UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 23-5711 PA (MARx)	Date	October 12, 2023
Title	Amelia Blackburn, et al. v. Etsy, Inc.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Kamilla Sali-Suleyman	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
None	None	

Proceedings: IN CHAMBERS — COURT ORDER

Before the Court is a Motion to Dismiss filed by defendant Etsy, Inc. ("Etsy" or "Defendant") (Docket No. 15). Defendant challenges the sufficiency of the Complaint filed by plaintiffs Amelia Blackburn and Taylor Blackburn (collectively "Plaintiffs") on behalf of themselves and a putative nationwide class of consumers who purchased goods from Etsy. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for October 16, 2023, is vacated and the matter taken off calendar.

I. Factual and Procedural Background

Etsy is, according to the Complaint, an "e-commerce platform . . . that allows vendors to sell goods directly to consumers, with a traditional focus on handmade or vintage items and craft supplies." (Compl. ¶ 2.) The Complaint alleges: "Since February 2019, Defendant has marketed itself across various platforms as '100% offsetting all carbon omissions from shipping.' A February 2019 webpage says that Etsy is 'becoming the first major online shopping destination to offset 100% of carbon emissions generated by shipping.'" (Id. ¶ 38.) Plaintiffs additionally allege that Etsy's annual SEC 10-K disclosures have touted the company's "goal to run a carbon neutral business" and that the checkout page a customer sees when making a purchase states that "Etsy offsets carbon emissions from every delivery." (Id. ¶¶ 39 & 42.)

Plaintiffs allege that Amelia Blackburn has made 20 purchases on Etsy since February 2019, and that Taylor Blackburn has made 16 purchases on Etsy since February 2019. (See id. ¶¶ 12 & 14.) According to the Complaint, "Plaintiffs have since discovered" that Etsy's representations about offsetting the carbon emissions from its shipping activities "are manifestly and provably false" because "nearly all offsets issued by the voluntary carbon offset market over promise and under deliver on their net carbon impact due to endemic methodological errors and fraudulent accounting on behalf of offset vendors." (Id. ¶¶ 6 & 46.) Plaintiffs' Complaint

alleges that because of these asserted problems with the carbon offset market, which Plaintiffs believe apply to the offsets purchased by Etsy, mean that its "representations that it '100% offset' all emissions from deliveries due to their purchase of offsets from the voluntary carbon market are in fact false—Defendant had simply invested in projects that, assuming nothing goes wrong, will altogether take all of those future years to offset Defendant's most recent year of carbon emissions from shipping." (Id. ¶ 62.)

Plaintiffs allege that they were injured because they would not have purchased the goods at the price they paid had they known Etsy's representations about offsetting 100% of the carbon emissions from shipping were false. Specifically, the Complaint alleges:

> Plaintiffs and the putative class were wronged by these actions. There is a significant market premium for green products, and specifically products that do not contribute to climate change. Since February 2019, Plaintiffs purchased products on Etsy's e-commerce platform at a market premium due to their belief that by using Etsy's e-commerce platform over another, they engaged in more ecologically conscious consumption and participated in a global transition away from carbon emissions. During this entire period, Defendant's e-commerce platform still produced massive amounts of CO2 from shipping, and its reliance on the voluntary carbon offset market in no way prevents its '100% offset' representations from being false and misleading. Plaintiffs would not have utilized Defendant's e-commerce platform, or at the very least would have paid substantially less for their purchases or sales on the platform, if they understood at the time of purchase that Defendant's carbon offsetting representations were false."

(Id. ¶ 7; see also id. ¶ 16.)

