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MICHAEL D. PLANET
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF VENTURA

ADYA, INC., Plaintiff, vs. THE RAW FOOD WORLD, INC., Defendant.	Case No.: 56-2012-00412608-CU-BC-VTA TENTATIVE DECISION

This cause came on regularly for trial by court on June 18, 2013, in Department 43 of the above-entitled court, the undersigned judicial officer presiding, a jury having been duly waived by the parties. Plaintiff, Adya, Inc. (Adya), appeared through its attorney of record, Steven J. Cooper. Defendant, The Raw Food World, Inc. (Raw Food), appeared through its attorneys of record, Self & Bhamre, by Hema C. Bhamre. Evidence, both oral and documentary, having been presented and the cause having been argued and submitted for decision on June 20, 2013, the court renders its Tentative Decision.

FACTS

Adya has sued Raw Food for breach of oral contract and, under a common count, for the reasonable value of goods delivered.

Adya and Raw Food are merchants. As relevant here, Adya sells a product known as Adya Clarity (the Product). It is a liquid which is intended to be added to drinking water. The FDA-approved use of the Product is as a water purification solution. It is not approved for sale in the United States for any other use.

Raw Food is an Internet vendor. Its business focuses on health and nutrition.

A successful relationship developed between Adya and Raw Food. Adya sold the Product to Raw Food, and Raw Food in turn sold the Product through its website. Adya shipped the Product from its principal place of business in Michigan to Raw Food's warehouse in Ojai, California. Raw Food actively promoted the Product, and demand grew. By late 2011, Raw Food had a standing order with Adya for all the product it could supply.

In October 2011, Mike Adams, a respected writer in the health food industry, expressed concerns on his website about the efficacy, labeling and marketing of the Product. Among Adams' claims, he suggested that the amount of aluminum in the Product was not accurately stated on the product label. Specifically, the labels referred to aluminum as a "trace element;" however, it was asserted that the aluminum content was actually much higher and, under FDA regulations, had to be specified by percentage.

Adams also criticized a use of the Product referred to as a "super shot." A "super shot" was a highly concentrated dose of the product consumed for health benefits. Adya's head of marketing, Matthew Bakos (Bakos), had on numerous occasions touted "super shots" publicly and to Raw Food's customers. According to claims made by Bakos, the regular use of "super shots" could minimize the symptoms of a broad array of maladies. Raw Food had helped Bakos convey this message to Raw Food's customers and others. Bakos acknowledged this was an "off-label" use of the product, at least in the United States. Adya did not have the required FDA approval to market the Product in the United States for this use.

Adya, through Bakos, publicly took the position that Adams' claims were unfounded, and Raw Food helped to publicize that position. However, the controversy adversely affected the demand for the Product.

Bakos and the president of Raw Food, Matthew Monarch (Monarch), communicated in the days that followed disclosure of Adams' criticisms. On the afternoon of Friday, October 28, 2011, Monarch and Bakos exchanged e-mail messages. Monarch wrote:

"There are a couple of things that we need to discuss if we are going to still stay in business with you. We need to have the label changed and due to the hit in business, we

are going to need terms of paying you as everything sells off. The things that we want to change on the label is adding aluminum as the second ingredient with it [*sic*] contents and I want you to consult with a specific lawyer that I recommended to discuss how to make the label compliant with FDA Standards. The final label needs to be approved by this lawyer. . . . If you can agree to these two stipulations now, then we shall continue. [I]f not, then please tell me where to return the product to [*sic*]." (Ex. 227.)

Bakos responded, "that is fine with me as long as the lawyer actually is going by [FDA] compliancy." (Ex. 227.)

The next morning, Saturday, October 29, 2011, Monarch and Bakos corresponded further. Monarch noted that Raw Food was at risk of losing "advertisers" but "because of the agreement we made with the label, they are sticking with us." Bakos replied that he did "not have a problem with 'some' of the labeling changes." However, he emphasized that he strongly disagreed with Adams' contentions and that the dispute could result in litigation against Adams. (Ex. 234.)

The following day, Sunday, October 30, 2011, Monarch and Bakos exchanged further e-mails. Under the caption, "aluminum listed as minerals known to heal? WOW!," Bakos mused about the virtues of the Product. Monarch responded, with a winking emoticon, that Adya should just sell the business to him. This was not a serious offer to buy.

