UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MICHELLE MORAN,

Plaintiff,

v.

EDGEWELL PERSONAL CARE, LLC, et al.,

Defendants.

Case No. 21-cv-07669-RS

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

I. Introduction

Plaintiff Michelle Moran brings this putative class action on behalf of consumers nationwide who purchased Defendant Edgewell Personal Care's ("EPC") Banana Boat branded sunscreen products. Moran avers that statements on Banana Boat products indicating that the sunscreen is "Reef Friendly" are false as the products contain ingredients harmful to coral reefs, and that she would not have purchased a Banana Boat sunscreen with that claim had she known the statement was false. She asserts various common law claims on behalf of a proposed nationwide class, and various violations of California law on behalf of a proposed California subclass. EPC brings this motion to dismiss pursuant to Federal Rules of Civil Procedure 8, 9(b), 12(b)(1), 12(b)(2), 12(b)(6), and 12(f). The motion to dismiss is granted as to advertisements other than the "Reef Friendly – No Oxybenzone or Octinoxate" claim on the sunscreen labels, and as to the claim for breach of implied warranty. The motion to dismiss is denied in all other respects.

II. Factual Background

EPC sells sunscreen products under the brand Banana Boat. These products, of which over ten are at issue in this lawsuit, contain a claim on the label stating "Reef Friendly – No Oxybenzone or Octinoxate." On behalf of a proposed nationwide class and a subclass of California consumers, Moran brings breach of warranty and unjust enrichment/restitution claims. Moran also brings three additional claims on behalf of the proposed California subclass: violation of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.*; California False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, *et seq.*; and the California Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq.*

III. Failure to State a Claim Under Rule 12(b)(6)

Defendant raises multiple arguments under Federal Rule of Civil Procedure 12(b)(6): (1) Plaintiff's CLRA, UCL, and FAL claims should be dismissed because Plaintiff fails to meet the reasonable consumer standard, and (2) the breach of warranty claim should also be dismissed because Defendant did not make an express or implied warranty and because the implied warranty claim fails for lack of privity.[1] For the reasons explained below, these arguments are granted in part and denied in part.

A. Legal Standard

Rule 12(b)(6) governs motions to dismiss for failure to state a claim. A complaint must contain a short and plain statement of the claim showing the pleader is entitled to relief. Fed. R. Civ. P. 8(a). While "detailed factual allegations" are not required, a complaint must have sufficient factual allegations to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). A Rule 12(b)(6) motion tests the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). When evaluating such a motion,

[1] Defendant also contends that Plaintiff fails to allege facts sufficient to establish she is entitled to restitution. This argument, while a Rule 12(b)(6) argument, is addressed in the discussion of Plaintiff's equitable claims.

courts generally "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

B. Discussion

1. Reasonable Consumer Standard

The UCL, FAL, and CLRA all utilize the reasonable consumer standard, *Shaeffer v. Califia Farms, LLC*, 44 Cal. App. 5th 1125, 1136 (2020), "which requires a plaintiff to show potential deception of consumers acting reasonably in the circumstances-not just any consumers." *Hill v. Roll Internat. Corp.*, 195 Cal. App. 4th 1295, 1304 (2011). "[W]hether a business practice is deceptive will usually be a question of fact not appropriate for decision" on a motion to dismiss. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Defendant argues that the inclusion of "No Oxybenzone or Octinoxate" below the statement "Reef Friendly" on the label means that no reasonable consumer would be misled, because a reasonable consumer would only interpret the label to mean that there was no oxybenzone or octinoxate in the product. This inquiry is "fact-intensive and not well-suited for resolution at the pleading stage." *White v. Kroger Co.*, No. 21-CV-08004-RS, 2022 WL 888657, at *2 (N.D. Cal. Mar. 25, 2022). Plaintiffs aver—with support from some scientific studies and regulators—that some of the chemicals in the challenged products damage coral reefs. It is inappropriate to conclude at the pleadings stage that a reasonable consumer would have interpreted the label to mean that the product was only free from oxybenzone or octinoxate, regardless of possible harms from other chemicals. The questions of whether the other chemicals in the products are harmful to reefs, and how a reasonable consumer would have interpreted the claim on the label, can only be resolved after the development of evidence in this case. The motion to dismiss is therefore denied as to Defendant's theory that the reasonable consumer standard cannot be met as a matter of law.

