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7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 LINDA HAWKINS and TEMI
11 TREIBATCH, Individually and On
12 Behalf of All Others Similarly Situated,

13 Plaintiffs,

14
15 v.

16 UGI CORPORATION, AMERIGAS
17 PROPANE, INC., AMERIGAS
PROPANE, L.P., AMERIGAS
18 PARTNERS, L.P., doing business as
AMERIGAS CYLINDER
19 EXCHANGE, FERRELLGAS, L.P.,
20 doing business as BLUE RHINO,
21 FERRELLGAS PARTNERS, L.P.,
22 FERRELLGAS, INC., FERRELLGAS
PARTNERS FINANCE CORP.,
23 FERRELLGAS FINANCE CORP.,

24 Defendants.

Case No. 14-cv-08461-DDP(JCx)
Consolidated with 14-cv-09398-DDP
(JCx))

CLASS ACTION

**NOTICE OF APPEAL AND NINTH
CIRCUIT RULE 3-2
REPRESENTATION STATEMENT**

Judge: Hon. Dean D. Pregerson
Date: N/A
Time: N/A

ORAL ARGUMENT REQUESTED

1 Notice is hereby given, pursuant to Rule 3(a)(1) and (c)(1) of the Federal
 2 Rules of Appellate Procedure, that Linda Hawkins and Temi Treibatch, Plaintiffs
 3 in the above-entitled action, hereby appeal to the United States Court of Appeals
 4 for the Ninth Circuit from the order dated May 4, 2016, granting Defendants’
 5 motions to dismiss Plaintiff’s Second Amended Complaint (Docket No. 73) and
 6 the Judgment entered thereon, dated and filed May 17, 2016 (Docket No. 75),
 7 copies of which is attached hereto as Exhibits A and B respectively.

8 Counsel and the parties in this matter are listed in the following
 9 Representation Statement as required by Ninth Circuit Rule 3-2:

10 **REPRESENTATION STATEMENT**

<u>PLAINTIFF’S COUNSEL</u>	<u>DEFENDANTS’ COUNSEL</u>
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Inc., Ferrellgas Partners Finance Corp.,
Ferrellgas Finance Corp.*

DATED: June 2, 2016

BOWER LAW GROUP PC

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*Attorneys for Proposed Lead Plaintiffs Teri
Treibach and Linda Hawkins and
for the Putative Class*

CERTIFICATE OF SERVICE

1
2 I hereby certify that on June 2, 2016, I electronically filed the foregoing with
3 the Clerk of the Court using the CM/ECF system, which will send notification of
4 such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I
5 hereby certify that I have e-mailed the foregoing document to the non-CM/ECF
6 participants, if any, indicated on the Manual Notice List.

7 Dated: June 2, 2016

/s/ David E. Bower

8 David E. Bower

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EXHIBIT A

1 Partners, L.P., Ferrellgas, Inc., Ferrellgas Partners Finance
2 Corp., and Ferrellgas Finance Corp. (collectively, "Ferrellgas").
3 Having considered the submissions of the parties and heard oral
4 argument, the court grants the motions to dismiss the Second
5 Amended Complaint ("SAC") and adopts the following order.

6 **I. Background**

7 Amerigas and Ferrellgas (collectively, "Defendants") sell pre-
8 filled propane cylinders to the public at locations such as
9 hardware stores, supermarkets, and gas stations.¹ (SAC ¶¶ 13-14,
10 28.) Defendants operate cages that allow consumers to drop off
11 "empty" propane cylinders and pick up pre-filled cylinders. (Id.
12 ¶¶ 28, 32.) Alternatively, consumers may refill, rather than
13 exchange, their cylinders at refill stations, although Plaintiffs
14 allege that such stations are no longer readily available in most
15 metropolitan areas. (Id. ¶¶ 29-30.)

16 Plaintiffs allege, on behalf of a putative class, that
17 Defendants fill propane cylinders with fifteen pounds of propane,
18 even though standard steel propane cylinders can hold over
19 seventeen pounds. (SAC ¶ 20.) Plaintiffs further allege that
20 Defendants' pre-filled propane cylinders bear labels identifying
21 the "net weight" of the cylinders as fifteen pounds. (Id. ¶ 28.)
22 The SAC also alleges that Defendants' cages and other marketing
23 materials instruct consumers to drop "empty" tanks near the cages
24 before obtaining a pre-filled tank from inside the cage. (Id. ¶¶
25 32, 36.)

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28 ¹ The SAC alleges that the retail stores "may simply have been acting as Defendants' agents" (SAC ¶ 28 n.1.)

