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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JACKIE FITZHENRY-RUSSELL,
Plaintiff,
v.
THE COCA-COLA COMPANY,
Defendant.

Case No. [5:17-cv-00603-EJD](#)
**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS; SETTING
CASE MANAGEMENT CONFERENCE**
Re: Dkt. No. 25

I. INTRODUCTION

In this putative class action, Plaintiff Jackie Fitzhenry-Russell (“Plaintiff”) alleges that the label on Seagram’s Ginger Ale, “Made With Real Ginger,” is false and misleading. Presently before the Court is Defendant The Coca Cola Company’s motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). The Court finds it appropriate to take the motion under submission for decision without oral argument pursuant to Civil L.R. 7-1(b). For the reasons set forth below, Defendant’s motion is denied.

II. BACKGROUND

Defendant The Coca Cola Company (“Defendant”), a Delaware corporation with its principal place of business in Atlanta, Georgia, manufactures, distributes, markets, advertises and sells soft drinks in the United States under several brand names, including Seagram’s. The packaging for Seagram’s Ginger Ale (the “Product”) includes the statement “Made With Real Ginger.” Plaintiff alleges that Defendant prominently made the claim “Made With Real Ginger” on the front label panel of the Product, “cultivating a wholesome and healthful image in an effort to promote the sale of its soft drink and to compete with small batch ginger ales that do use real

1 ginger root.” Complaint at ¶4. Plaintiff also alleges that consumers value the representation
2 “Made From Real Ginger” because studies have found that real ginger has health benefits.

3 Plaintiff alleges that the statement “Made With Real Ginger” is false and misleading
4 because the Product “is not made from real ginger root.” Complaint at ¶3. Rather, the Product is
5 allegedly made from carbonated water, high fructose corn syrup, citric acid, preservatives, and
6 “natural flavor.” Complaint at ¶22.¹ The “natural flavor” is allegedly “a chemical flavoring
7 compound that is manufactured to mimic the taste of ginger, but does not contain ginger as a
8 reasonable consumer understands it to mean and contains none of the health benefits of real ginger
9 root.” *Id.* The Food and Drug Administration has defined “natural flavor” to mean “the essential
10 oil, oleoresin, essence or extractive, protein hydrolysate, distillate, or any product of roasting,
11 heating or enzymolysis, which contains the flavoring constituents derived from a spice, fruit or
12 fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant
13 material, meat, seafood, poultry, eggs, dairy products, or fermentation products thereof, whose
14 significant function in food is flavoring rather than nutritional.” *Id.* at ¶25 (quoting 21 C.F.R.
15 §501.22(a)(3)).

16 Plaintiff acknowledges that Defendant might use ginger root in the creation of the “natural
17 flavor” in the Product. *Id.* at ¶26. Plaintiff alleges, however, that the “natural flavor” in the
18 Product is not ginger as a reasonable consumer would understand it. *Id.* Rather, Plaintiff alleges
19 that the scientists that created the “natural flavor” in the Product “would have isolated proteins
20 from the cells and tissue of the ginger root or extracted oils or essences from the ginger root. But
21 because those isolated compounds may not actually taste like ginger, the scientist would have then
22 combined those extractions with any number of other extractions from other plants and animals to
23 create a flavoring substance that tastes like ginger.” *Id.* Plaintiff alleges that “an average
24

25 ¹ Defendant requests that the Court take judicial notice of a more recent version of the product
26 packaging for the Product that lists ginger as an ingredient. The request for judicial notice is
27 denied because Defendant has not provided evidence to authenticate the packaging. Furthermore,
28 Plaintiff contends that this version of product packaging is not the same version of the product
packaging that was affixed to the cases of ginger ale she purchased, which did not list ginger as an
ingredient.

1 consumer does not have the specialized knowledge necessary to ascertain that the ginger flavor in
2 the soft drink is not from the presence of real ginger in the soft drink but instead comes from the
3 chemical compound[] added to the drink to make it taste like ginger.” Id. at ¶38.

4 Plaintiff alleges that Defendant intended for consumers to read the statement “Made With
5 Real Ginger” and to believe the Product is made from and contains real ginger. Id. at ¶43.

6 Plaintiff also alleges that Defendant had an incentive to emphasize the presence of ginger in the
7 Product “to appeal to consumers seeking real ingredients instead of a traditional soda.” Id. at ¶45.

8 Plaintiff further alleges that Defendant knew and intended that consumers would purchase and pay
9 a premium for the Product because they would perceive the Product as more nutritious and
10 healthful than other brands of ginger ales that are not made with real ginger. Id. at ¶46.

