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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LINDA HAWKINS, INDIVIDUALLY)
AND ON BEHALF OF ALL OTHERS)
SIMILARLY SITUATED,)
)
Plaintiff,)
)
v.)
)
UGI CORPORATION; AMERIGAS)
PROPANE, INC.; AMERIGAS)
PROPANE, L.P.; AMERIGAS)
PARTNERS, L.P., doing)
business as AMERIGAS)
CYLINDER EXCHANGE;)
FERRELLGAS COMPANY, INC.;)
FERRELLGAS, L.P., doing)
business as BLUE RHINO LLC;)
FERRELLGAS, INC.;)
FERRELLGAS PARTNERS FINANCE)
CORP.; FERRELLGAS FINANCE)
CORP.,)
)
Defendants.)
)

Case No. CV 14-08461 DDP (JCx)

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS**

[Dkt. 41, 42]

Presently before the court are two separate, but similar motions to dismiss filed by Defendants UGI Corporation, Amerigas Propane, Inc., Amerigas Propane, L.P., Americas Partners, L.P. (collectively, "Amerigas") and Ferrellgas, L.P., Ferrellgas, Inc., Ferrellgas Partners Finance Corp., and Ferrellgas Finance Corp.

1 (collectively, "Ferrelgas"). Having considered the submissions of
2 the parties and heard oral argument, the court grants the motion
3 and adopts the following order.

4 **I. Background**

5 Amerigas and Ferrelgas (collectively, "Defendants") sell pre-
6 filled propane cylinders to the public at locations such as
7 hardware stores, supermarkets and gas stations. (Consolidated
8 Amended Complaint ("CAC") ¶ 11.) Defendants operate cages that
9 allow consumers to drop off "empty" propane cylinders and pick up
10 pre-filled cylinders. (Id. ¶ 12.) Alternatively, consumers may
11 refill rather than exchange their cylinders at certain designated
12 refill stations. (Id. ¶ 27.)

13 Plaintiffs allege, on behalf of a putative class, that
14 Defendants fill their propane cylinders with fifteen pounds of
15 propane, even though standard propane cylinders can hold over
16 seventeen pounds. (CAC ¶ 18.) Plaintiffs further allege that
17 Defendants' pre-filled propane cylinders bear labels identifying
18 the "net weight" of the cylinders as fifteen pounds. (Id. ¶ 27.)
19 Plaintiffs also allege that Defendants' cages and other marketing
20 materials instruct consumers to drop "empty" tanks near the cages
21 before obtaining a pre-filled tank from inside the cage. (Id. ¶¶
22 27, 33-34.)

23 Plaintiffs further allege that Defendants' propane cylinders
24 are not capable of being truly emptied, and that at the time
25 propane-fueled appliances cease to ignite, the cylinders remain, on
26 average, ten percent full. (CAC ¶ 30.) Defendants allegedly know
27 that the cylinders cannot be emptied, but do not inform consumers
28 of that fact, and benefit by continually reselling the unused ten

1 percent that remains when consumers drop off "empty" tanks. (Id.)
2 The CAC alleges twelve causes of action, including fraud claims,
3 common law claims, and statutory claims under California law. All
4 claims are premised on the essential allegations that Defendants
5 "net weight" labels and "empty cylinder" instructions mislead
6 consumers into believing that Defendants' pre-filled cylinders
7 contain fifteen pounds of usable propane and are actually empty
8 when consumers return them. Defendants now move to dismiss the
9 CAC.

10 **II. Legal Standard**

11 A complaint will survive a motion to dismiss when it contains
12 "sufficient factual matter, accepted as true, to state a claim to
13 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.
14 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,
15 570 (2007)). When considering a Rule 12(b)(6) motion, a court must
16 "accept as true all allegations of material fact and must construe
17 those facts in the light most favorable to the plaintiff." Resnick
18 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint
19 need not include "detailed factual allegations," it must offer
20 "more than an unadorned, the-defendant-unlawfully-harmed-me
21 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or
22 allegations that are no more than a statement of a legal conclusion
23 "are not entitled to the assumption of truth." Id. at 679. In
24 other words, a pleading that merely offers "labels and
25 conclusions," a "formulaic recitation of the elements," or "naked
26 assertions" will not be sufficient to state a claim upon which
27 relief can be granted. Id. at 678 (citations and internal
28 quotation marks omitted).