1 Plaintiffs further allege that Defendants' propane cylinders
2 are not capable of being truly emptied, and that at the time
3 propane-fueled appliances cease to ignite, the cylinders remain, on
4 average, ten percent full. (SAC ¶ 38.) Plaintiffs allege that
5 they did not know that they might not be able to extract the
6 entirety of the fifteen pounds of propane purchased, or that
7 factors such as outside air temperature might affect their ability
8 to extract propane from Defendants' tanks. (Id. ¶¶ 5, 7.)
9 Defendants allegedly know that the cylinders cannot be emptied, but
10 do not inform consumers of that fact. Plaintiffs allege that
11 Defendants can easily implement a point-of-exchange weighing system
12 that would inform consumers how much propane remains in an "empty"
13 tank, but choose not to because Defendants benefit by continually
14 reselling the unused ten percent that remains when consumers drop
15 off "empty" tanks, and Defendants choose not to utilize more
16 efficient delivery technologies so as to continue enjoying that
17 benefit. (Id. ¶¶ 33, 38-39.)

18 Defendants now move to dismiss all twelve causes of action
19 alleged in the SAC.²

20 **II. Legal Standard**

21 A complaint will survive a motion to dismiss when it contains
22 "sufficient factual matter, accepted as true, to state a claim to
23 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.

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25 ² Plaintiffs appear to have filed a total of three oppositions
26 to the two motions. Docket Entries 66 and 68 appear to be
27 identical oppositions to Amerigas' motion, even though certain
28 pages identify themselves as part of the opposition to the
Ferrellgas motion. Docket Entry 67 is an opposition to the
Ferrellgas motion, although the table of authorities therein does
not appear to correspond to either of Plaintiffs' memoranda.

1 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,
2 570 (2007)). When considering a Rule 12(b)(6) motion, a court must
3 "accept as true all allegations of material fact and must construe
4 those facts in the light most favorable to the plaintiff." Resnick
5 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint
6 need not include "detailed factual allegations," it must offer
7 "more than an unadorned, the-defendant-unlawfully-harmed-me
8 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or
9 allegations that are no more than a statement of a legal conclusion
10 "are not entitled to the assumption of truth." Id. at 679. In
11 other words, a pleading that merely offers "labels and
12 conclusions," a "formulaic recitation of the elements," or "naked
13 assertions" will not be sufficient to state a claim upon which
14 relief can be granted. Id. at 678 (citations and internal
15 quotation marks omitted).

16 "When there are well-pleaded factual allegations, a court should
17 assume their veracity and then determine whether they plausibly
18 give rise to an entitlement of relief." Id. at 679. Plaintiffs
19 must allege "plausible grounds to infer" that their claims rise
20 "above the speculative level." Twombly, 550 U.S. at 555.

21 "Determining whether a complaint states a plausible claim for
22 relief" is a "context-specific task that requires the reviewing
23 court to draw on its judicial experience and common sense." Iqbal,
24 556 U.S. at 679.

25 **III. Discussion**

26 A. Procedural History and New Allegations

27 In granting Defendants' motions to dismiss an earlier
28 iteration of the SAC, this court found Plaintiffs' claims

1 implausible. Specifically, the court found that, given Defendants'
2 up-front, explicit, and undisputedly accurate representation that
3 Defendants' propane cylinders contain fifteen pounds of propane,
4 Plaintiffs could not plausibly allege that consumers were misled as
5 to the amount of propane within the cylinders. (Dkt. 54 at 5.)
6 The court was not persuaded by Plaintiffs' emphasis on usable
7 quantities of propane, as Defendants never made any representation
8 regarding usability or accessibility, and consumers generally know
9 that they may not be able to separate every bit of a product from
10 its packaging. (Dkt. 54 at 5 (citing Ebner v. Fresh Inc., No. SACV
11 13-477 JVS, 2013 WL 9760035 (C.D. Cal. Sept. 11, 2013)). This
12 court also determined that instructions to consumers to drop
13 "empty" tanks off outside Defendants' cages could not plausibly be
14 interpreted as a representation by Defendants that a consumer would
15 be able, contrary to the laws of physics, to utilize every molecule
16 of propane contained within a newly-purchased tank. (Dkt. 54 at
17 6.)

18 The allegations of the SAC are not materially different from
19 Plaintiffs' earlier allegations. The SAC does now include
20 allegations about Plaintiffs' subjective state of mind at the time
21 of purchase, including a lack of awareness that they would not be
22 able to use all of the propane they purchased. Although the SAC
23 acknowledges that the average amount of propane remaining in a
24 spent cylinder will vary as a result of environmental factors, it
25 also alleges that this fact is not generally known to consumers,
26 and that consumers have no way to "observe" the amount of propane
27 left in a spent tank. (SAC ¶¶ 31, 45 n. 2.)

