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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH CENTRAL DIVISION

MICHAEL YATES, individually and on behalf of all others similarly situated; and NORMAN L. JONES, individually and on behalf of all others similarly situated, Plaintiffs, v. TRAEGER PELLET GRILLS, LLC, a Delaware limited liability company, Defendant.	Case No. 2:19-cv-00723-BSJ **MOTION OF DEFENDANT TRAEGER PELLET GRILLS, LLC TO DISMISS AND/OR STRIKE PORTIONS OF FIRST AMENDED COMPLAINT** Judge Bruce S. Jenkins

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Relief Sought and Grounds for Motion

Defendant Traeger Pellet Grills, LLC ("Traeger") respectfully moves to dismiss the first amended complaint ("FAC") of plaintiffs Michael Yates and Norman Jones in its entirety; and in the alternative, strike their allegations requesting certification of a nationwide class under the Utah Consumer Sales Practices Act ("UCSPA"). The FAC fails to state any claim for relief because it does not -- and cannot -- allege (1) any facts showing a right to monetary relief or injunctive relief, and (2) any facts entitling plaintiffs to bring a class action for damages under the limited circumstances authorized by the UCSPA. The nationwide class allegations deserve to be stricken because the UCSPA does not apply extraterritorially, and it therefore does not provide non-Utah consumers with any cause of action.

Introduction and Summary of Argument

This is a false advertising lawsuit brought on behalf of a purported nationwide class against Traeger, a Utah-based company. FAC ¶ 33. Traeger "markets and sells pellet grills and the wood pellet fuel for these grills." FAC ¶ 4. "Unlike a conventional charcoal or gas grill, a pellet grill ignites wood pellets within a fire pot, and a fan stokes the flames, creating convection heat to cook the food on the grill's cooking grid." *Id.*

The central allegation of the lawsuit is that "contrary to Defendant's advertisements and product packaging, Defendant's wood pellets do not comprise or even primarily comprise the identified wood." *Id.* ¶ 11. Thus, for example, Traeger's "Mesquite BBQ Wood Pellets" allegedly "do not have any mesquite wood in them (or only a trace amount)," and a "mesquite-flavored oil [is added] to a less expensive wood to give the Mesquite BBQ Wood Pellets a mesquite flavor." *Id.* ¶¶ 70, 13.

There are two named plaintiffs, each of whom is "conscientious of the type of wood with which they grill, as different woods provide their food with different flavors." *Id.* ¶ 87. Plaintiff Michael Yates, a resident of California, claims to have been deceived into buying three bags of Traeger's Mesquite BBQ Wood Pellets and two bags of Traeger's Texas Beef Blend Pellets. *Id.* ¶ 88. When Yates grilled with the Mesquite BBQ Wood Pellets, "he found that the flavor did not appear to reflect actual mesquite wood." *Id.* ¶ 92. Plaintiff Norman Jones, a resident of Utah, bought "more than 40 bags of Traeger Wood Pellets" over a period of years (*id.* ¶ 27), and apparently concluded he had been deceived only after buying his fortieth bag.

On the basis of these allegations, plaintiffs purport to assert four claims. Plaintiffs Jones and Yates assert one claim under the UCSPA (first cause of action). *Id.* ¶ 118–27. Plaintiff Yates asserts three claims under California's consumer protection statutes: the Unfair Competition Law ("UCL") (second cause of action) (*Id.* ¶ 128–38), the False Advertising Law ("FAL") (third cause of action) (*Id.* ¶ 139–49), and the Consumer Legal Remedies Act ("CLRA") (fourth cause of action) (*Id.* ¶ 150–60). Plaintiffs seek, among other things, actual damages, statutory damages, restitution, and injunctive relief. *Id.* at 31, ¶¶ B–C .

Plaintiffs Jones and Yates also purport to assert the first cause of action, the UCSPA claim, on behalf of a nationwide class and a Utah "subclass" of Traeger wood pellet buyers. *Id.* at 25. Plaintiff Yates purports to assert the second, third and fourth causes of action on behalf of a California "subclass" of Traeger wood pellet buyers. *Id.* at 27, 28, 30.

