could not “transform plaintiffs’ unreasonable understanding concerning white chips into a reasonable one.”

As we mentioned when previously covering this case, challenges to literally true advertising are susceptible to a motion to dismiss—especially in a suit involving a product label with an ingredient list that can correct any a misconceptions. It is no surprise, then, that the Court here found little use for a survey that failed to provide the ingredients list to survey participants.

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