UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TIMOTHY BARRETT, individually and on behalf of all others similarly situated, Plaintiff, v. MILWAUKEE ELECTRIC TOOL, INC., d/b/a STILETTO TOOLS, INC., Defendant.	Civil No. 14cv1804 JAH(DHB) ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [DOC. # 8]

INTRODUCTION

Currently pending before this Court is the motion to dismiss [doc. # 8] filed by defendant Milwaukee Electric Tool, Inc., dba Stiletto Tools, Inc. ("defendant"). The motion has been fully briefed by the parties. After a careful consideration of the pleadings and relevant exhibits submitted, and for the reasons set forth below, this Court GRANTS defendant's motion.

BACKGROUND

Plaintiff Timothy Barrett ("plaintiff") filed his class action complaint on July 31, 2014. The complaint alleges four causes of action against defendant: (1) false advertising; (2) unfair competition; (3) negligent misrepresentation; and (4) intentional misrepresentation. See Compl. Plaintiff alleges that defendant manufactures, markets and sells its hammers and that, within the class period, class members each purchased

defendant's hammer in the State of California. Id. ¶¶ 6, 121-22. Plaintiff purchased a Stiletto "Tibone" hammer for $222. 60 from Dixieline Lumber in Solana Beach. ¶ 30. Plaintiff claims he and other consumers similarly situated purchased defendant's product because its label contained the statement that it was "100% Handcrafted" which allegedly led plaintiff to believe the product was of "superior quality" than other hammers thus justifying spending more for defendant's product than other lesser quality products. Id. ¶¶ 9, 12, 14.

Plaintiff alleges they were misled by defendant's label, noting defendant's process for producing its hammers is "predominately or entirely" mechanized. Id. ¶¶ 11, 48. Plaintiff also alleges a video on defendant's website demonstrates that defendant's production process is predominantly mechanized and/or automated, further proving defendant's intent to engage in false and misleading advertising Id. ¶¶ 46-57, 73.

Defendant filed the instant motion to dismiss on November 14, 2014. Plaintiffs subsequently filed an opposition and defendant filed a reply brief. The motion was, thereafter, taken under submission without oral argument. See CivLR 7.1(d.1). In addition, defendant, on May 29, 2015, filed a notice of recent authority to which plaintiff filed a response. Defendant, on September 2, 2015, filed a second notice of recent authority.

DISCUSSION

Defendant moves to dismiss plaintiffs' complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

1. Legal Standard

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984); see Neitzke v. Williams, 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law"). Alternatively, a complaint may be dismissed where it

presents a cognizable legal theory yet fails to plead essential facts under that theory. Robertson, 749 F.2d at 534. While a plaintiff need not give "detailed factual allegations," he must plead sufficient facts that, if true, "raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009)(quoting Twombly, 550 U.S. at 547). A claim is facially plausible when the factual allegations permit "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. In other words, "the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief. Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). "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." Iqbal, 129 S.Ct. at 1950.

In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of all factual allegations and must construe all inferences from them in the light most favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir. 2003); Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement." Iqbal, 129 S.Ct. at 1949.

When ruling on a motion to dismiss, the court may consider the facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the court takes judicial notice. Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). If a court determines that a complaint fails to state a claim, the court should grant leave to

amend unless it determines that the pleading could not possibly be cured by the allegation of other facts. See Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995).

2. Analysis

Defendant moves to dismiss all four of plaintiff's claims as they fail to plausibly allege a likelihood of deception to a reasonable consumer. See Doc. # 8-1 at 5-11. Defendant also moves to dismiss plaintiff's intentional and negligent misrepresentation claims for a failure to show the accused statement is false and that the plaintiff justifiably relied on it. See id. at 5.

A. Rule 12 Jurisdiction in UCL and FAL Claims

Defendant contends that the court can decide the issue of whether an advertisement is likely to deceive a reasonable consumer on the instant motion. Doc. # 8-1 at 4-5. Plaintiff argues that his UCL and FAL claims are generally not appropriate for resolution in a motion to dismiss. Doc. # 9 at 12-13. Defendant cites that a determination of whether an advertisement is actionable is purely a question of law because the primary evidence in a false advertising case is the advertisement itself. Lavie v. Proctor & Gamble Co., 105 Cal.App.4th 496, 503 (2003); Ariz. Cartridge Remanufacturers Ass'n, Inc. v. Lexmark Int'l, Inc., 290 F.Supp.2d 1034, 1041 (N.D. Cal. 2003). This Court agrees that whether an advertisement is likely to deceive is a question of law in which the Court can determine because the advertisement was attached to the Complaint. See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555, n. 19 (9th Cir. 1990).

B. UCL and FAL Claims

1. Likelihood of Deception

Defendant also contends that plaintiffs' claims fail because plaintiffs failed to plausibly allege that the "100% Handcrafted" advertisement is false or likely to mislead a reasonable consumer. Doc. # 8-1 at 5. Defendant explains the reasonable consumer standard applies to plaintiffs' claims and, under that standard, the standard is not the least sophisticated consumer. Doc. # 8-1 at 8; Hill v. Roll Intern. Corp., 195 Cal.App.4th

1295, 1304 (2011). Defendant further explains that "likely to be deceived" means that deception must be probable, not just possible. Id. at 9. Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995).

Defendant argues that the term "handmade" cannot mislead a reasonable consumer as a matter of law because it is not a "'specific and measurable claim.'" Id. at 5 (quoting Vitt v. Apple Computer, Inc., 469 F.App'x 605, 607 (9th Cir. 2012)(explaining that an actionable false advertisement requires "a 'specific and measurable claim' capable of being proved false or of being reasonably interpreted as a statement of objective fact")). Defendant claims that the term "100% Handcrafted" is an "[i]nherently vague and generalized" term, rendering it not actionable under California laws that prohibit misrepresentations. Id. at 5-6 (citing Vitt, 469 F.App'x at 607). Defendant asserts that "100% Handcrafted is akin to the claims dismissed in Vitt, in which the Ninth Circuit affirmed the trial court's decision that ads touting that the iBook G4 as "durable," "reliable," "high value," and an "ideal student laptop" were not "factual representations that a given standard has been met." Id. (quoting Vitt, 469 F.App'x at 607).

Defendant further contends that, under the Ninth Circuit's "common sense" approach, plaintiffs' proffered interpretation does not comport with common sense. Id. at 6 (citing Stuart v. Cadbury Adams USA, LLC, 458 F.App'x 689, 690 (9th Cir. 2011)(affirming dismissal of a UCL claim because it "def[ied] common sense.")). Defendant argues that a reasonable interpretation of the use of "100% Handcrafted" on the label cannot be that Stiletto employees, with their bare hands, mine the necessary ore from the Earth, distill the impure metal chlorides, add magnesium and heat rising to more than 2,000 degrees Fahrenheit, then shape the titanium by hand. Id. at 7. Defendant contends plaintiff' s interpretation of "100% Handcrafted" is unreasonable because there is no way a reasonable consumer would believe that every titanium hammer made by defendant was fashioned by hand. Id. Accordingly, defendant contends "[n]ot even the most naive consumer" could believe that. Id. In addition, defendant argues that plaintiff failed to allege any industry-specific standard for the term "handcrafted" because no such

standard exists. Id.

In addition, defendant argues that its use of "100% Handcrafted" cannot plausibly mislead reasonable consumers because its public website contains a video which demonstrates the actual production process for its product. Id. at 9. Defendant contends that a statement cannot be found misleading where the objective facts are disclosed by an advertiser to the buying public. Id. (citing Porras v. StubHub, Inc., 2012 WL 3835073 *6 (N.D.Cal. Sept. 4, 2012); Manchouck v. Mondelez Int'l Inc., 2013 WL 5400285 *3 (N.D.Cal. Sept. 26, 2013); Thomas v. Costco Wholesale Corp., 2013 WL 1435292 *5 (N.D. Cal. Apr. 9, 2013)). Defendant asserts that its website provides notice to consumers of exactly how its hammers are made, so a reasonable consumer cannot plausibly be misled to believe that Stiletto manufactures its titanium hammers completely by hand, without using any machines or equipment. Id. at 10.

