Grimm v. APN, Inc., et al.
SACV 17-356 JVS(JCGx)

Order Regarding Defendants' Motion to Dismiss

Defendants APN, Inc. and Ainsworth Pet Nutrition (collectively "APN") filed a motion to dismiss Plaintiff Christina Grimm's First Amended Complaint ("FAC") for lack of standing and failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Mot., Docket No. 29. Grimm opposes the motion. Opp'n, Docket No. 33. APN filed a timely reply. Reply, Docket No. 35.

Additionally, APN requests the Court take judicial notice of the PDF document titled "Procedures for Obtaining a Pet Food Processor License or registration." See Request for Judicial Notice ("RJN"), Docket No. 30. Grimm opposes APN's request. See Opp'n, Docket No. 34. APN filed a reply to Grimm's opposition. Reply, Docket No. 36.

For the following reasons, the Court **grants** APN's request for judicial notice and **grants in part and denies in part** APN's motion to dismiss.

I. BACKGROUND

This action arises out of APN's alleged deceptive marketing practices in connection with its Rachel Ray™ Nutrish® lines of dog food products. FAC, Docket No. 28 at 1. On February 28, 2017, Grimm filed a complaint alleging that APN deceptively marketed their products as "'natural' when many of them contain chemicals and artificial and/or synthetic ingredients." Comp., Docket No. 1 at 1. In response, APN filed an initial motion to dismiss for failure to state a claim and for lack of standing and a motion to strike portions of the complaint. See Mot., Docket No. 20 at 7, 11; Mot., Docket No. 22. The parties then filed a joint stipulation to extend Grimm's time to file an amended complaint and for APN to respond. Docket No. 26. After Grimm filed her amended complaint, APN filed the instant motion. See First Am. Compl. ("FAC"), Docket No. 28; Mot., Docket No. 29. The FAC alleges violations of the California Consumer Legal Remedies Act ("CLRA"), the California False Advertising Law ("FAL"), and the California Unfair Competition Law ("UCL"), breaches of express and implied warranties, and

negligence per se.

II. LEGAL STANDARD

A. Judicial Notice

Under Federal Rule of Evidence 201, the Court may take judicial notice of "a fact that is not subject to reasonable dispute" if it is "generally known" in the jurisdiction or it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

Because factual challenges have no bearing under Rule 12(b)(6), generally, the Court may not consider material beyond the pleadings in ruling on a motion to dismiss. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001), overruled on other grounds, Galbraith v. Cnty. of Santa Clara, 307 F.3d 1119, 1125 (9th Cir. 2002). There are, however, three exceptions to this rule that do not demand converting the motion to dismiss into one for summary judgment. Lee, 250 F.3d at 688. First, pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of matters of public record if the facts are not subject to reasonable dispute. Id. at 688-89; see Fed. R. Evid. 201(b). Second, the Court also may take judicial notice of documents attached to or "properly submitted as part of the complaint." Lee, 250 F.3d at 688. Third, if the documents are "not physically attached to the complaint," they may still be considered if the documents' "authenticity . . . is not contested" and the documents are necessarily relied upon by the complaint. Id.; United States v. Corinthian Colleges, 655 F.3d 984, 998–99 (9th Cir. 2011).

B. Article III Standing

Pursuant to Article III of the Constitution, the Court's jurisdiction over the case "depends on the existence of a 'case or controversy.'" GTE Cal., Inc. v. FCC, 39 F.3d 940, 945 (9th Cir. 1994). A "case or controversy" exists only if a plaintiff has standing to bring the claim. Nelson v. NASA, 530 F.3d 865, 873 (9th Cir. 2008), rev'd on other grounds, 131 S. Ct. 746 (2011). To have standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that their injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528

U.S. 167, 180–81 (2000); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Nelson, 530 F.3d at 873. "Because standing and ripeness pertain to federal courts' subject matter jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dismiss." Chandler v. State Farm Mut. Auto. Ins. Co., 598 F.3d 1115, 1122 (9th Cir. 2010).

