UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DENNIS PETERSON, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

CJ AMERICA, INC d.b.a. CJ FOODS INC.,

Defendant.

CASE NO. 14cv2570 DMS (JLB)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO STRIKE

This case comes before the Court on Defendant CJ America's motion to dismiss Plaintiff's Class Action Complaint, or in the alternative, motion to strike. Plaintiff filed an opposition to the motion, and Defendant filed a reply. For the reasons set out below, the Court grants in part and denies in part Defendant's motion.

I.

BACKGROUND

Plaintiff Dennis Petersen is a resident of Lakeside, California. (Compl. ¶ 9.) Defendant CJ America, Inc. produces and distributes Annie Chun's food products, including the products at issue in this case. (*Id.* ¶ 10.)

On or about July 26, 2013, Plaintiff purchased an Annie Chun's Udon Soup Bowl from a Vons grocery store in Lakeside. (*Id.*) The front of the package for the Udon

Soup Bowl states: "100% all natural ingredients," and "NO MSG ADDED." (*Id.* at 9.)[1] Plaintiff alleges that label, as well as the labels and packaging for fifteen other Annie Chun's products, is false and misleading because the products contain ingredients that have MSG.

To rectify this situation, Plaintiff filed the present case on behalf of himself and the following proposed class:

> All persons who bought one or more of CJ Foods's Subject Products after November 19, 2012 with the representations "NO MSG ADDED" including: Chinese Chicken Soup Bowl, Hot & Sour Soup Bowl, Korean Kimchi Soup Bowl, Miso Soup Bowl, Thai Tom Yum Soup Bowl, Udon Soup Bowl, Vietnamese Pho, Garlic Scallion Noodle Bowl, Korean Sweet Chili Noodle Bowl, Kung Pao Noodle Bowl, Pad Thai Noodle Bowl, Peanut Sesame Noodle Bowl, Teriyaki Noodle Bowl, Soy Ginger Ramen, Spicy Chicken Ramen, and Spring Vegetable Ramen.

(*Id.* ¶ 30.) Plaintiff alleges claims for violation of California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, *et seq.*, California's False Advertising Law ("FAL"), California Business and Professions Code § 17500, *et seq.*, California's Unfair Competition Law ("UCL"), California Business and Professions Code § 17200, *et seq.*, and breach of express warranty, California Commercial Code § 2313. The present motion followed.

II.

DISCUSSION

Defendant moves to dismiss Plaintiff's Complaint in its entirety. It raises several arguments. First, it argues Plaintiff lacks standing to assert claims based on the fifteen products he did not purchase and to pursue injunctive relief. Second, Defendant asserts Plaintiff has failed to satisfy the pleading requirements of Federal Rule of Civil Procedure 9(b). Third, Defendant contends Plaintiff has failed to allege certain facts

[1] "'MSG' stands for monosodium glutamate, a controversial flavor enhancer that reportedly can cause headaches, flushing, sweating, facial pressure or tightness, numbness, tingling or burning in the face, neck and other areas, rapid, fluttering heartbeats, chest pain, nausea and weakness." (Compl. ¶ 3.)

necessary to his claims. Finally, Defendant moves to dismiss or strike Plaintiff's nationwide class allegations.

A. Standard of Review

In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court established a more stringent standard of review for 12(b)(6) motions. To survive a motion to dismiss under this new standard, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (citing *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.* (citing *Twombly*, 550 U.S. at 556).

"Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007)). In *Iqbal*, the Court began this task "by identifying the allegations in the complaint that are not entitled to the assumption of truth." *Id.* at 680. It then considered "the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief." *Id.* at 681.

B. Standing

As stated above, Defendant argues Plaintiff lacks standing to pursue claims based on products he did not purchase. Defendant also asserts Plaintiff lacks standing to pursue the injunctive relief sought in the Complaint.

1. Claims Based on Products Not Purchased

Defendant does not challenge Plaintiff's standing regarding the product he purchased, Annie Chun's Udon Soup Bowl; rather, Defendant contends Plaintiff lacks standing to pursue claims as to the fifteen other Annie Chun's products he did not purchase. Plaintiff responds that this is an issue of typicality and adequacy that should be resolved on class certification, not a motion to dismiss. Plaintiff also asserts that if

the Court considers the issue now, he has standing to bring the putative class claims as to the fifteen other Annie Chun's products under the "substantially similar" test.

