UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV15-00200 JAK (Ex)	Date	July 14, 2015
Title	Oula Zakaria v. Gerber Products Co.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION (DKT. 52)**

I. Factual and Procedural Background

Oula Zakaria ("Plaintiff") brought this putative class action against Gerber Products Co. ("Defendant"). Dkt. 1. The First Amended Complaint ("FAC"), which is the operative Complaint, advances eight causes of action: (i) unlawful business acts and practices in violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*; (ii) unfair and fraudulent business acts and practices in violation of the UCL; (iii) violation of the California False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500 *et seq.*; (iv) violation of the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.*; (v) breach of express warranty in violation of Cal. Commercial Code § 2313; (vi) breach of the implied warranty of merchantability in violation of Cal. Commercial Code § 2314; (vii) negligent misrepresentation; and (viii) intentional misrepresentation. Dkt. 26, ¶¶ 82-155.

Defendant is the manufacturer of an infant formula called Good Start Gentle. Plaintiff alleges that Defendant misrepresented that Good Start Gentle, which contains partially hydrolyzed whey protein, reduces the risk to infants of developing atopic dermatitis, a form of eczema. FAC, Dkt. 26, ¶¶ 20, 36, 64. She also alleges that Defendant misrepresented that the FDA endorsed these false health claims. *Id.* ¶¶ 62, 68.

On June 18, 2015, Defendant's Motion to Dismiss the FAC was denied. Dkt. 51. It was determined that Plaintiff adequately alleged that the representations of Defendant were false. This determination was based in part on Plaintiff's allegations concerning a study by Adrian J. Lowe and others ("Lowe Study"), which concluded there was no evidence that the consumption by an infant of partially hydrolyzed whey formula at the conclusion of breastfeeding reduced the risk of allergic reactions, including eczema. *Id.* at 4, 8-9.

On July 2, 2015, Defendant filed a motion to reconsider the June 18, 2015 Order ("Motion"). Dkt. 52. Defendant contends a Fourth Circuit opinion issued on June 19, 2015 represents a significant,

intervening change of law. This decision, *In re GNC Corp.*, No. 14-1724, --- F.3d ---, 2015 WL 3798174 (4th Cir. June 19, 2015), held that, so long as there is a "reasonable difference of scientific opinion" as to the merits of a manufacturer's health claim, the alleged actual falsehood of that health claim cannot be the basis for a cause of action under several consumer protection laws, including the California UCL and CLRA. Dkt. 52-4 at 9, 21-22. A complaint that failed to allege that no reasonable expert accepted the health claim at issue was dismissed. *Id.*

The matter was deemed appropriate for decision without oral argument pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, and was taken under submission. Dkt. 54. For the reasons stated in this Order, the Motion is **DENIED**.

II. Analysis

A. Legal Standard

Fed. R. Civ. P. 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Under this rule, a district court may reconsider such a decision if it "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Smith v. Clark County School Dist.*, 727 F.3d 950, 955 (9th Cir. 2013).

Local Rule 7-18 provides that a motion for reconsideration may be brought when the moving party can demonstrate:

> (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

B. Application

Defendant contends *In re GNC Corp.* "has changed the law of false advertising." Dkt. 52 at 5.[1] There, the Fourth Circuit reviewed the dismissal of a consolidated, amended complaint in a multidistrict putative class action proceeding. Dkt. 52-4 at 6. Claims were asserted under California, Illinois, Florida, Ohio, New York, New Jersey and Pennsylvania law. *Id.* at 9-10. There is little analysis of the two California

[1] Defendant argues that its Motion is also supported by a decision by a District Court of the Southern District of West Virginia vacating an order for further briefing following the issuance of *In re GNC Corp.* Dkt. 52-3. *In re GNC Corp.* binds West Virginia district courts, which are within the Fourth Circuit. Therefore, this decision adds no additional weight to *In re GNC Corp.*

statutes -- only a brief citation to an unpublished Northern District of California decision. *Id.* at 17 n.6 (citing *Engel v. Novex Biotech LLC*, 2014 WL 5794608, at *2 (N.D. Cal. Nov. 6, 2014)). Instead, the Fourth Circuit stated that "the considerable body of federal common law construing the [Lanham] Act is instructive in construing the state laws at issue here." *Id.* at 18. The Court reasoned that all of the state laws prohibited literally false advertisements, but that where reasonable scientists disagree as to the efficacy of health claims, a representation is "equivocal," not false. *Id.* at 20-21. Thus, it concluded that, "in order to state a false advertising claim on a theory that representations have been proven to be false, plaintiffs must allege that all reasonable experts in the field agree that the representations are false." *Id.* at 23.