The Complaint alleges claims for: (1) violation of California's Consumers Legal Remedies Act, Cal. Civ. Code § 1750 et seq. ("CLRA"); (2) violation of California's False Advertising Law, Cal. Bus. & Prof. Code § 17500 ("FAL"); (3) Unlawful, Unfair, and

Fraudulent Trade Practices pursuant to California Business and Professions Code section 17200; and (4) negligent misrepresentation pursuant to California Civil Code section 1710.[1/]

Etsy contends in its Motion to Dismiss that Plaintiffs allegations concerning the price premium Plaintiffs claim to have paid for products with a 100% carbon offset fail to allege well-pleaded facts that Plaintiffs suffered an injury in fact and therefore lack standing to pursue their claims. Etsy additionally asserts that Plaintiffs' Complaint fails to state viable claims because, according to Etsy, Plaintiffs' particular view of the carbon offset market is not shared by reasonable consumers and relies on implausible allegations of falsity, Plaintiffs do not plausibly allege reliance, and the claim for negligent misrepresentation is barred by the economic loss doctrine.

II. Legal Standard

Generally, plaintiffs in federal court are required to give only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). While the Federal Rules allow a court to dismiss a cause of action for "failure to state a claim upon which relief can be granted," they also require all pleadings to be "construed so as to do justice." Fed. R. Civ. P. 12(b)(6), 8(e). The purpose of Rule 8(a)(2) is to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957)). The Ninth Circuit is particularly hostile to motions to dismiss under Rule 12(b)(6). See, e.g., Gilligan v. Jamco Dev. Corp. , 108 F.3d 246, 248-49 (9th Cir. 1997) ("The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim.") (internal quotation omitted).

However, in Twombly, the Supreme Court rejected the notion that "a wholly conclusory statement of a claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." Twombly, 550 U.S. at 561, 127 S. Ct. at 1968 (internal quotation omitted). Instead, the Court adopted a "plausibility standard," in which the complaint must "raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction]." Id. at 556, 127 S. Ct. at 1965. For a complaint to meet this standard, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." Id. at 555, 127 S. Ct. at 1965 (citing 5 C. Wright &

[1/] It is unclear how these claims brought under California law could apply to a nationwide class of consumers against a company incorporated in Delaware with a principal place of business in New York.

A. Miller, Federal Practice and Procedure §1216, pp. 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action") (alteration in original)); Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002) ("'All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.'") (quoting Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555, 127 S. Ct. at 1964-65 (internal quotations omitted). In construing the Twombly standard, the Supreme Court has advised that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009).

The more stringent pleading requirements of Federal Rule of Civil Procedure 9(b) apply to allegations of fraud. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). "Rule 9(b) requires particularity as to the circumstances of the fraud – this requires pleading facts that by any definition are 'evidentiary': time, place, persons, statements made, explanation of why or how such statements are false or misleading." In re Glenfed, Inc. Securities Litigation, 42 F.3d 1541, 1548 n.7 (9th Cir. 1994); see also Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 540 (9th Cir. 1989) ("A pleading is sufficient under rule 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations. While statements of the time, place and nature of the alleged fraudulent activities are sufficient, mere conclusory allegations of fraud are insufficient.") (citing Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir. 1987)).

III. Analysis

A. Negligent Misrepresentation

Defendant seeks to dismiss Plaintiffs' negligent misrepresentation claim as barred under California law by the economic loss rule. "The economic loss rule requires a purchaser to

recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise." Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 988, 22 Cal. Rptr. 3d 352, 358 (2004). In Robinson Helicopter, the California Supreme Court allowed a fraud claim, and created an exception to the economic loss rule, where "a defendant's affirmative misrepresentations on which a plaintiff relies and which expose plaintiff to liability for personal damages independent of the plaintiff's economic loss." Id. at 993, 22 Cal. Rptr. 3d at 362.

