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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO**

RACHEL ROSENDEZ, individually, and on behalf of all others similarly situated,

vs.

GREEN PHARMACEUTICALS; and Does 1-100, inclusive,
Defendants.

Case No.: CIVDS 1108022

**TENTATIVE AND PROPOSED
STATEMENT OF DECISION**

(CODE CIV. PROC. § 632)

The Honorable Bryan F. Foster

This court held a bench trial in the above captioned matter on the following dates: September 22, 2014, September 23, 2014, September 24, 2014, September 25, 2014, and September 29, 2014. Scott J. Ferrell and Ryan M. Ferrell appeared for Plaintiff Rachel Rosendez on behalf of the putative class. Carlos F. Negrete and David Boyer appeared for Defendant Green Pharmaceuticals. The Honorable Bryan Foster presided. The court has considered the testimony presented at trial, the pleadings and briefs submitted for this matter, trial exhibits, and the files herein. For the reasons set forth below in this Statement of Decision, the court finds in favor of the Defendant, Green Pharmaceuticals.

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I. INTRODUCTION

This action was brought under the California Consumer Legal Remedies Act and California Business and Professions Code Sections 17200 Et Seq., and 17500 Et Seq. Plaintiff alleged harm to herself and the putative class based upon the allegations that SnoreStop did not work as advertised and that Defendant utilized unfair and deceptive business practices in advertising media.

II. FACTUAL BACKGROUND

A Class Action complaint was filed on June 28, 2011, by purported class representative Rachel Rosendez alleging violations of the California Consumers Legal Remedies Act (“CLRA”) and violations of the California Business and Professions Code Section 17200, et seq. and 17500, et seq. (“UCL”).

Plaintiff alleged that in April of 2011, she went to a CVS in San Bernardino and purchased two boxes of SnoreStop for a total of \$29.00. She contended that she purchased the product in reliance on the statements that SnoreStop would stop or reduce snoring, and that she did not experience the effect that was advertised. Additionally, Plaintiff alleged that the marketing was false and deceptive.

Defendant produces SnoreStop FastTabs, the product at issue, and has sold it since 1997. Defendant contends that Plaintiff cannot refute that FastTabs have the efficacy as advertised. Defendant relies on study known as the Littman Study which purports to show that the product is effective as advertised.

At trial, Plaintiff proceeded on the theory that there is no scientific basis for the advertised efficacy of SnoreStop. Plaintiff provided no evidence of tests to determine the efficacy of SnoreStop.

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III. RELEVANT LEGAL STANDARD

A. PLAINTIFF FAILED TO MEET ITS BURDEN OF PROOF TO SUSTAIN A CAUSE OF ACTION AGAINST DEFENDANT FOR A VIOLATION OF THE CALIFORNIA CONSUMER LEGAL REMEDIES ACT.

The California Consumers Legal Remedies Act ("CLRA") is embodied in *California Civil Code §§ 1750 et seq.* The CLRA's purposes "are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." *Cal. Civ. Code § 1760.* The CLRA declares unlawful several "methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer". *Cal. Civ. Code § 1770.*

To obtain relief in a class action under the Consumer Legal Remedies Act *California Civil Code section 1750 et seq.*, both the named plaintiff and unnamed class members must have suffered some damage caused by a practice deemed unlawful. *In re Steroid Hormone Product Cases*, 181 Cal. App. 4th 145, 104 Cal. Rptr. 3d 329 (2d Dist. 2010), as modified on denial of reh'g, (Feb. 8, 2010) and review denied, (Apr. 14, 2010).

The first issue before the court is whether the Defendants engaged in an unlawful business practice. Plaintiff had the burden of proving that Defendant engaged in an unlawful business practice and Plaintiff failed to do so. In contending that Defendant engaged in an unlawful business practice, Plaintiff cited Defendant's packaging and asserted that the statements made on the package and the website were deceptive.

