UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case Nos.	2:16-cv-08338-SVW (AFMx)	Date	February 27, 2017
Title	*Jason Saidian v. Krispy Kreme Doughnut Corp.*	Page	1 of 7

Present: The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS – ORDER RE: MOTION TO DISMISS (Doc. 17)

Defendant Krispy Kreme Doughnut Corporation ("Krispy Kreme") moves to dismiss Plaintiff's first amended complaint ("FAC"), or in the alternative, to strike certain allegations and to stay the action. Doc. 17. The Court deems the matter appropriate for resolution without oral argument. L.R. 7-15. The Court will deny the motion.

I. BACKGROUND

Krispy Kreme sells a product called the "Chocolate Iced Raspberry Filled" doughnut, which does not contain actual raspberries. Doc. 11, ¶¶ 2–3. Similarly, Krispy Kreme sells "Maple Ice Glazed" and "Maple Bar" doughnuts that do not contain maple syrup or maple sugar. ¶¶ 4–5. Finally, Krispy Kreme sells a "Glazed Blueberry Cake" doughnut that does not contain actual blueberries, but instead contains "imitation blueberries that highly resemble actual blueberries due to their round shape and blue color." ¶¶ 6–7.

Plaintiff alleges that he purchased the above-mentioned products ("Products") believing that they contained the ingredients referenced in the product name ("Premium Ingredients"). ¶ 9. Such a belief was not unreasonable because "[n]o ingredients list is provided or available to costumers" in Krispy Kreme stores. ¶ 21. Plaintiff further alleges that he would not have purchased the Products, or would have paid significantly less for them, if he had known that they did not contain the relevant Premium Ingredient. *Id.*

On December 5, 2016, Plaintiff filed his FAC on behalf of himself and all others similarly situated. He asserts ten claims for relief: (1) violation of California's Consumer Legal Remedies Act ("CLRA), Cal. Civ. Code §§ 1750, *et seq.*; (2) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Professions Code §§ 17200, *et seq.*; (3) violation of California's False Advertising Law ("FAL"), Cal. Bus. & Professions Code; (4) breach of express warranty in violation of Cal. Commercial Code § 2313; (5) breach of implied warranty in violation of Cal. Commercial Code § 2314; (6) common law fraud; (7) intentional misrepresentation; (8) negligent misrepresentation; (9) breach of contract; and (10) quasi-contract/unjust enrichment/restitution. Doc. 11.

The claims arising under California statutory law are brought on behalf of "all California residents, who within the relevant statute of limitations period, purchased any of the products at a Krispy Kreme store." ¶ 45. The common law claims are brought on behalf of "all persons in the United States, who within the relevant statute of limitations periods, purchased any of the Products at a Krispy Kreme store." ¶ 46.

II. LEGAL STANDARDS

A. Motion to Dismiss

A successful 12(b)(6) motion must show that the complaint either lacks a cognizable legal theory or fails to allege facts sufficient to support its theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1988). A complaint that sets forth a cognizable legal theory will survive a motion to dismiss as long as it contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). 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 (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a 12(b)(6) motion, the Court takes the plaintiff's well-pleaded factual allegations as true and construes them in the light most favorable to the plaintiff. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Legal conclusions couched as factual allegations are not entitled to a presumption of truth and are not sufficient to defeat a 12(b)(6) motion. *Iqbal*, 556 U.S. at 678.

B. Motion to Strike

A court "may order stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Although generally disfavored, a motion to strike may be granted where necessary to spare the parties the time and expense associated with "litigating spurious issues." *Sidney–Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir.1983). A successful motion to strike must show that the law is clear beyond reasonable dispute and that the relevant claim or defense could not succeed under any set of circumstances. *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 990 (N.D. Cal. 2009) (citing *RDF*

Media Ltd. v. Fox Broadcasting Co., 372 F. Supp. 2d 556, 566 (C.D. Cal. 2005)). The motion to strike "was never intended to furnish an opportunity for the determination of disputed and substantial questions of law." *Salcer v. Envicon Equities Corp.*, 744 F.2d 935, 939 (2d Cir. 1984), *judgment vacated on other grounds*, 478 U.S. 1015 (1986) (citation omitted). Moreover, even a purely legal question will not be decided on a motion to strike if discovery might provide useful context for decision or render the question moot. *See id.* (citations omitted).