Early the next morning, Monday, October 31, 2011, Adya forwarded a statement of account to Raw Food by e-mail. Minutes later, Dennis Babjack (Babjack), Adya's president, e-mailed Monarch. He stated, "Enclosed is the statement that includes the last shipment of 10/27/11 to you. [¶] FYI your credit cards failed over the weekend and today. [¶] Please touch base with me on how you want to handle this."

Later that morning, Monarch responded. He stated that he had been in touch with Bakos. He noted that the controversy over the Product was causing problems for Raw Food, and "because I am choosing to stick with you guys," he was at risk of losing business. But he assured Babjack that he felt he need to "not let you guys down" because he felt Adya was "with the truth." Monarch said that Raw Food would determine what product from its inventory had

been sold and would have "a big fat check" for Adya. "This was one of our terms to stay with you in all this mess," he noted. The message concluded,

"We'll be holding on to the stock as it sells. If you want any back in the meantime, let me know. I can even refuse shipment on the last shipments if you like."

At that time, a shipment to Raw Food had been processed by Adya and was awaiting pick-up at Adya's facility by shippers retained by Raw Foods. (This was referred to as "the October 27, 2011 shipment" during the trial and in Babjack's October 31, 2011 e-mail.) Apparently with reference to that shipment, Monarch asked if the product shipped that day, adding, "I had said to stop making shipments to us." Babjack responded, "Sounds good." A few minutes later, Babjack sent another message indicating that Adya had not shipped "any additional product." He noted that all shipments commencing October 28, 2011 had been cancelled at Monarch's request. That exchange occurred in the afternoon.

That night, Monarch sent an e-mail to customers of Raw Food, under the caption, "Matt Monarch Apology." It opened, "We have decided to remove the Adya Clarity webinar from the web, remove Adya Clarity from our store, and to not carry this product from Adya, inc. [*sic*] again in the future." A "full refund" was offered to anyone wanting one. The message referenced Adams' criticisms of the Product, and it contained a link to Adams' website. The message suggested that the Product might not be safe, and although Monarch stated that he intended to continue using it, he concluded that it would be "best for all involved" to end sales of the product. He apologized for not taking this action sooner.

Babjack was surprised to learn of Monarch's "apology" the next day. Monarch did not inform Adaya that he would pull the Product before sending the "apology" e-mail. At trial, Monarch failed to provide a persuasive explanation for the abrupt shift in Raw Food's position, which occurred over just several hours on October 31, 2011. What is clear is that Monarch did not acquire any new information about the Product during the intervening time. That is, from Monarch's vantage, nothing had changed between the time he wrote that he was "choosing to stick" with Adya and when he wrote his customers that Raw Food was withdrawing the

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Product.[1]

On November 2, 2011, Babjack asked Monarch what he intended to do about the Raw Food's outstanding account balance, which was $183,056. Monarch replied that Raw Food was "going to return all of the product to [Adya] tomorrow" and that would "account for all this money and some." Babjack responded with this message:

"Returned product

"Delivered deliver [*sic*] to

"Adya Inc.

"376 Butters Ave

"Coldwater MI 49036

"Please forward PO number

"Thanks

"Dennis"

The following day, Zack Wood, an employee of Raw Food, wrote Babjack. He stated that he had "refused the delivery from Wednesday," apparently in reference to the October 27, 2011 shipment. Wood's message continued, "ALSO . . . today we sent off 2 more shipments," consisting of 28 pallets. He requested "a refund for what [Raw Food] paid for" these goods. Most, but not all, of the returned inventory was the Product. Wood concluded his message by asking for instructions on "the process by which we can make this happen."

On November 4, 2011, the day after Wood's message, Babjack wrote Monarch and Wood. He stated that Adya could not accept the returned shipment because the "integrity of the product" could not be assured. He indicated that Adya would notify the shipper that the shipment would be refused. Monarch responded, indicating that he had relied upon the

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[1] Monarch testified that, about this time, Bakos told him that Adya would not change its labels, contrary to the representations made in earlier e-mails. The court finds this testimony unpersuasive. The parties were actively corresponding at this point. The totality of Monarch's e-mails demonstrate that he knew how to confirm relevant communications. The statement attributed to Bakos would have been important to Monarch, were it made. The fact that none of the parties' correspondence refer to it suggests that, more likely than not, it was not made.

Babjack's November 2 e-mail in returning the product.

Ultimately, the goods were shipped to Michigan, at a cost of about $5,000 to Raw Food, but refused by Adya upon arrival. Raw Food has stored the product in Michigan at its expense.

DISCUSSION

Was There an Acceptance of the Goods and Was That Acceptance Revoked?

