Washington Legal Foundation

On the Merits:

HAROLD MAPLE,
individually and on behalf of others similarly situated,

Plaintiff-Appellant,

v.

COSTCO WHOLESALE CORPORATION, *et al.*,

Defendants-Appellees.

Nos. 13-36089, 14-35038, 14-35059

U.S. Court of Appeals For the Ninth Circuit

Questions Presented: (1) Whether the beverage name "VitaRain" alone would lead a reasonable consumer to believe that the beverage was made of "vitamins only," contained actual rainwater, or was "healthy" and "nutritional"; and (2) Whether a Complaint fails to plead a causal connection between the phrases "natural caffeine" or "natural tonic" and the Plaintiffs' purchasing decision where it does not allege that Plaintiffs ever read those statements prior to purchasing VitaRain.

Summary of the Case: Niagara Bottling manufactures and Costco sells VitaRain Tropical Mango Vitamin Enhanced Water Beverage ("VitaRain"). VitaRain's label states that it contains "natural caffeine." Maple filed a class-action lawsuit in the U.S. District Court for the Eastern District of Washington, alleging that the caffeine in VitaRain is not natural and that VitaRain is therefore falsely marketed as "natural tonic." The class action sought relief on behalf of all purchasers of VitaRain in Washington State. Finding that Plaintiffs' theory of liability regarding the VitaRain name/label was implausible, and that Plaintiffs showed no causation between the purchase of the VitaRain and Defendants' alleged wrongdoing, the District Court dismissed the Second Amended Complaint. Maple appeals the District Court's dismissal of the Second Amended Complaint; Niagara and Costco cross-appeal the District Court's refusal to dismiss the action with prejudice.

On The Merits:
Judgment for Defendants
Jeffrey B. Margulies
Norton Rose Fulbright

Maple's allegation that the name of the drink "VitaRain" is likely to deceive a substantial portion of the public is not "'plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The name of the drink does not even contain the word "Vitamin." The District

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Court correctly noted that "a consumer could not literally believe that the beverage contains only pure rainwater, just as a reasonable consumer would not believe that it contains only vitamins."

Moreover, Maple fails to allege with specificity how the name "VitaRain" suggests that the beverage is "nutritional" or "healthy." He makes broad, generalized statements that the drinks contain synthetic ingredients, but he fails to explain how or whether such ingredients are unhealthy.

Maple fails to adequately plead causation between his injuries and the alleged deceptive statement that "VitaRain" contains "natural caffeine" and is a "natural tonic." To assert a private claim under the Washington Consumer Protection Act, a plaintiff must allege with particularity that the unfair or deceptive practice proximately caused his injury. *See Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn. 2d 59, 83-84 (2007). Maple failed to plead that he actually read the statements that the drink contained "natural caffeine" and was a "natural tonic," or that he based his purchasing decision on those statements. The alleged deceptive statements could not have caused Maple's injuries because he never even read them.

Plaintiffs' allegation that VitaRain must include a disclosure that it contains "unnatural" or "synthetic" ingredients is expressly preempted by the Federal Food Drug and Cosmetic Act, as amended by the National Labeling and Education Act, 21 U.S.C. § 301 *et seq.*, which comprehensively regulates food and beverage labeling. Plaintiffs cannot through state law require food labeling that is not identical to federal law and fails to explain on appeal why his claims are not preempted.

Maple failed to adequately plead causation even after the court explicitly pointed out the deficiency in his First Amended Complaint. The fact that Maple did not correct the deficiencies that the District Court identified is "a strong indication" that he had no additional facts to plead. *In re Vantive Corp. Secs. Litig.*, 283 F.3d 1079, 1098 (9th Cir. 2002). We find no abuse of the "particularly broad" discretion a district court has to determine whether to allow leave to amend when it has previously granted a plaintiff leave to amend its complaint. *See Chodos v. W. Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002).

Maple argues that the District Court should have granted him leave to amend his complaint to add a new class representative with a more plausible claim. But Maple did not ask the District Court for such permission, and he is barred from raising this argument for the first time on appeal. *See Walsh v. Nevada Dept. of Human Resources*, 471 F.3d 1033, 1037 (9th Cir. 2006).

Finally, the District Court's refusal to dismiss the action with prejudice because it believed that the case was not decided "on the merits" was erroneous. Under Rule 41(b) of the Federal Rules of Civil Procedure, a dismissal for failure to state a claim is a decision on the merits unless otherwise stated in the dismissal order. Here, the District Court chastised Maple's inability to "perfect[] a viable complaint after multiple attempts." *Id.* It also denied leave to amend. *Id.* Furthermore, the District Court ordered the clerk to "close the case." *Id.* at *21.