C. *Landis* Stay

"A district court has inherent power to control the disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel, and for litigants." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). In ruling on a motion to stay, the Court considers three factors: (1) "the possible damage which may result from the granting of a stay," (2) "the hardship or inequity which a party may suffer in being required to go forward," and (3) "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Id.* (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936)).

III. ANALYSIS

A. Preemption

The Federal Food, Drug, and Cosmetic Act ("FDCA"), as amended by the Nutrition Labeling and Education Act ("NLEA"), preempts "any requirement for nutrition labeling of food that is not identical to the requirement of [21 U.S.C. § 343(q)]." 21 U.S.C. § 343-1(a)(4). The term "requirement" "reaches beyond positive enactments like statutes and regulations, to embrace common-law duties and judge-made rules." *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1118 (N.D. Cal. 2010) (citing *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 443 (2005)). Because courts cannot impose state-law labeling requirements that go beyond those required by the NLEA, a claim seeking the imposition of such a requirement must be dismissed. *See, e.g., id.* But a claim will not fail on preemption grounds "if the requirements [it] seek[s] to impose . . . do not involve claims or labeling information of the sort described in . . . [section] 343(q)." *Id.* at 119.

Krispy Kreme argues that Plaintiff's claims are preempted "because they require [Krispy Kreme] to disclose ingredients at the point of sale"—something that the NLEA does not require. Doc. 27 at 6. Krispy Kreme mischaracterizes Plaintiff's claims. Plaintiff does not allege that Krispy Kreme had a duty to disclose the ingredients of its products. Rather, Plaintiff alleges that Krispy Kreme had a duty to refrain from giving its products misleading names. Even if Plaintiff's theory were accepted, Krispy Kreme could avoid liability without making any changes to its labeling, simply by renaming its products. Krispy Kreme has not shown that Plaintiff's claims seek to impose requirements with respect to nutritional labeling, as would be necessary to establish preemption under the NLEA.[1]

[1] To the extent Krispy Kreme argues that the NLEA preempts state-law regulation of its products' names, it has not pointed the Court to any provision of 21 U.S.C. § 343(q) or its implementing regulations that governs the use of the terms "Raspberry," "Maple," or "Blueberry." To the extent Krispy Kreme argues that the NLEA *impliedly*

B. Plausibility

Krispy Kreme argues that Plaintiff's claims are implausible, and thus subject to dismissal under *Iqbal*, 556 U.S. 662, because a reasonable consumer would not understand the Products' names to constitute representations regarding the Products' ingredients. Doc. 27 at 10. The Court does not agree. Whether a reasonable consumer would be deceived by a particular statement is generally a factual question. This question may be resolved on a motion for dismiss only in those "rare situation[s]" where it is clear from the complaint that no reasonable consumer would be misled. *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 939 (9th Cir. 2008). Krispy Kreme fails to explain why this is one of those rare situations. It is plausible that Plaintiff will be able to show that reasonable consumers believe that "Raspberry-Filled" doughnuts are filled with raspberries, "Maple Iced Glazed" and "Maple Bar" doughnuts contain maple syrup or maple sugar, and "Glazed Blueberry Cake" doughnuts contain actual blueberries.[2] *Cf. id.* (a factual question existed as to whether a reasonable consumer would believe that a product called "fruit juice snack," and sold in packaging featuring pictures of fruits, contained fruit juice); *Henderson v. Gruma Corp.*, 2011 U.S. Dist. LEXIS 41077, *33 (C.D. Cal. Apr. 11, 2011) (reasonable consumer could believe that product marketed as "Guacamole Flavored Dip" contained avocado). The Court will not dismiss Plaintiff's claims under *Iqbal*.

C. Rule 9(b)

A plaintiff in federal court must plead any claim sounding in fraud with particularity. Fed. R. Civ. P. 9(b). "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (citation omitted). Krispy Kreme argues that Plaintiff has not satisfied these requirements. The Court does not agree. Plaintiff alleges that in fall of 2015, at the Santa Monica Krispy Kreme, he purchased the Chocolate Iced Raspberry Filled, Maple Iced Glazed, and Glazed Blueberry Cake doughnuts, and that he thought these products contained raspberry, maple, and blueberry respectively. Doc. 11, ¶ 15. Because Plaintiff "ha[s] identified the particular statements [he] allege[s] are misleading, the basis for that contention," and when and where he encountered the allegedly misleading statements, the requirements of Rule 9(b) are satisfied. *Chacanaca*, 752 F. Supp. 2d at 1126.

