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Safeway, Inc.

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

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| <p>Kumar Plaintiff/Petitioner(s)</p> <p style="text-align: center;">VS.</p> <p>Safeway, Inc. Defendant/Respondent(s) (Abbreviated Title)</p> | <p>No. <u>RG14726707</u></p> <p style="text-align: center;">Order</p> <p style="text-align: center;">Demurrer to Complaint Sustained</p> |
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The Demurrer to Complaint filed for Safeway, Inc. was set for hearing on 08/27/2014 at 08:30 AM in Department 21 before the Honorable Wynne Carvill. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The Demurrer of defendant Safeway, Inc. ("Defendant") to the Complaint of plaintiff Rohini Kumar ("Plaintiff") is ruled on as follows:

BACKGROUND:

Plaintiff Rohini Kumar ("Plaintiff") filed the complaint in this case on May 20, 2014 ("Complaint"), asserting claims against Safeway, Inc. ("Defendant") on behalf of herself, the general public and those similarly situated, based on alleged representations made by Defendant in connection with its marketing and sale of olive oil. More specifically, Plaintiff alleges that the labels on Defendant's olive oil products state that they are "IMPORTED FROM ITALY" despite the fact that the olives from which they are made are neither grown nor pressed in Italy, and that they are of the "Extra Virgin" grade, despite the fact that they are not.

Plaintiff's Complaint includes causes of action for (1) Violation of the Consumer Legal Remedies Act, California Civil Code sections 1750, et seq. ("CLRA"), (2) False Advertising, Business and Professions Code sections 17500, et seq. ("FAL"), (3) Breach of Contract, (4) Breach of the Covenant of Good Faith and Fair Dealing, (5) Fraud, Deceit and/or Misrepresentation, and (6) Unfair, Unlawful and Deceptive Trade Practices, Business and Professions Code sections 17200, et seq. ("UCL"), and is pled in proper form as a class action (California Rule of Court ["CRC"] 3.761.)

DEMURRER:

Defendant argues first that Plaintiff lacks standing to pursue any of her claims because she has not alleged any injury from the one Safeway product that she purchased, and she cannot allege any injury with regard to products that she did not purchase. Nor can she establish that she relied on any misrepresentations or omissions as to products she did not purchase. Plaintiff does not allege that any testing was conducted on the particular bottle that she purchased, or that there was any taste to the olive oil that indicated that it was not "extra virgin."

Defendant further argues that Plaintiff has not alleged that she purchased a product that was not made from Italian olives. She does not provide information about what was represented on the labeling about the country of origin of the olives or provide copy of the label, so it is possible that the bottle purchased by Plaintiff was made from Italian olives.

Second, Defendant argues that Plaintiff has not alleged facts demonstrating that any representations were false, unlawful or unfair in violation of the CLRA, the UCL or the FAL. Plaintiff was not misled by the phrase "Imported From Italy" because the label contains clarifying statements regarding the source of the olives, and she admits that she read the "best before" date on the back label, and that date is directly adjacent to the country of origin statement.

As to the "unlawful" prong of the UCL, Defendant argues that Plaintiff cannot rely on the CLRA and the FAL as the predicate statutory violation, since both of those claims are based on allegations of fraud, she has not pled facts sufficient to establish a violation of the Sherman Law (Health and Safety Code sections 109875, et seq.) or a violation of the Olive Oil Act (Health and Safety Code sections 112875, et seq.), and she cannot use the Tariff Act of 1930 because that statute does not allow for a private right of action. Defendant further argues that Plaintiff's claim that Defendant has violated California's standards governing the quality of Extra Virgin Olive Oil ("EVOO") is preempted by the federal Nutrition Labeling and Education Act ("NLEA").

As to the "unfair" prong of the UCL, Defendant argues that Plaintiff has not alleged sufficient facts to satisfy any of the various tests set forth in the applicable authorities.