28

1 The bulk of the new allegations, however, concern Defendants'
2 business practices. Plaintiffs allege, for example, that
3 Defendants have pared back their refilling, as opposed to cylinder
4 exchange, operations. Plaintiffs further allege that Defendants
5 could install a "weighing scale or gage [sic] that would tell the
6 consumers how much propane is left in the 'empty' tanks they are
7 exchanging." (SAC ¶ 33.) The SAC also now alleges that Defendants
8 could utilize new technology to improve the cylinders themselves to
9 allow more complete discharge of propane, or could inform consumers
10 that spent tanks do still contain some propane. (SAC ¶¶ 37, 39,
11 41.)

12 B. Plausibility of Fraud-Based Claims

13 As an initial matter, Plaintiffs' new allegations do little to
14 bolster the plausibility of the previously-dismissed,
15 misrepresentation-based claims. The SAC continues to acknowledge
16 that Defendants' cylinders accurately state, as they must, the net
17 weight of the propane contained therein. The SAC contains no new
18 material allegations regarding Defendants' "empty" cylinder drop-
19 off instructions. As this court explained, the word "empty"
20 appears only in the context of instructing consumers how to
21 complete a tank exchange. It remains implausible that a consumer
22 would interpret instructions regarding what to do with the propane
23 tank in his possession, which may or may not retain sufficient gas
24 pressure to dispense propane, as a representation that he would be
25 able to utilize every last ounce, or any particular percentage, of
26 the new, pre-filled tank he intended to purchase.

27 Further, and as explained by this court by reference to
28 toothpaste, peanut butter, shampoo, and many other products, the

1 general consumer is generally aware that she may not be able to
2 extract every bit of a product from its packaging. The same
3 reasoning underpinned the court's decision in Ebner v. Fresh Inc.,
4 No. SACV 13-477 JVS, 2013 WL 9760035 (C.D. Cal. Sept. 11, 2013),
5 which dismissed claims relating to accurately labeled, difficult to
6 extract lip balm, and was recently affirmed by the Ninth Circuit.
7 See Ebner v. Fresh, Inc., - F.3d -, 2016 WL 1056088 (9th Cir. Mar.
8 17, 2016). The Ninth Circuit held that a reasonable consumer
9 understands the "general mechanics" of a lip balm dispenser tube,
10 and that "[a]lthough the consumer may not know precisely how much
11 product remains, the consumers' knowledge that *some* additional
12 product lies below the tube's opening is sufficient to dispel any
13 deception" Ebner, - F.3d - at *6.

14 Plaintiffs attempt to distinguish the Ninth Circuit's holding
15 in Ebner by arguing that, unlike consumers of lip balm, they have
16 no way to see that any propane is left in an opaque steel cylinder,
17 have no choice but to return partially full cylinders to
18 Defendants, and cannot extract any propane that does remain. These
19 arguments are not persuasive. First, it simply is not the case
20 that consumers of propane have no choice but to yield unused, re-
21 sellable propane to Defendants. Although the SAC does allege that
22 propane refilling stations "are not readily available at all in
23 most metropolitan areas," that vague allegation flies in the face
24 of common sense and experience. Consumers who prefer to retain any
25 supposed benefit of unusable propane can opt to refill their
26 cylinders rather than exchange them at Defendants' cages. Second,
27 even if there were no refilling options available, consumers, like
28 those in Ebner, can determine whether or not any product remains.

1 Granted, consumers of propane cannot see the amount of product
2 remaining, any more than can purchasers of shaving cream,
3 hairspray, whipped cream, certain sunscreens, and many other
4 products. That inability to visually inspect a propane cylinder's
5 contents does not, however, prevent a consumer from determining
6 whether some product remains. Propane is stored in cylinders in
7 liquid form, and does not evaporate to gaseous form until exposed
8 to normal temperatures and pressures. Even assuming that consumers
9 do not understand the "general mechanics" of pressurized
10 containers, a consumer can determine whether product remains by
11 audibly sloshing remaining liquid around in the cylinder, or by
12 feeling the heft of a partially full cylinder. Those consumers who
13 desire a more accurate determination can simply weigh a cylinder on
14 a standard bathroom or other scale and subtract the tare weight of
15 the cylinder. Thus, regardless of consumers' inability to visually
16 observe the level of product remaining in a cylinder, and as in
17 Ebner, Plaintiffs here cannot plausibly allege that Defendants'
18 admittedly accurate net weight labels or "empty" tank drop-off
19 instructions are fraudulent, deceptive, or misleading.^{3 4}