In *Johns v. Bayer Corp.*, No. 09CV1935 DMS (JMA), 2010 U.S. Dist. LEXIS 10926 (S.D. Cal. Feb. 9, 2010), this Court addressed the matter as one of standing, specifically whether a plaintiff in a proposed class action had standing to bring claims based on products he did not purchase. *Id.* at *10-13. After considering the applicable law and the facts alleged in that case, the Court concluded the plaintiff lacked standing to pursue claims based on products he did not purchase. *Id.* at *13.

Following this Court's decision in *Johns*, the Ninth Circuit in *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011) (*en banc*), held that "[i]n a class action, standing is satisfied if at least one named plaintiff meets the requirements.... Thus, we consider only whether at least one named plaintiff satisfies the standing requirements...." *Id.* at 1021 (quoting *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007)). While *Stearns* does not expressly foreclose Defendant's argument here, it certainly sets foot on the path advanced by Plaintiff – that if a plaintiff has standing to assert claims regarding products he purchased, he may also assert claims (at least at the pleading stage) on behalf of others who purchased related products.

Recently, district courts in this circuit have cited *Stearns* and adopted the position advanced here by Plaintiff. *See, e.g., Clancy v. Bromley Tea Company*, No. 12-cv-03003-JST, 2013 WL 4081632, at *5 (N.D. Cal. Aug. 9, 2013) (quoting *Stearns*, 655 F.3d at 1020-21) ("[i]n determining whether a plaintiff in a proposed class action has standing, the Ninth Circuit's 'law keys on the representative party, not all of the class members[.]'"). Thus, "[t]ransmogrifying typicality or commonality into an issue of standing would undermine the well-established principles that '[i]n a class action, standing is satisfied if at least one named plaintiff meets the requirements[.]'" *Id.* (quoting *Bates*, 511 F.3d at 985). Other reasoned authorities agree with this approach. *See, e.g., Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1988) (holding because plaintiff had standing to sue for injury arising from his own benefit

plan, his ability to represent class members with different benefit plans should be analyzed under Rule 23, not standing); 7AA Wright, *et al.*, *Federal Practice and Procedure* § 1758.1 at 388-89 (3d ed. 2005) ("Representative parties who have a direct and substantial interest have standing; the question whether they may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation" under Rule 23.).

In light of *Stearns*, 655 F.3d at 1013, and further elucidation of the issue by other courts, this Court is persuaded that Plaintiff has it right. Whether Plaintiff can bring claims on behalf of others for related products he did not purchase is not an issue of standing, but rather is best addressed under Rule 23 at the class certification stage.[2]

Defendant argues this approach cannot be squared with the Rules Enabling Act, 28 U.S.C. § 2072, which "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right[.]" *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541, 2561 (2011). But as *Dukes* itself makes clear, the inquiry whether the Rules Enabling Act is violated is made at the Rule 23 stage, not at the pleading stage.

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[2] In the alternative, Plaintiff cites other district court cases and argues that if the issue is one of standing, Plaintiff nevertheless has standing to bring claims on behalf of others for the Annie Chun's products he did not purchase as those products are "substantially similar" to the Udon Soup Bowl product he did purchase. Plaintiff alleges that all of the Annie Chun's Products at issue "have ingredients that contain MSG" and all have misleading labels, namely "100% all natural ingredients" and "NO MSG ADDED." (Compl. ¶ 25). *See Astiana v. Dreyer's Grand Ice Cream, Inc.*, Nos. C-11-2910 EMC, C-11-3164 EMC, 2012 WL 2990766, at *13 (N.D. Cal. July 20, 2012) (holding standing met under substantially similar test met where food products were the same, labels were the same, and products shared many of the same ingredients). As noted, however, this Court declines to find this is an issue of standing. The reasoning in *Clancy* is persuasive: "A plaintiff has sufficiently 'typical' claims to represent a class if his claims 'are reasonably co-extensive with those of absent class members; they need not be substantially identical.' *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Whether products are 'sufficiently similar' is an appropriate inquiry, but it does not relate to standing: a plaintiff has no more standing to assert claims relating to a 'similar' product he did not buy than he does to assert claims relating to a 'dissimilar' product he did not buy. Seen this way, analyzing the 'sufficient similarity' of the products is not a standing inquiry, but rather an early analysis of the typicality, adequacy, and commonality requirements of Rule 23." 2013 WL 4081632, at *6.

