UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JEREMIAH YOURTH, individually and on behalf of all others similarly situated,

Plaintiff,

-v- **1:11-CV-1261 (NAM/CFH)**

PHUSION PROJECTS, LLC, doing business as Drink Four Brewing Co.

Defendant.

APPEARANCES:

Whatley Drake & Kallas, LLC
Patrick J. Sheehan, Esq., of counsel
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Attorney for Plaintiff

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Hon. Norman A. Mordue, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

INTRODUCTION

In this diversity action, defendant moves (Dkt. No. 10) to dismiss the amended complaint (Dkt. No. 9) on grounds of lack of jurisdiction and failure to state a claim. Fed.R.Civ.P. 12(b)(1),(6). The amended complaint is denominated a class action complaint and includes class action allegations. Plaintiff has not yet moved for certification. As set forth below, the Court denies the dismissal motion.

AMENDED COMPLAINT

In the introductory section of the amended complaint (Dkt. No. 9) plaintiff alleges:

> 1. Phusion produces, markets, and sells, particularly to young adults, a popular caffeinated alcoholic beverage named Four Loko ("Four Loko"), which comes in a variety of fruity flavors.
>
> 2. When consumed, a single 23.5-ounce can of Four Loko can be as potent as drinking six beers and two cups of coffee.
>
> 3. Four Loko has gained significant popularity, particularly with young adults and other inexperienced drinkers.
>
> 4. The fact is, since the caffeine in Four Loko masks the effects of alcohol, it tricks users into believing they can keep drinking well past the point of drunkenness. As such, this can cause sickness, alcohol poisoning and even death.
>
> 5. In an effort to continue reaping large financial gains from the sale of Four Loko, Phusion failed to disclose these harmful effects in its packaging, labeling, marketing, advertising and other promotion of Four Loko.
>
> 6. Plaintiff brings this action as a class action pursuant to Rules 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of all persons throughout the United States and its territories who purchased Four Loko for personal use, for violations of the New York General Business Law § 349, New York General Business law § 350 and unjust enrichment.
>
> 7. Plaintiff seeks damages suffered as a result of Phusion's practices, including, but not limited, to statutory damages, compensatory damages, and injunctive relief.
>
> 8. Plaintiff does not assert claims for personal injury.

After setting forth detailed factual allegations in support of plaintiff's claims, the amended complaint continues:

> 39. As a result of the deceptive marketing of Four Loko, as set forth above, which even the FDA and the FTC have recognized as targeted at inexperienced young drinkers, Phusion has been able to charge a price premium for Four Loko over similar alcoholic beverages that do not contain caffeine.

40. Based on the marketing, advertising, packaging, and labeling of these products and the omissions of material facts from the marketing, advertising, packaging and labeling, Plaintiff purchased Four Loko on several occasions between February 2010 and July 2010 from various convenience stores, including convenience stores located in Albany, New York.

41. As such, Plaintiff reviewed the marketing, advertising, packaging and labeling of Four Loko to see if there were any disclosures concerning possible negative health effects as a result of consuming high levels of alcohol and caffeine. Indeed, Plaintiff did not see any disclosures in the marketing, advertising, packaging or labeling of Four Loko of the particular dangers of drinking a beverage with high alcoholic and caffeine content, as set forth in detail above.

42. In an effort to reap large financial gains from the sale of Four Loko, Phusion omitted mention of these harmful effects in its marketing, advertising, packaging, and labeling and other promotion of Four Loko. Because such information goes to the safety of such products, Phusion was under a duty to disclose such information, which it failed to do. Plaintiff purchased Four Loko based in substantial part on Phusion's marketing, advertising, packaging and labeling and the omissions of material facts from such marketing, advertising, packaging and labeling. While expecting to purchase an alcoholic beverage, he did not reasonably expect to be purchasing a highly toxic, potentially lethal alcoholic beverage that had dangerous effects if consumed as intended given the toxic synergistic effects of the ingredients which the reasonable consumer targeted by the marketing, advertising, packaging, and labeling of such products could not have reasonably discovered. Given the foregoing, Plaintiff was misled by Phusion into purchasing and paying for a dangerous product that was not what it was represented to be and did not receive the benefit of their bargain.

43. As a result, Plaintiff suffered injury in fact and a loss of money or property in that he spent money purchasing Four Loko at a price premium when it actually had significantly less value – indeed, no value – to him than was reflected in the price paid for it. Since Four Loko was valueless, as evidenced by the fact that Phusion was forced to cease selling Four Loko with caffeine once its harmful effects were brought to light, Plaintiff has suffered damage and injury in terms of the expenditure of the purchase price of Four Loko. While Plaintiff seeks redress for his economic injuries, he does not assert claims for personal injury, either individually or on behalf of the Plaintiff Class.