20
21 ³ Even if Plaintiffs' claims were plausible, claims based upon
22 net weight labeling or cylinder design would be subject to
23 California's safe harbor doctrine, which bars claims predicated
24 upon conduct affirmatively permitted by statute. Ebner, - F.3d -
25 at *3 (citing Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20
26 Cal. 4th 163 (1999)). Federal regulations expressly permit the
27 steel tank design utilized by Defendants. 49 C.F.R. § 178.51.
28 California law mandates that Defendants label the cylinders' net
weight of propane. 4 C.C.R. § 4051(f).

This is not to say, and, contrary to Plaintiffs' characterization, Defendants do not argue, that the safe harbor doctrine immunizes Defendants from any and all possible claims under the CLRA, FAL, or UCL.

⁴ Plaintiffs have not adequately alleged claims based upon an
(continued...)

1 C. Unfair Business Practices

2 Plaintiffs contend that, even if their fraud-based claims
3 fail, they have adequately pleaded a claim for unfair competition
4 under California Business & Professions Code § 17200, which
5 proscribes "unfair" acts as well as unlawful or fraudulent ones.
6 See Cel-Tech, 20 Cal.4th at 180. Plaintiff's "unfair prong" claim
7 centers on Defendants' alleged "withholding from Plaintiffs . . .
8 credits earned for unused propane . . . and practice of
9 withholding leftover propane and reutilizing it for their own
10 profits" (SAC ¶ 72.)

11 California courts have applied differing tests in determining
12 whether a business practice is "unfair." See Hodsdon v. Mars,
13 Inc., - F.Supp.3d -, 2016 WL 627383 at * 7 (N.D. Cal. Feb. 17,
14 2016); Davis v. Ford Motor Credit Co., 179 Cal. App. 4th 581, 593-
15 97 (2009). One common, relatively less burdensome test finds a
16 business practice unfair if the practice "offends an established
17 public policy or when the practice is immoral, unethical,
18 oppressive, unscrupulous, or substantially injurious to consumers."
19 Hodsdon, - F.Supp.3d at * 7 (quoting S. Bay Chevrolet v. Gen.
20 Motors Acceptance Corp., 72 Cal. App. 4th 861, 886-87 (1999)
21 (internal quotation marks omitted). Looking to the practice's
22 impact on the alleged victim, the reasons and justifications for
23 the practice, and the motives of the alleged wrongdoer, "the court
24 must weight the utility of the defendant's conduct against the

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27 ⁴(...continued)
28 omission. Under California law, manufacturers only bear a duty to
disclose information related to safety concerns. Wilson v.
Hewlett-Packard Co., 668 F.3d 1136, 1142 (9th Cir. 2012).

1 gravity of the harm" S. Bay Chevrolet, 72 Cal. App. 4th at
2 886 (internal quotation and citation omitted).

3 Plaintiffs point to two alleged harms to consumers. First,
4 although contending that they are "well tethered to the reality
5 that products often adhere to the inside of their containers,"
6 Plaintiffs nevertheless argue that an alleged ten percent rate of
7 unusable propane is an "exorbitant amount."⁵ (Opp. to Amerigas
8 mot. at 17.) This supposed harm is premised upon the assumption
9 that Plaintiffs have no choice but to yield any inaccessible
10 propane to Defendants. As discussed above, that is not the case,
11 as propane consumers may opt to refill, rather than exchange, their
12 propane cylinders, thus retaining the unusable portion of propane
13 for themselves. See, e.g. Tietsworth v. Sears, 720 F.Supp.2d 1123,
14 1139 (N.D. Cal. 2010) (explaining, in unconscionability context,
15 that "any claim of oppression may be defeated if the complaining
16 party had reasonably available alternative sources of supply from
17 which to obtain the desired goods or services" (internal
18 quotation and citation omitted)).

19 Second, and in Plaintiffs' minds, more importantly, Plaintiffs
20 assert that they are harmed by their inability to "see how much
21 propane remains in the tank when it was no longer able to start a
22 fire." (Opp. to Amerigas mot. at 17.) As also explained above,
23 consumers' ability to determine whether, or even how much, propane
24 remains in a cylinder is not dependent upon visual observation.
25 The harms alleged here are not particularly severe.