C. Failure to State a Claim

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In resolving a Rule 12(b)(6) motion under Twombly , the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id. For purposes of ruling on a Rule 12(b)(6) motion, the court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir.2008). However, courts "'are not bound to accept as true a legal conclusion couched as a factual allegation.'" Iqbal, 556 U.S. at 678. (quoting Twombly, 550 U.S. at 555).

Under Federal Rule of Civil Procedure 9(b), a plaintiff must plead each element of a fraud claim with particularity, i.e., the plaintiff "must set forth more than the neutral facts necessary to identify the transaction." Cooper v. Pickett, 137 F.3d 616, 625 (9th Cir. 1997) (emphasis in original) (quoting Decker v. GlenFed,

Inc. (In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)). A fraud claim must be accompanied by "the who, what, when, where, and how" of the fraudulent conduct charged. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting Cooper, 137 F.3d at 627). "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." Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989). Statements of the time, place, and nature of the alleged fraudulent activities are sufficient, but mere conclusory allegations of fraud are not. Id.

III. DISCUSSION

A. Judicial Notice

APN requests that the Court take judicial notice of a PDF document titled "Procedures for Obtaining a Pet Food Processor License or Registration." RJN, Docket No. 30 at 2. The PDF is available on the California Department of Public Health ("CDPH") website.[1] Id., Ex. 1. As discussed above, on a motion to dismiss, the Court may consider matters properly subject to judicial notice. Lee, 250 F.3d at 688-89. Courts "can take judicial notice of '[p]ublic records and government documents available from reliable sources on the Internet,' such as websites run by governmental agencies." Gerristen v. Warner Bros. Ent. Inc., 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015); see also Michery v. Ford Motor Co., 650 Fed. App'x 338, 342 n.2 (9th Cir. 2016) (granting a request for judicial notice of the existence of documents available on a government website). The Court will therefore take judicial notice of the PDF document on the CDPH website–a government website.

Though the Court takes judicial notice of the existence of the document, it does not draw any legal conclusions from the statements contained therein. The Court takes judicial notice of the fact that the document states that the CDPH:

> [R]ecognizes the Association of American Feed Controls, Inc. (AAFCO) OFFICIAL PUBLICATION as the definitive reference for

[1] The parties dispute whether the document is available only on the archived version of the CDPH website or on both the archived and current versions. Opp'n, Docket No. 34 at 3; Reply, Docket No. 36. at 3-4.

> pet food ingredients and labeling. Any pet food label that complies with AAFCO guidelines for pet food ingredients and labeling will be considered in compliance with California law.

RJN, Docket No. 30, Ex. 1. But the AAFCO guidelines have not been adopted as a regulation and have no force as controlling law. See Cal. Gov't Code § 11340.5(a). Accordingly, for the present Motion, the Court disregards the AAFCO guidelines.

B. Article III Standing

APN argues that Grimm lacks standing to sue for products that she did not purchase. Mot., Docket. No. 29 at 8. Grimm alleges that she purchased at least four of APN's Nutrish products and purports to represent a class of California citizens who purchased "any" of APN's products, of which she alleges there are at least eighteen. FAC, Docket No. 28 ¶¶ 3, 8, 16. APN argues that Grimm only has standing to sue on the four products that she alleges she personally purchased and cannot assert claims for unnamed class members based on products she did not purchase. Mot., Docket No. 29 at 9-10. Grimm instead contends that whether she can assert claims for unnamed class members is a question that should be addressed at the class certification stage. Opp'n, Docket No. 33 at 6. Alternatively, Grimm argues that she does have standing to assert claims based on products she did not purchase because the products in APN's product line are substantially similar. Id.

The Ninth Circuit has addressed this precise question and held that it is one for the class certification stage. Melendres v. Arpaio, 784 F.3d 1254, 1262 (9th Cir. 2015), cert. denied, 136 S. Ct. 799 (2016). Melendres arose out of claims that the defendants adopted a discriminatory policy targeting Latinos, but nothing in the Ninth Circuit's opinion limits its reach to discrimination cases. And at least one court in this District has applied it in the consumer class action context, where the named plaintiffs purported to represent class members who had purchased products the named plaintiffs had not alleged they had purchased. Stotz v. Mophie, Inc., No. CV 16-9989-GW(FFMx), 2017 WL 1106104, at *6 (C.D. Cal. Feb. 2, 2017).