Plaintiff challenged the following five statements on the label of the SnoreStop package:

1. SnoreStop Extinguisher targets two areas. Its dual therapeutic action helps shrink the swollen tissues that block air passages in the mouth and in the back of the throat.
2. "Thanks. Now I'm back in the bedroom". James VC

3. Feedback from our own loyal customers indicates they are generally split in 2 groups, those swearing by our tablets the other by our sprays.
4. In a randomized, double-blind, placebo-controlled study published in the Sleep and Breathing medical journal, 79.5% of those taking SnoreStop's patented formula reported positive results when compared to just 45.5% in the placebo group.
5. Temporarily helps stop or reduce symptoms of non-apneatic snoring.

Plaintiff presented the testimony of Dr. Willis as to the active ingredients of SnoreStop to challenge the statements made on the SnoreStop package. Dr. Willis testified as to some of SnoreStop's individual ingredients but could not testify as to the product as a whole. There was not sufficient evidence presented that the combined ingredients of SnoreStop failed to perform the function that is advertised on the package.

In regard to the statements on the SnoreStop package, the Court also heard testimony from Ms. DeRivel indicating that the statement made about feedback from "our own loyal customers" indicated that 50% of SnoreStop satisfied customers swear by the spray and 50% of SnoreStop satisfied customers swear by the tablet. The court finds Ms. DeRivel's testimony credible.

The court also heard testimony from Plaintiff's expert, Dr. Willis, indicating that he took issue with the results of the study of SnoreStop that was referenced on Defendant's website. However, neither Dr. Willis nor the Plaintiff submitted any evidence of product testing or proof that the study that Defendant cited was flawed. Additionally, the court heard testimony from Rachel Rosendez who indicated that she took the product in an effort to stop snoring and the product did not work as advertised. Ms. Rosendez testified that since she took SnoreStop, she has not gone to the doctor because she believes that snoring is natural. Plaintiff offered no other witnesses as to the effectiveness of SnoreStop.

The Defendant presented the testimony of Gregory Dana Ullman who is a homeopathic practitioner. He outlined the theory of homeopathic treatment and presented his opinion as to the value and effectiveness of homeopathic remedies. The Court found Mr. Ullman's testimony to be not credible. Mr. Ullman's bias in favor of homeopathy and against conventional medicine was readily apparent from his testimony. He admitted that he was not an impartial expert but rather is a passionate advocate of homeopathy. He posted on Twitter that he views conventional medicine as witchcraft. He opined that conventional medical science cannot be trusted.

Mr. Ullman's credibility was undermined by his admission that he advocated the use of a radionics machine, whereby a physician puts a picture of his patient on one side, and a few medicines on the other side, and then sees which of the medicines the needle points toward. He relied on his personal experience with a radionics machine.

Mr. Ullman's testimony was unhelpful in understanding the purported efficacy of the ingredients of SnoreStop to reduce the symptoms of snoring. Although he is familiar with the theory of homeopathic treatment, his opinions regarding its effectiveness was unsupported and biased. The Court gave no weight to his testimony.

Although the Court has serious reservations regarding the effectiveness of the product in question, there is insufficient evidence presented by the Plaintiff to meet her burden of proof to establish a viable claim under the California Consumer Legal Remedies Act because Plaintiff offered insufficient evidence to support its contention that Defendant engaged in unfair and deceptive business practices. As a result of this finding it is not necessary for the court to address the second issue of whether Plaintiff and the class suffered damage from an unfair business practice.

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B. PLAINTIFF FAILED TO MEET ITS BURDEN OF PROOF TO SUSTAIN A CAUSE OF ACTION AGAINST DEFENDANT FOR A VIOLATION OF CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS 17200 ET SEQ. AND 17500 ET SEQ.

The Unfair Competition Law (“UCL”) prohibits “unlawful, unfair or fraudulent” business acts or practices. *Cal. Bus. & Prof. Code § 17200*. The false advertising law prohibits any “unfair, deceptive, untrue, or misleading advertising.” *Cal. Bus. & Prof. Code § 17500*. “[A]ny violation of the false advertising law . . . necessarily violates’ the [UCL].” *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950 (2002) (quoting *Comm. on Children’s Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 210 (1983)).