The FAC should be dismissed in its entirety for the following reasons:

1. The FAC fails to allege facts showing a right to monetary or injunctive relief -- and accordingly fails to state any claim "upon which relief can be granted" under Fed. R. Civ. P. 12(b)(6). Specifically:

- The purported claim for statutory damages under the Utah CSPA fails as a matter of law because the plain language of the CSPA bars statutory damages in class actions. *See infra* section II.A.
- The claims for actual damages under Utah law and actual damages and restitution under California law fail because such claims require factual allegations showing that plaintiffs suffered a loss by paying more than the actual market value of the products they received in return. *See infra* section II.B. The FAC makes no such allegations, and plaintiffs cannot in good faith make such allegations. *See infra* at *id*.
- The purported claims for injunctive relief under Utah and California law fail because such claims require factual allegations showing an imminent risk of future harm, and plaintiffs allege no such risk. *See infra* section II.C. Moreover, they cannot allege any such risk because their awareness of the allegedly deceptive practices precludes them from being deceived in the future. *See infra* at *id.*

2. The UCSPA limits the circumstances under which a consumer may bring a class action. Utah Code Ann. § 13-11-19; *see infra* section III. The FAC fails to allege facts showing that plaintiffs fit within those circumstances, and accordingly the UCSPA claim should be dismissed for this independent reason.

The Court should also strike the allegations of a nationwide class under the UCSPA because Utah statutes are presumed not to have any extraterritorial effect, and that presumption may only be overcome by statutory language reflecting a clear intent to apply the statute extraterritorially. *See infra* section IV. There is no indication in the UCSPA of any legislative intent to protect anyone other than Utah consumers or apply the UCSPA to non-Utah transactions. *See infra* at *id.*

Argument

I. LEGAL STANDARD

When evaluating a Rule 12(b)(6) motion to dismiss, "the court presumes the truth of all well-pleaded facts in the complaint, but need not consider conclusory allegations." *Margae, Inc. v. Clear Link Techs., LLC*, 620 F. Supp. 2d 1284, 1285 (D. Utah 2009). "Conclusory allegations are allegations that 'do not allege the factual basis' for the claim." *Id.* (citing *Brown v. Zavaras*, 63 F.3d 967, 972 (10th Cir. 1995)). "The court is not bound by a complaint's legal conclusions, deductions and opinions couched as facts." *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553–56 (2007)). "Further, though all reasonable inferences must be drawn in the non-moving party's favor, a complaint will only survive a motion to dismiss if it contains 'enough facts to state a claim to relief that is plausible on its face.'" *Id*. (citing *Twombly*, 550 U.S. at 570) (internal citation omitted).

A motion to strike under Fed. R. Civ. P. 12(f) is the appropriate vehicle for eliminating class action allegations. *See Sec. Sys., Inc. v. Alder Holdings, LLC*, 2019 WL 4879424, at *8 (D. Utah Oct. 3, 2019).

Claims for monetary relief or injunctive relief can be dismissed via either a motion to dismiss or a motion to strike. *See Hix Corp. v. Nat'l Screen Printing Equip. Inc.*, 108 F. Supp. 2d 1204, 1208 (D. Kan. 2000); *Whayne v. U.S. Dep't of Educ.*, 915 F. Supp. 1143, 1145 (D. Kan. 1996); *Baumgardner v. ROA Gen., Inc.*, 864 F. Supp. 1107, 1111 (D. Utah 1994).

II. PLAINTIFFS ARE NOT ENTITLED TO MONETARY OR INJUNCTIVE RELIEF

A. Plaintiffs Cannot Recover Statutory Damages Under The UCSPA

The plain language of the UCSPA bars the recovery of statutory damages in class actions under the Act. Section 13-11-19(2) states that "[a] consumer who suffers loss as a result of a violation of this chapter may recover, *but not in a class action*, actual damages or $2,000, whichever is greater. . . ." Utah Code Ann. § 13-11-19(2) (emphasis added). Thus, while the recovery of "actual damages" is allowed in class actions (*see id.* at § 13-11-19(4)), a statutory damage award of $2,000 per class member is not. This makes good sense, because otherwise class actions where class members have been minimally harmed could easily prove ruinous to defendants. The Court should accordingly dismiss or strike the claim for statutory damages under Utah law.

