UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SHANA GUDGEL,

Plaintiff,

v.

THE CLOROX COMPANY,

Defendant.

Case No. 20-cv-05712-PJH

ORDER GRANTING MOTION TO DISMISS WITH LEAVE TO AMEND

Defendant The Clorox Company's ("Clorox" or "defendant") motion to dismiss came on for hearing before this court on December 9, 2020. Plaintiff Shana Gudgel ("plaintiff") appeared through her counsel, William Wright and Daniel Levinson. Defendant appeared through its counsel, Emily Johnson Henn. Having read the papers filed by the parties and carefully considered their arguments and relevant authority, and good cause appearing, the court hereby GRANTS defendant's motion for the following reasons.

BACKGROUND

This is a product labeling case, brought as a putative class action, arising out of Clorox's "Splash-less Bleach" product. Plaintiff's central allegation is that the product's packaging and marketing would lead a reasonable consumer to believe that the product is suitable for disinfecting, and because the product is not suitable for that purpose, its packaging and marketing are misleading.

On August 14, 2020, plaintiff filed this suit on behalf of herself and a putative class, asserting five causes of action against Clorox: (1) violation of the California Consumers

Legal Remedies Act ("CLRA") § 1750; (2) violation of California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17500; (3) violation of California False Adverting Law ("FAL"), Cal. Bus. & Prof. Code § 17500; (4) negligent misrepresentation; and (5) unjust enrichment.

Plaintiff alleges that, shortly after the World Health Organization declared COVID-19 a pandemic on March 11, 2020, she purchased a 116 fl. oz. container of Clorox Splash-less Liquid Bleach for $3.99. Complaint, ¶ 11. Plaintiff alleges that she bought the product on the belief that it would be suitable for disinfecting surfaces as a way to control the spread of the coronavirus. Id., ¶¶ 20, 69.

Plaintiff alleges that, after she bought the product, she learned that the splash-less product is not actually suitable for disinfecting. Complaint, ¶ 11. The splash-less formula contains only 1-5% of sodium hypochlorite (the active ingredient in bleach), whereas plaintiff alleges that a minimum of 5% sodium hypochlorite is needed to be an effective disinfecting agent. Id., ¶¶ 24-25.

Plaintiff alleges that she was misled by Clorox's labeling and advertising into believing that the splash-less product would be effective for disinfecting. Plaintiff alleges that, "only on the back of the label, in small print, does the company disclose" that the product is not to be used for disinfecting. Complaint, ¶ 30.

Plaintiff defines the putative class as "all persons residing in the United States who purchased Splash-Less Clorox during the applicable statute of limitations." Complaint, ¶ 32.

Plaintiff seeks compensatory damages and "an injunction or other appropriate equitable relief requiring defendant to refrain from engaging in the deceptive practices" alleged in the suit. Complaint at 14.

Clorox moves to dismiss under Rule 12(b)(6) for failure to state a claim, under Rule 9(b) for failure to "allege with particularity the averments of fraud underlying her claim," and under Rule 12(b)(1) for lack of standing to pursue injunctive relief.

DISCUSSION

A. Legal Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, 349 F.3d 1191, 1199–1200 (9th Cir. 2003). Under Federal Rule of Civil Procedure 8, which requires that a complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), a complaint may be dismissed under Rule 12(b)(6) if the plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support a cognizable legal theory. Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013).

While the court is to accept as true all the factual allegations in the complaint, legally conclusory statements, not supported by actual factual allegations, need not be accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009). The complaint must proffer sufficient facts to state a claim for relief that is plausible on its face. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 558–59 (2007) (citations and quotations omitted).

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief.'" Id. at 679. Where dismissal is warranted, it is generally without prejudice, unless it is clear the complaint cannot be saved by any amendment. Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir. 2005).

For plaintiff's claims that sound in fraud, the allegations must also meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b). See Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009). Rule 9(b) requires a party alleging fraud or mistake to state with particularity the circumstances constituting fraud or mistake. To satisfy this standard, the "complaint must identify the who, what, when, where, and

how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." Salameh v. Tarsadia Hotel, 726 F.3d 1124, 1133 (9th Cir. 2013) (citation and internal quotation marks omitted).

Review is generally limited to the contents of the complaint, although the court can also consider a document on which the complaint relies if the document is central to the claims asserted in the complaint, and no party questions the authenticity of the document. See Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007). The court may consider matters that are properly the subject of judicial notice, Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005); Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001), and may also consider exhibits attached to the complaint, see Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989), and documents referenced extensively in the complaint and documents that form the basis of a the plaintiff's claims. See No. 84 Emp'r-Teamster Jt. Counsel Pension Tr. Fund v. Am. W. Holding Corp., 320 F.3d 920, 925 n.2 (9th Cir. 2003).

If dismissal is warranted, it is generally without prejudice, unless it is clear that the complaint cannot be saved by any amendment. Sparling, 411 F.3d at 1013. "Leave to amend may also be denied for repeated failure to cure deficiencies by previous amendment." Abagninin v. AMVAC Chem. Corp., 545 F.3d 733, 742 (9th Cir. 2008).

B. Analysis

1. Whether the Product Would Deceive a Reasonable Consumer

Plaintiff's first three causes of action are brought under California statutes: the Consumer Legal Remedies Act ("CLRA"), the Unfair Competition Law ("UCL"), and the False Advertising Law ("FAL"). The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770. The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. The FAL prohibits "any unfair, deceptive, untrue, or misleading advertising." Williams v. Gerber Prod. Co., 552 F.3d 934, 938 (9th Cir. 2008) (citing Cal. Bus. & Prof. Code § 17500) (internal quotation marks omitted).

The Ninth Circuit has explained that "these [three] California statutes are governed by the 'reasonable consumer' test." Williams, 552 F.3d at 938 (quoting Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995)); accord Consumer Advocates v. Echostar Satellite Corp., 113 Cal. App. 4th 1351, 1360 (2003). "Under the reasonable consumer standard, [plaintiffs] must show that members of the public are likely to be deceived." Williams, 552 F.3d at 938. "The California Supreme Court has recognized that these laws prohibit not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." Id. (internal quotation marks omitted) (quoting Kasky v. Nike, Inc., 27 Cal. 4th 939, 951 (2002)). The reasonable consumer test requires more than a mere possibility that defendant's product "might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (2003). Rather, the test requires a probability "that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." Id.

Generally, "whether a reasonable consumer would be deceived . . . [is] a question of fact not amenable to determination on a motion to dismiss." Ham v. Hain Celestial Grp., Inc., 70 F. Supp. 3d 1188, 1193 (N.D. Cal. 2014); see Reid v. Johnson & Johnson, 780 F.3d 952, 958 (9th Cir. 2015). "However, in rare situations a court may determine, as a matter of law, that the alleged violations of the UCL, FAL, and CLRA are simply not plausible." Ham, 70 F. Supp. 3d at 1193.

Clorox's central argument is that plaintiff "does not identify a valid theory of deception, because plaintiff alleges no facts showing an affirmative misrepresentation or fraudulent omission." Dkt. 26 at 6-12. Clorox argues that the label makes no statement or suggestion that the product at issue is suitable for sanitization or disinfection. Dkt. 26 at 8. Clorox further points out that the product's back label specifically states: "Not for sanitization or disinfection." Dkt. 26 at 2-3. Thus, Clorox contends that a reasonable consumer would not be misled, and as a result, plaintiff's statutory claims should be

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