United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

LEON KHASIN, individually and on behalf of all others similarly situated,

Plaintiff,

v.

THE HERSHEY COMPANY,

Defendant.

Case No. 5:12-cv-01862-EJD

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Re: Dkt. No. 139

Presently before the Court are two motions filed in the above-captioned case: a Motion for Summary Judgment by Defendant The Hershey Company ("Hershey" or "Defendant") and Motion for Partial Summary Judgment by Plaintiff Leon Khasin ("Khasin" or "Plaintiff"). Dkt. No. 139. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a). Plaintiff filed this putative class action against Defendant alleging that several of Defendant's products have been improperly labeled so as to amount to misbranding and deception in violation of several California and federal laws.

Per Civ. L. R. 7-1(b), the motions were taken under submission without oral argument. Having fully reviewed the parties' papers, the Court GRANTS Defendant's Motion for Summary

Judgment and DENIES Plaintiff's Motion for Partial Summary Judgment.

I. BACKGROUND

Plaintiff is a California consumer who, since 2008, purchased more than $25.00 of Defendant's products, including Special Dark Chocolate, Milk Chocolate, Special Dark Kisses, Special Dark Cocoa, Natural Unsweetened Cocoa, and Sugar Free Coolmint IceBreaker Mints. Dkt. No. 27 ¶ 19, 196. Plaintiff argues that the following representations on the packaging of these and other of Defendant's food products were unlawful and/or misleading: (1) antioxidant nutrient content claims, (2) nutrient content claims without required disclosures, (3) healthy diet claims, (4) sugar free claims, (5) unlawful serving sizes, (6) listing polyglycerol polyricinoleic acid as "PGPR", and (7) failing to disclose vanillin. Dkt. No. 27 ¶ 60, 197-99.

Khasin filed his original Complaint in this case on April 13, 2012 alleging that Hershey's mints, milk chocolate, dark chocolate and cocoa products were improperly labeled in violation of U.S. Food and Drug Administration regulations and California law. See Dkt. No. 1. Plaintiff's First Amended Complaint ("FAC") was filed on July 23, 2012. See Dkt. No. 27. Plaintiff's FAC alleges that he read the labels on Defendant's products, relied on these claims when making purchasing decisions, and was misled by these claims. Id. at ¶ 60, 197-99. This Court granted Defendant's Motion to Dismiss the FAC in part on November 9, 2012. See Dkt. No. 45. The Court dismissed Plaintiff's claims predicated on the Magnuson-Moss Warranty Act and the Song-Beverly Act. Id. The Court found that Plaintiff satisfied the UCL's injury-in-fact requirement because he alleged that he relied on Defendants' allegedly misleading conduct in purchasing certain products. Id. After the Court's order, the following causes of action remained: violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq., (counts 1-3); violation of the False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500 et seq., (counts 4-5); violation of the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 et seq., (count 6); and unjust enrichment / quasi-contract (count 7).

On June 14, 2013, Defendant filed a motion for partial summary judgment. See Dkt. No. 68. On May 5, 2014, the Court granted partial summary judgment in favor of Hershey as to all of

Khasin's claims, with the exception of Khasin's UCL claim concerning the statement "natural source of flavanol antioxidants" on certain labels of Hershey's dark chocolate and cocoa products. See Dkt. No. 131.

II. LEGAL STANDARD

Summary judgment is appropriate if, viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmoving party, there are no genuine disputes of material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 321 (1986). At the summary judgment stage, the Court "does not assess credibility or weigh the evidence, but simply determines whether there is a genuine factual issue for trial." House v. Bell, 547 U.S. 518, 559-60 (2006). A fact is "material" if it "might affect the outcome of the suit under the governing law," and a dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable trier of fact to decide in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of a material fact. Celotex, 477 U.S. at 323. Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. Id. at 322-23. But, on an issue for which the opposing party will have the burden of proof at trial, the party moving for summary judgment need only point out that "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she the burden of proof. Id. at 323. Once the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is genuine issue for trial." Anderson, 477 U.S. at 250.

If evidence produced by the moving party conflicts with evidence produced by the nonmoving party, a court must assume the truth of the evidence set forth by the nonmoving party with respect to that fact. See Leslie v. Grupo ICA, 198 F.3d 1152, 1158 (9th Cir. 1999). "Bald assertions that genuine issues of material fact exist," however, "are insufficient." See Galen v.

Cnty. of L.A., 477 F.3d 652, 658 (9th Cir. 2007); see also United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1061 (9th Cir. 2011) ("To survive summary judgment, a plaintiff must set forth non-speculative evidence of specific facts, not sweeping conclusory allegations."). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50.