11 Plaintiff allegedly purchased several cases of the Product over the last two years. Id. at
12 ¶54. Plaintiff allegedly made each of her purchases of the Product after reading and relying on the
13 statement “Made With Real Ginger” and believing the Product was made with and contained real
14 ginger. Id. at ¶55. Plaintiff alleges that she “was attracted to the Product because, when given a
15 choice, she prefers to consume soft drinks made with real ginger for health benefits, namely
16 stomach calming or relaxation.” Id. at ¶56. Plaintiff allegedly would not have purchased the
17 Product, or would have paid less for the Product, if she had known the Product was not “Made
18 With Real Ginger.” Id. at ¶59.

19 Based upon the foregoing allegations, Plaintiff seeks to represent a nationwide class
20 comprised of all persons who, between December 23, 2012 and the present, purchased the
21 Product. Plaintiff asserts claims for violations of California’s Consumers Legal Remedies Act
22 (“CLRA”), the False Advertising Law (“FAL”), the Unfair Competition Law (“UCL”), and for
23 common law fraud, deceit and/or misrepresentation.

24 III. STANDARDS

25 A motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#) tests the legal sufficiency of claims
26 alleged in the complaint. [Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 \(9th Cir. 1995\)](#).
27 When deciding whether to grant a motion to dismiss, the court must generally accept as

1 true all “well-pleaded factual allegations.” [Ashcroft v. Iqbal](#), 556 U.S. 662, 664 (2009). The court
2 must also construe the alleged facts in the light most favorable to the plaintiff. See [Retail Prop.
3 Trust v. United Bhd. of Carpenters & Joiners of Am.](#), 768 F.3d 938, 945 (9th Cir. 2014)
4 (providing the court must “draw all reasonable inferences in favor of the nonmoving party” for
5 a [Rule 12\(b\)\(6\)](#) motion). Dismissal “is proper only where there is no cognizable legal theory or an
6 absence of sufficient facts alleged to support a cognizable legal theory.” [Navarro v. Block](#), 250
7 F.3d 729, 732 (9th Cir. 2001).

8 Consumer-protection claims that sound in fraud, as Plaintiff’s do, are subject to the
9 heightened pleading requirements of Fed.R.Civ.P. 9(b). [Vess v. Ciba-Geigy Corp. USA](#), 317 F.3d
10 1097, 1102 (9th Cir. 2003); see also [Kearns v. Ford Motor Co.](#), 567 F.3d 1120, 1125 (9th Cir.
11 2009). Rule 9(b) requires that “a party must state with particularity the circumstances constituting
12 fraud. . . .” Fed.R.Civ.P. 9(b). The circumstances constituting the fraud must be “specific enough
13 to give defendants notice of the particular misconduct which is alleged to constitute the fraud
14 charged so that they can defend against the charge and not just deny that they have done anything
15 wrong.” [Semegen v. Weidner](#), 780 F.2d 727, 731 (9th Cir. 1985). Therefore, a party alleging
16 fraud must set forth “the who, what, when, where, and how” of the misconduct. [Vess](#), 317 F.3d at
17 1106 (quoting [Cooper v. Pickett](#), 137 F.3d 616, 627 (9th Cir. 1997)).

18 **IV. DISCUSSION**

19 **A. Whether Plaintiff Sufficiently Alleged “Made With Real Ginger” Is False or Misleading**

20 Claims under California’s UCL, FAL and CLRA are governed by the “reasonable
21 consumer” test. [Williams v. Gerber Products Co.](#), 552 F.3d 934, 938 (9th Cir. 2008). Under the
22 reasonable consumer standard, a plaintiff must show that members of the public are likely to be
23 deceived. [Id.](#) This standard also applies to common law fraud and negligent misrepresentation
24 claims. [Ham v. Hain Celestial Grp., Inc.](#), 70 F.Supp.3d 1188, 1193 (N.D. Cal. 2014) (citing
25 [Freeman v. Time, Inc.](#), 68 F.3d 285, 289 (9th Cir. 1995)). “Whether a reasonable consumer would
26 be deceived by a product label is generally a question of fact not amenable to determination on a
27 motion to dismiss.” [Ham](#), 70 F.Supp.3d at 1193. “[I]n rare situations a court may determine, as a

1 matter of law, that the alleged violations of the UCL, FAL and CLRA are simply not plausible.”
2 Id. (citing Werbel ex rel. v. Pepsico, Inc., No. 09-cv-4456-SBA, 2010 WL 2673860, at *3 (N.D.
3 Cal. July 2, 2010) (a reasonable consumer would not be deceived into believing that cereal named
4 “Crunch Berries” derived significant nutritional value from fruit)); see also Manchouck v.
5 Mondelez International, Inc., No. C13-02148 WHA, 2013 WL 5400285 (N.D. Cal. Sept. 26, 2013)
6 (rejecting claim that “Made With Real Fruit” made in connection with Strawberry and Raspberry
7 Newton sandwich cookies was misleading where the cookies contained only “a small amount of
8 processed fruit puree”).