44. The facts as stated herein were material in that had Plaintiff known the true undisclosed facts about Four Loko set forth above, he would not have

purchased it.

The amended complaint then sets forth the class allegations, which are not presently in issue.

Count 1 of the amended complaint claims defendant violated section 349 of New York General Business Law ("GBL"), which provides in subd (a): "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." Plaintiff claims that defendant's "actions and failures to ... disclose that Four Loko caused harmful effects including, but not limited to, sickness and alcohol poisoning, and even death, constitute deceptive acts and practices" under GBL § 349; that defendant "materially misled Plaintiff and Class members by failing to disclose ... the above-mentioned harmful effects"; and that "[a]s a result of [defendant's] deceptive acts and practices, Plaintiff and Class members have been injured."

Count 2 claims violation of GBL 350's prohibition of "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state[.]" Plaintiff asserts that defendant's "actions and failures to ... disclose in its marketing, advertising, packaging, and labeling of Four Loko that it caused harmful effects including, but not limited to, sickness and alcohol poisoning, and even death, constitute deceptive acts and practices" in violation of GBL § 350; that defendant "materially misled Plaintiff and Class members in its marketing, advertising, packaging, and labeling of Four Loko by failing to disclose ... the above-mentioned harmful effects"; and that "[a]s a result of [defendant's] deceptive acts and practices, Plaintiff and Class members have been injured."

Count 3, for unjust enrichment, alleges that, as a result of defendant's "deceptive, fraudulent and misleading marketing, advertising, packaging, and labeling of Four Loko,

[defendant] was enriched at the expense of Plaintiff, and all others similarly situated, through the payment of the purchase price for Four Loko; that "it would be against equity and good conscience to permit [defendant] to retai[n] the ill-gotten benefits that it received from Plaintiff, and all others similarly situated, in light of the fact that the Four Loko purchased by Plaintiff, and all others similarly situated, was not what [defendant] held it out it to be"; and that "it would be unjust or inequitable for [defendant] to retain the benefit without restitution to Plaintiff, and all others similarly situated, for the monies paid to [defendant] for Four Loko."

The amended complaint requests the following relief:

> a. Certifying this matter as a class action with Plaintiff as class representative and designating Plaintiff's counsel as class counsel;
> b. Declaring that Phusion's failure to disclose to Plaintiff and Class Members that Four Loko had harmful effects including, but not limited to, causing sickness and alcohol poisoning, and even death, constitutes an unfair or deceptive trade practice and enjoining such conduct;
> c. Requiring Phusion to compensate Class Members for all damages that result from the Phusion's marketing, advertising, packaging, and labeling of Four Loko;
> d. Awarding restitution to Plaintiff and the Class;
> e. Requiring Phusion to pay Plaintiff's and the Class's reasonable attorneys' fee and costs of litigation;
> f. Requiring Phusion to make Plaintiff and Class Members whole;
> g. Requiring Phusion to pay statutory damages and/or treble damages pursuant to New York General Business Law § 349; and
> h. Providing for such other legal and/or equitable relief as justice requires.

DISCUSSION

Mootness

Defendant moves to dismiss for lack of subject matter jurisdiction, contending that the action is moot because defendant has offered "to fully refund any amounts that Plaintiff paid for Four Loko as well as any fees and costs he incurred." Mootness is a flexible doctrine "of uncertain and shifting contours" that should be approached "issue by issue." *United States Parole*

Comm'n v. Geraghty, 445 U.S. 388, 401 (1980). The Second Circuit has not addressed the question of whether a defendant can moot a putative class action by offering to satisfy the plaintiff's demand prior to a motion for class certification. The Third, Ninth, and Tenth Circuits have held that, absent undue delay, a plaintiff may move to certify a class and avoid mootness even after receiving an offer of judgment under Fed.R.Civ.P. 68. *See Pitts v. Terrible Herbst, Inc*., 653 F.3d 1081, 1090-92 (9th Cir. 2011); *Lucero v. Bureau of Collection Recovery, Inc*., 639 F.3d 1239, 1249-50 (10th Cir. 2011); *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004); *see also Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 339 (1980); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920-21 (5th Cir. 2008); *see generally Wright & Miller*, 13C Fed. Prac. & Proc., Jurisdiction § 3533.9.1 (3d ed. 2012). The Seventh Circuit has taken a contrary position, holding that a plaintiff "cannot avoid mootness by moving for class certification after receiving an offer of full relief." *Damasco v. Clearwire Corp*., 662 F. 3d 891, 895 (7th Cir. 2011). Such a rule would, however, enable defendants to "pick off" successive representative plaintiffs, thus thwarting any effort to pursue a class action, particularly in cases such as the one at bar, where the individual claims are likely to be small. *See Weiss*, 385 F.3d at 344. As the Ninth Circuit observes:

> A rule allowing a class action to become moot "simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs" before the named plaintiffs have a chance to file a motion for class certification would ... contravene Rule 23's core concern: the aggregation of similar, small, but otherwise doomed claims.

