UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

CHARLES BRUCE, individually; MELISSA BRUCE, individually; MELISSA BRUCE, a/n/f of Autumn Bruce; and CHARLES BRUCE, a/n/f of Autumn Bruce;	)	2:19-CV-00175-DCLC
Plaintiffs,	)	
vs.	)	
JET.COM, INC.,	)	
Defendant	)	

MEMORANDUM OPINION AND ORDER

Defendant Jet.com, Inc. ("Defendant") has filed a Partial Motion to Dismiss [Doc. 19], seeking to dismiss Plaintiffs' federal Consumer Product Safety Act ("CPSA") claim. Defendant has also filed a corresponding Memorandum in Support [Doc. 15]. Plaintiffs Charles Bruce and Melissa Bruce ("Plaintiffs"), acting individually and in their capacities as next friends of their daughter, Autumn Bruce ("Autumn"), have responded in opposition [Doc. 29]. Defendant has replied [Doc. 30]. This matter is now ripe for resolution. For the reasons stated below, Defendant's Motion [Doc. 19] is **GRANTED**.[1]

[1] Plaintiffs filed a Motion for Leave to File Amended Complaint [Doc. 33] on August 13, 2020, which remains pending. Plaintiffs seek leave to amend their Complaint [Doc. 1] to add Walmart as a defendant and to add language to their claims under the Tennessee Consumer Protection Act [Doc. 33, pg. 3]. Because Plaintiffs' Proposed Amended Complaint [Doc. 33-1] would not change the Court's analysis of their CPSA claim, the Court will proceed with ruling on Defendant's Motion to Dismiss [Doc. 19]. If Plaintiffs are granted leave to amend their Complaint, the Court will dismiss Plaintiffs' CPSA claim from the Amended Complaint based on this Order.

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I. BACKGROUND

This action arises out of an incident involving a hoverboard (also known as a "self-balancing scooter") supplied by Defendant, which Autumn won through a giveaway as part of an anti-smoking campaign at her middle school [Doc. 1, ¶¶ 9-12]. After Autumn charged the hoverboard and turned it on one day, the hoverboard "started sparking and smoking, causing severe fire and smoke damage to Autumn's bedroom, and the rest of the home" [*Id.* at ¶ 17]. Plaintiffs and Autumn evacuated the home, called 911, and the Sullivan County Volunteer Fire Department arrived and extinguished the fire [*Id.* at ¶ 18]. Plaintiffs contend that "the home was uninhabitable due to fire and smoke damage, and [they were] required to live in a hotel while the fire was investigated and the home was repaired" [*Id.* at ¶ 20]. Plaintiffs further contend an investigation revealed the hoverboard caused the fire [*Id.* at ¶ 21].

Plaintiffs assert causes of action under products liability, negligence, intentional and/or negligent misrepresentation, the Tennessee Consumer Protection Act, breach of implied warranty, and the Consumer Product Safety Act [*see* Doc. 1]. Plaintiffs base their CPSA claim on Defendant's alleged violation of certain voluntary safety standards for hoverboards [*Id.* at ¶¶ 68-70]. Defendant moves to dismiss Plaintiffs' CPSA claim for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that a violation of voluntary standards does not give rise to a private right of action under the CPSA [Doc. 19].

II. STANDARD OF REVIEW

A complaint must contain a "short plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) eliminates a pleading or portion thereof that fails to state a claim upon which relief can

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be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) requires the Court to construe the allegations in the complaint in the light most favorable to the plaintiff and accept all the complaint's factual allegations as true. *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 475 (6th Cir. 1990). The Court may not grant a motion to dismiss based upon a disbelief of a complaint's factual allegations. *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990). The Court must liberally construe the complaint in favor of the party opposing the motion. *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995).

However, the plaintiff must allege facts that, if accepted as true, are sufficient "to raise a right to relief above the speculative level," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and to "state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). "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." *Ashcroft*, 556 U.S. at 678. Moreover, the Court need not "accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); *see also Ashcroft*, 556 U.S. at 678.