As to Plaintiff's contract claims, Defendant argues that there is no authority for the proposition that a product label constitutes the entirety of a contract between a product supplier and a consumer. Even if it could constitute a contract, Plaintiff has neither attached a copy of the label to the Complaint nor set forth the terms of the alleged contract verbatim. Nor has she properly pled performance, breach or damages. Having not established the existence of a contract, her good faith and fair dealing cause of action fails as well.

As to Plaintiff's fraud claims, Defendant argues that they are not alleged with adequate specificity.

Defendant requests that the court take judicial notice of the report issued by the University of California at Davis' Olive Oil Center in 2010, reference in paragraphs 34 and 35 of the Complaint ("UC Davis Report"), and argues that the Plaintiff has mischaracterized the UC Davis Report's findings. Defendant also argues that Plaintiff has not alleged facts tying the results of the testing done by Plaintiff's counsel to the bottle she purchased, other than by brand name.

SUMMARY OF PLAINTIFF'S OPPOSITION:

Plaintiff asserts that her Complaint properly alleges "injury-in-fact" for purposes of establishing standing to sue under the UCL, FAL and CLRA. Defendant has cited no authority for the proposition that Plaintiff needs to have tested the exact bottle she purchased in order to make a claim. Plaintiff has alleged that she would not have bought the product but for the misrepresentations on the label.

Plaintiff further asserts that Defendant cannot defeat Plaintiff's allegations about the "extra virgin" mislabeling by the improper introduction of extrinsic evidence challenging the validity of the UC Davis Report.

Plaintiff argues that the Complaint clearly alleges how Plaintiff was misled by the "Imported from Italy" claim on the label, and argues that whether a practice is deceptive, fraudulent or unfair is generally a question of fact which requires consideration and weighing of evidence from both sides.

Plaintiff further argues that a UCL unlawful claim can be predicated on violation of the CLRA and FAL, as well as on alleged violations of the Sherman law and the Olive Oil Act, all of which are properly pled in the Complaint, and that her claim is not precluded by the Tariff Act or the FDA regulations that are incorporated by reference into the Sherman Law because neither include an express bar. (Citing, inter alia, *Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390, 398; *In re Farm Salmon Cases* (2008) 42 Cal.4th 1077, 1087-1099.) Plaintiff also argues that her UCL claim is not preempted by the NLEA, because the NLEA express preemption provision does not apply. (Citing, inter alia, *Vermont Pure Holdings, Ltd. v. Nestle Waters North America, Inc.* (D.Mass. 2006) 2006 WL

Plaintiff also argues that her factual allegations satisfy all of the test for pleading and "unfair" practice under the UCL.

As to her cause of action for breach of contract, Plaintiff asserts that she has pled all of necessary elements: the label promised that in exchange for the purchase Plaintiff would receive "extra virgin" olive oil, she performed by paying money, Defendant failed to provide extra virgin olive oil, and Plaintiff was damaged in that she lost the money she spent.

DISCUSSION:

Defendant's arguments go far beyond the appropriate scope of a facial challenge to a pleading, purporting to rely on evidence presented under requests for judicial notice. The court rejects this attempt to turn the instant demurrer into an evidentiary hearing. Defendant's requests for judicial notice of (a) the UC Davis Report, (b) a Statement Issued by the Chemistry Expert Group of the International Olive Counsel on [the UC Davis Report], (c) a declaration from an unrelated case in the Superior Court of California, County of Orange, and (d) a photo copy of an olive oil label, are all DENIED. The court notes that Plaintiff did not object to judicial notice of the UC Davis Report, but the court finds consideration of that report unnecessary to the issues currently before it.

On its own motion, the court also strikes the Declaration of Seth Safier, submitted by Plaintiff with her opposition, as well as the Declaration of Anne Suplee, submitted by Defendant with its reply, and DENIES Defendant's reply request for judicial notice of a document published by the National Agricultural Research Foundation, Institute of Technology of Agricultural Products. Much, if not all, of this evidence will likely resurface as this case progresses, and the court takes no position here on its future admissibility in other contexts. For purposes of this demurrer, however, the court will consider only the facial allegations of the Complaint itself.