III. DISCUSSION

Hershey advances several arguments on which the Court may grant summary judgment. First, Hershey argues that, to prevail on his UCL claim, Khasin must prove he was deceived by Hershey's "natural source of flavanol antioxidants" statements. See Dkt. No. 155 at 1. Second, Hershey contends that there is no evidence of class-wide deception because Khasin has not shown that reasonable consumers would likely have been misled by Hershey's statements. See id. Third, Hershey claims that there is no evidence that Khasin suffered injury as a result of being deceived by Hershey's statements. See id.

For the reasons stated below, the Court concludes there is insufficient evidence that the "natural source of flavanol antioxidants" statement on the challenged Hershey products was likely to mislead reasonable consumers and that the label statements were therefore unlawful on that basis. Because Hershey has shown an absence of a genuine dispute of material fact on these points, the Court GRANTS Hershey's Motion for Summary Judgment. Thus, the Court need not address the Khasin's Motion for Partial Summary Judgment because it is largely a "mirror image" of Hershey's Motion for Summary Judgment. As such, the Court DENIES Khasin's Motion for Partial Summary Judgment as moot.

A. Statutory Framework

The federal Food, Drug, and Cosmetic Act ("FDCA"), codified at 21 U.S.C. § 301 et. seq., gives the Food and Drug Administration ("FDA") "the responsibility to protect the public health by ensuring that 'foods are safe, wholesome, sanitary, and properly labeled.' " Lockwood v. Conagra Foods, Inc., 597 F. Supp. 2d 1028, 1030 (N.D. Cal. 2009) (quoting 21 C.F.R. § 393(b)(2)(A)). For purposes of federal law, food is "misbranded" if its labeling is "false or

misleading in any particular. . . . ." 21 U.S.C. § 343(a)(1). California, through the Sherman Food, Drug, and Cosmetic Act ("Sherman Law"), Cal. Health & Safety Code § 109875 et seq., has expressly adopted the federal labeling requirements as its own. Under the Sherman Law, "All food labeling regulations and any amendments to those regulations adopted pursuant to the federal act . . . shall be the food regulations of [California]." See § 110100. California has also enacted a number of laws and regulations that adopt and incorporate specific federal food laws and regulations. See, e.g., § 110660 ("Any food is misbranded if its labeling is false or misleading in any particular."); see also § 110665 ("Any food is misbranded if its labeling does not conform with the requirements for nutrition labeling as set forth in." 21 U.S.C. § 343(q)); see also § 110670 ("Any food is misbranded if its labeling does not conform with the requirements for nutrient content or health claims as set forth in." 21 U.S.C. § 343(r)).

The parties agree that the FDA has yet to promulgate a regulation defining the word "natural" as it pertains to packaged food. See Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food ("FDA Policy Statement"), 58 Fed. Reg. 2303, 2407 (Jan. 6, 1993) (explaining that "FDA is not undertaking rulemaking to establish a definition for 'natural' at this time."). Instead, the FDA opted to "maintain its current policy . . . not to restrict the use of the term 'natural' except for added color, synthetic substances, and flavors as provided in [21 C.F.R.] § 101.22." Id. "Additionally," the FDA continued, "the agency will maintain its policy regarding the use of 'natural,' as meaning that nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food." Id. (citation omitted).

Against that statutory backdrop, Khasin's lawsuit has two prongs. Khasin argues that Hershey has violated the UCL, FAL, and CLRA because the labels on the challenged Hershey products are (1) unlawful and (2) misleading. FAC ¶ 5, Dkt. No. 27. First, he argues "that the particular products purchased by Khasin are a 'natural source of flavanol antioxidants' " is unlawful. FAC ¶ 17, Dkt. No.27. Secondly, he argues that "[t]he natural antioxidants found in

teas and certain fruits like berries and grapes can also be found in Hershey ®'s Kisses® Special Dark®" is misleading. FAC ¶ 17, Dkt. No. 27. The challenged Hershey products, Khasin alleges, make unlawful nutrient content claims as to the antioxidant labeling. The Court will address each argument in turn.