In opposition, plaintiff contends that the term "100% Handcrafted" is not required to be false to be actionable when there is a likelihood to deceive or confuse the public. Doc. # 9 at 14. While acknowledging Vitt's binding authority, plaintiff contends that when an advertiser numerically quantifies claims about their product, such claims transcend the realm of puffery and become actionable false advertising. Id. (citing Cook, Perkiss, and Liehe, Inc. v. Northern California Collections Service Inc., 911 F.2d 242, 246 (9th Cir. 1990) (internal citations omitted)). Plaintiff argues that defendant's advertisement claim, "All Stiletto hammers are 100% Handcrafted" is distinct from Vitt because it is a "specific and measurable claim." Plaintiff claims Vitt should not apply here because the term "Handcrafted" can be universally understood to mean made by hand rather than by machine.

Also, plaintiff asserts that the Complain alleges a reasonable consumer would interpret the term "Handcrafted" as it is defined by Merriam-Webster dictionary as "created by a hand process rather than by a machine." Doc. # 9 at 17. Plaintiff also points out that defendant's attempt to use non-party websites to define "Handcrafted" is

evidence extrinsic to the Complaint and thus inappropriate for consideration on a motion to dismiss. Id.[1] Plaintiff then claims that "it is not necessary to turn to legal authority to define a commonly used term" when consumers possess a clear understanding that the term denotes a product of high quality. Id. at 18-19.

In opposition, plaintiffs argues that courts have held a "percentage" claim to be "specific and measurable advertisement claim" and therefore actionable. Doc. # 9 at 19 (citing Southland Sod Farms v. Stover Seeds Co., 108 F.3d 1134, 1145 (9th Cir. 1997; also Abbit v. ING USA Annuity & Life Ins. Co., 99 F.Supp.2d 1189, 1202 (S.D. Cal. 2014)). In addition, plaintiff appeals that defendant's reliance on Manchouck runs counter to precedent which states that consumers should not "be expected to look beyond misleading representations on the front of the box." Id. at 24 (citing Williams v. Gerber Products Co., 552 F.3d 934, 939 (9th Cir. 2008)). Plaintiff also explains that defendant's reliance on Porras is inapplicable here because: 1) Plaintiff does not allege any contract between the parties exists, 2) plaintiff has not had his purchase refunded, 3) Plaintiff purchased defendant product in a store without knowledge of the existence of the processing video, and 4) Porras contravenes binding authority. Id. at 25-26. Plaintiff also attests that defendant's video link was not made "conspicuous and apparent" on the label where the "100% Handcrafted" advertisement was used. Id. at 26-27 (citing Chapman v. Skype Inc., 220 Cal.App.4th 217,227-228 (2013)[2]).

In reply, defendant points out that this Court can find, as a matter of law, that the advertisement could not plausibly mislead reasonable consumers and therefore plaintiff's claims would fail under Rule 12. Doc. # 12 at 2-3 (citing, inter alia, Hairston v. S. Beach

[1] However, Plaintiff likewise attempts to define "handcrafted" inappropriately. Plaintiff cites the meaning of the term "handcrafted"as it was used in, Jacob Shaw Inc. v. City of San Diego Neghborhood Code Compliance, 2007 WL 165231 (Cal. Ct. App. June 20, 2007), a unpublished, noncitable case as binding authority on this Court. Plaintiff also contends that the Court should adopt the definition of "handcrafted," used to define Indian arts and crafts products. Doc. # 9 at 18.

[2] In Chapman, the California Court of Appeal concluded that the call limits Skype included in their fair usage policy was not conspicuous and did not put a reasonable consumer on notice that Skype's advertisement of "Unlimited" calling in initial dealings was in fact not true. The Court reasoned that the phrase "fair usage policy" did not suggest to an ordinary consumer that the "Unlimited" plan is actually limited as to the number of minutes and number of calls.

Bev. Co. Inc., 2012 WL 1893818, at *4 (concluding that where a Court can conclude as a matter of law that members of the public are not likely to be deceived by product packaging, dismissal is appropriate). In addition, defendant points out that plaintiff's reliance on Williams v. Gerber Products Co., 552 F.3d 934 (9th Cir. 2008) is misplaced because courts[3] post-Williams have dismissed UCL claims as a matter of law, especially where the claim alleges a consumer will read a true statement then disregard "well-known facts of life," not assuming things the statement actually says. Doc. # 12 at 3. Defendant explains its "Handcrafted" description reflects the small-batch manufacturing process used to make the titanium hammers and points out that the Complaint catalogues the human involvement in the process without alleging how a hammer could be made by hand. Id. at 4. Defendant also rebuts that the "100% Handcrafted" advertisement is actionable because "Handcrafted" is a vague, generalized term "not factual representations that a given standard has been met,"[4] and "100%" does not make the term specific. Id. at 5-7. Notwithstanding, defendant contends that its advertisement is not false or misleading to reasonable consumers because Stiletto craftsmen manufacture their hammers in small batches of twelve using molds and other industry-related tools.[5] Id. at 7. Thus, according to defendant, this Court should determine that defendant's "100% Handcrafted" statement on its label is not misleading and dismiss plaintiff's complaint. Id. at 9.

Defendant additionally submitted, as supplemental authority, a case in which a district court found the label at issue not misleading and dismissed the action with prejudice. See Doc. # 16 (citing Salters v. Beam Suntory, Inc., 2015 WL 2124939 (N.D. Fla. May 1, 2015)). In Salters, the district court, after considering the plaintiffs' proposed definitions of the term "handmade," found that:

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[3] Red v. Kraft Foods, Inc., 2012 WL 5504011, at *3 (C.D. Cal. Oct. 25, 2012).

[4] Citing Vitt, 469 F. App'x at 607.

[5] Defendant notes that the Complaint outlines human components to its hammer-making process; namely, a "worker lock[s] the 'trees'[onto which was molds are fixed]" and a worker positions the molds on a "pneumatic knockout hammer" so that the ceramic coating can "vibrated off." Doc. # 12 at 8 (quoting Complaint ¶¶ 49, 51).

> In sum, no reasonable person would understand 'handmade' in this context to mean literally by hand. No reasonable person would understand 'handmade' in this context to mean substantial equipment was not used. If 'handmade' means only made from scratch, or in small units, or in a carefully monitored process, then the plaintiffs have alleged no facts plausibly suggesting the statement is untrue.

Salters, 2015 WL 2124939 at *3. Defendant also submitted, as supplemental authority, a case from this district in which the Honorable Larry Burns, District Judge, found the word "handcrafted" was not "specific and measurable" in the context of distilling bourbon. See Doc. # 19 (citing Welk v. Beam Suntory Imp. Co., 2015 WL 5022527 (S.D. Cal. Aug. 21, 2015)). In Welk, Judge Burns, after considering plaintiff's proposed defintion of the word "handcrafted," found that:

> A reasonable consumer wouldn't interpret the word 'handcrafted' on a bourbon bottle to mean that the product is literally 'created by a hand process rather than by a machine.' Thus, it isn't 'reasonably interpreted as a statement of objective fact.' And if Jim Beam uses the term 'handcrafted' to appeal to consumers' loose association of the term with 'higher quality manufacturing and high-end products,' as Welk suggests, then it isn't 'specific and measurable.' Instead it's 'generalized, vague, and unspecified' and therefore inactionable as 'mere puffery.'

