

Regional Court Hamburg

Ref.: 406 HKO 121/22

Announced on 13.02.2024

Reichow, JAng
Clerk of the Registry



Verdict

ON BEHALF OF THE PEOPLE

In the matter of

Verbraucherzentrale Hamburg e.V.,
represented by the chairman Michael Knobloch,
Kirchenallee 22, 20099 Hamburg

- Plaintiff -

Represented by:
Attorneys at law Burchert & Partner,
Otto-Suhr-Allee 29, 10585 Berlin,
Ref. no.: 25836-22 hr/sp

against

Upfield Deutschland GmbH,
represented by the managing directors Malte Hoffmann and Gökhan Katlan,
Valentinskamp 88-90, 20355 Hamburg

- Defendant -

Represented by:
Attorneys at law Zenk Rechtsanwälte Partnerschaft mbB,
Neuer Wall 25/Schleusenbrücke 1, 20354 Hamburg,
Ref. no.: 021223-22/HW/sy

the Regional Court of Hamburg - Chamber 6 for Commercial Matters - by the presiding judge at the Regional Court, Dr. Kagelmacher, on the basis of the oral hearing on 23.01.2024, finds:

1. The defendant is ordered, under penalty in each case of infringement, to pay an administrative fine of up to € 250,000.00 - or, failing that, administrative detention - or administrative detention of up to six months up to a total of two years, whereby the administrative detention is to be enforced on its managing directors, to refrain from placing on the market the spreadable fat "Sanella" with 400 g content, as reproduced on pages 2, 3, 4 and 5 above of the complaint of 14 December 2022 attached to this judgment; if it was only recently placed on the market, namely up to 3 months previously, in a packaging of the same size with 500 g, as reproduced on page 5 below, page 6, 7 and 8 above of the complaint of 14 December 2022.

2. The defendant is ordered to pay the plaintiff € 297.50 plus interest in the amount of 5 percentage points above the prime rate since January 9, 2023.
3. The remainder of the action is dismissed.
4. The costs of the legal dispute will be set off against each other according to a value in dispute of € 30,000.00.
5. The judgment is provisionally enforceable against security in the amount of € 15,000.00 in the case of item 1 and against security in the amount of 110% of the amount to be enforced in the other cases.

Facts of the case

The plaintiff is an association with legal capacity whose statutory tasks include safeguarding the interests of consumers by providing information and advice. The plaintiff is registered as a qualified organization in the list pursuant to Section 4 German Injunctions Act [UkIaG].

The defendant has been marketing a spreadable fat under the brand name "Sanella" for years. "Sanella" was offered for a long time with a net weight of 500 g in the packaging shown in Annex K 1. Since the summer of 2022 (14.07.2022), the defendant has been selling "Sanella" in an almost identical outer packaging with a nominal filling quantity of 400 g (Annex K 3). The filling quantities of 500 g and 400 g were or are indicated on the product packaging.

The plaintiff claims that, for the reasons stated in more detail in the statement of claim, the reduction of the filling quantity with essentially identical product packaging violates both § 43 German Measurement and Calibration Act [MessEG] and §§ 7 German Food Information Regulation [LMIV], 3, 5, 5 a German Unfair Competition Act [UWG], because the consumer is deceived by both the unchanged product packaging and the competitive environment characterized by 500 g packs that the new packaging also contains 500 g or that he is not sufficiently informed about the lower filling quantity, as this is only indicated relatively inconspicuously on the side of the product packaging. the consumer is not sufficiently informed about the lower filling quantity, as this is only indicated relatively inconspicuously on the side of the product packaging.

The plaintiff makes the following applications:

- I. The defendant is ordered, under penalty in each case of infringement, to pay an administrative fine of up to € 250,000.00 - or, failing that, administrative detention -

or administrative detention of up to six months up to a total of two years, whereby the administrative detention is to be enforced on its managing directors, to refrain from placing on the market the spreadable fat "Sanella" with a content of 400 g, as reproduced below (Fig. as page 2, 3, 4 and 5 above of the complaint of 14 December 2022), if it was previously placed on the market in a packaging of the same size with 500 g, as reproduced below (Fig. as page 5 below, page 6, 7 and 8 above of the complaint of 14. December 2022),

in the alternative - as recognized under item. 1 -

II. - as recognized under item 2.

The defendant applies for the action to be dismissed.