D. Warranty Claims

Krispy Kreme argues that Plaintiff's express warranty claims fail because "a product's name is not a warranty." Doc. 17 at 28. The Court finds no support for such a categorical rule. Krispy Kreme cites a single case, *Forouzesh v. Starbucks Corp.*, No. CV 16-3830 PA (AGRX), 2016 WL 4443203 (C.D. Cal. Aug. 19, 2016), but that case does not support Krispy Kreme's position. *Forouzesh* concerned the names of Starbuck's iced drinks. Starbucks stated on its website that a "Grande" drinks contained 16 fluid ounces. *Id.* at *1. However, when a costumer

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preempts Plaintiff's claims, that argument fails because the NLEA specifically disavows implied preemption. *See* Pub. L. 101-535, § 6(c)(1) (the NLEA "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted").

[2] It is particularly plausible that a consumer would be misled by the Blueberry Product, because it contains "imitation blueberries that highly resemble actual blueberries due to their round shape and blue color." Doc. 11, ¶ 6.

ordered a Grande iced drink, Starbucks' practice was to prepare a drink with 12 ounces of liquid; the remainder of the cup would be filled with ice. *Id.* The plaintiff asserted a claim for breach of warranty. *Id.* The court dismissed the action:

> [A]s young children learn, they can increase the amount of beverage they receive if they order "no ice." If children have figured out that including ice in a cold beverage decreases the amount of liquid they will receive, the Court has no difficulty concluding that a reasonable consumer would not be deceived into thinking that when they order an iced tea, that the drink they receive will include both ice and tea and that for a given size cup, some portion of the drink will be ice rather than whatever liquid beverage the consumer ordered. This conclusion is supported by the fact that the cups Starbucks uses for its Cold Drinks, as shown in the Complaint, are clear, and therefore make it easy to see that the drink consists of a combination of liquid and ice. Moreover, neither the menu nor signage Plaintiff has reproduced and incorporated into his Complaint explicitly state that the drinks consist of the identified ounces of liquid. Instead . . . Starbucks lists the sizes of its "drinks," not . . . the size of its "beverages" . . . .

Id. at *3. In other words, the court did not dispute that a product's name could constitute an affirmation of fact giving rise to a warranty claim. The court simply disagreed with the plaintiff that a reasonable consumer would understand the term "Grande' as an affirmation that the iced drink would contain 16 fluid ounces of beverage.

Contrary to Krispy Kreme's argument, courts frequently entertain express warranty claims based on a product's name. *See, e.g., In re 5-Hour Energy Mktg. & Sales Practices Litig.*, MDL 13-2438 PSG (PLAx), 2017 U.S. Dist. LEXIS 13466 at *34 (C.D. Cal. Jan. 24, 2017) ("Plaintiffs claim that trademark names can be warranties, and they cite ample concurring authority."). The Court will not dismiss Plaintiff's express warranty claim.[3]

E. Unjust Enrichment Claim

Krispy Kreme argues that Plaintiff's unjust enrichment claim should be dismissed because it is duplicative of his legal remedies under the CLRA, UCL, and FAL. This argument fails. The unjust enrichment claim is asserted on behalf of a putative nationwide class, while the CLRA, UCL, and FAL claims are asserted on behalf of a putative California class. Insofar as the non-California members of the putative nationwide class are concerned, the unjust enrichment claim is not duplicative. Even as to the California class members, dismissal is not appropriate. Because a plaintiff is entitled to plead in the alternative, "[a]n unjust enrichment count should not be dismissed unless it is insufficient apart from its inconsistency with the other counts."

[3] Krispy Kreme argues in its opening brief that Plaintiff's claim for breach of implied warranty fails because Plaintiff has not alleged that the doughnuts "'lack[ed] even the most basic degree of fitness for ordinary use.'" Doc. 17 at 29 (quoting *Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 (9th Cir. 2009)). Although allegations that the product lacks basic fitness for ordinary use are sufficient to state a claim for implied warranty, an implied warranty claim may also be predicated on allegations that the product fails to "conform to the promises or affirmations of fact made on the container or label if any." Cal. Commercial Code § 2314(2)(F). Krispy Kreme does not explain why Plaintiff cannot state a claim for breach of implied warranty on this theory.

Cheatham v. ADT Corp., 161 F. Supp. 3d 815, 832 (D. Ariz. 2016) (citation and quotation marks omitted; alterations incorporated); *accord Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762–63 (9th Cir. 2015) ("To the extent the district court concluded that the [quasi-contract] cause of action was . . . duplicative of or superfluous to Astiana's other claims, this is not grounds for dismissal.").

