

Ghirardelli Defeats White Baking Chips False Advertising Claims Premised On Faulty Survey Evidence

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Last month, a California court, for a second time, dismissed a class action complaint asserting that Ghirardelli's advertising for its "Classic White" "Premium Baking Chips" created the false impression that the product contained real chocolate—this time with prejudice. Plaintiffs in *Cheslow v. Ghirardelli Chocolate Co.*, Case No. 19-cv-07467-PJH, alleged that they purchased Ghirardelli's product because they believed it contained white chocolate, when in fact it does not contain any chocolate at all. The complaint asserted statutory claims under California's Unfair Competition Law, False Advertising Law, and the Consumer Legal Remedies Act.

Plaintiffs claimed that they purchased Ghirardelli's "Premium Baking Chips," which the packaging described as "Classic White Chips," because they believed that the term "White" described the type of chocolate in the product, and the term "Premium" denoted that the product was made with real chocolate, as opposed to a "cheap knock-off." In April, the court dismissed the original Complaint without prejudice on the grounds that (1) reasonable consumers would not have assumed the term "white" described the type of chocolate in the product rather than the product's color, (2) the term "premium" was mere puffery, and (3) because the packaging did not include any affirmative false statements, the plaintiffs could not simply ignore the ingredient list, which did not include the words "chocolate" or "cocoa."

Plaintiffs attempted to address these deficiencies by commissioning, and attaching to its amended pleading, a consumer survey that purported to reflect that 92% of respondents that viewed the front panel of Ghirardelli's product believed it contained white chocolate.

The court, however, found that the consumer survey results were insufficient to support the otherwise implausible false advertising claims. The court reasoned that while in some cases courts may rely upon consumer survey evidence to bolster a finding that product representations could deceive reasonable consumers, such evidence is legally insufficient on its own to "transform an unreasonable understanding of a product into a reasonable one." The court also found that the consumer survey Plaintiffs relied upon was flawed. Most importantly, the survey only showed respondents the front of the product's packaging and not the back panel, which included important information about the product, including the ingredient list.

A number of recent lawsuits have been filed that accuse food product manufacturers (and specifically manufacturers of chocolate-based products) of misleading consumers about a product's ingredients. Advertisers should remain vigilant in ensuring not only that their product packaging contains no affirmative false statements, but also that they do not create an overall net impression

about the product that is false or misleading to reasonable consumers. The court's decision in *Cheslow*, however, emphasizes that the existence of an accurate ingredients list – while it cannot be used to cure otherwise deceptive claims on the *front* of a product's packaging – remains relevant to whether reasonable consumers would be misled by a product's *overall* packaging. The decision also puts a greater burden on plaintiffs seeking to avoid dismissal through survey evidence to ensure that the survey is itself not misleading and presents respondents with an accurate picture of what they would actually see if they reviewed the product's packaging in its entirety.