B. Plaintiffs Cannot Recover Actual Damages Or Restitution Under Any Of Their Purported Claims

1. The Claim for Compensatory Damages Under the UCSPA Fails

Under the UCSPA, "[a] consumer who suffers loss as a result of a violation of this chapter" is entitled to recover the "actual damages" he or she has incurred. Utah Code Ann. § 13-11-19(4)(a). Under the Act, "actual damages" is a narrower concept than the "loss" necessary for a consumer to maintain an action under this statute. *See Andreason v. Felsted*, 137 P. 3d 1, 4

(Utah Ct. App. 2006) ("the term 'loss' naturally embodies a broader concept than the term 'damages,' which is itself a broader concept than the term 'actual damages' as it is used in [the UCSPA]."). Even assuming for purposes of argument that plaintiffs have suffered a "loss" that permits them to maintain a UCSPA action, they have nonetheless alleged no facts showing that they have incurred any "actual damages" due to their purchase of Traeger's products. This failure warrants the dismissal of plaintiffs' claims for compensatory damages under the UCSPA. *Cf. Vincent v. Utah Plastic Surgery Soc'y*, 621 Fed. Appx. 546, 551 (10th Cir. 2015) (sustaining dismissal of Lanham Act claim for failure to plead facts showing damages: plaintiffs' "bald allegations are insufficient to 'raise the right to relief above the speculative level.'") (citation omitted).

Although there are no cases addressing this language in the UCSPA, decisions construing similar consumer protection statutes provide guidance as to what plaintiffs must plead and prove to establish a right to "actual damages." In *Camasta*, the Seventh Circuit construed the Illinois Consumer Fraud and Deceptive Practices Act, which also authorizes the recovery of "actual damages." *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 734 (7th Cir. 2014). The court held that a complaint seeking "actual damages" must allege facts showing a price/value differential -- that is, that the consumer "paid more than the actual value of the merchandise he received." *Id.* at 739. Absent such allegations, there is no reason to conclude that the plaintiff has incurred any damages whatsoever. And because the complaint there alleged no such facts, the court dismissed the damages claim. *Id.* at 741; *see also Johnson v. Jos. A. Bank Clothiers, Inc.*, 2014 WL 4129576, at *7 (S.D. Ohio Aug. 19, 2014) (dismissing monetary claims under the Ohio Consumer Sales Practices Act, which authorizes recovery of "actual economic damages,"

for failure to plead facts showing that the suits bought by plaintiffs "were not worth, collectively, the amount that plaintiffs paid or that similar suits could have been purchased elsewhere for less."); *In re Lenovo Adware Litig.*, 2018 WL 620145, at *5 (N.D. Cal. Jan. 30, 2018) (dismissing damages claim under New York's consumer protection law because "plaintiffs have failed to allege sufficient facts to establish that they received less than what they paid for. . .").

Here, plaintiffs have alleged no facts showing that they paid more than the value of the Traeger wood pellets they received in return. They have accordingly failed to state a claim for "actual damages" under the UCSPA.

2. The Claims For Compensatory Damages And Restitution Under The California Statutes Also Fail

Plaintiffs' failure to plead facts showing any price/value differential also requires the dismissal of their claims for monetary relief under California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act.

a. The Claims Under the UCL and FAL

The monetary remedies under the UCL and FAL are construed identically. *See Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 694 (2006). Under both statutes, the only authorized monetary relief is restitution. *See Clark v. Super. Ct.*, 50 Cal. 4th 605, 611 (2010). Compensatory damages and punitive damages are not available. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1147–48 (2003). Restitution under these statutes is limited to the difference between the price paid and the value received. *See In re Tobacco Cases II*, 240 Cal. App. 4th 779, 802 (2015) (holding that trial court "lacked discretion to award restitution" because plaintiffs "did not establish any price/value differential."); *Chowning v. Kohl's Dep't Stores, Inc.*, 733 F. App'x 404, 405 (9th Cir. 2018) (in UCL/FAL false advertising

cases, "[t]he proper calculation of restitution . . . is price paid versus value received"); *Brazil v. Dole Packaged Foods, LLC*, 660 F. App'x 531, 534 (9th Cir. 2016) (holding, in UCL/FAL false advertising case, that "[t]he district court correctly limited damages to the difference between the prices customers paid and the value of the fruit they bought").

Requiring a showing of price/value differential to be eligible for restitution under the UCL and FAL is consistent with the fundamental principle that restitution is unavailable without a "showing of loss," because "restitution without proof of any loss to any plaintiff cannot be characterized as *restitutionary*." *Tobacco II*, 240 Cal. App. 4th at 801 (emphasis in original). And absent a price/value differential, there has been no "loss" for purposes of a monetary award. *Id.* at 802; *see Day v. AT & T Corp.*, 63 Cal. App. 4th 325, 340 (1998) (plaintiff who receives a product equal in value to the amount he paid has "given up nothing, regardless of whether he or she was improperly induced to purchase the [product] in the first place.").

b. The Claim Under the CLRA

Like the UCSPA, the CLRA authorizes the recovery of "actual damages." Cal. Civ. Code § 1780. To recover "actual damages" under the CLRA, a plaintiff must establish a price/value differential. *Zakaria v. Gerber Prod. Co.*, 755 F. App'x 623, 625 n.2 (9th Cir. 2018); *see also Stathakos v. Columbia Sportswear Co.*, 2017 WL 1957063, at *9 n.7, *12 (N.D. Cal. May 11, 2017); *Lyddy v. World of Jeans & Tops*, 2012 WL 760570, at *3 (S.D. Cal. Mar. 7, 2012). This is consistent with the general rule applicable to fraud-based claims. *See* Cal. Civ. Code § 3343 (price/value differential is appropriate measure in fraud-based actions).

C. Plaintiffs Lack Standing To Seek Injunctive Relief

To establish standing under Article III of the U.S. Constitution, plaintiffs have the "burden of showing that [they] have standing for each type of relief sought" -- including injunctive relief. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Because injunctive relief is a prospective remedy, a plaintiff seeking such relief must plead and prove facts showing a threat of injury that is "actual and imminent, not conjectural or hypothetical." *Id.*

Plaintiffs have pleaded no facts showing any threat of "actual and imminent" injury. To the contrary, the entire FAC is retrospective in nature, and does not even hint at any potential future injury. The plaintiffs accordingly lack standing to seek injunctive relief.

Moreover, plaintiffs cannot amend to fix this defect. Plaintiffs are well aware of what they consider to be Traeger's deceptive advertising, as evidenced by their filing of this lawsuit. They are accordingly unlikely to be deceived -- and thereby injured -- by Traeger's advertising in the future. *See Morris v. Davita Healthcare Partners, Inc.*, 308 F.R.D. 360, 369 (D. Colo. 2015) ("plaintiffs cannot seek injunctive relief where the alleged injury is the concealment of information that they now possess.").

III. PLAINTIFFS ALLEGE NO FACTS SUFFICIENT TO STATE A CLASS ACTION CLAIM UNDER THE UCSPA

Under the UCSPA, "a consumer may bring a class action for damages only under limited circumstances." *Callegari v. Blendtec, Inc.*, 2018 WL 5808805, at *2 (D. Utah Nov. 6, 2018). Those circumstances are set forth in subdivision 4(a) of Section 13-11-19 of the Act. Utah Code Ann. § 13-11-19(4)(a). Under that subdivision, a consumer may bring a class action for damages only if (1) he or she incurred a loss "caused by an act or practice specified as violating this

chapter by a rule" adopted by the Division of Consumer Protection, or (2) the act or practice has been "declared to violate [the Act] by a final judgment of . . . [a Utah state court] . . .". *Id.*

Plaintiffs allege no facts that satisfy either option. They allege no facts showing that a Utah state court has issued a final judgment declaring that the conduct at issue violates the Act, so they do not satisfy option (2). And with respect to option (1), they allege only that Traeger violated R152-11-3(b)(1) of the Utah Administrative Code. FAC ¶ 124. That rule, which is entitled "Bait Advertising/Unavailability of Goods," is a prohibition against "bait and switch advertising tactics," and a claim under it requires factual allegations showing that plaintiff was "diverted from the advertised consumer commodities to other consumer commodities." *Callegari*, 2018 WL 5808805, at *3 (quoting Utah Admin Code Rule 152-11-3). Because the FAC alleges no such diversion, it does not state a claim under this Rule. *See id.* (plaintiff failed to state a claim because "[he] did not allege that he was diverted from the product advertised by [defendant] to some other product.").

Plaintiffs accordingly do not satisfy either of the limited circumstances under which they may bring a class action for damages under the UCSPA.

IV. THE COURT SHOULD STRIKE THE NATIONWIDE CLASS ALLEGATIONS

Plaintiffs purport to bring this lawsuit on behalf of a class of "[a]ll persons who purchased Traeger pellets from any retail outlet in the United States after October 1, 2015 . . ." FAC ¶ 103. The only claim they assert on behalf of this purported national class is the UCSPA claim. *Id.* ¶ 120. They are accordingly seeking the certification of a nationwide class under which all members of the class would assert claims under the UCSPA. *Id.* Because the UCSPA

does not apply extraterritorially, non-Utah consumers may not invoke it, and the nationwide class allegations fail as a matter of law.