F. Injunctive Relief

Krispy Kreme argues that Plaintiff lacks standing to seek injunctive relief because he does not allege his intent to purchase the product in the future. Because "[a] request for relief cannot be dismissed for failure to state a claim," *Doe v. State of Arizona*, No. CV-15-02399-PHX-DGC, 2016 WL 1089743, at *5 (D. Ariz. Mar. 21, 2016), the Court construes this as a motion to strike Plaintiff's demand for injunctive relief. Such a motion will be granted only if it is clear that the requested relief is unavailable as a matter of law. *See Salcer*, 744 F.2d at 939 (the motion to strike "was never intended to furnish an opportunity for the determination of disputed and substantial questions of law").

It is not clear that injunctive relief is unavailable as a matter of law. Plaintiff alleges that he "would likely purchase the Products in the future if the Products were reformulated to include the premium characterizing ingredients." Doc. 11, ¶ 13. Although there appears to be disagreement on the issue, at least some courts in this circuit have found similar allegations sufficient to confer standing to seek injunctive relief. *See, e.g., Dean v. Colgate-Palmolive Co.*, No. EDCV 15-0107 JGB, 2015 WL 3999313, at *8 (C.D. Cal. June 17, 2015) (although "[d]istrict courts in this circuit have split on how to handle th[e] issue[,]" the better line of reasoning is that a plaintiff has standing to seek injunctive relief against false advertising even if he does not plead "any intention to purchase [the product] again"); *Lilly v. Jamba Juice Co.*, No. 13-CV-02998-JST, 2015 WL 1248027, at *5 (N.D. Cal. Mar. 18, 2015) ("Lilly's statement that she would consider spending her money to purchase Defendants' products if they were labeled correctly in the future therefore gives Plaintiffs standing to seek injunctive relief."). The Court will defer resolution of this disputed legal issue until a later point in the litigation.

G. Motion to Strike

Krispy Kreme asks the Court to strike ¶ 45 of Plaintiff's complaint, which defines a nationwide class to include "all persons in the United States, who within the relevant statute of limitations periods, purchased any of the Products at a Krispy Kreme store." Doc. 11, ¶ 45. Krispy Kreme argues that Plaintiff cannot assert claims under California statutory law on behalf of a nationwide class. Doc. 17 at 32 (citing *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) ("each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place")). However, none of the claims under California statutory law are brought on behalf of a nationwide class. *See* Doc. 11 at 16–23. The only claims brought on behalf of the nationwide class are those sounding in common law. *See id.* at 24–29. The motion to strike will be denied.

H. Motion to Stay

Krispy Kreme argues that this case should be stayed pending the Ninth Circuit's resolution of appeals in *Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, 2014 WL 2702726, at *1 (N.D. Cal. June 13, 2014) (appeal filed July 15, 2014) and *Kosta v. Del Monte Foods, Inc.*, 308 F.R.D. 217 (N.D. Cal. 2015) (appeal filed Oct. 2, 2015). According to Krispy Kreme, these cases are expected to clarify (1) whether Rule 23 includes an ascertainability requirement; (2) whether reliance on—and materiality of—food labels can be presumed; and (3) the requirements for injunctive relief standing.

However, the first issue was resolved earlier this year. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123–24 & n.4 (9th Cir. Cal. 2017) (the Ninth Circuit "has not adopted an "ascertainability requirement," but instead addresses ascertainability concerns "through analysis of Rule 23's enumerated requirements;" refusing to impose "[a] separate administrative feasibility prerequisite to class certification" because such a requirement would be incompatible with the language of Rule 23). The second issue is factually distinguishable: while *Jones* and *Kosta* involve representations on product labels, this case involves representations included in product names. The third issue is peripheral to this case, given that Plaintiff is primarily seeking damages. Krispy Kreme has not shown that a stay would promote the orderly course of justice. *Cf. CMAX*, 300 F.2d at 268.

Krispy Kreme has not shown that it would suffer hardship if the case were to proceed. It does not offer any specifics as to how it might conduct discovery differently after decisions in *Jones* and *Kosta*. Because Krispy Kreme has not shown that a stay would promote the ordinary course of justice or that it would suffer hardship if the case were to proceed, the Court need not consider the first *Landis* factor. A stay is not appropriate here.

IV. CONCLUSION

Krispy Kreme's motion to dismiss is **DENIED**.