To state a claim for false advertising, the plaintiff must show that (1) the statements in the advertising are untrue or misleading and (2) the defendants knew, or by the exercise of reasonable care should have known, that the statements were untrue or misleading. *People v. Lynam*, 253 Cal.App.2d 959, 965 (1967). More specifically, a plaintiff in a false advertising or unlawful competition action has the burden of producing evidence that the challenged advertising claim is false or misleading. *National Council Against Health Fraud, Inc., v. King Bio Pharmaceuticals, Inc.*, 107 Cal.App.4th 1336, 1344; *South Bay Chevrolet v. General Motors Acceptance Corp.*, 72 Cal.App.4th 861, 878.

A private plaintiff bears the burden of producing evidence and the burden of proof on a false advertising claim under the False Advertising Law and the Unfair Competition Law. *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.* (2003) 107 Cal.App.4th 1336, 1346. To prevail on a false advertising claim, a plaintiff need only show that members of the public are likely to be deceived. *Freeman v. Time, Inc.* (9th Cir.1995) 68 F.3d 285, 289; see *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267, [“ ‘members of

the public are likely to be deceived' ” under section 17200]. A “reasonable consumer” standard applies when determining whether a given claim is misleading or deceptive. *Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 512–513. A “reasonable consumer” is “the ordinary consumer acting reasonably under the circumstances” *Id.*

There was insufficient evidence showing that members of the public are likely to be deceived by Defendant’s advertising.

IV. CONCLUSION, ORDERS AND FINDINGS

For the reasons set forth above and good cause appearing, the Court makes the following findings and orders:

1. Plaintiff failed to meet its burden of proof to establish a claim under the California Legal Remedies Act and therefore finds in favor of Defendant.
2. With respect to the false advertising and unfair business practice claims brought under B & P Code §§ 17200 and 17500, a finding for Plaintiff under these sections requires that the Plaintiff show by a preponderance of the evidence that the Defendant made false or misleading statements in advertising or labeling as to one or more of their products. Moreover, it must be shown that the defendants knew, or through the exercise of reasonable diligence should have known, that the statements were false. With respect to these claims, the Court finds that the Plaintiff presented insufficient evidence to prove that Defendants made any false or misleading statements or representations in connection with the advertising or labeling of its product. Furthermore, the Plaintiff presented insufficient evidence to show that the Defendants knew or should have known that any of their statements were untrue, false or misleading.
3. The Court also finds that there is insufficient evidence for a finding that Defendants violated the fraudulent activity prong of B & P Code § 17200.

4. Plaintiff's request for certification of the proposed classes and notice thereto to be paid by Defendant is DENIED.

5. Plaintiff's request that the court adjudge and decree that Defendant has engaged in fraudulent, unfair, or deceptive business practices is DENIED.

6. Plaintiff's request for restitution and disgorgement is DENIED.

7. Plaintiff's request for an injunction ordering Defendant to cease and desist from engaging in the unfair, unlawful, and/or fraudulent practices alleged in the Complaint is DENIED.

8. Plaintiff's request for compensatory, actual, general, statutory, exemplary, punitive, and any other damages, is DENIED.

9. Plaintiff's request for pre-judgment and post-judgment interest is DENIED.

10. Plaintiff's request for costs of the proceedings herein is DENIED.

11. Plaintiff's request for attorney's fees is DENIED.

12. Judgment entered against Plaintiff, in favor of Defendant.

This Tentative Decision shall become the Court's Statement of Decision, unless within the time provided by law either party specifies additional controverted issues, or makes proposals not included in the Tentative Decision.

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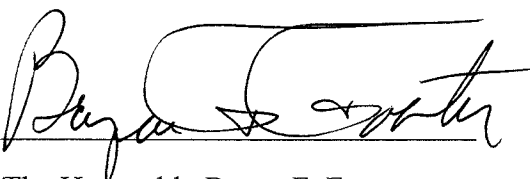
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The Court hereby directs Defendant's attorney to prepare and serve upon Plaintiffs a Judgment consistent with this Decision. The Court sets a hearing date of January 5, 2015, at 8:30 a.m. in Department S35 for receipt of Judgment. If the Judgment is entered before that date, the hearing will be vacated and no appearance necessary.

The judicial assistant is directed to serve this Tentative and Proposed Statement of Decision on the parties.

DATED: November 25, 2014

By: 
The Honorable Bryan F. Foster
Judge of the Superior Court