The defendant argues that the action is unfounded for the reasons set out in the statement of defense of 24 February 2023. In particular, there is no uniform market environment of 500 g packs. Rather, spreadable fats are sold in a large number of packs with different filling quantities. There is also no infringement of Section 43 (2) MessEG, especially since the smaller filling quantity has the technical advantage that the lid of the packaging remains free of spreadable fat adhesions. A comparison with previous pack sizes is just as inadmissible under § 43 (2) MessEG as a comparison with the market environment. Recourse to general misleading facts is not permissible within the scope of application of Section 43 (2) MessEG.

To supplement the parties' submissions, reference is made to their written submissions and annexes.

Reasons for the decision

The admissible action is partially justified, §§ 3, 5, 8, 13 para. 3 UWG.

Contrary to the opinion of the defendant, the general misleading offenses of Section 5 UWG are also applicable in the case of misleading statements regarding a package size. Even if one wanted to assume with the defendant that Section 43 (2) MessEG only covers deceptions objectively resulting from the design and filling of prepackages, there is no reason why Section 43 (2) MessEG should privilege deceptions resulting from other circumstances regarding the filling quantity of prepackages in such a way that the general misleading facts would not be applicable to them. If, on the other hand, Section 43 (2) MessEG also covers deceptions resulting from other circumstances, there is also no apparent reason why the general prohibitions of misleading statements should not apply.

In the present case, the sale of the 400 g pack in dispute here without a clearly visible explanatory notice about the changed filling quantity is misleading, at least for a period of 3 months, if "Sanella" was previously sold in 500 g packs in product packaging that was identical except for the filling quantity. The filling quantity stated on the product page will often escape the attention of the average consumer who is adequately attentive to the situation. On the contrary, due to the identical appearance of the packaging, he will regularly assume that he is purchasing a product that is also unchanged in terms of filling quantity and will only notice the lower filling quantity afterwards.

In this respect, the risk of repeated offenses has not ceased to exist due to the passage of time. It is true that significantly more than three months have already passed since the product changeover in summer 2022. However, it is by no means excluded that the defendant will carry out the product changeover at issue here again at a later date, i.e. reduce the filling quantity to 400 g again after having sold a 500 g pack in the meantime. This is also because the defendant has in the past offered its spreadable fat "Sanella" in a whole range of different pack sizes and filling quantities.

However, it cannot be established that the sale of the 400 g pack would be misleading irrespective of the time lapse since the changeover from 500 g to 400 g filling quantities. In any case, the 400 g pack of "Sanella" filled to 80% with spreadable fat does not, independently of the previously marketed 500 g pack, give the impression of a larger filling quantity than it contains. This cannot be established, even taking into account the competitive environment, so that it can be left open whether, when establishing a violation of Section 43 (2) MessEG, circumstances outside the specific packaging at issue can also be taken into account or whether only Section 5 UWG or Art 7 LMIV are relevant. Although spreadable fats continue to be sold in 500 g packs in many cases, they are also sold in a whole series of

pack sizes with different filling quantities. It is also neither apparent nor substantiated that the 500 g packs with their very different color designs convey a visually uniform image to the consumer, as would be necessary as a basis for a misleading impression with regard to the filling of the pack in dispute here. The misleading effect of the identically designed 500 g pack of "Sanella", on the other hand, only exists within a certain transitional period, which has not yet expired three months after the changeover, but which came to an end before the end of the oral hearing in this case.

Therefore, the action under item 1 is only successful with the alternative claim.

The claim for reimbursement of costs arises from Section 13 (3) UWG, together with interest in accordance with Sections 286, 288, 291 German Civil Code [BGB]. The warning letter was justified. The fact that the plaintiff proposed a cease-and-desist declaration with the warning letter that was unlimited in time and therefore too far-reaching is harmless in terms of reason and amount because it is the debtor's responsibility to formulate and submit a cease-and-desist declaration that eliminates the risk of repetition.

The procedural ancillary rulings follow from sections 92, 709 ZPO.

Dr. Kagelmacher
Presiding Judge at the Regional Court



For the accuracy of the transcript
Hamburg, 13.02.2024

Reichow, JAng
Clerk of the Registry

Document signed
by: Reichow, Justice of the Free and
Hanseatic City of Hamburg
on: 13.02.2024 12:52

