

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 1:18-CV-10907-RWZ

KATHY DUMONT

v.

REILY FOODS COMPANY and NEW ENGLAND COFFEE COMPANY

ORDER

October 21, 2021

ZOBEL, S.D.J.

After a number of procedural and substantive dispositions that have narrowed the scope of this case, Plaintiff Kathy Dumont currently alleges on behalf of herself as well as others similarly situated that Defendants Reily Foods Co. and New England Coffee Co. (collectively, "Defendants") engaged in unfair and deceptive practices and unfair competition under Massachusetts General Laws, Chapter 93A, §2 by failing to include on the front label of their Hazelnut Crème coffee that the coffee does not contain actual hazelnuts. Based on an earlier decision, Plaintiff is not entitled to proceed with a premium price theory of harm. Docket #45 at 4.

On August 16, 2021, Defendants moved for partial summary judgment seeking dismissal of, or in the alternative to strike, Plaintiff's class allegations. Docket #46. Defendants assert that because Plaintiff cannot pursue a premium price theory of harm, she is limited to pursuing a "full refund" theory of damages, which cannot be used to meet the requirements for class certification under Federal Rule of Civil Procedure 23.

Docket #47. On September 9, 2021, I allowed Plaintiff's assented-to motion for an extension of the deadline for her opposition to Defendants' motion to September 21, 2021. Docket #50. Plaintiff, however, never filed an opposition. On September 24, 2021, Defendants notified the Court thereof. Docket #52.

Because Plaintiff has failed to file an opposition to Defendants' motion for partial summary judgment, I consider the facts presented by Defendants in their motion undisputed. See Perez-Cordero v. Wal-Mart Puerto Rico, 440 F.3d 531, 533-34 (1st Cir. 2006) ("When a non-moving party fails to file a timely opposition to an adversary's motion for summary judgment, the court may consider the summary judgment motion unopposed, and take as uncontested all evidence presented with that motion."). Based on those facts, Defendants have met their burden to show that they are entitled to their requested relief as a matter of law. See id. at 534 ("an unopposed summary judgment motion still must be scrutinized in accordance with Fed. R. Civ. P. 56"). Plaintiff's only claimed relief is for a full refund of the purchase price of the coffee. At least in a food case such as this, a "full refund" theory of damages defeats the requirement under Rule 23(b)(3) that "the questions of law and fact common to class members predominate over any questions affecting only individual members." That is because a full refund theory assumes that "consumers receive no benefit whatsoever from purchasing the accused product," when in fact they do receive some benefit "in the form of calories, nutrition, vitamins, and minerals." See, e.g., Werdebaugh v. Blue Diamond Growers, No. 12-cv-2724-LHK, 2014 U.S. Dist. LEXIS 71575, at *78 (N.D. Cal. May 23, 2014); see also Docket #47 at 5-7. The determination of damages on a class-wide basis under a full refund theory "would not account for these benefits conferred upon class

members," Caldera v. J.M. Smucker Co., No. 12-cv-4936-GHK (VBKx), 2014 U.S. Dist. LEXIS 53912, at *10-11 (C.D. Cal. Apr. 1, 2014), and would therefore require individualized inquiries into the benefit each consumer received from the coffee, regardless of product quality.

Accordingly, Defendants' motion for partial summary judgment (Docket #46) is ALLOWED and Plaintiff's class allegations are hereby STRICKEN.

October 21, 2021

DATE



RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE