UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARY GARRISON, et al.,

Plaintiffs,

v.

WHOLE FOODS MARKET CALIFORNIA, INC., et al.,

Defendants.

Case No. 14-cv-00334-VC

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Re: Dkt. No. 65

The unopposed motion to dismiss Mrs. Gooch's as a defendant, on the ground that the Garrisons lack standing to sue Mrs. Gooch's, is granted. *See* Hrg. Tr., at 71. For the following reasons, the motion for summary judgment is denied with respect to the claims for violation of the Unfair Competition Law and the False Advertising Law, and the common law claims for fraud, negligent misrepresentation, breach of contract, and breach of express warranty.[1]

1. The defendant contends the Garrisons were not deceived by the "all natural" label on the challenged products. Based on a review of the plaintiffs' deposition testimony, it does seem unlikely that a jury would find the Garrisons credible on this issue. But if the jury somehow believes the Garrisons' testimony, this would form a basis for a finding that they were deceived.

[1] There appears to be some confusion about any claim the plaintiffs may have asserted under California's Consumer Legal Remedies Act. In the complaint, the plaintiffs asserted a claim for injunctive relief under the CLRA and stated their intent to amend the complaint to include a claim for damages under the CLRA after they had satisfied the notice requirements of that statute. Compl., at ¶ 98. The plaintiffs never filed an amended complaint (and so the defendants did not move for summary judgment on a CLRA damages claim). In their opposition to the summary judgment motion, the plaintiffs seem to contend that there is a fact dispute about whether they provided notice that precludes granting summary judgment on the CLRA claim. Opp., at 21–22. But this cannot be, because there is no underlying claim about which any fact could be in dispute.

The Garrisons testified at various points in their depositions that they bought the products during the class period, and that they paid more for the products than they otherwise would have paid because the labels led them to believe the products contained no synthetic ingredients. *E.g.*, G. Garrison Dep. (Jan. 22, 2015), at 29:15–30:1, 117:4–23; M. Garrison Dep. (Jan. 27, 2015), at 26:4–6, 130:23–131:22. Sodium Acid Pyrophosphate ("SAPP"), an ingredient in the products they bought, is synthetic. 7 C.F.R. § 205.605. Although the Garrisons could not identify the precise dates on which they bought the products and did not have receipts for their purchases, their testimony that they recalled buying the products multiple times during the class period (and their explanations for why they know the purchases took place within that period) is sufficient to create a factual issue for the jury. *E.g.*, G. Garrison Dep. (Jan 22, 2015), at 41:9–43:6, 43:21–44:11, 45:20–46:10, 47:2–49:7; M. Garrison Dep. (Jan 27, 2015), at 26:14–29:22, 31:10–32:23. And although the Garrisons apparently had a mistaken belief that organic foods (like "all natural" foods) contain no synthetic ingredients, that does not automatically render unreasonable their belief that products labeled "all natural" would not contain any synthetic ingredients, nor does it eliminate the fact dispute that exists about whether they were deceived by the labels at issue.[2] *Cf. Garrison v. Whole Foods Mkt. Grp., Inc.*, 2014 WL 2451290, at *3 (N.D. Cal. June 2, 2014).

2. The defendant contends that even if the Garrisons were deceived by the label, they did not suffer any actual injury (within the meaning of California's consumer protection statutes) as a

[2] The defendant contends that the claims related to its soft-baked cookie products must fail for a related reason. The defendant has submitted evidence suggesting the cookies both contained SAPP and had labels claiming they were "all natural" for only a fraction of the class period, from April 2012 until as late as November 2013. And while the plaintiffs testified that they purchased soft-baked cookies from some point in 2009 until 2012 or 2013, they cannot pinpoint the exact date of their purchases (and thus have not produced evidence that their purchases in fact occurred when the cookies both contained SAPP and bore "all natural" labels). But even assuming the evidence forecloses the conclusion that the plaintiffs purchased soft-baked cookies that both contained SAPP and were labeled "all natural," the plaintiffs would still be permitted to pursue the cookie claims on behalf of a class if the products are substantially similar to those the plaintiffs did purchase. *Cf. Garrison v. Whole Foods Mkt. Grp., Inc.*, 2014 WL 2451290, at *5 (N.D. Cal. June 2, 2014).

result of the deception. But again, there is evidence from which a jury could conclude that the Garrisons suffered an actual injury. The "actual injury" threshold is not high. *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 886 (Cal. 2011). Assuming the jury somehow believes the assertions the Garrisons made in their depositions and in the letters they tried to send Whole Foods before filing suit, the jury could infer that the Garrisons paid more for the products than they would have paid if they'd known the products contained a synthetic ingredient. G. Garrison Dep. (Jan. 22, 2015), at 117:4–23; M. Garrison Dep. (Jan. 27, 2015), at 130:23–131:22; Orzano Decl. ISO MSJ, Ex. A, Exs. 17, 18; *id.*, Ex. B, Exs. 8, 9.

3. Although it's not clear the defendant intended to make this argument, at the hearing there was extensive discussion of whether the Garrisons must make an evidentiary showing relating to remedies that is distinct from (but related to) the "actual injury" question. Specifically, the Court raised the question whether a line of cases not cited by the defendant requires that the Garrisons support their claims for restitution, at the summary judgment stage, with evidence of the actual amount of the price premium they paid. *See Ogden v. Bumble Bee Foods, LLC*, 2014 WL 27527, at *12–13 (N.D. Cal. Jan. 2, 2014); *Ries v. Arizona Beverages USA, LLC*, 2013 WL 1287416, at *7–8 (N.D. Cal. Mar. 28, 2013). If these cases are correct and if they apply here, several of the Garrisons' claims would not be able to survive summary judgment, because there would be no evidence from which the jury could determine the actual amount of restitution owed — the Garrisons' deposition testimony offers nothing more than baseless speculation about the premium they paid, and their expert provides no opinion about that premium. However, it would be unfair to grant summary judgment for the defendant under this line of cases (even assuming the cases are correct) given the procedural posture of this case. Under the Court's scheduling orders, the discovery deadline has passed on the issue of "liability" with respect to the named plaintiffs, but these orders are ambiguous about whether discovery is still open on the question of damages with respect to the named plaintiffs. Moreover, expert discovery is still open, and evidence about a price premium would most likely come from expert testimony, so it would be reasonable to interpret the Court's scheduling orders as saying that

discovery has not closed on the question of damages. *Cf. Ries v. Arizona Beverages USA, LLC*, 287 F.R.D. 523, 532 (N.D. Cal. 2012).

4. The defendant contends that the breach of contract and express warranty claims fail for the additional reason that the Garrisons did not provide pre-suit notice of their claims. Assuming for sake of argument that such notice is required by California law, there is nonetheless a fact issue that precludes summary judgment. The defendant in this case is Whole Foods Market California, Inc. It appears the Garrisons mailed their notice to the correct address for Whole Foods Market California, Inc., namely, 5980 Horton Street, Suite 200 in Emeryville, California. The only mistake they made was to address the letter to "Whole Foods Market, Inc." rather than "Whole Foods Market California, Inc." This mistake is not serious enough to assume that the defendant never received the notification or that the Garrisons failed to properly provide it. *Compare Cardinal Health 301, Inc. v. Tyco Elecs. Corp.*, 169 Cal. App. 4th 116, 135–36 (2008). Nor is the declaration submitted by the defendant, which states that the defendant has "no record of receiving" the notice, sufficient to resolve this issue as a matter of law, particularly given the presumption that when a party mails something to a recipient at the correct address, the recipient actually received it. *Anderson v. United States*, 966 F.2d 487, 491 (9th Cir. 1992) (citing *Rosenthal v. Walker*, 111 U.S. 193–94 (1884)).

IT IS SO ORDERED.

Dated: March 29, 2016

VINCE CHHABRIA
United States District Judge