The District Court's statements surrounding its dismissal indicate that it intended to foreclose Maple from bringing the same claim in the future. *See Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 988-89 (9th Cir. 2005) (res judicata bars "subsequent filing of claims denied leave to amend"). Because the District Court found that allowing Maple to constantly amend his complaint was futile, it should have dismissed Maple's claims with prejudice. *See, e.g., Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219

(10th Cir. 2006) ("A dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile."). Whether other class members are barred from bringing similar claims against Defendants is not a question before the Court.

We affirm the court's dismissal of Maple's Second Amended Complaint, but vacate the judgment of the District Court and remand with instructions to dismiss the complaint with prejudice.

Dissenting View:
Shirish Gupta
Flashpoint Mediation

The grant of a motion to dismiss under F.R.C.P. 12(b)(6) is reviewed *de novo*, *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013), and the court must accept all factual allegations in the complaint as true and in the light most favorable to Maple, *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

Maple contends that VitaRain's marketing violates Washington's Consumer Protection Act which prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.8.020. Washington's statute is similar to unfair competition statutes in other states in this Circuit, namely California Bus. & Prof. Code §17200 (prohibiting "any unlawful, unfair or fraudulent business act or practice"). As such, decisions under Cal. Bus. & Prof. Code §17200 will be illustrative *but not binding* on this matter.

There has been considerable litigation across the country over whether state consumer protection laws apply to products allegedly falsely marketed as "natural." The majority of these cases finds that such consumer statutes do apply.

As the District Court correctly pointed out, whether a particular act or practice is unfair or deceptive is a question of law, *Sunsites, Inc. v. Fed. Trade Comm'n*, 785 F.2d 1431, 1435 (9th Cir. 1986). As such we review Costco's motion *de novo*.

A thorough review of the record in this case reveals that the District Court read Maple's claims that VitaRain falsely represented that it contained "natural caffeine" and was a "natural tonic" too narrowly. It incorrectly read Maple's claim to equate "natural" with "healthy" or "nutritional." The nutritional value of an ingredient is not the test.

The test is whether a reasonable consumer could have been deceived by the marketing. See *In re Frito-Lay North America, Inc. All Natural Litigation*, 2013 WL 4647512, at *15, No. 12-MD-2413 (RRM) (RLM) (EDNY Aug. 29, 2013) ("The question of whether a reasonable consumer would likely be deceived by the designation 'all natural' is a factual dispute."); *Pappas v. Naked Juice Co. of Glendora, Inc.*, CV11-08276-JAK (PLAx) (C.D. Cal. 2012); *Bates v. Kashi Company*, 3:11-cv-01967-H-BGS (S.D. Cal. 2012); *In re ConAgra Foods, Inc.*, 908 F.Supp.2d 1090 (C.D. Cal. 2012).

Maple alleges that Niagara intentionally and knowingly identified its caffeine and tonic as "natural." Maple further alleges that had he known that VitaRain contains synthetic caffeine and other non-natural ingredients, he would not have purchased it. Moreover, he contends that the "natural" term is material to VitaRain purchasers in Washington. At the motion-to-dismiss stage, we must interpret all inferences associated with these allegations in favor of Maple.

Niagara and Costco contend that Maple does not allege that he saw or relied on the "natural" label prior to purchasing VitaRain. The court is cognizant that only people who have relied on the false representation should be able to recover. However, causation is more aptly addressed at summary judgment.

As a parallel, at the end of its October 2013 Term, the Supreme Court in *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. ____ (2014) refused the business community's entreaty to overrule the fraud-on-the-market presumption set forth in *Basic v. Levinson*, 485 U. S. 224 (1988). The Court upheld the core holding in *Basic* that a securities fraud plaintiff could satisfy § 10(b) of the Securities Exchange Act of 1934's reliance requirement by invoking the presumption that the price of stock traded in an efficient market reflects all public, material information—including material misstatements. The investor plaintiff is not required to prove or even plead that he saw or directly relied on the material misstatement. Given the Court's reaffirmation of *Basic*, we see no reason why the bar, at least at the pleading stage, should be higher for consumers than for sophisticated investors.

Given that Maple purchased VitaRain and alleges that he would not have done so had he known that the product's caffeine was artificial rather than natural, he has stated a claim under RCW 19.8.020.

I respectfully dissent.

Jeffrey B. Margulies is a partner in the Los Angeles office of Norton Rose Fulbright where he specializes in product-safety and class-action litigation. **Shirish Gupta** mediates securities, intellectual property, and consumer class actions with Flashpoint Mediation; he teaches negotiation and settlement at UC Hastings Law School.

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