

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MELISSA L VIGIL,
Plaintiff,

v.

MARS, INC., et al.,
Defendants.

Case No. 16-cv-03818-VC

**ORDER GRANTING SUMMARY
JUDGMENT**

Re: Dkt. No. 55

The summary judgment motion by Mars, Inc. and Mars Food US, LLC is granted. To bring suit under California's False Advertising Law, Consumer Legal Remedies Act and Unfair Competition Law, a plaintiff must show that the defendant's misrepresentation "played a substantial part, and so had been a substantial factor, in influencing his decision" to purchase the product in question. *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009). In this lawsuit, Melissa Vigil complains that the package for Ready Rice overstates the amount of rice in a serving. But Vigil confirmed in her deposition that the statement about serving size "wasn't something [she] considered when [she] made the purchase of the product." Dkt. No. 57-5, Vigil Dep. at 103:18-104:12.

Vigil attempts to get around this testimony by arguing that: (i) she looked at the package's representation about the amount of sodium per serving before purchasing the product; and (ii) the statement about the amount of sodium per serving was necessarily misleading, because the amount of rice per serving was smaller than what was represented on the package. In other words, Vigil argues that although the package created the impression that the rice had 10 mg of sodium per cup (because the package represented the serving size to be one cup), it actually had

10 mg of sodium for something less than a cup (because the actual serving size was materially less than a cup). But that is not what Vigil filed a lawsuit about. Throughout her lawsuit, Vigil has complained that Mars gives the misimpression that a customer is buying more rice than she actually gets for the money, not that Mars makes misrepresentations about the sodium content or other nutritional value. For example, in her second amended complaint, Vigil stated: "Plaintiff and members of the putative Class reasonably expect that Defendants' Uncle Ben's Ready Rice products will effectively yield approximately two cups of rice. However, the true yield of the prepared Ready Rice product is never two cups, but rather consistently yields only 66 to 75 percent of the amount represented on the label." Dkt. No. 38 at ¶ 2. It would not be appropriate to allow Vigil to completely change her theory of the case in response to this summary judgment motion. *See Trishan Air, Inc. v. Federal Ins. Co.*, 635 F.3d 422, 435 (9th Cir. 2011).

In any event, Vigil does not provide evidence to show that she relied on any misrepresentation of sodium content per cup of rice. Merely observing a misrepresentation and then purchasing the misrepresented product does not allow a plaintiff to sue. The plaintiff must show that in the misrepresentation's "absence the plaintiff 'in all reasonable probability' would not have engaged in the injury-producing conduct." *In re Tobacco II Cases*, 46 Cal. 4th at 326. According to Vigil, Ready Rice would, absent the misrepresentation, state on its package that there are 10 mg of sodium per two thirds of a cup of rice. Vigil points to no testimony suggesting that had she known that Ready Rice contained this much sodium, she would have decided against purchasing the product. Vigil did testify that she looked at sodium content because she does not "like a lot of salt in her food," and because she is "sensitive." Dkt. 57-5 at 88:15-17. But this evidence does not suggest that Vigil would have changed her decision had the alleged misrepresentation been corrected, because the evidence demonstrates that Ready Rice has a very small amount of salt, regardless of whether the serving size was two thirds of a cup or one cup. *See* 21 C.F.R. § 101.61(b) (noting that food with less than 5 mg of sodium per reference amount customarily consumed can be labelled "sodium free" and that food with less than 35 mg of sodium per reference amount customarily consumed can be labeled "very low

sodium").

Reliance can be inferred where the misrepresentation is material; under California law, a misrepresentation is material if a reasonable person "would attach importance to [the representation's] existence or nonexistence in determining his choice of action in the transaction in question." *See In re Tobacco II Cases*, 46 Cal. 4th at 327. But any misrepresentation of the amount of sodium in Ready Rice is not material. The difference between the purported misrepresentation, 10 mg of sodium per cup of rice, and the purported accurate amount, 10 mg per two thirds of a cup, is less than 5 mg per cup of rice. This is a negligible amount of sodium. *See* 21 C.F.R. § 101.61(b).¹ Thus, no reasonable person would change their conduct based on a misrepresentation of this scale.

Summary judgment is therefore granted to Mars and Mars Food US. All motions in limine are denied as moot.

IT IS SO ORDERED.

Dated: September 27, 2017



VINCE CHHABRIA
United States District Judge

¹ Federal guidelines recommend that Americans eat less than 2,300 mg of sodium per day and note that the average sodium daily intake is 3,440 mg per day. U.S. Department of Health and Human Services and U.S. Department of Agriculture, *2015-2020 Dietary Guidelines for Americans* 34 (2015), <https://perma.cc/F2Y8-E735>. Some Americans with hypertension are encouraged to reduce their sodium consumption to as little as 1,500 mg per day. *Id.* Even for Americans who consume 1,500 mg of sodium per day, the 5 mg per cup difference is 0.33% of their daily sodium intake. *See id.*