

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 0:19-cv-62342-UU

BROOK SNYDER, et al.,

Plaintiffs,

v.

GREEN ROADS OF FLORIDA LLC

Defendant.

ORDER ON MOTION TO DISMISS

This cause is before the Court on Defendant’s Motion to Dismiss or, in the Alternative, to Stay (D.E. 15) (the “Motion”). The Motion is fully briefed. For the reasons stated below, the Complaint is dismissed to the extent Plaintiffs have failed to allege facts sufficient to demonstrate their standing to pursue class action claims based on products they did not purchase and for injunctive relief. Also, for reasons explained below, the action is stayed pursuant to the primary jurisdiction doctrine. In all other respects, the Motion is DENIED.

I. Background

Defendant, a Florida limited liability company that maintains its principal place of business in Deerfield Beach, Florida, is a manufacturer, distributor and seller of cannabidiol (“CBD”) products including but not limited to CBD Oil, CBD Gummies, CBD capsules, CBD Terpenes, CBD Topicals, CBD Syrups, CBD Tea and CBD Coffee. D.E. 1 ¶¶ 1–2. Plaintiff Snyder, a citizen of Florida, purchased a 250mg version of Defendant’s CBD Oil through Defendant’s website for a total purchase price of \$43.74. *Id.* ¶¶ 34, 43. Plaintiff Terry, a citizen of Ohio, purchased a “Relax Box” through Defendant’s website for a total purchase price of \$104.14. *Id.* ¶¶ 35, 40. The Relax Box contained CBD Gummies, CBD Tea, and CBD Oil. *Id.* ¶ 40. Each

Plaintiff claims that he relied on the product labels in making his decision to purchase, that the product labels misrepresented the amount of CBD that each product contained and that, as a result, each was over-charged for the products each purchased. *Id.* ¶¶ 12, 41–42.

The Complaint alleges federal subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d)(2) and (6) “because the aggregate sum of the claims of the members of the putative class exceeds \$5 million, exclusive of interest and costs, because Plaintiffs bring this action on behalf of a proposed class that is comprised of over one hundred members, and because at least one of the members of the proposed class is a citizen of a different state than Green Roads.” *Id.* ¶ 37. It contains two claims: Count I for Unjust Enrichment by both Plaintiffs on behalf of a nationwide class of all purchasers of *all* of Defendant’s products within the applicable limitations period; and Count II by Snyder on behalf of the Florida subclass of all Florida purchasers of *all* of Defendant’s products for violation of the Florida Deceptive and Unfair Trade Practices Act (“FDUPTA”), FLA. STAT. §§ 501.201, *et. seq.*

The State of Florida Department of Agriculture and Conservation Services (“FDACS”) regulates CBD products, including their labelling in respect to the number of milligrams of hemp extract contained in a CBD product. FLA. DEP’T OF AGRIC. AND CONSUMER SERV., DIV. OF FOOD SAFETY, Final Rule 5K-4.034 – Hemp Extract (effective Jan. 1, 2020), <https://www.flrules.org/gateway/RuleNo.asp?id=5K-4.034>. The Food and Drug Administration (“FDA”) is actively considering the regulation of CBD products, including the “manufacturing, product quality, marketing, labeling, and sale of products containing cannabis or cannabis-derived products.” *See* U.S. FOOD & DRUG ADMIN., *Scientific Data and Information About Products Containing Cannabis or Cannabis-Derived Compounds; Extension of Comment Period*, 84 Fed. Reg. 28822, 28823 (June 20, 2019).

II. Legal Standards

A. Rule 12(b)(1)

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows for the dismissal of a claim when it is determined that the Court lacks subject-matter jurisdiction. Federal courts are bound by Article III of the United States Constitution to adjudicating only actual “cases” or “controversies.” *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). Article III standing is a jurisdictional requirement that cannot be waived and, as such, may be brought up at any time in the proceeding. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1299 (11th Cir. 2001). “Because standing is jurisdictional, a dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).” *Stalley v. Orlando Reg’l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (citation and internal quotation marks omitted). “A dismissal for lack of subject matter jurisdiction is not a judgment on the merits and is entered without prejudice.” *Id.* (citation omitted).

B. Rule 12(b)(6)

To state a claim for relief, Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” While a court, at this stage of the litigation, must consider the allegations contained in the plaintiff’s complaint as true, this rule “is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In practice, to survive a Rule 12(b)(6) motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 570). 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. *Id.* The plausibility standard requires more than a sheer possibility that a

defendant has acted unlawfully. *Id.* When a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Id.* Determining whether a complaint states a plausible claim for relief is a context-specific undertaking that requires the court to draw on its judicial experience and common sense. *Id.* at 679.

C. Motion to Stay

It is well-established that a district court has the inherent authority to stay its own proceedings. *See, e.g., Landis v. North Am. Water Works and Elec. Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself”); *see also Ortega Trujillo v. Conover & Co. Commc’ns, Inc.*, 221 F.3d 1262, 1264 (11th Cir. 2000) (evaluating district court’s *sua sponte* stay of case pending resolution of a related foreign matter for abuse of discretion). “Stays of proceedings can also promote judicial economy, reduce confusion and prejudice, and prevent possibly inconsistent resolutions.” *Lopez v. Miami-Dade Cty.*, 145 F. Supp. 3d 1206, 1208 (S.D. Fla. 2015) (quotations omitted).

III. Analysis

A. Standing

As set forth by the United States Supreme Court in *Spokeo v. Robbins*, 136 S. Ct. 1540 (2016), Article III standing requires a plaintiff to 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. To establish “injury in fact,” a plaintiff must show that he or she suffered an “‘invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Id.* at 1548 (quoting *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560 (1992)). For the injury to be “concrete,” it must be “real” and not abstract; however, it need not be tangible. *Id.* Dismissal is appropriate under Fed. R. Civ. P. 12(b)(1) if the plaintiff does not satisfy Article III standing requirements. *See Stalley*, 524 F.3d at 1232.

These principles are applicable in the class action context. “[It] is well-settled that prior to the certification of a class . . . the district court must determine that at least one named class representative has Article III standing to raise each class subclaim.” *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000). “Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a) to assert the rights of others.” *Id.* at 1280 (quoting *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987)). Thus, district courts have addressed class plaintiff standing early in litigation—prior to a motion for class certification having been filed. *See, e.g., Weiss v. General Motors LLC*, No. 19-cv-21442-RNS, 2019 WL 5394621, at *3 (S.D. Fla. Oct. 22, 2019).

Defendant argues pursuant to Fed. R. Civ. P. 12(b)(1) that Plaintiffs lack standing in respect of the claims pled and that therefore the Complaint should be dismissed. D.E. 15 at 4–7. The Court agrees with Defendant that: (1) Plaintiffs lack standing to sue for products they did not purchase; and (2) they have failed to allege a future injury sufficient to support a claim for injunctive relief.

i. Products Not Purchased

In *Ohio State Troopers Association, Inc. v. Point Blank Enterprises, Inc.*, 347 F. Supp. 3d 1207 (S.D. Fla. 2018), this very Court considered whether in a consumer class action a putative class plaintiff has standing to bring claims on account of products not purchased. After a thorough review of the Eleventh Circuit precedent, this Court held that an unnamed plaintiff in a consumer

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