A. Whether Hershey's Labels Are Deceptive

Khasin's UCL claim is governed by the "reasonable consumer standard," which requires evidence that "members of the public are likely to be deceived" by the business practice or advertising at issue. Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008) (internal quotation marks omitted). To survive summary judgment, Khasin "must produce evidence showing 'a likelihood of confounding an appreciable number of reasonably prudent purchasers exercising ordinary care.' " Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1026 (9th Cir. 2008) (quoting Brockey v. Moore, 107 Cal. App. 4th 86, 99 (2003)). Put differently, Khasin must show "it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 507 (2003). Here, Khasin offers consumer survey about how consumers could interpret Hershey's flavonal antioxidant statements, and cites Federal Register entries indicating that the purpose behind FDA's labeling rules is to minimize consumer confusion. Khasin SJ Mot. at 13-15. Although surveys and expert testimony regarding consumer expectations are not required, "a few isolated examples of actual deception are insufficient" in the Ninth Circuit. Clemens, 534 F.3d at 1026 (internal quotation marks omitted). Moreover, under California law, Khasin cannot "obtain relief by arguing how consumers could react; [he] must show how consumers actually do react." Zeltiq Aesthetics, Inc. v. BTL Indus., Inc., 13-cv-05473-JCS, 2014 U.S. Dist. LEXIS 40402, at *33 (N.D. Cal. Mar. 25, 2014); see also Hylton v. Anytime Towing, No. 12-57267, 2014 U.S. App. LEXIS 4975, at *4 (9th Cir. Mar. 17, 2014) (recognizing that on summary judgment a party cannot rely on "allegations unsupported by factual data."). Without such proof, Khasin does not satisfy the UCL's "reasonable consumer" test.

Khasin testified that he was misled by Hershey's "natural source of flavanol antioxidants"

label. See Depo. of Leon Khasin ("Khasin Depo.") Ex. K, ¶ 79, Dkt. No. 144. According to Khasin, he believed at the time of purchase that flavanol antioxidants made them a "better choice" than other candy products. Id. at 174. Khasin provides additional evidence from the European Food Safety Authority (EFSA), the U.S. Department of Agriculture, the Tea Quarterly, and an internal Hershey email exchange to show that flavanol antioxidants are not known to provide health benefits. See Pls. Resp. Mot. Summ. J. ("Response") at 2-4, Dkt. No. 149. Khasin asks for the Court to infer that Hershey's statements could mislead other consumers as he was because consumers are likely to assume that the statement, "natural source of flavanol antioxidants," facially violates FDA regulations. Id. at 4-6. Khasin also claims that he is not required to prove reliance on Hershey's label claims to succeed on his UCL claim to show deception, but even if he were, this requirement is satisfied through his testimony that the Hershey's "natural source of flavanol antioxidant" statements were a factor in his purchasing decision. Id. at 9-12.

Hershey maintains that its product labeling is not false and does not mislead consumers because its products retain flavanol antioxidants that are naturally found in the cocoa bean. Def. Reply 5, Dkt. No. 155. In particular, Hershey points to expert testimony to reiterate that Hershey's evidence is both true and unrebutted. Id. Further, Hershey alleges that Khasin understood that Hershey's products are candy, not health foods as derived from his prior testimony. Id. Hershey argues that Khasin provides no "extrinsic evidence" required by the Ninth Circuit to show that reasonable consumers are likely to be misled in the same way. Id. at 6. Lastly, Hershey urges that Khasin is required to prove reliance on Hershey's statements under both state and federal law. Id. at 5-6 (citing Khasin v. Hershey Co., 2014 WL 1779805, at *4 (In the "mislabeling of food products" . . . "the actual reliance requirement applies to Plaintiff's claims under all prongs of the UCL."); see also Figy v. Amys Kitchen, 2013 WL 6169503, at *3 (N.D. Cal. 2013); Kwikset Corp. v. Super. Ct., 51 Cal. 4th 310, 327 n.10 (2011); Wilson v. Frito–Lay N. Am., 961 F. Supp.2d 1134 (N.D. Cal. 2013).

Here, Khasin's evidence is insufficient to create a genuine dispute of material fact. First, the Court will address the issue of whether Khasin was misled in the purchase of the Hershey

products. Second, whether Khasin is likely to be misled by Hershey's statements. Finally, whether Khasin was injured as a result of his reliance when he purchased Hershey products labeled with the statement, "natural source of flavanol antioxidant."

First, Khasin argues that he was "mislead" by the label "natural source of flavanol antioxidants" and the "implicit representation[s]" that the FDA has established a Recommended Daily Intake ("RDI") or Recommended Daily Value ("RDV") for flavanol antioxidants. See Williams, 552 F.3d at 939; Dkt. No. 149 at 7-8. However, his solitary testimony, without more, is not enough to survive summary judgment. "[A] few isolated examples of actual deception are insufficient" to survive summary judgment." Clemens, 534 F.3d at 1026 (internal quotation marks omitted); see also Ries v. Arizona Beverages USA, No. 10-CV-00139, 2013 WL 1287416, at *7 (N.D. Cal. Mar. 28, 2013) (granting summary judgment where defendants' owner testified that some consumers of AriZona Iced Tea "were confused by the term a hundred percent natural" because such testimony, without more, "does not demonstrate that it is probable that a significant portion of the consuming public could be confused by the 'all natural' labeling of defendants' products."). Thus, absent additional evidence in addition to his own testimony, Khasin does not meet his burden on the question of deception.