As such, APN "conflates standing and class certification." Melendres, 784 F.3d at 1261. Standing ensures that "the injury a plaintiff suffers defines the scope of the controversy he or she is entitled to litigate." Id. Class certification ensures

that "named plaintiffs are adequate representatives of an unnamed class." Id. Once a named plaintiff establishes that she has standing to sue, it "shift[s] the focus of examination from the elements of justiciability to the ability of the named class representative to 'fairly and adequately protect the interest of the class.'" Id. at 1262 (emphasis in the original). Dissimilarities between injuries suffered by class representatives and class members "are only relevant to class certification, not to standing." Id. (quoting Newberg on Class Actions § 2:6) (internal quotation marks omitted).

APN does not contest that Grimm has standing to sue based on the four products she alleges that she purchased. Consequently, whether Grimm "may be allowed to present claims on behalf of others in the class who have purchased similar but not identical, products" will be assessed at the motion for class certification stage. Stotz, 2017 WL 110614, at * 6.

C. Notice under the CLRA

APN moves to dismiss Grimm's CLRA claim it its entirety or, in the alternative, Grimm's CLRA claim as to those products and labeling phrases not specifically identified in her CLRA letter on the ground that Grimm violated CLRA's pre-filing notice requirements. Mot., Docket No. 29 at 24.

In relevant part, California Civil Code section 1782 provides that "[t]hirty days or more prior to the commencement of an action for damages" under CLRA, the consumer "shall" notify the potential defendant "of the particular alleged violations of Section 1770" and "[d]emand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770." Cal. Civ. Code § 1782(a)(1), (2). The purpose of the notice requirement–to give the manufacturer sufficient notice to make appropriate corrections–can "only be accomplished by a literal application of the notice provisions." Outboard Marine Corp. v. Superior Court, 52 Cal. Rptr. 853, 859 (Cal. Ct. App. 1975).

The parties dispute whether Grimm gave APN sufficient notice of the eighteen products specified in Grimm's FAC. APN claims Grimm only specifically identified five products she alleges to have purchased. Mot., Docket No. 29 at 24. Grimm disputes that characterization. She claims the letter notifies APN that its practices in promoting "numerous Rachel Ray™ Nutrish® products"

violate the CLRA and defines "products" to include the entire line of Rachel Ray Nutrish dog food. Opp'n, Docket No. 33 at 23 (quoting Docket No. 29-2). APN cites Frenzel v. AliphCom, 76 F. Supp. 3d 999, 1016 (N.D. Cal. 2014), for the proposition that Grimm must "provide notice regarding each particular product on which the CLRA claim is based." Reply. Docket No. 35 at 15. In that case, the plaintiff alleged that he purchased the defendant's device without distinguishing between the product's three different generations. Frenzel, 76 F. Supp. 3d at 1016. The court concluded that by failing to identify which generation of product he first purchased he failed to give defendants adequate notice. Id. at 1017. Unlike the plaintiff in Frenzel, Grimm gave APN notice that its practices in promoting the entire Rachel Ray™ Nutrish® line of products violates the CLRA. See Docket No. 29-2, Ex. 1.

Additionally, APN maintains that Grimm's notice letter only described the alleged misuse of the word "natural" while her FAC alleges the misuses of both the term "natural" and "no artificial preservatives." Mot., Docket No. 29 at 24. Accordingly, APN argues that Grimm cannot bring her claim pertaining to the term "no artificial preservatives" under the CLRA. Id. But Grimm gave APN adequate notice of that claim when she alleged that APN engaged in unfair business practices by "advertising, marketing, and selling of its Products as natural when in fact they contain chemicals and artificial and/or synthetic ingredients, included L-Ascorbyl-2-Polyphosphate, Menadione Sodium Bisulfite Complex, Thiamine Mononitrate, 'natural flavors,' and a variety of caramel color." Docket No. 29-2, Ex. 1. This was also sufficient to give APN notice that its use of the term "no artificial preservatives" allegedly violated § 1770.