9 Defendant moves to dismiss Plaintiff’s complaint for failure to allege a false or misleading
10 statement. Defendant reasons that in paragraph 26 of the complaint, Plaintiff admits that the
11 Product is, in fact, made with real ginger and therefore, “Made With Real Ginger” is not a false
12 statement.²

13 Defendant’s reading of the complaint is inaccurate. Nowhere does Plaintiff admit that the
14 Product is made with real ginger. Instead, Plaintiff alleges repeatedly that the Product is not made
15 from real ginger, and therefore the statement “Made With Real Ginger” is false or misleading.
16 Complaint at ¶¶3, 22, 33, 37, 38. Specifically, in paragraph 26 of the complaint, Plaintiff alleges:

17 While it may be that ginger root is used in the creation of the natural
18 flavor, it is not ginger as a reasonable consumer would understand it.
19 Rather the scientists that created the ‘natural flavor’ added to the
20 Product would have isolated proteins from the cells and tissue of the

21 ² Defendant also argues that the statement “Made With Real Ginger” is not misleading because it
22 cannot reasonably be construed as a representation about the health benefits of ginger or a
23 representation about the form or quantity of the ginger in the Product.

24 Plaintiff clarifies in her motion papers that she is not contending that consumers would interpret
25 the statement “Made With Real Ginger” to mean that the Product confers health benefits.
26 Plaintiff’s Opposition, pp. 7-8. Rather, Plaintiff included allegations about the health benefits of
27 real ginger to explain why Defendant’s statement “Made With Real Ginger” would be material to
28 reasonable consumers and why consumers would be willing to pay a price premium to purchase a
beverage they believed contained real ginger. Id.

Also, contrary to Defendant’s argument, Plaintiff does not allege that “Made With Real Ginger”
communicates to consumers that ginger is present in a certain quantity or form. Rather, Plaintiff
alleges that reasonable consumers reading the statement “Made With Real Ginger” would interpret
it to mean that the Product is flavored with and contains real ginger when in fact, the Product does
not contain real ginger.

1 ginger root or extracted oils or essences from the ginger root. But
2 because those isolated compounds may not actually taste like ginger,
3 the scientist would have then combined those extractions with any
4 number of other extractions from other plants and animals to create
5 a flavoring substance that tastes like ginger.

6 Complaint at ¶26. Defendant characterizes the allegations above as based on nothing more than
7 “pure speculation” because Plaintiff did not perform any empirical tests of the Product.
8 Defendant’s Reply Brief, p. 3. Although Plaintiff has not alleged she performed any tests on the
9 Product, she alleges sufficient facts from which to infer that the statement “Made With Real
10 Ginger” is false or misleading. Plaintiff alleges that the Product contains only the following
11 ingredients: carbonated water, high fructose corn syrup, citric acid, preservatives and “natural
12 flavor” and further alleges that the “natural flavor” is not ginger as a reasonable consumer would
13 understand it. Complaint at ¶¶22, 26. Defendant contends that Plaintiff’s theory is “nonsensical,”
14 arguing that a reasonable consumer would “understand that it is not physically possible to
15 incorporate ginger root into a soft drink without first reducing it to ‘oils’ or ‘essences.’”
16 Defendant’s Reply Brief, p.5. Whether a reasonable consumer would be deceived, however, is
17 generally a question of fact not amenable to determination on a motion to dismiss. Ham v. Hain
18 Celestial Grp., Inc., 70 F.Supp.3d at 1193. At the pleading stage, Court finds Plaintiff’s theory is
19 “plausible” and the cases relied upon by Defendant are inapposite.

