KILPATRICK TOWNSEND

September 28, 2021

Second Circuit – false advertising class actions predicated on puffery are doomed to fail

by James F. Bogan III

Takeaway: Although a district court deciding a Rule 12 motion to dismiss must draw every inference in favor of a plaintiff, courts know puffery when they see it. In *George v. Starbucks Corp*., --- Fed. Appx. ----, No. 20-4050-cv, 2021 WL 3825208 (2d Cir. Aug. 27, 2021), the plaintiffs cobbled together a number of Starbucks' marketing statements in an effort to show that it misled its customers about the alleged use of pesticides containing a toxic compound. But the district court and the Second Circuit saw through these allegations, finding that most of the alleged statements amounted to puffery.

In *George*, Christopher George and other plaintiffs filed a putative class action against Starbucks under New York General Business Law Sections 349 and 350. The class claimed that Starbucks's promotional materials touting its coffee and food products deceived the public because Starbucks allegedly uses a pest-control product containing a toxic chemical in several of its New York City stores. The Southern District of New York granted Starbucks' motion to dismiss, and the class plaintiffs appealed to the Second Circuit.

Affirming the decision below, the panel agreed with the district court that most of the statements identified in plaintiffs' operative complaint amounted to nothing more than puffery. As explained by the panel, "[p]uffery is an exaggeration or overstatement expressed in broad, vague, and commendatory language. Such sales talk ... is considered to be offered and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer." 2021 WL 3825208, at *1 (quoting *Time Warner Cable, Inc. v. DIRECTV, Inc*., 497 F.3d 144, 159 (2d Cir. 2007)). The statements referenced in the complaint, such as "Best coffee for the Best You," "Taste of Inspiration," "Starbucks or nothing," and "heart, soul, craft, pride, love[;] you won't find that in any other cup of coffee," constituted puffery, given that these general statements did not "misrepresent[ ] an inherent quality or characteristic of the defendant's product." *Id*. (quoting *Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Lab'ys* , 850 F.2d 904, 917 (2d Cir. 1988)).

The panel noted that while certain alleged misrepresentations might be specific enough to rise above the level of puffery, "these statements refer only to how Starbucks sources its products and crafts its coffee and the ingredients it uses in its baked goods. No reasonable consumer would believe that these statements communicate anything about the use of pesticide in Starbucks's stores." *Id*. at *2. As the panel explained, "in determining whether a reasonable consumer would have been misled by a particular advertisement, context is crucial." *Id*. (quoting *Geffner v. Coca-Cola Co.*, 928 F.3d 198, 200 (2d Cir. 2019)). No reasonable consumer

would construe statements about how Starbucks sources its products, the ingredients used in its baked goods, or how it makes its coffee to refer to whether or not Starbucks uses pesticides in some of its New York locations.

Finally, the plaintiffs argued on appeal that Starbucks should be liable for certain omissions, but the panel ruled that their omissions argument had been forfeited, on the ground that they did not properly present the argument to the district court.