Pitts, 653 F.3d 1091 (quoting *Roper*, 445 U.S. at 339; citing *Weiss*, 385 F .3d at 348-49). Viewing the mootness issue in the context of the circumstances in the instant case, and considering the reasoning in *Pitts*, *Weiss*, and other cases addressing the issue, this Court

concludes that, unless plaintiff has unduly delayed in moving for certification, defendant's offer of full relief does not moot the action.

As for whether plaintiff has delayed unduly in moving for certification, the Court notes that plaintiff commenced the instant action on October 24, 2011, and defendant made the settlement offer on December 9, 2011. Plaintiff's failure to move to certify the class in this interval of less than seven weeks does not support a finding of undue delay in this case. Plaintiff had no opportunity for discovery prior to the settlement offer, inasmuch as defendant's waiver of service was not signed until December 16, 2011, a week after the settlement offer. Defendant made its first dismissal motion (Dkt. No. 5) about a month later, on January 17, 2011. The first dismissal motion became moot when plaintiff filed the amended complaint on February 7, 2012, and defendant made the instant dismissal motion two weeks later. It is not unreasonable for plaintiff to delay moving for certification until the Court decides defendant's dismissal motion. Under all the circumstances, the Court finds that plaintiff has not committed undue delay.[1] Dismissal of the amended complaint on the ground of mootness is denied.

Preemption

Defendant next argues that the Alcoholic Beverage Labeling Act ("ABLA"), 27 U.S.C. §§ 213, *et seq*., expressly preempts plaintiff's state law claims that defendant failed properly to warn of the alleged harmful effects of caffeinated alcoholic beverages. It is undisputed that Four Loko is an "alcoholic beverage" within section 214(1) of the ABLA and that it properly displays the

[1] Indeed, to hold otherwise would encourage premature class certification motions. *See Damasco*, 662 F.3d at 896 (recognizing the likelihood of premature certification motions).

warnings required by section 215 to be placed on all containers of alcoholic beverages.[2] Defendant argues that any additional warning requirement is preempted by section 216, which provides: "No statement relating to alcoholic beverages and health, other than the statement required by section 215 of this title, shall be required under State law to be placed on any container of an alcoholic beverage[.]"

The Court reads section 216's preemption of state laws requiring statements "relating to alcoholic beverages and health" as intended to further the ABLA's purpose of ensuring that the public is reminded about "any health hazards that may be associated with the consumption or abuse of alcoholic beverages through a nationally uniform, nonconfusing warning notice on each container of such beverages." 27 U.S.C. § 213(1). In furtherance of this purpose, section 216 preempts any state law requiring different or additional warnings regarding alcoholic beverages. There is, however, no basis to construe section 216 as intended to preempt state law requiring warnings regarding a non-alcoholic ingredient that may have adverse health effects of its own, just because the ingredient happens to be combined with alcohol. Nor is there any reason to construe the ABLA as intended to preempt state law requiring warnings regarding an adverse health effect of the combination of a non-alcoholic ingredient and alcohol, where the adverse health effect is distinct from that posed by alcohol alone. In a case involving facts highly similar to the case at bar, Chief Judge Barry Ted Moskowitz of the Southern District of California wrote:

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[2] The required warning reads in full:

> GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.

27 U.S.C. § 215(a).

> Here, the warnings Plaintiff claims Defendant should have given relate to the interaction of caffeine and alcohol, not the health risks of alcohol per se. The warning would be something to the effect that caffeine may desensitize the person drinking the alcoholic beverage to any effects of the alcohol. The warning would not even have to reiterate or discuss what adverse health effects alcoholic beverages have. In other words, Plaintiff's claims do not seek to impose requirements regarding statements relating to the health hazards of consuming or abusing alcohol and are not expressly preempted by § 216.

Cuevas v. United Brands Co., 2012 WL 760403, *3 (S.D.Cal. Mar. 8, 2012) (emphasis in original). The same reasoning applies here; the warnings plaintiff claims should have been given do not "relat[e] to alcoholic beverages and health" and are thus not preempted by section 216 of the ABLA. Moreover, the ABLA applies only to packaging and would not preempt plaintiff's claims based on representations in other contexts, such as advertising and marketing. Dismissal of plaintiff's state law claims on the ground of preemption is denied.