Welk, 2015 WL 5022527, at *4 (S.D. Cal. Aug. 21, 2015)

This Court agrees with the findings and conclusions of both the Salters and Welk courts as the analyses therein are persuasive. See also Nowrouzi v. Maker's Mark Distillery, Inc., 2015 WL 4523551 (S.D. Cal. July 27, 2015). Here, plaintiff's complaint alleges that defendant falsely promotes its hammers as being "100% Handcrafted" when in fact defendant's hammers are manufactured entirely using mechanized processes, which are demonstrated by a video posted on defendant's website and defendant's patents. Compl. ¶ 1. Plaintiff, in their opposition, posits two proposed meanings: (1) "fashioned by hand through the use of hand tools;" and (2) "created by a hand process rather than by machine." Doc. # 12 at 8; Doc. # 9 at 18. This Court finds that "100 % Handcrafted" can neither be reasonably interpreted as meaning literally made by hand nor that a reasonable consumer would understand the term to mean no equipment or automated process was used to manufacture the hammers. Notwithstanding, the Complaint reflects plaintiff's recognition that the Stiletto hammer could not have been made entirely by

hand due to its craftsmanship. Plaintiff even alleges that the embossments on the rubber grip of the hammer would not be feasible unless the hammer had been crafted using a mechanized injection molidng process. Compl. ¶ 36. As such, plaintiff was on notice from his observations that Stiletto used processes, beyond what could be achieved by hand, to achieve a precision that could not be accomplished if the hammers were made strictly by hand. Additionally, the video (See https://www.youtube.com/watch?v=WXFRRg8YMT0) posted on defendant's website demonstrates that Stiletto hammers are not made entirely through a mechanized process. For example, at the 2:00 mark in the video, it is shown how humans use their hands to weld the injected molds of the hammers onto the processing "trees." The video then details, at the 2:10-19 portion, that humans use their hands in applying the necessary ceramic coating for each hammer, in which six coats need to be evenly applied before the process can move forward. Also, at the 3:19, the video demonstrates that humans use their hands to polish each hammer to finish the process. The Court finds that humans use their hands to handle and craft the hammers throughout the process of making the Stiletto hammers. Thus, this Court finds plaintiff's interpretation of defendant's "100% Handcrafted" advertisement is unreasonable and it is not likely that a reasonable consumer would have been deceived.

In addition, this Court is convinced that plaintiffs' UCL and FAL claims cannot possibly be cured by the allegation of other facts. Accordingly, this Court GRANTS defendant's motion to dismiss plaintiff's UCL and FAL claims with prejudice. See Doe, 58 F.3d at 497.

C. Negligent and Intentional Misrepresentation

After consideration of the pleadings and relevant exhibits, this Court finds that defendant's "100% Handcrafted" advertisement is not a false statement and more akin to inactionable "mere puffery." See Salters, 2015 WL 2124939, at *3. For that reason, plaintiff's negligent and intentional misrepresentation claims cannot be cured by allegations of other facts. Consequently, the Court GRANTS defendant's motion to dismiss plaintiff's negligent and intentional misrepresentation claims with prejudice. See

Doe, 58 F.3d at 497; See also Countrywide Home Loans, Inc. v. Am.'s Wholesale Lender, Inc., 2014 WL 545841, *3 (C.D. Cal. Feb. 7, 2014).

CONCLUSION AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED that defendant's motion to dismiss [doc. # 8] is GRANTED as follows:

1. Defendant's motion to dismiss plaintiffs' UCL and FAL claims based on failure to plausibly allege likelihood of deception is GRANTED and plaintiffs' UCL and FAL claims are DISMISSED with prejudice;

2. Defendant's motion to dismiss plaintiffs' negligent misrepresentation claim is GRANTED and plaintiff's intentional misrepresentation claim is DISMISSED with prejudice; and

3. Defendant's motion to dismiss plaintiffs' intentional misrepresentation claim is GRANTED and plaintiffs' intentional misrepresentation claim is DISMISSED with prejudice.

The Clerk of Court is directed to terminate this action.

Dated: January 26, 2016

JOHN A. HOUSTON
United States District Judge