D. Failure to State a Claim

1. Basic Pleading Requirements under Iqbal and Twombly

APN argues that Grimm's FAC fails to state a claim in light of Iqbal and Twombly. Mot., Doc. 29 at 11. First, APN claims that Grimm fails to allege any details of transactions in which she purchased APN's products. Id. This is not accurate. Grimm alleges that she purchased APN's products "monthly" starting in 2016 at the Target store in Aliso Viejo, California. FAC, Docket No. 28 ¶ 11. Additionally she alleges that she purchased at least four of APN's Nutrish products. Id. ¶ 3.

Second, APN claims that Grimm "fails to set forth the most basic facts that would show Plaintiff's 'claim[s] have at least a plausible chance of success.'" Mot., Doc. 29 at 11 (quoting Levitt v. Yelp!, Inc., 765 F.3d 1123, 1135 (9th Cir. 2014)). This too is inaccurate. Grimm alleges that she "read and relied upon the labels on the Products in making her purchasing decisions, along with viewing the statements, misrepresentations, and advertising on Defendants' website and elsewhere on the internet." FAC, Docket No. 28 at ¶ 34. She further alleges that APN represents its products as "natural" and that they contain "no artificial preservatives" but they contain "chemicals and artificial and/or synthetic ingredients." Id. ¶¶ 21, 24. On a motion to dismiss, the court must accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the non-moving party. Manzarek, 519 F.3d at 1031. Accordingly, Grimm satisfies her burden to show that her claim for relief is "plausible on its face." Twombly, 550 U.S. at 570.

Finally, APN argues that Grimm fails to satisfy the basic pleading requirement because she alleges she relied on APN's advertising campaign but fails to identify "even a single advertisement" upon which she relied or that APN published. Mot., Docket No. 29 at 12; Reply, Docket No. 35 at 6. Instead, Grimm alleges that APN engaged in a long-term advertising campaign to convince potential customer that its products lack unnatural ingredient. FAC, Docket No. 28 at ¶ 29.

APN relies on Kearns v. Ford Motor Co., 567 F.3d 1120 (9th Cir. 2009), to argue that Grimm's allegations fail to meet the "applicable pleading requirement." Reply, Docket No. 35 at 6. But the pleading standard discussed in Kearns is Rule 9(b)'s heightened requirements, not Rule 8's basic pleading standard. 567 F.3d at 1126-27. As such, the Court will address the issues raised by Kearns in the following section.

2. Plaintiff's UCL, FAL, and CLRA Claims

APN also maintains that Grimm's UCL, FAC and CLRA claims are deficient as a matter of law. Mot., Docket No. 29 at 12.

APN claims that the heightened pleading standard under Rule 9(b) applies to Grimm's UCL, FAL and CLRA claims. Id. at 14. Grimm argues that the heightened standard only applies to allegations arising out of fraud and, as such,

does not apply to her UCL claims under the unlawful and unfair prongs. Opp'n, Docket No. 33 at 12.

When a plaintiff alleges a "unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of a claim, . . . [that] claim is said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading of the claim as a whole must satisfy the particularity requirements of Rule 9(b)." Vess, 317 F.3d at 1103-04. As noted above, to satisfy Rule 9(b), the party alleging a claim grounded in fraud must set forth facts establishing "the who, what, when, where, and how," of the misconduct. Id. at 1106. Furthermore, the party "must set forth what is false or misleading about the statement, and why it is false." Id. Merely alleging "neutral facts to identify the transaction" is insufficient. Kearns, 567 at 1124 (quoting In re GlenFed, Inc. Sec. Litig., 42 F.3d at 1549).