Finally, Defendant raises the legitimate concern that this approach "expand[s] the scope and cost of discovery and litigation" to class allegations that are neither specifically defined nor directly connected to the named plaintiff's alleged injury. No doubt that is true. But efficiency and cost savings considerations – stout as they may be – are relative considerations that must yield to the just disposition of every cause. *See* Fed. R. Civ. P. 1 ("These rules ... should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."). The Court can address Defendant's concerns through careful case management and supervision of discovery.

2. Injunctive Relief

Next, Defendant argues Plaintiff lacks Article III standing to seek injunctive relief. Specifically, Defendant asserts Plaintiff failed to allege he intends to purchase the products at issue in the future, therefore he lacks standing to request injunctive relief. Plaintiff responds that the injunctive relief he seeks is authorized by the relevant statutes, and that he need not plead intent to purchase the products in the future to have standing for injunctive relief.

"District courts in this circuit are split over the issue of whether a plaintiff, who is seeking to enjoin a seller or manufacturer from making false or misleading misrepresentations about an item the plaintiff previously purchased, must be able to establish that he would likely purchase the item again to establish standing." *Mason v. Nature's Innovation, Inc.*, No. 12cv3019 BTM (DHB), 2013 WL 1969957, at *2 (S.D. Cal. May 13, 2013). Some courts have declined to impose that requirement, reasoning the plaintiff's

> request to be relieved from false advertising by defendants in the future, and the fact that they discovered the supposed deception some years ago does not render the advertising any more truthful. Should plaintiffs encounter [the false advertising] at the grocery store today, they could not rely on that representation with any confidence. This is the harm California's consumer protection statutes are designed to redress.

Ries v. Arizona Beverages USA LLC, 287 F.R.D. 523, 533 (N.D. Cal. 2012). *See also Kumar v. Salov North Am. Corp.*, Nos. 14-CV-2411-YGR, 2015 WL 457692, at * (N.D. Cal. Feb. 3, 2015) (finding allegations sufficient for Article III standing for injunctive relief under CLRA, UCL and FAL); *Figy v. Frito-Lay North Am., Inc.*, ___ F.Supp.3d ___, No. 13-3988 SC, 2014 WL 3953755, at * (N.D. Cal. Aug. 12, 2014) (same).

The majority of courts, however, have held otherwise. *See Musgrave v. ICC/Marie Callender's Gourmet Products Division*, No. 14-cv-02006 JST, 2015 WL 510919, at *9 (N.D. Cal. Feb. 5, 2015) (finding plaintiff lacks standing for injunctive relief absent allegation of intent to purchase in the future); *Frenzel v. AliphCom*, ___ F.Supp.3d ___, No. 14-cv-03587-WHO, 2014 WL 7387150, at *11 (N.D. Cal. Dec. 29, 2014) (same); *Davidson v. Kimberly-Clark Corp.*, ___ F.Supp.3d ___, No. C 14-1783 PJH, 2014 WL 7247398, at *4-5 (N.D. Cal. Dec. 19, 2014) (same); *Morgan v. Wallaby Yogurt Co.*, Inc., No. 13-cv-00296-WHO, 2014 WL 1017879, at *6 (N.D. Cal. Mar. 13, 2014) (same); *Rahman v. Mott's LLP*, No. CV 13-3482 SI, 2014 WL 325241, at *10 (N.D. Cal. Jan. 29, 2014) (agreeing with defendant "that to establish standing, plaintiff must allege that he intends to purchase the products at issue in the future."). These courts hold "that a plaintiff does not have standing to seek prospective injunctive relief against a manufacturer or seller engaging in false or misleading advertising unless there is a likelihood that the plaintiff would suffer future harm from the defendant's conduct - i.e., the plaintiff is still interested in purchasing the product." *Mason*, 2013 WL 1969957, at *4. Those courts ground their holding in "the Ninth Circuit's interpretation of Article III's standing requirements[.]" *Id.* They also reject the contrary view that imposition of such a rule will foreclose the availability of injunctive relief in false advertising cases, calling that an "exaggeration." *Id.* The *Mason* court stated "plaintiffs who have no intention of again purchasing a product that is the focus of false advertising claims are not precluded from seeking an injunctive remedy because they can sue in state court." *Id.* at *5. More importantly, the *Mason* court stated, "as important as consumer protection is, it is not within the Court's authority to carve out

an exception to Article III's standing requirements to further the purpose of California consumer protection laws." *Id.*

This Court has carefully considered the reasoning of both lines of cases. Although the Court agrees with those courts that have expressed concern about foreclosing injunctive relief to plaintiffs in federal court, especially when that relief is specifically provided for in the statutes, ultimately the Court agrees with those other courts that have found that policy insufficient to confer Article III standing. As stated in *Mason*, plaintiffs who are unable to satisfy Article III's standing requirements have the option of filing their claims in state court. Even if that option were not available, however, the Court would not be free to modify or adjust Article III's standing requirements to fill that gap.