2. Breach of Warranty Claim

Defendant argues that Plaintiff has failed to state a claim for breach of an express or implied warranty. "To prevail on a breach of express warranty claim, Plaintiffs must prove: (1)

'the seller's statements constitute an affirmation of fact or promise or a description of the goods; (2) the statement was part of the basis of the bargain; and (3) the warranty was breached.'" *Brown v. Hain Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 899-900 (N.D. Cal. 2012) (quoting *Weinstat v. Dentsply Int'l, Inc.*, 180 Cal. App. 4th 1213, 1227 (2010)). Defendant's arguments concerning the breach of express warranty claim are repetitive of the arguments discussed above; courts have held that when a plaintiff adequately pleads falsity of an advertising claim under California consumer protection statutes, the plaintiff also has adequately pled a breach of express warranty based on those claims. *See, e.g., In re S.C. Johnson & Son, Inc. Windex Non-Toxic Litigation*, Case No. 20-cv-03184-HSG, 2021 WL 3191733, at *9 (N.D. Cal. July 28, 2021). Here, Plaintiffs have adequately pled that the "Reef Friendly" label indicated more than just the absence of oxybenzone and octinoxate, and thus Plaintiff has pled a claim for breach of express warranty. The motion is therefore denied as to the breach of express warranty claim.

Defendant next argues that the breach of implied warranty claim fails because plaintiff cannot show privity. The privity requirement has an exception for "when the plaintiff relies on written labels or advertisements of a manufacturer[,]" *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008), but Defendant argues this exception "is applicable only to express warranties." *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 696 (1954). Plaintiff argues that courts have "relaxed" this requirement "when the plaintiff relies on written labels or advertisements of a manufacturer[.]" *Roper v. Big Heart Pet Brands, Inc.*, 510 F. Supp. 3d 903, 924 (E.D. Cal. 2020) (quoting *Van Mourik v. Big Heart Pet Brands, Inc.*, No. 3:17-CV-03889-JD, 2018 WL 1116715, at *5 (N.D. Cal. Mar. 1, 2018)). As this Court has previously noted, however, the holding from the California Supreme Court in *Burr v. Sherwin Williams* that the privity exception only applies to express warranties has never been overruled. *See In re Sony PS3 Other OS Litig.*, No. C-10-1811-RS, 2011 WL 672637 (N.D. Cal. Feb. 17, 2011) (explaining that a case which said the privity requirement could be "relaxed" was "not consistent with clear California precedent that privity remains a requirement in implied warranty claims even though it has been eliminated in express warranty claims"). The motion to dismiss is thus granted as to the breach of

implied warranty claim.

IV. Failure to Meet the Pleading Requirements of Rule 9(b)

Defendant contends that Plaintiff has not met the heightened pleading standard of Federal Rule of Civil Procedure 9(b). When a claim is "grounded in fraud" a pleading "must satisfy the particularity requirement of Rule 9(b)[,]" *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009), which requires the party to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Defendant argues that "[i]t is facially impossible for Plaintiff to explain what is false about the 'Reef Friendly – No Oxybenzone or Octinoxate' claim and why it is false[.]" Motion to Dismiss, p.10. Plaintiff has set out in her Complaint "what representation is allegedly misleading, where and how defendants make the representation, and why plaintiff contend[s] it is misleading." *White v. Kroger*, 2022 WL 888657, at *3. The motion to dismiss for failure to plead with particularity is therefore denied.

Defendant also argues that Plaintiff makes vague references to "advertising" and "marketing" without any further explanation, and that to "the extent Plaintiff's claims rely on any marketing or advertising aside from the 'Reef Friendly – No Oxybenzone or Octinoxate' claim, they must be dismissed." Motion to Dismiss, p.10. Plaintiff does not identify any other marketing claims or forms of advertisements in her Complaint. To the extent Plaintiff's claims are predicated on anything other than the "Reef Friendly – No Oxybenzone or Octinoxate" claim, the motion to dismiss is granted.

V. Article III and Statutory Standing

A. Legal Standard

Standing is a requirement for federal court jurisdiction. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 337-38 (2016). To establish standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* at 338. The party asserting federal subject matter jurisdiction has the burden of proving the existence of jurisdiction. *Chandler v. State Farm Mut. Auto Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

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