

## A 'Clean' Escape, For Now: Retailer Obtains Initial Dismissal of 'Clean' Class Action; Plaintiff Granted Leave to Amend

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PRACTICES    FDA Regulatory and Compliance, Retail

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On March 15, 2024, a New York federal district court dismissed all claims brought against Sephora in a class-action lawsuit over “Clean at Sephora.” The plaintiff, represented by prolific class-action lawsuit filer Spencer Sheehan, was granted leave to submit an amended complaint on or before March 29. The case is one of at least two class-action lawsuits recently brought against large retailers in connection with the marketing of beauty products with a designation of “clean” to signal to consumers that a list of ingredients specified by the retailer is absent. Given that retailers and other advertisers have long categorized products by their attributes, including by the absence of a list of ingredients that consumers may not want, the outcome of the cases could be significant for how products are categorized and advertised and how retailers support transparency for consumers.

The plaintiff’s central assertion in the recently dismissed class-action was that Sephora’s classification of certain products as “Clean at Sephora” misleads consumers into believing that the products being sold are free from all synthetic or potentially harmful ingredients when they are not. Sephora, in its motion to dismiss, countered that its “Clean at Sephora” program is completely transparent and clearly informs consumers of the exact ingredients they are and are not buying. Sephora uses “Clean at Sephora” and an accompanying green seal to indicate products formulated without ingredients specified by Sephora, including parabens, sulfates SLS and SLES, phthalates, mineral oils, and formaldehyde. Sephora advertises “[t]he beauty you want, minus the ingredients you might not.”

The dismissal of the consumer protection claims turned on the plaintiff’s failure to plausibly allege that a reasonable consumer would be misled by the retailer’s seal and advertising. The court pointed out that the advertisements relied upon by the plaintiff explicitly noted that the products were “formulated without *specific* ingredients that are known or suspected to be potentially harmful to human health and/or the environment,” but nothing indicated any claim that the products were free of all synthetic or harmful ingredients. The plaintiff’s own subjective mistaken conclusion was deemed insufficient to satisfy the objective “reasonable consumer” standard used when evaluating whether a defendant’s conduct is materially misleading under state and federal consumer protection laws.

The court also cautioned against an increasingly common tactic by the plaintiff’s counsel to tack on several unidentified “‘multi-state’ consumer fraud act claims” to the specific state and federal consumer protection claims. Given the failure to specifically identify the state statutes allegedly violated, there was insufficient notice to enable Sephora to adequately defend itself, so the court dismissed these vague claims, which would have likely failed on the merits for the same reasons discussed above.

The dismissal of the breach of warranty and fraud claims was similarly straightforward. First, the plaintiff's failure to issue the required pre-suit notice of breach to the defendant, combined with her failure to sufficiently allege any express or implied misrepresentations by the defendant disposed of the breach of warranty claims. Notably, the court rejected the assertion "that [the] defendant was on notice of the alleged defects in its products due to complaints from other third-parties or regulators," noting that the Uniform Commercial Code requires the buyer herself to issue notice to the seller. The court also did not accept that the complaint itself could serve as pre-suit notice where the plaintiff had not made any kind of objection to the retailer prior to her purchase. As for the fraud claims, the plaintiff failed to identify any material, false statement or allege an intent to defraud in any sufficient way and especially not to the degree of particularity required for fraud claims. For the same reasons, in particular the failure to show that the retailer made any false or misleading express or implied claims, the plaintiff's unjust enrichment claims were also deemed defective and dismissed.

The court's dismissal turned on the lack of any allegation that the retailer made any misleading statements or misrepresentations with respect to its "Clean at Sephora" campaign or that a reasonable consumer would have been misled into believing the products were free of all synthetic and potentially harmful ingredients. The plaintiff, should she decide to try again, was granted leave to amend her complaint on or before March 29, 2024 (despite a failure to follow local procedural rules regarding amended pleadings). Notably, the motion to dismiss was pending for about a year, so hopefully the dismissal ends the matter for the defendant.

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Prepared by Suzie Trigg, Ellie Sowanick, and Carleigh Lenz as of March 20, 2024, based on *Sephora v. Finster*, No. 6:22-CV-1187 (N.D.N.Y. Nov. 11, 2022) (order granting defendant's motion to dismiss).