Plaintiffs' Opposition to the Motion to Dismiss does not contain any argument concerning their claim for negligent misrepresentation or why it is not barred by the economic loss doctrine. The Court therefore concludes that Plaintiffs have abandoned their claim for negligent misrepresentation and the Court dismisses it without leave to amend. See Stichting Pensioenfonds ABP v. Countrywide Fin. Corp., 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) ("[I]n most circumstances, failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue.") (quoting Sportscare of America, P.C. v. Multiplan, Inc., No. 2:10–4414, 2011 WL 589955, at *1 (D.N.J. Feb. 10, 2011)); see also Jenkins v. County of Riverside, 398 F.3d 1093, 1095 n. 4 (9th Cir.2005) (plaintiff abandoned claims by not raising them in opposition to motion for summary judgment).

B. Standing

To satisfy the requirements for Article III standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 578 U.S. 330, 338, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016). Importantly, the requirements for Article III standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, [so] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). Specifically, "at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element" of Article III standing. Spokeo, 578 U.S. at 338, 136 S. Ct. at 1547 (quoting Warth v. Selden, 422 U.S. 490, 518, 95 S. Ct. 2197, 2215, 45 L. Ed. 2d 343 (1975)).

In construing the standing requirements for false advertising clams under California law like those asserted here, the California Supreme Court has explained:

> From the original purchasing decision we know the consumer valued the product as labeled more than the money he or she parted with; from the complaint's allegations we know the consumer valued the money he or she parted with more than the product as it actually is; and from the combination we know that because of the misrepresentation the consumer (allegedly) was made to part with more money than he or she otherwise would have been willing to expend, i.e., that the consumer paid more than he or she actually valued the product. That increment, the extra money paid, is economic injury and affords the consumer standing to sue.

Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 330, 120 Cal. Rptr. 3d 741, 757 (2011).

In support of their CLRA, FAL, and unfair business practices claims, Plaintiffs allege that as a result of Defendant's alleged misrepresentation that Defendant's business provides "100% offsetting [of] all carbon omissions from shipping," Plaintiffs "would not have utilized Defendant's e-commerce platform, or at the very least would have paid substantially less for their purchases or sales on the platform" and "paid a substantial price premium due to the false and misleading 100% offsetting claim." (Compl. ¶¶ 16 & 38.) That is, according to the Complaint, Plaintiffs' "injury in fact" is the economic harm from paying a price premium resulting from the 100% offsetting claim. But the Complaint also alleges that Etsy's platform allows "vendors to sell goods directly to consumers, with a traditional focus on handmade or vintage items and craft supplies." (Id. ¶ 2.) Nor do all of the statements promise to offset 100% of carbon emissions. (Id. ¶ 43 ("Etsy offsets carbon emissions from every delivery.").)

The Ninth Circuit, in construing equivalent false advertising claims under New York's consumer protection laws, explained that it is not sufficient for a complaint to allege only that a plaintiff paid a price premium for the product:

> Plaintiffs did not allege how much they paid for the beverage, how much they would have paid for it absent the alleged deception, whether Starbucks (as opposed to a third-party distributor) was responsible for any overpayment, or any other details regarding the price premium. The bare recitation of the word "premium" does not adequately allege a cognizable injury.

Naimi v. Starbucks Corp., 798 F. App'x 67, 70 (9th Cir. 2019) (emphasis added). Courts within the Ninth Circuit, when applying California law, have similarly concluded that a conclusory allegation of a price premium, without supporting well-pleaded facts, fails to satisfactorily allege standing under the applicable federal pleading standard. See Babaian v. Dunkin' Brands Group, Inc., CV 17-4890 VAP (MRWx), 2018 WL 11445614, at *8 (C.D. Cal. Feb. 16, 2018) ("Plaintiff does not sufficiently allege facts supporting a plausible inference of a price premium."); see also Horti v. Nestle HealthCare Nutrition, Inc., CV 21-9812 PJH, 2022 WL 2441560, at *8 (N.D. Cal. July 5, 2022) ("Plaintiffs announce that they have suffered injury based on their payment of a 'premium price' for a product that did not work as advertised and that they would not have paid for had they known the truth, but this is insufficient to adequately allege a cognizable injury. As in Naimi, plaintiffs' allegations lack any detail about the prices they paid or the differences between Boost Glucose Control products and non-premium products. Plaintiffs thus fail to make out a concrete injury. Plaintiffs lack standing for any of their claims . . . .").