This action arises from the sale and delivery of goods between merchants. Goods were sold by Adya to Raw Food pursuant to their oral agreement and past course of dealing. The goods stored in Raw Food's warehouse on November 1, 2011, had been accepted by it. That is, Raw Food had not rejected the goods after a reasonable opportunity to inspect them. (See Cal. Comm. Code § 2606, subd. (1) [acceptance occurs when buyer fails to make an effective rejection after a reasonable opportunity to inspect]; and Comm. Code § 2602, subd. (1) ["Rejection of goods must be within a reasonable time after their delivery or tender"].)

Raw Food contends that it revoked the acceptance of the goods. Under California Commercial Code section 2608, subdivision (1), a buyer may revoke the acceptance of goods "whose nonconformity substantially impairs its value to him" under two circumstances:

"(a) On the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

"(b) Without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances."

The court finds that Raw Food has not proved an effective revocation of its acceptance of the goods. A revocation of acceptance must be based upon a "nonconformity" of the goods. Here, Raw Food failed to inform Adya of the reason why the inventory was being returned. (But see Cal. Comm. Code § 2606, subd. (1), and § 2605, subd. (1).) Therefore, the basis for the return, at this point, is somewhat murky. The evidence is subject to two interpretations. One view is that Raw Food returned the Product because of the alleged mislabeling of the aluminum concentration.[2] The other view is that Raw Food feared that, in light of Adams' criticisms, it

[2] To the extent that Raw Food contends that it could revoke the acceptance because of Bakos' advocacy of "super shots" – it is not clear that it does – such a position would be

would be difficult to sell the Product in its inventory and that it needed to promptly convert the inventory into cash in order to pay Adya's outstanding invoice. The court finds that the weight of the evidence supports the later view. There are several reasons.

First, after learning of Adams' criticisms and concluding the labeling of the Product needed to be changed, Monarch wrote Babjack that "[w]e'll be holding on to the stock as it sells." This was a manifestation of intent to accept the goods (and sell them to Raw Foods' customers) notwithstanding the state of the product label.

Second, from all appearances, the event which precipitated the return of the inventory was the receipt of Adya's invoice and notification that the charges to Raw Food's credit cards had been declined. Within a short time afterwards, Monarch notified Babjack that he intended to pay for the inventory as it sold, which was a change in the parties' course of dealings. Hours later, Raw Food pulled the Product. The court draws the inference that, in that intervening time, Monarch realized that with the falling demand for the Product, Raw Foods might find it difficult to sell the Product in its warehouse and hence have trouble paying Adya. Thus, the decision to return the Product was a financial one.

Finally, Raw Food did not simply return the Product from its warehouse. It also returned other goods purchased from Adya. Raw Food did not contend, either then or now, that these other goods were "nonconforming." If the reason for returning the Product was its label, then there was no reason to return the other goods. However, if the reason for the return was the need to generate a credit to offset Raw Food's account payable to Adya, then returning more than just the Product made sense.

Therefore, the court finds that the return of the Product was not due to a "nonconformity [which] substantially impair[ed] its value to [Raw Food]," within the meaning of California Commercial Code section 2608.

Moreover, even assuming the Product was returned because of its label, the evidence still fails to establish an effective revocation of the acceptance. Initially, the court notes that no direct

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unavailing. Raw Food knew this was an "off-label" use of the Product at the time the goods were accepted.

evidence of the aluminum concentration of the Product was adduced. Therefore, the only evidence that the labels were, in fact, contrary to FDA regulations was Bakos' agreement to change them. More importantly, even if the Product was "nonconforming," neither prong of subdivision (1) of California Commercial Code section 2608 has been proved here. Raw Food never asked Adya to re-label the Product *in its warehouse*; rather, the evidence shows that Raw Food intended to sell that Product as it was. The parties agreed to explore using different labels on future shipments. Therefore, subparagraph (1)(a) of California Commercial Code section 2608 does not apply. Subparagraph (1)(b) of that section does not apply because, to rely upon this provision, Raw Food had to be unaware of the "nonconformity" at the time of acceptance. Yet, Monarch initially informed Bakos and Babjack that Raw Food would keep and sell the Product in its warehouse after being fully advised of the controversy about the labels.

Therefore, the court finds an effective revocation of the acceptance of the goods did not take place.

Is Adya Estopped from Denying Raw Foods a Credit?

