

California federal court finds plaintiff failed to adequately allege that slack-fill did not serve a functional purpose

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The Hon. Philip S. Gutierrez of the Central District of California recently dismissed a class-action complaint filed against Boulder Brands USA, Inc. (Defendant).¹ Mark Cordes (Plaintiff) filed the action under California's Consumer Legal Remedies Act (CLRA), Cal. Civ. Code §§ 1750, et seq., alleging that the amount of "slack-fill" (the empty space inside a product's container) in Defendant's Glutino Gluten Free Fudge Covered Pretzels (the Product) deceives consumers into believing the opaque packages contain more pretzels than they actually do. Plaintiff initially alleged that up to 40 percent of the product's packaging was slack-fill and subsequently sought to amend his complaint to increase that number to 80 percent.

In a previous order, the court held that Plaintiff lacked standing for two reasons: first, because he did not allege that he intended to purchase the Product in the future; and second, because he did not explain why, if he did make future purchases, he would be unable to determine beforehand the number of pretzels in the Product's packaging. After failing to cure these defects in his amended complaint, the court once again found that Plaintiff lacked standing and dismissed his claim for prospective injunctive relief.

Plaintiff also made claims in his initial complaint that were based on products he did not purchase. Plaintiff sought to represent a class of purchasers of all varieties of Defendant's gluten-free pretzel products. The "prevailing view" in the Ninth Circuit is that class action plaintiffs may bring claims for products they did not purchase only so long as the products and alleged misrepresentations are substantially similar. In *re 5-Hour ENERGY Mktg. & Sales Practices* Litig., No. MDL 13-2438 PSG (PLAx), at *7 (C.D. Cal. Sept. 4, 2014). Just as with Plaintiff's initial complaint, the court found that his amended complaint did not contain anything that would indicate that all varieties of Defendant's pretzels have similar slack-fill in their packaging. As a result, the court held that Plaintiff lacked standing to sue on behalf of the putative class and products he did not purchase.

The court also found that Plaintiff failed to adequately plead that the slack-fill at issue is "nonfunctional" ² under the CLRA. Specifically, the court dismissed Plaintiff's CLRA claim after finding that Plaintiff's conclusory allegations did not raise a plausible inference that the first (i.e., protection of the contents of the package) or third (unavoidable product settling during shipping and handling) safe harbor provisions of the applicable statute, providing for functional bases for slack-fill, did not apply.

Finally, the court found that all of the "new" facts Plaintiff sought to add to his amended complaint could have been learned by a simple trip to the grocery store even before he filed his first amended complaint.

For all of the above reasons, Defendant's motion to dismiss was granted without leave to amend.

¹ *Cordes v. Boulder Brands USA, Inc.*, No. CV 18-6534 PSG (JCX), (C.D. Cal. Oct. 17, 2018)

² See Cal. Bus. & Prof. Code §12606.2(c)

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