Applying the majority rule to the facts of this case, Plaintiff's request for injunctive relief must be stricken. Plaintiff alleges he "would not have bought the product had he known that it contained MSG." (Compl. ¶ 9.) Nowhere does he allege that he would purchase the product in the future if it was properly labeled. Thus, the Court grants Defendant's motion to strike Plaintiff's request for injunctive relief from the Complaint.

C. Failure to Satisfy Rule 9(b)

Defendant also moves to dismiss all of Plaintiff's claims for failure to comply with Federal Rule of Civil Procedure 9(b). Plaintiff argues this Rule does not apply to all of his claims, and for those claims to which it does apply, he has met the pleading standard.

Rule 9(b) "requires that, when fraud is alleged, 'a party must state with particularity the circumstances constituting fraud....'" *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting Fed. R. Civ. P. 9(b)). Thus, to the extent Plaintiff's claims allege Defendant affirmatively misrepresented the MSG content in its products in violation of the CLRA, the UCL and the FAL, those claims must satisfy Rule 9(b).

A pleading satisfies Rule 9(b) if it identifies "the who, what, when, where, and how" of the misconduct charged. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). Plaintiff asserts he has satisfied those requirements in this case, and the Court agrees. Plaintiff has alleged that beginning on November 9, 2012, Defendant made misrepresentations to retail consumers throughout California and the nation at supermarkets and big box stores about the MSG content in its products by stating on the front labels of those products that there was "NO MSG ADDED," when in fact the products contain MSG. Accordingly, Plaintiff has met the requirements of Rule 9(b).

D. Failure to Allege Products Contain MSG

Next, Defendant argues Plaintiff has failed to allege certain facts essential to his claims. Specifically, Defendant asserts Plaintiff's claims fail because Plaintiff has failed to allege the products at issue actually contain MSG.

Defendant takes issue with Plaintiff's allegations that the products at issue "contain MSG or *are known to contain MSG*[,]" (Compl. ¶ 27) (emphasis added), arguing it is unclear from this allegation whether the products at issue actually contain MSG or are merely suspected of having MSG. However, the Court finds the allegations in the Complaint are sufficient. Plaintiff alleges the products at issue "contain several ingredients that have MSG." (*Id.* ¶ 3.) Elsewhere, he alleges the products at issue "contain one or more ingredients that contain MSG or create MSG during processing[.]" (*Id.* ¶ 27.) Defendant's argument unfairly focuses on particular allegations rather than the allegations as a whole. When considered as a whole, the Complaint makes clear that Plaintiff's claims are based on his belief that the products at issue contain MSG even though the packaging states there is "NO MSG ADDED." Defendant's argument that the allegations about MSG are insufficient is unconvincing, and does not warrant dismissal of the Complaint.

E. No Consumer Confusion

Next, Defendant argues Plaintiff's claims are implausible because no reasonable consumer would be deceived by the "NO MSG ADDED" representation on Defendant's

products. Plaintiff disagrees, and also asserts this issue is inappropriate for resolution on a motion to dismiss.

"[W]hether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer." *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008). However, there is no hard-and-fast rule against making this determination on a motion to dismiss. *See Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1161-62 (9th Cir. 2012) (affirming dismissal of claims because advertising not likely to deceive reasonable consumer); *Elias v. Hewlett-Packard Co.*, 903 F.Supp.2d 843, 854-57 (N.D. Cal. Oct. 11, 2012) (resolving issue of likelihood of confusion on motion to dismiss); *Garcia v. Sony Computer Entertainment America, LLC*, 859 F.Supp.2d 1056, 1065-66 (N.D. Cal. 2012); *McKinniss v. Sunny Delight Beverages Co.*, No. CV 07-02034-RGK (Jcx), 2007 WL 4766525, at *4-5 (C.D. Cal. Sept. 4, 2007) (same). Accordingly, this Court will proceed to consider whether the representations at issue here are sufficient to state a claim.