Although not expressly raised by the parties, the court invited supplement trial briefs on the issue of estoppel. Specifically, the court asked the parties to brief the issue of whether Adya should be estopped, based on the November 2, 2011 exchange of e-mails, from asserting that Raw Food's return of the product for a credit was unauthorized under the law. The court, having considered the briefs of both sides, concludes the answer to this question is in the negative.

The equitable doctrine of estoppel may be raised in an action governed by the California Commercial Code. (See Cal. Comm. Code § 1103, subd. (b).) " '[T]he doctrine of equitable estoppel is a rule of fundamental fairness whereby a party is precluded from benefiting from his inconsistent conduct which has induced reliance to the detriment of another. [Citations.] Under well settled California law four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury....' [Citaiton.]" (*In re Marriage of Turkanis*

and Price (2013) 213 Cal.App.4th 332, 352.)

Here, Monarch indicated to Babjack that he intended to return the Product in Raw Food's warehouse as a way of satisfying Raw Food's outstanding account balance. Specifically, Monarch stated, "We are going to return all of the product to you tomorrow, which will account for all this money and some." In response, Babjack provided a shipping address and requested a "PO number." Soon afterwards, Raw Food shipped its inventory to Adya at the designated address, at a cost of about $5,000.[3]

Monarch's message was not equivocal nor was it an invitation for Adya's consent to return the product. Rather, it was an affirmative statement that Raw Food would be returning the product. In order to prevail on a claim of equitable estoppel, the party asserting the doctrine must establish that he or she relied upon the opposing party's conduct to his detriment. (*Brown v. Chiang* (2011) 198 Cal.App.4th 1203, 1227.) Because Monarch had decided to return the Product before Babjack's message, the element of reliance is not established.

Further, the evidence does not support the conclusion that Babjack intended to induce Raw Food to return the inventory. Rather, his apparent purpose was to provide Monarch with Adya's correct shipping address, which had recently changed. Babjack was merely accommodating Raw Food in performing the course of action independently determined by Monarch.

Moreover, in response to Woods' e-mail of November 3, 2011, inquiring about the "process" by which Raw Food could return the product for a credit, Babjack responded with a clear objection. The court finds that Adya is not estopped.

CONCLUSION

Adya is entitled to recover from Raw Food the sum of $183,056, with prejudgment interest at the rate of ten percent per annum commencing November 10, 2011, and costs to be established by memorandum.

This tentative decision shall become the court's final statement of decision unless, within

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[3] The evidence does not clearly establish whether the shipment had been dispatched by the time of Babjack's November 4, 2011 e-mail.

10 days after announcement or service of the tentative decision (plus five days for service by mail), a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision. (See Code Civ. Proc. § 632; Cal. Rules of Court, Rule 3.1590(c).) If no such request/proposal is made within the specified time, counsel for plaintiff is to prepare, serve and submit a proposed judgment within 20 days of the service of this tentative decision.

The clerk is directed to mail to the parties copies of this tentative decision.

July 23, 2013

Mark S. Borrell
Judge of the Superior Court

PROOF OF SERVICE
C.C.P. § 1013 (a) et seq.

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

Case Number: **56-2012-00412608-CU-BC-VTA**
Case Title: **ADYA, INC. v. THE RAW FOOD WORLD, INC.**

I am employed in the County of Ventura, State of California. I am over the age of 18 years and not a party to the above-entitled action. My business address is 800 S. Victoria Avenue, Ventura, CA 93009. On the date set forth below, I served the within:

TENTATIVE DECISION

On the following named party(ies)

Steven J. Cooper
21515 Hawthorne Blvd., Suite 1150
Torrance, California 90503

Hema C. Bhamre
4400 MacArthur Blvd, Suite 320
Newport Beach, California 92660

_____**BY PERSONAL SERVICE**: I caused a copy of said document(s) to be hand delivered to the interested party at the address set forth above on _____ at the time so indicated.

__X__ **BY MAIL**: I caused such envelope to be deposited in the mail at Ventura, California. I am readily familiar with the court's practice for collection and processing of mail. It is deposited with the U.S. Postal Service on the dated listed below.

and____**BY FACSIMILE**: I caused said documents to be sent via facsimile to the interested party at the facsimile number set forth in the attached service list at _____ with no notice of error from telephone number _____.

I declare under penalty of perjury that the foregoing is true and correct and that this document is executed on **July 23, 2013**, at Ventura, California.

MICHAEL D. PLANET, Superior Court
Executive Officer and Clerk

By _____
Hellmi McIntyre, Judicial Secretary