Moreover, even if the Court were to accept Khasin's testimony as the only evidence of deception, the facts in the record speak to the contrary. Khasin testified in his deposition that Hershey's products are candy, not health foods. Leon Khasin Transcript ("Khasin Tr.") Ex. 2 at 79, Dkt. No. 139. Further, Khasin admitted under oath that he has no understanding of an RDV or RDI (Id. at 74), and he is not concerned about the fats and sodium in Hershey's products. Id. at 167, 168, 196. As such, Khasin does not meet his burden on the question of deception.

Second, Khasin must provide other extrinsic evidence in addition to his allegations to prove whether a reasonable consumer is likely to be misled. See Rice v. Fox Broad. Co., 330 F.3d 1170, 1181-2, n. 8 (9th Cir. 2003); see also Khasin v. Hershey Co., 2014 WL 1779805, at *10-11 (N.D. Cal. May 5, 2014); see also Ries v. Arizona Beverages USA, 2013 WL 1287416, at *7 (N.D. Cal. Mar. 28, 2013). Here, Khasin produces no extrinsic evidence to suggest that a

reasonable consumer would have expected or assumed that any particular level of flavanol antioxidants would be found in the alleged Hershey products. Khasin provides only his own personal logic to arrive at the conclusion that the statement, "natural source of flavanol antioxidants" is misleading, without any other extrinsic evidence. There is insufficient evidence present such that the Court could find that a reasonable consumer would be misled by Hershey's statements. Further, even if the Court were to accept Khasin's personal logic to arrive at the conclusion that the phrase, "natural source of flavanol antioxidants" misleads consumers because it appears to violate FDA regulations, "not every regulatory violation amounts to an act of consumer fraud." See Mason v. Coca-Cola Co., 774 F. Supp. 2d 699, 705 n.4 (D.N.J. 2011).

The additional "evidence" offered by Khasin is not relevant to the issue of determining whether the phrase, "natural source of flavanol antioxidants" constitutes a mislabeling under UCL. For example, Khasin cites the FDCA's disclosure requirements as his evidence that the phrase "natural source of flavanol antioxidants" is a nutrient content claim that could have misled consumers because Hershey should have disclosed its products contain "disqualifying amounts of saturated fat." Plaintiff's Opposition ("Pls. Opp.") at 5-6, Dkt. No. 149. According to the regulation that plaintiff relies upon, ". . . a nutrient content claim that characterizes the level of antioxidant nutrients present in a food may be used on the level or in the leveling of that food: (1) An RDI has been established for each of the nutrients." 21 C.F.R. § 101.54(g)(1). However, such measures are not appropriate in this case because Hershey did not characterize the level or amount of antioxidants present in its product. Here, Khasin's showing of FDA letters regarding the characterizing level or amounts of nutrients is not relevant to showing that consumers are likely to be misled by Hershey's statements. While the Court views the FDA letters as controlling, despite being informal, of its regulatory definitions, the letters themselves are irrelevant to deciding whether Khasin was likely to be misled by Hershey's statements. See Victor v. R.C. Bigelow, Inc., 2014 WL 1028881, at *15 (N.D. Cal. Mar. 14, 2014) (citing Kane v. Chobani, Inc., 2013 WL 3703981, at * 17 (N.D. Cal. July 12, 2013) ("As set forth by the Supreme Court in Auer v. Robbins, an agencys' interpretation of its own regulation, even if set forth in an informal

document, is controlling unless plainly erroneous or inconsistent with the regulation." (citing Auer v. Robbins, 519 U.S. 452, 461 (1997))) (quotation marks and brackets omitted). Therefore, Khasin is unable to meet his burden as to whether a reasonable consumer would be misled by Hershey's statements.

Third, Khasin does not meet the burden of showing he suffered injury as a result of purchasing and relying on Hershey's statements. For Khasin to prevail on his UCL claim, he is required to prove that he "lost money or property," as a result of Hershey's deceptive labeling to "demonstrate some form of economic injury." Kwikset, 51 Cal. 4th at 322-23. Khasin proffers no evidence to show economic injury, but rather claims that his purchases are "legally worthless" because they are inaccurate representations of what he thought he was purchasing. See Pls. Opp. 6, Dkt. No. 149. He further claims that he paid a "price premium" because Hershey products with the statement, "natural source of flavanol antioxidants," are objectively worth less than what he paid, but the expert evidence he proffers to support this argument does not propose a model to determine how to calculate this presumed "price premium." See Dkt. No. 139 at 13. Hershey shows in its evidence, which is comprised of empirical data, including historical sales data and a consumer survey, that there is no price change attributable to the labeling phrase, "natural source of flavanol antioxidants." Id. at 14-15. Therefore, Khasin has not met his burden of showing that he suffered economic injury through loss of money or property, as a result of Hershey's alleged deceptive labeling.