Because the Complaint alleges that vendors sell unique handmade or vintage items directly to consumers, it is not clear, at least from the allegations in the Complaint, that any particular product purchased by Plaintiffs was available elsewhere, let alone at a cheaper price that did not reflect the "premium" associated with Etsy having purchased carbon offsets through the carbon offset market. The price of a unique handmade product may result from a variety of factors that may have nothing to do with whether the platform on which it was sold attempted to offset the carbon from the platform's shipping activities. To adequately allege standing, Plaintiffs must allege well-pleaded facts that make it plausible that the allegedly false information about the carbon offsets caused Plaintiffs to pay a price premium. See Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 966 (9th Cir. 2018) ("To properly plead an economic injury, a consumer must allege that she was exposed to false information about the product purchased, which caused the product to be sold at a higher price, and that she 'would not have purchased the goods in question absent this misrepresentation.'") (quoting Honojos v. Kohl's Corp., 718 F.3d 1098, 1105 (9th Cir. 2013)). The Complaint alleges no well-pleaded facts that support a plausible inference that Plaintiffs paid a price premium caused by Etsy's statements about carbon offsetting.

The Court therefore concludes that the Complaint fails to satisfactorily allege well-pleaded facts to satisfy the federal pleading standard to support Plaintiffs' standing. This conclusion is further supporting by the particular situation alleged in the Complaint, where there is no single product purchased by the class, the alleged misstatement has nothing to do with the quality of any particular product, and many factors may have contributed to a consumer's

decision to purchase a particular item.[2/] Moreover, Plaintiffs' entire theory is that Etsy in fact purchased carbon offsets from the carbon offset market that, according to the market, would offset Etsy's carbon footprint from shipping. It is the carbon offset market, and not Etsy, that sets the price for those offsets and the amount of carbon at which those offsets are valued. Based on what is alleged in the Complaint, there are no well-pleaded facts that plausibly support an inference that the alleged misstatements about the efficacy of Etsy's carbon offset program caused Plaintiffs or the class they seek to represent to pay a premium for the goods they purchased. As a result, the Complaint does not satisfactorily allege well-pleaded facts sufficient at the pleading stage to support Plaintiffs standing to assert their claims.

Because the Complaint fails to satisfactorily allege well-pleaded facts to support Plaintiffs' standing, the Court dismisses the CLRA, FAL, and unfair business practices claims with leave to amend. Unless and until Plaintiffs can allege sufficient facts to support their standing, the Court declines to address the remaining grounds raised in Defendant's Motion to Dismiss.

Conclusion

For all of the foregoing reasons, the Court grants Defendant's Motion to Dismiss. Plaintiffs' claim for negligent misrepresentation is dismissed without leave to amend. Plaintiffs' remaining CLRA, FAL, and unfair business practices claims are dismissed with leave to amend. The First Amended Complaint may not include any new claims or parties without the Court's authorization. Plaintiffs' First Amended Complaint, if any, shall be filed by no later than November 6, 2023. Failure to file a First Amended Complaint by that date may, without further warning, result in the Court deeming Plaintiffs to have stood on their Complaint and the dismissal of the original Complaint without leave to amend and with prejudice.

IT IS SO ORDERED.

[2/] This problem, even if Plaintiffs can allege sufficient facts related to the purchases they made to plausibly allege that they paid a price premium for the products they purchased, may prove insurmountable at the class certification stage, when they seek to represent a class of purchases who all purchased different products at different prices, some of which might not have been available elsewhere. Such situations, along with others, such as whether the 100% offsetting statements were material to each purchaser's decision, may require individualized determinations that may not be suitable for class-wide treatment.