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Ninth Circuit affirms dismissal of false advertising claim against Mars subsidiary based on reasonable consumer test

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The Ninth Circuit recently upheld the dismissal of a putative class action finding that labeling Dove Dark Chocolate products as deriving from a "Rainforest Alliance Certified™ farm" did not mislead reasonable chocolate consumers. *Myers v. Starbucks Corp.*, No. 22-55930, 2024 WL 3102800 (9th Cir. June 24, 2024).

In that unpublished decision, class representative Lori Myers sued Mars Wrigley Confectionery US, LLC ("Mars"), alleging violations of California's Unfair Competition Law and the California Consumers Legal Remedies Act. 2024 WL 3102800, at *1. She alleged that Mars displays a misleading label on its Dove Dark Chocolate products: "We buy cocoa from Rainforest Alliance Certified™ farms, traceable from the farms in our factory." *Id*.

Myers said this label falsely led her to believe that Mars's Dove Dark Chocolate products contain cocoa traceable to farms that do not employ child slave labor or participate in deforestation in West Africa. *Id*. Myers contended that Mars can only trace a small fraction of the cocoa it buys to farms where the cocoa beans originated. *Id*.

The district court dismissed Myers's complaint on the grounds that the label on Mars's Dove Dark Chocolate products is "carefully worded" and "technically true." *Id*. at 3. But the Ninth Circuit disagreed, ruling that under California law, the "literal truth is not a defense." *Id*. The Ninth Circuit reasoned that California law prohibits not only advertising which is false but also advertising which, "although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." *Id*. (quotations omitted) (citing *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1017 (9th Cir. 2020), and *Kasky v. Nike, Inc.*, 45 P.3d 243, 250 (Cal. 2002)).

Nonetheless, the Ninth Circuit upheld the dismissal for other reasons. Citing *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016), the court found that "a significant portion of reasonable chocolate consumers" would not be led to believe that Dove Dark Chocolate contained cocoa beans produced without child labor or deforestation. *Id*. at 4. The Ninth Circuit determined that the label and its placement on Dove Dark Chocolate products could lead chocolate consumers to reasonably conclude that some of the cocoa beans were from Rainforest Alliance Certified™ farms.*Id*. But the Ninth Circuit found that the label does not represent that the Rainforest Alliance Certified™ farms avoid deforestation and the use of child labor, and Myers did not allege to the contrary. *Id*.

Takeaway: The Ninth Circuit reiterated that the literal truth is not a defense to a false advertising claim under California law. That determination, however, is not a death knell for manufacturers if there is evidence that the label in question would not have misled reasonable consumers.