All of Plaintiff's causes of action arise under California law. In interpreting California law, federal courts are to "predict as best we can what the California Supreme Court would do in these circumstances." *Pacheco v. United States*, 220 F.3d 1126, 1131 (9th Cir. 2000). Out-of-circuit decisions are not binding on courts of the Ninth Circuit. *See, e.g.*, *Int'l Chem. Workers Union Council v. N.L.R.B.*, 467 F.3d 742, 748 n.3 (9th Cir. 2006). Therefore, *In re GNC Corp.* is, at most, persuasive authority, but does not present an "intervening change in controlling law." *See McNamara v. Royal Bank of Scotland Grp., PLC*, 2013 WL 1942187, at *3 (S.D. Cal. May 9, 2013) (for purposes of motion for reconsideration under Rule 59(e), "controlling law" refers to "binding precedent only").

Under these standards, *In re GNC Corp.* is not persuasive for three primary reasons. First, Defendant cites no California cases consistent with its holding. Under California law, a false advertising claim may be stated under the UCL or CLRA where "members of the public are likely to be deceived" by an advertisement that is either "false" or "although true, is either actually misleading or . . . has a capacity, likelihood or tendency to deceive or confuse the public." *Williams v. Gerber Products Co*., 552 F.3d 934, 938 (9th Cir. 2008) (citing *Kasky v. Nike, Inc*., 27 Cal. 4th 939, 951 (2002)). The allegations of the FAC are sufficient to meet these tests under California law as it has been interpreted by district courts here. *See, e.g.*, *Hesano v. Iovate Health Sciences, Inc*., 2014 WL 197719, at *3 (S.D. Cal. Jan. 15, 2014) (actual falsehood may be pleaded by "alleging studies showing that a defendant's statement is false"); *Cardenas v. NBTY, Inc*., 870 F. Supp. 2d 984, 995 (E.D. Cal. 2012) (denying motion to dismiss based on "clinical cause and effect studies [that] have found no causative link" between the supplement at issue and the defendants' health claim); *Fraker v. Bayer Corp*., 2009 WL 5865687, at *8 (E.D. Cal. Oct. 6, 2009) ("To successfully allege a claim for false advertising, Plaintiff has the burden to plead and prove facts that show that the claims that Defendant made in connection with product are false or misleading.").

Engel, on which *In re GNC Corp.* relies, is consistent with these decisions. There, the complaint was deemed insufficient to state a claim because it did not allege that any scientific authority contradicted the health claims by the party that manufactured and distributed a health supplement. *Engel v. Novex Biotech LLC*, 2014 WL 5794608, at *4 (N.D. Cal. Nov. 6, 2014). In submitting any amended complaint, the plaintiff was required to allege that there was some factual support for his theory of actual falsity. The decision did not state that Plaintiff had to allege that all studies and experts were in accord on the issue raised by the health claim. *Id.*

Second, the falsehood alleged by Plaintiff is not that all experts agree that Defendant's product lacks a health benefit, but rather that the product in fact lacks that benefit. Thus, the FAC concerns a false advertising claim based on the statement that Good Start Gentle reduced the risk of atopic dermatitis in

infants. Plaintiff alleged that the product did not do so. If some reasonable experts incorrectly had opined that Good Start Gentle had this health benefit, this would not necessarily bar the claim. A fact issued could remain as to what Defendant knew as to this scientific issue, including any contrary scientific opinions. To be sure, where the scientific evidence is inconclusive, a plaintiff may fail to carry her burden to show actual falsehood, and a private false advertising claim cannot be based on mere lack of substantiation. *See Nat'l Council Against Health Fraud, Inc. v. King Bio Pharm., Inc*., 107 Cal. App. 4th 1336, 1345 (2003). However, these issues may not always be resolved without the development of some factual record, which would preclude their resolution on a motion to dismiss.

Third, unlike the plaintiffs in *In re GNC Corp.*, Plaintiff advances theories of liability that go beyond a claim that Defendant knowingly made a false statement about its product. She also relies on the theory that Defendant misstated the FDA's support of the health claims of Good Start Gentle. Defendant's motion to dismiss was in part denied on this basis. *In re GNC Corp.* left open the possibility that a false advertising claim could be brought where a manufacturer made representations that implied greater support for its health claims than were present. *See* Dkt. 52-4 at 23.

III. Conclusion

For the reasons stated in this Order, the Motion is **DENIED**. Defendant has not shown that relief from the June 18, 2015 Order is warranted under the governing legal standards of Fed. R. Civ. P. 54(b) or Local Rule 7-18.

IT IS SO ORDERED.

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