Grimm's UCL claim is principally grounded in fraud and, accordingly, must meet the requirements of Rule 9(b). Grimm also includes the other prongs of § 17200, but that does not relieve her from meeting Rule 9(b) to the extent that fraud is alleged. See FAC, Docket No. 28 ¶ 70. Grimm's core allegation is that APN made deceptive and fraudulent misrepresentations about the contents of its products. See FAC, Docket No. 28 ¶ 1. The unfair and unlawful prongs of Grimm's UCL claim also arise out of that core allegation. Grimm alleges that APN's conduct with respect to its labeling, advertising, marketing and sale of its products was unfair because it violates public policy as declared by the FAL and the CLRA, among other laws. Id. at ¶ 74. Additionally, she alleges that APN's conduct was unlawful because it violates the FAL and CLRA. Both the FAL and the CLRA claims arise out of the same alleged "unified course of fraudulent conduct" and Grimm relies on that conduct "entirely" as the basis of her UCL claim.

Grimm's UCL, FAL, and CLRA claims fail to satisfy Rule 9(b)'s particularity requirements. Grimm does specify which of APN's products she purchased and where she purchased them. FAC, Docket No. 28 at ¶¶ 3, 11. However, she does not allege with particularity when she purchased them, merely stating that she purchased them monthly starting in 2016. Id. ¶ 11. She does not allege when in 2016 she began or when she stopped making such purchases. Grimm describes what terms on APN's labels were misleading, but she does not describe why they are misleading. See id. ¶¶ 1-2. Though Grimm alleges that APN's products contain certain chemicals, natural flavors, and caramel colors, she

fails to allege why the presence of those ingredients makes APN's labels and marketing practices deceptive. See id. ¶¶ 6-7. Finally, Grimm alleges nothing particular about APN's advertising campaign, merely describing it as "long-term." Id. ¶ 29. This sort of general description is insufficient where Rule 9(b) applies. See Kearn, 567 F.3d at 1125-26 (finding a complaint alleging false representation in advertisements insufficient under Rule 9(b) where it failed to allege any particular circumstances surrounding the misrepresentation, including what any television advertisements or sales materials specifically stated, where the plaintiff was exposed to the misrepresentations or which ones he found material, and which sales materials he relied upon in making his purchase decision).

Consequently, the Court dismisses Grimm's UCL, FAL, and CLRA claims for lack of particularity under Rule 9(b). The Court grants Grimm leave to amend the claims.

APN also argues that Grimm fails to sufficiently plead that it made statements that are likely to deceive a reasonable consumer. Mot., Docket No. 29 at 12. Because the Court dismisses the UCL, FAL, and CLRA claims above, the Court declines to address this argument.

3. Plaintiff's Warranty Claims[2]

a. Notice

To bring a claim for breach of an express or implied warranty, the California Commercial Code requires that "[t]he buyer must, within a reasonable time after he or she discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy." Cal. Com. Code § 2607(3)(A). However, "under California law, a consumer need not provide notice to a manufacturer before filing suit against them." Keegan v. American Honda Motor Co., 838 F. Supp. 2d 929, 951 (C.D. Cal. 2012); see also Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 62 (1963) (en banc) (holding that a consumer's failure to give a manufacturer notice did not bar his breach of warranty claim under California law). Furthermore, Grimm did provide APN with some pre-suit notice, as discussed above.

[2] The Court does not address APN's second argument–that Grimm does not have standing to sue for the products she did not purchase–because that issue is addressed above.

Accordingly, any issues with Grimm's CLRA notice letter do not bar her breach of warranty claims.

b. Express Warranty

Under § 2313 of the California Commercial Code, a seller makes an express warranty through:

> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise [or]
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

Cal. Com. Code § 2313(1)(a)-(b). "To state a claim for breach of express warranty under California law, a plaintiff must allege (1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of warranty which proximately caused plaintiff's injury." T&M Solar and Air Conditioning, Inc. v. Lennox Int'l Inc., 83 F. Supp. 3d 855, 875 (N.D. Cal. 2015).