Further, Khasin does not show economic injury because he undermines his claim by stating that "at least 90% of my purchases" were "consumed by someone other than me." See Dkt. No. 144, Ex. P at ¶¶ 7-8, 11-12, 15-16. Therefore, Khasin has not met his burden showing he was injured as a result of Hershey's alleged deceptive labeling. Consequentially, because Khasin is unable to prove that he was misled and relied on that deception, he cannot prove that he was injured as a result.

In sum, Khasin does not provide sufficient evidence to support his allegations that Hershey's statements are deceptive.

B. Whether Hershey's Labels Are Unlawful

Khasin alleges that Hershey products that bear the phrase "natural source of flavanol antioxidants" on its labels is "unlawful" for the purposes of the UCL. FAC ¶ 17. Hershey asserts that its "Special Dark chocolate and cocoa products retain flavanol antioxidants naturally present in the cocoa bean" and that there is no evidence proffered by either party rebutting this statement. See Dkt. No. 155 at 4-5; see also Decl. of Mark Payne ("Payne Decl.") Dkt. No. 139, Ex. 13. "By proscribing any unlawful business practice, the UCL borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." Alvarez v. Chevron Corp., 656 F.3d 925, 933 n.8 (9th Cir. 2011) (alteration and internal quotations omitted). "Virtually any law federal, state or local can serve as a predicate for an action under the UCL." Smith v. State Farm Mut. Auto. Ins. Co., 93 Cal. App. 4th 700, 718 (2001). "If a plaintiff cannot state a claim under the predicate law, however, [the UCL] claim also fails." Stokes v. CitiMortgage, Inc., 2014 WL 4359193, at *11 (C.D. Cal. Sept. 3, 2014) (internal quotation marks omitted); see also Bruton v. Gerber Products Co., 2014 WL 7206633, at *7 (N.D. Cal. Dec. 18, 2014) (internal quotation marks omitted).

In his Opposition, Khasin explains that his UCL unlawful claim is based on a violation of the Sherman Law, which "expressly prohibits false and misleading food labeling and advertising." See Dkt. 149 at 5-6 (citing Cal. Health & Safety Code §§ 10660, 110398, 110400). Khasin reiterates that Hershey's products are in violation of state law and the UCL, so he is not required to prove reliance on the Hershey product misrepresentation. Id. at 18. However, Hershey asserts that Khasin is required to prove reliance under the UCL. See Dkt. No. 155 at 5.

The California Supreme Court requires plaintiffs to prove all elements of a UCL claim, not just the "prong" under which plaintiff brings suit. Kwikset Corp., 51 Cal 4th at 327 n.9. The Court has found that Khasin was required to prove deception, reliance on that deception, and injury. Khasin v. Hershey Co., 2014 WL 1779805, at *10-11. Further, Khasin confirms that his UCL unlawful claim requires a finding that Hershey's "a natural source of flavanol antioxidants" label violated the Sherman law by misleading reasonable consumers. See Dkt. No. 149 at 9-10.

Put differently, Khasin's UCL claim is only viable so long as he proves that Hershey violates the Sherman Law through its statement, "a natural source of flavanol antioxidants." Thus, because Khasin did not meet his burden, the UCL unlawful claim fails. With no predicate violation on which to rely, Khasin's UCL unlawful claim cannot stand. See Stokes, 2014 WL 4359191, at *11.

Thus, the Court DENIES Khasin's motion for partial summary judgment based on the unlawful prong of the UCL. See Bruton v. Gerber Products Co., 2014 WL 7206633, at *6 (N.D. Cal. Dec. 18, 2014) (citing Bias v. Moynihan, 508 F.3d 1212, 1219 (9th Cir. 2007) ("A district court does not have a duty to search for evidence that would create a factual dispute."))

IV. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Hershey's Motion for Summary Judgment. The Court also DENIES as moot Khasin's Motion for Partial Summary Judgment. Judgment shall be entered in favor of Hershey and the Clerk shall close this case file.

IT IS SO ORDERED.

Dated: March 31, 2015

EDWARD J. DAVILA
United States District Judge

United States District Court
Northern District of California