Sections 349 and 350 of New York General Business Law

Safe Harbor

The Court rejects defendant's argument that its compliance with the ABLA's labeling requirements entitles it to the benefit of the "safe harbor" in GBL § 349(d), which provides a complete defense to a deceptive practices action where the practice is "subject to and complies with the rules and regulations of, and the statutes administered by ... any official department, division, commission or agency of the United States." As discussed above, the deceptive practice alleged by plaintiff here is conduct that is not subject to the ABLA, because plaintiff does not complain of defendant's failure to warn of the health risks of alcohol consumption *per se*. Thus, plaintiff's compliance with the ABLA is no defense. Likewise, the Court rejects defendant's argument based on GBL § 350-d (which provides a complete defense to a deceptive practices action where the advertisement is subject to and complies with the rules and regulations of, and

the statutes administered by the Federal Trade Commission or any official department, division, commission or agency of the state of New York."). These safe harbor statutes do not provide a defense in the instant case.

Failure to State a Claim

Defendant next argues that the amended complaint must be dismissed under Fed.R.Civ.P. 12(b)(6) because plaintiff does not plead enough facts to state plausible claims for relief under GBL §§ 349 and 350. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Section 349 declares unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce" and grants a private cause of action to "any person who has been injured by reason of any violation of this section[.]" GBL § 349(a),(h). Section 350 declares unlawful "[f]alse advertising in the conduct of any business, trade or commerce[,]" and section 350-e(3) grants a private cause of action to any person injured by a violation of section 350. Defendant argues that the amended complaint fails to plead facts plausibly supporting a finding of either deception or injury under sections 349 and 350.

Defendant argues that plaintiff could not have been deceived about Four Loko's contents because the label discloses its ingredients. Plaintiff does not, however, complain that the label did not disclose the alcohol and caffeine content of Four Loko or that it did not disclose the dangers of drinking alcohol. Rather, the amended complaint pleads that "the combination of high levels of alcohol and caffeine, along with guarana and taurine, produce dangerous mi[n]d-altering effects that are not disclosed on the packaging and labeling or in the marketing, advertising or other promotional materials for Four Loko, nor would reasonable consumers, particularly the young adults who are targeted by [defendant], be able to anticipate these dangerous

mi[n]d-altering effects by reading the packaging, labeling marketing, advertising or other promotional materials for Four Loko." The amended complaint further alleges that, although plaintiff expected to purchase an alcoholic beverage, plaintiff "did not reasonably expect to be purchasing a highly toxic, potentially lethal alcoholic beverage that had dangerous effects if consumed as intended given the toxic synergistic effects of the ingredients which the reasonable consumer targeted by the marketing, advertising, packaging, and labeling of such products could not have reasonably discovered[.]" The Court finds that plaintiff adequately pleads a plausible claim for deception.

As for injury, plaintiff alleges that defendant "has been able to charge a price premium for Four Loko over similar alcoholic beverages that do not contain caffeine"; that defendant misled plaintiff "into purchasing and paying for a dangerous product that was not what it was represented to be and did not receive the benefit of their bargain"; that as a result, plaintiff "suffered injury in fact and a loss of money or property in that he spent money purchasing Four Loko at a price premium when it actually had significantly less value – indeed, no value – to him than was reflected in the price paid for it"; and that since Four Loko was valueless, plaintiff "has suffered damage and injury in terms of the expenditure of the purchase price of Four Loko." This is sufficient to state a plausible claim of injury. Dismissal of the GBL causes of action on the ground of failure to state a claim is denied.

Unjust Enrichment

Defendant argues that the third cause of action for unjust enrichment fails to state a claim. The three elements of an unjust enrichment claim under New York common law are: (1) the defendant benefitted; (2) at the plaintiff's expense; and (3) equity and good conscience require

restitution. *See Federal Treasury Enterprise Sojuzplodoimport v. Spirits International N.V.*, 400 Fed.Appx. 611, 613 (2d Cir. 2010). The third cause of action alleges that, as a result of defendant's "deceptive, fraudulent and misleading marketing, advertising, packaging, and labeling of Four Loko, [defendant] was enriched at the expense of Plaintiff, and all others similarly situated, through the payment of the purchase price for Four Loko"; that "it would be against equity and good conscience to permit [defendant] to retai[n] the ill-gotten benefits that it received from Plaintiff, and all others similarly situated, in light of the fact that the Four Loko purchased by Plaintiff, and all others similarly situated, was not what [defendant] held it out it to be"; and that "it would be unjust or inequitable for [defendant] to retain the benefit without restitution to Plaintiff, and all others similarly situated, for the monies paid to [defendant] for Four Loko." The amended complaint pleads sufficient facts to state a plausible claim for unjust enrichment. Dismissal of this cause of action is denied.

CONCLUSION

It is therefore

ORDERED that the motion (Dkt. No. 10) to dismiss is denied.

IT IS SO ORDERED.

September 27, 2012
Syracuse, New York

Honorable Norman A. Mordue
U.S. District Judge