To state a claim under the statutes alleged in this case, Plaintiff must show "that members of the public are likely to be deceived by the business practice or advertising at issue." *Elias*, 903 F.Supp.2d at 854.

> "Likely to deceive" implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.

Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (2003).

Here, Defendant argues it is implausible "that the phrase 'NO MSG ADDED' would lead consumers to believe that a product contains no MSG ***at all***." (Mem. of P. & A. in Supp. of Mot. at 12.) Defendant asserts its representation must be read as a whole, and the inclusion of the word "added" makes clear that the products at issue are not free of MSG, but rather "the level of MSG in the products (if any) has not been artificially increased, that is, no MSG was added to the product." (*Id.* at 14.)

Plaintiff disputes Defendant's interpretation of its packaging. In support of his position that the packaging is likely to deceive a reasonable consumer, he cites a flyer from the Food and Drug Administration ("FDA") that states "foods with any ingredient that naturally contains MSG cannot claim 'No MSG' or 'No added MSG' on their packaging." (Opp'n to Mot. to Dismiss, Ex. A at 3.) Defendant takes issue with Plaintiff's reliance on any statements from the FDA, but those statements are referenced in the Complaint. (*See* Compl. ¶ 21) ("Foods containing ingredients with naturally occurring MSG, however, cannot be labeled 'No MSG' or 'No added MSG.'") Furthermore, Plaintiff clearly alleges Defendant's packaging is likely to deceive reasonable consumers because the front of the packaging "prominently display[s] the 'NO MSG ADDED' claim on the front of the package[,]" while listing the ingredients that contain MSG "in fine print, in an inconspicuous location on the back of the label." (*Id.* ¶ 28.) These allegations are sufficient to withstand Defendant's motion to dismiss.

F. Breach of Express Warranty

Turning to Plaintiff's breach of express warranty claim, Defendant argues this claim must be dismissed because Plaintiff did not allege the products at issue contain no MSG. Plaintiff asserts his allegations are sufficient.

"To plead an action for breach of express warranty under California law, a plaintiff must allege: (1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of warranty which proximately caused plaintiff's injury." *Baltazar v. Apple, Inc.*, No. CV-10-3231-JF, 2011 WL 3795013, at *2 (N.D. Cal. Aug. 26, 2011) (citing *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (1986)). Here, Plaintiff alleges "Defendant made an express warranty and/or approved the use of the express warranty to Plaintiff and members of the Class that the Subject Products they were purchasing did not contain MSG by making the representations 'NO MSG ADDED.'" (Compl. ¶ 62.) Again, Defendant interprets this representation literally to mean no additional MSG was added to the products. However, Plaintiff

argues the representation is subject to a different interpretation, namely, that the products at issue do not contain MSG at all. The Court agrees. The statements describing the Annie Chun's products as "NO MSG ADDED" are sufficiently "specific and unequivocal" to state a claim for breach of express warranty. *See In re Ferrero Litig.*, 794 F.Supp.2d 1107, 1117-18 (S.D. Cal. 2011).

G. Nationwide Class Allegations

Finally, Defendant moves the Court to dismiss or strike Plaintiff's nationwide class allegations. Defendant urges the Court to apply California's choice of law analysis to those allegations, and argues that after doing so, those allegations should be dismissed or stricken.

Plaintiff acknowledges that some district courts have adopted this approach in light of *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581 (9th Cir. 2012). However, he argues that most courts have declined to take this approach, instead opting to defer the issue to the class certification stage. (*See* Mem. of P. & A. in Opp'n to Mot. at 22-23) (citing cases). This Court agrees with the latter courts that this issue is properly addressed on class certification, not a motion to dismiss. The choice of law issue is a detailed, fact-heavy inquiry that should occur after the record is further developed and at the class certification stage, not at the pleading stage. Accordingly, the Court declines to dismiss or strike Plaintiff's nationwide class allegations at this stage of the case.

III.

CONCLUSION AND ORDER

For these reasons, the Court grants in part and denies in part Defendant's motion to dismiss or, in the alternative, motion to strike. Specifically, the Court grants the motion to strike Plaintiff's request for injunctive relief, and denies the motion as to the remaining arguments.

IT IS SO ORDERED.

DATED: May 15, 2015

HON. DANA M. SABRAW
United States District Judge