

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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EVA RIVAS,

Plaintiff,

v.

THE HERSHEY COMPANY,

Defendant.

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MEMORANDUM AND ORDER

19-CV-3379 (KAM) (SJB)

KIYO A. MATSUMOTO, United States District Judge:

Eva Rivas ("Plaintiff") alleges that the "Kit Kat White" candy bar materially misleads consumers because it does not contain white chocolate. The defendant in this action, the Hershey Company ("Hershey" or "Defendant"), moves to dismiss the complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

For the reasons herein, the complaint is DISMISSED with prejudice because the court lacks subject matter jurisdiction over the action, and Defendant's motion to dismiss is therefore rendered moot.

Background

On June 7, 2019, Plaintiff, individually and on behalf of all others similarly situated, filed a complaint against Hershey. (ECF. No. 1, Complaint ("Compl.")). Initially, Plaintiff raised seven causes of action: (1) violation of New

York's General Business Law ("GBL") §§ 349 and 350, and the consumer protection laws of the other 49 states; (2) violation of California's False Advertising Law, Business and Professions Code § 17500; (3) violation of California's Unfair Competition Law, Business and Professions Code § 17200; (4) negligent misrepresentation; (5) breach of express warranty and of the implied warranty of merchantability; (6) fraud; and (7) unjust enrichment. (See generally *id.*) At a pre-motion conference before the court in November 2019, Plaintiff agreed to dismiss the Jane Doe plaintiffs and six of the causes of action, and proceed only with "Plaintiff's individual claims against Defendant" (ECF Minute Entry and Dkt. Order Nov. 13, 2019.) The claims remaining in the case, therefore, are Plaintiff's individual claims under New York GBL §§ 349 and 350.

Defendant Hershey manufactures, distributes, and markets Kit Kat candy bars, which are crisp wafers coated in a variety of flavors, including, most commonly, milk chocolate. One variety, the Kit Kat White, is coated "in a white confection coating." (Compl. ¶ 1.) Plaintiff alleges that Kit Kat White is misleading to consumers because it does not contain white chocolate. (See *id.* at ¶¶ 2-4.) Plaintiff alleges that the Kit Kat White is marketed as an "alternative[]" to the dark and milk chocolate versions of the Kit Kat, and in that context, "the

reasonable consumer expects the white variety to contain white chocolate," which is "derived from cacao fat." (*Id.* at ¶¶ 2-3.)

Kit Kat White's packaging describes the product as "[c]risp [w]afers [i]n [c]rème." (*Id.* at ¶¶ 2, 6.) A depiction of the front of the packaging is shown below:



(*Id.*)

Plaintiff alleges that Kit Kat White is "intended to be viewed and understood as white chocolate" not only based on its packaging, but based on point-of sale marketing, retail displays, advertisements, and on the websites of third parties.

(*Id.* at ¶ 6.) Plaintiff cites, as examples, the websites of retailers such as Target, Dollar General, and Amazon, which use "white chocolate" in the description of Kit Kat White bars.

(*Id.*) In addition, Plaintiff alleges that Defendant's own marketing and advertising suggest that Kit Kat White contains white chocolate, because it is advertised along with, or displayed next to, the milk chocolate and dark chocolate versions. (*Id.* at ¶¶ 10-11.)

Plaintiff also contends that Kit Kat White used to contain white chocolate, but it no longer does. (*Id.* ¶¶ 36-37.) Because Defendant did not update the overall scheme of Kit Kat White's packaging, Plaintiff avers that consumers are being misled into thinking that Kit Kat White still contains white chocolate. (*Id.*)

Lastly, Plaintiff asserts that "as a result of the false and misleading labeling, the [Kit Kat White bars] are sold at premium prices . . . compared to other similar products." (*Id.* at ¶ 42.) Plaintiff alleges that if she had known that Kit Kat White bars did not contain real white chocolate, she would not have purchased the product, or she would have paid less for it. (*Id.* at ¶ 41.)

In January 2020, Hershey's filed the instant motion to dismiss the complaint. (ECF No. 12, Motion to Dismiss; see ECF No. 13, Memorandum in Support ("Mem.")) Plaintiff opposed the motion (ECF No. 14, Memorandum in Opposition ("Opp.")), and Hershey filed a reply brief (ECF No. 15, Reply in Support). With her opposition, Plaintiff filed two documents not referenced in her complaint.¹ The first was a letter from

¹ In general, on a motion to dismiss, a court should only "consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint" that the plaintiff relied upon in the complaint. *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). Nonetheless, the court describes these documents briefly, though it does not find them relevant to this Memorandum and Order.

Hershey to the Food and Drug Administration ("FDA"), dated August 9, 1989, in which Hershey asked the FDA to establish a standard to identify white chocolate. (Opp., Ex. A.) Hershey noted in the letter that:

In many cases, the use of fanciful names obscures the true nature of the product. Consumers who might expect to be purchasing a "chocolate" or "white chocolate" product may, in fact, be purchasing a coating-type product manufactured with cheaper ingredients made from other oils and/or fats and which contain little or no cacao ingredients.

(*Id.* at 2.) In addition, Plaintiff filed with her opposition the results from a marketing survey conducted by Hershey "to determine the most common name used by adult candy consumers when shown a variety of confection products, including a generic white confection bar." (Opp., Ex. B., at 1.) The results showed that "the majority of candy consumers tend[ed] to identify white confection as either 'white chocolate' specifically or as some variety of chocolate." (*Id.*)

Defendant subsequently filed notices of additional authority, drawing the court's attention to two recent decisions from the United States District Court for the Northern District of California: *Cheslow v. Ghiradelli Chocolate Company*, No. 19-cv-7467, 2020 WL 1701840 (N.D. Calif. April 8, 2020) (granting motion to dismiss complaint regarding Ghiradelli Premium Baking Chips Classic White Chips); and *Prescott v. Nestle USA, Inc.*,

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