

Second Circuit Dismisses Claims of Would-Be Ad-Blockers

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On November 22, 2017, the Second Circuit in *Heskiaoff v. Sling Media* affirmed the dismissal of a class action complaint against Sling Media that alleged deceptive business practices in connection with Sling's introduction of advertisements into its television streaming service. In a summary order, the panel affirmed the district court's holding that the complaint and proposed amendments to the complaint failed to plausibly allege a violation of New York General Business Law Section 349 because plaintiffs failed to point to any affirmative statement or omission made by Sling Media that would have misled a reasonable consumer into believing that the service would never include advertisements.

Sling Media produces the Slingbox, a device that attaches to a television and, in conjunction with software installed on a computer or mobile device, allows the user to stream television programming remotely on that computer or mobile device. Aside from advertisements inherent in the underlying television programming, the Slingbox service was offered free of advertisements until 2014. At that time, Sling Media began transmitting its own ads to subscribers in the form of videos that played upon opening the software and banners displayed alongside the streamed content. The complaint alleged that by failing to disclose to consumers its plans to introduce advertising content, Sling Media had engaged in deceptive business practices.

The district court held that plaintiffs failed to state a claim because there was no plausible allegation that Sling had knowledge of a plan to disseminate advertising and failed to disclose its plan to plaintiffs when they purchased their Slingboxes prior to 2014. Nor did plaintiffs plausibly allege that this information, if disclosed, would have been material to a reasonable consumer's purchasing decision because, among other things, the complaint failed to allege that plaintiffs expected an ad-free experience or were even aware that Slingbox was ad-free when purchased. In affirming, the Second Circuit held that the complaint failed to allege why a reasonable consumer would have been led to believe that Slingbox would always be an ad-free product.

The Second Circuit also affirmed the district court's denial of plaintiffs' motion to replead because the proposed misrepresentations or omissions—such as an alleged failure to explicitly warn consumers in advance of the advertising—would not have caused a reasonable consumer to believe

that Slingbox was, and always would be, ad-free.

The case serves as a reminder that a false advertising claim based on an alleged omission of information cannot survive dismissal under New York law unless the alleged omission plausibly would mislead a reasonable consumer. The decision also gives comfort to media companies that plan to introduce advertising into their services, though additional disclosures may be necessary if they ever affirmatively represented that their products would remain ad-free.

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