The court rejects Defendant's argument that Plaintiff does not have standing to pursue her CLRA, FAL and UCL claims. Fundamental to its standing argument are the assertions that Plaintiff has failed to establish that the product she purchased is not extra virgin olive oil, and that she has failed to demonstrate that the product she purchased did not contain Italian olives. Both of these assertions either depend on the evidentiary showing that the court has refused to consider at the pleading stage, or are based on the proposition that Plaintiff was required to test the very bottle of olive oil that she purchased, which proposition the court rejects as unsupported by the authorities cited. Nor do Defendant's arguments regarding the sufficiency of Plaintiff's allegations of injury have merit. Plaintiff adequately alleges that she, and other similarly situated consumers, incurred damages in the form of money spent on Defendant's products. As Plaintiff correctly asserts in her opposition, to the extent that Defendant challenges her ability to represent purchasers of grades of olive oil other than the one she purchased in connection with her "Imported from Italy" claim, the question is not one of "standing," but rather of typicality, to be addressed at the time of class certification.

Defendant's argument that Plaintiff could not have been misled by the product label because of clarifying statements on the back label is not well taken, at least for purposes of demurrer. Again, Defendant improperly relies on evidence outside of the pleadings. Likewise, Defendant's separate challenge to Plaintiff's 5th cause of action for common law fraud, deceit and misrepresentation, which is based only on allegations regarding what Plaintiff refers to as "Defendant's false 'extra virgin' representations," for lack of specificity, and its assertion of NLEA preemption are not well taken.

Nor do Defendant's arguments directed to the "unlawful" and "unfair" prongs of Plaintiff's UCL claims, including her use of alleged violations of the CLRA, the FAL, the Sherman Law and the Olive Oil Act as predicates, or its assertion of NLEA preemption have merit.

In sum, while Defendant's demurrer clearly demonstrates its game plan for defending Plaintiff's CLRA, FAL, UCL and common law fraud claims, it has not succeeding in establishing that these causes of action are not properly pled.

Defendant's challenge to Plaintiff's contract claims, however, is a different story. While Defendant has not presented any case authority directly involving product labeling, its arguments regarding the

insufficiency of Plaintiff's allegations for purposes of stating contract claims are persuasive. For her part, Plaintiff has failed to present any case authority directly supporting her contract theory of recovery. The closest she comes are cases in which quasi-contract claims, seeking recovery for unjust enrichment, or breach of express warranty claims were allowed to proceed (e.g., *Jones v. ConAgra Foods, Inc.* (N.D.Cal. 2012) 912 F.Supp.2d 889; *Goldemberg v. Johnson & Johnson* (S.D.N.Y. 2014) 2014 WL 1285137.) Indeed, apparently recognizing the shortcomings of these authorities, Plaintiff requests, in footnote 10 of her opposition, leave to amend to assert a claim of unjust enrichment in the event the court finds her contract claims insufficiently pled. Given that the court has determined that Plaintiff's causes of action under the CLRA, the FAL and the UCL, under which adequate remedies at law are available, are adequately pled, a separate claim for unjust enrichment would be unnecessarily duplicative. (*Collins v. EMachines, Inc.* (2012) 202 Cal.App.4th 249, 260.)

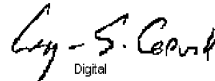
Ruling:

Defendant's demurrers to the 1st, 2nd, 5th and 6th causes of action are **OVERRULED**. The Complaint includes adequate factual allegations to state causes of action for violations of the CLRA, the FAL and the UCL and for common law fraud.

Defendant's demurrers to the 3rd and 4th causes of action for breach of contract and breach of the covenant of good faith and fair dealing are **SUSTAINED** without leave to amend.

Defendant shall answer the causes of action remaining in the Complaint forthwith, and no later than September 11, 2014.

Dated: 09/02/2014

A handwritten signature in black ink that reads "Wynne Carvill". Below the signature, the word "Digital" is printed in a small font.

Judge Wynne Carvill