26 _____
27 ⁵ This argument contradicts the SAC, which alleges that
28 Plaintiffs "never realized [they] would not be able to utilize all
of the propane [they] were purchasing" (SAC ¶¶ 5, 7
(emphasis added).)

1 Nor do the justifications for Defendants' business practices
2 strike this court as particularly nefarious. At present, consumers
3 drop their tanks off outside Defendants' cylinder cages. A retail
4 store employee then unlocks the cage and hands the consumer a
5 filled cylinder, for which the consumer later pays at a point of
6 sale. Plaintiffs request that Defendants implement a measurement
7 and credit system whereby the retail store employee would first
8 weigh or otherwise assess consumers' old cylinder, determine the
9 weight of any remaining propane, calculate the value of that
10 propane, and then issue a credit, specific to that cylinder, to the
11 consumer, who presumably would later seek to apply that credit to
12 the newly purchased cylinder at a point of sale, or perhaps "cash
13 out" instead. The justifications for, and utility of, Defendants'
14 relatively streamlined system appear obvious when contrasted with
15 the more complicated, time-consuming, and likely costly mechanism
16 Plaintiffs propose. Given the balance of the relevant factors,
17 Plaintiffs have not plausibly alleged an unfair business practice.

18 D. Other Claims

19 Among the claims Defendants move to dismiss are Plaintiffs'
20 claims for "Violation of Consumer Fraud Laws of Several States
21 Except for California," breach of contract and "Breach of Express
22 Warranties of Each State," violation of the Magnuson-Moss Warranty
23 Act, violation of California's Song-Beverly Consumer Warranty Act,
24 unjust enrichment, and money had and received. Although Plaintiffs
25 refer to Defendants' arguments in passing, they provide no
26 substantive opposition or arguments of their own. The court

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1 construes this failure as a waiver of those claims.⁶ See Rodriguez
2 v. Federal Nat'l Mortgage Assoc., No. 15-cv-04890-ODW, 2015 WL
3 9582539 at *2 (C.D. Cal. Dec. 29. 2015).

4 **IV. Conclusion**

5 For the reasons stated above, Defendants' Motions to Dismiss
6 are GRANTED. The Second Amended Complaint is DISMISSED, with
7 prejudice.

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9 IT IS SO ORDERED.



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12 Dated: May 4, 2016

DEAN D. PREGERSON
United States District Judge

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25 ⁶ The closest Plaintiffs come to a substantive opposition is,
26 with respect to their contract and warranty claims, a statement
27 that "[A]ny act that a person may do may be done through an agent."
28 (Opps. at 23.) Even assuming that Plaintiffs are referring to
retailers who host cylinder cages, the SAC only alleges, in a
footnote, that such retailers "may" have been acting as agents,
without any factual support or allegations regarding contracts or
warranties entered into by any supposed agent. See n.1, supra.

EXHIBIT B

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LINDA HAWKINS and TEMI
TREIBATCH, Individually and on
Behalf of all Others Similarly Situated,

Plaintiffs,

vs.

UGI CORPORATION, AMERIGAS
PROPANE, INC., AMERIGAS
PROPANE, L.P., AMERIGAS
PARTNERS, L.P., dba AMERIGAS
CYLINDER EXCHANGE,
FERRELLGAS COMPANY, INC.,
FERRELLGAS, L.P., dba BLUE
RHINO, FERRELLGAS PARTNERS,
L.P., FERRELLGAS, INC.,
FERRELLGAS PARTNERS FINANCE
CORP., FERRELLGAS FINANCE
CORP.,

Defendants.

Case No. 2:14-cv-08461-DDP (JCx)
Consolidated with 2:14-cv-09398-
DDP (JCx))

FINAL JUDGMENT

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The Court hereby enters final judgment in favor of Defendants UGI CORPORATION, AMERIGAS PROPANE, INC., AMERIGAS PROPANE, L.P., AMERIGAS PARTNERS, L.P., dba AMERIGAS CYLINDER EXCHANGE, FERRELLGAS COMPANY, INC., FERRELLGAS, L.P., dba BLUE RHINO, FERRELLGAS PARTNERS, L.P., FERRELLGAS, INC., FERRELLGAS PARTNERS FINANCE CORP., and FERRELLGAS FINANCE CORP.

(collectively, "Defendants") as follows:

1. Final judgment is entered in favor of Defendants and against Plaintiffs Linda Hawkins and Temi Treibatch (collectively, "Plaintiffs");
2. Plaintiffs shall take nothing as to Defendants by way of their Second Amended Complaint [Dkt. 55].

Dated: May 17, 2016



Hon. Dean D. Pregerson
United States District Court Judge