20 For example, in Red v. Kraft Foods, No. CV-10-1028-GW, 2012 WL 5504011 (C.D. Cal.
21 Oct. 25, 2012), the plaintiff claimed that the statement “Made With Real Vegetables” on a box of
22 crackers was false and misleading. The court dismissed the consumer-protection claims after
23 rejecting plaintiff’s assertion that the statement would lead a reasonable consumer to believe that
24 the product was healthy and contained a significant amount of vegetables. The court concluded
25 that “a reasonable consumer will be familiar with the fact of life that a cracker is not composed of
26 primarily fresh vegetables,” and that “it strains credulity to imagine that a reasonable consumer
27 will be deceived into thinking a box of crackers is healthful or contains huge amounts of
28 vegetables simply because there are pictures of vegetables and the true phrase ‘Made with Real
29 Vegetables’ on the box.” Id. at *3-4. In the present case, it does not “strain credulity” to imagine

1 that a reasonable consumer would believe that a ginger ale product bearing the statement “Made
2 With Real Ginger” on the product label would, in fact, contain real ginger, and not just a chemical
3 compound derived from ginger that was created in a laboratory to mimic the flavor of real ginger.

4 The case Workman v. Plum, Inc., 141 F.Supp.3d 1032, 1035-36 (N.D. Cal. 2015), is also
5 distinguishable. In Workman, the court rejected the plaintiff’s claim that an image of certain
6 ingredients on the product panel was false and misleading. Notably, the plaintiff in Workman
7 conceded that all four of the ingredients pictured on the product panel were actually present in the
8 product. The court reasoned that a reasonable consumer would simply not view the pictures on
9 the packaging and assume that the size of the items pictured directly correlated with their
10 predominance in the product. Moreover, the court concluded that any potential ambiguity
11 regarding the predominance of the pictured ingredients “could be resolved by the back panel of the
12 products, which listed all ingredients in order of predominance. . . .” Workman, 141 F.Supp.3d at
13 1035.

14 Unlike Workman, the Plaintiff in this case does not concede that ginger is present in the
15 Product. Furthermore, unlike Workman, Plaintiff alleges that reasonable consumers “lack the
16 meaningful ability to test or independently ascertain the truthfulness of” the statement “Made With
17 Real Ginger.” Complaint at ¶38. Plaintiff also alleges that consumers “would not know the true
18 nature of the ginger flavoring merely by reading the ingredient label; its discovery requires
19 investigation beyond the grocery store and knowledge of food chemistry beyond that of the
20 average consumer.” Id.

21 Furthermore, even if the chemical compound used to flavor the Product has trace amounts
22 of ginger in it, the statement “Made With Real Ginger” is actionable because Plaintiff has alleged
23 that the statement is likely to deceive reasonable consumers into believing that the Product is
24 flavored with and contains real ginger. See e.g. Kasky v. Nike, Inc., 27 Cal.4th 939, 950 (2002)
25 (UCL and false advertising law prohibit not only false advertising, “but also advertising which[,]
26 although true, is either actually misleading or which has a capacity, likelihood or tendency to
27 deceive or confuse the public.”) (quoting Leoni v. State Bar, 39 Cal.3d 609, 626 (1985)).

1 Plaintiff's allegation that the statement "Made With Real Ginger" is false or misleading is
2 sufficient at the pleading stage.

3 B. Class Claims

4 Defendant contends that the class claims on behalf of "all persons" who purchased
5 Seagram's Ginger Ale should be dismissed because they encompass sales outside of California to
6 non-California consumers that are beyond the reach of California's consumer protection laws.
7 Plaintiff asserts that the scope of the class should be decided later in the context of a class
8 certification motion and not a motion to dismiss.

9 The Court agrees that it is preferable to defer ruling on the scope of the class in the context
10 of a class certification motion and not a motion to dismiss. See Bruton v. Gerber Prod. Co., No.
11 12-CV-02412-LHK, 2014 WL 172111 (N.D. Cal. Jan. 15, 2014) (denying motion to strike
12 nationwide class allegations because the court cannot resolve any choice-of-law challenge at the
13 pleading stage). California applies a three-step "governmental interest analysis" to determine
14 whether California law should apply extraterritorially. Figby v. Lifeway Foods, Inc., No. 13-CV-
15 04828-TEH, 2016 WL 4364225, at *6 (N.D. Cal. Aug. 16, 2016) (citing Mazza v. Am. Honda
16 Motor Co., Inc., 666 F.3d 581, 590 (9th Cir. 2012)). At this stage in the proceedings, neither party
17 has undertaken the governmental interest analysis and thus it would be premature to dismiss the
18 class action claims at this stage.

19 V. CONCLUSION

20 For the reasons set forth above, Defendant's motion is DENIED. The Court sets a case
21 management conference for November 16, 2017 at 10:00 a.m. The parties shall file a joint case
22 management statement no later than November 6, 2017.

23
24 **IT IS SO ORDERED.**

25 Dated: October 18, 2017



EDWARD J. DAVILA
United States District Judge