III. ANALYSIS

The CPSA provides a private right of action for "[a]ny person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the [Consumer Product Safety Commission ("CPSC")]." 15 U.S.C. § 2072(a). If a complaint does not identify such a rule or order, it fails to establish a private right of action. *See, e.g.*, *Scott v. Sona U.S.A.*, No. 1:08-CV-00625, 2011 WL 249452, at *1 (S.D. Ohio Jan. 25, 2011) ("[T]he CPSA does not create a private cause of action for the violation of any regulation, but rather, it more narrowly creates a cause of action when a party violates a consumer

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product safety rule, or rule or order, of the [CPSC] promulgated under the CPSA."). The CPSA defines "consumer product safety rule" as "a consumer products safety standard described in [§ 2056(a)], or a rule under this chapter declaring a consumer product a banned hazardous product." 15 U.S.C. § 2052(6). Section 2056(a) in turn provides that the CPSC may promulgate consumer product safety standards in accordance with § 2058. *Id.* § 2056(a).

Section 2058(a) states that the CPSC may commence a proceeding for the development of a consumer product safety rule by publishing in the Federal Register an "advance notice of proposed rulemaking," which must satisfy six listed requirements. *Id.* § 2058(a). The first of these requirements says the notice must identify the product and the nature of the risk of injury associated with it. *Id.* § 2058(a)(1). The notice must also invite people to submit to the CPSC "an existing standard or a portion of a standard as a proposed consumer product safety standard." *Id.* § 2058(a)(5). Similarly, the notice must invite people to submit to the CPSC "a statement of intention to modify or develop a voluntary consumer product safety standard to address the risk of injury identified in [subsection (a)(1)] together with a description of a plan to modify or develop the standard." *Id.* § 2058(a)(5).

Section 2058(b) specifically deals with voluntary standards and provides that if a person submits a standard to the CPSC under subsection (a)(5), the CPSC may publish that standard as a proposed consumer product safety rule if it determines that the standard "would eliminate or adequately reduce the risk of injury identified in a notice under subsection (a)(1)" if promulgated. *Id.* § 2058(b)(1). Section 2058(b) further provides that if the CPSC determines that compliance with a voluntary standard submitted under subsection (a)(6) "is likely to result in the elimination or adequate reduction of the risk of injury identified in the notice" and that "it is likely that there will be substantial compliance with such standard," then the CPSC

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> shall terminate any proceeding to promulgate a consumer product safety rule respecting such risk of injury and shall publish in the Federal Register a notice which includes the determination of the Commission and which notifies the public that the Commission will rely on the voluntary standard to eliminate or reduce the risk of injury, except that the Commission shall terminate any such proceeding and rely on a voluntary standard only if such voluntary standard is in existence.[2]

Id. § 2058(b)(2). The statute further states that before the CPSC may rely upon a voluntary standard, it "shall afford interested persons (including manufacturers, consumers, and consumer organizations) a reasonable opportunity to submit written comments regarding such standard." *Id.* § 2058(b)(2). The CPSA does not define "other rule or order" as used in § 2072(a).

In their Complaint, Plaintiffs contend they have a private right of action under the CPSA for Defendant's alleged violation of certain voluntary safety standards for hoverboards [Doc. 1, ¶¶ 68-70]. Defendant argues these voluntary standards do not classify as a promulgated rule or order and therefore do not give rise to a private right of action under § 2072 [Doc. 15, pg. 2]. In response, Plaintiffs point to a letter the CPSC issued on February 18, 2016 [Doc. 29-1][3] to manufacturers, importers, and retailers of self-balancing scooters "to urge [them] to make certain that self-balancing scooters that [they] import, manufacture, distribute, or sell in the United States comply with currently applicable voluntary safety standards, including all referenced standards and requirements contained in UL 2272 – *Outline of Investigation for Electrical Systems for Self-balancing Scooters*" [Doc. 29, pg. 2; *see* Doc. 29-1, pg. 1]. The letter further cautioned that "[s]elf-balancing scooters that do not meet these voluntary safety standards pose an unreasonable risk of fire to consumers" [Doc. 29-1, pg. 1]. The letter advised that the CPSC considers self-

[2] "For purposes of this section, a voluntary standard shall be considered to be in existence when it is finally approved by the organization or other person which developed such standard, irrespective of the effective date of the standard." *Id.* § 2058(b)(2).

[3] This letter was superseded by a subsequent CPSC letter [Doc. 29-2]. However, that letter was issued on February 22, 2018, after the incident in question [*see id.*].

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