Judge tosses Diet Dr Pepper false advertising class action for the fourth and final time

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A California federal judge recently ruled that the term “diet” alone on a soft drink label does not constitute a claim that the soft drink will assist in weight loss. On August 21, District Judge William H. Orrick of the Northern District of California dismissed in its entirety and with prejudice a third amended class action complaint filed by Diet Dr Pepper drinker against Dr Pepper/Seven Up Inc. (Dr Pepper). *Becerra v. Dr Pepper/Seven Up, Inc.*, No. 17-cv-05921-WHO (N.D. Cal. Aug. 21, 2018)

Plaintiff Shana Becerra alleged that the company's use of the term “diet” in “Diet Dr Pepper” constituted false and misleading advertising in violation of California’s False Advertising Law (FAL), Consumers Legal Remedies Act (CLRA), and Unfair Competition Law (UCL), as well as a breach of both express and implied warranties. She argued that use of the term "diet," because of its association with no sugar or calories, (i) falsely conveys to the reasonable consumer, that it is a weight loss or weight maintenance product, and (ii) that the presence of the non-caloric artificial sweetener aspartame in the product actually leads to weight gain. On behalf of herself and other similarly situated, she sought damages and an injunction to force Dr Pepper to stop marketing its products as “diet.”

Dr Pepper moved to dismiss the third amended complaint, arguing, among other things, that despite the amendments made by Becerra, the complaint still failed to allege facts establishing that reasonable consumers are likely to be deceived by the term “diet”; failed to meet the heightened pleading standards for her fraud-based claims; and that the warranty claim cannot stand because “diet” as used in the brand name is not an actionable misrepresentation.

Noting that to survive a Rule 12(b)(6) motion to dismiss the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face, ” *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007), Judge Orrick concluded that (i) it is "not plausible that reasonable consumers would believe consuming Diet Dr Pepper leads to weight loss or healthy weight management absent a change in lifestyle" and (ii) the plaintiff also failed to "plausibly allege" that aspartame causes weight gain, noting that the plaintiff failed to produce a single study finding causation between aspartame and weight gain.

In addition to ruling that the plaintiff failed to allege facts establishing that reasonable consumers are likely to be deceived by the brand name, Judge Orrick held that the plaintiff failed to meet the heightened pleading standards for her fraud-based claims; and that the warranty claim cannot stand because “diet” as used in the brand name is not an actionable misrepresentation.

On the plaintiff's consumer protection claims under the UCL, FAL, and CLRA , Judge Orrick wrote that they are governed by the reasonable consumer test, which requires a showing “that members of the public are likely to be deceived.” *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016). Further, there must be a probability “that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.” *Id*. (quoting *Lavie v. Procter & Gamble Co*., 105 Cal. App. 4th 496, 508 (2003)).

With regard to the reasonable consumer test, the plaintiff cited (i) specific references to dictionary definitions of the

term “diet” allegedly showing that reasonable consumers expect diet products to lead to weight loss or not affect weight; (ii) a sampling of print and video advertisements for Diet Dr Pepper allegedly showing that defendant knew its marketing and use of the term “diet” was deceptive; (iii) American Beverage Association articles suggesting that diet soft drinks can help with weight loss goals; and (iv) a survey of California and nationwide consumers regarding their understanding of the impact “diet” soft drinks have on their weight.

Judge Orrick analyzed each of the above factual allegations, and concluded that none "help cure the deficiencies in the complaint."

Regarding the breach of express and implied warranty claims, Judge Orrick held that the complaint does not sufficiently allege that Diet Dr Pepper misrepresented a promise to consumers that they could lose weight or maintain a healthy weight by using the product.

The term “diet” labeled on Diet Dr Pepper does not create an express or implied warranty to consumers that the product will lead to weight loss or healthy weight management. Dr Pepper is correct that for these reasons, Diet Dr Pepper “conform[s] to … the affirmation of fact made on the … label.” Cal. Com. Code §2314(f).

This decision adds to the growing list of rulings dismissing claims that soda makers falsely advertise their zero-calorie drinks as “diet,” finding that no reasonable consumer is likely to be deceived by the term.

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