"Under a deeply rooted and longstanding canon of construction, [Utah] statutes are presumed not to have extraterritorial effect." *Nevares v. M.L.S.*, 345 P.3d 719, 727 (Utah 2015). This presumption "is a gap-filler, operating under a 'clear statement' rule. It provides that unless a statute gives a 'clear indication of an extraterritorial application, it has none.'" *Id.*; *see also Johnson & Johnson Vision Care, Inc. v. Reyes*, 665 F. App'x 736, 746 (10th Cir. 2016) *(*applying presumption against extraterritorial application and interpreting statute "as though it doesn't apply to retail sales made outside of Utah.").

There is no language in the UCSPA that provides any indication, let alone a clear indication, of the legislature's intent to apply it extraterritorially. The Act must therefore be presumed to apply only to Utah consumers and transactions occurring in Utah. In these circumstances, plaintiffs cannot assert a nationwide class based on the UCSPA.

Moreover, the nationwide class allegations under the UCSPA would fail even if the Act applied outside of Utah. In that scenario, the Court would have to perform a conflict of laws analysis to determine which law applies to non-Utah class members: the UCSPA or the deceptive practices law of the state where the consumer read and relied on the alleged false advertising. Under that analysis, the law of the state where the consumer read and relied on the alleged false statement is the proper law to apply.

Utah applies the "most significant relationship" approach set forth in the Restatement (Second) Conflict of Laws to resolving conflict of law issues in tort cases. *Lake-Allen v. Johnson & Johnson, L.P.*, 2009 WL 2252198, at *2 (D. Utah July 27, 2009). The applicable

section of the Restatement is Section 148, concerning claims for fraud and misrepresentation. *See* Restatement (Second) Conflict of Laws § 148. Under that section, the state where the plaintiff viewed and relied on the representations in issue will be the state of the applicable law. *See id.*, cmt j; *see also, e.g., Pennsylvania Employee, Benefit Tr. Fund v. Zeneca, Inc.*, 710 F. Supp. 2d 458, 472 (D. Del. 2010) (under Section 148, "Pennsylvania law controls in that this is the forum where each plaintiff relied upon the alleged misrepresentations by buying Nexium, as well as the place where . . . the alleged misrepresentations were received."). Accordingly, no nationwide class based on the UCSPA would be proper, even if it applied extraterritorially.

Conclusion

Dismissal of the entire FAC is warranted because it fails to allege facts showing any entitlement to monetary relief or injunctive relief (*supra* section I), and accordingly does not state any claim "upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Apart from those shortcomings, the UCSPA claim fails for the additional reason set forth in section II. And the national class allegations are legally infirm for the reasons set out in section III. Traeger therefore respectfully requests an order dismissing the entire FAC.

DATED: January 23, 2020

PARSONS BEHLE & LATIMER

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2020, I electronically filed a true and correct copy of the foregoing **MOTION OF DEFENDANT TRAEGER PELLET GRILLS, LLC TO DISMISS AND/OR STRIKE PORTIONS OF FIRST AMENDED COMPLAINT** with the Clerk of the Court using the CM/ECF system, which sent notification to all counsel of record.

/s/ Julianne P. Blanch

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MICHAEL YATES, individually and on behalf of all others similarly situated; and NORMAN L. JONES, individually and on behalf of all others similarly situated, Plaintiffs, v. TRAEGER PELLET GRILLS, LLC, a Delaware limited liability company, Defendant.	Case No. 2:19-cv-00723-BSJ **ORDER GRANTING MOTION OF DEFENDANT TRAEGER PELLET GRILLS, LLC TO DISMISS AND/OR STRIKE PORTIONS OF FIRST AMENDED COMPLAINT** Judge Bruce S. Jenkins

The Court having reviewed Defendant Traeger Pellet Grills, LLC's Motion to Dismiss and/or Strike Portions of the First Amended Complaint, and for good cause appearing, it is

hereby ORDERED that the Motion is GRANTED, and the First Amended Complaint is dismissed with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

DATED this ___ day of _____, 2020.

_____
BRUCE S. JENKINS
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2020, a true and correct copy of the foregoing was served on all counsel of record by electronically filing it with the Clerk of the Court.

/s/ Julianne P. Blanch