APN contends that Grimm fails to allege an express breach of warranty claim because she "only" alleges that "Defendants made express representations . . . that the Products were natural and did not contain artificial preservatives" without alleging any specific warranty language. Mot. Docket No. 29 at 18; FAC, Docket No. 28 at ¶ 79. But Grimm also alleges that the same language is featured on APN's packaging and that she relied on such representation in making her purchases. FAC, Docket No. 28 at ¶¶ 2, 11. Thus, she alleges that the use of the terms "natural" and "no artificial preservatives" are the express warranty. And Grimm alleges that APN breached that warranty by including "chemicals and artificial and/or synthetic ingredients." Id. ¶¶ 24, 83. Accordingly, Grimm alleges each element and sufficiently pleads a claim for breach of an express warranty.

c. Implied Warranty

Under § 2314 of the California Commercial Code:

> (1) Unless excluded or modified (Section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .
>
> (2) Goods to be merchantable must be at least such as
>
> (a) Pass without objection in the trade under the contract description; and
>
> (b) In the case of fungible goods, are of fair average quality within the description; and
>
> (c) Are fit for the ordinary purposes for which such goods are used; and
>
> (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> (e) Are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) Conform to the promises or affirmations of fact made on the container or label if any.

Cal. Com. Code § 2314. Grimm alleges that "Defendants breached the implied warranties by selling the Products that failed to conform to the promises or affirmations of fact made on the container or label as each Product contained one or more artificial preservatives." FAC, Docket No. 28 at 96. APN contends that this is insufficient because Grimm does not establish that its products fail to "possess even the most basic degree of fitness for ordinary use." Mot., Docket No. 29 at 19.

However, "merchantability" has several meanings. Hauter v. Zogarts, 514 Cal.3d 104, 117 (1975) (citing Cal. Com. Code § 1314(2)(a)-(f)). A violation of any of its meaning is a violation of the implied warranty of merchantability under California law. Id. at 118 (finding a product breached the implied warranty where it failed to live up to a statement on its carton and where it was not fit for its ordinary purpose). Accordingly, Grimm sufficiently pleads a claim for breach of the implied warranty of merchantability by alleging that APN failed to conform to promises on the container, even though she does not allege that its products were

not fit for their ordinary use.

4. Negligence Per Se Claim

APN moves to dismiss Grimm's negligence per se claim on the ground that it is not an independent cause of action. Mot., Docket No. 29 at 19. Grimm does not challenge APN's argument. "[T]o apply negligence per se is not to state an independent cause of action. The doctrine does not provide a private right of action for violation of a statute." Quiroz v. Seventh Ave. Cntr., 45 Cal. Rptr. 3d 222, 244 (Cal Ct. App. 2006). Accordingly, Grimm's negligence per se claim is dismissed.

5. Punitive Damages

California Civil Code § 3294 permits an award of punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." Cal. Civ. Code § 3294(a). Grimm requests punitive damages under the CLRA and because she alleges that APN has engaged in fraud, malice, or oppression. FAC, Docket No. 28 ¶ H. APN moves to dismiss Grimm's claim for punitive damages. Mot., Docket No. 29 at 23. But a request for damages is not a claim and not subject to a Rule 12(b)(6) motion to dismiss. Shimy v. Wright Med. Tech., Inc., No. 2-14-CV-04541-CAS, 2014 WL 3694140, at *4 (C.D. Cal. July 23, 2014); see also Oppenheimer v. Sw. Airlines Co., No. 13-CV-260-IEG-BGS, 2013 WL 3149483, at *4 (S.D. Cal. June 17, 2013) (collecting cases). Therefore, APN's motion is denied.

IV. CONCLUSION

For the foregoing reasons, the Court **grants** APN's request for judicial notice; the Court **denies** APN's 12(b)(1) motion to dismiss for lack of standing; the Court **grants** APN's 12(b)(6) motion to dismiss with regards to the CLRA, FAL, UCL, and negligence per se claims and **denies** its motion with regard to the express and implied warranty claims; and the Court **grants** Grimm leave to amend her CLRA, FAL, and UCL claims. Grimm shall file an amended complaint within 30 days.

IT IS SO ORDERED.