1 "When there are well-pleaded factual allegations, a court should
2 assume their veracity and then determine whether they plausibly
3 give rise to an entitlement of relief." Id. at 679. Plaintiffs
4 must allege "plausible grounds to infer" that their claims rise
5 "above the speculative level." Twombly, 550 U.S. at 555.
6 "Determining whether a complaint states a plausible claim for
7 relief" is a "context-specific task that requires the reviewing
8 court to draw on its judicial experience and common sense." Iqbal,
9 556 U.S. at 679.

10 **III. Discussion**

11 Defendants raise a threshold challenge to the plausibility of
12 Plaintiffs' claims. (E.g., Ferrelgas Motion at 5.) Defendants do
13 not, however, challenge the laws of physics, and concede the
14 "obvious truth - some propane can linger in tanks that no longer
15 sustain flame."¹ (Id. at 4.) Ferrelgas acknowledges that "there
16 is no way for [it] to design cylinders that dispel every ounce of
17 propane contained within them." (Ferrelgas Mot. at 7.) The CAC
18 does not allege that Defendants expressly represented to consumers
19 that all of the propane contained in Defendants' cylinders was
20 usable or accessible. Nevertheless, Plaintiffs argue that the
21 allegations of the CAC, considered "in context," make clear that
22 Defendants mislead consumers "as to the quantity of propane they
23 were purchasing." (Dkt. 45 at 4.)

24 Plaintiffs' argument is difficult to square with the
25 allegations of the CAC. The CAC alleges that Defendants' propane
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27 ¹ Indeed, the CAC acknowledges that the amount of propane
28 remaining in a cylinder "varies depending on factors such as ambient
temperature, altitude and air pressure." (CAC n. 2.)

1 cylinders bear labels stating that they contain a net weight of
2 fifteen pounds of propane. The CAC does not allege that the labels
3 are not accurate or truthful. It is therefore unclear to the court
4 how consumers could plausibly have been misled as to the amount of
5 propane they purchased. Plaintiffs' emphasis on the "usable"
6 amount of propane does not save their claims from implausibility.
7 It is well-known to consumers that it may be difficult or
8 impossible to extract every bit of a product from its packaging, as
9 any purchaser of toothpaste, peanut butter, shampoo, and a host of
10 other products is aware. See Ebner v. Fresh Inc., No. SACV 13-477
11 JVS, 2013 WL 9760035 (C.D. Cal. Sept. 11, 2013) (dismissing claims
12 relating to accurately labeled, difficult to extract lip balm, with
13 prejudice).

14 Nor do references to the word "empty" on Defendants' cages
15 give rise to a plausible claim that Defendants misled consumers to
16 believe that all fifteen pounds of propane purchased could be
17 extracted from Defendants' cylinders. First, the CAC does not
18 allege that Defendants made any express representations to that
19 effect. Second, the word "empty" appeared only in the context of
20 instructing consumers how to complete a tank exchange.
21 Specifically, consumers were instructed to leave "empty" tanks near
22 the cages, then to seek the assistance of a retail employee, who
23 would return to the cage with the consumer, unlock the cage, and
24 provide the consumer with a tank full of fifteen pounds of propane.
25 It is implausible that a consumer would interpret instructions
26 regarding what to do with the propane tank in his possession as a
27 representation that he would be able to utilize every last ounce of

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1 the full tank he intended to purchase.² Nor, given general
2 consumer knowledge, the natural properties of gaseous propane, and
3 the vagaries of atmospheric conditions, would any such
4 interpretation be reasonable.

5 Because Plaintiffs have not plausibly alleged that Defendants'
6 representations were inaccurate or misleading, the CAC must be
7 dismissed. Any amended complaint shall be filed within fourteen
8 days of the date of this Order.

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12 IT IS SO ORDERED.

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15 Dated: January 21, 2016



DEAN D. PREGERSON
United States District Judge

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27 ² Indeed, some consumers are likely willing to turn in even a
28 tank containing usable amounts of propane in exchange for the
certainty of a full tank.